

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 INTERVENOR,
THE ATTORNEY GENERAL OF ONTARIO
ON THE MOTION FOR PRODUCTION OF DOCUMENTS**
(Returnable April 21, 2011)

VOLUME I of II
(Tabs 1 to 25)

April 14, 2011

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INDEX

VOLUME I

1. *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.)
2. *Cholakis v. Cholakis*, [2000] M.J. No. 6 (Q.B.)
3. *Agnew v. New Brunswick Telephone Co.*, [2002] N.B.R. (2d) (Supp.) No. 53 (Q.B.)
4. *Lazin v. Ciba-Geigy Canada Ltd., Jacobs and McClure*, [1976] 3 W.W.R. 460 (Alta. C.A.)
5. *Westminster Airways Ltd. v. Kuwait Oil Co.*, [1951] 1 K.B. 134, [1950] 2 All E.R. 596 (C.A.)
6. *McKergow v. Comstock*, [1906] O.J. No. 320 (Div. Ct.)
7. *Hoyt v. Insurance Corp. of British Columbia* (2001), 89 B.C.L.R. (3d) 44 (C.A.)
8. *Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009)
9. *Hopps-King Estate v. Miller*, [1998] O. J. No. 5556 (Ont. Master)
10. *Apotex Inc. v. Canada*, [2005] F.C.J. No. 1021 (C.A.)
11. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134
12. *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131
13. *Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511
14. *Eurig Estate (Re)*, [1998] 2 S.C.R. 565
15. *Reference Re Firearms Act (Can.)*, [2000] 1 S.C.R. 783
16. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567
17. *R. v. Oakes*, [1986] 1 S.C.R. 103
18. *Club Pro Adult Entertainment Inc. v. Ontario* (2008), 233 O.A.C. 355
19. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
20. *Le Syndicat national des employés de l'aluminium d'Arvida inc. c. Le Procureur général du Canada*, [2003] J.Q. no 15801 (Sup. Ct.)
21. *Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing)*, [2001] OJ No. 3597 (Sup. Ct.)
22. *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [2008] B.C.J. No. 2414 (Sup. Ct.)

23. *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106
24. *Ontario Black Bear/Ontario Sportsmen and Resource Users Assn. v. Ontario*, [2000] O.J. No. 263 (Sup. Ct.)
25. *Ontario Teachers' Federation v. Ontario (Attorney General)* (1998), 39 O.R. (3d) 140 (Gen. Div.)

VOLUME II

26. *Manufacturer's Life Insurance Co. v. Dofasco Inc.*, [1989] O.J. No. 1456 (H.C.) [QL]
27. *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 106 (Sup. Ct.)
28. *John Labatt Ltd. v. Molson Breweries*, [1994] 1 F.C. 801 (T.D.)
29. *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*, [2000] N.S.J. No. 404 (Sup. Ct.)
30. *R. v. Ahmad*, [2009] O.J. No. 6156 (Sup. Ct.)
31. *Mannesman Dematic Rapistan Ltd.*, [2001] O.L.R.D. No. 2821 (L.R.B.)
32. *Bakhtiyari v. British Columbia Institute of Technology*, 2006 BCHRT 494
33. *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (Sup. Ct.)
34. *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (Sup. Ct.)
35. *Araujo v. Jews for Jesus*, [2010] O.J. No. 4739 (Sup. Ct.)
36. *McDermott v. Rebuck*, [2008] B.C.J. No. 1092 (S.C.)
37. *Carey v. Ontario*, [1986] 2 S.C.R. 637
38. *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3
39. *Order PO-2034 (Ministry of Community and Social Services)*, [2002] O.I.P.C. No. 119; aff'd in *Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680 (Div. Ct.)
40. *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980)
41. *Masse et al. v. Ontario* (November 8, 1995), Court File No. 590/95 (Div. Ct.)
42. *Ontario (Management Board of Cabinet)*, [1998] O.L.R.D. No. 1598 (L.R.B.)
43. *Bedford v. Canada (Attorney General)*, 2011 ONCA 209
44. *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321(C.A.)

45. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574
46. *R. v. Campbell*, [1999] 1 S.C.R. 565
47. *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 380
48. *Quebec (Attorney General) v. Canada (Attorney General)*, [2001] F.C.J. No. 198 (C.A.)
49. *Xentel DM Inv. v. Schroder Ventures US Fund L.P. 1*, [2008] O.J. No. 1788 (Sup. Ct.), leave to appeal ref'd, [2008] O.J. No. 4044 (Div. Ct.)
50. *Canada v. Solosky*, [1980] 1 S.C.R. 821
51. *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592

Case Name:

**Ontario Federation of Anglers & Hunters v. Ontario
(Ministry of Natural Resources)**

Between

**Ontario Federation of Anglers & Hunters ("OFAH") and C.
Davison Ankney, applicants (respondents), and
Her Majesty the Queen in Right of Ontario as represented by
The Ministry of Natural Resources and The Honourable John
Snobelen, respondents (appellants)**

[2002] O.J. No. 1445

211 D.L.R. (4th) 741

158 O.A.C. 255

93 C.R.R. (2d) 1

113 A.C.W.S. (3d) 63

Docket No. C36139

Ontario Court of Appeal
Toronto, Ontario

Abella, MacPherson and Simmons JJ.A.

Heard: November 22, 2001.

Judgment: April 19, 2002.

(69 paras.)

*Practice -- Discovery -- Examination, persons who may be examined -- Crown, ministers -- Appeals
-- Evidence on appeal -- Admission of "new evidence."*

Appeal by the defendant, the Ontario Ministry of Natural Resources, from an order requiring the Ontario Premier and its Minister of Natural Resources to submit to an examination for discovery. The plaintiff, the Ontario Federation of Anglers & Hunters, sought to introduce fresh evidence to support its view that the Premier and Minister were proper parties for examination. The Federation

brought an action alleging that the Premier and Minister acted unlawfully in cancelling the spring bear hunt. Specifically it alleged that, rather than exercising his independent judgment under the applicable law, the Minister responded to political pressure from the Premier. It also claimed that the cancelling regulation was invalid, as it was made for the extraneous reasons of humane hunting practices and political expediency, in response to pressure from animal rights activists and related groups.

HELD: Appeal allowed. The decision was set aside, and the summonses to witness to the Premier and the Minister were quashed. Even if the Federation had evidence supporting its allegations that the Premier unduly pressured the Minister, this was irrelevant to the regulation's validity. As well, the allegation that the Minister failed to exercise independent discretion ignored the fact that the passing of a regulation was not in itself an exercise of independent ministerial discretion. The regulation was a decision of Cabinet, not of the Premier. Concerns regarding animal welfare fell squarely within the policy and objectives of Ontario's Fish and Wildlife Conservation Act, and the evidence supported the Minister's concerns about the treatment of bears. The fact that the government consulted animal welfare groups amounted to part of its regular work in responding to public concerns. Taking political or partisan considerations into account did not by itself imply government impropriety. The Federation raised no justiciable issue. Therefore, the fresh evidence was irrelevant. In any event, with due diligence the Federation could have presented the new evidence earlier in the proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(b), 7.

Fish and Wildlife Conservation Act, S.O. 1997, c. 41, s. 113.

Ontario Rules of Civil Procedure, Rule 39.03(1), 39.03(2).

Appeal from:

On appeal from an order of the Divisional Court (Southey, Kozak and Lederman JJ.) dated January 11, 2001, reported at 196 D.L.R. (4th) 367.

Counsel:

Robert Charney and Hart Schwartz, for the appellants.

Timothy Danson, for the respondents.

The judgment of the Court was delivered by

1 ABELLA J.A.:-- The issue in this appeal is whether the circumstances surrounding the cancellation of the spring bear hunt in Ontario give rise to an entitlement to examine the Premier and the Minister of Natural Resources.

BACKGROUND

2 The Minister of Natural Resources, John Snobelen, announced the government's intention to cancel the spring bear hunt in a press release dated January 15, 1999, explaining the basis for the cancellation as follows:

Many people have told us that the way the hunt is conducted and the inevitable loss of some cubs are unacceptable. We have reviewed current practices and considered modifications; but none provide assurance those young bears and their mothers would be protected as they emerge from their dens in the spring.

3 In October 1998, the Minister had asked his Deputy Minister to meet with representatives of the Ontario Federation of Anglers and Hunters ("OFAH"), the Northern Ontario Tourist Outfitters Association ("NOTO") and the Schad Foundation, an animal rights organization, in an attempt to find some common ground for changes to the spring black bear hunt. Three meetings were held. No consensus emerged from them.

4 That December, the Minister requested that the Ministry staff prepare a paper to consider alternatives to the status quo that would reduce or eliminate cub orphaning in the spring.

5 Early in January 1999, Premier Mike Harris called the Past President of NOTO to advise him of the government's intention to end the spring bear hunt.

6 On January 14, 1999, NOTO's President wrote to the Premier's Office to request an immediate meeting to discuss the proposed cancellation. As a result, the President of NOTO and other NOTO members were invited to meet with Minister Snobelen to discuss the proposed cancellation of the spring bear hunt.

7 The meeting with NOTO took place on January 21, 1999. During this meeting, the Minister explained the Ministry's obligations under the Environmental Bill of Rights process. He also discussed the possibility of compensation for the industry and listened to concerns about the economic consequences of the cancellation.

8 That same day, a Notice of Proposal for a regulation that would close the spring season for hunting black bears was posted by the Ministry of Natural Resources on the Environmental Bill of Rights Registry. The proposal's stated purpose was to "eliminate the mistaken shooting of female bears with young cubs during the spring open hunting season". The proposal also stated that "ending the spring bear hunt is the only way to guarantee that females with young cubs are not mistakenly shot during the hunt, thereby leaving orphans (which experience a high mortality rate at this time of year)".

9 The Notice of Proposal stated that written submissions could be made between January 21, 1999 and February 20, 1999. Thirty-five thousand, three hundred and forty-seven submissions were received by the government, 64 per cent opposing the government's proposal to end the spring bear hunt and 35 per cent in support of it.

10 The Minister held a meeting with his staff on March 3, 1999 to consider these responses and decided to end the spring bear hunt.

11 The Record of Decision, dated March 3, 1999, enumerates the following factors as influencing the Minister's decision:

- * The growing concern from Ontario citizens that hunting bears in the spring when nursing cubs are dependent on their mothers is inappropriate.
- * The majority of the submissions in the EBR process were made by hunters and bear hunt operators who opposed the proposed regulation, but that the EBR process is not a vote or plebiscite.
- * The respondents in favour of the government's decision were mostly unaffiliated with any particular group and likely represent a view held by a large number of Ontarians.
- * Cancellation of the spring bear hunt could cause some economic hardship and the province should offer financial assistance to bear hunt operators and assist the tourist industry to attract alternative forms of tourism.
- * The decision to close the spring bear hunt was not required for sustainable management of black bears in Ontario.

12 On March 4, 1999, Ontario Regulation 670/98 was amended by Ont. Reg. 88/99 to delete the spring open season for black bears.

13 On April 12, 1999, as a result of the cancellation, OFAH and NOTO brought an application for judicial review challenging the regulation.

14 The primary challenge to the regulation was that it was ultra vires the Fish and Wildlife Conservation Act, S.O. 1997, c. 41 in the following ways: the Minister failed to exercise his discretion at all, since the cancellation came as a directive from the Premier in response to pressure from industrialist Robert Schad; and the Minister took unethical hunting practices and political expediency into account in issuing the regulation, thereby considering improper purposes and "extraneous" factors.

15 OFAH and NOTO also claimed that the regulation infringed their right to freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms on the grounds that hunting was a form of expression; and that the regulation infringed their liberty and security interests under s. 7 of the Charter.

16 The allegation of impropriety arises from the apparent change in the public position about the hunt taken by the Minister of Natural Resources. On December 17, 1998, the Minister had stated in a letter to major stakeholders that there was no basis for cancelling the spring bear hunt. Within a month, on January 15, 1999, the Ministry of Natural Resources issued its news release announcing its intention to end the spring bear hunt. There was, NOTO and OFAH claimed, no explanation for the abrupt reversal other than inappropriate influence on the Minister by the Premier.

17 An application for an interim injunction was brought before Justice Stach in the Superior Court on April 28, 1999 to suspend the operation of the regulation until the merits of the judicial review could be heard by a full panel of the Divisional Court. Justice Stach dismissed the application on April 28, 1999.

18 NOTO formally withdrew from the litigation in October, 1999.

19 On March 9, 2000, the applicants served a Notice of Examination on the Minister of Natural Resources, the Honourable John Snobelen, and a Summons to Witness on the Premier, the Honourable Mike Harris, pursuant to rule 39.03 of the Rules of Civil Procedure.

20 On March 24, 2000, Yates J. quashed the processes, finding them to be an abuse of process.

21 The Divisional Court, whose majority reasons were written by Justice Lederman, overturned Justice Yates' decision on January 11, 2001 on the grounds that the evidence sought by OFAH was relevant to an issue in dispute, and ordered the examinations to proceed "limited to the sole issue of whether the Minister made his own decision in exercising his discretion to pass the regulation or whether he was merely directed to pass the regulation by the Premier without the exercise of any independent discretion."

22 Justice Kozak dissented on the basis that the subject matter of the dispute, a political decision, was not justiciable.

23 The Divisional Court unanimously dismissed OFAH's cross-motion seeking to prohibit the Crown from proceeding with its motion to strike out various affidavits and paragraphs in affidavits filed by the applicants.

24 This is an appeal by the Crown from the decision of the Divisional Court permitting the examinations to take place.

25 On appeal, OFAH brought an application to introduce fresh evidence from members of NOTO. The evidentiary record to date, in addition to the fresh evidence sought to be introduced, includes a thirteen-volume application record from OFAH.

APPLICABLE STATUTORY PROVISIONS

26 The relevant provisions of the Rules of Civil Procedure are rules 39.03(1) and (2):

39.03(1) Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

27 Section 113(1) of the Fish and Wildlife Conservation Act states:

113.(1) The Minister may make regulations,

...

(2) prescribing open seasons or closed seasons for wildlife.

ANALYSIS

28 The application for judicial review challenges the validity of Ontario Regulation 670/98, as amended by Ontario Regulation 88/99, which terminated the spring open hunting season for black bears from April 15 to June 15.

29 The primary claim by OFAH is that the Minister followed the dictates of the Premier rather than exercising his independent judgment, and that the Regulation is invalid because the decision to cancel the spring bear hunt was made for the extraneous reasons of political expedience and humane hunting practices.

30 As the majority in the Divisional Court correctly observed, an examination under rule 39.03 is appropriate when the evidence sought is relevant to any issue raised on the main application. (See *Payne v. Ontario (Human Rights Commission)* (2000), 192 D.L.R. (4th) 315 (Ont. C.A.) and *Consortium Development (Clearwater) Ltd. v. Sarnia*, [1998] 3 S.C.R. 3). The onus is on the party seeking to conduct the examination to show on a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending application and that the proposed witness was in a position to offer relevant evidence.

31 The majority also acknowledged that courts should be careful to ensure that a summons to witness directed to a Minister of the Crown under rule 39.03 is not simply for the purpose of "turning the court process into an extended battle ground for extracting information pertaining to the ongoing political debate ..." (*Ontario Teachers' Federation v. Ont. (A.G.)* (1998), 39 O.R. (3d) 140 (Gen. Div.) at p. 148. See also *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (Div. Ct.) at p. 14-15).

32 However, it concluded that there was a live issue to which the evidence of the Premier and Minister would be relevant, namely, evidence that the Minister did not make his decision independently.

(a) Whether the Minister made the Decision at the Direction of the Premier

33 OFAH alleges undue pressure on the Minister from the Premier resulting from a meeting on January 5 or 7, 1999 between Robert Schad and the Premier. There is no evidence in this record of such a meeting. The paragraph containing this allegation was struck from the application record by the February 27, 2001 consent order of Dunnet J. and there is therefore no evidence regarding the alleged meeting in the record before this court.

34 Even if there were evidence of such a meeting, or of Mr. Schad's influence on the Premier, or evidence that it was the Premier who urged passage of the Regulation, none of these facts has any legal relevance to whether the Regulation is valid.

35 There is no doubt that Robert Schad and the Schad Foundation are well known animal rights activists, that they sought the cancellation of the spring bear hunt, and that they were committed to using their influence to try to persuade the government to end the hunt. But evidence of the Premier's contact with Robert Schad, if there was any, or of his calling the past president of NOTO to let him know the government's intention in January 1999, shows only that the Premier contacted major stakeholders. These were some of the stakeholders that the Minister himself had asked his Deputy to meet with in October 1998.

36 The allegation that there has been a failure on the Minister's part to exercise any independent discretion in passing the Regulation also ignores the fact that the passing of a regulation is not in itself an exercise of independent ministerial discretion. Moreover, in *Thorne's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106, the Supreme Court of Canada confirmed the irrelevance of motives in determining the validity of a regulation:

... It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council.

...

... Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations. (at pp. 112-13)

(See also *New Brunswick Broadcasting Company v. Donahue*, [1993] 1 S.C.R. 319 at 389 per McLachlin J.).

37 Similarly, in *Canadian Association of Regulated Importers v. Canada*, [1994] 2 F.C. 247 (F.C.A.) at 260, 263:

It is not fatal to a policy decision that some irrelevant factors be taken into account; it is only when such a decision is based entirely or predominantly on irrelevant factors that it is impeachable. It is not up to the Court to pass judgment on whether a decision is "wise or unwise" ... This Court, because these matters involve "value judgments", is not to "sit as an appellate body determining whether the initiating department made the correct decision."

As this court stated in *National Anti-Poverty Organization v. Canada* (Attorney General), [1989] 3 F.C. 684 at page 707, "Even if one were to assume that the Governor in Council acted with a dual purpose in mind (one falling within his mandate ... and the other falling outside his mandate ...) I doubt that this could advance the respondents' case." For, as the Supreme Court of Canada has explained, "Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations." (See *Thorne's Hardware Ltd. v. The Queen*, supra at 112-113.)

...

In conclusion, there is ample evidence in the record to support the decision made by the Minister to adopt the system he did. In doing so he relied on relevant factors. This is not to say that the evidence demonstrated that he necessarily made the right decision. That is not the standard of review that we must apply. Indeed, even if it could be shown that he may have made the wrong decision, this Court would have no business interfering with it in these circumstances.

38 This judicial deference was applied and reinforced by this court in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed [2000] S.C.C.A. No. 264, where the court held:

[I]t was not open to the respondents, by way of judicial review, to challenge the proposal on its merits. Whether a particular restructuring proposal is or is not "timely and efficient", or is or is not consistent with "the greatest good of society", do not represent questions of law answerable on judicial review. These are policy issues that the legislature intended the commission, not the court, to decide ... Indeed, with respect, the court had no institutional expertise in arriving at political, economic and social compromises ...

(See also *East Luther Grand Valley v. Ontario* (2000), 48 O.R. (3d) 247 at 254 (S.C.J.), appeal to the Divisional Court dismissed [1996] O.J. No. 511, and *Masse v. Ontario* (1996), 134 D.L.R. (4th)

20 at 36-7 (Ont. Div. Ct.), application for leave to appeal to the Ontario Court of Appeal dismissed (1996), 89 O.A.C. 81, application for leave to appeal to the Supreme Court of Canada dismissed (1996), [1996] S.C.C.A. No. 373, 97 O.A.C. 240.)

39 Even if the Regulation was influenced by the views of the Premier, the Regulation is a decision of Cabinet, not of the Premier or any individual minister. A minister opposed to such a decision may wish to resign, but as Sir Ivor Jennings pointed out in *Cabinet Government* 3rd. ed. (Cambridge University Press, Cambridge, 1963) at pp. 278-279:

If a minister does not resign he is responsible' ... From the minister's point of view it means only that he must vote with the Government, speak in defence of it if the Prime Minister insists, and that he cannot afterwards reject criticism of his act, either in Parliament or in the constituencies, on the ground that he did not agree with the decision.

40 Therefore, even if the Premier had directed the Minister to enact the regulation, it represents no justiciable error for the Minister to comply.

(b) Whether the Minister took Extraneous Factors into Account

41 As for the argument that the minister lost jurisdiction by considering extraneous factors, namely ethical and humane hunting practices and political expediency, I start with the observation that the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. This guiding principle is set out in *Reference Re: Validity of Regulations in Relation to Chemicals*, [1943] S.C.R. 1 at 12:

[W]hen Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth.

(See also Brown and Evans, *Judicial Review of Administrative Action in Canada*, (1998), at paras. 12:4441 and 12:4443.)

(i) Ethical and Humane Hunting Practices

42 The regulation was passed pursuant to s. 113(1) of the Fish and Wildlife Conservation Act, 1997, which gives the Minister authority to "make regulations prescribing open seasons or closed seasons for wildlife."

43 Regulation 670/98 established the open season for wildlife. Prior to March 4, 1999, the regulation prescribed a spring open season for black bears from April 15 to June 15 or 30, and a fall open season for black bear hunting from September 1 to October 15 or 31. Black bears were the only large game animals for which a spring hunting season was permitted.

44 The Fish and Wildlife Conservation Act received Royal Assent on December 18, 1997 and was proclaimed on January 1, 1999. It was enacted to provide a scheme of wildlife conservation and

management including the establishment of ethical, humane and responsible hunting practices. The Act assigns to the government the responsibility for balancing the interests of people against the welfare of animals to determine what constitutes humane treatment or the unnecessary suffering of animals.

45 Concerns regarding animal welfare, including humane and ethical hunting practices, fall squarely within the policy and objectives of the Fish and Wildlife Conservation Act. This is accomplished by the Ministry of Natural Resources regulating the conduct of hunters. Section 6(1)(a) of the Act, for example, states that "except under the authority of a license and in accordance with the regulations, a person shall not hunt or trap a black bear ...".

46 The basis for the regulation cancelling the spring bear hunt, as explained by the Ministry at the time, was "a growing concern from Ontario's citizens that the hunting of bears in the spring could lead to orphaning of young cubs at a time when mortality of those cubs would be very high. The Minister is of the view that it is inappropriate to hunt big game animals in the spring when the young are very dependent."

47 The evidence supports his concerns. The statistics and methodology for the killing of the bears was described by the Crown in its factum as follows:

Between 1990 and 1997, approximately 4,100 black bears per year were killed during the spring hunting season. Approximately 30% (1230) were females, and approximately 492 of the females were over 5 years of age. Ninety-eight per cent of the bears were hunted at bait sites, where the hunters remain hidden approximately 15 to 20 meters from the bait, and wait for the bears to approach the bait site. Up to 274 bear cubs per year may be orphaned during the spring hunting season, with the likely numbers being in the range of 20 to 90. Issues relating to black bear hunting, including the potential for orphaning cubs in the spring, have engendered controversy in Ontario for a number of years, and there was growing public concern over the issue in the period leading up to the cancellation decision.

48 The stated purpose for closing the spring bear hunt, namely, to prevent the mistaken shooting of nursing mothers of newly born cubs that would starve to death if orphaned by the hunt, is therefore consistent with the purposes of, and authorized by, the Fish and Wildlife Conservation Act. It was therefore not beyond the Minister's jurisdiction to take ethical or humane hunting practices into account in cancelling the spring hunt.

(ii) Political Expediency

49 The wisdom of government policy through regulations is not a justiciable issue unless it can be demonstrated that the regulation was made without authority or raises constitutional issues. Neither is the case here. (See *Challenging Government Policy*, Sara Blake, presented on October 20, 2000 to the Canadian Bar Association Ontario Continuing Legal Education Meeting; *A & L Investments Ltd. et al. v. The Queen* (1997), 36 O.R. (3d) 127 at 134-135 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed (1998), [1997] S.C.C.A. No. 657, S.C.C. File No. 26395; *Cosyns v. Canada* (Attorney General) (1992), 7 O.R. (3d) 641 at 655-656 (Div. Ct.); *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at 282-283.)

50 The majority in the Divisional Court said that the proposed examination was justified by the allegation that the government changed its policy based on political expediency rather than as a response to public concerns. With respect, it seems to me that there is no discernible difference between the two. There is nothing inappropriate, let alone unlawful, about the government consulting with and considering the public's reaction to a policy measure. To be politically expedient is to be politically responsive to selected and discrete public concerns. That is what governments do.

51 In any event, it is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process. Whether one characterizes taking public opinion into account as political expediency or political reality, taking it into account is a valid function of political decision making.

52 Similarly, attempting to influence the government to change a practice, as OFAH, NOTO, and Robert Schad did, is an accepted feature of our system of government. Where the result of the influence is a regulation, it is the regulation itself, not the motives of the people who enacted it, which is relevant.

53 Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.

54 When the government takes political or partisan considerations into account, therefore, this does not, by itself, give rise to an inference of impropriety. Such an inference is, in any event, an ironic allegation from OFAH, since what it is seeking is the government's compliance with its opinion, the very result it challenges in asserting that the government inappropriately responded to the opinions of Mr. Schad.

55 Nor does the fact that the government may have changed its mind provide a basis for permitting cross-examination, since such changes are neither impermissible nor unusual. The fact that the Minister asked his Deputy to hold meetings with major stakeholders in October of 1998 in an attempt to find common ground for changes to the spring black bear hunt, shows, in any event, that changes to the existing policy were being considered by the Minister at that time. His December 17, 1998 letter indicates that the potential for cub orphaning in the spring hunt was a concern of the government. The change of policy was a decision to address the concern by attempting to eliminate rather than merely reduce the orphaning. As the Minister said on January 15, 1999, "we have reviewed current practices and considered modifications; but none provide assurances these young bears and their mothers would be protected as they emerged from their dens in the Spring".

Conclusion

56 While I concede that Ministers of the Crown are not immune from testifying under rule 39.03, in my view there is no justiciable issue raised by the evidence in this case as to the validity of the Regulation. It was made, according to the record, within and under the relevant legislation and based on proper factors. Nor is there any reasonable evidentiary basis for concluding that the evidence sought to be obtained from the proposed examinations is relevant. Instead of the requisite evidence, what is offered is speculation and allegations, neither of which, even if true, gives rise to a valid challenge to the regulation.

57 Moreover, in *Re: Canada Metal Co. Ltd. et. al v. Heap et. al* (1975), 7 O.R. (2d) 185 (C.A.), this court held that the test is not only whether the evidence is relevant to an issue in dispute, but also whether the right to examine would be an abuse of process, which includes considering

whether the underlying application has merit. There is, with respect, no merit in the underlying application in this case. No justiciable constitutional issues are raised in the underlying application since the Charter of Rights and Freedoms creates no constitutionally protected right to hunt in either s. 2(b) or s. 7. And even if the decision to cancel the spring bear hunt was made unilaterally by the Premier, or if he directed the Minister to cancel the hunt, or if the Minister took political expediency or humane hunting practices into account, none of these facts would provide any justification for setting aside the Regulation.

58 The Minister was creating public policy through the statutory authority to enact delegated legislation under s. 113(1) of the Act. The regulation is authorized by the enabling legislation and there is therefore no need for an examination of the Minister's motives or for evidence about whether he agrees with the Premier.

59 The only recourse for this type of decision, based on the evidence before us, is in the political not the judicial arena. In the absence of a reasonable evidentiary foundation, therefore, permitting the applicants to examine the Premier and the Minister about why the final decision to cancel the spring bear hunt was made, would amount to sanctioning a fishing expedition.

60 There is therefore no reasonable evidentiary basis to permit the examinations of the Premier or the Minister to proceed.

FRESH EVIDENCE

61 The test for the admission of fresh evidence is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

62 The fresh evidence is from members of NOTO, which had originally joined in the application for judicial review. Their evidence, compendiously, seeks to elaborate on their understanding of how and why the spring bear hunt was cancelled. In my view, for the following reasons, this evidence does not meet the due diligence, relevance or determinative branches of that test.

63 The stated purpose of the fresh evidence is to create a foundation for cross-examining the Premier of Ontario and his Minister about the decision-making process and their motivation for passing the Regulation. Since, for reasons stated above, neither the process nor motivations behind the Regulation is relevant or reviewable in this case, the proposed fresh evidence is accordingly irrelevant.

64 Moreover, the fresh evidence does not meet the threshold for admission for the following additional reasons:

- * The fresh evidence, far from "having been discovered", demonstrates a lack of due diligence. The evidence was known or available by the time the application was brought. The fact that there was some reluctance on the part of the deponents to provide the information previously does not change its character as evidence that could or should have been produced as part of the application record.
- * There is nothing in the evidence to support the conclusion that OFAH was not able to obtain co-operation from counsel for NOTO during the period prior to the application. The court still has no evidence from OFAH as to what steps, if any, it took to obtain this fresh evidence before NOTO withdrew from the litigation.
- * The fresh evidence consists of allegations, not evidence.

65 OFAH suggests, without evidentiary support, that NOTO voted to withdraw from the litigation because of government intimidation and that evidence from its members was not previously available.

66 The evidence demonstrates the contrary, indicating that NOTO's decision to withdraw from the litigation was based not on any intimidation or coercion, but on the advice of its counsel. His advice was that even if NOTO were successful before the Divisional Court, the government could restart the process and terminate the hunt differently and in accordance with a court's directions. He also told his client that the court system was not a timely forum for resolving this case and that the better expenditure of funds by NOTO would be on political advocacy.

67 From April to September 1999, NOTO and OFAH were working together. Even after NOTO withdrew from the litigation, it "encouraged any operators who want to, to continue to help OFAH with their legal challenge". The deponents of the affidavits submitted as fresh evidence were not previously asked about any information they had by counsel either for OFAH or NOTO. NOTO's counsel stated in his evidence that he never talked to counsel for OFAH about, and no one from OFAH asked him to interview, any of the NOTO members for any information they had about any pressure put on the Minister by the Premier. But in any event, as previously indicated, such pressure, even had there been evidence of it, is not relevant to determining the validity of this Regulation.

68 In summary, the fresh evidence does not meet the requirements of the Palmer test for the introduction of fresh evidence. The motion for its introduction is therefore dismissed.

69 Accordingly, the appeal is allowed, the decision of the Divisional Court is set aside, and the Summons to Witness to the Honourable Mike Harris, Premier of Ontario, and the Notice of Examination to the Honourable John Snobelen, Minister of Natural Resources, are quashed, with costs throughout if sought.

ABELLA J.A.

MacPHERSON J.A. -- I agree.

SIMMONS J.A. -- I agree.

cp/e/nc/qlhcc/qlkjg/qltl

2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6



2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6

Cholakis v. Cholakis

Harry Cholakis, Plaintiff and Leo Cholakis, Fairmont Real Estate Limited, John Cholakis, Paul Cholakis and Kensington Building Limited, Defendants

Manitoba Court of Queen's Bench

Monnin J.

Judgment: January 11, 2000
Docket: Winnipeg Centre CI 95-01-92830

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Counsel: *Stephen F. Vincent*, for Plaintiff.

Richard I. Good, for Defendants Leo Cholakis and Fairmont Real Estate Limited.

Subject: Civil Practice and Procedure; Corporate and Commercial

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — General

Plaintiff alleged that defendants failed, as directors of K Ltd., to manage K Ltd. reasonably and competently for benefit of shareholders — Plaintiff requested disclosure of substantial accounting information relating to operation of K Ltd. — Order for production of accounting information was granted — Defendants appealed — Appeal allowed in part — Defendants had already produced accounting information with portions excised — Master erred in holding that excised portions should be ordered produced if they were not clearly irrelevant — Onus was on plaintiff to convince court that excised portions were relevant — Expunged material was not relevant — Defendants not required to produce unedited accounting information — Master did not err in ordering defendants to produce material on computer accounting program — Electronic information requested by plaintiff fell within definition of document and contained relevant information that should be produced.

Corporations --- Practice and procedure in actions involving corporations — Discovery — Production of documents

Plaintiff alleged that defendants failed, as directors of K Ltd., to manage K Ltd. reasonably and competently for benefit of shareholders — Plaintiff requested disclosure of substantial accounting information relating to operation of K Ltd. — Order for production of accounting information was granted — Defendants appealed — Appeal allowed in part — Defendants had already produced accounting information with portions excised — Master erred in holding that excised portions should be ordered produced if they were not clearly irrelevant — Onus was on plaintiff to convince court that excised portions were relevant — Expunged material not relevant — Defendants not required to produce unedited accounting information — Master did not err in ordering defendants to produce material on

2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6

computer accounting program — Electronic information requested by plaintiff fell within definition of document and contained relevant information that should be produced.

Cases considered by *Monnin J.*:

G.E. Capital Corp. Finance Group Ltd. v. Bankers Trust [\(1994\), \[1995\] 2 All E.R. 993, \[1995\] 1 W.L.R. 172](#) (Eng. C.A.) — referred to

Manufacturers Life Insurance Co. v. Dofasco Inc. [\(1989\), 38 C.P.C. \(2d\) 47](#) (Ont. H.C.) — referred to

Reichmann v. Toronto Life Publishing Co. [\(1988\), \(sub nom. Reichmann v. Toronto Life Publishing Co. \(No. 2\)\) 30 C.P.C. \(2d\) 280, 66 O.R. \(2d\) 65](#) (Ont. H.C.) — considered

Rules considered:

Queen's Bench Rules, Man. Reg. 553/88

R. 30 — considered

R. 30.01(1) — considered

R. 30.02(1) — considered

R. 30.02(2) — considered

APPEAL from order for production of documents.

***Monnin J.*:**

1 This is an appeal from an Order of the Master, entered August 26, 1999, whereby he ordered the defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited to provide to the plaintiff:

(a) complete and unedited adjusting journal entries of the defendant Kensington Building Limited, including those prepared by Wintemute Randle Kilimnik, Chartered Accountants, up to and including the 1998 financial statements;

(b) complete and unedited journal entries of the same defendant, up to and including the 1998 financial statements;

(c) complete and unedited monthly trial balances of the same defendant, up to and including December 1998; and

(d) on floppy disk, the accounting program and the accounting data that has been, and will be, produced to the plaintiff in paper form including all transactions up to December 1998, such that the plaintiff can load and operate the program on a similar computer.

2 The defendants Leo Cholakis and Fairmont Real Estate Limited seek to set aside that Order.

2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6

3 The Order was made in the course of a long-standing and protracted dispute between the plaintiff and his brothers with respect to the manner in which the latter, as directors of Kensington Building Limited, of which all four are shareholders, have been conducting the business.

4 Without delving into the intricacies of the details of the claim made by the plaintiff against his brothers, one of the aspects of the litigation deals with an allegation of the failure of the directors to manage Kensington Building Limited reasonably and competently for the benefit of the shareholders.

5 As part of the discovery process, the plaintiff has requested disclosure of substantial accounting information relating to the operation of Kensington Building Limited. In particular, by an Order of June 5, 1998, the defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited were ordered to produce for inspection all business records relating to a number of categories in the financial statements of Kensington Building Limited.

6 After an unsuccessful appeal of that Order, the defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited provided affidavits of documents and further provided a total of 12 boxes of documents. Portions of the accounting information were excerpted on the grounds that they did not relate to the areas of the financial statements that were ordered to be disclosed.

7 The plaintiff went before the Master seeking disclosure of the unedited adjusting journal entries, journal entries and monthly trial balances, as well as the accounting program and the accounting data on floppy disk. The accounting information on floppy disk was not provided on the basis that doing so in that fashion would disclose the portions that were not obligated to be disclosed and that since all relevant information had been provided in paper form, there was no prejudice to the plaintiff in not being provided with the floppy disk.

8 To assist in his determination, the Master was provided with the original adjusting journal entries and yearly trial balances for his review.

9 In his Order, entered August 26, 1999, the Master ordered disclosure; however, he stayed the implementation of the Order by consent, pending the disposition of an appeal.

10 Upon the appeal, the defendants Leo Cholakis and Fairmont Real Estate Limited filed further material, including the affidavit of G. Dale Randle, a Chartered Accountant with the firm Wintemute Randle Kilimnik, who has been personally involved in the performance of accountancy services for Kensington Building Limited. Mr. Randle's affidavit sets out that he supervised the editing of the adjusting journal entries and the yearly trial balances on the instructions of the defendant Leo Cholakis to ensure that only those expenses that were disclosed pertained to the items referred to in the Order of June 5, 1998. It also sets out that monthly trial balances were never prepared and that all that was provided, in edited form, were yearly trial balances. He also confirmed that if computer disks were provided, they would contain information pertaining to all the expenditures incurred by Kensington Building Limited, information above and beyond what was required to be produced by the previous Order.

11 However, Mr. Randle's affidavit does not disclose whether an edited electronic version of the accounting program, limited to information that was to be disclosed, could be prepared, and at what cost.

12 The two issues before the court are, therefore, whether

(a) the accounting information provided in its edited form satisfies the previous Order; and

(b) the computer disk is producible.

2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6

13 The starting point for the determination of the issues in question is of course the Queen's Bench Rules. Rule 30 deals with the discovery of documents. For our purposes, the following Rules pertain:

Document

30.01(1) In rules 30.02 to 30.11,

- (a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device;
- (b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled; and
- (c) a relevant document is one which relates to any matter in issue in an action.

.

Disclosure

30.02(1) Every relevant document in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Rule, whether or not privilege is claimed in respect of the document.

Production for inspection

30.02(2) Every relevant document that is not privileged and that is in the possession, control or power of a party to an action shall be produced for inspection if requested, as provided in this Rule.

14 The plaintiff takes the position that since the adjusting journal entries, the journal entries and the trial balances contain relevant information, they should be produced in their entirety without editing. The plaintiff noted that it is not alleged that the accounting information contained in the expurgated portions is either privileged or proprietary or that its disclosure would somehow cause prejudice to the defendants Leo Cholakakis, Fairmont Real Estate Limited and Kensington Building Limited. The only factual basis upon which its disclosure is resisted is that it is not relevant to the areas of the financial statements that were found relevant by the previous Order.

15 The plaintiff calls into question some of the statements advanced by the defendants Leo Cholakakis and Fairmont Real Estate Limited in their affidavit material, claiming that he has in fact received documentation, namely, the monthly trial balances, which the defendants and their accountant say do not exist.

16 In his affidavit filed for this court, the plaintiff has also raised concerns as to the documentation seemingly being prepared only for the litigation, which fact he claims would be revealed by complete disclosure of the entire journal entries and trial balances.

17 In response, the position of the defendants Leo Cholakakis and Fairmont Real Estate Limited is that production of documents with material blanked out on the grounds of irrelevance is a time honoured and usual procedure followed in this jurisdiction and others. I was referred to the case of *G.E. Capital Corp. Finance Group Ltd. v. Bankers Trust* (1994), [1995] 2 All E.R. 993 (Eng. C.A.). In that case, Lord Justice Hoffmann (as he then was) concluded, at p. 997:

...In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged. There is no additional requirement that the part must deal with an entirely different subject matter from the rest.

The *Peruvian Guano* test must be applied to the *information* contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so.

18 Lord Justice Leggatt went on to say, at p. 998:

...The present case is not about privilege: it is about relevance. The plaintiffs are obliged to disclose the relevant parts of documents, but not the irrelevant. There can be no argument that in doing so they were in some way waiving any right not to disclose each of the documents as a whole. For over a century litigants have been permitted to cover up or blank out irrelevant parts of documents. The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question.

19 I agree that it is an issue of relevance. Had the plaintiff been able to satisfy me that the portions, which were whited out, were relevant, then the entire accounting information would have been producible. However, I accept the evidence, as contained in the affidavits of the defendant Leo Cholakis and G. Dale Randle, that the expurgated portions relate to subject matters of the financial statements which were determined not relevant for the purposes of discovery. I make this finding based upon the fact that discovery of documents at this stage need relate only to the subject items of the financial statements as set out in the previous Order.

20 I appreciate that in circumstances such as this where the plaintiff has not seen the information, he is somewhat arguing blindly. However, I believe sufficient information can be gleaned from the contextual location of the information and what is generally understood to be its contents for the plaintiff to make a reasonable argument, allowing the court to conclude one way or the other.

21 The court has been provided with the original unedited accounting information as had been the Master. While I have reviewed the material, I would be unable, by comparing it with the material provided to the plaintiff, to confirm whether the expunged information is relevant or not without expert accounting advice. I have, therefore, relied upon the evidence of Mr. Randle to conclude that the expunged material is not relevant.

22 It may be that at a different juncture of this case through information elicited on the examinations for discovery, discrepancies, if any, in the financial statements, may mean that the irrelevant does become relevant. However, I cannot accept the premise upon which the Master appeared to have proceeded; namely, that as his review of the original adjusting journal entries and yearly trial balances could not lead him to conclude that the whited-out portions were not clearly irrelevant, he would order their production. In my view, that is a reversal of the required test and it is up to the proponent, namely, the plaintiff, to convince the court that the unedited accounting information is relevant before the court should order its production.

23 For a case where a court in another jurisdiction concluded that irrelevant portions of a document could be expunged before production, see *Manufacturers Life Insurance Co. v. Dofasco Inc.* ([\(1989\), 38 C.P.C. \(2d\) 47](#) (Ont. H.C.)).

24 I would therefore find that the defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited have satisfied the terms of the Order of June 5, 1998, by producing the accounting information in

its edited form.

25 On the second issue of whether the computer disk is producible, different considerations apply. Counsel for the defendants Leo Cholakakis and Fairmont Real Estate Limited, on the motion, has acknowledged that in the normal course, if a document is relevant, it should be produced. He has also acknowledged that the fact that the accounting information is contained in electronic format does not render it any less of a document subject to disclosure. However, he argues that since the accounting information has been provided in paper form, the defendants Leo Cholakakis, Fairmont Real Estate Limited and Kensington Building Limited should be excused from providing the electronic version as to do so would provide the plaintiff with the very portions that have been withheld.

26 He further argues that while the Rules and the jurisprudence recognize a duty of fair and broad disclosure, these same defendants should not be required to provide irrelevant accounting information simply because it is on a computer program. He argues that there is no prejudice to the plaintiff since he has obtained the relevant information from the documents provided and that there is, therefore, no practical reason why the electronic version need be provided.

27 The plaintiff argues that he requires the computer disk in order to perform certain accounting functions, which could be performed much more speedily and inexpensively if provided with the data in electronic format and the information required to run the program. Obtaining the information from the 12 boxes of documents provided would require substantial data input and effort on his part.

28 The position of the defendants Leo Cholakakis and Fairmont Real Estate Limited is that they have no obligation to make things easier for the plaintiff and that convenience to assist the plaintiff's case is not a concept endorsed by the Rules.

29 The only case that I have been able to locate on point is that of *Reichmann v. Toronto Life Publishing Co.* (1988), 30 C.P.C. (2d) 280 (Ont. H.C.). The plaintiffs were suing the defendant in an action for libel and obtained an Order compelling the author of the allegedly defamatory article to produce all current and previous versions of a manuscript concerning the plaintiffs. The defendant produced a hard copy of the manuscript, which was stored on a computer disk but refused to produce the disk. The plaintiffs moved to compel production of the disk. The motion was granted. The definition of "document" in the Ontario Rule in question is closely similar to the Manitoba Rule. Counsel for the defendant in that case submitted, as in this one, that by delivering the product of the disk, the plaintiffs have obtained production of the "information recorded or stored by means of" the disk, and that that is all they are entitled to. However, in reaching his conclusion, Justice Anderson had the following comment (at p. 282):

...I do not at all understand the technology involved but it appears to be the position of the plaintiffs that information would be made available to them by the possession of the disc which is not obtainable from the product of the disc with which they have been provided.

30 The plaintiff has satisfied me that the electronic information requested falls within the definition of a document under the Rules and contains relevant information that should be produced. If the defendants Leo Cholakakis, Fairmont Real Estate Limited and Kensington Building Limited wish to provide the information in a format that does not reveal irrelevant information, then it is incumbent upon them to develop a mechanism by which that can be done. The interests of broad disclosure in a modern context require, in my view, the production of the information in the electronic format when it is available.

31 My view might be different if the information, which might be disclosed, would be privileged or because of its confidential nature, disclosure would prejudice these same defendants. That is not the nature of the information as I understand it. Furthermore, use of the latter would be subject to the implied undertaking Rule, limiting its use to purposes of the litigation.

2000 CarswellMan 7, 44 C.P.C. (4th) 162, [2000] M.J. No. 6

32 The defendants Leo Cholakis, Fairmont Real Estate Limited and Kensington Building Limited are therefore to produce on floppy disk the accounting program and the accounting data that they have produced to the plaintiff in paper form, including all transactions up to December 1998. I recognize there is no legal obligation to warrant that the program and data can be loaded and operated by another party on a similar computer, but all necessary technical information should be provided to allow the plaintiff or his advisors to access the information.

33 These same defendants will have a reasonable period of time in which to see whether the electronic program can be modified such that the production of the data is limited to those areas of the financial statements that were ordered to be disclosed in the Order of June 5, 1998. If this cannot be done without impairing the accuracy of the remaining information, then the program and data should be produced in their original form.

34 If the information is provided in a revised format, there should be an accompanying affidavit from these defendants or a party involved in the revisions, providing details as to how the information was modified and confirming that only the irrelevant information has been removed from the program.

35 Costs for performing such an operation will be borne by these defendants although it may be a disbursement to be considered in an Order for costs at a further stage in the proceedings.

36 As to the costs of this appeal, since the results are divided, each party will bear its own costs.

Appeal allowed in part.

END OF DOCUMENT

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53



2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Agnew v. New Brunswick Telephone Co.

Harrison Agnew, J.C. Norbert Allain, Catherine H. Allison, David Anderson, Brenda Armstrong, Lillian Armstrong, Francis Arsenault, Blair F. Atkinson, Larry R. Banks, Donald Beaumaster, Wayne Beaumaster, Donna Black, John Black, Robert W. Bond, M.M. Madonna Boudreau, Joan Boyle, Anne Brown, Verdell Budrow, Lloyd Cain, Howard Carle, John Carson, Marjorie Cavanaugh, Russell Clark, Mary Ellen Cole, Donald Copp, Elva Cotter, Frederick Coulter, William Craft, Paul F. Creary, Clifford Cummings, Galen Dempsey, Fernand Doucet, Clive Douthwright, John Dunklee, David Field, Wilfred Finnamore, Gary Foster, Lillian Fougere, Guy E. Gallant, Jeannine Gautreau, Garry Gilbert, Jacqueline Gilliland, Edward A. Gilks, Allan Groundwater, Roger J. Hachey, Peter Haines, Sally Harley, Donna Hawco, Clifford Hayes, David Hayes, Louis Hebert, Garnet Horsman, Robert Horsman, David Hudson, James Humby, Lynnette Illsley, Omer Jacob, Herbert Jameson, Allan Jones, M. Lucia Kenny, Sheila Kerr, Blair Lacey, Audrey Lavigne, Margaret Lavigne, Louise Lavoie, Deborah Leblanc, Rose L'Italien, Raymond Lloyd, Arthur Love, Raymond Maber, James McCarron, Mabel McKinley, C. Robert McLeod, Claudette McLeod, Darrel Milburn, Robert Mott, Francis A. Mullin, Brian J. Muzzerall, Leslie D. Nason, Pauline Nichol, Donna Oke, Patricia O'Keefe, Robert Orr, David Parlee, Wilson Peacock, Freeman Perry, Glendon Phillips, Joseph A. Pickup, Wayne Pollock, Carol D. Powers, Gerald Powers, Harold Rice, Paula Ring, Litigation Administrator for the Estate of David Ring, Gary Robertson, Frank Shaw, Wendell Shorey, Rosemarie Short, Donald Sloat, Alan V. Smith, G. Kevin Smith, Paul Smith, J.M. Claude Sonier, Gerald Steeves, Reginald Steeves, Bruche Stevens, Norman Strong, Robert Tait, Joseph Adelard Theriault, Lee Van Buskirk, Gail Vaughan, Clarence Vautour, Douglas Wade, Clinton Webb, Diane E. White, Victor H. Willaims, David G. Wilson, Barbara Woods and John G. Woods, Plaintiffs and The New Brunswick Telephone Company, Limited, Defendant

New Brunswick Court of Queen's Bench

Glennie J.

Heard: April 2, 5, 2002
Judgment: May 31, 2002
Docket: S/C/399/00

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Counsel: *James M. Barry*, for Plaintiffs

Barry R. Morrison, Q.C., for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — General

Several employees who took May, 1998 early retirement incentive offered by employer brought action for damages against employer for difference between incentive accepted by them and more lucrative early retirement incentive

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

offered by employer in October, 1999 — Retired employees alleged that at time 1998 incentive was offered employer was aware that merger was going to take place and knew or ought to have known that it would result in further early retirement incentive program being offered — Representative of employer was examined for discovery — Retired employees brought application for order that employer provide them with certain documents which were acknowledged to exist by employer's representative at discovery and which were not listed in employer's affidavit of documents and for order that employer's representative re-attend at discovery to answer further questions — Employer ordered to produce portions of various documents and employer's representative ordered to re-attend at discovery to answer further questions — At discovery stage, if documents sought to be produced have semblance of relevancy then they must be produced — Employer was entitled to disclose only those portions of documents in question that were relevant to issues raised in pleadings.

Pensions --- Practice in pension actions — General

Several employees who took May, 1998 early retirement incentive offered by employer brought action for damages against employer for difference between incentive accepted by them and more lucrative early retirement incentive offered by employer in October, 1999 — Retired employees alleged that at time 1998 incentive was offered employer was aware that merger was going to take place and knew or ought to have known that it would result in further early retirement incentive program being offered — Representative of employer was examined for discovery — Retired employees brought application for order that employer provide them with certain documents which were acknowledged to exist by employer's representative at discovery and which were not listed in employer's affidavit of documents and for order that employer's representative re-attend at discovery to answer further questions — Employer ordered to produce portions of various documents and employer's representative ordered to re-attend at discovery to answer further questions — At discovery stage, if documents sought to be produced have semblance of relevancy then they must be produced — Employer was entitled to disclose only those portions of documents in question that were relevant to issues raised in pleadings.

The employer offered an early retirement incentive program to its employees in May, 1998. At the time the employer represented to the employees that no subsequent early retirement incentive program would be offered. In March, 1999 the employer entered into a combination agreement for the purpose of merging with other regional telephone companies. The employer offered a second and better early retirement incentive program in October, 1999. Several employees who had taken the May, 1998 early retirement incentive brought an action for damages against the employer for the difference between the incentive accepted by them and the more lucrative incentive offered in October, 1999. The retired employees alleged that at the time the 1998 incentive was offered the employer was aware that a merger was going to take place and knew or ought to have known that it would result in a further early retirement incentive program being offered. A representative of the employer was examined for discovery. The retired employees brought an application for an order that the employer provide them with certain documents which were acknowledged to exist by the employer's representative at discovery and which were not listed in the employer's affidavit of documents and for an order that the employer's representative re-attend at discovery to answer further questions.

Held: The employer was ordered to produce portions of various documents and the employer's representative was ordered to re-attend at discovery to answer further questions.

At the discovery stage, if the documents sought to be produced have a semblance of relevancy then they must be produced. The employer was entitled to disclose only those portions of the documents in question that were relevant to the issues raised in the pleadings.

The employer was ordered to produce any portion of the business plan presented to the November 26, 1998 meeting of its board of directors which dealt with the possible merger, early retirement programs or the downsizing of the workforce. The employer was ordered to produce any portion of its long-range and 1997 and 1998 business plans dealing with the "strategic option" of "consolidation by way of merger and acquisition" or the downsizing of em-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

ployees and/or early retirement incentive plans.

The employer was ordered to produce any portion of any documents containing cost savings calculations projected to be achieved through the 1998 early retirement incentive and the calculation of total savings in fact achieved by the 1998 incentive. The employer was ordered to produce any portion of the cost savings analysis relating to the downsizing of employees which was used to prepare the joint management information circular prepared for the merging companies.

The employer was ordered to produce any portion of the minutes of meetings of the council of regional telephone companies from 1995 to January 1, 1999 dealing with the possible merger. The corporate secretary of the employer was ordered to carry out the necessary review of the council's minutes.

The corporate secretary of the employer was also ordered to review his notes and the minutes of the meetings of board of directors of the employer from August 1997 to October 29, 1998 for any reference to downsizing, early retirement incentives or possible mergers and to produce same. It was clear from the employer's representative's testimony at discovery that the board of directors was considering a merger option at the October 29, 1998 meeting.

The employer was also ordered to produce a memo apparently prepared in either August or September 1998 with respect to the possible merger. No evidence existed to support the suspicions of counsel for the plaintiff retired employees that specific merger or amalgamation talks took place prior to July of 1998.

The employer was ordered to disclose whether it was a trustee of the pension plans relating to the plaintiff retired employees, and if so, to provide answers to questions relating thereto.

Cases considered by *Glennie J.*:

Adams v. Norcen Energy Resources Ltd., [24 C.P.C. \(4th\) 188](#), 1998 CarswellAlta 1030, 233 A.R. 174, 20 C.C.P.B. 160 (Alta. Q.B.) — considered

Bank of Montreal v. 3D Properties Inc., (sub nom. *Bank of Montreal v. 3D Properties Inc. (No. 1)*) 111 Sask. R. 53, 1993 CarswellSask 189 (Sask. Q.B.) — considered

Bartmanovich v. Manitoba Crop Insurance Corp., 1998 CarswellMan 337, 130 Man. R. (2d) 40, [1999] 3 W.W.R. 161 (Man. Q.B.) — considered

Boxer v. Reesor, [43 B.C.L.R. 352](#), 35 C.P.C. 68, 1983 CarswellBC 63 (B.C. S.C.) — considered

Continental Guaranty Corp. v. Pettigrew (1922), [22 O.W.N. 239](#) (Ont. H.C.) — considered

Forest Protection Ltd. v. Bayer AG, 1998 CarswellNB 449, (sub nom. *Forest Protection Ltd. v. Bayer A.G.*) 169 D.L.R. (4th) 374, (sub nom. *Forest Protection Ltd. v. Bayer A.G.*) 84 C.P.R. (3d) 187, 207 N.B.R. (2d) 50, 529 A.P.R. 50, 46 C.P.C. (4th) 52 (N.B. C.A.) — considered

Goddard v. Shoal Harbour Marine Service Ltd., [24 W.W.R. 166](#), 1958 CarswellBC 8 (B.C. S.C.) — considered

Guarantee Co. of North America v. Canada (Minister of Public Works), [120 Nfld. & P.E.I.R. 63](#), 373 A.P.R. 63, 1994 CarswellNfld 180 (Nfld. T.D.) — considered

Irving Oil Ltd. v. 050414 N.B. Ltd., [2001 NBQB 197](#), 2001 CarswellNB 369 (N.B. Q.B.) — considered

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Jackson v. Belzberg, (sub nom. *Belzberg v. Jackson*) 31 B.C.L.R. 140, [1981] 6 W.W.R. 273, 1981 CarswellBC 256 (B.C. C.A.) — considered

Johnston v. Prince Edward Island, 94 Nfld. & P.E.I.R. 4, 298 A.P.R. 4, 1991 CarswellPEI 55 (P.E.I. T.D.) — referred to

Kay v. Posluns, 71 O.R. (2d) 238, 1989 CarswellOnt 917 (Ont. H.C.) — considered

Lafrance v. Corney, 7 C.P.C. (3d) 322, 125 N.B.R. (2d) 368, 316 A.P.R. 368, 1992 CarswellNB 64 (N.B. Q.B.) — considered

Lazin v. Ciba-Geigy Canada Ltd., [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380, 1976 CarswellAlta 80 (Alta. C.A.) — considered

Manufacturers Life Insurance Co. v. Dofasco Inc., 38 C.P.C. (2d) 47, 1989 CarswellOnt 433 (Ont. H.C.) — considered

Manufacturers Life Insurance Co. v. Dofasco Inc. (1989), 38 C.P.C. (2d) 47 at 53 (Ont. H.C.) — referred to

Martin v. Scribal Proprietary Ltd. (1956), 67 R.P.C. 127 — considered

Mazumder v. Bell Canada, 2000 CarswellOnt 2960 (Ont. Master) — considered

McIntosh v. Don Carlos Casino Ltd., 28 W.W.R. 277, 1959 CarswellMan 24 (Man. Q.B.) — considered

Métropolitaine, cie d'assurance-vie c. Frenette, 4 C.C.L.I. (2d) 1, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) 89 D.L.R. (4th) 653, 134 N.R. 169, (sub nom. *Metropolitan Life Insurance Co. v. Frenette*) [1992] I.L.R. 1-2823, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) 46 Q.A.C. 161, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) [1992] 1 S.C.R. 647, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) [1992] R.R.A. 466, 1992 CarswellQue 95, 1992 CarswellQue 113 (S.C.C.) — considered

New Brunswick Telephone Co. v. New Brunswick (Minister of Municipal Affairs) (1981), 33 N.B.R. (2d) 238, 80 A.P.R. 238 (N.B. Q.B.) — considered

North American Trust Co. v. Mercer International Inc., 1999 CarswellBC 2064, 71 B.C.L.R. (3d) 72, 36 C.P.C. (4th) 395 (B.C. S.C.) — considered

Parker v. Parker, 16 C.P.C. 276, 1980 CarswellOnt 380 (Ont. Co. Ct.) — considered

Reading & Bates Construction Co. v. Baker Energy Resources Corp., 22 C.I.P.R. 240, 24 C.P.R. (3d) 66, 25 F.T.R. 226, 1988 CarswellNat 644 (Fed. T.D.) — considered

Schmidt v. Air Products of Canada Ltd., 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re*) 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re*) 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re*) 73 W.A.C. 81, C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, 1994 CarswellAlta 746, [1995] O.P.L.R. 283 (S.C.C.) — referred to

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Slattery (Trustee of) v. Slattery, [95 N.B.R. \(2d\) 422, 241 A.P.R. 422, 1989 CarswellNB 247](#) (N.B. Q.B.) — considered

St. Regis Timber Co. v. Lake Logging Co., [\[1947\] 1 W.W.R. 810, \[1947\] 3 D.L.R. 56, 1947 CarswellBC 18](#) (B.C. C.A.) — considered

Thériault v. Madawaska Maliseet First Nation, [2001 NBQB 149, 2001 CarswellNB 327](#) (N.B. Q.B.) — considered

Toronto Board of Education Staff Credit Union Ltd. v. Skinner, [46 C.P.C. 292, 1984 CarswellOnt 477](#) (Ont. H.C.) — considered

U.F.C.W., Local 1252, Fishermen's Union v. Cashin, [\(sub nom. U.F.C.W., Local 1252, Fishermen's Union v. Cashin \(No. 1\)\) 85 Nfld. & P.E.I.R. 118, \(sub nom. U.F.C.W., Local 1252, Fishermen's Union v. Cashin \(No. 1\)\) 266 A.P.R. 118, 1990 CarswellNfld 93](#) (Nfld. T.D.) — considered

Ward v. Dana G. Colson Management Ltd., [24 C.P.C. \(3d\) 211, 1994 CarswellOnt 496](#) (Ont. Gen. Div.) — considered

Statutes considered:

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)

Generally — referred to

Rules considered:

Rules of Court, N.B. Reg. 82-73

Generally — referred to

R. 33.08(3) — considered

APPLICATION by retired employees for order that employer provide them with certain documents which were acknowledged to exist by employer's representative at discovery and which were not listed in employer's affidavit of documents and for order that employer's representative re-attend at discovery to answer further questions.

Glennie J.:

1 Several retired employees of The New Brunswick Telephone Company, Limited ("NB Tel") have commenced an action against NB Tel with respect to their acceptance of an Early Retirement Incentive Program which was offered to them by NB Tel in May of 1998.

2 The retired NB Tel employees now seek an order pursuant to Rule 33.08(3) of the *Rules of Court* that NB Tel provide them with certain documents relating to their action against NB Tel which were acknowledged to exist by NB Tel's representative at discovery and to which no privilege attaches. These documents were not listed in NB Tel's Affidavit of Documents.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

3 The Plaintiffs also seek an order that NB Tel's representative reattend and answer questions at discovery relating to issues raised in the action including all questions relating to any documents disclosed pursuant to any order of this Court.

Background

4 The Plaintiffs retired from their jobs during 1998 and 1999. During that time frame, NB Tel offered two Early Retirement Incentive Programs ("ERIP's") to eligible NB Tel employees: the first in May, 1998 (the "1998 ERIP") and the second in October, 1999 (the "1999 ERIP"). The employees who accepted the 1998 ERIP were not penalized with a reduced pension for early retirement. The employees who accepted the 1999 ERIP, in addition to having no penalty for early retirement also received a lump sum payment of one and one-half year's salary. The employees who accepted the 1998 ERIP did not receive the lump sum payment of one and one-half years salary.

5 The Plaintiffs were NB Tel employees who either accepted the 1998 ERIP or retired after the 1998 ERIP was made and before the 1999 ERIP was offered. The damages they are seeking represent the additional monies they would have received if they had not retired before the more lucrative 1999 ERIP was offered.

6 The Plaintiffs are alleging that:

- at the time the 1998 ERIP was offered, NB Tel was aware that a merger was going to take place with the other telephone companies in Atlantic Canada (the "Atlantic Telcos");
- NB Tel knew or ought to have known that the merger would result in a further incentive package to induce NB Tel employees to retire and thereby achieve projected cost savings and improved efficiencies;
- NB Tel represented to its employees that there would be no future incentive program offered subsequent to the 1998 ERIP; and
- NB Tel, in its capacity as Trustee of its pensions plans, owed a fiduciary duty to the members of those plans, and that NB Tel breached its fiduciary duty in not revealing to its employees the likelihood of the merger with the other Atlantic Telcos which took place in March of 1999.

7 NB Tel denies it knew of the Atlantic Telcos merger at the time the 1998 ERIP was offered, and says that the 1998 ERIP was offered in "utmost good faith"; and that it has not breached any fiduciary duty to the members of its pension plans.

8 At the time the 1998 ERIP was offered, NB Tel was owned 100% by Bruncor Inc. ("Bruncor"). Bruncor, along with Island Telecom Inc. ("Island Tel"), Maritime Telegraph and Telephone Company, Limited ("MT&T") and NewTel Enterprises Limited ("NewTel") entered into a Combination Agreement dated March 22, 1999 with Atlantic Co. (subsequently, Aliant Inc.) for the purpose of combining or merging the ownership of their respective businesses.

9 Following the signing of the Combination Agreement, each of Bruncor, Island Tel, MT&T, and NewTel became a wholly-owned subsidiary of Atlantic Co.

10 This action was commenced on April 25, 2000. On August 31, 2000, NB Tel provided a draft, unsworn Affidavit of Documents to Counsel for the Plaintiffs. A sworn Affidavit of Documents was delivered to Counsel for the Plaintiffs on November 9, 2000.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

11 On February 14, 2001, the Plaintiffs applied to this Court for an order that NB Tel provide a further and better Affidavit of Documents and that it disclose and produce for inspection all non-privileged documents relevant to the issues raised in the pleadings.

12 At that point in time, the Plaintiffs advanced the following grounds for their application:

1. The Defendant has failed to disclose the voluminous documentation which must exist pertaining to the 1999 merger of Bruncor Inc., NewTel Enterprises Limited, Maritime Telegraph & Telephone Company Limited, and Island Telecom Inc.

2. The Defendant's knowledge in 1998 of the pending merger and subsequent effects on its employees is central to the Plaintiffs' claims. The documents which must exist pertaining to the merger of the Atlantic telephone companies are relevant to the within action and must be produced pursuant to the Rules of Court.

13 One of the lawyers representing the Plaintiffs, Rodney J. Gillis, Q.C., deposed to an affidavit in support of the Notice of Motion filed by the Plaintiffs on February 14, 2001, in which he stated that although he had received a sworn Affidavit of Documents from the Defendant on November 9, 2000, he took the position that NB Tel's Affidavit of Documents did not disclose many documents "*which must exist in relation to the issues raised in the pleadings.*" [Emphasis added.]

14 In his February 14, 2001 affidavit, Mr. Gillis went on to say:

The pleadings herein clearly reveal that the central issue pertains to the knowledge of the Defendant of its intentions for its employees in the context of the merger of the Atlantic Telephone Companies resulting in the creation of Aliant. Inherently, documents pertaining to the merger dated prior to the offering by the Defendant of the 1998 Early Retirement Incentive Package are relevant to the issues raised in this litigation.

15 It would appear that the genesis for Mr. Gillis' belief that there must be other undisclosed documents in existence pertaining to the merger of the Atlantic Telcos and which documents he alleged were created before the May 1998 ERIP was offered, is based on the answer to a question put to an administrative assistant to the President of NB Tel during her medical malpractice trial in this court in February of 2000.

16 That trial had nothing to with the subject matter of this litigation. However, Mr. Gillis, who was acting for one of the Defendants in the medical malpractice action, managed to slide in a question during that trial concerning the merger of the Atlantic Telcos. He states as follows in this regard in his February 14, 2001 Affidavit:

The existence of the documents requested herein was supported by the sworn testimony of Carolyn Bertin during a trial of this Court in February, 2000. Mrs. Bertin had been employed as an administrative assistant and office manager for the President of NB Tel, Leno Celeste. She was also manager of credit and collections and a Project Manager... Mrs. Bertin was asked when the merger of the Atlantic Telcos occurred. She replied: 'I think the Aliant merger talks started around 97, I believe'.

17 It must be remembered that the question posed to Mrs. Bertin concerning the merger of the Atlantic Telcos would have come out of the blue during an unrelated trial. The witness would have been focusing on her own trial and lawsuit at the time the merger question was put to her.

18 In any event, it appears that Mrs. Bertin's answer during the trial of her medical malpractice lawsuit that she thought and believed the Atlantic Telco merger talks began around 1997 sowed seeds of suspicion in the mind of

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Mr. Gillis and created the basis for his belief that certain other undisclosed documents exist.

19 Counsel for NB Tel says that in the spring of 1998, Stephen G. Wetmore, who was then the President and Chief Executive Officer of NewTel wrote an article in a trade magazine concerning the possible merger of the Atlantic Telcos.

20 Counsel for NB Tel also says that in the summer of 1998, the then President of NB Tel, Gerald Pond, met with Mr. Wetmore and other Atlantic Telcos CEO's and talked about Mr. Wetmore's article. At that point in time, Bell Canada had decided to create a new company to compete for major telephone company corporate accounts in New Brunswick.

21 Shortly before the Combination Agreement dated March 22, 1999 was entered into, each of the four Atlantic Telcos along with Atlantico entered into a Memorandum of Agreement dated March 19, 1999 with BCE Inc. and Bell Canada providing for what is described in a Joint Management Information Circular prepared for shareholders as *"an orderly transition and continuity of the business relationships between them subsequent to the completion of the Combination."*

22 According to the Joint Management Information Circular, the Memorandum of Agreement consists of three parts: a statement of agreement and procedure, a long-term strategic alliance term sheet and a long-term shareholder relationship termsheet.

23 The Information Circular states:

The statement of agreement and procedure records the mutual understanding of the parties that there shall be a strategic alliance between the Combining Companies, BCE and Bell Canada...

The long-term strategic alliance termsheet identifies the four Atlantic Provinces as the traditional territory of AtlanticCo and its operating subsidiaries, and Quebec and Ontario as the traditional territory of Bell Canada. It includes a statement that AtlanticCo is the vehicle by which telecommunications services will be offered in AtlanticCo's designated territory, and a statement of the commitment of BCE and Bell Canada to the development of a strong and independent AtlanticCo with a focus on the creation of shareholder value through growth. It identifies specific areas of co-operation or joint action for the purpose and objective of offering, marketing and providing telecommunications services and showing their respective customers a cohesive network with common user interfaces and a seamless delivery of services. It establishes a series of co-operative structures and designates each of Bell Canada and AtlanticCo as a preferred supplier for the other and their respective customers.

24 According to Counsel for NB Tel, the first NB Tel Board of Directors' discussion of a possible merger of the Atlantic Telcos took place at a joint board meeting of Bruncor and NB Tel held on October 29, 1998.

25 The minutes of the October 29, 1998 joint board meeting along with the minutes of a joint board meeting held on April 30, 1998 have already been provided by Counsel for NB Tel to Counsel for the Plaintiffs. They were not included in NB Tel's November 9, 2000 Affidavit of Documents.

26 As mentioned, on August 31, 2000, Counsel for the Defendant, Barry Morrison, Q.C., provided an unsworn draft Affidavit of Documents to Counsel for the Plaintiffs, Rodney J. Gillis, Q.C.

27 On September 8, 2000, Mr. Gillis wrote to Mr. Morrison as follows:

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

I am in receipt of your client's Affidavit of Documents in this matter. The Schedule "A" documents appear to be no more than a listing of the contents of the personnel files of each of the Plaintiffs.

As you are aware, the essence of the Plaintiffs' claim is that your client negligently misrepresented to its employees that the 1998 Early Retirement Incentive Program would be the last such offer to be made in the foreseeable future, when it knew or ought to have known that there would be a further and better such offer subsequent to the merger with the other Atlantic telephone companies. The Affidavit of Documents is devoid of any of the multitude of documents which have to exist pertaining to the merger of the Atlantic Telco's. There is also no listing of documents relating to NB Tel's decisions to offer the 1998 and 1999 ERIP's to its employees.

The documents to which I am referring will not be found in the personnel folders of the Plaintiffs. The merger of your client with the other Atlantic Telco's and the creation of Aliant, must have, by its nature, involved extensive research, meetings, reports, correspondence, memoranda and records of communication of all types at the most senior management level. There is no reference in your client's Affidavit to research, proposals, directors' minutes, projections, business plans, costs, efficiencies, valuations, analysis, staffing considerations, management requirements, responsibilities, shareholder considerations, strategies, implementation schedules, public relations, or any of the myriad of documents involved in a merger of that magnitude.

The decisions pertaining to the offer of the 1998 and 1999 ERIP's likewise could not have been arrived at without the generation of a significant number of documents relating to cost/benefit analysis, potential savings, productivity, staffing requirements, eligibility criteria and many others. No documents relating to the making of those decisions are listed in the Affidavit.

Mr. Morrison, you are aware that the Plaintiffs in this action are retirees with limited resources. They do not have the deep pockets of your client such that they can withstand the tremendous expense of a litigation protracted by unnecessary Motions and delays. The failure of you client to disclose the many obviously relevant documents in its possession can only be construed as an attempt to hide the course of dealings which, when revealed, will support my clients' allegations, or as evidence of bad faith in the conduct of the action, or both. The reluctance or refusal to disclose all relevant documents can only increase the cost of this litigation; an increase which will impact much more severely on the Plaintiffs than on NB Tel.

I request that you provide us with a revised Affidavit of Documents which discloses the materials that are in the possession of your client and relevant to the issues raised in the Statement of Claim. I suggest those documents will be found, among other places, in the files of senior management at NBTel. If you will not provide such a revised Affidavit, it will be necessary to bring a Motion requesting an Order for the delivery of a further and better Affidavit of Documents. I would be seeking costs of such Motion on a solicitor/client basis in light of the clearly deficient and inadequate nature of your first Affidavit.

28 On October 31, 2000, Mr. Gillis wrote to Mr. Morrison as follows:

I am writing to request once again that you provide us with a proper Affidavit of Documents in this matter. As I have previously reminded you, the merger of the Atlantic Telcos is at the heart of the issues raised in the pleadings and it is not credible that such an undertaking transpired without generating hundreds, if not thousands, of documents; your initial Affidavit of Documents included none of them.

Mr. Morrison, it has not been many months since we requested your Affidavit of Documents. There has been more than an adequate time for your client to search its files and identify the relevant documents. If it has not, then the conclusion must follow that the documents have been destroyed on your client is attempting to hide something.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

29 An Affidavit of Documents was finally deposed to by Rose M. Hubley on November 9, 2000. Her title in the sworn Affidavit of Documents is stated to be "*Director of Human Resources of Aliant Inc. and The New Brunswick Telephone Company Limited.*" The sworn Affidavit of Documents listed 1641 items in its attached Schedule.

30 The draft Affidavit of Documents stated Mrs. Hubley's title to be "*Chairman of the Employees' Benefit Committee of the Defendant, The New Brunswick Telephone Company, Limited.*" The draft Affidavit of Documents listed 1610 items in its attached Schedule.

31 Prior to forwarding the Sworn Affidavit of Documents to Mr. Gillis on November 9, 2000, Mr. Morrison forwarded a letter to Mr. Gillis on October 3, 2000 which reads in part as follows:

Thank you for your fax of September 8, 2000 and your letter of September 29, 2000.

Even before receiving your September 8, 2000 letter our client had been doing a double check to make sure that all relevant documents are made available for this litigation. That double check was prompted by the appearance of some documents in the possession of your clients that had not appeared in our client's search thus far. Representatives of our client are in particular looking at other departments than the Human Resources Department as potential repositories of relevant documents.

That being said, we must take issue with some of the statements in your earlier letter.

In particular, you are wrong in alleging as you have in the last two sentences of the second paragraph of page 1 of your letter. The Minutes of a Joint Board of Director's meeting dealing with the 1998 ERIP is an example of a document listed in our client's Affidavit of Documents that demonstrates your error.

In the third paragraph on page 1 of your letter you partly state the obvious. Of course there are numerous documents in existence relating to the merger of the Atlantic telephone companies and the creation of Aliant. As you well know, however, the existence of documents does not necessarily make them relevant. You have stated that your clients' claim is that NBTel misrepresented to them that the 1998 Early Retirement Incentive Program would be the last such offer to be made in the foreseeable future when it knew or ought to have known that there would be a further and better such offer subsequent to the merger with other Atlantic telephone companies. Our client has produced, to the best of its knowledge, all documents relevant to that issue. If the double check turns up anything further, we of course will let you know immediately. [Emphasis added.]

32 The hearing of the Plaintiffs' February 14, 2001 Motion for an order that NB Tel deliver a further and better Affidavit of Documents and disclose and produce for inspection all non-privileged documents relevant to the issues raised in the pleadings was heard by Justice John Turnbull on March 19, 2001.

33 At that hearing, James M. Barry, one of the lawyers for the Plaintiffs, advised the Court as follows as stated at pages 6 & 7 of the transcript of the March 19, 2001 hearing:

MR. BARRY: Our position essentially, my lord, is simply that there is no way that it is realistic, that is was only in 1998 that the defendant was aware of the pending merger of NBTel or Bruncor rather with the other Atlantic telephone companies to form Aliant.

And in fact that at the time the representations were made to the employees, that the '98 package was going to be the only such offer to be forthcoming in the foreseeable future, when those representations were made, that the defendant in fact was aware of the probability or the pending merger the following year, that the nature of that merger is of such a magnitude that it certainly didn't arise just in the last few months before the merger occurred in March of '99.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

And on the basis of the fact that the merger was going to take place, then the defendant must have been aware that there would be a need to reduce the work force to achieve efficiencies and savings which is a part of this type of huge merger. And on the basis of the fact —

THE COURT: What are the dates again that the actual merger took place?

MR. BARRY: In March 1999, my lord.

THE COURT: And your clients were approached —

MR. BARRY: In May —

THE COURT: — on the —

MR. BARRY: May 1998. Now they did not —

34 And at page 18:

MR. BARRY: Well, Mr. Morrison states that our client has produced to the best of its knowledge all documents relevant to that issue. And he summarizes the claim of the plaintiffs in the sentence before that.

I would submit, my lord, that that can't be correct, that there has to be many, many documents pertaining to the merger and the way in which the company was going to achieve financial betterment of their position be entering into the merger. And among that would be how they are going to reduce their work force and achieve savings along those lines.

35 Mr. Barry summarizes the main issue as follows at the bottom of page 18 of the transcript:

The issue is what did the defendant know when it made those representations in 1998 that this was going to be the last chance to accept an early retirement incentive program?

36 At the hearing of this motion for further disclosure, Mr. Barry quite candidly admitted that the Plaintiffs are looking for a "smoking gun."

37 Justice Turnbull concluded at the March 19, 2001 hearing that "*the suspicions the Court had have evaporated. It [the Affidavit of Documents] is one of the better ones I have seen. I am particularly impressed at the efforts that have gone into preparing a proper and complete affidavit in this case.*" Justice Turnbull accordingly held that a further Affidavit of Documents was not required.

38 This application can not be a second chance to raise what has already been dealt with by this Court. However, the Plaintiffs now argue that the testimony of Curtis Howe, the Chief Technology Officer of Aliant Telecom Inc., who was the representative of NB Tel chosen by the Plaintiffs to be examined at discovery "*reveals the existence of documents which are related to this action and which were not included in the Defendant's Affidavit of Documents.*"

39 As will be referenced later in this decision, some of those documents have already been provided to Counsel for the Plaintiffs. Accordingly, it is necessary to determine if the other documents now sought by the Plaintiffs were in fact mentioned by Mr. Howe during his testimony at Discovery on February 26, 2002 and if so mentioned,

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

whether they are in existence and relevant to this action based upon the pleadings. Counsel for the Defendant takes the position that the documents sought are not relevant.

40 Although the Plaintiffs chose Mr. Howe as the representative of NB Tel to be examined, a review of the transcript of Mr. Howe's examination discloses that they may have picked the wrong person. Counsel for the Plaintiffs apparently thought Mr. Howe had been the Vice-President, Planning and Marketing of NB Tel as is evident from the following exchange between Mr. Howe and Counsel for the Plaintiffs taken from the transcript of the discovery:

Q.604 — Mr. Jollymore's position with the Telephone Company at that time was what?

A. He was the outgoing Vice-President, Planning and Marketing for NB Tel.

Q.605 — And that is the position that you hold today?

A. No.

Q.606 — What is your position again?

A. Chief Technology Officer for Aliant Telecom.

Q.607 — But at one point you were Vice-President, Planning and Marketing?

A. No.

Q.608 — Never had that position?

A. No.

41 I mention this because it is obvious from reading the transcript of the discovery of Mr. Howe that he was not a key NB Tel corporate officer able to readily answer the particular lines of questioning being advanced by the Plaintiffs with respect to when NB Tel officials first started discussing the possibility of merger with the other Atlantic Telcos as well as specific details relating to the ERIPS. Except for one presentation, Mr. Howe did not attend board meetings of NB Tel. In fact, Mr. Howe doesn't know how many directors of NB Tel there were at the time. Mr. Howe was not a Senior Corporate Officer of NB Tel or part of its senior management team at the relevant times material to this action.

42 In his affidavit in support of this motion, Mr. Gillis says:

The Discovery of the Defendant's representative, Mr. Curtis Howe, was commenced on February 26, 2002. It was apparent to me from an early point that Mr. Morrison was determined to interrupt my Discovery of Mr. Howe by objecting to my questions and by instructing his client's representative to not answer questions which related to issues clearly raised in the pleadings.

43 In reviewing the transcript of the examination of Mr. Howe in its entirety, I am of the view that Counsel for NB Tel was not "determined to interrupt" the Discovery of Mr. Howe. Counsel for NB Tel is entitled to object to a question if he does not feel it is relevant. That is his job. If Counsel for the parties cannot agree as to relevancy, then in such event, either party can apply to the Court to seek an order pursuant to Rule 33.08(3).

44 Counsel for NB Tel has provided Counsel for the Plaintiffs with copies of the minutes of certain joint board

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

meetings of NB Tel and Bruncor as well as a joint meeting of the Bruncor and NB Tel Human Resource and Compensation Committees held on April 30, 1998. Counsel for NB Tel has also offered to provide the handwritten notes of NB Tel's Corporate Secretary, Barrie Black, of the April 30, 1998 board meeting as well as to "look again" to see if there is something relevant in the 1997 and 1998 financial projections. I am satisfied, on reviewing the transcript of the examination of Mr. Howe, that Counsel for NB Tel was not trying to stonewall during the discovery of Mr. Howe.

45 It is obvious from reviewing the transcript that Mr. Howe's lack of knowledge during his discovery leads to frustration on the part of Counsel for the Plaintiffs and to some extent to the bickering between Counsel for the Plaintiffs and Counsel for the Defendant. In this regard, it must be remembered that the Plaintiffs chose Mr. Howe as the representative of NB Tel they wanted to examine.

46 In this regard, Counsel for NB Tel remarks as follows during the examination of Mr. Howe:

MR. MORRISON: Mr. Gillis, you chose this witness by the way, despite the protestations of NB Tel that a more appropriate witness with more personal knowledge would be the better. Please proceed.

Applicable Law

47 Rule 33.08(3) requires the production for inspection of documents not previously disclosed where the person examined admits to having those documents in his possession. It provides as follows:

33.08(3) Where a person admits upon his examination that he has in his possession, custody or control anything not previously disclosed which relates to the matters in question in the proceeding and which is not privileged, he shall produce it for inspection by the examining party.

48 In *Ward v. Dana G. Colson Management Ltd.*, [\[1994\] O.J. No. 533](#) (Ont. Gen. Div.), Justice Macdonald writes at ¶ 16:

A party to a proceeding, if granted a second chance to raise what was already before the court, undermines the integrity of rules which guide the conduct of litigation. There has to be certainty and finality of the disposition of matters by the courts. Otherwise the results would be chaotic.

The real issue here is whether the documents sought by Mr. Mazumder have sufficient relevance to the action as pleaded to require Bell Canada to produce them for inspection at his stage of the action. The test is whether the documents have a semblance of relevancy to the action (see; [Kay v. Posluns \(1989\)](#), 71 O.R. (2d) 238 (Ont.H.C.)). Wide latitude is given at the discovery stage, but there are boundaries.

49 In *Boxer v. Reesor* [\(1983\)](#), 35 C.P.C. 68 (B.C. S.C.), Chief Justice MacEachen of the British Columbia Supreme Court, in an application by the plaintiff for discovery of documents in the hands of the Defendant, stated at pages 75 and 76 regarding relevance:

That question is usually determined upon a description of the nature of the documents sought to be produced and the reasonable interpretation of the pleadings. ...

It seems to me that the clear right of the plaintiff is to have access to documents which *may* fairly lead them to a trial in inquiry which may directly or indirectly advance their case or damage the defendant's case, particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed in some parts of this application. Other parts seem to me, with respect, to be asking

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

for too much.

50 In *Boxer*, the documents were identified in groupings, such as, minutes of meetings of the company for a certain period of time, travel vouchers, length and anticipated costs of an exploration program, so the Court was able to deal with them as a group and determine whether or not, based on the contents of the pleadings, they were related to the pleadings.

51 A similar definition of relevance with regard to documents sought to be discovered was set forth in *St. Regis Timber Co. v. Lake Logging Co.*, [1947] 1 W.W.R. 810 (B.C. C.A.), where Justice Robertson stated:

Documents are relevant which contain information which may either directly or indirectly enable a party seeking discovery either to advance his own case or damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Every document which will throw any light on the case is relevant.

52 This passage is quoted with approval by Justice Brown in *Goddard v. Shoal Harbour Marine Service Ltd.* (1958), 24 W.W.R. 166 (B.C. S.C.). In that case, one of the parties sought discovery of a corporate minute book, parts of which had nothing to do directly or indirectly with the action. The Court ordered that those portions which did not have anything to do with the action should be sealed, and the balance of the minute book be produced for inspection. See also: *Johnston v. Prince Edward Island*, 1991 CarswellPEI 55 (P.E.I. T.D.), per Matheson, J.

53 In *New Brunswick Telephone Co. v. New Brunswick (Minister of Municipal Affairs)* (1981), 33 N.B.R. (2d) 238 (N.B. Q.B.), the Province of New Brunswick was attempting, through legislation, to devise a valid method of imposing a tax on NB Tel and others who owned a certain type of equipment. The manner in which the statutes had been applied in that case may well have been relevant in ascertaining their effect and to show the circumstances in which they had been applied. Accordingly, the Court ordered that tax records of other persons who were not parties be made available to NB Tel because it might throw some light on the way the legislation had been applied and to ascertain its effect. This was a very broad order relating to a number of people for a period of three years.

54 NB Tel's 1981 action against the Province of New Brunswick challenged the constitutionality of certain taxing statutes. NB Tel applied for an order for production of certain documents for inspection, including assessments and tax notices and supporting documents relating to other taxpayers. Justice Stevenson ordered that the assessment and tax notices and supporting documents and working papers relating to the calculation of the assessments and taxes for all taxpayers assessed and taxed as owning such property for three taxation years be produced, because they related to the matters in issue. He writes at ¶ 21:

Counsel for the plaintiff suggests that questions of relevance and admissibility are foreclosed by the inclusion of the documents in the affidavits of documents. The deponent who makes such an affidavit is required to disclose documents "relating to the matters in question". O.31, r.12. A document may relate to a matter in question without being either relevant or admissible on the trial of the issues. The extended meaning of relevance in discovery was adverted to in the *Burmah Oil* case by Lord Wilberforce at p. 729, where he said:

It is hardly necessary to state that the mere fact that the documents are or may be 'relevant' to the issues, within the extended meaning of relevance in relation to discovery, is not material. The question of privilege or immunity only arises in relation to 'relevant' documents and itself depends on other considerations, viz., whether production of these documents (admittedly relevant) is necessary for the due administration of justice.

and by Lord Scarman at p. 756:

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

The case law has given an extended meaning to the qualifying clause 'which relate to the matters in issue'. It embraces not only documents directly relevant but also documents which may well lead to a relevant train of inquiry: see *Dompagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55. This extended meaning is a vital part of the law of discovery, enabling justice to be done where one party knows the facts and possesses the documents and the other does not.

55 The real issue on this application is whether the documents sought by the Plaintiffs have sufficient relevance to the action as pleaded to require NB Tel to produce them. Documentary disclosure is part of the discovery process and the semblance of relevancy test applies equally to documentary discovery as it does to oral discovery and discovery by way of written interrogatories (see: *Kay v. Posluns* ([1989](#)), [71 O.R. \(2d\) 238](#) (Ont. H.C.)).

56 A wide latitude is permitted at the discovery stage. If the documents sought have a semblance of relevancy then they must be produced. However, semblance of relevancy is not a blanket license to require production of each and every document that might possibly have a glimmer of relevancy to the plaintiff's theory of the case.

57 In *Forest Protection Ltd. v. Bayer AG* ([1998](#)), [207 N.B.R. \(2d\) 50](#) (N.B. C.A.), Justice Ryan writes at ¶ 28:

A party to litigation has absolutely no right to unilaterally decide on its own or by its counsel to ignore the Rules of Court and, for its own self interest or otherwise, determine that the documents relating to a matter in issue in the action, are irrelevant and, therefore, need not be included in the Affidavit of Documents. Not only must documents be included in the affidavit but each document must be sufficiently identified. The purpose of this Rule is to discover, to reveal, not cover, not conceal.

58 In *Slattery (Trustee of) v. Slattery* ([1989](#)), [95 N.B.R. \(2d\) 422](#) (N.B. Q.B.), Justice Jones writes at ¶ 10:

Courts have generally given a wide interpretation to relevancy. In *Marriott v. Chamberlain* [1886] 17 Q.B.D. 154 Lord Esher, M.R. dealing with the English Rules which used the phrase "relating to any matter in question", a phrase which is certainly no wider than that in our present Rules, stated:

But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or nonexistence of which is relevant to the existence or non-existence of the facts directly in issue.

59 Discovery is not a general fishing expedition. See: *Jackson v. Belzberg*, [\[1981\] 6 W.W.R. 273](#) (B.C. C.A.), at pp. 275-276, and *McIntosh v. Don Carlos Casino Ltd.* ([1959](#)), [28 W.W.R. 277](#) (Man. Q.B.).

60 A balance must be struck between full disclosure of relevant facts in the discovery process and the protection of the right against unjustified intrusion into a party's private information. See: *Métropolitaine, cie d'assurance-vie c. Frenette*, [\[1992\] S.C.J. No. 24](#) (S.C.C.), *Lafrance v. Corney*, [\[1992\] N.B.J. No. 232](#) (N.B. Q.B.), *Thériault v. Madawaska Maliseet First Nation* (2001), N.B.R. (2d) Uned 77 [\[2001 NBQB 149\]](#) (N.B. Q.B.), and *Irving Oil Ltd. v. 050414 N.B. Ltd.* (2001), N.B.R. (2d) Supp. TBED O.C. 044 [\[2001 NBQB 197\]](#) (N.B. Q.B.).

61 The test as to what documents are required to be produced is simply relevance. What documents parties are entitled to is a matter of law, not a matter of discretion. See: *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* ([1988](#)), [22 C.I.P.R. 240](#), [24 C.P.R. \(3d\) 66](#), [25 F.T.R. 226](#) (Fed. T.D.):

There is a low threshold test for determining whether a document is relevant. For example, a document is relevant if it is evidence upon an issue. Moreover, if the document could reasonably contain information which may enable the party seeking production to advance that party's case, then, it too is relevant.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

62 An officer of a corporate party may be compelled to produce on his examination for discovery as such officer, all relevant documents in the possession and under the control of the corporation. See: *Continental Guaranty Corp. v. Pettigrew* (1922), 22 O.W.N. 239 (Ont. H.C.).

63 The broad relevance test applicable to the production of documents is that a party is entitled to discovery of a document or record if it directly or indirectly enables it to advance its own case or to destroy that of an adversary, or may fairly lead to a train of inquiry which may have either of these consequences. See: *Bank of Montreal v. 3D Properties Inc.* (1993), 111 Sask. R. 53 (Sask. Q.B.):

If a document "relates to any matter or question" in the action it must be discovered. Its probative value is another matter.

It is not an answer to say that the documents will not assist the plaintiffs. That is for the trier of fact to decide. The defendant does not sit in judgment.

It seems to me that every document relates to the matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

64 The question of the relevancy of documents is left in the first instance to the party making production with that party's statements in the affidavit as to relevancy being *prima facie* conclusive. Relevance must be tested by the pleadings and the particulars although discovery will not be ordered from an irrelevant allegation in the pleadings.

65 Company minute books, if relevant, are compellable. See: *Goddard v. Shoal Harbour Marine Service Ltd.* (1958), 24 W.W.R. 166 (B.C. S.C.); *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47 (Ont. H.C.), additional reasons at (1988), 38 C.P.C. (2d) 47 at 53 (Ont. H.C.)

66 There is a *prima facie* obligation on the party seeking production to establish a basis to show relevancy and the failure to do so will cause the Court not to order that production. See: *Parker v. Parker* (1980), 16 C.P.C. 276 (Ont. Co. Ct.), at 279, per Clements Co.Ct.J.

67 In *Guarantee Co. of North America v. Canada (Minister of Public Works)* (1994), 120 Nfld. & P.E.I.R. 63, 373 A.P.R. 63 (Nfld. T.D.), the plaintiff's application for an order for a further listing of documents from the Crown was dismissed. Other than the suspicions of the plaintiff in that case, there was no evidence to suggest that the Crown's determination of relevance was in error, or that any of the further documents related to the issues in plaintiff's claim. Absent evidence of bad faith or of additional relevant information not disclosed, the opposing party was to accept the Crown's determination of relevancy.

68 The question of relevancy of documents is left in the first instance to the party making production with that party's statements in the affidavit as to relevancy being *prima facie* conclusive. Relevance must be tested by the pleadings and the particulars although discovery will not be ordered from an irrelevant allegation in the pleadings. See: *Martin v. Scribal Proprietary Ltd.* (1956), 67 R.P.C. 127.

69 Semblance of relevancy is not a blanket license to require production of each and every document that might possibly have a glimmer of relevancy to the plaintiff's theory of the case. In *Mazumder v. Bell Canada*, 2000 CarswellOnt 2960 (Ont. Master), the plaintiff's theory was that there may have been a way that Bell Canada could have generated information or a report that might have shown that harassing telephone calls did not originate from

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

his residence. By poring through hundreds of thousands of pages of manuals and logs from Bell Canada, the plaintiff in that case hoped to uncover that Bell Canada could have generated a particular type of report in 1996. There was no evidence before the court that such capability or such report existed. Bell Canada had placed before the court evidence that no such report existed. The court accepted Bell Canada's evidence.

70 If the documents sought have a semblance of relevancy then they must be produced. It is for the trial judge to make the final determination of relevancy at trial (see: *Toronto Board of Education Staff Credit Union Ltd. v. Skinner* (1984), 46 C.P.C. 292 (Ont. H.C.)).

71 A wide latitude is permitted at the discovery stage. However, semblance of relevancy is not a blanket license to require production of any and every document that might possibly have a glimmer of relevancy to the plaintiff's theory of the case. As well, mere suspicion is not enough.

72 In *U.F.C.W., Local 1252, Fishermen's Union v. Cashin* (1990), 85 Nfld. & P.E.I.R. 118 (Nfld. T.D.), Russell, J., writes at ¶12:

An opposite party must be satisfied with his adversary's list of documents unless it can be shown that it is in error or there are admissions from it. Mere suspicions of the existence of other documents that have not been mentioned is insufficient. One must be content with the list that has been made in the ordinary form unless it can be shown that there are other documents in the other party's possession or power from admissions or statements of that other party. But just to show that such documents might contain relevant matter would be insufficient. (Choate, *Discovery in Canada* (1977) p. 200).

It is not enough for the party applying for further discovery to swear to a belief that documents are in the party's possession. If it could be shown that there was cause for suspicion from the acts of the other party it would be a different thing, but swearing that you have suspicion is not enough. A further order will not be granted unless there are facts or admissions showing that documents are withheld. (Choate, *Discovery in Canada* (1977 p. 202).

Discovery, whether general or specific, is never ordered for the mere purpose of enabling a party to fish out some case.

It is not sufficient to make a general affidavit based upon a priori reasoning that certain classes of documents must be in the opponent's possession or power. The rule is not intended to give a party a right to discover documents by filing a mere general affidavit, based upon a priority reasoning, wherein he asserts that he has reason to believe that letters must have passed between his adversary and some third person, or that books or other documents must exist relating to the subject matter of the action. The rule was not intended to cover that ground at all. That ground had been already covered by the original list of documents and when a party has filed that he has *prima facie* discharged his duty. It is not enough for a party to allege there must be documents which relate to this matter and then call on the other party to disclose them.

There is a heavy onus on the party seeking additional discovery because it is a question of the bona fides of the original list of documents. The plaintiff must show that a defendant has further documentation that has not been disclosed and that it is relevant. [Emphasis added.]

73 In *Bartmanovich v. Manitoba Crop Insurance Corp.*, 1998 CarswellMan 337 (Man. Q.B.), Oliphant, J. writes at ¶ 14 to 17:

Relevance, in terms of documents at the discovery stage of litigation, was discussed by the court in *Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (Eng. Q.B.), at p. 63:

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary....

There is a very low threshold for determining the question of relevance of documents. See [Reichmann v. Toronto Life Publishing Co. \(1990\)](#), 66 D.L.R. (4th) 162 (Ont. H.C.). See also [Ministic Air Ltd. v. Canadian Broadcasting Corp. \(1995\)](#), 103 Man. R. (2d) 296 (Man. Q.B.).

While the threshold test for determining relevance may be low, the same may not be said for the test imposed upon a party seeking further disclosure, as opposed to disclosure. See the judgment of Orsborn, J. in [Guarantee Co. of North America v. Canada \(Minister of Public Works\) \(1994\)](#), 120 Nfld. & P.E.I.R. 63, 373 A.P.R. 63 (Nfld. T.D.), para. 26, wherein he quotes from [U.F.C.W., Local 1252, Fishermen's Union v. Cashin \(1990\)](#), 85 Nfld. & P.E.I.R. 118 (Nfld. T.D.), at para. 8:

There is a heavy onus on the party seeking additional discovery because it is a question of the bona fides of the original list of documents. The plaintiff must show that a defendant has further documentation that has not been disclosed and that it is relevant. [Emphasis added.]

Orsborn, J. also observed at para. 26, sub-para. 5:

An opposite party must be satisfied with his adversary's list of documents unless it can be shown that it is in error or there are admissions (sic) from it. Mere suspicions of the existence of other documents that have not been mentioned is (sic) insufficient...

and, at para. 26, sub-para. 7:

...It is not enough for a party to allege that there must be documents which relate to this matter and then call on the other party to disclose them. [Emphasis added.]

74 In *Discovery In Canada*, Carswell, the author, Clare E. Choate, writes at page 214:

If a motion for a further and better affidavit is made, it is usually made following discovery. "A party who has made an affidavit of documents cannot be ordered to make a further affidavit unless, either upon the face of the affidavit itself, or of the documents referred to in it, or in his pleading, there is something which affords a presumption that he has in his possession other relevant documents besides those the possession of which he had admitted." See: *Hall v. Truman, Hanbury & Co.* (1885) 29 Ch. D. 307 at 319; [Doyle v. Williams \(1907\) 9 O.W.R. 286](#).

75 And at page 219:

The question of the relevancy of documents is left in the first instance to the party making production with his statements in the affidavit as to relevancy being prima facie conclusive. Relevance must be tested by the pleadings and the particulars although discovery will not be ordered from an irrelevant allegation in the pleadings.

76 I will now address the issue of whether, in the event it is determined that a document or a portion of a document is relevant to the issues raised in the pleadings in this case, NB Tel is entitled to disclose only the relevant part of the document that relates to the matter in question. In other words, is NB Tel entitled to disclose only those por-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

tions of documents that it says may be relevant? In my opinion, NB Tel is so entitled.

77 In *North American Trust Co. v. Mercer International Inc.*, [1999 CarswellBC 2064](#) (B.C. S.C.), Justice Lowry writes at ¶ 5, 6, 7 and 11:

Despite the wording of the rules, this court has, in some circumstances, been disposed to relieve a litigant from disclosing parts of producible documents which are clearly not relevant to the pleaded issues. I am referred first to *Goddard v. Shoal Harbour Marine Services Limited et al.* (1958), 24 W.W.R. 166 (B.C. S.C.) where discovery was limited to only those pages of a company's minute book that bore directly or indirectly on what was at issue in the action. The remaining pages were to be "sealed up" following what was described as the English practice. *Goddard* was applied in *Jervis Court Development Ltd. v. Ricci*, (October 7, 1992), Doc. Vancouver C913115, C916016, C922494 (B.C. S.C.) at para. 24 with respect to personal notes passing between a mother and her daughter. In *V. (K.L.) v. R. (D.G.)* (April 5, 1993), Doc. Vancouver C921471 (B.C. S.C.) a litigant was not required to produce portions of medical records nor parts of a personal diary that were not relevant to the issues. Indeed, I understand that in personal injury litigation, expurgated copies of medical records are commonly produced, although when the withheld disclosure is challenged it appears that the court will order full production except in the clearest cases: *Carroll v. Passant* (November 22, 1996), Doc. Vancouver B916799 (B.C. S.C.) at para. 10 (S.C.), a decision arising out of a *Halliday* order (*Halliday v. McCulloch* (1986), 1 B.C.L.R. (2d) 194 (B.C. C.A.)).

The English practice of sealing up irrelevant parts of a document requires a litigant to state in its list of documents that only certain parts of a document are being produced and on what basis it is said that certain parts of the document are not relevant: *Halsbury's* 4th. Vol. 13 para. 42.

There are decisions of the courts of Ontario and Alberta where litigants have not been required to disclose some parts of documents that are clearly irrelevant: *Collins v. Beach et al.* (1988), 24 C.P.C. (2d) 228 (Ont. H.C.) (tax returns), *Manufactures Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47 (Ont. H.C.) (financial statements), and *Lazin v. Ciga-Geigy Canada Ltd., Jacobs and McClure*, [1976] 3 W.W.R. 460 (Alta. C.A.) (a personal diary). In *Lazin*, at p. 463, it was held that the term "documents relating to the matters in question" found in the rules governing discovery in Alberta meant only the relevant portions of what might physically be called a document.

In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings, or the personal sensitivity of a person's medical records, diary notations, or familial communications, and much the same can be said where expurgated disclosure of a document has been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in *Jervis Court Development* at para. 24 and *Vickers* at para. 10, must be read in the context of what was decided. [Emphasis added.]

78 And at ¶ 17:

Where a litigant has listed a document as relating to any matter in question without qualification, it should generally be required to disclose the document in its entirety (but see *John Labatt Ltd.* at p.480).

79 The difference in this case is that NB Tel has not listed the documents now sought in this application in its Affidavit of Documents.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

80 In *Lazin v. Ciba-Geigy Canada Ltd.*, [1976 CarswellAlta 80](#) (Alta. C.A.), McDermid, J.A., writing for a unanimous court, states at ¶ 4 & 5:

The first question to be considered is what is a document? In *Royal Bank of Canada v. Wallis*, [1918] 2 W.W.R. 620, 41 D.L.R. 393, Stuart, J., giving the judgment of this Division said:

It is apparent, therefore, that what a party is required to produce is any 'document' relative to the issues. And the chief question is this: Is a ledger or other book of account admittedly containing accounts relating to transactions between the bank and many other individuals not connected with the issues in the case properly to be termed a "document" within the meaning of the rule, and the order based thereon?

It seems to me that this is not so. The whole book cannot be called "a document". Rather, it is a series of documents bound together for convenience. It is true that Rule 369, dealing with the time and place where documents may be inspected, uses the words "or in the case of bankers' books or other books of account in constant use for the purpose of any trade or business," but the obvious sense is, "in the case of documents contained in bankers' books," etc. I do not think the rule can be read as declaring that a large banker's book of account is to be regarded by the producing party as a 'document.'

Rule 364 provides that the opposite party may inspect and take copies of the 'documents' produced. Surely it would not be contended that he could take copies of pages in the ledgers referring to the bank's dealings with other customers not involved in the transactions at all.

Of course, there is the obvious query to be made as to a single page in a journal or day book upon which may be entered a large number of items dealing with quite distinct and mutually unrelated matters. It may be asked — Then do you not consider the whole page a 'document' notwithstanding these irrelevant entries. Using the word in the physical sense, I suppose the whole page would be the 'document', but there is no doubt that the irrelevant items could be covered up and any dispute about them could perhaps only be resolved by a judge's inspection under Rule 372(2).

The subject-matter and substance of entries must be considered as well as mere physical form, and, while a page of a day book, with all items but the one relevant one covered over, should be considered the true document, on the other hand, a number of related pages all dealing with the same relevant subject-matter might be treated as one document or as a number of documents indifferently.

In my opinion reference in the present R. 188 to "what documents relating to the matters in question" means only the relevant portions of what might physically be called a document. If part only of a page is relevant then that is the document that must be disclosed in the affidavit. As stated in Williston and Rolls, Law of Civil Procedure (1970), vol. 2, at p. 898:

If only part of a document is relevant, the proper course is either to disclose only the relevant part or disclose the whole document with a claim to seal up the irrelevant part, or the part which is not material may be covered up during the inspection. [Emphasis added.]

81 I am of the view that NB Tel need only to disclose the relevant part of documents related to the pleaded issues of this case.

Documents and Answers Sought by this Application

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

82 In his affidavit, in support of this application, Mr. Gillis states:

Mr. Justice Turnbull accepted the testimony of Ms. Hubley that she had searched for all relevant documents. However, in rendering his oral decision, His Lordship noted that the Discovery process may reveal the existence of documents relevant to the issues raised in the pleadings which are not listed in the Defendant's Affidavit of Documents.

83 Since Justice Turnbull has already determined that NB Tel's Affidavit of Documents was "*proper and complete*", it is only documents relating to this matter which are now acknowledged by Mr. Howe and NB Tel to exist and to which no privilege attaches and which were not listed in NB Tel's November 9, 2000 Affidavit of Documents, which would have to be provided to the Plaintiffs if found by this Court to be relevant.

84 Accordingly, I will now deal with the documents which Counsel for the Plaintiffs say were disclosed by Mr. Howe during his discovery and were not listed in NB Tel's November 9, 2000 Affidavit of Documents, as well as answers sought by Counsel for the Plaintiffs of certain questions put to Mr. Howe at discovery.

Information Gathering Process

85 The first question that Counsel for the Plaintiffs says that Counsel for NB Tel instructed his client not to answer is referenced in paragraph 17 of the Gillis Affidavit as follows:

17. The point in time at which the Defendant was aware of the pending merger with the other Atlantic telephone companies is at the center of the Plaintiffs' allegations. Inherently, the activities of the Defendant in analyzing and preparing for the merger are appropriate and necessary areas of inquiry in the Discovery of the Defendant. At page 45 of the transcript of my Discovery of Mr. Howe, he admits being part of an information gathering process regarding the merger. At page 48-50, I asked Mr. Howe about the nature of that process, including the following question:

Q.190 — Well, particularly so in the early 1990's when you focused upon the avenue being one of the path of consolidation through merger and acquisition with other telco's.

There would be a number of employees that would be offered packages in order to try and achieve those economies of scale?

At page 50, Mr. Morrison instructs his client to not answer my question.

86 The following response to question 190 by Mr. Howe is not contained in the Gillis Affidavit:

A. Sorry. Your question again?

87 In response to Mr. Howe, Mr. Gillis replies:

Q.191 — Well, particularly so in the early 1990s when the senior management and the executive levels looked at the other approach taken by telcos in North America?

88 This appears to be a statement rather than a question to which Counsel for the Defendant replies:

MR. MORRISON: He didn't say that they looked at other approaches, Mr. Gillis. Please be careful to repeat what he said accurately. Otherwise I'm going to interject. I apologize for doing so but it is my job.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

89 The exchange continues as follows:

Q.192 — I thought you told me that you were part of an information-gathering process. Was that right?

MR. MORRISON: At what point did he say that?

90 Counsel then debate what Mr. Howe had actually said earlier in the discovery about being part of "*an information-gathering process*." There is a discussion between Counsel about having the reporter play back Mr. Howe's statement that he was part of an information-gathering process but in the end, Counsel did not have it played back.

91 Mr. Morrison at one point in the exchange says, "*Those words may have been part of an answer.*"

92 In my opinion, Counsel for NB Tel is correct in this regard. Mr. Howe's reference to "*information-gathering*" is contained on page 45 in answer to question 181 as follows:

Q.181 — What do you mean by the words "general trends" in the time frame 1995 to an inclusive January 1999?

A. Well, the general trends in the industry can't be confined to 1995, '99, at least for purposes of the thinking and the information-gathering that I was part of.

But the management had taken I think a number of steps — the management had taken a number of steps to inform itself and inform the employees of the current and projected trends in the industry as it related to competition, as it related to margin in the business, our existing businesses, as it related to the need to find new sources of growth, and more broadly there was a high level of awareness that the industry had set itself upon a path of consolidation generally through merger and acquisition.

And that was widely communicated to the employees as one of the macro level options available to the business and one that in our best judgment was not the optimal path for NBTel.

93 The final exchange between Counsel with respect to Mr. Howe's comments on "*information-gathering*" are as follows:

MR. MORRISON: — please put it in context, Mr. Gillis. What are you talking about, they were part of an information-gathering process?

MR. GILLIS: He knows exactly what I'm talking about.

MR. MORRISON: Well, I don't know. And therefore I'm going to object to the question and instruct the witness not to answer it.

94 Counsel for the Plaintiffs did not rephrase the question or "*put it in context*" as requested by Counsel for the Defendant, but instead went on to another question. In my opinion, it was reasonable for Counsel for NB Tel to request that question 190 be put into context. It is a statement without a specific question.

95 Counsel for the Defendant says Mr. Howe only became involved as part of an "*information-gathering*" process in November of 1999. There is no evidence before me to suggest otherwise. In my opinion, there is nothing further required to be done with respect to question 190.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Notes Made in Preparation for Discovery

96 In their application, the Plaintiffs seek a copy of the notes made by Mr. Howe in preparation for discovery. At the hearing of this motion, Counsel for NB Tel stated that these notes were made by Mr. Howe two days before the discovery and that litigation privilege applies. With that assertion, Counsel for the Plaintiffs withdrew the request for Mr. Howe's notes of the meetings held in preparation for discovery, and accordingly these notes are no longer at issue.

Long Range Business Plans

97 The Plaintiffs seek a copy of the slide presentation used by Mr. Howe with respect to a long-range Business Plan presented to the executive level of NB Tel.

98 Mr. Howe comments on the practice of one and three year business plans as follows:

Q.624 — And this practice of a one and a three-year business plan, that was something that was done on a yearly basis by Bruncor?

A. Generally. One-year plans were done every year. The longer range plan was done, as I mentioned previously, more on a continuous update basis.

The one-year plan included two and three-year financials generally, at the time of this presentation.

Q.625 — So you are saying the one-year plan would carry forward the two and three-year financial projections even though the —

A. Generally.

Q.626 — Okay. Would you undertake to provide those financial projections as they were presented in the years 1997, 1998?

MR. MORRISON: 1997, 1998. What relevance are they, Mr. Gillis?

MR. GILLIS: Well, if I understand it correctly —

MR. MORRISON: If there is something in the plan that is relevant to this case — we have already checked. We will look again to see if there is something that is relevant to the case. The company has plans every year, financial projections.

99 I am of the opinion that any portion of the business plan presented to the November 26, 1998 Board meeting dealing with the possible merger or combination of NB Tel (through Bruncor) with the other Atlantic Telcos is relevant and a copy of those portions should be produced to the Plaintiffs along with any portion dealing with early retirement programs or downsizing of the NB Tel workforce. Although Mr. Howe testified at discovery that he does not believe he saw Mr. Jollymore's presentation of the one and three-year business plans presented by Mr. Jollymore to the November 1998, Board meeting, he adds,

I would think, although I didn't... I don't believe I saw Peter's presentation. I would certainly expect that it identified the merger as an option.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Now whether or not it identified specific cost benefit aspects of a merger, I would be very doubtful, because there wasn't much analysis to support that.

It would have to be — it would have to have been very directional, in my view, perhaps supported by some broad gauge understanding of what the benefits could be. I didn't see the presentation. So I'm —

Q.629 — Would you undertake to provide —

A. — not able to say more.

100 Counsel for NB Tel objected to the question and refused to give an undertaking to obtain a copy of the slides used in the presentation with respect to the long-range Business Plan. Counsel for NB Tel gives the following reason at discovery:

Mr. Morrison: Because you have not defined what kind of a document you want. You have asked for very broad documents relating to presentations concerning long-range plans of my client. I don't see the relevance of that.

101 Counsel for the Plaintiffs argue that the slide presentation with respect to the long-range Business Plan could include a reference to a pending merger of the Atlantic Telcos.

102 In their Pre-Motion Brief, Counsel for the Plaintiffs state:

The Affidavit of Rodney J. Gillis sets out numerous documents in the possession of the Defendant, which were admitted to exist by the Defendant's representative at Discovery, and which were not previously disclosed.

Rule 33.08(3) of the *Rules of Court*, reproduced above, requires the production for inspection of documents not previously disclosed where the person examined admits to having those documents in his possession.

The Plaintiffs' submit that there does exist many documents relating to the issue of what knowledge was possessed by the Defendant in 1998 regarding the merger of the Atlantic Telcos, and relating to the relationship between the merger and the employees of the Defendant.

The Plaintiffs' motion requesting a further and better Affidavit of Documents from the Defendant, heard on March 19, 2001, by Mr. Justice Turnbull, was denied. His Lordship accepted the testimony of Rose Hubley that she had performed a thorough search of the Defendant's documents and that all relevant materials were disclosed. However, Mr. Howe's testimony at Discovery reveals the existence of documents which are related to this action and which were not included in the Defendant's Affidavit of Documents.

103 The Gillis Affidavit states at ¶ 9 & 10:

The Defendant refused to disclose the relevant documents as requested, and on March 19, 2001, our Motion to compel the delivery of a further and better Affidavit of Documents was heard by Mr. Justice Turnbull. His Lordship heard submissions from counsel and permitted cross-examination of Rose Hubley, Director of Human Resources for the Defendant, on her Affidavit of Documents.

Mr. Justice Turnbull accepted the testimony of Ms. Hubley that she had searched for all relevant documents. However, in rendering his oral decision, His Lordship noted that the Discovery process may reveal the existence

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

of documents relevant to the issues raised in the pleadings which are not listed in the Defendant's Affidavit of Documents. [Emphasis added.]

104 As stated, the Plaintiffs chose Curtis Howe, now the Chief Technology Officer for Aliant Telecom, to be the individual to be discovered on behalf of NB Tel.

105 Mr. Howe commenced his employment with NB Tel in June of 1982. In June of 1995, he was the General Manager of Systems Engineering for NB Tel, a position he held for approximately 18 months. In 1996, he took on responsibility for a number of marketing functions as well as a regulatory function in NB Tel's Planning and Marketing Department. Towards the end of 1997, Mr. Howe took on additional marketing responsibilities and dropped his responsibility for systems engineering.

106 In mid 1999, after the merger or combination of the Atlantic Telcos took place, Mr. Howe left his marketing function and became Vice-President of Engineering for NB Tel.

107 At discovery, Mr. Howe was asked what the management structure of NB Tel was prior to the merger. He answered that Gerry Pond was the President of the company and that Lino Celeste was the Chairman of the Board of Directors.

108 When asked how many directors sat on the Board of NB Tel at that time (1995 to January of 1999), Mr. Howe responded, "*I don't know.*"

109 When asked why there were structural changes at NB Tel from 1995 to January of 1999, Mr. Howe answered, "*I don't know all the reasons for structural changes.*"

110 Mr. Howe's answers are often very general in nature. For example, "... *I would say we were developing the skills of the business in response to current and future needs of the business.*"

111 When Mr. Howe was asked again about the organizational structure of NB Tel as it existed in the period 1995 to January of 1999, he responded, "*I don't know it all*" to which Counsel for the Plaintiffs replied, "*All right. Give me what you know. Then you can undertake to find out the rest.*"

112 Not long into the discovery of Mr. Howe, the following exchange takes place between Counsel for the Plaintiffs and Counsel for the Defendant:

MR. GILLIS: What is your suggestion, Mr. Morrison? We are going to be back before a judge.

MR. MORRISON: Well, no doubt, no doubt. You and I usually end up back before a judge, Mr. Gillis.

113 When asked about NB Tel's interest with Stentor, Mr. Howe responded, "*I'm not sure of the structural arrangements there.*"

114 The following exchange takes place between Mr. Howe and Counsel for the Plaintiffs:

Q.59 — The data processing that you have mentioned, still dealing with the organizational structure of NB Tel in 1995 and January of '99, you indicated that was jointly owned by Bruncor and NB Tel?

A. The data processing business?

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Q.60 — Yes.

A. I don't think I said it was jointly owned by NBTel and Bruncor.

Q.61 — Was it a separate subsidiary of Bruncor?

A. I'm not sure if Bruncor held the interest or NBTel did.

115 It should be noted that Mr. Howe had not indicated that the data processing business was jointly owned by Bruncor and NB Tel.

116 Again, early in the discovery the following exchange takes place between Counsel for the Plaintiffs and Mr. Howe:

Q.62 — These corporations, the call centre, the position that you acquired from the Irving organization and MITI, things of this nature, were they — how should I put it — separate corporations in which there was either a minority or majority interest held by Bruncor/NBTel at various times, more in the form of an investment?

A. I'm sorry, I don't understand the question.

117 When asked if Human Resources, Purchasing and Real Estate would comprise 75% of the Corporate Services division as it was in 1995, Mr. Howe replied: "*I don't know.*"

118 When asked by Counsel for the Plaintiffs if there was a number or a letter that could be assigned to the Senior level of Planning and Marketing during the period 1995 to January, 1999, Mr. Howe replied, "*I don't know.*"

119 Mr. Howe testified that NB Tel had a system of levels for its employees at that time. The following exchange takes place in this regard between Mr. Howe and Counsel for the Plaintiffs:

Q.99 — Level 4. And level 5 would be the Vice-President?

A. I'm not sure the Vice-President was called level 5.

Q.100 — Was there a level 5?

A. I don't know.

120 Mr. Howe was asked about business planning in NB Tel's Planning and Marketing division. He had testified that his involvement with regulatory matters concerning filings with the CRTC included the introduction of products and services, changes to products and services, interconnection arrangements, pricing and costing analyses.

121 Mr. Howe says that the scope of business planning changed several times from 1995 to 1999. The following is his answer to question 165:

A. And it was broadly oriented towards developing the long-range plans for the business, generally responsible for the preparation of the annual, the 12-month business plan. Those would be the key responsibilities.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

122 Counsel for the Plaintiffs then referred to a "*planning book*" even though Mr. Howe had not referred to a planning book.

123 Counsel for NB Tel then pointed out that Counsel for the Plaintiffs were assuming something since Mr. Howe had made no reference to a document.

124 Mr. Howe says there was an annual Business Plan which was "*built on a schedule with a deliverable on an annual basis.*"

125 With respect to a long-range Business Plan, Mr. Howe testified:

And so to my knowledge we didn't have a specific deliverable called long-range business plan deliverable. We had an annual plan with an ongoing activity or an ongoing process led by this group.

126 Mr. Howe says that business planning was an "ongoing process" which in his group concerned itself with creating a profitable business based on broadband services and operations and products.

127 It is obvious from reading the transcript of the discovery of Mr. Howe that he was not at the same decision making level as Mr. Celeste or Mr. Pond with respect to the operation of NB Tel during the time period focused upon by the Plaintiffs' Counsel, namely 1995 to January of 1999. As stated, Counsel for the Plaintiffs in fact thought Mr. Howe had been NB Tel's Vice-President, Planning and Marketing, which would have made him a corporate officer of NB Tel, but as Counsel for the Plaintiffs found out at discovery, such was not the case.

128 The Plaintiffs say that Mr. Howe testified that, in addition to the 12-month Business Plans, NB Tel maintained a long-range Business Plan which consisted of materials used in presentations to the executive of NB Tel. The Plaintiffs say that Mr. Howe admitted that he had used those materials himself and that he had borrowed the materials from a former NB Tel employee.

129 Mr. Howe testified at discovery (in answer to question 427) that the documents that he was referring to "*would be presentation form. They would be macro level descriptions of the industry, the strategic options available to our company.*"

130 Question 429 reads as follows:

Q.429 — And the strategic options include consolidation by way of merger and acquisition?

A. Yes.

131 Mr. Howe goes on to say at Discovery that these presentations were considered at the NB Tel executive level. When asked if they would be in the form of transparencies or on a CD-Rom with a power point presentation, or both, or if there is a printed copy, Mr. Howe responded that he didn't know if there are any copies around. He testified that a variety of people would have made those presentations or used the materials in presentations. He says he borrowed his copy from an individual who had developed the slides and that he believes he returned that copy to him.

132 Counsel for the Plaintiffs asked Mr. Howe to inquire of the individual who had loaned his copy of the long-range plan to Mr. Howe in order to obtain a copy of the slides that he had used on the long-range Business Plan. Counsel for NB Tel objected and refused to give the undertaking on the grounds that Counsel for the Plaintiffs had not "*defined what kind of a document you want. You have asked for very broad documents relating to presentations*

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

concerning long-range plans of my client. I don't see the relevance of that. If you would ask a narrower question relating to the specific issues in the pleadings, I would have no trouble with that but you continue to ask for broad questions calling for broad answers. And it's completely irrelevant."

133 I am of the opinion that any portion or segment of NB Tel's long-range Business Plan referred to by Mr. Howe at discovery dealing with the "*strategic option*" of "*consolidation by way of merger and acquisition*" and any portion dealing with the downsizing of NB Tel employees is relevant and a copy should be made available to the Plaintiffs. I direct that the Corporate Secretary of NB Tel, Barrie Black, review the NB Tel Long-Range Business Plan in question (including slides made with respect thereto) and copy any portions contained therein dealing with consolidation by way of merger or combination and/or the downsizing of NB Tel employees and/or early retirement incentive plans. The Corporate Secretary should confirm in an affidavit that he has carried out this review, and attach the relevant portions or excerpts to his affidavit. I am of the view that in the circumstances of this case, Mr. Black is in the best position to provide this information.

Twelve Month Business Plans

134 Counsel for the Plaintiffs seek a copy of NB Tel's 12-month Business Plans for 1997 and 1998. Counsel for NB Tel says the Plaintiffs' Counsel already have a copy of NB Tel's 1999 Business Plan.

135 Mr. Howe testified that there were business plans prepared by NB Tel for a 12-month period but when he was asked if the format in which the plans were prepared was in a printed format for distribution to NB Tel's senior executive, the Vice-Presidents, the President and perhaps the Board of Directors, Mr. Howe replied, "*I don't know.*"

136 When he was asked if he would have received this Business Plan, Mr. Howe replied, "*I don't know that either.*"

137 When asked if he was on the distribution list for at least one of those years, Mr. Howe replied, "*I don't know with certainty.*"

138 One of the Counsel for the Plaintiffs says "*that is my suspicion*" that the Business Plan would contain some reference to the general trend in the industry was for a path of consolidation, mergers and acquisitions. As stated, mere suspicion is not enough to trigger an order for further disclosure. See: [*U.F.C.W., Local 1252, Fishermen's Union v. Cashin*](#), *supra*.

139 When he was asked by Counsel for the Plaintiffs if those documents (the Business Plans) exist, Mr. Howe replied, "*I don't know.*"

140 It is again obvious that Mr. Howe has little personal knowledge of the matters focused upon by Counsel for the Plaintiffs and in particular documents relating to the issue of the knowledge possessed by NB Tel in 1998 regarding the possible merger of the Atlantic Telcos and relating to the relationship between the merger and the employees of NB Tel.

141 Mr. Howe described the 12-month Business Plan as follows:

A. The 12-month business plan, as it was presented to out board, typically included some projections, high-level financial projections for 24 months and maybe 36 months in some cases.

So to that extent there would have been forward-looking views of financials —

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

Q.382 — right.

A. — which were beyond a 12-month window.

142 Counsel for the Plaintiffs asked for copies of NB Tel's 12-month Business Plans for 1997 and 1998. Counsel for NB Tel refused to give those documents to Counsel for the Plaintiffs on the grounds that he had already given him all the documents "*that are relevant to this litigation — Mr. Justice Turnbull resolved that issue sometime back in 2001.*" Counsel for the Plaintiffs argue that Justice Turnbull did not resolve this matter.

143 I am of the view that the only portion of the 1997 and 1998 NB Tel Business Plans which would be relevant to this litigation would be those portions dealing with Early Retirement Incentive Programs, the possible merger or combination of NB Tel with the other Atlantic Telcos and the reduction or downsizing of NB Tel employee levels as part of such Business Plans.

144 It would appear such business plans would have been presented to the Board of Directors of NB Tel and Bruncor at a Joint Board of Directors meeting.

145 One of the Counsel for the Plaintiffs says he is suspicious by nature:

MR. GILLIS: Well, what I'm looking for are the plans themselves. And then I want to find out the individuals that provided input to the plans. Because I'm just suspicious by nature.

MR. MORRISON: Well, I'm not going to indulge your suspicions, Mr. Gillis.

MR. GILLIS: Well, you will indulge my suspicions.

MR. MORRISON: If the court orders us to indulge your suspicions then so be it. As of right now you are not going to be indulged.

146 Again, as stated, mere suspicion is not enough. However, the testimony of Mr. Howe discloses the existence of documents not disclosed in NB Tel's Affidavit of Documents, some of which in my opinion are relevant to this litigation.

147 I am of the view that any portion of NB Tel's 12-month Business Plan for the years 1997 and 1998 making reference to early retirement incentive programs, the downsizing or reduction of NB Tel's staff levels and/or a possible merger of NB Tel with the other Atlantic Telcos is relevant and relates to the matters in question in this case and, accordingly, if any such references appear in the 1997 and 1998 12-month Business Plans, a copy of the portions of the 1997 and 1998 Business Plans containing those references should be made available to the Plaintiffs. In order to determine if there is any reference in NB Tel's 1997 and 1998 Business Plans relating to early retirement incentive programs, the downsizing or reduction of NB Tel staff levels or the possible merger or combination of NB Tel with the other Atlantic Telcos, I direct NB Tel to deliver to Counsel for the Plaintiffs an Affidavit of Barrie Black, who was the Corporate Secretary of NB Tel at the material times relating to this litigation, confirming that he has reviewed the corporate minutes of NB Tel's Board of Directors and corporate records of NB Tel for the years 1997 and 1998 as well as the 1997 and 1998 Business Plans and setting forth in his Affidavit any references to these specific subject matters.

Cost Benefit Analysis of the 1998 ERIP

148 At discovery, Mr. Howe said:

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

There were financial calculations done of the benefit of the 1998 ERIP. And there were financial calculations done of the 1999 ERIP. To my knowledge neither was part of the Business Plan.

149 Mr. Howe went on to say that he did not have the cost savings and the calculations and he did not know where to find that document. In answer to question 417, Mr. Howe said: "*I don't know where the document is — .*" Counsel for NB Tel would not undertake to obtain the document.

150 Mr. Howe testified at discovery that the intent of the ERIPS was to "*reduce expenses in the business, costs in the business, particularly expenses without jeopardizing revenues and service levels.*" When it was stated in question 825 that "*you must have projected what the expense saving or cost reduction would be*", Mr. Howe responded in the affirmative. When he was asked, "*what was that?*" Mr. Howe replied, "*I don't know.*" When it was stated in question 827 that projections were made if nobody elected to go out on the ERIP what the costs and expenses would be, Mr. Howe responded in the affirmative but said, he "*didn't know what they were.*" Counsel for NB Tel questioned the relevancy of those questions to this case. Counsel for NB Tel says that NB Tel acknowledges that this represented a cost saving to NB Tel, that is why the ERIP was carried out. Counsel for the Plaintiffs say they want to know the extent of the cost saving because the allegation is that the Plaintiffs were urged to accept the offer. They argue that the dollar amount has everything to do with the urging. At the hearing of this application, Counsel for NB Tel said that he thinks that Counsel for the Plaintiffs already have the details of the cost benefit analysis. In the event that Counsel for the Plaintiffs do not have a copy of the Cost benefit analysis, I direct that Counsel for NB Tel provide Counsel for the Plaintiffs with a copy of such cost benefit analysis of the 1998 ERIP.

151 I am of the opinion that the portion of any documents containing the cost savings calculations projected to be achieved by the 1998 ERIP is relevant and I direct that a copy of such calculations or cost benefit analysis be made available by NB Tel to the Plaintiffs.

Joint Management Information Circular

152 A document entitled *Joint Management Information Circular* (the "Information Circular") was marked as an exhibit at the discovery of Mr. Howe. This document is a comprehensive information binder which was circulated to the shareholders of the four Atlantic Telcos. The Information Circular was signed by each of Bruncor, Island Tel, MT&T and NewTel on April 12, 1999. NB Tel is not a party to the Information Circular, however its parent, Bruncor, is. The Information Circular states that its contents had been approved by the Boards of Directors of each of Bruncor, IslandTel, MT&T and NewTel. It consists of 174 pages and attached to it are financial statements for Bruncor, IslandTel, MT&T, NewTel as well as a proforma consolidated financial statement for AtlanticCo.

153 Attached to the Information Circular is a copy of the Combination Agreement made by and among Bruncor, NewTel, MT&T, IslandTel and 3595641 Canada Inc. The Combination Agreement is dated March 22, 1999. Attached to the Combination Agreement as further schedules are copies of the various amalgamation agreements as well as fairness opinions from RBC Dominion Securities Inc., HSBC James Capel Canada Inc., carrying on business as HSBC Securities, First Marathon Securities Limited, CIBC Wood Gundy Securities Inc. and ScotiaMcLeod Inc. These opinions basically state that the combination or merger of the Atlantic Telcos is fair, from a financial point of view, to the shareholders of each of the Atlantic Telcos.

154 Counsel for the Plaintiffs argue that since the preparation of the Information Circular required extensive analysis of the cost savings expected to be achieved through the merger of the Atlantic Telcos, including reduced staff requirements from the elimination of duplication and increased efficiencies, they want to know who prepared the Information Circular and they want to receive a copy of the raw data or analysis that was provided to the authors of the Information Circular. Counsel for NB Tel refused to give a listing of that information and refused to list the documents used in order to prepare the Information Circular.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

155 On review, it is evident that a great deal of the information contained in the Information Circular is financial in nature and is similar to what is provided to shareholders of a corporation on an annual basis in annual reports and in those cases where a corporation is issuing shares and as a consequence is required to publish a prospectus.

156 With respect to the portion of the Information Circular relating to Bruncor, it should be noted that there is a disclosure that Bruncor and NB Tel's Boards of Directors approved special compensation and related arrangements for certain named executive officers at a meeting held on March 4, 1999 that provided for the payment of certain severance benefits for executive officers if a change of control of Bruncor occurred. Looking back, it is obvious at that point in time that a merger or combination of the Atlantic Telcos was imminent and the Combination Agreement was then being drafted. The following reference is also contained in a section in the Information Circular entitled "*Results of Operations-Wireline Services*":

Salaries, pensions and employee benefits in the wireless business increased by \$1.2 million, or 1.7 percent, due to general salary increases, offset by a reduction in the number of NB Tel employees during the year. Salary and benefit costs are expected to decline by about \$10 million going into 1999 as almost 200 NB Tel employees accepted an early retirement incentive package in 1998, with retirement dates stretching from July 1998 into early 1999. NB Tel expects to be able to realize efficiency improvements in both its wireline and wireless businesses to avoid replacing the retiring employees. This 8 percent reduction in the workforce in a short period of time requires a considerable change in the organization, but the system and work design improvements that have been made in the last two years are enabling the transition. [Emphasis added.]

157 Mr. Howe testified that the Information Circular was prepared on behalf of Aliant. He did not know who prepared it. He did not know who from NB Tel or Bruncor provided the documents to the authors of the Information Circular.

158 In my view, a list of the names of the contributors to the Information Circular is not relevant to this case. Nor is a list of the documents that were used in order to prepare the Information Circular relevant.

159 Counsel for the Plaintiffs made reference to the following statement contained on page 19 of the Information Circular:

The Combining Companies have determined that by combining their personnel, financial and technological resources they can create a stronger and more vibrant enterprise, with the potential to take advantage of the opportunities for growth which are available in the dynamic Canadian and international telecommunications industries.

160 Counsel for the Plaintiffs argue that there had to be an analysis made to make that statement and Counsel asked Mr. Howe if that was correct. Mr. Howe answered in the affirmative. But when pressed as to who made the analysis, Mr. Howe replied, "*I don't know.*" When he was asked to find out who in NB Tel made the analysis and provide him with a copy of the analysis, Counsel for NB Tel objected.

161 The Information Circular states at page 19:

Over the past several years, the Combining Companies have developed, implemented and executed business plans that have been designed to provide substantial growth opportunities, both inside and outside of their traditional territories. These business plans have been successful in maintaining and enhancing the profitability of each Combining Company within a demanding and increasingly competitive environment.

Based upon these factors, the Combining Companies decided in early 1999 that a combination of the four com-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

panies, together with the development of a strong strategic relationship with BCE and Bell Canada, would have substantial benefits for their respective Shareholders, customers, employees and other stakeholders.

162 With respect to cost savings as a result of the merger, the Information Circular states as follows at page 20:

AtlanticCo expects to realize substantial savings as a result of the synergies available to the Combining Companies and their operating subsidiaries. As a result of the Combination, the Combining Companies expect to save \$80 million in cash operating costs and \$50 million in capital expenditures on an annualized basis by the end of the second year of combined operations. Synergies will come from the consolidation of functional support areas and the realization of potential savings due to combined purchasing power. Estimated one-time costs to achieve these savings are expected to be approximately \$70 million. It is anticipated that AtlanticCo will have a lower average cost structure than any of the Combining Companies are able to achieve today. AtlanticCo will also have increased access to capital funding and intends to use that available capital to pursue growth opportunities. [Emphasis added.]

163 Mr. Howe confirmed that the operating cost savings realized by the amalgamation of the Atlantic Telcos were in the "vicinity" of \$80 million dollars a year which is the figure stated at page 20 of the Information Circular. When it was put to Mr. Howe by Counsel for the Plaintiffs that there must have been a calculation made with respect to that cost saving prior to the preparation of the report, Mr. Howe responded, "*I assume there was.*"

164 The Combination Agreement was entered into by the Atlantic Telcos on March 22, 1999. On May 19, 1999, the merger or combination of Bruncor with the other Atlantic Telcos was approved by its shareholders at their annual meeting. On October 1, 1999, Aliant announced the 1999 ERIP. Applications for acceptance of the 1999 ERIP were to be submitted by November 8, 1999. The Plaintiffs allege in their Statement of Claim that NB Tel knew or ought to have known at the time when the 1998 ERIP was announced (May 11, 1998) that the pending merger of NB Tel with the other Atlantic Telcos would result in another early retirement incentive program as a function of the stated purposes of the merger "*which included the achievement of significant operating efficiencies through the combining of management functions and elimination of duplication.*"

165 The Plaintiffs seek the "raw data or the information or the analysis" that was provided to the authors of the Information Circular.

166 I am of the opinion that the only relevant documentation relating to the Information Circular is that portion of the cost saving analysis relating to the reduction or downsizing of the number of employees which would have been prepared to arrive at the \$80 million figure which the Atlantic Telcos expected to save in cash operating costs by combining their assets. There is also an estimated one-time cost to achieve those savings expected to be approximately \$70 million dollars. Mr. Howe confirmed at discovery that there was an analysis carried out. I am of the opinion that the portion of that analysis that contains the breakdown of the \$80 million dollar savings in cash operating costs and the estimated one-time cost of approximately \$70 million dollars as they relate to the reduction or downsizing of NB Tel staff levels in order to achieve the savings is relevant to the case at bar and accordingly a copy of that portion of the analysis should be provided to the Plaintiffs by NB Tel. In my opinion, all other data or raw material that went into the production of the Information Circular is not relevant and accordingly NB Tel need not provide same. As stated, the name or names of the authors of the Information Circular or any of its components is, in my opinion, not relevant, and need not be provided.

The Atlantic Provinces Telecommunications Council

167 According to the Information Circular, NB Tel and the other Atlantic Telcos cooperated for many years prior to their merger in both operational and strategic initiatives through an entity known as the Atlantic Provinces Telecommunications Council ("APTC"). According to the Information Circular, APTC was formed in 1970 to im-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

prove the quality and market effectiveness of the telecommunications services offered throughout the four Atlantic Provinces by coordinating efforts where a common or complementary strategic objective existed. Through the APTC alliance, the Atlantic Telcos developed and implemented a common billing system and implemented common payroll, finance and administration systems.

168 The Plaintiffs seek a copy of the minutes of APTC meetings held in the time period from 1995 to January 1, 1999, as well as any documents that were presented at any of those meetings. The following is the relevant question and response in this regard:

Q.542 — What I am after was an undertaking to provide to me a copy of the minutes of the APTC from 1995 to and inclusive 1st of January, 1999.

Secondly I'm interested in any documents that were presented at any of those meetings, whether they be financial projections, statements, any document of any nature and kind whatsoever, it is extremely broad, with respect to documents, because there probably aren't very many.

And I wanted an undertaking to have those provided to me, they being in the possession of Aliant, which is the merged company which would have all of the documents of Bruncor.

MR. MORRISON: We are not going to give you that undertaking, Mr. Gills. We have already given you the undertaking to look to see if the minutes exist for 1998 and 1999.

And if there is something relevant in them then we will disclose it to you. That's it.

169 Mr. Howe testified at discovery that participation in APTC meetings included executives of the four Atlantic Telcos. He said that generally the respective Atlantic Telco Presidents, sometimes the CFO's and sometimes other members of executive management would attend APTC meetings. He was asked if he ever attended an APTC meeting and replied, *"not that I can recall."* The Plaintiffs are seeking any financial projections that would have been presented at APTC meetings in the time period from 1995 to January 1, 1999 which would indicate the consequences of any possible combination or merger of the Atlantic Telcos. Mr. Howe said he did not know if there is such a document. When he was asked to make an inquiry of NB Tel's CFO or CEO at the time to ascertain whether or not such financial documents were ever considered, presented or discussed by the APTC, Counsel for NB Tel said the question was too broad and that he was not going to give that undertaking. Counsel for NB Tel undertook to ascertain if APTC minutes exist and that if there is anything in those minutes relevant to this case as a result of that inquiry including relevant financial projections, NB Tel would provide them to the Plaintiffs. Counsel for NB Tel stated: *"we will amend our Affidavit of Documents and produce them for the years 1998 and 1999."*

170 When Counsel for the Plaintiffs asked Mr. Howe if members of APTC were considering amalgamation or merger *"for some considerable period of time"*, Mr. Howe responded: *"I believe that the option of a merger had been identified and considered many times over the period back into the 1980's."* (Answer to Question 571) When asked about high-level executive discussions about merger, Mr. Howe responded: *"I'm aware that there was some consideration of a merger in 1992. I don't know who was part of that or any of the specifics."* (Question 577) When asked when the next consideration of merger occurred, Mr. Howe responded:

A. 1995. And at that time the merger option was brought forward. And the President of NBTel at that time refused to take that option forward for further analysis, refused to present it for further consideration.

171 I am of the opinion that any portion of minutes of APTC meetings from 1995 to January 1, 1999 dealing with the possible merger or combination of the Atlantic Telcos or financial projections, reports, slides, power point presentations or any analysis dealing with such possible combination or merger that were presented at any APTC

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

meeting during that time period are relevant and should be produced by the Defendant to the Plaintiffs. I choose 1995 as the starting point because that is the date used by Mr. Howe as the time when the "merger option was brought forward". Assuming the minutes and any of the other APTC documents I have referred to exist, I direct that the Corporate Secretary of NB Tel review same for relevancy and include a reference to this review in his affidavit and a confirmation that he has reviewed all of the APTC minutes of meetings and documentation presented to those meetings from 1995 to January 1, 1999 and that the relevant portion or excerpts of APTC relevant minutes and documents to be provided to Counsel for the Plaintiffs are all of the APTC documents relating to this matter and are attached to his affidavit.

Minutes of Board of Directors Meetings

172 The entire transcript of the examination for discovery of Mr. Howe which took place on February 26, 2002 was placed in evidence before this Court with respect to this application. It consists of 231 pages and after reading the transcript I make the following observations: There are several documents which are disclosed throughout the discovery which were not disclosed in NB Tel's Affidavit of Documents deposed to by Mrs. Hubley and which affidavit was the subject matter of the application before Justice Turnbull. For example, extracts from the minutes of Joint Board meetings of NB Tel and Bruncor and copies of handwritten notes of certain board meetings prepared by the Corporate Secretary were not included in NB Tel's Affidavit of Documents. Given the volume of documents involved in this case, this is not unexpected. In fact, in his affidavit in support of this motion, Mr. Gillis states at paragraph 10:

Mr. Justice Turnbull accepted the testimony of Ms. Hubley that she had searched for all relevant documents. However, in rendering his oral decision, His Lordship noted that the Discovery process may reveal the existence of documents relevant to the issues raised in the pleadings which are not listed in the Defendant's Affidavit of Documents.

173 A review of the transcript of Mr. Howe's examination readily leads to the conclusion that the Defendant is not trying to stonewall the Plaintiffs by refusing to provide documentation. It simply comes down to a question of the meaning of relevancy, and the vetting of further documentation such as the minutes of Directors' meetings, the Corporate Secretary's handwritten notes, the minutes of the APTC meetings and various Business Plans that contained references to downsizing and the merger, amalgamation and/or combination of the Atlantic Telcos.

174 As an example of the difference of opinion on relevancy, Counsel for the Plaintiffs asked Counsel for the Defendant to provide a copy of the NB Tel Board of Directors' minutes from August of 1997 to October 29, 1998. According to the discovery transcript and the evidence before me, NB Tel has provided the Plaintiffs with copies of the October 29, 1998 Joint Board meeting of NB Tel and Bruncor at which meeting a decision was made to seek expert advice on the merits of the merger as well as the minutes of a Board meeting dated November 26, 1998. Counsel for NB Tel explained that he obtained those minutes in preparation for the discovery and advised at page 146 of the transcript: "*So that gives you the full Board information that you were seeking.*" Counsel for NB Tel also provided Counsel for the Plaintiffs with copies of the minutes of the Joint Human Resources and Compensation Committee minutes that approved the 1998 ERIP. That meeting was held on April 30, 1998. The day before the examination for discovery of Mr. Howe was conducted, Counsel for NB Tel faxed Counsel for the Plaintiffs a series of handwritten pages containing notes made by Mr. Black, NB Tel's Corporate Secretary, which are notes made by Mr. Black at the July 20, 1998, September 24, 1998 and October 29, 1998 Board meetings. These notes were not disclosed in Mrs. Hubley's Affidavit of Documents. Counsel for the Plaintiffs are not satisfied with these notes and want more. The following exchange between Counsel for the Plaintiffs and Counsel for NB Tel is worthwhile to review in order to understand the mindset of Counsel with respect to relevancy and in effect the reason for this application by the Plaintiffs:

MR. GILLIS: Now yesterday you faxed to our office a series of handwritten pages. And I may have them out of sequence.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

MR. MORRISON: And you may not.

MR. GILLIS: How should I mark them?

MR. MORRISON: You can mark them any way you want.

MR. GILLIS: They don't seem to have a beginning.

MR. MORRISON: Well, that makes it more challenging, doesn't it, Mr. Gillis.

MR. GILLIS: They are numbered sequentially according to the manner in which you faxed them to us.

MR. MORRISON: The first two pages purport to be excerpts from Barry Black's notes taken as Secretary at the July 1998 board meeting of NBTel, I think.

My understanding from Mr. Black is that there was a board meeting of at least NBTel. Whether it was a joint board meeting I can't tell you right now. And the minutes or his notes don't indicate but just say the board meeting. So we can assume that it is at least NBTel board meeting. And the first two pages, the top two pages on this sheaf of documents represent excerpts from that July meeting.

The next documents are his notes of the September 24th 1998 board meeting. I know that is difficult to read. And the final document represents his notes of the October 29th 1998 board meeting.

I said to Mr. Barry when I told him that these were coming that they were probably very difficult to read and that we were undertaking to obtain a translation of the notes, and that once we had an accurate translation we would provide it to you.

And that is where we stand, as we sit here now, the translation has not been completed.

(Two-page handwritten notes of Mr. Black — July 20th 1998 — marked 61)

(Eight pages — copy of Mr. Black's handwritten notes — September 24th 1998 — marked 62)

(16 pages — copy of Mr. Black's handwritten notes — October 29th 1998 — marked 63)

Q.659 — If I understand it, Mr. Morrison, that you are trying to obtain a typed version of the documents marked 61, 62 and 63, is that correct?

MR. MORRISON: That's correct, Mr. Gillis.

Q.660 — So I gather Mr. Black performed the function as recording secretary at board meetings?

MR. MORRISON: That's correct.

Q.661 — And had done so for a period of some years?

MR. MORRISON: I don't know. I mean — I don't know. I mean, he certainly did that for those three meet-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

ings.

Q.662 — Well, he would have similar minutes recorded for pervious board meetings perhaps going back to the fall of 1997?

MR. MORRISON: Well, I mean, he could have done it for years and years and years. I just don't know that answer to your question.

Q.663 — Well, if he did would you undertake to provide me with copies of those board minutes that he made notes of from let's say August of 1997 up until the ones that you have provided here which are July 30th 1998?

MR. MORRISON: No.

Q.664 — Likewise would you also provide to me a copy of the board minutes for the same period, August of '97 till the board minutes that you have provided to me of October 29th 1998?

MR. MORRISON: No.

MR. GILLIS: Would you state the reasons why for the record?

MR. MORRISON: They are not relevant.

MR. GILLIS: I see. They are relevant with respect to when the ERIP was offered, the first ERIP, when it was approved by the boards, what discussion was entered into, what analysis and calculations were made. That is what I would like to have it for.

MR. MORRISON: Well, you have the board minutes and the actual minutes of the joint Human Resources and Compensation Committee minutes that approved the 1998 ERIP, Mr. Gillis. You already have it.

MR. GILLIS: I'm dealing — I have those minutes marked?

MR. MORRISON: Well, you don't have them marked. But they have been produced.

MR. GILLIS: Oh, well, let's mark them then.

MR. MORRISON: That's fine. I have no trouble if you want to mark them. I will show you A-1611.

(Minute of meeting — April 30th 1998 — marked 64)

175 The document marked '64' contains minutes of a joint meeting of the Board of Directors of Bruncor and NB Tel along with the Human Resources and Compensation Committee.

176 I agree with Counsel for the Plaintiffs that documents are relevant in this case with respect to when the 1998 ERIP was offered; when the 1998 ERIP was approved by the Board of Directors of NB Tel and Bruncor as well as what discussions were entered into and what analysis and calculations were made with respect thereto. That is the reason Counsel for the Plaintiffs is advancing for wanting copies of Board meetings back to August of 1997. Counsel for NB Tel argues that the Plaintiffs now have the minutes of the relevant Board meetings and the actual

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

minutes of the Joint Human Resources and Compensation Committee minutes that approved the 1998 ERIP. It is obvious that Counsel for the Plaintiffs are suspicious that there is something contained in prior minutes that may deal with the 1998 ERIP or with the possible merger of the Atlantic Telcos. Counsel for NB Tel is in effect saying there is nothing in those minutes which is relevant to this case. Counsel of NB Tel says there were thirteen Board of Directors meetings between August 1997 and November 1998. All of those meetings were joint NB Tel/Bruncor Board meetings. In light of the fact that more documentation was provided by NB Tel to the Plaintiffs at the discovery of Mr. Howe than was disclosed in NB Tel's original Affidavit of Documents, I am of the opinion that this log jam should be resolved by the Corporate Secretary of NB Tel reviewing the Board minutes of Bruncor and NB Tel from August of 1997 to October 29, 1998 and setting forth in an affidavit that he has so reviewed those minutes to ascertain if there is any reference in those minutes to downsizing or reduction of employee staffing levels, early retirement incentive programs and/or the possible merger or combination of NB Tel and Bruncor with the other Atlantic Telcos and if there is any such reference to any of these items to attach to his affidavit the relevant extracts from those minutes dealing with same together with copies of any presentations made or reports or memoranda circulated at those meetings relating to downsizing, ERIP's or the possible merger or combination of the Atlantic Telcos.

177 Counsel for NB Tel has provided Counsel for the Plaintiffs with copies of minutes of the Joint Board of Directors of Bruncor and NB Tel for meetings held on November 26, 1998 and October 29, 1998. Mr. Howe attended the November 26, 1998 board meeting to present NB Tel's market plan for 1999 to the Board. It should be noted, these minutes were not included in NB Tel's Affidavit of Documents dealt with by Justice Turnbull.

178 It would appear that the key person who was responsible for presenting an overview for the one and three year business plans for Bruncor to the Board was Peter Jollymore. According to the Information Circular, Mr. Jollymore was Bruncor's Vice-President, Planning and Marketing for 1996, 1997 and 1998. (See Information Circular, page 81)

179 According to the Information Circular, Mr. Jollymore went on pre-retirement leave on December 4, 1998. Mr. Jollymore presented the one and three year business plans to the Bruncor Board of Directors' meeting. As stated, it would appear that Counsel for the Plaintiffs thought Mr. Howe at one point was the Vice-President of Planning and Marketing of NB Tel, but such was not the case.

180 The following exchange is relevant:

Q.609 — Had you ever seen this one and three-year business plan of Bruncor?

A. The version that Peter presented?

Q.610 — Yes.

A. I don't know that I saw the version he presented. I have seen some of the preparatory work leading up to his presentation.

181 Mr. Howe was one of three people who provided information to Mr. Jollymore and Mr. Jollymore would then prepare the one and three year business plans. Mr. Howe was not then a corporate officer of NB Tel. Today, Mr. Howe is the Chief Technology Officer for Aliant Telecom. His only involvement at the 1998 Board meeting appears to have been to present the NB Tel market plan for 1999. Another person in the Planning and Marketing Department was involved in business planning activity. Mr. Howe was involved in market planning activity. Mr. Howe's only involvement with respect to the merger of the Atlantic Telcos was in the fall of 1998 when he was asked by management to come up with reasons why NB Tel should not merge or amalgamate with the other Atlantic Telcos.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

182 As mentioned, it is obvious from reading the transcript of Mr. Howe's discovery that he may not have been the right person chosen by the Plaintiffs to examine, particularly with respect to NB Tel's merger activities and with respect to the 1998 and 1999 ERIP's. This has resulted in many of the log jams which took place during the discovery of Mr. Howe. In fairness to Mr. Howe, he simply does not know the answers because at the material times targeted by Counsel for the Plaintiffs, namely 1995 to January of 1999, he was not at the senior management level of NB Tel.

183 It is clear from Mr. Howe's testimony at discovery that the Board of Directors of NB Tel and Bruncor were considering a merger option at the joint October 29, 1998 Board meeting.

184 I direct that NB Tel deliver to the Plaintiffs a copy of the relevant portion of any notes taken by the Corporate Secretary of NB Tel of Board meetings from August 1997 to October 30, 1998 as well as copies of the relevant portions of minutes of such Board meetings. The Corporate Secretary is to confirm that he has reviewed his notes and the corporate minutes of the relevant Directors Meetings and that the relevant extracts therefrom are attached to his affidavit.

185 It should be noted that the top four executive officers of Bruncor for the years 1996, 1997 and 1998, namely Gerald L. Pond (Chief Executive Officer), Peter G. Jollymore (Vice-President Planning and Marketing), William H. Steeves (Vice-President and Chief Financial Officer) and John O. Travis (Vice-President Planning and Operations) are no longer in the direct employ of Aliant Inc. As well, the Chairman of Bruncor, Leno J. Celeste, is no longer involved. One officer who appears to have been there at all material times and is still there is Barrie H. Black, General Counsel and Corporate Secretary. In all likelihood, Mr. Black would have been at all the relevant Board meetings and would in any event, as Corporate Secretary, have access to the corporate records of NB Tel in order to facilitate the implementation of the material to be produced and delivered in accordance with this decision. For that reason, I am of the opinion that Mr. Black should be the individual to swear an affidavit with respect to a review of the minutes and documents referred to in this decision in order to confirm and produce those portions which are relevant, namely those portions dealing with merger and combination discussions of NB Tel with the other Atlantic Telcos or early retirement incentive programs or the downsizing or reduction of NB Tel's employee levels.

The Wetmore Merger Memorandum

186 Another example of a document which was disclosed at Mr. Howe's examination for discovery on February 26, 2002 which was not disclosed in NB Tel's Affidavit of Documents deposed to on November 9, 2000 is the memo or document prepared by Mr. Wetmore with respect to his thoughts and ideas covering the possible merger of the Atlantic Telcos. It would appear that this letter or memo was the real genesis of the merger or combination of the Atlantic Telcos which eventually took place. According to Mr. Howe's sworn testimony, the initial discussion between Mr. Pond and Mr. Wetmore took place in either July or August of 1998. Mr. Wetmore apparently prepared his memo in either August or September of 1998. There is no evidence before me to support any suspicions of Counsel for the Plaintiffs that specific merger or amalgamation talks or plans took place among the Atlantic Telcos prior to July of 1998. As mentioned, a copy of Mr. Wetmore's memo should be provided by NB Tel to the Plaintiffs.

187 With respect to the time period when discussions took place among the CEO's of the Atlantic Telcos, Mr. Howe testified, "... *the initial conversation here is to understand what would be the broad parameters of a merger. And that took place in a discussion between Gerry Pond and Stephen Wetmore in early July or August of 1998.*" Mr. Wetmore would go on to become the CEO of Aliant Inc. but has recently left that position. According to Mr. Howe, Mr. Wetmore was asked in either July or August of 1998 to put his thoughts down, "*his broad ideas down as to what did he think a merger of these companies would entail and I believe he did that in early August or September of 1998.*" Mr. Howe testified that in early October of 1998 a one-day meeting was held among the four CEO's and CFO's of the Atlantic Telco's to "*further discuss a merger and what it would entail.*" Mr. Howe testified that he believes that the exchange between Mr. Wetmore and the other Atlantic Telco CEO's at the early October, 1998 meeting represented the basis for the report to the Boards of NB Tel and Bruncor that stated they were currently review-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

ing the merger option with the other Atlantic Telcos. Mr. Howe says he did not have any documentation concerning the particulars of those discussions.

188 Counsel for the Plaintiffs asked Mr. Howe to undertake to provide the Plaintiffs with a copy of the merger option that was the subject matter of the Board of Directors' meeting held on October 29, 1998. Counsel for NB Tel advised Counsel for the Plaintiffs at the discovery of Mr. Howe that he was attempting to obtain a copy of the document prepared by Mr. Wetmore and undertook to produce that document and include it as a relevant document in this proceeding. Counsel for NB Tel added, "*Just as soon as we have it, if it still exists, we will produce it. We are aware that it existed at one time.*" Counsel for the Plaintiffs then asked to have a copy of the "*merger option documentation*" that is referenced in the Board minutes. Counsel for NB Tel undertook to include that as part of the undertaking.

189 I am of the opinion that a copy of the document prepared by Mr. Wetmore with respect to a possible merger of the Atlantic Telcos as well as the "*merger option documentation*" presented to the Board of Directors' meeting on October 29, 1998 are relevant and accordingly such documentation must be produced and delivered by the Defendant to the Plaintiffs.

Information With Respect to NB Tel Pension Plans

190 The Plaintiffs are alleging that NB Tel breached its fiduciary duty to them as members of pension plans administered by NB Tel. At discovery, Counsel for NB Tel refused to allow Mr. Howe answer questions with respect to the pension plans. The following is a list of the questions regarding the pension plans which Counsel for NB Tel would not permit Mr. Howe to answer:

Q. 750 — Alright. My question is what investment did either of those plans have in shares in NB Tel and/or Bruncor in 1997, 1998?

Q. 751 — What filings does the trustee of the pension plan make with respect to its holdings?

Q. 782 — When did the defendant become a trustee under the pension plan set forth in the Statement of Claim?

Q. 755 — Do you know whether the defendant is a trustee under either of the pension plans?

Q. 757 — Are there records kept with respect to the minutes of the trustee concerning that plan?

Q. 758 — Would you undertake to find out and let me know?

191 The Plaintiffs' allegations with respect to a breach of fiduciary duty with respect to the pension plans are referenced in their Statement of Claim as follows:

156. The Plaintiffs say that the Defendant is a trustee for the members of the Pension Plans, pursuant to the provisions of the *Pension Benefits Standards Act*, 1985 c.P-7.01 (R.S., 1985, c. 32 (2nd Supp.)). As such, the Defendant owed the Plaintiffs a duty to administer the Pension Plans in a manner which reflected the best interests of all of the trust beneficiaries.

157. The Plaintiffs say that the Defendant was in breach of its fiduciary duty to the Plaintiffs in making representations which it knew, or ought to have known, were false. In particular, the Defendant breached its fiduciary duty to the Plaintiffs in representing that the 1998 ERIP was the only such plan that would be made available to

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

the Defendant's employees.

158. The Plaintiffs further state that the Defendant acted in furtherance of its own interest to the detriment of the Plaintiffs, and was in breach of its statutory and common law duty to act in the best interest of the members of the Pension Plans.

192 In *Adams v. Norcen Energy Resources Ltd.* (1998), 24 C.P.C. (4th) 188, 1998 CarswellAlta 1030 (Alta. Q.B.), former employees who brought an action against Norcen Energy Resources Ltd. on the basis that they were wrongfully deprived of pension benefits were held by the Alberta Court of Queen's Bench to be entitled to documents relating to the trust agreements to the date of the conversion of the pension plan, the use of the pension surplus and the plans termination. Their Statement of Claim in that case alleged that Norcen, as trustee of the pension plan, breached its fiduciary duties. Moore, C.J.Q.B. concluded that all trust documentation had to be viewed in order to determine the nature of the trust. He writes at ¶ 12 & 13:

It is trite law that the test for relevancy in document production is very broad, and that the pleadings should be given a wide interpretation. Norcen's argument that the documents are not relevant to the allegations in the Statement of Claim requires the Court to take a very narrow view of the pleadings as opposed to a broad view. I find that all of the documents which the Plaintiffs seek should be produced.

There are clearly allegations in the Statement of Claim that Norcen was in a fiduciary position to the Plaintiffs as the trustee of the pension plan and that it breached its fiduciary duties in the Statement of Claim. As discussed in *Schmidt v. Air Products Canada Ltd.*, supra, the court must look at all trust documentation to determine the nature of the trust. This includes the original trust agreement and all other documents which amend the original rights and obligations of the parties to the trust. I direct that Norcen produce all documents relating to the trust agreement, including the original trust document and all documents amending the trust up to and including the time of the conversion.

193 At page 200 of the transcript of Mr. Howe's discovery, Counsel for the Plaintiffs explains as follows what the Plaintiffs are seeking with respect to the records of the trustee of the pension plans:

MR. MORRISON: Why would they be relevant, Mr. Gillis?

MR. GILLIS: I'm interested in the records of the trustee with respect to that plan, particularly in the period 1998, with respect to the first ERIP. That is the time frame I'm looking at.

MR. MORRISON: Are you making an allegation against the trustee of the plan? I mean, you are saying that NBTel is the trustee. Are you talking about NBTel as the trustee? Is that what you are alleging?

MR. GILLIS: I believe NBTel is the trustee. They had a fiduciary duty. Now NBTel wouldn't be a trustee, it would have individuals or nominees that are the trustees —

MR. MORRISON: That is what I thought.

MR. GILLIS: — who are individuals.

And if there is two or three there would be minutes of their meetings. And I wanted to get at the minutes of their meetings with respect —

MR. MORRISON: I'm not going to give you that undertaking.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

MR. GILLIS: — to the 1998 ERIP.

Q.759 — Does that document exist, minutes of the meetings of the trustees of the defined benefit pension plan for the year 1998?

A. I don't know.

Q.760 — Would you undertake to find out and let me know?

MR. MORRISON: No. Because it's irrelevant, Mr. Gillis.

Q.761 — Are there minutes for the money purchase pension plan in 1998, minutes of the meetings of the trustees?

A. I don't know.

Q.762 — Could you undertake to find out and let me know?

MR. MORRISON: No.

194 In *Adams v. Norcen Energy*, *supra*, the Plaintiffs sought production of all documents relating to the trust agreement governing the pension plan, including the original trust agreement and all amending documents. The Plaintiffs in that case argued that it was necessary to see all documents relating to the establishment of the pension plan to determine the obligation of the trustee and the rights of the beneficiaries. See also: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.). Norcen said that it had produced trust documentation from 1994 onwards and that the other trust documents were not relevant because they concerned obligations or rights that did not exist at the time the cause of action arose. The Plaintiffs in *Norcen* also sought production of documents relating to issues of the pension surplus including information relating to contribution holidays, as contribution holidays could affect the amount of the surplus. Norcen argued that those matters were not relevant in the pleadings. To establish the relevancy of the documents, the Plaintiff in *Norcen* referred to the allegations that Norcen offered the pension conversion to some but not all employees; that the surplus increased in value after the Plaintiffs were terminated; that Norcen had a duty to act fairly and in good faith towards the employees; and that Norcen was liable to account for all benefits it received by virtue of retaining this enhanced value.

195 The Plaintiffs in *Norcen* also argued that documents relating to plan termination were relevant. They cited allegations in their Statement of Claim that Norcen was the administrator of the plan governed by the *Pension Act*; that it had a duty to act fairly and in good faith toward the Plaintiffs; that there was a significant reduction in the number of employees. The Plaintiffs in *Norcen* further argued that for the purposes of establishing relevancy, they need only plead the factual basis for a planned termination. Chief Justice Moore concluded that the documents concerning Norcen's use of the surplus plan money were relevant and should be produced. He concluded that this would also encompass documents relating to Norcen's right to take contribution holidays, as contribution holidays could affect the value of the fund. He writes at ¶ 15:

15 Although the term "plan termination" is not used in the pleadings, the Statement of Claim alleges that Norcen is bound by the obligations in the *Pension Act* because it is the plan administrator. There are other allegations that Norcen has a fiduciary duty towards the Plaintiffs by virtue of that Act, and that Norcen has breached this fiduciary duty. The pleadings state that Norcen instituted a substantial reorganization involving a significant reduction in the number of employees. It is a question of law whether this downsizing triggered a plan termina-

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

tion under the Act. Documents relating to the plan termination may be relevant, as a "plan termination" triggers certain obligations the employer/administrator has under the Act which, if not fulfilled, would be breach of fiduciary duty towards the plaintiffs. This also encompasses a list of employees who remain in the original plan insofar as it relates to plan termination.

196 In the event NB Tel is in fact a trustee under the relevant NB Tel pension plans relating to the Plaintiffs, then such status should be disclosed by Counsel for NB Tel to Counsel for the Plaintiffs. In the event NB Tel is a trustee, I am of the view that questions 750, 751, 757, 758 and 782 put to Mr. Howe at his examination for discovery are relevant and I direct that NB Tel provide answers to these questions to the Plaintiffs through Mr. Howe's reattendance at discovery.

Calculation of Total Savings Achieved from the 1998 ERIP

197 The final document sought by the Plaintiffs is the calculation of the total savings achieved from the 1998 ERIP. This request is referenced in paragraph 33 of the Gillis Affidavit as follows:

33. The cost savings to be achieved through the 1998 ERIP were a function of the number of employees accepting the package, their salaries and total number of years left until normal retirement. I asked Mr. Howe to provide the calculation of the total savings achieved. Mr. Morrison refused to provide the undertaking:

Q. 844 — Now with respect to this calculation, how many years saving would the telephone company be looking at?

A. I don't know the total.

Q. 845 — Did anybody make the calculation?

A. I don't know.

Q. 846 — Did anybody even make the calculation after you knew how many people elected to take the ERIP?

A. I don't know.

Q. 847 — Would you find out and let me know?

Mr. Morrison: No, Mr. Gillis.

Mr. Gillis: Now you might state the reason why Mr. Morrison, on the record? Because I am going to apply for all of these items.

198 According to the Plaintiffs' Statement of Claim, approximately 200 employees of NB Tel accepted the 1998 ERIP.

199 At discovery, Counsel for the Plaintiffs asked Mr. Howe what the order of magnitude of the cost savings was. Counsel for the Plaintiffs stated at page 217:

I'm not interested in a paper chase. There was a detailed analysis made. Nobody in business would enter into this without some analysis whether one person took it or a hundred and fifty took it.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

200 Counsel for NB Tel advised that he was not going to give the paper without a court order but was prepared to let Mr. Howe give him an estimate so "*that you have an idea. You said you wanted an order of magnitude so that would drive somebody to want to urge someone to take this plan.*"

201 Mr. Howe says NB Tel estimated between 50 and 80 people would elect to take the 1998 ERIP offer and "generally speaking every employee would cost about \$50,000.00 per year." He told Counsel for the Plaintiffs that this would give a rough idea of the projected benefits. Mr. Howe said he didn't know how many years savings NB Tel would be looking at. He doesn't know the total. When asked if anyone made the calculation, he answered, "*I don't know.*" Counsel for the Plaintiffs asked Mr. Howe how it would translate through to the bottom line if there is a reduction of expenses and costs but a maintenance of revenue stream. The following questions and answers are relevant in this regard:

Q.867: — What I'm looking for is to find out where this money or the advantage that the company gets as a result of this '98 ERIP, where it ends up.

And what I suggested to you, it either ends up in retained earnings or is paid out by way of a dividend. That is the only two places it can end up. And the other side of the balance sheet it will be over in assets, current assets.

A. And so your question to me is?

Q.868 — Well, first of all, you would agree with me that the benefit that the company received by the employees taking the 1998 ERIP, it improved the bottom line of the company, is that correct, in future years?

A. The intent of the ERIP was to improve our financial performance in 1998 and beyond.

202 Mr. Howe testified that the "*key metric*" for NB Tel in 1998 was "*earnings per share growth.*" The following exchange is relevant in this regard:

Q.878 — So the advantage with more employees taking the '98 ERIP would mean greater earnings per share in NBTel or Bruncor, is that correct?

A. That was the intent.

Q.879 — And the greater earnings per share is something that you understand from your investments in the stock market people look at, amongst other things?

A. Yes. Can you clarify greater, greater than what?

Q.880 — You know, unfortunately I get to ask the questions. You get the privilege of answering them here and somewhere else.

MR. MORRISON: He is certainly entitled to ask for clarification of any question, Mr. Gillis. You know that as well as I do.

MR. GILLIS: He can ask.

MR. MORRISON: You are refusing to clarify your question, are you? It's on the record, Mr. Gillis.

2002 CarswellNB 232, 2002 NBQB 179, 32 C.C.P.B. 169, [2002] N.B.R. (2d) (Supp.) No. 53

MR. GILLIS: No, Mr. Morrison. You continually make these gratuitous statements, for whatever reason I'm not too sure. But if you would just wait I'm sure it will all come clear to you in the end.

MR. MORRISON: Thank you, Mr. Gillis.

Q.881 — Now if I understand it correctly, the advantage that would accrue to a large shareholder in NBTel or Bruncor would be then greater earnings per share growth. Would that be correct?

Your shareholders basically are looking for earnings, are they not?

A. I would say that we had set an expectation of ourselves and with our investors that we would achieve earnings per share growth.

203 I am of the opinion that the calculation of the total savings achieved by the 1998 ERIP is relevant and accordingly, I direct that a copy of that calculation be provided by NB Tel to the Plaintiffs.

Conclusion and Disposition

204 In the result, the Plaintiffs are entitled to copies of those documents or the portions thereof I have directed NB Tel to provide, together with an affidavit of NB Tel's Corporate Secretary with respect to his review for relevancy of the corporate minutes and documents as directed herein. Mr. Howe is to reattend at discovery to answer the specific questions that I have directed NB Tel to provide to the Plaintiffs. Costs will be costs in the cause.

Order accordingly.

END OF DOCUMENT

Case Name:

LAZIN v. CIBA-GEIGY CANADA LTD. et al.

[1976] A.J. No. 622

66 D.L.R. (3d) 380

Alberta Supreme Court, Appellate Division

McDermid, Sinclair, Haddad, JJ.A.

Judgment: February 16, 1976

(15 paras.)

Counsel:

Harold W. Veale, Q.C., for appellant.

Marguerite J. Trussler, for respondent, David McClure.

R. B. Low, for respondent, Harold Jacobs.

Peter R. Chomicki, for respondent, Ciba-Geigy Canada Ltd.

The judgment of the Court was delivered by

1 MCDERMID, J.A.:--The appellant appeals from an order of the learned Chambers Judge that she must produce her personal diary for the period from May 25, 1971, until February 1, 1974, for examination by the respondents. The appellant commenced an action alleging negligence against the respondents. The respondent, Ciba-Geigy, is the manufacturer of a drug "Tegretol". The use of this drug was prescribed for the appellant by the respondents, Dr. Jacobs and Dr. McClure, during the course of their treatment of the appellant. The appellant alleges that as a result of taking this drug she suffered an impairment of her speech and her mental condition so as to make her forgetful and that her writing and reading became difficult and her ability to comprehend was diminished and she was unable to concentrate. The respondents by their amended defences alleged that the condition of the appellant was caused not by taking the drug but by the psychological make-up of the appellant.

2 During the course of her examination for discovery the appellant referred to her diary to refresh her memory as to the dates on which she consulted the doctors. The diary had not been referred to

in her affidavit of production. She subsequently made a further affidavit in which certain pages of her diary were referred to as being relevant. An application was made to the Chambers Judge that she produce all of her diary for the period in question and an order was granted requiring her to produce the same. In the argument before us counsel for the appellant stated he had looked at the diary and he was unable from his knowledge to say what parts were relevant and what parts were not relevant; counsel for the respondents admitted that certain portions of the diary might not be relevant, for instance, if the appellant had entered in her diary that on a particular day she bought tea or coffee. They maintained, however, that any other matter which would indicate her mental condition was relevant for their defence for, as they alleged, the impairment had not been caused by her use of the drug, but by her mental condition and that there was a record of mental instability in her family.

3 At the beginning of the appeal counsel for the appellant offered to agree to an order that would allow the Judge to inspect all of the diary and decide what parts were relevant. He stated further that he would agree that the Judge appoint an expert to assist him in his determination as to relevancy; that if this offer was not acceptable to the respondents he would agree that the matter be deferred until the trial of the action, whereupon the Judge after hearing evidence could decide what parts of the diary were relevant. Neither of these offers was acceptable to the respondents, and they submitted all of the diary should be produced. They stated they were not content to rely upon a Court-appointed expert as to what was relevant and what was not relevant. They submitted that this action was commenced by the appellant, that she had brought into issue the reputation of the doctors and that this was a matter of such considerable importance to them that it should override any right of the appellant to keep her diary private.

4 The first question to be considered is what is a document. In *Royal Bank of Canada v. Wallis* (1918), 41 D.L.R. 383 at pp. 385-6, [1918] 2 W.W.R. 620 at p. 623, 13 Alta. L.R. 416, Stuart, J., giving the judgment of this Division said:

It is apparent, therefore, that what a party is required to produce is any "*document*" relative to the issues. And the chief question is this: Is a ledger or other book of account admittedly containing accounts relating to transactions between the bank and many other individuals not connected with the issues in the case properly to be termed a "document" within the meaning of the rule, and the order based thereon?

It seems to me that this is not so. The whole book cannot be called "a document". Rather, it is a series of documents bound together for convenience. It is true that r. 369, dealing with the time and place where documents may be inspected, uses the words "or in the case of bankers' books or other books of account in constant use for the purpose of any trade or business," but the obvious sense is, "in the case of documents contained in bankers' books," etc. I do not think the rule can be read as declaring that a large banker's book of account is to be regarded by the producing party as a "document."

R. 364 provides that the opposite party may inspect and take copies of the "documents" produced. Surely it would not be contended that he could take copies of pages in the ledgers referring to the bank's dealings with other customers not involved in the transactions at all.

Of course, there is the obvious query to be made as to a single page in a journal or day book upon which may be entered a large number of items dealing with quite distinct and mutually unrelated matters. It may be asked --Then do you not consider the whole page a "document" notwithstanding these irrelevant entries? Using the word in the physical sense, I suppose the whole page would be the "document", but there is no doubt that the irrelevant items could be covered up and any dispute about them could perhaps only be resolved by a judge's inspection under r. 372(2).

The subject-matter and substance of entries must be considered as well as mere physical form, and, while a page of a day book, with all items but the one relevant one covered over, should be considered the true document, on the other hand, a number of related pages all dealing with the same relevant subject-matter might be treated as one document or as a number of documents indifferently.

5 In my opinion reference in the present Rule 188 to "what documents relating to the matters in question" means only the relevant portions of what might physically be called a document. If part only of a page is relevant then that is the document that must be disclosed in the affidavit. As stated in Williston and Rolls, *Law of Civil Procedure* (1970), vol. 2, at p. 898:

If only part of a document is relevant, the proper course is either to disclose only the relevant part or disclose the whole document with a claim to seal up the irrelevant part, or the part which is not material may be covered up during the inspection.

6 In my opinion this is a correct statement of the law: see cases cited by the authors and *Royal Bank v. Wallis, supra*.

7 In this case the appellant has set out in her affidavit what parts of the diary she considers relevant, but it is admitted by her counsel that she has not sufficient technical knowledge of the matters involved in this lawsuit so as to know what is relevant nor has he. The learned Chambers Judge made an order that the diary for the period in question should be produced, but he did not inspect it before making the order. If there are matters in the diary which the appellant does not wish to reveal and, if they are not relevant, she is entitled to keep them private.

8 In my opinion the Chambers Judge was not entitled to make a blanket order. When there is a contest as to relevancy a Judge must inspect the document and decide whether the disputed part is relevant or not.

9 The proper procedure is for the appellant to make a proper affidavit as to "what documents relating to the matters in question are in the possession or power of the party". She does so after consultation with her counsel. If counsel is unable to decide he must seek expert advice as to whether a document is relevant. As stated in Williston and Rolls, *supra*, at p. 897, "The duty of determining the relevance of documents rests on the party making production, and he cannot avoid this responsibility ...".

10 If the opposing party is not satisfied such party may be permitted by the Court to cross-examine upon the affidavit: Rule 194(3).

11 The opposing party may apply to the Court for a further and better affidavit if such party considers a relevant document has been omitted. In such an application the opposing party must satisfy the Court as to the relevancy of the contested document.

12 Rule 194(2) provides:

194(2) If upon the application any privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim of privilege and consider all relevant evidence which may be adduced tending to establish or destroy the claim of privilege.

13 Although this Rule does not refer to the relevancy of a document, but only to the question of privilege, in my opinion the Court has the same power in considering whether the document is relevant. The Court may inspect the document to decide whether it is relevant or not. Both parties may call expert witnesses to give evidence as to what is relevant so as to assist the Court. The Judge will then have to make up his mind after hearing the evidence and inspecting the diary as to what parts are relevant.

14 Accordingly the appeal is allowed and the matter will be referred back to a Chambers Judge. Under the circumstances it should be a different Judge than the one who made the order in question in this appeal.

15 Costs of the appeal will be in the cause.

All England Law Reports/1950/Volume 2 /Westminster Airways Ltd v Kuwait Oil Co Ltd - [1950]
2 All ER 596

[1950] 2 All ER 596

Westminster Airways Ltd v Kuwait Oil Co Ltd

COURT OF APPEAL

SINGLETON AND JENKINS LJ

10, 11 JULY 1950

Discovery - Privilege - Production of documents - Communications between insurers and assured - Communications before plaintiffs' formal claim - Right of court to inspect documents - RSC Ord 31, r 19A (2).

An aircraft owned by the plaintiffs was damaged by a motor truck owned by the defendants and driven by a person alleged to be their servant or agent. The plaintiffs sued the defendants for damages for negligence and in their defence the defendants denied that the driver of the truck was negligent or that he was their servant or agent. Before a claim was made by the plaintiffs correspondence passed between the defendants and their insurance brokers and insurers, for which privilege was claimed. The plaintiffs disputed the claim to privilege on the ground that the documents did not belong to the class of documents which were privileged, and that in any case the court ought to look at them before deciding the question of privilege.

Held - (i) where, as in the present case, the circumstances were such that there could have been no doubt, even before a formal claim for damages was lodged, that a claim would ensue, *prima facie* communications between the assured and the insurance company, whether direct or through the brokers of the assured, were of a character in respect of which a claim to privilege was justified.

Jones v Great Central Ry Co ([1910] AC 4) and *Anderson v Bank of British Columbia* (1876) (2 Ch D 644), *distinguished*.

Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Ry Co ([1913] 3 KB 850), and *Adam S S Co Ltd v London Assurance Corpn* ([1914] 3 KB 1256), *applied*.

(ii) if, looking at the affidavit of documents, the court found that the claim to privilege was formally correct, and that the documents in respect of which it was made were sufficiently identified and were such that, *prima facie*, the claim to privilege would appear to be properly made in respect of
[1950] 2 All ER 596 at 597

them, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

Note

As to when the Production of Documents can be resisted, see *Halsbury*, Hailsham Edn, Vol 10, pp 378-402, paras 458-483; and for Cases, see *Digest*, Vol 18, pp 120-139, Nos 705-891.

Cases referred to in judgments

Jones v Great Central Ry Co [1910] AC 4, 79 LJKB 191, 100 LT 710, 18 *Digest* 137, 875.

Anderson v Bank of British Columbia (1876), 2 Ch D 644, 45 LJCh 449, 35 LT 76, 18 *Digest* 131, 823.

Greenough v Gaskell (1833), 1 My & K 98, 39 ER 618, 18 *Digest* 125, 743.

Reid v Langlois (1849), 1 Mac & G 627, 19 LJCh 337, 41 ER 1408, 18 *Digest* 132, 828.

Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Ry Co [1913] 3 KB 850, 83 LJKB 474, 109 LT 64, 18 *Digest* 87, 394.

Southwark Water Co v Quick (1878), 3 QBD 315, 47 LJQB 258, 18 *Digest* 121, 714.

Jones v Monte Video Gas Co (1880), 5 QBD 556, 49 LJQB 627, 42 LT 639, 18 *Digest* 85, 380.

Collins v London General Omnibus Co (1893), 63 LJQB 428, 68 LT 831, 57 JP 678, 18 *Digest* 141, 905.

Adam SS Co Ltd v London Assurance Corpn [1914] 3 KB 1256, 83 LJKB 1861, 111 LT 1031, 18 *Digest* 138, 890.

Coss v National Maternity Hospital (unreported).

Appeal

Appeal by the plaintiffs from an order of Parker J dated 9 June 1950, partly allowing the defendants' appeal from an order of a master ordering the defendants to disclose further documents, being communications between them and their insurers regarding the accident which gave rise to the action. The facts appear in the judgment of Singleton LJ.

C N Shawcross KC and Bickford Smith for the plaintiffs.

R M Everett for the defendants.

11 July 1950. The following judgments were delivered.

SINGLETON LJ.

This is an appeal from an order of Parker J who allowed in part an appeal from a master on a question of discovery of documents. The action was commenced on 12 May 1949, the statement of claim was delivered on 14 May and the defence on 10 June. An amended statement of claim was delivered on 8 November. This alleges that the defendants were the owners of a motor truck and that the plaintiffs at all material times were the owners of a De Havilland "Dove" aircraft which was forced to land on a road in the district of Kuwait in the principality of Kuwait on the night of 25 November 1947. Whilst the aeroplane was stationary, it is alleged, the motor truck was driven into it and caused severe damage to it. It is alleged, further, that at the time the truck was in the charge of the defendants' servant or agent, one Jackson, and driven by their servant or agent, one Hough. By their defence the defendants admit that they were the owners of the truck. They plead that neither of the individuals mentioned as being in charge of, or as driving, the truck was their servant or agent, and they deny negligence.

On 29 September 1949, the defendants delivered a list of documents. It is not surprising that this was regarded by the plaintiffs' advisers as insufficient. The letter sets out a few documents in the first part, and below "documents for which privilege is claimed." There are four groups of them, and the only one which I need read is as follows: "Correspondence passing between the defendants and their insurers which by its nature is privileged." The plaintiffs contested the question of privilege and applied for an affidavit of documents and on 18 May 1950,

[1950] 2 All ER 596 at 598

the master made an order. In para 2 he dealt in this way with the question of the documents for

which privilege was claimed as I have stated:

"That the defendants do on four days' notice being given produce at the office of Messrs. Hair & Co., solicitors for the said defendants ... the following documents, namely, correspondence between the defendants and their insurers listed in the second part of the defendants' list of documents dated Sept. 29, 1949, and that the plaintiffs be at liberty to inspect."

The defendants appealed to the judge in chambers, who adjourned the matter. On 6 June 1950, two affidavits were sworn by Mr Angeloni, secretary of the defendant company. On 9 June the matter came before Parker J again, and he allowed the appeal so far as it related to para 2 of the order. It is against that part of his order that the plaintiffs appeal.

The first affidavit of Mr Angeloni deals with the subject-matter of para 2 of the order of the master, and says:

"The defendant company have in their possession or power documents passing between the defendants and their insurers set forth in the schedule hereto."

The schedule embraces some fifty documents, beginning with a letter of 19 December 1947. The affidavit also says:

"The defendant company object to produce any of the documents set forth in the schedule hereto upon the ground that they came into existence and were made after litigation was in contemplation and in view of such litigation for the purpose of obtaining and furnishing to the solicitors of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the solicitors to enable them to conduct the defence in this action and to advise the defendants."

That claim is in a form which has been frequently before the courts. The appeal of the plaintiffs is purely in relation to the documents which are set forth in the schedule to this first affidavit, and in respect of which the defendants claim privilege.

The defendants have disclosed the first document mentioned in the schedule. That is a letter from the Tanker Insurance Company Ltd insurance brokers of the defendants, to the Royal Insurance Company Ltd dated 19 December 1947. That letter says:

"Dear Sirs, Motor Vehicle Insurance, Kuwait Oil Company, Ltd. We enclose herewith a copy of a memorandum received to-day from Kuwait in connection with an accident occurring on Nov. 25 last. Pending any advices you may have, we are deferring acknowledgement of their communication."

The memorandum enclosed was a letter from the defendants' resident accountant at Kuwait to their

London office, dated 3 December 1947, and it is important to notice that that memorandum, as well as another memorandum, was disclosed by the defendants in a list of documents in the other affidavit, a list in respect of which privilege is not claimed.

In the second affidavit the secretary, having set out certain facts with regard to the ownership and use of the lorry, enclosed in the schedule of documents which are disclosed a memorandum from Mr Campbell, the defendants' resident accountant in Kuwait, to the defendants in London, dated 27 November 1947, and also a memorandum from Mr Campbell to the defendants in London, dated 3 December 1947, which is the document enclosed with the letter of 19 December. The second affidavit contains a number of other documents, but the plaintiffs have applied for, and have had access to, the two memoranda which I have mentioned, and, in particular, the one sent with the letter of 19 December 1947, the letter being the first document, among others, for which privilege is claimed. The schedule

[1950] 2 All ER 596 at 599

to the first affidavit includes the item "Letter Claims Superintendent of Royal Insurance Company to Tanker Insurance Company, 22 December 1947." Then the next item is: "Letter Claims Superintendent of Royal Insurance Company to Tanker Insurance Company, 23 December 1947." The next document is a letter from the defendants to Mr A C Wright, of the Tanker Insurance Company, dated 31 December 1947, and to that document counsel for the plaintiffs, in his reply, said he attached considerable importance. It is of interest to notice that formal notice of claim in respect of this accident was given on 29 December 1947, that is, before the date of the letter from the defendants to Mr Wright of the Tanker Insurance Company, who were acting as their insurance brokers.

It is quite clear from the document enclosed with the letter of 19 December 1947 (the memorandum from the Kuwait Oil Company, Kuwait, to the defendants in London), that there was more than a probability of litigation at the time of the writing of the memorandum which was prepared in December, 1947. That memorandum is in these terms:

"At about 7.30 p.m. on November 25 a Dove aircraft belonging to the Westminster Airways made a forced landing on the Burgan Magwa road about two miles from Magwa. Through electric storms and inability to make contact with Basrah airport the pilot had lost his bearings and landed where he did to inquire of his whereabouts from someone at Magwa. A few minutes later a Pickup [the truck] coming from the direction of Burgan crashed into the aircraft which was still on the road and caused extensive damage. The accident was peculiar, to say the least of it, and we were advised by a member of the staff of airworks who are here that the Ministry of Civil Aviation would probably require a court of inquiry. The political agent was asked to do this and agreed, but subsequently stated that to take evidence on oath a case would have to be raised against the driver of the vehicle who was Mr. H. H. Hough, a driller, who, incidentally, had tendered his resignation some few days previously. We were not prepared to state a case against Hough but the pilot of the aircraft did so and Hough was tried in the political agent's court for driving without due care and in such a way as might cause hurt. The result of the case was that Hough was found guilty and a fine of Rs.500 was imposed. The political agent has left Kuwait for a few days, but on his return we will obtain from him a certified copy of the particulars, evidence etc., in the case and forward it to you so that if any legal action follows the facts will be available to you."

That document has been disclosed, as has the earlier memorandum to which I referred.

The formal claim is from Lloyd's sub-agent on 29 December 1947:

"Dear Sirs, Dove Aircraft G/AKET. Under instructions from Lloyd's, London, we hereby give you formal notice of their intention to lodge a claim against you for the loss of, and damage to, the above aircraft on Nov. 25, 1947."

It is obvious from the nature of the accident and from the document of 31 December 1947, that litigation was anticipated before the actual claim was received.

Counsel for the plaintiffs claims that the further documents set out in the schedule to the first affidavit are not privileged, and, furthermore, he submits that the court ought to look at them before deciding that they are privileged. Parker J did not think it necessary to do so, nor do I. The court ought to regard the defendants' affidavit as covering the question unless there is some reason to cast doubt on it. The defendants have now disclosed documents up to a time when it was clear beyond doubt, if not it was not clear before, that litigation was imminent, and the documents thereafter came into existence for the purpose of providing information on which the defendants' solicitors

[1950] 2 All ER 596 at 600

could meet any claim which was made, and which they anticipated would be made.

In support of the appeal counsel for the plaintiffs relied chiefly on two authorities. The first is *Jones v Great Central Ry Co*, the headnote of which is as follows ([1910] AC 4):

"A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants:--*Held*, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced."

Lord Loreburn LC said (*ibid*, 5):

"The question arises as follows: Godfrey Jones, a servant of the defendant railway company, had a dispute with his official superiors which ended in his dismissal. He thought himself aggrieved and brought this action. He was a member of a trade union on terms which entitled him to a variety of benefits, and among others to the right of receiving legal assistance in case of unjust dismissal. In such case he was bound by the rules to give full particulars to the authorities of the trade union, and the sanction of the executive committee or of the general secretary was needed before a solicitor was engaged. In the present instance certain letters passed between Godfrey Jones and the officials of the union, containing information about the dispute. They were written before any action was brought in order to satisfy the union authorities that they ought to sanction the employment of a solicitor and to furnish information by which the solicitor should be enabled to conduct the action which the workman contemplated and desired."

The learned Lord Chancellor held, and the other Law Lords agreed, that those documents were not privileged. That case seems to be quite different from the case before this court.

The other authority was *Anderson v Bank of British Columbia*, the headnote of which is:

"A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:--*Held* (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced."

Counsel for the plaintiffs relied chiefly on the judgment of James LJ in the Court of Appeal, but it is useful to look at the judgment of Sir George Jessel MR. The Master of the Rolls, having referred to the words of Lord Brougham LC in *Greenough v Gaskell* and to Lord Cottenham LC's summary of that decision in *Reid v Langlois*, went on to say ((1876) 2 Ch D 649):

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly

[1950] 2 All ER 596 at 601

conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule. Now, as to the extent of the rule. It goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defence."

The judgment of James LJ appears to me to limit the privilege rather more strictly than has been done in some of the other cases. I do not propose to read it all, but there is one short passage which I think I ought to read (*ibid*, 656):

"Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."

It was held on the facts of that case both by the Court of Appeal and by the Master of the Rolls in the court of first instance that the document--the report from the manager in Oregon to the general

manager--was not privileged. Again, I think, that case can be distinguished from the present case. In matters of this kind which, as counsel for the defendants put it, involve a certain amount of discretion, it really is a question on which side of the line a case falls.

I need only refer to two authorities cited in support of the order of Parker J. The first, *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Ry Co*. The headnote states:

"In an affidavit of documents on behalf of the defendants in an action of negligence privilege was claimed for certain documents in a schedule to the affidavit on the ground that 'they came into existence and were made after this litigation was in contemplation and in view of such litigation for the purpose of obtaining for and furnishing to the solicitor of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants.' A judge at chambers, after inspecting the documents under the provisions of R.S.C., Ord. 31, r. 19A (2), made an order by which some of the documents were protected and others were ordered to be disclosed, the dividing line being drawn at the date on which the plaintiffs first preferred their claim against the defendants:--*Held*, first, that the judge at chambers and the Court of Appeal were entitled under R.S.C., Ord. 31, r. 19A (2), to inspect the documents for the purpose of deciding on the validity of the claim of privilege, as no particular formula of words in the affidavit could be conclusive against evidence furnished by the document themselves; and, secondly, after inspecting the documents, that protection had been

[1950] 2 All ER 596 at 602

appropriately claimed for them by the affidavit and that the dividing line drawn by the judge in chambers was inappropriate in the particular case. It is not necessary that the affidavit should state that the information was obtained 'solely' or 'merely' or 'primarily' for the solicitor, if it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated."

There are three matters which come to mind in regard to that decision. The first is that the claim of the defendants to privilege was upheld on the wording of the affidavit and that the wording of the present affidavit in the present case is similar in all respects; the second is--as it makes quite clear, and, indeed, the rule itself makes it clear--that it is open to the court to look at the documents themselves in order to ascertain whether they are privileged or not, if the court thinks it necessary so to do. The third is that the argument of counsel for the plaintiffs that one cannot determine whether a document is privileged or not without looking at it must be considered in regard to the affidavit, and it is not necessary that the affidavit should state that the information is obtained solely for the use of the solicitor. There may be other purposes allied to that purpose of a kind which would not of themselves be privileged.

In the course of his judgment Buckley LJ said ([1913] 3 KB 856):

"The question for determination here is I think whether the documents in question fall within the principle of"

Anderson v Bank of British Columbia or within that of *Southwark Water Co v Quick*. Buckley LJ continued, referring to *Anderson v Bank of British Columbia* (*ibid*, 856):

"The resulting document was not privileged, and this upon the ground that it was not a confidential communication obtained by or

for the solicitor or as materials forming, as it is called, part of the brief of the party making the affidavit."

Hamilton LJ said (*ibid*, 858):

"Although an affidavit of discovery cannot be controversially challenged, as by cross-examination, counter-affidavit, or administration of interrogatories, *Jones v. Monto Video Gas Co.* lays down authoritatively how and how far it can be challenged otherwise: 'If from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit, but except in cases of this description no right to a further affidavit exists.' Now that r. 19A (2) has given the judge power to inspect documents as to which there is a disputed claim of privilege, the documents which are not disclosed are available, either at the instance of the opposite party or in the discretion of the judge himself, as material on which to shew the insufficiency of the affidavit, because both are equally 'documents therein referred to'."

Dealing with the facts of the case, Hamilton LJ said (*ibid*, 861):

"Hence I should not have been disposed to interfere with the order which BUCKNILL, J., in his discretion made as to particular documents, but on examining them I think he has proceeded on a wrong principle. He has drawn his distinguishing line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptionable, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins v. London General Omnibus Co.*, at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably ensue."

[1950] 2 All ER 596 at 603

The formal notice of claim in the case under appeal was not made until 29 December but if ever a claim could be anticipated after an accident, I should think this is the case. It was, indeed, an unusual case. Heavy damage was done, it is claimed by the statement of claim, and I should think myself that everyone must have anticipated at once that a claim would follow. The privilege claimed is in respect of documents at a date considerably after the date of the accident.

The other case on which counsel for the defendants relied is *Adam S S Co Ltd v London Assurance Corpn*. It is not necessary to go into the facts of that case, but I draw attention to the judgment of Buckley LJ where, on an affidavit in much the same form as the present one, he said ([1914] 3 KB 1259):

"To my mind that is a complete and satisfactory claim of privilege based upon the grounds recognised in *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co.*. The question to be answered is this: Is the judge satisfied that the documents, which are sought to be protected, were *bona fide* obtained for the solicitor, though not actually by him? Were they documents obtained for the purpose of being used, not necessarily in an existing litigation, but in an anticipated litigation?"

Kennedy LJ said (*ibid*, 1260):

"Assuming that to be so, these letters were written after the first step had been taken which put the parties, as has been said, at arm's length. The defendants in their list of documents, which is to be treated as if it were an affidavit of documents, claim privilege for them. To my mind they clearly appear privileged. They were letters which passed between the salvage association and their agents in Perim for the purpose of being used by the underwriters in a litigation which was obviously threatened and impending, and they

were letters written for the purpose of obtaining or giving advice on the subject; and counsel has assured us that the only letters for which privilege is claimed are of that character. Upon principle as well as upon authority the documents are privileged."

In my view, the documents set out in the schedule to the first affidavit fall within the line of authorities relied on by the defendants rather than upon those relied upon by the plaintiffs, and I am of opinion that the order of Parker J was right, and that the claim to privilege is established. I do not find it necessary, for the reasons I have given, to look at the documents themselves. I am satisfied on the whole that this appeal ought to be dismissed.

JENKINS LJ.

I agree. The claim for further discovery, as developed in argument before us, was not to the effect that the claim to privilege was wholly bad on the face of it, with the result that the whole of the documents to which that claim related should be disclosed, but was argued on the lines that here was a dubious claim to privilege which might, or might not, be justified, and that the proper course in the circumstances was for the court itself to inspect the documents and decide how far, if at all, they were privileged documents. It is not open to doubt that under RSC Ord 31, r 19A (2), the court has power in a proper case to inspect documents where a claim of privilege is set up against a claim for inspection of documents by the opposite party. *Birmingham and Midland Omnibus Co Ltd v London and North Western Ry Co*, to which my Lord has already referred, affords an illustration of a case in which the court did take that course, and, as it happened, having done so, held that the claim to privilege was well founded, but there is nothing in the rule or in the authorities to constrain the court to hold that in every case where a claim to privilege is made and disputed the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend

[1950] 2 All ER 596 at 604

on its own circumstances, but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, *prima facie*, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

Considering this matter from that point of view, I find that the documents in respect of which privilege is claimed are communications passing between the defendants and their insurance brokers and insurers with respect to the accident which gave rise to the claim in the action, and that

the claim to privilege in respect of those communications is made in the usual and regular form. In my judgment, *prima facie*, those documents are of a character in respect of which the claim to privilege is justified. The insurers, after all, are concerned in the matter only because they have agreed by the contract of insurance to indemnify their assured against claims of the character in question. That is how they come into it. That being so, the very fact that the insurance company is communicated with at all indicates that a claim is anticipated. Moreover, in the present case, the circumstances were such that there could be no doubt, even before a formal claim was lodged, that a claim would ensue. *Prima facie*, in such circumstances a communication between the assured and the insurance company, whether direct or through the assured's brokers, would be directed to the question whether the claim should be disputed or admitted, and if it was to be disputed, how best to conduct the defence. If the communications were of that character, then, in my judgment, they would be well within the privileged area, and the deponent to the affidavit claims that they were in fact within the privileged area by making in respect of them the claim to privilege in the usual general form. In those circumstances, it seems to me that on the face of the affidavit here a *prima facie* case of privilege is made out.

Counsel for the plaintiffs said that the court ought to go behind that claim, because the insurance company is not concerned, or not primarily concerned, with the defence of the expected action, or with the collecting of information and advice to that end, unless and until it has admitted liability. He, therefore, in effect, invites the court to read through the correspondence and find out when it was that the insurance company, having admitted liability, identified itself, so to speak, with the defendants' side of the matter. He was, as I understood him, prepared to agree that after that point was reached, what ensued would be privileged from discovery. In my judgment, this suggestion of a possibility of a dispute as to liability on the part of the insurance company is not enough to make it proper for the court to go behind the affidavit in the present case. There is, in fact, no reason to suppose that the insurance company ever did dispute liability, and, on the other hand, it is on the whole unlikely that they would ever categorically, and in so many words, have said to the defendants: "We acknowledge that we are liable to indemnify you." In the circumstances of this case, therefore, there seems no reason to suppose that the search we are invited to embark on by counsel for the plaintiffs would result in arriving at the dividing line which he suggests. The whole of this correspondence took place after it had become obvious from the accident itself that a claim was likely to ensue, and for the reasons I have endeavoured to state, I think that in the circumstances of this case, Parker J having exercised his discretion in the matter, the order he has made should stand.

I should, perhaps, mention an unreported case from Southern Ireland to which we were referred, the case of *Coss v National Maternity Hospital*, a decision of Nixon J. The case is of interest because the learned judge had to deal with the question of privilege in regard to correspondence between an insurance company and the defendants and their solicitors and so had before him the very matter with which we are concerned. In that case the judge held, with regard

[1950] 2 All ER 596 at 605

to the correspondence, that the proper course for him to take was to look at the documents under the general power given by the corresponding rule in Southern Ireland, and he said this:

"So far as a line of demarcation may apply, I conceive it should not have reference to the date of the making of a claim by the plaintiffs, but to the point of time, if ascertainable, at which the insurance company ceased to be interested or concerned in the matter from the point of view of their own liability to their insured, and acquired instead the character of agents, even prospectively, for the legal advisers of the defendants. Having inspected the documents, I think the line of demarcation should be drawn at the letter of Aug. 23, 1946, from the insurance company to the assistant secretary of the defendants. The plaintiffs are entitled, in my view, to inspection of documents within the description in item 21 up to and including that date."

The judge in that case thus took the view which we were invited by counsel for the plaintiffs to adopt. With respect to the judge, I think that is too narrow a view to form the foundation of any general rule. After all, it must be remembered that the documents are documents with respect to which privilege has been claimed on oath, and, for the reasons I have endeavoured to state, they are documents in respect of which, *prima facie*, the claim to privilege would appear to be proper. I, therefore, cannot see that it would be right to lay down any general rule to the effect that in all such cases it is necessary to peruse the document for the purpose of arriving at a line of demarcation such as the judge in Southern Ireland described. Of the authorities cited to us, it seems to me that the one nearest in point is the *Adam S S Co Ltd v London Assurance Corpn* in which the Court of Appeal, looking at the affidavit and the nature of the documents, held--so far as appears from the report, without inspecting them--that the claim to privilege made in the affidavit was properly made, and disposed of the matter on that footing. For these reasons I agree that the appeal fails and should be dismissed.

Appeal dismissed with defendants' costs in the cause.

Solicitors: William Charles Crocker (for the plaintiffs); Hair & Co (for the defendants).

F Guttman Esq Barrister.

[1950] 2 All ER 596 at 606

Indexed as:

McKergow v. Comstock

[1906] O.J. No. 320

11 O.L.R. 637

Ontario High Court of Justice
Divisional Court

Mulock C.J.Ex.D., Anglin and Clute JJ.

March 20, 1906

Defamation -- Libel -- Discovery -- Examination of Plaintiff -- Absence of Justification -- Qualified Privilege -- Honest Belief -- Relevancy of Questions.

In an action for libel in which the defendant has pleaded qualified privilege to which the plaintiff has replied malice, the defendant, although he has not pleaded justification, is not precluded, on examination of the plaintiff for discovery, from asking questions which are relevant to the issue of defendant's honest belief as tending to shew the absence of malice although they may incidentally prove the truth of the libel.

1 THIS was an action for libel under the following circumstances:

2 Prior to 27th June, 1905, the plaintiff was secretary of a company in which the defendant Comstock was induced to buy shares. Before doing so he employed his co-defendant McCullough to ascertain for him from the president and secretary, the financial condition of the company. This was satisfactory and Comstock invested \$5,000 in what seemed a promising venture.

3 The company, however, soon got into difficulties, and it was stated on the argument to be now in liquidation.

4 Comstock then employed McCullough to make an examination of the company's affairs. The result of McCullough's investigations was so unsatisfactory that Comstock instructed his solicitor to write to McCullough and say that he proposed "to take criminal proceedings against the president and secretary for having furnished him with a false financial statement, as well as civil proceedings

to cancel the subscription and obtain a refund of the money" of which it appeared that \$1,800 had been repaid.

5 This letter McCullough forwarded to plaintiff's father with one from himself in which he spoke of criminal proceedings as being in contemplation. The present action was thereupon commenced.

6 On his examination for discovery the plaintiff was asked certain questions which he declined to answer on the advice of his counsel. The defendants then moved for an order that he re-attend and answer fully. [11 OLR Page638]

C. A. Moss, for the defendants.

John Jennings, for the plaintiff.

7 February 8. The MASTER IN CHAMBERS:-- The second paragraph of the statement of defence of Mr. Comstock alleges that the libel complained of "was a privileged communication, in that it was written as the result of an audit or investigation made by the defendant McCullough for his co-defendant Com. stock into the affairs of the company" in question.

8 The questions which plaintiff refused to answer were as to the plaintiff's connection with the company and his duties and powers as secretary, and as to the financial condition of the company at the time when Comstock was induced to subscribe. Some questions objected to were answered later on. But he positively declined to answer any which were directed to elicit the real condition of the company at the very time when plaintiff sent to the defendants (or one of them) a statement of the company's affairs, dated 13th April, which he nevertheless says "was a strictly honest statement at that time and made to the best of my ability and with all the information I had or knew about."

9 The statement of defence might have been fuller and more explicit. But in an action such as the present the defendants should not be tied down too strictly, especially as in the reply the plaintiff charges them with "endeavouring to extort moneys from John McKergow (the plaintiff's father) by threatening criminal proceedings against his son;" and that "the letters complained of were written in pursuance of an illegal conspiracy between the defendants to that effect, and with no other purpose or object whatsoever"-a charge which if sustained would render defendants liable to seven years' imprisonment under sec. 406 of the Criminal Code, and would probably lead a jury to give heavy damages. The defence of Mr. Comstock may fairly be taken to mean that the audit made by McCullough shewed the real condition of the company on the 13th April to have been so entirely different from that contained in the plaintiff's statement of that date that Comstock had sufficient grounds for writing the letter which has led to this action.

10 Evidence of what McCullough found might be relevant to a [11 OLR Page639] defence of qualified privilege which defendant sets up. It would certainly be important in mitigation of damages as tending to disprove the deliberate malice which is expressly charged in the reply, and a defendant is entitled to get from the plaintiff everything which may, not which must, assist his defence.

11 The plaintiff should attend for further examination and answer fully on the matters in question, and the trial must be stayed until the examination is finished. But as the defence was not put as clearly as it might have been, the costs of the present motion will be in the cause.

12 The plaintiff then appealed to a Judge in Chambers.

13 On February 20 the appeal was heard before FALCONBRIDGE C.J.K.B., in Chambers, the same counsel appearing, when the appeal was dismissed with costs to the defendants in any event.

14 The plaintiff then appealed to the Divisional Court.

15 On March 1 the appeal was heard before MULOCK C.J.Ex.D., ANGLIN and CLUTE JJ.

John Jennings, for the appellant.

C. A. Moss, for the respondent, Comstock.

16 John Jennings, for the appellant. The whole point is as to whether the plaintiff was bound to answer the questions put to him. The only defence was qualified privilege to which the reply was malice and that the questions would only be material where the truth of the libel was put in issue by a plea of justification, and there is no such plea on the record here. Neither would the questions be relevant in mitigation of damages, or to rebut malice. Malice is a condition of the mind at the time of publication, and admissions by the plaintiff months afterwards can throw no light on the mental state of the defendant at the time of publication: *Underwood v. Park*, (1784), 2 Str. 1200; *Stuart v. Lovell* (1817), 2 Stark 93; *Vessey v. Pike* (1829), 3 C. & P. 512; *Speck v. Phillips* (1839), 5 M. & W. 279, 281; *Rumsey v. Webb* (1842), Car. & M. 104; *Harris v. Thompson* (1853), 13 C.B. 333, 352; *Bracegirdle v. Bayley* (1859), 1 F. & F. 536; *Watt v. Watt*, [1905] A.C. 115; *Switzer v. Laidman* (1889), 18 O.R. 420; *Ross v. Bucke* (1892), 21 O.R. 692; *Brown v. Moyer* (1893), 20 A.R. 109, 513-5 *Small v. Mackenzie* (1830), Dra. 241. [11 OLR Page640] There are no cases in Ontario expressly in point as to what is allowable on discovery in a case of this kind, but the cases, relative to evidence allowable at the trial, apply. The defendant is not allowed to use the examination for discovery as a mere fishing expedition to enable him to decide whether or not he would take the risk of putting a plea of justification on the record. If the defendant had pleaded justification the plaintiff would have been entitled to particulars, otherwise he would be obliged to go down to trial prepared to meet every item in the financial statement: *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87, 146; *Yorkshire Provident Life Ins. Co. v. Gilbert*, [1895] 2 Q.B. 148; *Gourley v. Plimsoll* (1873), L. R. 8 C.P. 362. It has been clearly laid down in England that only interrogatories will be allowed which are relevant to the issue raised: *Kennedy v. Dodson*, [1895] 1 Ch. 334.

17 C. A. Moss, for the respondent, Comstock. The respondent by his defence sets up that the libel complained of was a privileged communication and was written in consequence of an audit or investigation by his co-defendant McCullough, to which the plaintiff replies malice. The defendant therefore to rebut the contention of malice must be prepared at the trial to produce evidence to substantiate his belief in the truth of the statement made by him, and thus shew that he had a reasonable cause for his belief. To do so he is entitled to go into the statement furnished by the plaintiff and to get admissions. The defendant is certainly entitled to do so in mitigation of damages. A wider scope is allowed on examination for discovery than at the trial. It does not follow that the questions submitted would necessarily be allowed at the trial, but it would depend to a great extent on the shape the case took. The cases under the English practice do not apply, for a more stringent rule is observed in the case of interrogatories than is allowable here in the case of examination for discovery: *Odgers on Libel*, 3rd ed., 573, 610, 612.

18 Jennings, in reply. The pleadings as framed do not raise the question as to the truth or falsity of the statement made and if there is any doubt about it we are prepared to amend. Rule 268 directs

how the pleadings are to be framed, and shews [11 OLR Page641] that a plea of justification is necessary. The defendant's belief in the truth of statements made on a privileged occasion is no answer to a plea of actual malice. The whole question is, not the belief of the defendant in the truth of his statement, but the motive with which he used the privileged occasion; *Clark v. Molyneux* (1877), 3 Q.B.D. 237; *Howe v. Jones* (1885), 1 Times L.R. 461.

19 March 20. ANGLIN J.:-- The plaintiff appeals from an order of Falconbridge C.J.K.B., dismissing an appeal from an order of the Master in Chambers requiring him to answer certain questions which he had upon advice of counsel declined to answer when under examination for discovery. This action is brought for alleged libel contained in letters written by the defendants, in substance charging the plaintiff with having concocted a false statement of the affairs of a joint stock company of which he was secretary, in order to induce the defendant, Comstock, to subscribe for \$5,000 worth of shares in such company. The defence consists of general denials and pleas of qualified privilege. The defendant Comstock alleges a business connection of a confidential nature relating to the matters in question with his co-defendant, to whom it is charged he made publication. The defendant, McCullough, pleads that John McKergow, the father of the plaintiff, to whom he published the alleged libel, was financially interested in the company and that such interest and personal friendship with John McKergow and the plaintiff required the defendant, McCullough, to make the communication complained of. The plaintiff's reply puts in issue the facts alleged by the defendants in support of their pleas of privilege, and the sufficiency in law of such facts, if established. It also charges that publication to John McKergow of the alleged libel was "in pursuance of an illegal conspiracy between the two defendants to extort monies from the said John McKergow by threatening criminal proceedings against his son, the plaintiff in this action, and with no other purpose or object whatsoever."

20 The questions which the plaintiff refused to answer relate to his keeping of the books of the company, to his signing company cheques, and to details of and matters covered by certain items [11 OLR Page642] contained in the alleged falsified financial statement presented to the defendant, Comstock, the preparation of which the defendant admitted. These questions, counsel for the appellant maintained, were intended to elicit answers which could only be relevant were the truth of the libel put in issue by plea of justification. Mr. Moss argued that the questions were relevant, because touching facts, which, if proved, might tend to mitigate damages, and might also tend to satisfy the jury that the defendants had honestly believed that the plaintiff had done that with which he is in the libel charged.

21 The general proposition that, where justification is not pleaded, evidence to prove the truth or the falsity of the alleged libel is inadmissible has been too long and too firmly established to admit of controversy: *Ross v. Bucke*, 21 O.R. 692. The truth of the libel is not in issue upon this record.

22 Though many questions may be put and many answers elicited for purposes of discovery which would not be permitted at trial and everything is relevant upon discovery which may directly or indirectly aid the party seeking discovery to maintain his own case or to combat that of his adversary, clearly irrelevant matters may not be inquired into, and relevancy must be determined by the pleadings construed with fair latitude. The examining party may not in the absence of some special antecedent fiduciary relations between himself and his antagonist, "fish" for material to support a case which he has not set up. It is said to be especially objectionable that a defendant in libel or slander, who has not pleaded justification, should seek on discovery to elicit from the plaintiff in-

formation to enable him to determine whether he may venture to put such a plea upon the record: *Beaton v. Globe Printing Co.* (1894), 16 P.R. 281, 287, 290.

23 In mitigation of damages a defendant may not give evidence of facts, which, if proved, would constitute justification: *Watt v. Watt*, [1905] A.C. 115 at p. 118. Upon a plea clearly specifying portions of a libel distinctly severable from the rest, and justifying such portions, evidence of their truth may be given in mitigation, but without such a plea, such evidence cannot be received upon that ground. Indeed it would seem that evidence which would in itself go to establish justification may be [11 OLR Page643] received in mitigation if the defendant pleading the facts to which it relates in his plea expressly disavows the truth of the libel and discredits such evidence as proof thereof: *Switzer v. Laidman*, 18 O.R. 420.

24 Apart from any question of privilege bona fides is always material upon the question of damages. A plaintiff may offer evidence to prove lack of good faith-absence of honest belief on the part of a defendant-in order to aggravate his damages; a defendant may, in like manner, give evidence to shew that he acted in good faith to mitigate the damages: *Pearson v. Lemaitre* (1843), 5 M. & G. 700, 719. The existence or absence of express malice is the issue to which such evidence is relevant and, as the lack of honest belief is cogent evidence of such malice, the existence of such belief goes far to negative it.

25 As the record now stands the pleas of qualified privilege set up by the defendants are distinctly put in issue by the plaintiff's reply. The plaintiff expressly alleges that the publication by the defendants was malicious. He joins issue upon the entire defence. Honest belief of the defendants at the time of the publication in the truth of the matter published being certainly not admitted by the reply, it would in my view be quite open to the plaintiff, should the trial Judge rule that the occasion of publication is upon admitted facts privileged or would be privileged upon certain facts in dispute being found by the jury in the defendants' favour, to adduce in rebuttal evidence to establish malice, and, for that purpose, to prove any facts which would tend to shew a lack of honest belief on the part of the defendants at the time of publication: *Jenoure v. Delmage*, [1891] A.C. 73.

26 At this stage of the litigation it is impossible to anticipate what the ruling upon the issue as to privilege may be. But the defendants have a right to a discovery which may prove serviceable should the ruling upon that question be favourable to them. They are not bound to rely upon the presumption of absence of malice which arises from privilege; they may anticipate an effort on the part of the plaintiff to rebut that presumption by any means open to them; and, to aid them in combatting whatever case the plaintiff might, not probably but possibly, endeavour to make in order to establish express malice, [11 OLR Page644] they are entitled presently to all relevant discovery. Whether at the trial any evidence so obtained can be used by the defendants-otherwise than in mitigation of damages-must depend upon whether the ruling upon the legal question involved in the plea of privilege is favourable to them and upon the course which, in that event, the plaintiff may be advised to take to rebut the presumption of absence of malice thus raised.

27 Mr. Odgers in the 4th edition of his work on Libel and Slander, at p. 645, citing *Manning v. Clement* (1831), 7 Bing. 362, 365, says: "Where no justification is pleaded, the defendant can give no evidence of the truth of his words, not even in mitigation of damages. ... But evidence admissible and pertinent under another issue cannot be excluded merely because it happens incidentally to prove the truth of the libel. ... Thus, if the defendant had pleaded privilege, he may shew that he reasonably and bonâ fide believed in the truth of the charge he made, and it is no objection that the

grounds of his belief are so forcible as to convince every reasonable man of the plaintiff's guilt:" *Huson v. Dale* (1869), 19 Mich. 17.

28 It remains to be considered whether the questions objected to are relevant to an issue as to the honest belief of the defendants at the time of the publication.

29 The reasonableness of the grounds upon which the defendant founded his belief is, of course, not open for inquiry-if the jury is convinced that he did in fact honestly believe the plaintiff's guilt. But, in determining whether such honest belief did in fact exist, the character of the grounds upon which the plaintiff founded it must weigh much with the jury. I confess that I find it difficult to understand that evidence upon some of the matters, to which the questions, to which the plaintiff takes exception, relate, might not appreciably aid the minds of the jurymen in reaching a conclusion upon the issue whether the alleged belief of the defendants in the truth of the libel was honest. At bar counsel for the plaintiff stated that he had no intention of disputing the reality and the honesty of the belief of the defendants in the plaintiff's guilt when the alleged libel was published, that he regarded his present pleading as precluding his doing so, and, to meet any difficulty upon that score, he offered to amend his reply by inserting an express [11 OLR Page645] admission that the defendants did in fact, when publishing the letters complained of, honestly believe that the statements which they contained were true. Had the issue as to honest belief been thus eliminated, I doubt if the discovery sought by the defendants would have been at all relevant. But, since the argument and after full consideration, the learned counsel has expressed his desire to withdraw this offer, while still adhering to the view that upon the record as now framed evidence would be inadmissible either to establish or to challenge the defendants' belief in the truth of the alleged libel when they published it. This view of the scope of the record I have already stated my inability to accept.

30 Evidence upon the questions-whether it was the plaintiff's duty to sign cheques, whether he did in fact sign cheques of the company, whether he kept its books, whether he left its cash book behind him when he resigned, why he signed cheques after serving a notice of resignation, and after leaving the service of the company, what he referred to by the words "my cheque" in a telegram, to what date his admitted statement was prepared, what certain items in that statement included, whether stock was taken for the preparation of the statement, whether he had signed certain cheques as an officer of the company-while it might go towards establishing some facts which would be serviceable in support of justification, if pleaded, cannot, I think, be pronounced a priori wholly irrelevant to an issue as to the honest belief of the defendants in the truth of the alleged libel at the time of publication. If all these questions were answered favourably to the defendants, the answers would not in themselves suffice to support a plea of justification, would not prove the truth of the alleged libel. The questions cannot on that ground be disallowed. The discovery sought is in nowise oppressive. If it were to be now adjudged wholly irrelevant, the trial Judge would be bound to discard such evidence, unless the defendants should before trial successfully invoke the intervention of the Court of Appeal. Unless it is unavoidable, they should not now be put in that position. On the other hand, it by no means follows that, if we refuse to disallow the questions put to the plaintiff, because unable at this stage of the litigation to pronounce the matters [11 OLR Page646] to which they relate wholly irrelevant, the trial Judge will be bound to receive in evidence the answers given. His freedom in ruling upon evidence at the trial will not be at all affected by such a judgment. Authorities dealing with interrogatories, upon the relevancy and propriety of which the Court must pass before they are put, may not always be relied upon as guides in determining whether a party should be upheld in his refusal to answer questions put to him under a system of discovery which is broader and more elastic.

31 For these reasons I think the plaintiff's appeal should be dismissed as to the questions above enumerated.

32 Question No. 45 appears to me to require the witness merely to state an amount which a statement presented to him is said to shew on its face. It seems a useless and, as such, an improper question. Question No. 44, which asks whether the plaintiff when drawing certain cheques considered the debts for which they were drawn to be debts of the company, is, I think, quite irrelevant in the absence of a plea of justification. These two questions should not be answered.

33 With this variation, the appeal will be dismissed with costs to be costs to the defendants in the cause.

34 MULLOCK C.J.Ex.D., and CLUTE J., concurred.

[Leave to appeal to the Court of Appeal refused by OSLER J.A. on 2nd April, 1906.]

qp/s/qlwlh/qlajg

Indexed as:

Hoyt v. Insurance Corp. of British Columbia

Between

**Deborah Jane Hoyt, plaintiff (respondent), and
Insurance Corporation of British Columbia,
defendant (appellant)**

[2001] B.C.J. No. 377

2001 BCCA 154

149 B.C.A.C. 285

89 B.C.L.R. (3d) 44

26 C.C.L.I. (3d) 227

4 C.P.C. (5th) 193

10 M.V.R. (4th) 170

103 A.C.W.S. (3d) 281

Vancouver Registry No. CA026484

British Columbia Court of Appeal
Vancouver, British Columbia

Rowles, Finch and Donald JJ.A.

Heard: February 6, 2001.

Judgment: March 1, 2001.

(42 paras.)

Practice -- Discovery -- Interrogatories -- Requirement that questions relate to facts -- Improper questions.

Appeal by the defendant Insurance Corporation of British Columbia from a decision striking out portions of its interrogatories. The plaintiff Hoyt was injured in a motor vehicle accident. The Corporation denied her claim on the ground that it was not satisfied that her injuries entitled her to benefits. In the interrogatories, the Corporation asked for the names of medical practitioners who had treated Hoyt for injuries in this, previous and subsequent motor vehicle accidents. Hoyt did not want to provide the names of these potential witnesses. A master decided that just as the names of potential witnesses could be compelled on an examination for discovery, they were equally compellable on an interrogatory. On appeal, the judge ruled that the master erred in law. The practice was that the identity of potential witnesses could not be compelled by interrogatories unless their identity was a material fact in issue.

HELD: Appeal dismissed. The master erred in law. The portions were properly struck out. The identity of the medical practitioners was not an issue. The relevant issue was the fact of treatment.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 27(22), 29(1), 29(5), 29(7).

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231.

Insurance (Motor Vehicle) Act Regulations.

Counsel:

J.A. Graham, for the appellant.

D. Roberts, Q.C., for the respondent.

The judgment of the Court was delivered by

FINCH J.A.:--

I

1 The issue on this appeal is whether the identity of potential witnesses can be compelled in answer to interrogatories delivered under Rule 29(1) which reads, in part:

A party to an action may serve on any other party ... interrogatories in form 22 relating to a matter in question in the action...

(emphasis added)

2 A master in chambers dismissed the plaintiff's application to strike out interrogatories served upon the plaintiff by the defendant. He held that, as the names of potential witnesses could be compelled on examination for discovery, they were equally compellable on interrogatory.

3 On appeal to the Supreme Court of British Columbia, a judge in chambers held that the master had erred in law. The judge indicated that the court has consistently held that the identity of potential witnesses can not be compelled by interrogatories unless their identity is a material fact in issue. He allowed the plaintiff's appeal and ordered those parts of the interrogatories seeking the identity of potential witnesses to be struck out.

II

4 Following an accident on 14 December, 1998 in which the plaintiff alleges she was injured, she applied to I.C.B.C. for payment of accident benefits. I.C.B.C. refused payment on the basis that she had "not established that the injuries which she indicates she sustained in the accident entitled her to accident benefits."

5 The plaintiff commenced an action for a declaration that she was entitled to no fault benefits, judgment for the amount of the no fault benefits payable, and for other relief. In her amended statement of claim the plaintiff alleged that she was the owner of a vehicle insured by the defendant, and that she held a B.C. driver's licence. She alleged that she suffered injuries while driving her car when it was struck by another vehicle. She alleged particulars of the injuries, and their effects, caused by the accident.

6 The amended statement of claim then contained the following allegations:

9. The Plaintiff's medical practitioner has found that the Plaintiff suffered injury in the said motor-vehicle accident of Monday, December 14, 1998 and her medical practitioner has prescribed therapy and medication reasonably necessary for the Plaintiff's rehabilitation from those injuries.
10. The Plaintiff applied for No-Fault Benefits for medical expense coverage from the Defendant so that she could be indemnified for the cost of the medical treatment that she required because of these injuries, but the Defendant refuses or neglects to provide the Plaintiff with such indemnity and to pay for such medical treatment.
11. The Defendant has denied the Plaintiff her No-Fault Benefits pursuant to its policy of minimal damage.
12. The Defendant's policy for minimal damage states that the Defendant only adjust a claim on its merit if the vehicle driven by the claimant is damaged beyond criteria accepted by the Defendant, subject to the following exceptions:
 - a. the existence of pre-existing health problems, injuries or conditions of the

- claimant;
- b. a lifestyle or employment increasing susceptibility to injury;
- c. presence of an objective injury warranting compensation;
- d. the effectiveness of the Plaintiff as a witness; and
- e. other extenuating circumstances.
- 13. The Defendant's minimal impact policy is not prescribed by statutory or other legislative authority with respect to No-Fault Benefits.
- 14. Notwithstanding that the Plaintiff does not accept that the Defendant has the right to deny her coverage for No-Fault Benefits, except by applying the statutory provisions for No-Fault Benefit coverage, the Plaintiff, on the 22nd of December 1998 and since that date has specifically detailed how her claim ought to be accepted under the said criteria applied by the Defendant, and specifically she has advised the Defendant how:
 - a. her employment situation as day-care operator that increases her susceptibility to injury;
 - b. she has objective injuries as documented by her physician of muscle spasm and difficulty moving her head and as documented by her physiotherapist as neurological deficits indicated by differing pupil dilation, asymmetrical facial expression, decreased corneal reflex over left eye, asymmetrical babinski response, impaired balance, deviated tongue thrust and decreased range of motion for neck, shoulder an upper middle back.
- 15. Notwithstanding, that the Plaintiff has provided information to the Defendant, such that she ought to have met the requirements to receive No-Fault benefits pursuant to the No-Fault statutory scheme AND the Defendant's own minimal damage criteria, the Defendant has, wrongfully denied and continues to deny the Plaintiff No-Fault benefits contrary to the Defendant's own criteria, and the statutory scheme for such benefits and in such a manner to amount to bad-faith on the part of the defendant in its handling of the Plaintiff's claim for No-Fault Benefits.

7 The defendant's amended statement of defence admits that the accident occurred, but denies that the plaintiff suffered any injury. The defendant pleaded that the plaintiff failed to comply with the Regulations under the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"), denied that it had failed to pay benefits, alternatively said that it had paid to the plaintiff any benefits she was entitled to, and pleaded the provisions of the Act and Regulations.

8 At the same time that it delivered its defence, the defendant also delivered interrogatories. The interrogatories to which counsel for the plaintiff objected were:

- 2. Have you returned to your usual employment as of the date of these Interrogatories? If you have not returned to your usual employment to date by reason of injuries sustained in the motor vehicle accident which is the subject

matter of this lawsuit ("the Motor Vehicle Accident"), have you been told not to return and, if so, by whom? Do you know when you will be returning to your usual employment and, if so, what is that date?

3. What are the names and addresses of all medical institutions, medical doctors, chiropractors, physiotherapists, psychologists or any other person who has been treating you or been consulted by you with regard to diagnosis, treatment or assessment of the injuries sustained by you in the Motor Vehicle Accident?
4. Prior to the MVA Date, have you ever sustained injuries which are similar in nature to the injuries sustained in the Motor Vehicle Accident? If so, give the date and details of the previous injury, or injuries, as well as the names of the physicians and practitioners from whom you received treatment?
5. Subsequent to the MVA Date, have you ever sustained injuries which are similar in nature to the injuries sustained in the Motor Vehicle Accident? If so, give the date and details of the subsequent injury, or injuries, as well as the names of the physicians and practitioners from whom you received treatment?

(emphasis added)

9 A master in chambers ordered that all interrogatories be answered. The plaintiff appealed.

10 The order appealed from reads:

THIS COURT ORDERS that the Appeal of the Plaintiff be allowed and pursuant to Rule 29(7) of the Rules of Court that the following Interrogatories or parts thereof be struck out:

(a) Interrogatory #2: that part of that Interrogatory which reads as follows:

"if you have not returned to your usual employment to date by reason of injuries sustained in the motor vehicle accident, which is the subject matter of this lawsuit (the motor vehicle accident) have you been told not to return and, if so, by whom."

- (b) Interrogatory #3: the entire interrogatory;
- (c) Interrogatory #4: that Part of that Interrogatory which reads as follows:

"as well as the names of the physicians and practitioners from whom

you received treatment."

(d) Interrogatory #5: that part of that Interrogatory which reads as follows:

"as well as the names of physicians and practitioners from whom you received treatment."

III

11 Counsel for the defendant contends that there is no general rule against the use of interrogatories to obtain the names of witnesses. He says that the cases relied upon by the plaintiff to support this position were wrongly decided. He says that the proper scope and purpose of interrogatories is as set out in *British Columbia Lightweight Aggregate Ltd. v. Canada Cement LaFarge Ltd.* (1977), 4 B.C.L.R. 259 (C.A.), namely, that interrogatories must be relevant and must relate to a matter in question. Whether they meet this test is governed by the pleadings. Counsel for the defendant says that in most motor vehicle litigation the existence of a professional witness will relate to facts in issue, so that interrogatories asking for the identity of such a witness will be proper. Use of interrogatories for this end will conform with the general purpose of the rules, namely, the just, speedy and inexpensive determination of cases on their merit. He says that in this case the interrogatories in question were proper and should not have been struck out.

12 Counsel for the plaintiff says that the learned chambers judge did not err in ordering interrogatories to be struck out. He says that unless the name of a person is material or relevant to a fact in issue on the pleadings, it cannot be obtained on interrogatories. Interrogatories are limited to questions that will elicit facts necessary to defeat the opponent's case or to support the interrogator's own case. While there are some cases where the identity of a witness is a material fact in issue, this is not one of them. Here, whether the plaintiff suffered injuries or suffered from a pre-existing condition are material facts in issue. The identity of the individual who diagnosed the plaintiff's condition either pre or post accident is not relevant to the diagnosis or to the plaintiff's health. The identities of doctors, hospitals, or physiotherapists are not facts the plaintiff must prove. They do not make any fact in issue either more or less probable. The judge's order was in accord with a well-established practice of the B.C. Supreme Court, and this Court should not interfere with such a practice unless it is shown to be clearly wrong.

IV

13 In the course of their submissions, counsel referred us to many authorities. The leading case in British Columbia on the scope of questions permissible on interrogatories is *B.C. Lightweight*. It considered the rule on interrogatories contained in the then new 1977 Supreme Court Rules. In the action, the plaintiff sued for damages for the destruction of its business, alleged to result from a conspiracy by the defendants to achieve that goal. The defendants denied the conspiracy, and any

misconduct. Both sides delivered interrogatories. The defendants objected to the plaintiff's interrogatories on the grounds that they were irrelevant and unnecessary. The chambers judge described the scope of the plaintiff's interrogatories as "immense." He used as an illustration:

1. "Identify all interests in real property held at any time by the Defendant specifying when each was acquired, from whom, and for how much, and when each was disposed of, to whom and for how much."

14 The judge rejected a submission by counsel for the plaintiff that the scope of interrogatories was intended to be the same as that for oral examinations for discovery. He said at 260:

Under the Supreme Court Rules, 1961, there was a distinction between the wide latitude allowed in cross-examination under examination for discovery and the limited scope of interrogatories: *McConachy v. Times Publishers Ltd.* (1964), 50 W.W.R. 389, 49 D.L.R. (2d) 349 (B.C.C.A.). The distinction remains. And such finding in law is fatal to nearly all the interrogatories left in dispute. The only ones I find valid are: (6a), (3), (4) and (5). The balance is struck out. The plaintiff will have leave to serve new ones in its place.

15 This Court dismissed the plaintiff's appeal. Mr. Justice Taggart gave the judgment of the Court. He agreed with the chambers judge that under the 1977 Rules the scope of interrogatories had not been made equal to the scope of questions that might be asked on examinations for discovery. He said at 265:

It is true that the proviso contained in 1961 M.R. 343 does not appear in the 1977 rules relating to interrogatories, but in my opinion the language employed in R. 29 indicates that interrogatories must be relevant in the sense that they relate to a matter in question in the action. To that extent at least the proviso to be found in 1961 M.R. 343 is carried forward into the new rules.

16 The proviso in the 1961 Rule, to which he referred, said this:

Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. (Form 16, App. K.)

17 Mr. Justice Taggart continued at 266:

I must express my concern with language used by the trial judge in relation to the question of the relevance of interrogatories. I reiterate that the judge said:

"It [R.29(1)] does not say may relate to matter in question in the action. So

without a positive determination that the question relates to a matter in question in the action, an interrogatory should be disallowed."

I think that may be putting too great an emphasis on relevancy insofar as interrogatories are concerned. 1977 R. 29(1) and (5) use the words "relating [or relate] to matter in question in the action". Whether the interrogatories fall within those words can only be ascertained from the pleadings and proceedings in the action as they stand when the interrogatories are issued.

18 There is a reference in the reasons of Taggart J.A. to the judgment of A.L. Smith L.J. in *Kennedy v. Dodson*, [1895] 1 Ch. 334 concerning the proper use of interrogatories. The quoted passage from *Kennedy* is at 264:

The legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted.

19 There was much discussion on this appeal as to whether the Court in *B.C. Lightweight* approved of that passage. That question has also been the subject of much discussion in cases decided since *B.C. Lightweight*.

20 In my view, that question must be answered in the negative. In *B.C. Lightweight* the Court was addressing its attention to the language of our Rules 29(1) and (5), the former using the phrase "relating to a matter in question in the action," and the latter the phrase "does not relate to a matter in question in the action." It held that whether interrogatories fell within those words could only be "ascertained from the pleadings and proceedings in the action as they stand when the interrogatories are issued."

21 Whether an interrogatory relates to a matter in question in the action is clearly a broader test than that enunciated by A.L. Smith L.J. in *Kennedy*. He limited the use of interrogatories to obtaining "admissions of fact which it is necessary for the party interrogating to prove in order to establish his case." No such limitation can be read into the language of Rules 29(1) and (5), and on a careful reading of the judgment in *B.C. Lightweight* I am satisfied that the Court did not intend to endorse any such limitation. The question that Court was asked to decide was whether the scope of interrogatories was as broad as the scope of questions permitted on examinations for discovery. It said that it was not. It did not say that the scope of interrogatories was as narrow as the test propounded by A.L. Smith L.J.

22 Before referring to other *B.C.* cases, it may be useful to mention *Marriott v.*

Chamberlain,[1886] 17 Q.B.D. 154 (C.A.). That was an action for libel, to which the defendant pleaded justification. Facts in issue were whether the plaintiff had fabricated a story that the defendant had circulated a letter, and whether the plaintiff had been informed by a solicitor as to the existence and location of copies of the letter. The defendant delivered interrogatories seeking the names and addresses of the solicitor and the persons who possessed the copies. The lower courts ordered the plaintiff to answer the interrogatories, and that order was affirmed by the court of appeal. Lord Esher, M.R. said this at 163:

The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

Bowen and Fry L.JJ delivered separate concurring judgments.

23 The decision in *Marriott* is not referred to in any of the judgments delivered in *Kennedy*. In my view, this casts significant doubt on the correctness of the passage quoted from it, even at the time it was decided.

24 There are many B.C. cases where the court has refused to permit interrogatories to be used for the purpose of obtaining the names of potential witnesses. These appear to be cases where the identity of the witnesses was not shown to be relevant to a fact in issue. The list of cases, not exhaustive, includes: *Twitchell v. Delta Hotels Limited* (1978), 9 B.C.L.R. 204 (S.C.), *Sherwin v. Sillis* (1979), 15 B.C.L.R. 391 (S.C.), *Silvaggio v. Adamson* (1988), 27 B.C.L.R. (2d) 182 (S.C.), *Hou v. Westbild Holdings Ltd.* (1994), 98 B.C.L.R. (2d) 92 (S.C.), *Weir-Jones Engineering Consultants Ltd. v. Perimeter Technology Corp.*, [1995] B.C.J. No. 152 (S.C.), and *Doran v. Grisnich*, [1996] B.C.J. No. 2926 (S.C.).

25 Some of these cases state the bare proposition that interrogatories may not be used to obtain the names of witnesses. Many of those cases cite *Kennedy* as authority for that proposition. It does not appear to me that any of these cases was wrongly decided in the result. However, the language of Rule 29 does not, on its face, give rise to such a restricted construction. And, as noted above, it is of much broader scope than the passage cited from *Kennedy*.

26 In this group of cases, the correct interpretation of Rule 29 appears to be best captured by Mr. Justice Macdonell in *Silvaggio*. After an extensive review of the authorities he said at 190:

The chief difficulty in this case is that the statement of defence is terse and no

such link can be drawn between the names of the various professionals and a matter in question between the parties.

I have grave doubts about the viability of a rule which prevents parties from obtaining names of witnesses by interrogatories when they are able to do so by way of oral discovery. Such an anomaly may have the consequence of adding to litigation expense and discouraging settlement. Yet, in the absence of evidence of such names being directly material to a matter in issue in the pleadings, and until such time as the rules might be amended, I am bound by the expression of the limitations on discovery by interrogatories in *B.C. Lightweight Aggregate Ltd. v. Can. Cement Lafarge Ltd.* and the above-cited decisions in this court.

27 In other B.C. cases, interrogatories seeking the names of potential witnesses have been held to be proper: see *Pierre v. Canadian Broadcasting Corporation (C.B.C.)*, [1993] B.C.J. No. 2175 (S.C.), *Roitman v. Chan* (1994), 99 B.C.L.R. (2d) 182 (S.C.) and *A & B Sound Ltd. v. Future Shop Ltd.* (1996), 2 C.P.C. (4th) 373, [1996] B.C.J. No. 1344 (S.C.). In *Pierre* the plaintiff claimed damages arising from incidents in which the defendant had published or broadcast her image and had identified her as a witness to murder. The defendant pleaded, inter alia, the plaintiff's consent to the broadcast. The plaintiff delivered interrogatories which included questions as to the identity of persons to whom the consent was given.

28 Mr. Justice K.J. Smith held at para.20 that:

[T]he test for whether interrogatories are proper is whether they are relevant to the issues raised in the pleadings....

29 He said further at para.23:

Here, the defendants are corporations and as such can act only through agents. Thus, the identity of the person referred to in interrogatory 2(b) goes to the issue of whether employees or agents of the defendants heard the words, that is, whether the alleged consent was communicated to the defendants, a material fact. Similarly, the identity of the persons referred to in interrogatory 8(b) is directly relevant to the defendant's state of mind, which is a material fact.

30 In my respectful view, that is a correct statement and application of the principle.

31 The words in Rule 29(1) "relating to a matter in question in the action" are therefore to be interpreted as creating a test of relevance. What is relevant is that which makes a fact in issue more or less probable. Generally, the names of witnesses have no probative value. They identify the means or the source by which a party can prove matters that are in issue. But of themselves, the identity of witnesses generally adds nothing to the proof.

32 However, in some cases, such as *Marriott, Pierre, Roitman and A & B Sound*, the identity of a witness may be relevant to a material fact in issue. In such cases, interrogatories may properly be used to obtain discovery of such evidence.

33 Applying the test of relevance to the interrogatories in this case, in my respectful view, the master was in error and the chambers judge was correct. The identity of doctors, physiotherapists or other health care professionals providing treatment to the plaintiff are not facts in issue on the pleadings, and do not tend to render either more or less probable the fact that such treatment has been rendered or received. The fact of treatment is relevant. Who provided the treatment is not.

34 I have examined Part 7 of B.C. Reg. 447/83, the Revised Regulation (1984) under the Insurance (Motor Vehicle) Act. I can see nothing in Part 7 - "Accident Benefits" that would make relevant the interrogatories in issue.

35 The learned master said:

I am of the view that there is no difference between the propriety of a question asked on an interrogatory and of a question asked on an examination for discovery, except that an interrogatory is not a cross-examination and an examination for discovery is. Apart from that, there is no difference.

36 This statement is clearly not correct, for at least two reasons. First, B.C. *Lightweight* is authority directly to the contrary. Second, the rule governing examinations for discovery contains this:

27(22)

Unless the court otherwise orders, a person being examined for discovery shall answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

(emphasis added)

37 The question arose in the course of counsel's submissions as to why there should, in principle, be a difference between the scope of questions permissible on examination for discovery and in an interrogatory. The history of the rules, and their application, suggest that the two procedures were not intended to provide parallel means of obtaining the same information. Rather, they supplement

one another. Interrogatories can be burdensome for the recipient and can add unnecessarily to the exchange of paper, duration of proceedings and expense. They were not intended to provide the equipment for a fishing expedition.

38 If the Court, or those responsible for suggesting revisions to the rules, should come to the conclusion that the scope of interrogatories should be broadened, it is within the power of the Court to seek appropriate amendments. Some of the cases referred to suggest that would be useful.

39 However, in the absence of such an amendment, this Court should not interfere with decisions of the trial court on matters of practice in that court, unless such practise is based on an error in principle. In *Bradley v. Cowan*, [1971] 1 W.W.R. 140 (B.C.S.C.), Mr. Justice Ruttan said at 143:

It is not within the discretion of this Court to ignore practice which has long continued for many years and indeed even higher courts on appeal will not likely disturb such practice.

Broom, Legal Maxims, 10th ed., has this to say at p. 82:

"The practice of the Court is the law of the Court.

Every Court is the guardian of its own records and master of its own practice."

And in our own Court of Appeal Sloan C.J.B.C. said in *British Columbia Packers Ltd. v. Burrard Iron Works Ltd. et al* (1955), 17 W.W.R. 409 at 410:

"We are the custodians of our own practice and a long existing one should not be disturbed except on irresistible grounds not present here."

40 See also *Cowan v. Duke of Buccleugh* (1876), 2 App. Cas. 344 at 347 and *Re Patterson and Nanaimo Dry Cleaning & Laundry Workers Union Local No. 1*, [1947] 4 D.L.R. 159 at 173 (B.C.C.A.).

41 Here, the well settled practice of the trial court will not generally permit the use of interrogatories to obtain the names of witnesses, unless they can be shown to be relevant to issues raised in the pleadings. No proper basis has been shown for this Court to interfere with that practice.

42 I would dismiss the appeal.

FINCH J.A.

ROWLES J.A.:-- I agree.

DONALD J.A.:-- I agree.

cp/i/qldrk/qltln/qlmxd

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Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed.

CHAPTER 2 - TYPES OF EVIDENCE AND CONDITIONS FOR THE RECEIPT OF EVIDENCE

II. CONDITIONS FOR THE RECEIPT OF EVIDENCE

A. General

§2.33 A piece of evidence must satisfy a number of requirements before it can be considered by the trier of fact in their ultimate deliberation on the facts in issue in civil or criminal proceedings. Once it meets these requirements, the evidence can be received by the court. To be received, evidence must meet two basic requirements. First, it must be admissible. Second, the trial judge must not have exercised his or her judicial discretion to exclude the evidence. Two further concepts make up the principle of admissibility. Evidence is not admissible unless it is: (1) relevant; and (2) not subject to exclusion under any other rule of law or policy.¹ Therefore, the trial judge will determine whether the proffered evidence is relevant. If it is not, it will be rejected.² If it is relevant, the trial judge will consider whether it is subject to any exclusionary rule of the law of evidence. If it is not, the trial judge will consider whether he or she has a judicial discretion to reject the evidence and whether that discretion should be exercised in the circumstances. If the evidence is subject to an exclusionary rule or is irrelevant, there is no generally recognized judicial discretion to nevertheless receive the evidence.³

§2.34 The exclusionary rules which make up the second branch of the admissibility test constitute a large part of the law of evidence and are discussed throughout section II of this chapter. The concepts of "relevance" and "judicial discretion" require some further explanation at this stage.

Footnote(s)

1 *R. v. Morris*, [1983] 2 S.C.R. 190 , at 201, [1983] S.C.J. No. 72 (S.C.C.) *per* Lamer J. (as he then was); *R. v. Watson* (1996), 30 O.R. (3d) 161 , [1996] O.J. No. 2695 (Ont. C.A.). The distinction between the concepts of relevance and the application of evidentiary exclusionary rules is noted in *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378 , at 1386, [1989] S.C.J. No. 50 (S.C.C.), *per* Sopinka J. See also *R. v. Underwood* (2002) , 9 C.R. (6th) 354 , [2002] A.J. No. 1558 , at paras. 19-20 (Alta. C.A.); all relevant evidence is to be received by the trier of fact unless the evidence is rendered inadmissible by a particular rule of exclusion; the onus is on the party tendering the evidence to prove that it is and not barred by an exclusionary rule.

2 1 Wigmore, *Evidence* (Tillers rev. 1983), § 9, at 655. The conviction or acquittal of another

person charged with the same crime as the accused is irrelevant and immaterial to the issue of the guilt or innocence of the accused: *R. v. Fisher* (2003), 18 C.R. (6th) 377 , [2003] S.J. No. 597 (Sask. C.A.), leave to appeal refused [2004] S.C.C.A. No. 113 (S.C.C.). Evidence that footprints found at the scene of a crime were made by shoes with a tread similar to the tread on shoes found in the vicinity of the accused's apartment was irrelevant where the tread pattern was a common one and no inference could be drawn that the shoes belonged to the accused: *R. v. Portillo* (2003), 17 C.R. (6th) 362 , [2003] O.J. No. 3030 (Ont. C.A.).

3 *Savard v. R.*, [1946] S.C.R. 20 , [1945] S.C.J. No. 42 (S.C.C.). However, inadmissible portions of documents might be admitted along with the admissible portion, but the trier of fact must not act on the inadmissible portion: see *R. v. Bandura*, [1934] 1 D.L.R. 595 , [1983] A.J. No. 4 (Alta. C.A.). There is a discretionary admission of hearsay evidence, however, as discussed in Chapter 6, § 6.63 ff.

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CHAPTER 2 - TYPES OF EVIDENCE AND CONDITIONS FOR THE RECEIPT OF EVIDENCE

II. CONDITIONS FOR THE RECEIPT OF EVIDENCE

B. Relevance

2. Facts in Issue

§2.36 The first step in determining what is relevant is to identify the facts that are in issue in the case. It is the substantive law relating to the particular charge or cause of action that forms the basis for this identification exercise. So, in a civil action for negligent misrepresentation, the plaintiff may first have to prove that a representation was made, that it was false, that it was relied on to the detriment of the plaintiff, that the defendant was negligent in making the statement and that damage was suffered. Not every fact may be in issue. For example, the defendant might admit that the representation was made and that it was false, dispensing with the need for proof on those issues and rendering any evidence on those issues irrelevant.¹ The defendant may still deny that he was negligent in making it or that the plaintiff relied on it, therefore defining the scope of the facts that are in issue. In a criminal case, the relevance of evidence has to be determined in reference to all the issues which have to be established by the prosecution for the particular offence charged and any defences raised by the defence.²

§2.37 Direct or circumstantial evidence of the facts in issue is relevant.³ Therefore, in the misrepresentation example, evidence given by the plaintiff's spouse to the effect that the plaintiff admitted knowledge of the falsity of the statement prior to the purported acts of reliance would be direct evidence relevant to reliance as a fact in issue.⁴ On the other hand, if the action was based on a false statement in a prospectus, testimony from the plaintiff's business partner that the plaintiff admitted that he never reads prospectuses before purchasing would be circumstantial evidence on the issue of reliance.

§2.38 A fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue.⁵ In *R. v. Watson*,⁶ the defence sought to adduce evidence of the deceased's habitual possession of a weapon to extricate the accused of any involvement in the shooting. The Ontario Court of Appeal held that such evidence was relevant as the deceased's conduct was in issue. Evidence that a person repeatedly acted in a certain way in the past when circumstances similar to the present occasion arose has been received as evidence that the person acted in conformity with past practice

on the occasion in question. The reasoning is that the fact that a person was in the habit of doing a certain thing in a given situation suggests that the person acted in the same way when a similar situation arose. It makes the conclusion that a person acted in a particular way more likely than it would be without the evidence of habit.

§2.39 Facts relating to the credibility of the witness giving direct or circumstantial evidence of a fact in issue are relevant.⁷ A fact that proves the existence or tends to prove the existence of a pre-condition to the admissibility of a piece of evidence, such as the voluntariness of a confession, the authenticity of a signature on a document, or the statutory conditions for a legal wiretap, is equally relevant. If no such relationship exists between the evidence offered and any one or more facts in issue, the evidence is excluded as irrelevant.

§2.40 In a civil case, the facts in issue are established by the pleadings. Although any detailed discussion of the function of pleadings properly belongs in writings on practice and procedure, a brief mention should be made of the role of pleadings in controlling the admissibility of evidence.

§2.41 While, in practice, much latitude is allowed, especially in cases tried by judges alone, evidence which is completely unrelated to the issues as disclosed in the pleadings will nevertheless be rejected. An exception is made in divorce cases and in other cases where the interests of the public are concerned. In these cases, the courts have, in their discretion, allowed evidence of condonation, connivance or collusion even though not pleaded. This exception does not apply to an alimony action since only the rights of the parties are involved.⁸

§2.42 Unnecessary or immaterial allegations in the pleadings cannot, however, make evidence relevant that is not.⁹

Footnote(s)

1 See Chapter 19, § 19.1.

2 *R. v. Arp*, [1998] 3 S.C.R. 339 , [1998] S.C.J. No. 82 (S.C.C.); *Perkins v. Jeffery*, [1915] 2 K.B. 702, at 707, 84 L.J.K.B. 1554; *Harris v. D.P.P.*, [1952] A.C. 694 , [1952] 2 All E.R. 1044 (H.L.). If a trial judge's reasons reveal a failure to consider relevant evidence, as opposed to a mere failure to record it, this is a substantive error of law requiring an appellate court to intercede: *R. v. Ahenakew* (2008) , 53 C.R. (6th) 314 , [2008] S.J. No. 9 (Sask. C.A.).

3 As to the distinction between direct and circumstantial evidence, see this chapter, § 2.71 ff.

4 *Dickey v. C.N.R.*, [1921] 1 W.W.R. 1196 , 58 D.L.R. 528 (Alta. C.A.).

5 *Clark v. Stevenson* (1865), 24 U.C.R. 200 , [1865] O.J. No. 35 (U.C.Q.B.); *R. v. Perry*, [1945] 4 D.L.R. 762 , [1945] P.E.I.J. No. 2 (P.E.I.C.A.); *R. v. Stawycznuj*, [1933] 4 D.L.R. 725 (Man. C.A.). The fact that an accused was experiencing financial pressure may be

relevant to the accused's motive to commit a crime for profit. However, evidence that an accused person has a certain level of income or is in receipt of government assistance is insufficient, in and of itself, to support an inference that the accused has a motive to commit a profit-motivated crime: *R. v. Mensah* (2003), 9 C.R. (6th) 339 , [2003] O.J. No. 1096 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 207 (S.C.C.).

6 (1996), 30 O.R. (3d) 161 , [1996] O.J. No. 2695 (Ont. C.A.). See also Chapter 11, Similar Fact Evidence.

7 Although they may still be inadmissible if obnoxious to an exclusionary rule, such as the collateral fact rule (see Chapter 16, § 16.200). However, prior sexual activity by a complainant is not admissible to support an inference that the complainant is more likely to have consented or is less worthy of belief, and if the defence seeks to adduce such evidence, it must establish that the evidence supports at least some relevant inference: *R. v. Darrach*, [2000] 2 S.C.R. 443 , 36 C.R. (5th) 223 , [2000] S.C.J. No. 46 , at para. 46 (S.C.C.). But see *R. v. L. (R.S.)* (2006), 40 C.R. (6th) 180 , [2006] N.B.J. No. 226 (N.B.C.A.), where the New Brunswick Court of Appeal held that evidence of post-offence sexual conduct between an accused and complainant was relevant and could be used by the jury to assess the complainant's credibility.

8 *Macdougall v. Macdougall*, [1970] 3 O.R. 680 , [1970] O.J. No. 1592 (Ont. C.A.).

9 *Larson v. Boyd* (1919), 58 S.C.R. 275 , [1919] S.C.J. No. 8 (S.C.C.); *Kelly v. Dew* (1860), 9 N.B.R. 435 (N.B.C.A.).

Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed.

CHAPTER 2 - TYPES OF EVIDENCE AND CONDITIONS FOR THE RECEIPT OF EVIDENCE

II. CONDITIONS FOR THE RECEIPT OF EVIDENCE

B. Relevance

4. Relevance Distinguished from Weight

§2.49 There are no degrees of relevance recognized in Canadian law.¹ Such an idea was put to rest in *R. v. Morris*.² A review of the facts of that case is instructive. The accused was charged with trafficking in heroin imported from Hong Kong. A search of the accused's premises disclosed a clipped newspaper article on the subject of sources of supply of heroin in Pakistan. At issue was the admissibility of this article.³ McIntyre J., for the majority, held that this was admissible circumstantial evidence. He stated that

... an inference could be drawn from the unexplained presence of the newspaper clipping among the possessions of the appellant, that he had an interest in and had informed himself on the question of sources of supply of heroin, necessarily a subject of vital interest to one concerned with the importing of the narcotic.⁴

Although McIntyre J. agreed that the probative value of this evidence was low, it was an error for the judge to confuse relevance with weight. He noted that if the article had been on sources of heroin supply in Hong Kong it would have had greater weight and if it had been a step-by-step guide to importing heroin, its weight would have been greater still. Yet the clipping was nevertheless still relevant evidence and it should have been put before the trier of fact.⁵ The trier of law determines if the evidence is relevant. The trier of fact determines what, if any, weight is to be given to it. Obviously, where the judge is the trier of both fact and law the distinction becomes blurred and the weight to be given the evidence becomes the paramount consideration. Without relevance the evidence can have no weight.

Footnote(s)

1 As to the English position that the evidence must be "sufficiently relevant", see C. Tapper, *Cross and Tapper on Evidence*, 11th ed. (London: Butterworths, 2007), at 77.

2 [1983] 2 S.C.R. 190 , [1983] S.C.J. No. 72 (S.C.C.).

3 Distinguish these facts from those in issue in *R. v. Cloutier*, [1979] 2 S.C.R. 709 , [1979]

S.C.J. No. 67 (S.C.C.).

4 *R. v. Morris*, [1983] 2 S.C.R. 190 , at 191, [1983] S.C.J. No. 72 (S.C.C.).

5 See also *Ferris v. Monahan* (1956), 4 D.L.R. (2d) 539 , [1956] N.B.J. No. 11 (N.B.C.A.); *R. v. Underwood* (2002), 9 C.R. (6th) 354 , [2002] A.J. No. 1558 (Alta. C.A.) (it need only be shown that one possible interpretation of the facts is relevant to an issue at trial; the strength or weight of the evidence is a matter for the trier of fact).

Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed.

CHAPTER 14 - PRIVILEGE

II. CONFIDENTIAL COMMUNICATIONS WITHIN SPECIAL RELATIONSHIPS

C. Solicitor and Client

1. Rationale

§14.42 It has long been established that *prima facie* all four of Wigmore's prerequisites are met in a solicitor and client communication.¹ But the privilege's origin and development go back much further in history. The solicitor-client privilege is the oldest of the privileges for confidential communications with roots in the 16th century. The basis of the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep his client's secret.² Thus, the early privilege belonged solely to the solicitor,³ and the client benefited from it only incidentally. By the 18th century, the courts regarded the ascertainment of truth to be more important than professional dignity, and oath and honour alone ceased to excuse lawyers from their civic duty to give testimony. In order to preserve the protection, however, the early rationale gave way to the view that the privilege was necessary, not in order to maintain the solicitor's reputation, but for the protection of the client. Effectual legal assistance, it was assumed, could only be given if clients frankly and candidly disclosed all material facts to their solicitors, which, in turn, was essential to the effective operation of the legal system. It was thought that this would not take place if the possibility existed that their confidences might be revealed.⁴

§14.43 A complete statement of the privilege has been given as follows:

That rule as to the non-production of communications between solicitor and client says that where . . . there has been no waiver by the client and no suggestion is made of fraud, crime, evasion, or civil wrong on his part, the client cannot be compelled and the lawyer will not be allowed without the consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending.⁵

The Supreme Court of Canada has elevated the privilege to a "fundamental civil and legal right".⁶ The party asserting the right to solicitor-client privilege must establish, on the balance of probabilities, that the criteria for the privilege exist.⁷

§14.44 Building on earlier cases,⁸ the Supreme Court of Canada again reiterated in *R. v. McClure*,⁹ *R. v. Brown*,¹⁰ *Lavallée*, *Rackel & Heintz v. Canada (Attorney General)*,¹¹ *Pritchard v. Ontario*

(*Human Rights Commission*¹² and *Blank v. Canada (Minister of Justice)*¹³ and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*¹⁴ that the solicitor-client privilege is a principle of fundamental justice, and a civil right of supreme importance that forms a cornerstone of our judicial system.

§14.45 In *Maranda v. Richer*,¹⁵ LeBel J. stated:

The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.¹⁶

§14.46 The privilege transcends protection for an accused's right to have private communications with his or her lawyer. It also enhances the administration of justice overall. In *Lavallée*,¹⁷ Arbour J. stated:

... the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.¹⁸

§14.47 In *McClure*, the Court pointed out that the solicitor-client privilege, because of its unique status within the justice system and its being integral to its successful administration, has the status of a class privilege. In the absence of express legislative language, regulatory boards, agencies and commissions are not to review solicitor-client confidences to determine whether the privilege is properly claimed. Given the fundamental role of the privilege in the integrity of the justice system, such review is to be conducted only by the courts.¹⁹ It thereby stands apart from relationships that are not protected by a class privilege but that may still be protected on a case-by-case basis (as, for example, doctor/patient, psychologist/patient, journalist/informant and religious communications). The latter may be protected if, in a given situation, they satisfy the four criteria of the Wigmore test,²⁰ but otherwise communications within those relationships are susceptible to disclosure.

Footnote(s)

1 See, e.g., *R. v. Fehr* (1984), 10 C.C.C. (3d) 321 , at 329, [1984] A.J. No. 720 (Alta. Q.B.), affd (1985), 14 D.L.R. (4th) 128 , [1985] A.J. No. 2601 (Alta. C.A.).

2 For example, see *Solosky v. Canada*, [1980] 1 S.C.R. 821 , at 833-35, [1980] S.C.J. No. 130 (S.C.C.), per Dickson J. (as he then was).

3 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 , 81 D.L.R. (4th) 211 , at 232, [1991] S.C.J. No. 53 (S.C.C.).

4 *Smith v. Jones*, [1999] 1 S.C.R. 455 , [1999] S.C.J. No. 15 , at para. 46 (S.C.C.); *R. v. Campbell*, [1999] 1 S.C.R. 565 , [1999] S.C.J. No. 16 , at para. 49 (S.C.C.); *Geffen v. Goodman Estate*, *ibid.*, at 231 (D.L.R.); *R. v. Gruenke*, [1991] 3 S.C.R. 263 , 67 C.C.C. (3d) 289 , at 305, [1991] S.C.J. No. 80 (S.C.C.), per Lamer C.J.C.; *Greenough v. Gaskell* (1833),

1 My. & K. 98, 39 E.R. 618 (Ch.); *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, at 649 (C.A.); *Re Canada (Combines Investigation Act)*, [1975] F.C. 184, 55 D.L.R. (3d) 713, at 721-22, [1975] F.C.J. No. 38 (F.C.A.); *Flack v. Pacific Press Ltd.* (1970), 14 D.L.R. (3d) 334, at 336-40, [1970] B.C.J. No. 631 (B.C.C.A.).

5 *Re Combines Investigation Act* (1972), 26 D.L.R. (3d) 745, at 746, [1972] B.C.J. No. 100 (B.C.S.C.), *per* Munroe J. The criteria for the existence of solicitor client privilege were set out by the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, at para. 15 (S.C.C.). See also *Greenough v. Gaskell*, *ibid.*; *Kulchar v. Marsh*, [1950] 1 W.W.R. 272, at 274, [1949] S.J. No. 38 (Sask. Q.B.).

6 *Solosky v. Canada*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, at 760, [1980] S.C.J. No. 130 (S.C.C.); *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, at 232, [1991] S.C.J. No. 53 (S.C.C.); *Smith v. Jones*, [1991] 1 S.C.R. 455, [1999] S.C.J. No. 15 (S.C.C.).

7 *McCarthy, Tétrault v. Ontario* (1993), 95 D.L.R. (4th) 94, [1993] O.J. No. 1680 (Ont. Prov. Div.).

8 *Solosky v. Canada*, [1980] 1 S.C.R. 821, [1980] S.C.J. No. 130 (S.C.C.); *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43 (S.C.C.); *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455, [1999] S.C.J. No. 15 (S.C.C.).

9 [2001] 1 S.C.R. 445, [2001] S.C.J. No. 13 (S.C.C.).

10 [2002] 2 S.C.R. 185, [2002] S.C.J. No. 35 (S.C.C.).

11 [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61 (S.C.C.).

12 [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16 (S.C.C.).

13 [2006] 2 S.C.R. 319, [2006] S.C.J. No. 39, at para. 24 (S.C.C.).

14 [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45 (S.C.C.).

15 [2003] 3 S.C.R. 193, [2003] S.C.J. No. 69 (S.C.C.).

16 *Ibid.*, at para. 12.

17 [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61 (S.C.C.).

18 *Ibid.*, at para. 36.

19 *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45 (S.C.C.).

20 *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, [2008] O.J. No. 983,

at para. 24 (Ont. C.A.). See this chapter, § 14.271.

Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed.

CHAPTER 14 - PRIVILEGE

II. CONFIDENTIAL COMMUNICATIONS WITHIN SPECIAL RELATIONSHIPS

C. Solicitor and Client

6. Use of Agents

§14.101 A lawyer, in the ordinary course of his or her practice, utilizes employees such as articling students, law clerks and secretaries. Communication to such agents for the purpose of facilitating the obtaining of legal advice is equally protected.¹ The same can be said about the client's agents, so long as they are employed as his or her agents for the purpose of obtaining legal advice.² That is so, notwithstanding that the agent may add something to the communication as a product of his or her own skill. Accordingly, communications by a client to an accountant, who then lays the matter before a solicitor with his or her own comments or advice, are protected.³ If, however, the communication is made to a person who must consider and act upon it himself or herself, no privilege arises, even though the result of the decision may necessarily be the retention of a solicitor. In *Goodman & Carr v. M.N.R.*,⁴ an accountant's opinion was sent to the client's lawyer at the client's request. It was held not to be privileged because the agent was not an agent for the client seeking legal advice, but was really offering his own opinion. Because these communications through agents are not normally made in a litigious atmosphere, this situation must be distinguished from the case where a third party is retained to obtain facts or to make a report to assist the client or his or her solicitor in litigation.⁵

§14.102 Some controversy has arisen as to whether an individual can be appropriately characterized as an agent of the solicitor so that communications between them attract solicitor-client privilege. This has arisen particularly in the context of insurance adjusters who provide information to defence counsel. In *General Accident Assurance Co. v. Chrusz*,⁶ the Ontario Court of Appeal held that an adjuster was not an agent of the insurer's solicitor and accordingly solicitor-client privilege would not protect his reports from disclosure. If there was to be protection, it would have to be considered under the separate and distinct litigation privilege⁷ rather than solicitor-client privilege.

§14.103 The New Brunswick Court of Appeal in *Lamey (Litigation Guardian of) v. Rice*,⁸ without referring to the *Chrusz* decision, came to the opposite conclusion, holding that the adjuster, in carrying out an investigation, was indeed acting as agent of the client at the direction of the client's lawyer, and as a result produced documents to assist the lawyer in advising the client. Therefore the

file was protected by solicitor-client privilege because of the agency relationship.⁹

§14.104 The better position is that of Doherty J.A. in *Chrusz* to the effect that in order to attract solicitor-client privilege, the notion of agency should not be extended to all situations where the individual assists the lawyer in formulating legal advice for a client. To constitute agency, the role should be limited to circumstances where the individual is merely a conduit or channel of communication from the client. It would also include a person who acts as a messenger or translator, or who has assembled information provided by the client to explain to the lawyer in order to obtain legal advice. The function of the third party must be central to the solicitor-client relationship as, for example, where the client authorizes the third party to direct a lawyer to act for the client or where the client authorizes the third party to seek legal advice from the lawyer on behalf of the client.

§14.105 The British Columbia Court of Appeal in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*¹⁰ adopted Doherty J.A.'s analysis and concluded that third party communications fall within solicitor-client privilege only where the third party is performing a function on the client's behalf that is integral to the obtaining of legal advice, such that the third party is seen as standing in the shoes of the client.

§14.106 Once the individual engages upon an investigative function and gathers information from outside sources or proffers opinions in respect of his or her findings, then such individual, although retained by the solicitor, acts outside the narrow scope of "agency". There is a difference between communications with persons enlisted for the purpose of directly giving and receiving legal advice, and those communications or information from persons that relate to the legal problem in issue and are useful to the lawyer. Protection for such latter information that is generated from such persons should fall within an analysis under litigation privilege rather than solicitor-client privilege.¹¹

Footnote(s)

1 *Ibid.*; *Alcan-Colony Contracting Ltd. v. M.N.R.*, [1971] 2 O.R. 365 , [1971] O.J. No. 1528 (Ont. H.C.J.); *Susan Hosiery Ltd. v. M.N.R.*, [1969] C.T.C. 353 (Exch.).

2 *General Accident Assurance Co. v. Chrusz* (1998), 37 O.R. (3d) 790 , [1998] O.J. No. 1107 (Ont. Div. Ct.); (but see Garry D. Watson & Frank Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1999) 77 Can. Bar Rev. 315, who are critical of the Divisional Court's broad definition of "client's agents" so as to include claims adjusters hired by the insurer); *Wheeler v. LeMarchant* (1881), 17 Ch. D. 675, at 684 (C.A.).

3 *Susan Hosiery Ltd. v. M.N.R.*, [1969] C.T.C. 353 (Exch.); *Sunwell Engineering Co. v. Mogilevsky* (1986), 8 C.P.C. 14 , [1986] O.J. No. 174 (Ont. H.C.J.), leave to appeal refused (1986), 8 C.P.C. (2d) 14 n (Ont. Dist. Ct.). See also *Long Tractor Inc. v. Canada (Deputy Attorney General)* (1997), 162 Sask. R. 161, [1997] S.J. No. 841 (Sask. Q.B.).

4 [1968] 2 O.R. 814 , [1968] O.J. No. 1248 (Ont. H.C.J.).

5 See this chapter, § 14.178 ff.

6 (1999), 45 O.R. (3d) 321 , [1999] O.J. No. 1107 (Ont. C.A.).

7 See this chapter, § 14.178 ff. See also *Ontario (Liquor Control Board) v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401 , [2005] O.J. No. 3042 (Ont. C.A.).

8 (2000), 227 N.B.R. (2d) 295 , [2000] N.B.J. No. 271 (N.B.C.A.).

9 *Ibid.*, at para. 12; see *Edgar v. Auld* (2000), 225 N.B.R. (2d) 71 , [2000] N.B.J. No. 69 (N.B.C.A.), in which the Court makes reference to and relies upon *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 , [1999] O.J. No. 1107 (Ont. C.A.), for its holding in respect of the test for litigation privilege.

10 (2002), 9 B.C.L.R. (4th) 1 , [2002] B.C.J. No. 2779 (B.C.C.A.).

11 See Margaret L. Waddell, "Litigation Privilege and the Expert in the aftermath of *Chrusz*" (2001) 20 Advocates' Soc. J. 10 , at 14.

Indexed as:
Hopps-King Estate v. Miller

Between
Michael Daniels, Executor of the Estate of Edna Hopps-King and
Michael Daniels, plaintiffs, and
Dr. Charles Miller, Dr. Gilles Laferriere, Dr. Thomas Baitz,
H. Blakely, R.N., N. Harris, R.N., Cornwall General Hospital,
The Trustees of Cornwall General Hospital and The Trustees of
Hotel Dieu Hospital, defendants

[1998] O.J. No. 5556

83 O.T.C. 339

29 C.P.C. (4th) 23

84 A.C.W.S. (3d) 1062

Court File No. 95-CV-88574

Ontario Court of Justice (General Division)
Ottawa, Ontario

Master Beaudoin

December 21, 1998.

(10 pp.)

Practice -- Discovery -- What documents must be produced -- Documents relating to matters in issue -- Privileged documents, information possessed by professional regulatory body -- Medicine -- Liability of practitioners -- Negligence or fault -- Surgical operations by doctors.

Motion by the Hopps-King Estate for an order compelling production of certain documents for discovery. Miller was a doctor employed by Cornwall General Hospital. In February 1994, Miller performed heart bypass surgery on Hopps-King. Due to complications in the operation, Hopps-King suffered permanent kidney problems which required her to undergo dialysis treatment three times weekly until her death from kidney failure three years later. Dr. Miller's medical license was revoked because of an unrelated matter six months after the Hopps-King surgery. The Hopps-King

Estate sued both Dr. Miller and the Cornwall General Hospital for negligence. The Estate sought production of two types of documents. The first type was related to general complaints regarding Dr. Miller's medical practice. The second type constituted documents relating to proceedings involving Dr. Miller before the College of Physicians and Surgeons.

HELD: Motion allowed in part. The Court ordered production of documents relating to complaints regarding Dr. Miller. Information in the hospital records which related to Dr. Miller's health prior to and at the time of the surgery, the status of his application to the hospital for privileges as of the date of the surgery and general complaints with respect to his competence were relevant to the issue of whether the hospital failed to have competent medical personnel on staff at the relevant time. The documents involving complaints were not protected by peer review privilege, as they were provided by nurses and administrative staff who wanted to protect themselves rather than by fellow physicians, and there was no expectation that these documents would not be disclosed. Documents relating to proceedings involving Dr. Miller before the College of Physicians and Surgeons clearly were not subject to production as they were inadmissible in civil proceedings under section 36(3) of the Regulated Health Professions Act.

Statutes, Regulations and Rules Cited:

Regulated Health Professions Act, 1991, s. 36(3).

Counsel:

John Lundrigan, for the plaintiffs.

John Morris, for the defendant Cornwall General Hospital.

Daniel Boivin, for the defendants Dr. Charles Miller and Dr. Thomas Baitz.

1 MASTER BEAUDOIN:-- This motion is brought by the plaintiff for: (1) an order requiring the defendant the Cornwall General Hospital to produce for discovery the personnel file of the defendant Dr. Charles Miller; (2) in the alternative, an order requiring the Cornwall General Hospital to produce the personnel file of the defendant Dr. Charles Miller to the court for inspection, following which the court will determine which portions of the personnel file, if any, are to be produced for discoveries; (3) an order requiring the representative of the Cornwall General Hospital, Ms. Diane Cameron, to reattend examination for discovery at her own expense and answer questions regarding the renewal and suspension of Dr. Charles Miller's privileges; (4) an order requiring Dr. Charles Miller to reattend at examination for discovery at his own expense to answer certain questions surrounding the suspension of his licence in September of 1994 and to answer such further questions regarding the post-operative care provided to the late Edna Hopps-King.

The Facts

2 On February 7, 1994, the defendant Dr. Charles Miller performed an aorto-bifemoral bypass on Edna Hopps-King. The in the course of the surgery, the aorta was severed, and a hemorrhage ensued. While Dr. Miller successfully reattached the aorta, there was a complete occlusion to her renal arteries. Ms. Hopps-King subsequently suffered a complete permanent failure of her kidneys and was required to undergo dialysis treatment three times weekly until her death in October of 1997.

3 This statement of claim was issued on January 20th, 1995. It alleges, among other things, that the physicians who treated Hopps-King did not possess the skill, training and expertise needed to determine the nature and extent of her injuries; that they failed to inform Hopps-King adequately or at all of the risk she undertook by submitting or consenting to the surgical procedure; that the physicians were unqualified by reason or training or experience to properly and safely perform the bypass and failed to explain the limitations of their qualifications and experience. With regard to the defendant Cornwall General Hospital, the plaintiffs allege that it failed to ensure that the medical and nursing staff were adequately trained, clinically competent to understand and deal with Hopps-King's medical condition. The statement of claim was amended recently to include an allegation of negligence on the part of the defendant doctors with respect to the post-operative care provided to Edna Hopps-King.

4 A representative of the Cornwall General Hospital, Ms. Diane Cameron, was examined for discovery on September 18th, 1996. The defendant Dr. Charles Miller was examined for discovery on September 17th, 1996.

5 In response to this motion, Mr. Morris, on behalf of the Cornwall General Hospital, has firstly agreed to have the hospital's representative, Ms. Cameron, attend for a follow-up discovery as requested in the notice of motion. In addition, he has compiled all of the documents which may be classified as part of Dr. Miller's "personnel file" in five volumes which were produced for the court. Except for specific documents identified by the defendant hospital, this defendant took the position that the documents contained in these volumes were irrelevant to the proceeding, but did not object to producing them to the plaintiff for review on a without-prejudice basis. The defendant then submits that if the plaintiff considers any of these documents relevant and producible, the hospital is prepared to have the court decide, by reviewing the document, whether it is relevant and producible for the purposes of this proceeding. The defendant hospital then set out a number of documents which it characterized as "complaints" in relation to Dr. Miller's practice. The hospital took the position with respect to these documents that none of these documents concerned the plaintiff or contained "similar fact evidence" and are therefore irrelevant or inadmissible for the purpose of this proceeding. There is a second category of documents that this defendant objects to producing as they relate to proceedings before the College of Physicians and Surgeons. It is the position of the hospital that these documents are irrelevant and inadmissible because they contain no similar fact evidence and that their use in this proceeding is barred by section 36(3) of the Regulated Health Professions Act, 1991.

6 Before proceeding to that issue, the court will address the issue of whether or not Dr. Miller needs to reattend any questions or whether or not Ms. Cameron needs to answer any questions with respect to the subsequent revocation of Dr. Miller's licence and retirement in August 3rd, 1994, some six months after the surgery in question.

7 The court has had the benefit of reviewing these documents and is satisfied that none of these documents relate to the surgery on the late Edna Hopps-King. The court is also satisfied that it is not relevant to the allegations of negligence that have been specifically pleaded as against Dr. Miller and nor is it relevant to the alleged negligence of the defendant hospital.

Relevance

8 It is trite law to say that a party must produce every document that is relevant to the issues as pleaded in a proceeding. It is also trite law to say that relevance at discovery is broader than admis-

sibility at trial. A document may be produced for discovery notwithstanding that it may or may not be admissible at trial. A consideration of relevance always commences with the pleadings.

9 The plaintiff alleges that the defendant hospital failed to employ competent medical staff and alleges that the defendant doctor did not possess the necessary competent skills to perform a particular procedure. It is for this reason that he seeks production of the entire personnel file of the defendant doctor. In support, he relies on the decision of *Duras v. Welland General Hospital et al.* (1985), 51 O.R. (2d) 284 (S.C.).

10 In the alternative, the plaintiff submits that if the plaintiff is not entitled to the production of the complete file, then the plaintiff asks that the court inspect the file and order the production of portions of the file which pertain to (a) Dr. Miller's health prior to and at the time of surgery; (b) whether or not this application for privileges had been renewed at the date of the surgery which forms the subject matter of the litigation; (c) the circumstances of the suspension of Dr. Miller's licence and his privileges at the Cornwall General Hospital; (d) similar fact evidence of Dr. Miller's level of competency with respect to similar surgical procedures and his failure to properly advise patients of the risks associated with a particular procedure prior to surgery.

11 The court has already dealt with the question of Dr. Miller's licence and suspension. In responding to this motion, counsel for the defendant doctors submit that these personnel files contain evidence of character or similar fact evidence that would not be admissible at trial and, therefore, this evidence should not be submitted at discovery. Counsel for the defendant hospital maintains that these records are irrelevant and inadmissible because (a) they contain no similar fact evidence or (b) their use in the proceeding is barred by the Regulated Health Professions Act, 1991, section 36(3). In addition, the hospital claims "peer review privilege" associated with the documents.

12 Dealing firstly with the admissibility of similar fact evidence in civil cases, all parties have relied on excerpts from Sopinka on *The Law of Evidence in Canada*, and I will simply repeat the conclusion that is found at page 522 of that text:

It is apparent from the foregoing that while the rules relating to the admissibility of similar facts in civil cases reflect very strongly the influence of the "category" approach of the earlier criminal cases, they in fact focus on whether the evidence is relevant to the matter in issue. The categories of relevance are not closed and the inquiry should concentrate on determining relevance without the constraint of fitting the evidence into a particular pigeonhole. Moreover, prejudice, which dominates the determination of admissibility of similar fact evidence in criminal cases, plays a significantly lesser role in civil cases, and evidence of similar facts should be admitted if it is logically probative to an issue in the case as long as, to borrow the formula of Lord Denning, it is not unduly "oppressive or unfair" to the other side.

13 The court is satisfied that even though a more liberal approach is to be used with respect to the admissibility of similar fact evidence in civil cases, great care has got to be considered in respect of the admissibility of such evidence given its potential prejudicial nature. Accordingly, if the court were simply considering the claim as against Dr. Miller while reviewing these documents, the court would be looking narrowly at operation procedures that were sufficiently similar to the case at hand. However, when the court considers the allegations as against the hospital, namely that they failed to have competent medical personnel on staff at the relevant time, the issue is much broader. Dr.

Miller's competency, from the hospital's perspective, involves more than his skill with respect to this particular type of procedure. It involves all issues that address his competence as a surgeon. Accordingly, information in the hospital records which relate to Dr. Miller's health prior to and at the time of the surgery, the status of his application for privileges as of the date of the surgery and complaints of a general nature with respect to his competence are relevant and, in the court's view, producible for discovery purposes.

14 The court appreciates that this produces a peculiar result in that documents that might not otherwise be producible as against Dr. Miller will still come to light as a result of the claims as against the hospital - yet the basis of the claim as against the hospital is distinct. (See Duras). The trial judge will be able to deal with the issue of admissibility when this becomes necessary.

15 With respect to Dr. Miller's application for privileges, it is to be noted that his privileges to perform certain surgical procedures are to be renewed every year. At the time in question, Dr. Miller had applied for a renewal of his privileges on or about November of 1993. The formal approvals, however, did not occur until March and April of 1994, after the surgery. It does appear that there was a credentials committee meeting on January 18th, 1994, but minutes of that committee meeting were not available at Ms. Cameron's discovery. There is an issue as to whether or not the renewal of privileges proceeded in the usual fashion. Clearly, any and all records surrounding this issue ought to be produced. Those that are in the five volumes of material submitted by Mr. Morris appear to already be in the plaintiff's possession. It is principally with respect to these other documents which Mr. Morris characterizes as "the complaints" that the court has devoted its attention.

16 At the outset, Mr. Morris has identified a number of documents as being protected by the provisions of section 36(3) of the Regulated Health Professions Act, 1991, which section provides:

No record of a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, or a proceeding relating to an order under section 11.1 or 11.2 of the Ontario Drug Benefit Act 1993, c. 37.

17 I concur that this section prevents the disclosure of these records. Unlike those situations where a document may be produced at discovery with the question of admissibility to be left to the trial judge, there clearly is ability to admit these records at trial. It would defeat the purposes of the statute if documents that are clearly inadmissible at trial were somehow disclosed at discovery. An order for their production now would completely destroy the confidentiality purpose of the statutory provisions. Accordingly, the documents identified at Tabs 131, 159, 167, 168, 174, 175, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232, 233, 234, 235, 236, 243, 244, 252, 253, 254, 255, 256, 257, 258, 259, 275, 278, 290, 281, 282, 283, 284, 285, 286, 293, 295, 296, 308, 309, 310, 311, 312, 313, 314, 318, 319, and 321 need not be produced.

18 With respect to the remaining documents, the court has reviewed each of these. In the court's view, it is appropriate to consider the records for the year preceding the surgery. This is consistent with the annual renewal and review of Dr. Miller's privileges. It provides an appropriate balance between the issues of relevance and undue prejudice. The court has also considered the argument

that these documents are subject to the peer review privileges set out in the decision of *Smith v. Royal Columbian Hospital et al.* (1981), 123 D.L.R. (3d) 723 (B.C.S.C.). In that case, the documents in question concerned the suitability of a doctor to remain a member of the staff, and they were the records of the hospital's credentials committee. The documents were provided by other doctors. In this instance the majority of the documents are not produced by Dr. Miller's fellow physicians. Most of these documents come from administration or from nursing staff. These are not documents that were originated in confidence and with the expectation that they would not be disclosed. As a matter of fact, these documents were probably originated by others in order to protect themselves. There was no expectation that these would not be disclosed. The four elements of confidentiality and privilege as set out in the *Smith* case are clearly not met here. Accordingly, the following "complaint" documents are relevant to the issues of negligence as against the defendant hospital and are to be disclosed: Tab 133, 143, 144, 148, 149, 150, 151, 152, 153, 267, 270, 195, 197, 200, 201, 202, 204, 206, 208, 267, and 270. All of these documents are producible documents in that they relate to Dr. Miller's general competence to do surgery in the year preceding the surgery on Ms. Hopps-King and are directly relevant with respect to the hospital's negligence in terms of granting of privileges at the relevant time.

19 The parties may make written submissions to the court with respect to the issue of costs.

MASTER BEAUDOIN

qp/d/bbd/DRS

Case Name:

Apotex Inc. v. Canada

Between

**Apotex Inc., appellant, and
Her Majesty the Queen, Bristol-Myers Squibb Canada Inc.
and Bristol-Myers Squibb Company, respondents**

[2005] F.C.J. No. 1021

[2005] A.C.F. no 1021

2005 FCA 217

2005 CAF 217

337 N.R. 225

41 C.P.R. (4th) 97

140 A.C.W.S. (3d) 47

Docket A-476-04

Federal Court of Appeal
Toronto, Ontario

Rothstein, Nadon and Sharlow JJ.A.

Heard: April 28, 2005.

Judgment: June 9, 2005.

(42 paras.)

Civil evidence -- Admissibility -- Relevancy -- Appeal from dismissal of appeal, reported at [2004] F.C.J. 1469, allowed in part.

Civil procedure -- Discovery -- Examination for discovery -- Range of examination -- Objections and compelling answers to questions.

Civil procedure -- Discovery -- Examination for discovery -- Range of examination -- Relevant evidence.

Civil procedure -- Appeals.

Intellectual property law -- Patents -- Particular subject matter -- Medicines.

Appeal by Apotex from the dismissal its appeal from a decision ordering it to answer questions posed by Bristol-Meyers during examinations for discovery. Apotex had refused to answer the question based on relevance. The questions related to applications filed by Apotex for listing on provincial drug formularies, whether a drug manufactured by Apotex infringed a patent, and Apotex's conduct in prosecuting a judicial review application against the Minister. A prothonotary ordered Apotex to answer the questions, and a federal court judge upheld that decision.

HELD: Appeal allowed in part. Apotex did not concede to the relevancy of questions about its applications for listing on provincial drug formularies by undertaking to provide information on them, because the undertaking only required Apotex to produce the applications if they disclose something relevant. Apotex did not need to answer questions about the applications. The trial judge was correct in finding that questions regarding whether Apotex infringed a patent were relevant and Apotex was ordered to answer them. The questions related directly to the dispute between the parties. The judicial review application was also relevant because Apotex made specific allegations against Bristol-Meyers in the application. Apotex was ordered to answer questions on these issues.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, Rules 222(2)

Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133

Counsel:

Julie Rosenthal, for the appellant.

Patrick Smith, for the respondent (Bristol-Myers Squibb).

Marc Richard, for the respondent (Bristol-Myers Squibb).

The judgment of the Court was delivered by

1 NADON J.A. :-- This is an appeal from a decision of von Finckenstein J. of the Federal Court,

[2004] F.C.J. No. 1469, 2004 FC 1220, dated September 7, 2004, who dismissed the appellant's appeal from a decision of Prothonotary Tabib. In her decision dated June 24, 2004, the learned Prothonotary ordered the appellant to answer a number of questions posed by the respondents, Bristol-Myers Squibb Canada Inc. and Bristol-Myers Squibb Co. (together, "BMS") during the course of examinations on discovery.

Background

2 On March 26, 2002, the appellant filed a statement of claim in the Federal Court against BMS, claiming damages or accounting of profits by reason of BMS' initiation, on November 18, 1999 in file T-2020-99, of an application for prohibition against the appellant under the Patented Medicines (Notice of Compliance) Regulations (the "Regulations") and the subsequent failure of BMS to discontinue, in a timely manner, its application. I should point out that on February 23, 2001, BMS discontinued its prohibition proceedings.

3 The appellant also seeks damages against Her Majesty the Queen by reason of the Minister of Health's (the "Minister") refusal to diligently process its Abbreviated New Drug Submission ("ANDS") for its drug Apo-Pravastatin.

4 BMS' application for prohibition was commenced following receipt by BMS in October 1999 of notices of allegation from the appellant in respect of BMS' patents 1,150,170 (the "'170 patent") and 1,323,836 (the "'836 patent").

5 Prior to sending its notices of allegation, the appellant had taken the position that it was not obliged, under the Regulations, to issue such notices by reason of the fact that its ANDS for Apo-Pravastatin, submitted to the Minister on December 23, 1998, did not make any comparison to BMS's patents.

6 The Minister did not agree with the appellant and took the position that the appellant was obliged under the Regulations to issue notices of allegation to BMS in respect of patents '170 and '836. Further, the Minister indicated to the appellant that he would not process its ANDS until such time as it had sent notices of allegation to BMS. In the event, the Minister did not begin to review the appellant's ANDS until October 2000. The Minister completed his review by February 21, 2001, and issued a notice of compliance to the appellant on February 27, 2001. The appellant claims damages against Her Majesty the Queen for the resultant delay.

7 Following the commencement of the appellant's action against the respondents in March 2002, examinations for discovery were conducted in 2003 during the course of which the appellant refused to answer a number of questions posed by BMS on the grounds of relevance. As a result, BMS brought a motion to compel answers to these questions.

8 On June 24, 2004, Prothonotary Tabib ordered that certain questions were to be answered. The appellant appealed that decision and, on September 7, 2004, von Finckenstein J. dismissed the

appellant's appeal, concluding that the questions at issue were relevant and, hence, that the Prothonotary had made no reviewable error.

9 By its appeal to us, the appellant seeks an order setting aside von Finckenstein J.'s decision, and dismissing BMS' motion to compel answers to the questions at issue.

10 The parties have conveniently organized the questions at issue into three groups, namely:

1. Questions relating to applications filed by the appellant for listing on provincial drug formularies;
2. Questions relating to whether the appellant's drug Apo-Pravastatin is manufactured by a process that infringed the '170 patent.
3. Questions relating to the appellant's conduct in prosecuting a judicial review application against the Minister by reason of his refusal to process the ANDS for its drug Apo-Pravastatin.

11 Before turning to the questions at issue, a few words regarding the standard of review which the motions Judge was bound to apply in reviewing the decision of Prothonotary Tabib. In *Merck & Co. v. Apotex Inc.* (2003), 28 C.P.R. (4th) 491 at para. 9, our Court explained the standard in the following terms:

[9] It is common ground that when a motions judge hears an appeal from a prothonotary, assuming that no questions vital to the final issue of the case are involved, the reviewing judge can only exercise his or her own discretion in place of the prothonotary's if he or she concludes that the exercise of discretion by the prothonotary "was based upon a wrong principle or upon a misapprehension of facts" (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.) at para. 95). In the present case the question for this Court is whether the prothonotary's decision was based upon a wrong principle. If so, the learned motions judge should have set it aside and exercised his own discretion.

12 In *Merck and Co., Inc. v. Apotex Inc.* (C.A.), [2004] 2 F.C. 459, Décary J.A., writing for a unanimous Court on this point, reformulated the test put forward by MacGuigan J.A. in *Canada v. Aqua-Gem Investments Ltd.* (C.A.), [1993] 2 F.C. 425, in order to dissipate confusion which, in his view, had arisen from the wording used by MacGuigan J.A. At paragraph 19 of his Reasons, Décary J.A. wrote:

[19] To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage

in the process of determining whether the orders are clearly wrong. The test would now read:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

- a) the questions raised in the motion are vital to the final issue of the case, or
- b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[Emphasis added]

13 At paragraph 20 of his Reasons, Décary J.A. then briefly averred to the test by which we are to review von Finckenstein J.'s decision herein:

[20] With respect to the test to be applied by this Court on an appeal from a judge's decision, the Supreme Court of Canada, in *Z.I. Pompey Industrie v. ECU-Line N.V.* (2003), 224 D.L.R. (4th) 577, held at para. 18 that the Federal Court of Appeal may only interfere with the decision of the applications judge where the judge "had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if [the judge's] decision was arrived at on a wrong basis or was plainly wrong".

[Emphasis Added]

14 As neither party has taken the position that the questions raised by Apotex in its motion before the Prothonotary were vital to the final issue of the case, the motions Judge could only intervene if the Order made by the Prothonotary was clearly wrong.

15 As the issue before the learned Prothonotary was one of relevancy, I should indicate that the correct approach to that issue at the stage of discovery was enunciated by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856, where Urie J.A., writing for the Court at page 2 of the decision, stated:

[...] The correct test of relevancy for purposes of discovery was, in our opinion, propounded by McEachern C.J. in the case of *Boxer and Boxer Holdings Ltd. v. Reesor, et al.* (1983), 43 B.C.L.R. 352 (B.C.S.C.) When, at page 359, he said:

It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.

16 We recently reaffirmed that test in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] F.C.J. No. 837, 2002 FCA 229. At paragraphs 24 and 25 of her Reasons for the Court, Madam Justice Sharlow wrote in the following terms:

[24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[25] The "train of inquiry" test for documentary discovery was expressly approved by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856, 55 N.R. 73, 79 C.P.R. (2d) 138 (F.C.A.), adopting the test from *Boxer v. Reesor* (1983), 43 B.C.L.R. 352, 35 C.P.C. 68 (B.C.S.C.). See also *Ikea Ltd. v. Idea Design Ltd.*, [1987] 3 F.C. 317, 13 F.T.R. 306, 16 C.P.R. (3d) 65 (F.C.T.D.) and *Oro Del Norte, S.A. v. The Queen* (1990), 35 F.T.R. 107, [1990] 2 C.T.C. 67, 90 D.T.C. 6373 (F.C.T.D.).

17 With those remarks in mind, I now turn to the motions Judge's decision and the grounds put

forward by the appellant in seeking to set aside that decision.

18 I begin with the first group of questions, i.e. those relating to applications filed by the appellant for listing Apo-Pravastatin on provincial formularies. The motions Judge concluded that these questions were relevant and, hence, found no error with the Prothonotary's decision. In his view, by giving an undertaking regarding provincial formularies, counsel for the applicant had implicitly conceded the relevancy of the questions.

19 The undertaking on which the Judge relied for his determination can be found at pages 23 to 25 of the transcript of the evidence of Dr. Bernard Sherman (Appeal Book, Vol. II, pages 280-282), the appellant's witness, and it is as follows:

MR. CREBER: I have outstanding the question as to how the Ontario government was able to determine interchangeability. If you could provide a more complete answer on that, I would appreciate it.

MR RADOMSKI: I don't understand the question. You want us to go into the mind of the Ontario regulator to decide how the Ontario regulator determined that the Apotex product would be interchangeable?

MR. CREBER: Let's back up.

Q. You are aware that your company has to apply to the Ontario government to be listed on the formulary?

A. Yes.

Q. Therefore, there is a document that made such an application?

A. Yes.

Q. Can I see that document?

MR. RADOMSKI: Why Is that document relevant?

MR. CREBER: In there I assume that there would be references to the comparative bioavailability studies that were forwarded by the federal government.

MR. RADOMSKI: Here is what I am prepared to do.

THE WITNESS: That would be long after any relevant event.

MR. RADOMSKI: I appreciate that. I will look through the provincial submission, in light of the issue as you have identified it and, if there is anything relevant, we will produce it.

- - - UNDERTAKING

MR. CREBER: I would ask also for the other provinces and territories and private formularies in that request.

MR. RADOMSKI: You are asking for a lot. Dr. Sherman has pointed out that the provincial submission post-dates the federal submission and the federal Notice of Compliance. The issue has nothing to do with the provinces: it has only to do with the federal regulations.

I will look through the Ontario submission and, if there is anything relevant in there, we will produce it. If there is nothing relevant in there, then there is nothing to produce. If there is something relevant in the Ontario submission, I will then consider whether we will look at the other provinces' submissions.

20 As I understand the undertaking, counsel for the appellant agreed to produce the appellant's applications to the Ontario Government, to the other provinces and territories and to private formularies, to the extent only that "there is something relevant", i.e. that there was a reference to the comparative bioavailability studies forwarded by the federal government. Consequently, I cannot see how the undertaking can be read as constituting an implicit recognition by the appellant that Apotex' applications to be listed on provincial formularies were relevant to the issues between the appellant and BMS.

21 I am therefore of the view that the Judge was clearly wrong in finding, as he did, that the point of relevance had been conceded by the appellant. There can be little doubt that the debate between the parties pertains to the filing of the appellant's ANDS with the Minister and, specifically, whether the appellant's ANDS makes reference to BMS' patents. This appears quite clearly from the

pleadings and, in particular, from paragraph 25 of the appellant's Statement of Claim, paragraphs 10 and 14 of BMS Canada's Statement of Defence and paragraphs 12 to 16 of BMS US' Statement of Defence.

22 I should point out that no issue is raised in the pleadings concerning the appellant's provincial filings.

23 In supporting the Judge's conclusion on this issue, BMS argued that the questions were relevant, not only on the pleadings, but by reason of the appellant's conduct and the remedy that it seeks.

24 With respect to the pleadings, BMS says that if there is a reference in the provincial formularies to their patents, then the questions are clearly relevant. I cannot agree. Firstly, provincial formularies are not raised in the pleadings and, secondly, as I have just indicated, the issue between the parties concerns the appellant's ANDS filed with the Minister.

25 With respect to the appellant's conduct and the remedy sought, BMS argues, inter alia, that if the sales of a generic product depend, in great part, on the provincial listings, the dates of these listings are crucial in determining the appellant's damages. Assuming, but without deciding, that the dates of the provincial listings are relevant, I still do not see how this makes the provincial filings, per se, relevant.

26 I therefore conclude that the Judge erred in concluding that the questions of group one were relevant. In my view, they clearly were not relevant and, as a result, the Judge ought to have interfered with the Prothonotary's decision. Consequently, the appellant need not answer these questions.

27 I now turn to the second group of questions which pertain to whether the appellant's Apo-Pravastatin was manufactured by a process which infringed BMS' '170 patent.

28 The judge, after referring to paragraph 21 of the appellant's Statement of Claim, where the appellant alleges that its drug was manufactured by a non-infringing process, and to paragraphs 17 and 18 of the BMS respondents' respective Statements of Defence, where the appellant's allegations are denied, concluded that the questions were relevant because the questions were directed at facts that were in dispute between the parties.

29 If, as the appellant argues, the questions at issue, although raised in the pleadings, are not relevant because the '170 patent expired in July 2000 and that the only period of time at issue between it and BMS is February 21 to February 27, 2001, then the allegation in paragraph 21 of its Statement of Claim should, as the judge held, have been withdrawn.

30 Before concluding on this point, I wish to point out that at paragraphs 2(a) and 44 of its Statement of Claim, the appellant seeks damages from BMS by reason of its initiation of prohibition

proceedings, and that at paragraph 10 of its Reply to BMS' Statements of Defence, the appellant alleges that BMS ought never to have commenced its proceedings. In the light of these allegations, it is perfectly understandable why BMS would wish to make inquiries with regard to the process used by the appellant to manufacture Apo-Pravastatin.

31 I am therefore of the opinion that the motions Judge made no reviewable error as far as this group of questions is concerned.

32 I now turn to the final group of questions, i.e. those that pertain to the appellant's refusal to answer questions relating to the judicial review application which it commenced as a result of the Minister's refusal to process its ANDS. Specifically, the appellant refused to produce the affidavit of Dr. Bernard Sherman, its President, filed in support of the judicial review application, on the grounds that the application and the affidavit were not relevant to its claim against BMS.

33 At paragraphs 27 and 28 of his Reasons, the motions judge concluded, in the following terms, that the documents were relevant:

[27] I find it difficult to accept this argument. Having produced the mandamus application (which it intends to rely on for some purpose) which refers to the supporting affidavit, it is incumbent on Apotex to produce this referenced affidavit. It may well be totally irrelevant to BMS Canada and BMS US as Apotex claims. However, without examining that document it is impossible to determine its relevance. At this point only Apotex knows the contents of the affidavit and its relevance.

[28] It may or may not be relevant for instance, to an assessment of the conduct of Apotex. This litigation is based on s. 8 of the Patented medicines (Notice of Compliance) Regulations. In such proceedings, the conduct of the first or second person which contributed to the delay is relevant to the quantum of damages. The affidavit in question may or may not shed light on the conduct of Apotex. As long as Apotex does not withdraw this document, it must produce supporting documents referenced therein.

34 The appellant says that its judicial review application, brought against the Minister on November 25, 1999, in Court file T-2074-99, and ultimately discontinued, is not in issue between it and BMS. In its view, the Judge erred in finding relevance on the basis that the notice of application appeared in its affidavit of documents filed under rule 223 of the Federal Court Rules, 1998.

35 The appellant says that it was bound to include the notice of application in its affidavit of documents by reason of rules 222 and 223, which require a party to disclose all documents that may be relevant to an issue, whether or not it intends to rely on these documents. Thus, since the notice of application is no doubt relevant to the issues between the appellant and Her Majesty the Queen,

the appellant says that it had no choice but to include the document in its affidavit of documents.

36 The appellant, therefore, takes issue with the motions Judge's conclusion that in listing the notice of application in its affidavit of documents, the appellant must have intended to rely on it "for some purpose". In my view, in so concluding, the motions Judge was clearly in error. Rule 222(2) makes it clear that all documents relevant to an issue between the parties must appear in an affidavit of documents, whether or not the party filing the affidavit intends to rely on the document. Rule 222(2) reads as follows:

222. (2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

* * *

222. (2) Pour l'application des règles 223 à 232 et 295, un document d'une partie est pertinent si la partie entend l'invoquer ou si le document est susceptible d'être préjudiciable à sa cause ou d'appuyer la cause d'une autre partie.

37 There can be no doubt that the appellant's application for judicial review in Court file T-2074-99 and the matters raised therein are relevant to the issues between the appellant and Her Majesty the Queen. The question for determination herein is whether the appellant's judicial review application and, hence, Dr. Sherman's affidavit, have any relevance to the issues between BMS and the appellant.

38 In support of the Judge's conclusion on this point, BMS point to his finding that Dr. Sherman's affidavit may shed light on the appellant's conduct and, as a result, is relevant. BMS further argues that it does not lie with the appellant to make general allegations against all respondents, and then to attempt to limit the debate by taking the position that certain of these allegations do not pertain to its claim against BMS.

39 I have carefully reviewed the appellant's Statement of Claim and its Reply to BMS' Statements of Defence, and I am of the view that in light of the allegations found in the appellant's pleadings against it, BMS is entitled to discover the appellant in regard to its judicial review application and, hence, in regard to Dr. Sherman's affidavit.

40 Since the appellant makes specific allegations against BMS regarding its decision to commence prohibition proceedings and is claiming damages caused to it by reason of the commencement of those proceedings, BMS should be allowed, in my view, to discover the appellant with respect to all facts, including those pertaining to its conduct, which might have a bearing on the damages sought. In that regard, it is relevant, in my view, for BMS to, inter alia, know why the appellant delayed the sending of its NOA.

41 Consequently, I cannot conclude that the Judge made a reviewable error in refusing to interfere with the Prothonotary's decision.

42 For these reasons, I would allow the appellant's appeal in part, I would set aside the Federal Court's decision insofar as the questions of group one are concerned, and I would accordingly dismiss BMS' motion to compel answers to the questions found in that group. In the circumstances, I would make no order as to costs.

NADON J.A.

ROTHSTEIN J.A.:-- I agree

SHARLOW J.A.:-- I agree

cp/e/qlspg/qlhcs

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.

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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.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

[page138]

Jack Woodward, Robert J. M. Janes and Patricia Hutchings, for the appellant.

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Monique Rousseau, for the intervener the Attorney General of Quebec.

Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.

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Solicitors for the appellant: Woodward & Company, Victoria.

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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.

[page142]

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

28. ...

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for

any or all of the following purposes, namely,

- (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

C. Westbank Indian Band Taxation By-law (1990)

2. (1) As provided in this by-law, and for raising revenue for local purposes,

- (a) land and interests in land are subject to taxation;
- (b) subject to any exemption contained in this by-law, every interest holder of land shall be assessed and taxed on his interest in such land...

D. Westbank Indian Band Assessment By-law (1990)

36. (1) Land held or occupied by a municipality or the Crown in Right of the Province of British Columbia, held or occupied by, or on behalf of, a municipality or the Crown in Right of the Province of British Columbia, is, with the improvements on it, liable to assessment under this section, subject to the Constitution Act, S.C.

IV - Judgments Below

A. Supreme Court of British Columbia (1996), 138 D.L.R. (4th) 362

8 Downs J. held that s. 125 of the Constitution Act, 1867, exempted B.C. Hydro from taxation imposed by the appellant. At trial, the parties agreed that the respondent is an agent of the provincial Crown and that s. 125 applies to agents of [page143] the Crown. The appellant argued that s. 125 only confers immunity from taxation imposed under s. 91(3) of the Constitution Act, 1867, and the tax imposed in this case was founded on s. 91(24) of the Constitution Act, 1867. This argument was also rejected by Downs J., who held that the legislation in pith and substance fell under s. 91(3) of the Constitution Act, 1867. Downs J. distinguished this type of tax from regulatory charges, which would not attract the scrutiny of s. 125.

9 Downs J. further rejected the appellant's alternative argument that the Westbank by-laws bound the Crown because of s. 17 of the Interpretation Act. After reviewing s. 17 of the Interpretation Act, Downs J. held that s. 83(1)(a) of the Indian Act did not expressly bind the Crown, nor would the Band's taxation regime be "wholly frustrated" if the Crown were not bound. Therefore, she held that s. 83(1)(a) and the Westbank by-laws were not binding on the provincial Crown by implication.

10 Related to this issue was the argument that the respondent was bound to accept the burden of the assessment by-law because it accepted the benefit of the permits for the rights of way. Here, Downs J. held that there was no nexus between the permits and the taxes, given that the respondent held the permits long before s. 83 of the Indian Act was enacted. Further, the by-law itself expressly stated that it was subject to the Constitution Act, and as such, the "benefit/burden" principle did not apply.

11 Downs J. also rejected numerous other arguments advanced by the appellant, which either have not been appealed or have been conceded by the appellant before this Court. As such, Downs J. granted the respondent's application for summary judgment.

[page144]

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?

[page145]

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".

[page147]

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".

[page149]

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).

[page152]

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.

[page153]

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.

[page159]

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**

[page132]

**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.

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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.

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 disproportionately exceed the costs of the regulatory scheme. In either case, the charge qualifies as a tax which is *ultra vires* the Minister's powers.

VI. Respondent's Position

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

[page140]

VII. Selecting the Appropriate Regulatory Scheme

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

VIII. Analysis

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

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

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

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

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

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

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

2. *Regulatory Charges Distinguished From User Fees*

19 It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, "courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice" (see *Eurig*, at para. 22).

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

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

3. *The Characteristics of a Tax*

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

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

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

4. *Distinguishing a Regulatory Charge From a Tax*

24 The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J. in *Westbank* added a fifth consideration to those articulated by Duff J. in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para. 43). This fifth consideration provides that even if the levy has all [page144] the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

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

[A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of ac-

tual 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 bene-

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

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

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

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

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

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

Step 2: The Relationship Between the Business Licence Fees and the Regulation of Jasper National Park

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

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

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

In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless.

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

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

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

43 In the corporate plan of the Parks Canada Agency for 2004/2005 to 2008/2009, fee revenue from all of Canada's national parks in 2003/2004 amounted to approximately \$78 million against costs of \$519 million or approximately 15 percent of the costs (Respondent's Record, at pp. 63-66). Although fee revenue as a percentage of cost is very low overall, considering the revenue/cost relationship for all of Canada's parks is a tenuous basis for inferring the revenue/cost relationship in one particular park. However, Mr. Alan Latourelle, Chief Executive Officer of the Parks Canada Agency, speaking to a Parliamentary Committee in 2005, testified that "[Parks Canada] generate[s]

about \$43 million in our [M]ountain [P]arks, and our actual expenditures -- total, including capital - - are about \$60 million" (House of Commons, Standing Committee on Environment and Sustainable [page151] Development, *Evidence*, 1st sess., 38th Parl., May 19, 2005, at p. 7). Although not clearly stipulated in the minutes of the Committee, from the context of the discussion and the date of his appearance, it appears Mr. Latourelle was referring to the revenues and expenditures for 2003/2004.

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

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

[page152]

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

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

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

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

6. *Proprietary Charges*

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

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

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

IX. Conclusion

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

* * * * *

APPENDIX

Constitution Act, 1867

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

[page154]

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

all Matters coming within the Classes of Subjects next herein-after enumerated;
that is to say, --

...

1A. The Public Debt and Property.

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

...

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

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

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

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

...

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

...

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

...

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

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

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

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

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

20. ...

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

...

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

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

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

24. The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of calculating [page156] fees in respect of products, rights or privileges provided by the Agency.

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

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

4. ...

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

National Parks General Regulations, SOR/78-213

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

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

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

Solicitors:

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

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

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

cp/e/qllls

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 [page 514] 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 contin-

ued 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]

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

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History and Disposition:

APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Gendreau and Brossard J.J.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 Phillion*, 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.

[page517]

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.

[page518]

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 constitu-

tional. 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 pro-

vincial 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*?

[page524]

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.

[page525]

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

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

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

1867. Finally, the appellants argue that the accumulation of surpluses and the allocation of those surpluses to overall federal expenditures, including public debt reduction, are contrary to the principles that determine the constitutional framework for collecting and using employment insurance premiums.

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

D. *Parliament's Unemployment Insurance Power*

23 In their arguments, the appellants and the Attorney General of Canada display conflicting visions of the scope of Parliament's unemployment insurance power. The appellants take the position that this power is essentially limited to the payment of benefits during periods of unemployment and the collection of money to pay those benefits. They stress that a close relationship must be maintained between the premiums imposed on employers and employees and the system those premiums are used to finance. According to the respondent's interpretation, the Parliament of Canada may adopt active measures to prevent unemployment or alleviate its consequences.

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

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

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

This means that when the Constitution was amended, a portion of the jurisdiction over property and civil rights was detached so that the aspects relating to unemployment insurance could be assigned to Parliament.

(*Reference*, at para. 37)

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

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

(*Reference*, at para. 39)

[page528]

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

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

(*Reference*, at para. 43)

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

30 In this analysis of the content of legislative powers, changes in the way such powers are exercised and in the interplay of the powers assigned to the two levels of government often raise difficult problems. The solutions that must be applied when exercising powers change where new problems must be addressed. However, the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system. The power in question must be interpreted generously, but in a manner consistent with its legal

context, having regard to relevant historical elements [page529] (*Reference*, at paras. 45-46; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 201-2).

31 Thus, according to this Court's decision in the *Reference*, the federal unemployment insurance power must be interpreted generously. Its objectives are to remedy the poverty caused by unemployment and maintain the ties between unemployed persons and the labour market. On this basis, the Court identified four characteristics of unemployment insurance plans under s. 91(2A):

With these principles and objectives in mind, four characteristics that are essential to a public unemployment insurance plan can be identified:

- (1) It is a public insurance program based on the concept of social risk
- (2) the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market
- (3) by paying temporary income replacement benefits
- (4) in the event of an interruption of employment.

(*Reference*, at para. 48)

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

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

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

E. *Impugned Legislative Measures*

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

36 The employment service program has, in one form or another, been part of the system since the beginning. And the appellants concede that measures involving participation in training pro-

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

[page531]

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

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

F. *Constitutional Validity of the Legislative Measures*

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

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

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

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

(b) for whom a benefit period has been established in the previous 60 months and who (i) was paid special benefits under section 22 or 23 during the benefit period,

- (ii) subsequently withdrew from active participation in the labour force to care for one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
- (iii) is seeking to re-enter the labour force.

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

[page533]

[TRANSLATION] The direct investment in question involves five measures provided for in section 59 of the *Employment Insurance Act*.

The first of these measures is the wage subsidy. A claimant may request that a wage subsidy be granted to an employer who will provide the claimant with a job that will lead to long-term employment or to employment with another employer. This measure is designed more specifically for people facing employment disadvantages who need time to become fully productive or who need work experience. Occasionally, this measure may enable employers to create a job that would otherwise not exist.

The second type of employment benefit is the earnings supplement. The purpose of such supplements is to increase, for temporary periods, the incomes of people who would otherwise find it difficult to accept jobs that pay less than their previous jobs. Earnings supplements offer claimants an opportunity to leave employment insurance for work before their income benefits expire.

Self-employment assistance is the third type of employment benefit. This program helps insured participants start businesses and helps them acquire, from service providers, the skills they need to make their proposed businesses viable. This assistance takes several forms, including consulting services and help in preparing a business plan. Insured participants continue to receive benefits while establishing their businesses.

The fourth measure, the job-creation partnership, is designed to create jobs that are sustainable in local economies where there is high unemployment and jobs are scarce. Partnerships may be entered into with the private sector, the provinces, local communities and community organizations in order to provide jobs compatible with provincial and local community plans and priorities for economic development. Such partnerships seem similar to the old job creation measures.

The fifth and final measure is a system of skills loans and grants. This type of financing enables an insured participant to attend an institution to develop needed job skills. In an explanatory document, Human Resources Development Canada stated that, since labour market training is a provincial responsibility, these benefits will be offered in any province only with the agreement of the provincial government. [paras. 77-82]

[page534]

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

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

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

[page535]

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

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

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

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

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

branch of the appeals, which relates to the financing of the system, the surpluses generated by the reforms to the system and the allocation of the surpluses.

G. *Scope of the Appellants' Constitutional Challenge*

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

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

52 It is therefore important to define the true purpose of the constitutional challenge. There is [page537] nothing unconstitutional about financing the system by requiring employers and employees to pay premiums. This has been the mechanism favoured by Parliament since the employment insurance system was established in 1940, as Gascon J. noted in the Superior Court (para. 202). However, there is no reason why Parliament could not have financed the system differently by means of its general taxing power under s. 91(3) of the *Constitution Act, 1867*. The new legislative power conferred on Parliament in 1940 fell within a constitutional framework that did not limit Parliament's legislative jurisdiction with regard to federal government activities. Parliament could have decided to finance the new system out of the taxes collected by the federal government. Indeed, this was the source of funding used to absorb deficits in the employment insurance system for several years.

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

H. *Changes in the Financing Scheme*

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

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

was employed until 1996, except during a few years when the premium rate was set in the Act itself (Gascon J., at para. 207).

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

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

58 Before the new mechanism began to be employed, Parliament set the premium rate for 1995 and 1996 at three percent of insurable earnings (*Budget Implementation Act, 1994*, S.C. 1994, c. 18, s. 26). That rate was maintained for 1996 pursuant to a transitional provision of the *Employment Insurance Act* (Schedule II, s. 12).

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

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

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

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

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

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

(An Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations, S.C. 2001, c. 5, s. 9)

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

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

[page540]

I. Surpluses

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

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

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

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

J. Constitutionality of the Premium-Setting Mechanism

67 The appellants, supported on this point by one intervener, the Canadian Labour Congress, submit that no provision of the Constitution authorized the premium-setting mechanisms that led to the accumulation of the surpluses in the Account and the use of those surpluses by the Government of Canada. They argue that the federal government misappropriated employment insurance monies. In short, the appellants submit that amounts collected as premiums were diverted from their intended purposes and allocated to the government's current expenditures, to deficit reduction and to restoring a balance in public finances. According to them, these amounts were also used to finance employment and economic development programs that fell outside the federal unemployment insurance power, as opposed to paying compensation during actual periods of unemployment.

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

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

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

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

72 This question of the validity of imposing regulatory charges has come before this Court on several occasions. In its decisions, the Court has accepted the use of regulatory charges to finance government programs and has developed tests for identifying such special levies. There are two steps in the identification process. First, the existence of a [page543] regulatory scheme must be established. According to the analytical approach adopted in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, there must be (1) a complete and detailed code of regulation, (2) a regulatory purpose of influencing specific behaviour, (3) the existence of actual or properly estimated costs of the regulation and (4) a relationship between the regulation and

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

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

66. The Commission shall, with the approval of the Governor in Council on the recommendation of the [page544] Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,

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

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

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

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

75 However, this conclusion does not resolve the issue of the legal effects of the situation resulting from the 2001 and 2004 amendments to the *Employment Insurance Act*, under which the power

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

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

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

78 Exactly the same wording was used for s. 66.3, which applied to 2005. Thus, the effect of ss. 66.1 and 66.3 was that s. 66 did not apply. As I mentioned above, s. 66 imposed rules that applied to the Commission's exercise of its regulatory authority and to the preparation of opinions by the Minister and the Minister of Finance. It required [page546] the Commission to set a premium rate that might establish relatively stable rate levels while at the same time ensuring that enough revenue would be collected to pay all authorized expenditures of the employment insurance system. This resulted in a framework under which it was possible to maintain a connection between the employment insurance program and its expenditures and revenues. It also ensured that premiums continued to constitute a regulatory charge within the meaning of *Westbank* and *Connaught*. When Parliament departed from s. 66 by passing ss. 66.1 and 66.3 in 2001 and 2004, this legal situation was radically altered. Every legal connection between revenues and expenditures disappeared. The collection of premiums ceased to be tied to the system and to its requirements, contrary to the principle laid down in *Westbank* (para. 44). The legal connection between the premium-setting system and the regulatory scheme ceased to exist.

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

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

K. *Violation of Section 53*

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

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

[page547]

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

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

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

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

[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.

...

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

...

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

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

(b) participating in any other employment activity

[page554]

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

...

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

- (a) harmonization with provincial employment initiatives to ensure that there is no unnecessary overlap or duplication;
- (b) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;
- (c) co-operation and partnership with other governments, employers, community-based organizations and other interested organizations;
- (d) flexibility to allow significant decisions about implementation to be made at a local level;
- (d.1) availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language;
- (e) commitment by persons receiving assistance under the benefits and measures to
 - (i) achieving the goals of the assistance,
 - (ii) taking primary responsibility for identifying their employment needs and locating services necessary to allow them to meet those needs, and
 - (iii) if appropriate, sharing the cost of the assistance; and
- (f) implementation of the benefits and measures within a framework for evaluating their success in assisting persons to obtain or keep employment.

[page555]

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

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

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

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

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

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

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

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

(a) encourage employers to hire them;

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

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

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

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

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

(2) The Commission shall

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

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

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

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

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

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

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

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

[page557]

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

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

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

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

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

(a) grants or contributions;

(b) loans or loan guarantees;

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

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

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

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

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

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

...

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

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

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

...

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

72. There shall be paid into the Consolidated Revenue Fund

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

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

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

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

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

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

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

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

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

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

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

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

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

Solicitors:

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

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

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

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

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

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

cp/e/qllls

Indexed as:
Eurig Estate (Re)

**Marie Sarah Eurig, as Executor of the Estate of Donald
Valentine Eurig, appellant;**
v.
**The Registrar of the Ontario Court (General Division) and the
Attorney General for Ontario, respondents, and
The Attorney General of Quebec, the Attorney General of
British Columbia and the Attorney General for Alberta,
interveners.**

[1998] 2 S.C.R. 565

[1998] S.C.J. No. 72

File No.: 25866.

Supreme Court of Canada

1998: April 27 / 1998: October 22.

**Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory,
McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Estates -- Executors and administrators -- Probate fees -- Provincial regulation providing for probate fee based on value of estate administered -- Whether probate levy a fee or a tax -- Whether ad valorem levy ultra vires on ground that it is an indirect tax -- Whether ad valorem levy invalid on ground that it was imposed by body other than provincial legislature -- O. Reg. 293/92, s. 2(1) -- Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5 -- Constitution Act, 1867, ss. 53, 54, 90, 92(2).

The appellant is the executor of her late husband's estate. Pursuant to s. 2(1) of O. Reg. 293/92, made under the Administration of Justice Act, the total value of the estate required payment of \$5,710 in probate fees in order to obtain letters probate. Section 5(c) of the Administration of Justice Act provides that the Lieutenant Governor in Council may make regulations requiring the payment of "fees in respect of proceedings in any court" and prescribing the amounts thereof. Section

2(1) of O. Reg. 293/92 sets out a schedule of ad valorem fees which must be paid in order to obtain a grant of probate. The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

Held (Gonthier and Bastarache JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ.: The probate levy as enforced at present is a tax, not a fee, according to the criteria set out in this Court's decision in *Lawson*. With respect to the first criterion, the levy is compulsory and therefore enforceable by law. While probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases. The criterion that the fee must be levied by a public body is also satisfied here. The probate levy also meets the criterion that the levy be intended for a public purpose, as the revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate. Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid. In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service, indicating that the levy is a tax and not a fee. Although the probate levy is properly characterized as a tax, it is a direct tax and therefore *intra vires* the province pursuant to s. 92(2) of the Constitution Act, 1867.

While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act, 1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature. The probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 293/92 unconstitutional.

Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. While s. 5 authorizes the Lieutenant Governor in Council to impose fees, it does not constitute an express delegation of taxing authority. The Act clearly does not authorize the imposition of a tax, albeit a direct one.

Since s. 54 of the Constitution Act, 1867 concerns the appropriation of taxes, and not the imposition of taxes, it is not relevant to this appeal.

Per McLachlin and Binnie JJ.: As found by Major J., the probate "fee" imposed under O. Reg. 293/92 is in reality a tax which is *ultra vires* s. 5 of the Administration of Justice Act. The interpretation of s. 5 is not assisted by the legislative history of the probate fee under different and more specialized enactments. Section 5 does not contemplate a fee based on the size of the bank account of the person or estate requesting a service or initiating an action as opposed to the cost, however broadly calculated, of providing or administering same. However, Major J. was disagreed with in

his conclusion that the tax is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867, which applies to the province by virtue of s. 90. Section 53 requires that money bills originate in the House of Commons. The analysis of Major J. reads the word "bills" out of the section, and takes the section out of the context of the series of sections in the Constitution Act, 1867 of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. Regulation 293/92 is not, and never was, a "bill". General principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

Per Gonthier and Bastarache JJ. (dissenting): While the probate fee is a tax, and a direct tax within the legislative authority of the province, it is not invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867. The purpose of s. 53 is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level. Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council. Section 54 of the Constitution Act, 1867 is not relevant to this appeal. Moreover, the probate fees are authorized under s. 5 of the Administration of Justice Act. According to the ordinary rules of interpretation, including the legislative history of the impugned provision, s. 5(c) of the Administration of Justice Act, which authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court, is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate.

Cases Cited

By Major J.

Distinguished: *Cotton v. The King*, [1914] A.C. 176; referred to: *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *The King v. National Fish Co.*, [1931] Ex. C.R. 75; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.

By Binnie J.

Referred to: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

By Bastarache J. (dissenting)

Hodge v. The Queen (1883), 9 App. Cas. 117; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Irving Oil Ltd. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Procureur général du Canada v. Compagnie de Publication La Presse, Ltée*, [1967] S.C.R. 60.

Statutes and Regulations Cited

Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo. 3, c. 8.
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Constitution Act, 1867, ss. 53, 54, 90, 92(2), (14).
Constitution Act, 1982, ss. 45, 52(1).
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Small, Joan. "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 *Ottawa L. Rev.* 33.

APPEAL from a judgment of the Ontario Court of Appeal (1997), 31 O.R. (3d) 777, 96 O.A.C. 354, [1997] O.J. No. 101 (QL), affirming a decision of the Ontario Court (General Division) (1994), 20 O.R. (3d) 385, 5 E.T.R. (2d) 304, [1994] O.J. No. 2570 (QL), dismissing the appellant's application for a declaration that the imposition of an ad valorem levy for grants of letters probate was unlawful. Appeal allowed, Gonthier and Bastarache JJ. dissenting.

Peter W. Hogg, Q.C., Peter T. Fallis, and J. Gregory Richards, for the appellant.
Tanya Lee, for the respondents.
Monique Rousseau, for the intervener the Attorney General of Quebec.
George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.
Robert J. Normey, for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Fallis, Fallis & McMillan, Durham, Ont.

Solicitor for the respondents: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Monique Rousseau and André Gaudreau, Sainte-Foy.

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

Solicitor for the intervener the Attorney General for Alberta: The Alberta Department of Justice, Edmonton.

The judgment of Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ. was delivered by

1 MAJOR J.:-- At issue in this appeal is whether the province of Ontario acted within its legislative authority in imposing an ad valorem levy for grants of letters probate.

I. Facts

2 The appellant is the executor of her late husband's estate. The total value of the estate was \$414,000 which, pursuant to s. 2(1) of O. Reg. 293/92, subsequently amended by O. Reg. 802/94, required payment of \$5,710 in probate fees in order to obtain letters probate. The regulation was purported to be under the authority of the Administration of Justice Act, R.S.O. 1990, c. A.6.

3 The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

II. Judicial History

A. Ontario Court (General Division) (1994), 20 O.R. (3d) 385

4 Morrison J., in assessing the probate charge, held that the difference between a fee and a tax is that a tax is compulsory, while a fee is only required to be paid where one seeks the services for which it is imposed. In concluding that the charge for probate is a fee and not a tax, he held that probate fees lack the universal application characteristic of a tax. In certain circumstances, executors can administer and distribute the bequest of a deceased without applying for a grant of probate. Also, living persons can arrange their affairs so that there is no necessity for probate. Morrison J. also held that "sliding scale" fees can be supported as ancillary or adhesive to a valid provincial regulatory scheme.

5 In rejecting the appellant's submission that the Administration of Justice Act does not authorize escalating fees as prescribed by the Regulations, Morrison J. held that the language used in s. 5(c) of the Act, together with the long history of similarly worded statutes providing for escalating probate fees, demonstrated the intention of the legislature to authorize volumetric fees. He therefore dismissed the application.

B. Ontario Court of Appeal (1997), 31 O.R. (3d) 777

6 Morden A.C.J.O. held that, in light of the legislative evolution of the probate fee system in Ontario, the ad valorem fee structure imposed by the Regulations is properly authorized by s. 5(c) of the Administration of Justice Act and is not a revenue-generating device enacted for a purpose not authorized by the Act.

7 He also held that the charge for probate is a fee and not a tax. A tax is a levy which is enforceable by law, imposed under the authority of the legislature by a public body, and made for a public purpose: *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at p. 363. Although the fee is compulsory and therefore enforceable by law, Morden A.C.J.O. found that it is legislation in relation to s. 92(14) of the Constitution Act, 1867 and is not aimed at raising a revenue under s. 92(2). Thus, the charge for probate did not meet all the requirements of a tax.

8 Morden A.C.J.O. held that the question of whether the taxing power could be delegated to the Lieutenant Governor in Council pursuant to ss. 53 and 54 of the Constitution Act, 1867 did not arise because the fees in question are not taxes. He concluded that even if the fees were considered to be taxes, they were ingredients of a regulatory scheme not covered by ss. 53 and 54. The appeal was dismissed.

III. Issues

9 On November 27, 1997, the Chief Justice stated the following constitutional questions:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?
2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

IV. Relevant Constitutional, Statutory and Regulatory Provisions

A. Constitutional Provisions

10 Constitution Act, 1867

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

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recom-

mended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, -- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

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

...

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

...

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Constitution Act, 1982

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

B. Statutory Provisions

11 Administration of Justice Act, R.S.O. 1990, c. A.6

5. The Lieutenant Governor in Council may make regulations,
 - (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
 - (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;

- (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

C. Regulations

12 Ontario Regulation 293/92 (pursuant to the Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5)

- 2. -- (1) The following fees are payable in estate matters:
 - 1. For a grant of probate, administration or guardianship, not being a double probate, cessate grant or administration de bonis non administratis.
 - i. on the first \$50,000 of the value of the estate being administered, per thousand dollars or part thereof \$ 5.00
 - ii. on the portion of the value of the estate being administered that exceeds \$50,000, per thousand dollars or part thereof 15.00

The above section was re-enacted by O. Reg. 802/94, s. 1, which reads as follows:

- 2. -- (1) The following fees are payable in estate matters:
 - 1. For a certificate of appointment of estate trustee, other than a certificate of succeeding estate trustee or a certificate of estate trustee during litigation,
 - i. on the first \$50,000 of the value of the estate being administered, per thousand dollars or part thereof . \$ 5.00
 - ii. on the portion of the value of the estate being administered that exceeds \$50,000, per thousand dollars or part thereof . . 15.00

V. Analysis

13 In Ontario, letters probate (now referred to as "certificate of appointment of estate trustee with a will") are issued by the Ontario Court (General Division). The purpose of probate is to certify that a will and codicils have been duly proved and registered in the court and that administration of the property of the deceased has been committed by the court to the persons named in the will as executors. Ontario Regulation 293/92 (subsequently re-enacted as O. Reg. 802/94) sets out a schedule of ad valorem charges which must be paid in order to obtain a grant of probate. The appellant challenges the legality of those charges.

A. Is the Probate Levy a Fee or a Tax?

14 The appellant contends that the probate levy prescribed by s. 2(1) of O. Reg 293/92 is a tax rather than a fee. This distinction is important because a tax may be either direct or indirect, and

pursuant to s. 92(2) of the Constitution Act, 1867, a province only has jurisdiction to impose a direct tax. Conversely, a province may charge a fee, regardless of whether it is an indirect tax, provided that it is validly enacted under a provincial head of power other than the taxing power: see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 412, and *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at p. 988.

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

16 The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed. In this appeal the first concern is identifying the nature of the probate levy. The manner in which the levy was imposed will be considered later.

17 The Court of Appeal held that with respect to the first *Lawson* criterion the probate fee is compulsory and therefore enforceable by law. I agree. A practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations. Although probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases, as illustrated by R. Hull and I. M. Hull in *Macdonell, Sheard and Hull on Probate Practice* (4th ed. 1996), at p. 188:

Any debtor of the testator is justified in refusing to pay his debt to the executor until probate is produced. All proceedings in an action by the executor to enforce such payment will be stayed until the plaintiff obtains probate. Similarly an action to recover possession of the testator's goods, or for damages for their wrongful conversion, brought by the executor, must fail unless the executor has proved the will. In the absence of special statutory provisions to the contrary, the executor will fail whenever it is necessary to establish title as the personal representative of the deceased.

See also *The Solicitor's Guide to Estate Practice in Ontario*, by M. E. Rintoul (2nd ed. 1990), at pp. 35-36, wherein protection for the executor and administrative efficiency are identified as practical and legal reasons that frequently compel an executor to obtain probate. The fact that in some instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs.

18 The criterion that the fee must be levied by a public body is also satisfied here as probate fees in Ontario are levied by the Ontario Court (General Division).

19 The probate levy also meets the fourth *Lawson* criterion for a tax as the proceeds were intended for a public purpose. The Ontario Law Reform Commission concluded in 1991 that it is difficult to discern a principled justification for ad valorem probate fees, and that "[t]he only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue" (*Report on Administration of Estates of Deceased Persons*, at p. 286).

20 Those conclusions are supported by the evidence before this Court which showed that probate fees do not "incidentally" provide a surplus for general revenue, but rather are intended for that very

purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate.

21 Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 72. This nexus was also considered relevant to determining the nature of a municipal charge in *Allard Contractors*, *supra*. In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):

A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme. . . .

22 In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

23 Having determined that the probate levy is enforceable by law, is levied by a public body, is intended for public purposes, and that no nexus exists between the amount of the levy and the cost of the service for granting letters probate, the compelling conclusion is that the probate levy as presently enforced is a tax.

B. Is the Probate Levy a Direct or Indirect Tax?

24 Section 92(2) of the Constitution Act, 1867 confers upon the provinces the power to raise revenue for provincial purposes only by means of direct taxation: see *Allard Contractors*, *supra*, at p. 394, per Iacobucci J. It therefore has to be determined whether the probate levy is a direct or indirect tax.

25 In *Principles of Political Economy* (1884), Book V, ch. II, at p. 550, John Stuart Mill defined the distinction between direct and indirect taxes. That oft repeated definition has not been much improved upon and is frequently referred to by courts in determining whether a levy is direct or indirect:

A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. . . .

26 Applying Mill's definition, the tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation does not make the executor personally liable for the fees. Payment is made by the executor only in his or her representative capacity. As a result, this case is readily distinguishable from *Cotton v. The King*, [1914] A.C. 176 (P.C.), where the succession duty was intended to be paid by one person and recouped from another. Here, as the amount is paid out of the estate by the executor in his or her representative capacity with the intention that the estate should bear the burden of the tax, the probate fees fall within Mill's definition of direct tax. The probate levy does not fall within the more expansive definition of an "indirect tax" in *Allard Contractors*, per Iacobucci J., at p. 396.

27 Thus, although the probate levy is properly characterized as a tax and not a fee, it is a direct tax and therefore intra vires the province pursuant to s. 92(2) of the Constitution Act, 1867. As a result there is no need to consider whether it would survive as an indirect tax on the basis that it was ancillary to a valid regulatory scheme. Such a result in any event is doubtful on the facts.

C. Did the Implementation of the Probate Tax Violate Sections 53 or 54 of the Constitution Act, 1867?

28 While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act, 1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90 of the Constitution Act, 1867, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature.

29 To date, s. 53 has been the subject of only limited academic and jurisprudential discussion. It has been suggested that the purpose of s. 53 is to prevent the introduction of taxation legislation in the Senate, and that with the abolition of bicameral legislatures in the provinces it has become redundant: see, e.g., W. H. McConnell in *Commentary on the British North America Act* (1977), at p. 132.

30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

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

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

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

33 The conclusion that s. 53 continues to be binding upon the provinces is supported by the fact that the applicability of s. 53 to the provinces was not removed when the Constitution was amended in 1982, even though bicameral legislatures had ceased to exist at the provincial level by that time.

34 Section 53 is a constitutional imperative that is enforceable by the courts. A contrary opinion was expressed in *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, where Pigeon J. for the majority commented in obiter that ss. 53 and 54 are not entrenched in the Constitution and can be indirectly amended through inconsistent legislation. Those comments, however, were made before the passage of the 1982 amendments to the Constitution.

35 By virtue of s. 45 of the Constitution Act, 1982, the legislature of each province retains the discretion to exclusively make laws amending the constitution of the province. That power must be read in association with s. 52(1) of the Constitution Act, 1982, which stipulates that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Subsection 52(1) effectively requires any provincial legislation that seeks to amend the constitution of the province to do so expressly: see J. Small in "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 *Ottawa L. Rev.* 33, at p. 50. Otherwise, the legislation is liable to being struck down on the basis that it is inconsistent with the Constitution.

36 Nothing in the Administration of Justice Act purports to amend the constitutional requirement for imposing tax legislation set out in s. 53. The Ontario legislature did not delegate to the Lieutenant Governor in Council the authority to impose a tax. Therefore whether it could constitutionally do so does not need to be addressed. The only power conferred by s. 5 of the Act was to make regulations regarding the payment of fees, not the imposition of taxes. Yet the probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. While the legislature of Ontario may well be competent to establish probate taxes under the terms of the Administration of Justice Act, s. 53 requires that they do so explicitly. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional. The unconstitutionality of the impugned legislation is an important reminder of the fact that the imposition of a tax has both political and legal dimensions which require the legislature to act carefully if the tax is to be successfully implemented.

37 The appellant also challenges the validity of the probate tax on the ground that it violates s. 54 of the Constitution Act, 1867. However, since s. 54 concerns the appropriation of taxes, and not the imposition of taxes (see Small, *supra*, at p. 40), it is not relevant to this appeal.

D. Is the Probate Levy Authorized by Section 5 of the Administration of Justice Act?

38 Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. Section 5 reads:

5. The Lieutenant Governor in Council may make regulations,
 - (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
 - (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
 - (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

39 While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of taxing authority. Whether the province may delegate its taxing authority was not fully argued before this Court, is obiter in the result, and should be considered only when the issue has been raised in the courts below. Of relevance to this appeal is that the Act clearly does not authorize the imposition of a tax, albeit direct.

40 The constitutional requirement for a clear and unambiguous authorization of taxation within the enabling statute also provides the reply to Bastarache J.'s concerns. Once it has been determined that the probate fees levied by the impugned regulation are a direct tax, the question is whether the Administration of Justice Act, and the action of the Lieutenant Governor in Council in enacting O. Reg. 293/92, fulfil the legal and constitutional requirements for the imposition of a tax. Section 53 constitutionally mandates the court to strictly construct enabling legislation, such as s. 5 of the Administration of Justice Act, when determining whether it properly creates a taxation power. This simply strengthens the general principle of interpretation that "[i]f Parliament wants to give the Executive or some administrative agency the power to raise a tax by regulation, it must do so in a specific and unequivocal provision" (R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at p. 445).

41 Bastarache J. states that the authorization extended to the Lieutenant Governor in Council in the Administration of Justice Act to prescribe fees "includes the power to implement a direct tax" (para. 60). With respect, this conclusion cannot be sustained. The distinction between these two forms of charges cannot be erased by simply interpreting the word "fees" to include taxes. This distinction is both legally and constitutionally significant to determining the validity of the enactment. As s. 53 of the Constitution Act, 1867, Standing Order 56 of the Ontario legislature, and the general law on construction of taxing statutes all demonstrate, the imposition of taxes is an act of unique political significance, subject to special rules and requirements, none of which the impugned scheme meets. Ontario Regulation 293/92 is both unconstitutional and ultra vires as it seeks to impose a tax without clear and unambiguous authorization from the legislature to do so.

42 The appellant also argued that s. 5 does not authorize the imposition of ad valorem probate fees. Given my conclusion that the probate levy is a tax and not a fee, it is not necessary to address this issue. I would add, though, that the wording of the Act does not appear to restrict the type of fee

that may be imposed provided that it possesses the characteristics of a fee, including inter alia the existence of a nexus between the amount charged and the cost of the service provided.

E. Disposition and Remedy

43 Section 52(1) of the Constitution Act, 1982 provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The probate fee levied by O. Reg. 293/92 is in substance a direct tax which has not been imposed in accordance with the requirements of s. 53 of the Constitution Act, 1867. Thus the regulation is invalid and of no force or effect.

44 An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totalled \$51.8 million and \$52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.

45 The final issue is whether the appellant is entitled to a refund of the probate fees of \$5,710 paid by her as executor for her late husband's estate.

46 In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, La Forest J. for three of the six members of the Court held that there is a general rule against recovery of taxes paid under unconstitutional statutes, with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax is unjust or oppressive in the circumstances.

47 Even if this Court were to adopt the rule articulated by La Forest J., it would not prevent recovery by the appellant in this case. An exception has been recognized where taxes are paid under compulsion or protest: *Air Canada*, supra, at pp. 1209-10. Here, the appellant has challenged the validity of the regulation imposing the probate fee from the outset. She paid the fee in order to fulfil her legal obligations as executor of the estate only after the Ontario Court (General Division) held that the regulation was legally valid. Had the proper decision been rendered at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage.

48 The appeal is accordingly allowed with costs and the appellant refunded the \$5,710 paid by her.

49 For the reasons given, I would answer the constitutional questions as follows:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?

Answer: No.

2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

Answer: Yes.

The reasons of Gonthier and Bastarache JJ. were delivered
by

50 BASTARACHE J. (dissenting):-- This appeal concerns the validity of the fees set for probate by the legislature of Ontario through Regulation 293/92, which was enacted pursuant to s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6. The facts and the issues have been set out in the reasons of Major J. and I will not repeat them.

51 I have read the reasons of my colleagues Major and Binnie JJ. and in a number of aspects, I cannot, with respect, agree with their approaches. I accept Major J.'s characterization of the probate fee as a tax and I accept that it is a direct tax within the legislative authority of the province. I do not, however, agree that the probate fee is invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the Constitution Act, 1867). Moreover, I do not accept Major and Binnie JJ.'s conclusion that the probate fees are not authorized under s. 5 of the Administration of Justice Act.

Sections 53 and 54 of the Constitution Act, 1867

52 Sections 53 and 54 of the Constitution Act, 1867, which are made applicable to the provincial legislature by virtue of s. 90 of the Act, provide as follows:

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

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

53 The appellant argued that s. 53 of the Constitution Act, 1867 requires that any bill that appropriates public revenue or imposes any tax must originate in the Legislative Assembly. With respect to s. 54, the appellant argued that it prohibits the Legislative Assembly from adopting or passing

such a bill unless it has been recommended to the Legislative Assembly by message of the Lieutenant Governor.

54 Major J., in his reasons, states that the rationale underlying s. 53 of the Constitution Act, 1867 is to prohibit any body other than the legislature from imposing a tax on its own accord. The purpose of s. 53 of the Constitution Act, 1867, in my view, is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. The section was enacted because of a concern in English history about taxation bills being introduced in the House of Lords rather than in the Commons. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level (W. H. McConnell, *Commentary on the British North America Act* (1977), at pp. 105-6 and 131-32; W. R. Anson, *The Law and Custom of the Constitution* (3rd ed. 1897), Part 1, at pp. 265-68).

55 Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53 of the Constitution Act, 1867. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53 of the Constitution Act, 1867. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at pp. 131-33; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), at p. 722; *Irving Oil Ltd. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787).

56 I agree with Major J. that s. 54 of the Constitution Act, 1867 is not relevant to this appeal. Section 54 requires that bills relating to the appropriation of taxes (supply bills) be accompanied by a royal recommendation. The only bills that are guaranteed to the executive under s. 54 of the Constitution Act, 1867 are true appropriation bills.

Section 5 of the Administration of Justice Act

57 Section 5 of the Administration of Justice Act provides as follows:

5. The Lieutenant Governor in Council may make regulations,

- (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
- (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
- (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

58 Having found that the probate fee enacted pursuant to s. 5 of the Administration of Justice Act is in reality a direct tax imposed by the province through its delegate, the Lieutenant Governor in Council, the issue to be decided at this stage is whether s. 5 of the Administration of Justice Act authorizes the imposition of the fee structure found in Regulation 293/92. In finding that the probate

fee is a direct tax, it has been determined that the probate fee is (1) enforceable by law; (2) levied by a public body; and (3) intended for a public purpose (reasons of Major J., at paras. 17-20).

59 In determining whether or not the probate fee, as a direct tax, is authorized under the Administration of Justice Act, it is not necessary to conduct an analysis of whether a nexus exists between the quantum charged and the cost of the service. It is only because variable fees are indirect in their general tendency that the nexus argument is normally raised (see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at pp. 398 and 402; see also *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 53). In *Allard and Home Builders'*, the nexus between the fee and the value of the service provided arose in the context of indirect taxes, which would only be valid if ancillary to a valid regulatory scheme. It is noted in *Home Builders'*, at para. 53, that "[a]ny power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) [Direct Taxation] meaningless". It has long been accepted that there is no constitutional prohibition against a direct tax that is variable and designed to defray the costs of a regulation (see *Shannon v. Lower Mainland Dairy Products Board*, *supra*, at p. 721). As Professor La Forest (as he then was) stated in *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), quoted in *Home Builders'*, *supra*, at para. 52: "there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence". The sole issue here is whether s. 5 of the Administration of Justice Act is broad enough to authorize this direct tax, not whether there is a nexus between the tax and the probate service, as would be required if the tax was indirect.

60 In my view, according to the ordinary rules of interpretation, including the legislative history of the impugned provision as thoroughly described by Morden A.C.J.O. in the Court of Appeal, s. 5(c) of the Administration of Justice Act is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate. It authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court. This includes the power to implement a direct tax on applications for probate. The language of the section does not require that the fees be in proportion to services rendered. There is no exclusion of an "ad valorem" fee structure (*Procureur général du Canada v. Compagnie de Publication La Presse, Ltée*, [1967] S.C.R. 60).

61 The powers of a provincial legislature cannot be limited except by the Constitution. The province of Ontario authorized the Lieutenant Governor in Council, through s. 5 of the Administration of Justice Act, to implement a direct tax in respect of court proceedings. The Lieutenant Governor in Council validly prescribed the amount for this tax and the method of payment through the taxing of applications for letters probate pursuant to Regulation 293/92. Accordingly, I would dismiss the appeal with costs.

The reasons of McLachlin and Binnie JJ. were delivered by

62 BINNIE J.:-- I agree with Justice Major's conclusion that Ontario's probate "fee" is in reality a tax, albeit a direct tax within the legislative authority of the province. I also agree with his proposed disposition of the appeal. I differ, however, from his conclusion that the probate tax imposed under O. Reg. 293/92 (now 802/94) is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867. I prefer to rest my conclusion on his alternative ground that O. Reg. 293/92 is *ultra vires* s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6.

63 The legislative power of the province is sovereign except as limited by the Constitution itself, including limitations flowing from the federal-provincial division of powers, and the Canadian

Charter of Rights and Freedoms. In the absence of a constitutional prohibition, the legislature has power to authorize a tax structure of its own choosing, and for which it will be politically accountable, including a tax to be prescribed by the Lieutenant Governor in Council. I do not construe s. 53 of the Constitution Act, 1867 as constituting such a prohibition.

64 Major J. rightly observes at para. 31 that:

In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax ab initio without the authorization of the legislature.

It seems to me this leads to a straightforward question of whether the regulation is ultra vires s. 5 of the Administration of Justice Act. There is no need to look to the constitutional subtleties of s. 53, which provides:

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

Section 53 appears under the heading "Money Votes; Royal Assent" in a series of five sections dealing with various aspects of the relationships among the House of Commons, the Senate and the Crown. These provisions are made applicable to the provinces by s. 90. Section 53 requires that money bills originate in the House of Commons. Regulation 293/92 is not, and never was, a "bill". It is a regulation that was prescribed by the Lieutenant Governor in Council. Bills arise only as part of the legislative process in the House of Commons or the Senate.

65 My colleague advances the proposition in para. 32 that:

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. [Emphasis added.]

66 Again, in para. 40, he argues that s. 53 "constitutionally mandates the court to strictly construct enabling legislation". In my view, respectfully, this analysis reads the word "bills" out of the section, and takes the section out of the context of the series of sections of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. It is explicitly related to legislative procedure and there is nothing that I can see in its text to justify concluding that its "basic purpose" is the constitutional entrenchment of a principle of "strict construction" of legislation, delegated or otherwise. Regardless of the attraction of my colleague's broad rationale of promoting "parliamentary control over, and accountability for, taxation" (para. 32), I do not think the Court can facilitate achievement of the objective by rewriting s. 53. As the Court recently affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

67 I do, however, agree with Major J. that O. Reg. 293/92 is ultra vires s. 5 of the Administration of Justice Act, and would like to add a comment about the respondents' use of legislative history to support the government position. The respondents emphasized the historical evolution of probate fees in Ontario from 1793 until the present, and related the present fee structure to provisions in the Estates Act, R.S.O. 1990, c. E.21, having a bearing on probate fees. It is argued that it would be reasonable to infer from this historical context that the legislature of Ontario intended by s. 5 to con-

tinue the authority of the Lieutenant Governor in Council to impose escalating ad valorem probate fees. Leaving aside the taxation issue, the difficulty with relying on legislative history in this case is that the context has changed. The statutory authority no longer exists in an Act dealing with a court exercising a specialized estates jurisdiction. Section 5 of the Administration of Justice Act, unlike sections of the Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo 3, c. 8, and subsequent versions of the Surrogate Courts Acts, does not have a narrow focus. Section 5(a) authorizes fees "for any thing required or authorized under any Act to be done by any person in the administration of justice" (emphasis added), s. 5(b) allows fees to be prescribed "in connection with services under any Act for the administration of justice" (emphasis added), and s. 5(c) allows fees to be prescribed "in respect of proceedings in any court" (emphasis added). The words "for", "in connection with" and "in respect of" are words of very broad signification, and the obligation to pay the prescribed fee can be in relation to an enormous variety of "things", "services", and "proceedings". If s. 5(c), for example, validly authorizes escalating ad valorem fees for probate, it must equally authorize escalating ad valorem type fees "in respect of" other court proceedings. The 200-year legislative history of probate fees does not, therefore, justify an interpretation of the new and more generalized power to prescribe fees in s. 5 of the Administration of Justice Act beyond the sort of "fees" that the text of s. 5 would otherwise support.

68 It is implicit in the notion of "fee for service" that there is, somewhere, a cost base that is somehow connected to the provision of the relevant service and is to be allocated amongst users. The New Shorter Oxford English Dictionary, vol. 1, at p. 928, includes in its definition of "fee" a "sum payable to a public officer in return for the execution of relevant duties". The Court of Appeal accepted as appropriate in this regard the costs of operating the entire Ontario Court (General Division). The respondents seem to suggest that all users of the Ontario Court (General Division) are being subsidized by the government treasury and that some users cannot complain if they are subsidized less than other users. The record is singularly bare of any accounting data in this regard. In any event, as a matter of ordinary statutory interpretation, s. 5 cannot reasonably be construed as authorizing a fee for "things", "services" or "proceedings" based on the size of the bank account of the person seeking them rather than the cost of their delivery -- however broadly the cost of such things, services or proceedings may be defined.

69 In short, the Ontario legislature may delegate the power to prescribe an escalating ad valorem probate tax to the Lieutenant Governor in Council but it must do so in clear and unambiguous language. The present section authorizes the Lieutenant Governor in Council to prescribe fees, and unless and until the section is amended the charge to users for the relevant service must have some reasonable relationship to the cost of the provision of that service.

Appeal allowed with costs, Gonthier and Bastarache JJ. dissenting.

cp/d/hbb

Indexed as:

Reference re: Firearms Act (Can.)

**IN THE MATTER OF Section 27(1) of the Judicature Act,
R.S.A. 1980, chapter J-1**

**AND IN THE MATTER OF a Reference by the Lieutenant
Governor in Council to the Court of Appeal of Alberta
for hearing and consideration of the questions set out
in Order in Council 461/96 respecting the Firearms Act,
S.C. 1995, chapter 39**

The Attorney General for Alberta, appellant;

v.

**The Attorney General of Canada, respondent, and
The Attorney General for Ontario, the Attorney General
of Nova Scotia, the Attorney General for New Brunswick,
the Attorney General of Manitoba, the Attorney General
for Saskatchewan, the Government of the Northwest
Territories, the Minister of Justice for the Government
of the Yukon Territory, the Federation of Saskatchewan
Indian Nations, the Coalition of Responsible Firearm
Owners and Sportsmen (CORFOS), the Law-Abiding
Unregistered Firearms Association (LUFA), the Shooting
Federation of Canada, the Association pour la santé
publique du Québec inc., the Alberta Council of Women's
Shelters, CAVEAT, the Fondation des victimes du 6
décembre contre la violence, the Canadian Association
for Adolescent Health, the Canadian Pediatric Society,
the Coalition for Gun Control, the Canadian Association
of Chiefs of Police, the Corporation of the City of
Toronto, the City of Montreal and the City of Winnipeg,
interveners.**

[2000] 1 S.C.R. 783

[2000] S.C.J. No. 31

2000 SCC 31

File No.: 26933.

Supreme Court of Canada

2000: February 21, 22 / 2000: June 15.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (61 paras.)

Constitutional law -- Division of powers -- Criminal law power -- Firearms -- Licensing and registration of ordinary firearms -- Whether licensing and registration provisions of Firearms Act intra vires Parliament -- Constitution Act, 1867, s. 91(27) -- Firearms Act, S.C. 1995, c. 39.

In 1995, Parliament amended the Criminal Code by enacting the Firearms Act. The amendments require the holders of all firearms to obtain licences and register their guns. Alberta referred constitutional questions to the Court of Appeal to determine whether the licensing and registration provisions of the Firearms Act, as they relate to ordinary firearms, are intra vires Parliament. The majority of the Court of Appeal concluded that the Act is a valid exercise of Parliament's criminal law power. Alberta appealed to this Court.

Held: The appeal should be dismissed. The impugned provisions of the Firearms Act are constitutional.

The Firearms Act constitutes a valid exercise of Parliament's jurisdiction over criminal law. The Act in "pith and substance" is directed to enhancing public safety by controlling access to firearms. Its purpose is to deter the misuse of firearms, control those given access to guns, and control specific types of weapons. It is aimed at a number of "mischiefs", including the illegal trade in guns, both within Canada and across the border with the United States, and the link between guns and violent crime, suicide, and accidental deaths. The purpose of the Firearms Act conforms with the historical public safety focus of all gun control laws. The changes introduced by the Act represent a limited expansion of the pre-existing gun control legislation. The effects of the Act also suggest that its essence is the promotion of [page785] public safety. The criteria for acquiring a licence are concerned with safety. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified.

The Firearms Act possesses all three criteria required for a criminal law. Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. The regulation of guns as dangerous products is a valid purpose within the criminal law power. That purpose is connected to prohibitions backed by penalties.

The Firearms Act is not essentially regulatory legislation. The Act's complexity does not necessarily detract from its criminal nature. Nor does the law give either the chief firearms officer or the Registrar undue discretion. The offences are clearly defined in the Act. The chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Further, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with a scheme,

but independently serve the purpose of public safety. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort. Finally, Parliament may use indirect means to further the end of public safety.

The 1995 gun control scheme is distinguishable from existing provincial property regulation schemes. The Act addresses the aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse. While ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Their control accordingly falls within the criminal law power.

The registration provisions cannot be severed from the rest of the Act. The licensing provisions require everyone who possesses a gun to be licensed; the registration [page786] provisions require all guns to be registered. These portions of the Firearms Act are both tightly linked to Parliament's goal of promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme.

The Firearms Act does not trench on provincial powers such that upholding it as criminal law will upset the balance of federalism. The provinces have not established that the effects of the Act on provincial jurisdiction over property and civil rights are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Third, assuming (without deciding) that the provincial legislatures have the jurisdiction to enact a law in relation to the property aspects of firearms, the double aspect doctrine permits Parliament to address the safety aspects of ordinary firearms. Fourth, the Firearms Act does not precipitate the federal government's entry into a new field since gun control has been the subject of federal law since Confederation. There is no colourable intrusion into provincial jurisdiction.

The problems associated with the misuse of firearms are firmly grounded in morality. However, even if gun control did not involve morality, it could still fall under the federal criminal law power. Parliament can use the criminal law to prohibit activities which have little relation to public morality.

The apprehensions of northern, rural and aboriginal Canadians that this law does not address their particular needs do not go to the question of Parliament's jurisdiction to enact the law. The cost of the program and the efficacy of the law, or lack thereof, are equally irrelevant to Parliament's ability to enact it under the division of powers analysis. Within its constitutional sphere, [page787] Parliament is the judge of whether a measure is likely to achieve its intended purpose.

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Applied: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; referred to: *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960]

S.C.R. 713; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *McGuigan v. The Queen*, [1982] 1 S.C.R. 284; *Attorney General of Canada v. Pattison* (1981), 30 A.R. 83; *Martino v. Dawson* (1990), 57 C.C.C. (3d) 482; *R. v. Northcott*, [1980] 5 W.W.R. 38; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501; *R. v. Cosman's Furniture (1972) Ltd.* (1976), 73 D.L.R. (3d) 312; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Westendorp v. The Queen*, [1983] 1 S.C.R. 43; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *R. v. Felawka*, [1993] 4 S.C.R. 199; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Furtney*, [1991] 3 S.C.R. 89; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368; *R. v. Chiasson* (1982), 66 C.C.C. (2d) 195, *aff'd* [1984] 1 S.C.R. 266; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310.

[page788]

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APPEAL from a judgment of the Alberta Court of Appeal (1998), 219 A.R. 201, 179 W.A.C. 201, 65 Alta. L.R. (3d) 1, 164 D.L.R. (4th) 513, 19 C.R. (5th) 63, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, [1998] A.J. No. 1028 (QL), upholding the constitutionality of the licensing and registration provisions of the Firearms Act. Appeal dismissed.

Roderick A. McLennan, Q.C., Thomas W. R. Ross and Neal A. McLennan, for the appellant.

Graham R. Garton, Q.C., and Sheila Martin, Q.C., for the respondent.

Robert E. Charney and Edward J. Maksimowski, for the intervener the Attorney General for Ontario.

Louise Walsh Poirier and Reinhold Endres, Q.C., for the intervener the Attorney General of Nova Scotia.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Kenneth J. Tyler, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, Q.C., and Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Scott Duke, for the intervener the Government of the Northwest Territories.

William Craik and Lee Kirkpatrick, for the Minister of Justice for the Government of the Yukon Territory.

Delia Opekokew, Darren W. Winegarden, Albert C. Peeling and John D. Parsons, for the intervener the Federation of Saskatchewan Indian Nations.

[page790]

Dallas K. Miller, Q.C., for the intervener the Coalition of Responsible Firearm Owners and Sportsmen.

David R. Holman, for the intervener the Law-Abiding Unregistered Firearms Association.

Brian A. Crane, Q.C., and Paul Shaw, for the intervener the Shooting Federation of Canada.

Paul Larochelle, Q.C., and Michèle Thivierge, for the intervener the Association pour la santé publique du Québec inc.

Alexander D. Pringle, Q.C., and June Ross, for the intervener the Alberta Council of Women's Shelters.

Peter A. Downard, Paul F. Monahan and Rochelle S. Fox, for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health and the Canadian Pediatric Society.

Jill Copeland, for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The following is the judgment delivered by

THE COURT:--

I. Introduction

1 In 1995, Parliament amended the Criminal Code, R.S.C., 1985, c. C-46, by enacting the Firearms Act, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court.

[page791]

2 The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law.

3 The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: Constitution Act, 1867. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the "Peace, Order and good Government" of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control law is really about -- its "pith and substance" -- and then ask which head or heads of power it most naturally falls within.

4 We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

II. Reference Questions

5 The formal questions put to the Alberta Court of Appeal by the Alberta government in 1996 are attached in Appendix A. Simply put, the issue before us is whether or not the licensing and registration provisions in the Firearms Act, as they [page792] relate to ordinary firearms, were validly enacted by Parliament. The impugned provisions of the Act are attached in Appendix B.

III. Legislation

6 For many years, the Criminal Code has restricted access to firearms, mainly automatic weapons and handguns, by classifying some as prohibited and some as restricted. The Firearms Act amendments extended this regulation to all firearms, including rifles and shotguns. As a result, s. 84 of the Criminal Code now controls three classes of firearms: (1) prohibited firearms (generally automatic weapons); (2) restricted firearms (generally handguns); and (3) all other firearms (generally rifles and shotguns). The third class of guns is variously referred to as "ordinary firearms", "long guns", and "unrestricted firearms". We will refer to this class as "ordinary firearms".

7 The reference questions focus on the validity of the licensing and registration provisions for ordinary firearms introduced by the Firearms Act. The licensing sections of the Act provide that a person must be licensed in order to possess a firearm. Eligibility for a licence reflects safety interests. An applicant with a criminal record involving drug offences or violence, or a history of mental illness, may be denied a licence. An applicant who seeks to acquire a firearm must pass a safety course which requires a basic understanding of firearm safety and the legal responsibilities of firearm ownership. The chief firearms officer, who issues licences, may conduct a background check on the applicant in order to determine eligibility, and may attach conditions to a licence. Once issued, a licence is valid for five years, but it may be revoked for contravention of its conditions or for [page793] certain criminal convictions. A licence refusal or revocation may be appealed to a court.

8 The registration provisions of the Act are more limited. A firearm cannot be registered unless the applicant is licensed to possess that type of firearm. Registration is generally done by reference to the serial number on the firearm. A registration certificate is valid as long as its holder owns the weapon. If ownership of a registered weapon is transferred, the new owner must register the weapon. In order to give gun owners time to register their weapons, people who owned ordinary firearms as of January 1, 1998 are deemed to hold registration certificates that are valid until January 1, 2003. Possession of an unregistered firearm of any type is an offence. All licences and registration certificates, along with imported, exported, lost and stolen guns, are recorded in the Canadian Firearms Registry, which is operated by a federal appointee.

IV. Reasons of the Alberta Court of Appeal

9 The Alberta Court of Appeal upheld the 1995 gun control law by a 3:2 majority: (1998), 65 Alta. L.R. (3d) 1. The court wrote four judgments.

A. Majority

10 Fraser C.J.A., in a comprehensive judgment, began by noting that guns may be regulated by both the federal and provincial governments for different purposes, and that the effectiveness of the law is irrelevant to its constitutional characterization. She found that Parliament's purpose in enacting the law was to enhance public safety. While guns preserve lives and serve as useful tools, they also wound and kill. The latter aspect of guns -- their inherent dangerousness -- is the focus of the impugned provisions of the Act. Parliament's aim [page794] was to reduce the misuse of guns in crime, including domestic violence, as well as to reduce suicides and accidents caused by the misuse of firearms. The licensing provisions, which require applicants to pass a safety course and undergo a criminal record check and background investigation, support this purpose. The registration system, by seeking to reduce smuggling, theft and illegal sales, also addresses misuse. The licensing and registration provisions are inextricably intertwined. While the provisions entail the regulation of property rights, this regulation is the means of the law, not its end. On this basis, Fraser C.J.A. concluded that the Act is in pith and substance designed to protect public safety from the misuse of firearms.

11 Fraser C.J.A. went on to the second step in the analysis: considering whether or not that pith and substance could be allocated to one of Parliament's heads of power under the Constitution Act, 1867. She held that the legislation falls under the criminal law power, s. 91(27), under either its "prevention" aspect or its "prohibition, penalty, and purpose" aspect. The law does not represent a "colourable" or improper intrusion into provincial jurisdiction.

12 Berger and Hetherington J.J.A. wrote separate opinions agreeing with the Chief Justice. Hetherington J.A. held that any firearm, used improperly, is dangerous to human life and health. As a result, Parliament's purpose, in seeking to prevent crime and promote public safety by discouraging possession, is a valid criminal law purpose. The potential inefficacy of the law, highlighted by Alberta and the other provincial governments, is irrelevant unless it shows that Parliament had a different purpose -- a colourable motive. Colourability has not been shown because the law genuinely attempts to improve firearms storage, reduce trafficking, and aid in tracking guns generally. While the law may [page795] affect property and civil rights, that does not prevent Parliament from enacting it. Hetherington J.A. concluded that the Firearms Act contains prohibitions accompanied by penal sanctions, enacted for criminal public purposes, and therefore it is a valid law under the test propounded by *La Forest J.* of this Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

13 Berger J.A. likewise noted that all guns are capable of causing death if misused. He held that Parliament's purpose in enacting the legislation was to ensure that firearms are only possessed by those qualified to use them. The licensing provisions identify those who are qualified. The registration system ensures that only qualified people can acquire firearms. As a prohibition backed by a penalty, for a public purpose, the law is a valid exercise of Parliament's criminal law power. The regulatory aspects of the law are merely the means to an end.

B. Minority

14 Conrad J.A. dissented, Irving J.A. concurring. Conrad J.A. broadly defined the purpose of the law as regulating all aspects of the possession and use of firearms. While firearms and safety are subjects of both federal and provincial concern, the criminal law power represents a "carve-out"

from provincial jurisdiction. The regulation of ownership rather than use and the complexity of the regulations demonstrate that this legislation cannot be classified as valid criminal law. The Criminal Code generally prohibits acts, rather than regulating ownership. Possession itself is not dangerous; it is only misuse that is dangerous, and the law goes far beyond prohibiting misuse. This led Conrad J.A. to conclude that the Firearms Act represents a colourable intrusion into the provincial jurisdiction over property and civil rights, and is invalid as an exercise of Parliament's jurisdiction [page796] over criminal law or its peace, order and good government power. While she would have struck down the legislation entirely, she held that if the licensing scheme were deemed valid, the registration scheme could be severed from the licensing scheme.

V. Analysis

15 The issue before us is whether the licensing and registration provisions of the Firearms Act constitute a valid federal enactment pursuant to Parliament's jurisdiction over criminal law or its peace, order and good government power. In order to answer this question, we must engage in the division of powers analysis used so often by this Court, and most recently summarized in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *R. v. Morgentaler*, [1993] 3 S.C.R. 463. There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the Constitution Act, 1867 in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

A. Characterization: What Is the Pith and Substance of the Law?

16 The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

17 A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government [page797] publications: see *Morgentaler*, supra, at pp. 483-84. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see *Global Securities*, supra, at para. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35; and *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 14. Purpose may also be ascertained by considering the "mischief" of the legislation -- the problem which Parliament sought to remedy: see *Morgentaler*, supra, at pp. 483-84.

18 Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficacious-

ness is not relevant to the Court's division of powers analysis: Morgentaler, *supra*, at pp. 487-88, and Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see Morgentaler, *supra*, at pp. 482-83; Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117 (P.C.) (Alberta Bank Taxation Reference); and Texada Mines Ltd. v. Attorney-General of British Columbia, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say [page798] that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

19 Against this background, we turn to the purpose of the Firearms Act. Section 4 states that the purpose of the Act is "to provide ... for the issuance of licences, registration certificates and authorizations under which persons may possess firearms" and "to authorize ... the manufacture of" and "transfer of" ordinary firearms. This is the language of property regulation. However, this regulatory language is directly tied to a purpose cast in the language of the criminal law. The licensing, registration and authorization provisions delineate the means by which people can own and transfer ordinary firearms "in circumstances that would otherwise constitute [a criminal] offence". Those who challenge the legislation point to the first part of the section and its regulatory focus. Those who seek to uphold the law point to the second part of the section and its criminal focus.

20 The statements of the Honourable Allan Rock, Minister of Justice at the time, in his second-reading speech in the House of Commons, reveal that the federal government's purpose in proposing the law was to promote public safety. He stated: "The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada" (House of Commons Debates, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706 (emphasis added)). Mr. Rock went on to describe the contents of the bill in more detail (at p. 9707):

First, tough measures to deal with the criminal misuse of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legitimate [page799] use of firearms can be carried on in a manner consistent with public safety. [Emphasis added.]

(See also the judgment of Fraser C.J.A., at paras. 169-72.)

Later, the Minister referred to the problems of suicide, accidental shootings, and the use of guns in domestic violence, and detailed some of the shooting tragedies that had spurred public calls for gun control. Russell MacLellan, the Parliamentary Secretary of Justice at the time, underscored the government's concerns, noting that the Act pursues "three fundamental policies: the deterrence of the misuse of firearms, general controls on persons given access to firearms, and controls placed on specific types of firearms" ("Canada's firearms proposals" (1995), 37 Can. J. Crim. 163, at p. 163).

21 Another way to determine the purpose of legislation is to look at the problems it is intended to address -- the so-called "mischief" approach. The Firearms Act is aimed at a number of evils or "mischiefs". One is the illegal trade in guns, both within Canada and across the border with the

United States: see The Government's Action Plan on Firearms Control, tabled in the House of Commons in 1994. Another is the link between guns and violent crime, suicide, and accidental deaths. In a paper commissioned by the Department of Justice in 1994, *The Impact of the Availability of Firearms on Violent Crime, Suicide, and Accidental Death: A Review of the Literature with Special Reference to the Canadian Situation*, Thomas Gabor found that all three causes of death may increase in jurisdictions where there are the fewest restrictions on guns. Whether or not one accepts Gabor's conclusions, his study indicates the problem which Parliament sought to address by enacting the legislation: the problem of the misuse of firearms and the threat it poses to public safety.

[page800]

22 Finally, there is a strong argument that the purpose of this legislation conforms with the historical public safety focus of all gun control laws. This reference challenges the licensing and registration provisions of the Act only as they relate to ordinary firearms. Alberta does not question the licensing and registration of restricted and prohibited weapons. It freely admits that the restrictions on those categories of weapons are constitutional. Indeed, Alberta would have difficulty alleging otherwise, as numerous courts have upheld the validity of different aspects of the federal gun control legislation that existed prior to the enactment of this Act: see *R. v. Schwartz*, [1988] 2 S.C.R. 443; *McGuigan v. The Queen*, [1982] 1 S.C.R. 284; and *Attorney General of Canada v. Pattison* (1981), 30 A.R. 83 (C.A.).

23 More specifically, before the introduction of the Firearms Act, the registration of all restricted weapons was upheld by the British Columbia Court of Appeal in *Martinoff v. Dawson* (1990), 57 C.C.C. (3d) 482. Furthermore, the Criminal Code required anyone seeking to obtain any kind of firearm to apply for a firearms acquisition certificate. This requirement was upheld in *R. v. Northcott*, [1980] 5 W.W.R. 38 (B.C. Prov. Ct.). These cases upheld the previous gun control legislation on the basis that Parliament's purpose was to promote public safety. The Firearms Act extends that legislation in two respects: (1) it requires all guns to be registered, not just restricted and prohibited firearms; and (2) eventually all gun owners will be required to be licensed, not just those who wish to acquire a firearm. These changes represent a continuation of Parliament's focus on safety concerns, and constitute a limited expansion of the pre-existing legislation. Given the general acceptance of the gun control legislation that has existed for the past hundred years, the constitutional validity of which has always been predicated on Parliament's concern for public safety, it is difficult to now impute a different purpose to Parliament. This [page801] supports the view that the law in pith and substance is about public safety.

24 The effects of the scheme -- how it impacts on the legal rights of Canadians -- also support the conclusion that the 1995 gun control law is in pith and substance a public safety measure. The criteria for acquiring a licence are concerned with safety rather than the regulation of property. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified. What the law does not require also shows that the operation of the scheme is limited to ensuring safety. For instance, the Act does not regulate the legitimate commercial market for guns. It makes no attempt to set labour standards or the price of weapons. There is no attempt to protect or regulate industries or

businesses associated with guns (see Pattison, *supra*, at para. 22). Unlike provincial property registries, the registry established under the Act is not concerned with prior interests, and unlike some provincial motor vehicle schemes, the Act does not address insurance. In short, the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership. We therefore conclude that, viewed from its purpose and effects, the Firearms Act is in "pith and substance" directed to public safety.

B. Classification: Does Parliament Have Jurisdiction to Enact the Law?

25 Having assessed the pith and substance or matter of the law, the second step is to determine whether that matter comes within the jurisdiction of the enacting legislature. We must examine the [page802] heads of power under ss. 91 and 92 of the Constitution Act, 1867 and determine what the matter is "in relation to". In this case, the question is whether the law falls under federal jurisdiction over criminal law or its peace, order and good government power; or under provincial jurisdiction over property and civil rights. The presumption of constitutionality means that Alberta, as the party challenging the legislation, is required to show that the Act does not fall within the jurisdiction of Parliament: see *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.

26 The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669, "overlap of legislation is to be expected and accommodated in a federal state". Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have "incidental effects" upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.

27 As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty: *RJR-MacDonald*, *supra*; *Hydro-Québec*, *supra*; and *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the "Margarine Reference"). The Attorney General of Canada argues that the 1995 gun control law meets these three requirements, and points to commentary on this legislation which supports its position: D. Gibson, "The Firearms Reference in the Alberta Court of Appeal" (1999), 37 *Alta. L. Rev.* 1071; D. M. Beatty, "Gun Control and Judicial Anarchy" (1999), 10 *Constitutional Forum* 45; A. C. Hutchinson and D. Schneiderman, "Smoking Guns: The Federal Government Confronts The Tobacco and Gun Lobbies" (1995), 7 *Constitutional* [page803] *Forum* 16; and Peter W. Hogg's testimony before the Standing Senate Committee on Legal and Constitutional Affairs, October 26, 1995.

28 Before determining whether the three criminal law criteria are met by this legislation, some general observations on the criminal law power may be apposite. Criminal law, as this Court has stated in numerous cases, constitutes a broad area of federal jurisdiction: *RJR-MacDonald*, *supra*; *Hydro-Québec*, *supra*; and *Margarine Reference*, *supra*. The criminal law stands on its own as federal jurisdiction. Although it often overlaps with provincial jurisdiction over property and civil rights, it is not "carved out" from provincial jurisdiction, contrary to the view of Conrad J.A. It also includes the law of criminal procedure, which regulates many aspects of criminal law enforcement,

such as arrest, search and seizure of evidence, the regulation of electronic surveillance and the forfeiture of stolen property.

29 Not only is the criminal law a "stand-alone" jurisdiction, it also finds its expression in a broad range of legislation. The Criminal Code is the quintessential federal enactment under its criminal jurisdiction, but it is not the only one. The Food and Drugs Act, the Hazardous Products Act, the Lord's Day Act, and the Tobacco Products Control Act have all been held to be valid exercises of the criminal law power: see *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501 (B.C.C.A.); *R. v. Cosman's Furniture (1972) Ltd.* (1976), 73 D.L.R. (3d) 312 (Man. C.A.); *Big M Drug Mart*, *supra* (legislation struck down on other grounds); and *RJR-MacDonald*, *supra* (legislation struck down on other grounds), respectively. Thus the fact that some of the provisions of the Firearms Act are not contained within the Criminal Code has no significance for the purposes of constitutional classification.

30 Although the criminal law power is broad, it is not unlimited. Some of the parties before us [page804] expressed the fear that the criminal law power might be illegitimately used to invade the provincial domain and usurp provincial power. A properly restrained understanding of the criminal law power guards against this possibility.

31 Within this context, we return to the three criteria that a law must satisfy in order to be classified as criminal. The first step is to consider whether the law has a valid criminal law purpose. Rand J. listed some examples of valid purposes in the *Margarine Reference* at p. 50: "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law". Earlier, we concluded that the gun control law in pith and substance is directed at public safety. This brings it clearly within the criminal law purposes of protecting public peace, order, security and health.

32 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts look at whether laws of this type have traditionally been held to be criminal law: see *Morgentaler*, *supra*, at p. 491, and *RJR-MacDonald*, *supra*, at para. 204; see also *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, and *R. v. Zelensky*, [1978] 2 S.C.R. 940. Courts have repeatedly held that gun control comes within the criminal law sphere. As Fraser C.J.A. demonstrated in her judgment, gun control has been a matter of criminal law since before the enactment of the Criminal Code in 1892, and has continued since that date (see also E. M. Davies, "The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence" (2000), 6 Appeal 44, and M. L. Friedland, *A Century of Criminal Justice* (1984), at pp. 125 ff.).

33 Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. Section 2 of the Criminal Code (as amended by s. 138(2) of the Firearms Act) defines a "firearm" as "a barrelled weapon from which any shot, bullet or other projectile can [page805] be discharged and that is capable of causing serious bodily injury or death to a person" (emphasis added). This demonstrates that Parliament views firearms as dangerous and regulates their possession and use on that ground. The law is limited to restrictions which are directed at safety purposes. As such, the regulation of guns as dangerous products is a valid purpose within the criminal law power: see *R. v. Felawka*, [1993] 4 S.C.R. 199; *RJR-MacDonald*, *supra*; *R. v. Wetmore*, [1983] 2 S.C.R. 284; and *Cosman's Furniture*, *supra*.

34 The finding of a valid criminal law purpose does not end the inquiry, however. In order to be classified as a valid criminal law, that purpose must be connected to a prohibition backed by a pen-

alty. The 1995 gun control law satisfies these requirements. Section 112 of the Firearms Act prohibits the possession of a firearm without a registration certificate. Section 91 of the Criminal Code (as amended by s. 139 of the Firearms Act) prohibits the possession of a firearm without a licence and a registration certificate. These prohibitions are backed by penalties: see s. 115 of the Firearms Act and s. 91 of the Code.

35 It thus appears that the 1995 gun control law possesses all three criteria required for a criminal law. However, Alberta and the provinces raised a number of objections to this classification which must be considered.

(1) Regulation or Criminal Prohibition?

36 The first objection is that the Firearms Act is essentially regulatory rather than criminal legislation because of the complexity of the law and the discretion it grants to the chief firearms officer. These aspects of the law, the provinces argue, are the hallmarks of regulatory legislation, not the criminal law: see Hogg, *supra*, at pp. 18-25 and 18-26.

37 Despite its initial appeal, this argument fails to advance Alberta's case. The fact that the Act is [page806] complex does not necessarily detract from its criminal nature. Other legislation, such as the Food and Drugs Act, R.S.C., 1985, c. F-27, and the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), are legitimate exercises of the criminal law power, yet highly complex. Nor does the Act give the chief firearms officer or Registrar undue discretion. The offences are not defined by an administrative body, avoiding the difficulty identified in the dissenting judgment in *Hydro-Québec*, *supra*. They are clearly stated in the Act and the Criminal Code: no one shall possess a firearm without a proper licence and registration. While the Act provides for discretion to refuse to issue an authorization to carry or transport under s. 68 or a registration certificate under s. 69, that discretion is restricted by the Act. A licence shall be refused if the applicant is not eligible to hold one: s. 68. Eligibility to hold a licence is delineated in the rest of the Act: a person is ineligible to hold a licence if the person has been convicted of certain offences (s. 5(2)) or is subject to a prohibition order (s. 6); s. 7 requires the applicant to complete a safety course. Discretion regarding registration is also bounded by the Act. A refusal by the chief firearms officer or the Registrar must be for "good and sufficient reason": ss. 68 and 69; the refusal must be in writing with reasons given (s. 72). These provisions demonstrate that the Act does not give the chief firearms officer or the Registrar undue discretion. Furthermore, the chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Refusal or revocation of a licence or a registration certificate may be referred to a provincial court judge: s. 74. The courts will interpret the words "good and sufficient reason" in ss. 68 and 69 in line with the public safety purpose of the Act, ensuring that the exercise of discretion by the chief firearms officer and the Registrar is always wed to that purpose.

[page807]

38 Furthermore, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with the scheme, as was the case in *Boggs v. The Queen*, [1981] 1 S.C.R. 49, but stand on their own, independently serving the purpose of public safety. Nor are the prohibitions and penalties directed to the object of revenue generation. Parliament's intention was

not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort.

39 Alberta and the supporting interveners argued that the only way Parliament could address gun control would be to prohibit ordinary firearms outright. With respect, this suggestion is not supported by either logic or jurisprudence. First, the jurisprudence establishes that Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *RJR-MacDonald*, *supra*. Second, exemptions from a law do not preclude it from being prohibitive and therefore criminal in nature: see *R. v. Furtney*, [1991] 3 S.C.R. 89, *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, and *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497. Third, as noted above, the prohibition in this case is not merely designed to enforce a fee payment or regulatory scheme separate from the essential safety focus of the law: by way of contrast, see *Boggs*, *supra*. Finally, if prohibition is not required to make handgun control constitutional, which no one suggests, why should it be required for ordinary firearms?

40 In a related argument, some provincial interveners contended that if the purpose of the legislation is to reduce misuse, then the legislation should deal with misuse directly. On this view, Parliament could prohibit the careless or intentional misuse of guns, as it has in ss. 85-87 of the Criminal Code, [page808] but could not prohibit people from owning guns if they present risks to public safety or regulate how people store their guns. Again, the answer is that Parliament may use indirect means to further the end of public safety. The risks associated with ordinary firearms are not confined to the intentional or reckless conduct that might be deterred by a prohibition on misuse. The Attorney General of Canada argued, for example, that the suicide rate is increased by the availability of guns. A person contemplating suicide may be more likely to actually commit suicide if a gun is available, it was argued; therefore Parliament has a right to prevent people at risk, for example due to mental illness, from owning a gun. A prohibition on misuse is unlikely to deter a potential suicide; a prohibition on gun ownership may do so. Other examples where a prohibition on misuse falls short are not hard to envisage. A prohibition on misuse is unlikely to prevent the death of a child who plays with a gun; a prohibition on irresponsible ownership or careless storage may do so. Again, reducing availability may have a greater impact on whether a robber uses a gun than a law forbidding him to use it. Whether the 1995 gun law actually achieves these ends is not at issue before us; what is at issue is whether Parliament, in targeting these dangers, strayed outside its criminal law power. In our view, it did not.

(2) Property and Civil Rights or Criminal Law?

41 Alberta's second major objection to classifying the 1995 gun control scheme as criminal law is that it is indistinguishable from existing provincial property regulation schemes such as automobile and land title registries.

42 This argument overlooks the different purposes behind the federal restrictions on firearms and the [page809] provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights, pursuant to the provinces' s. 92(13) jurisdiction: *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; *Validity of Section 92(4) of the Vehicles Act*,

1957 (Sask.), [1958] S.C.R. 608; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396.

43 The argument that the federal gun control scheme is no different from the provincial regulation of motor vehicles ignores the fact that there are significant distinctions between the roles of guns and cars in Canadian society. Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons in violent crime, including domestic violence; cars generally are not. Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the Firearms Act to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

[page810]

44 In a variation on the theme of property and civil rights, the opponents of the 1995 gun control law argue that ordinary guns, like rifles and shotguns, are common property, not dangerous property. Ordinary firearms are different, they argue, from the automatic weapons and handguns that Parliament has regulated in the past. Ordinary guns are used mainly for lawful purposes in hunting, trapping and ranching. Automatic weapons and handguns, by contrast, have few uses outside crime or war. The fact that Parliament has the right under the criminal law power to control automatic weapons and handguns does not, they argue, mean that Parliament has the right to regulate ordinary guns.

45 The difficulty with this argument is that while ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Guns cannot be divided neatly into two categories -- those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety. As such, their control falls within the criminal law power.

46 In a further variation on this argument, the provinces of Ontario and Saskatchewan submitted that even if the licensing provisions of the law were valid criminal legislation, the registration provisions are mainly provincial property legislation and should be severed and struck out. The argument is that the registration portions of the Act simply amount to regulation, with little connection to the public safety purpose advanced by the federal government to justify the Act as a whole. Conrad J.A. agreed with this argument, finding that although the Act "cleverly intertwines" the licensing and registration provisions through "clever packaging", the registration provisions could be severed from the gun control law. As proof, she [page811] pointed to the fact that the pre-existing firearms acquisition certificate scheme, governing prohibited and restricted arms, applied to ordinary firearms without being connected to a registration system.

47 We are not persuaded that the registration provisions can be severed from the rest of the Act, nor that they fail to serve Parliament's purpose in promoting public safety. The licensing provisions require everyone who possesses a gun to be licensed. The registration provisions require all guns to be registered. The combination of the two parts of the scheme is intended to ensure that when a firearm is transferred from one person to another, the recipient is licensed. Absent a registration system, this would be impossible to ascertain. If a gun is found in the possession of an unlicensed person, the registration system permits the government to determine where the gun originated. With a registration scheme in place, licensed owners can be held responsible for the transfer of their weapons. The registration system is also part of the general scheme of the law in reducing misuse. If someone is found guilty of a crime involving violence, or is prohibited from possessing a weapon, the registration scheme is expected to assist the police in determining whether the offender actually owns any guns and in confiscating them. The registration scheme is also intended to reduce smuggling and the illegal trade in guns. These interconnections demonstrate that the registration and licensing portions of the Firearms Act are both tightly linked to Parliament's goal in promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme. The government is not prevented from improving the system because the pre-existing firearms acquisition certificate system was not connected to a registration system. Moreover, prior to this Act, the federal government had a registration system for handguns. It now seeks to extend it to all guns. Contrary to the suggestions of [page812] Conrad J.A., no improper purpose in including registration in the scheme has been demonstrated.

(3) Undue Intrusion into Provincial Powers?

48 In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. In support of its submission, Alberta cites the work of D. M. Beatty, who suggests applying considerations of rationality and proportionality from the Canadian Charter of Rights and Freedoms s. 1 cases to questions of legislative competence: *Constitutional Law in Theory and Practice* (1995). It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the Constitution Act, 1867. This said, however, it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; see also *General Motors of Canada Ltd. v. City National Leasing*, *supra*. The courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation that does not conform with the requirements of the criminal law: see *Boggs*, *supra*, and the *Margarine Reference*, *supra*. The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

[page813]

49 The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but rather to the provincial power over property

and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant: see, e.g., *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is ultra vires the federal government. In summary, the question is whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or "in pith and substance", the regulation of property and civil rights.

50 In our view, Alberta and the provinces have not established that the effects of the law on provincial matters are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Exercises of the criminal law power often affect property and civil rights to some degree: *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368 (P.C.). Such effects are almost unavoidable, as many aspects of the criminal law deal with property and its ownership. The fact that such effects are common does not lessen the need to examine them. It does suggest, however, that we cannot draw sharp lines between criminal law and property and civil rights. Food, drugs and obscene materials are all items of property and are all legitimate subjects of criminal laws. In order to determine the proper classification of this law, then, we must go beyond the simplistic proposition that [page814] guns are property and thus any federal regulation of firearms is prima facie unconstitutional.

51 Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Most provinces already have regulations dealing with hunting, discharge within municipal boundaries, and other aspects of firearm use, and these are legitimate subjects of provincial regulation: see *R. v. Chiasson* (1982), 66 C.C.C. (2d) 195 (N.B.C.A.), aff'd [1984] 1 S.C.R. 266. The Act does not affect these laws.

52 Third, the most important jurisdictional effect of this law is its elimination of the ability of the provinces to not have any regulations on the ownership of ordinary firearms. The provinces argue that it is in their power to choose whether or not to have such a law. By taking over the field, the federal government has deprived the provinces of that choice. Assuming (without deciding) that the provincial legislatures would have the jurisdiction to enact a law in relation to the property aspects of ordinary firearms, this does not prevent Parliament from addressing the safety aspects of ordinary firearms. The double aspect doctrine permits both levels of government to legislate in one jurisdictional field for two different purposes: Egan, supra.

53 Fourth, as discussed above, this law does not precipitate the federal government's entry into a new field. Gun control has been the subject of federal law since Confederation. This law does not allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces. There is no colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law. While we are sensitive to the concern of the provincial governments that the federal jurisdiction over criminal law not be permitted such an [page815] unlimited scope that it erodes the constitutional balance of powers, we do not believe that this legislation poses such a threat.

(4) Is Moral Content Required?

54 Yet another argument is that the ownership of guns is not criminal law because it is not immoral to own an ordinary firearm. There are two difficulties with this argument. The first is that while the ownership of ordinary firearms is not in itself regarded by most Canadians as immoral, the problems associated with the misuse of firearms are firmly grounded in morality. Firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism. Preventing such misuse can be seen as an attempt to curb immoral acts. Viewed thus, gun control is directed at a moral evil.

55 The second difficulty with the argument is that the criminal law is not confined to prohibiting immoral acts: see *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (P.C.). While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality. For instance, the criminal law has been used to prohibit certain restrictions on market competition: see *Attorney-General for British Columbia v. Attorney-General for Canada*, *supra*. Therefore, even if gun control did not involve morality, it could still fall under the federal criminal law power.

(5) Other Concerns

56 We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered [page816] from a great distance. These apprehensions are genuine, but they do not go to the question before us -- Parliament's jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the Charter, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

57 We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis. Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used them in the commission of offences, the registration system seeks to make those guns more traceable. The cost of the program, another criticism [page817] of the law, is equally irrelevant to our constitutional analysis.

VI. Conclusion

58 We conclude that the impugned sections of the Firearms Act contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant

to s. 91(27) of the Constitution Act, 1867 and hence intra vires Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.

59 Having determined that the legislation constitutes a valid exercise of Parliament's jurisdiction over criminal law, it is unnecessary to consider whether the legislation can also be justified as an exercise of its peace, order and good government power.

60 We would dismiss the appeal. The licensing and registration provisions in the Firearms Act do not constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867. The Act is a valid exercise of Parliament's jurisdiction over criminal law pursuant to s. 91(27).

61 The answers to the reference questions are as follows:

Question 2:

- (1) No.
- (2) No.

Question 3:

- (1) No.
- (2) No.

[page818]

Appendix A -- The Reference Questions

The Reference was initiated by Her Majesty the Queen in Right of Alberta on September 26, 1996 by Order in Council 461/96. The Lieutenant Governor in Council referred four specific questions to the Court (under headings 2 and 3):

1. For purposes of these questions,

- (a) "Firearms Act" means the Firearms Act, chapter 39 of the Statutes of Canada, 1995;
- (b) "ordinary firearm" means "firearm", as defined in section 2 of the Criminal Code (Canada), as amended by section 138 of the Firearms Act, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined in section 84 of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act;
- (c) "licensing provisions" means those portions of the Firearms Act relating to the mandatory regime of licensing for those persons who own or possess or wish to own or possess an ordinary firearm, including, without limitation, sections 5 to 10, 54, 55, 56, 58, 61, 64, 67, 68 and 70, and the related en-

forcement provisions of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act;

- (d) "Registration provisions" means those portions of the Firearms Act relating to the mandatory regime of registration for an ordinary firearm, including, without limitation, sections 13 to 16, 54, 60, 61, 66, 69, 71, 82 to 94, 112 and 115, and the related enforcement provisions of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act.

2. (1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the Constitution Act, 1867?

- (2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

[page819]

3. (1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the Constitution Act, 1867?

- (2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

Appendix B -- The Legislation

This is the version of the Firearms Act as assented to, and as referred to the Alberta Court of appeal by Order in Council 461/96. It does not take into account any amendments to the Act.

5. (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

- (a) has been convicted or discharged under section 736 of the Criminal Code of
 - (i) an offence in the commission of which violence against another person was used, threatened or attempted,
 - (ii) an offence under this Act or Part III of the Criminal Code,
 - (iii) an offence under section 264 of the Criminal Code (criminal harassment), or
 - (iv) an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the Food and Drugs Act or subsection 4(1) or (2) or 5(1) of the Narcotic Control Act;
- (b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

[page820]

- (c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

6. (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

(2) Subsection (1) is subject to any order made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment).

7. (1) An individual is eligible to hold a licence only if the individual

- (a) successfully completes the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and passes the

- tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;
- (b) except in the case of an individual who is less than eighteen years old, passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;
 - (c) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or
 - (d) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act.

(2) An individual is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual

[page821]

- (a) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course; or
- (b) passes a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister.

(3) An individual against whom a prohibition order was made

- (a) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,
 - (i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and
 - (ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and
- (b) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,

- (i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and
- (ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.

(4) Subsections (1) and (2) do not apply to an individual who

- (a) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;
- (b) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;
- (c) on the commencement day, possessed one or more firearms and does not require a licence to acquire other firearms;
- (d) requires a licence merely to acquire cross-bows; or

[page822]

- (e) is a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms.

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer from the application of that subsection.

8. (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of

target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

9. (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

(2) A business other than a carrier is eligible to hold a licence only if

[page823]

- (a) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or
- (b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

(3) A business other than a carrier is eligible to hold a licence only if every employee of the business who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition is the holder of a licence authorizing the holder to acquire restricted firearms.

(4) In subsection (3), "firearm" does not include a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon

- (a) from which any shot, bullet or other projectile can be discharged; and
- (b) that is capable of causing serious bodily injury or death to a person.

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person's ineligibility.

(6) Subsection (3) does not apply in respect of an employee of a museum

- (a) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or
- (b) who is designated, by name, by a provincial minister.

10. Sections 5, 6 and 9 apply in respect of a carrier whose business includes the transportation of firearms, [page824] prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition from one province to any other province, or beyond the limits of a province, as if each reference in those sections to a chief firearms officer were a reference to the Registrar.

13. A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

14. A registration certificate may be issued only for a firearm

- (a) that bears a serial number sufficient to distinguish it from other firearms; or
- (b) that is described in the prescribed manner.

15. A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

16. (1) A registration certificate for a firearm may be issued to only one person.

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

(2) An application for a licence, registration certificate or authorization must be made to

- (a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or
- (b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

- (a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

[page825]

- (b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

55. (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of the applicant, which may consist of interviews with neighbours, community workers, social workers, individuals who work or live with the applicant, spouse, former spouse, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

56. (1) A chief firearms officer is responsible for issuing licences.

(2) Only one licence may be issued to any one individual.

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

58. (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

[page826]

60. The Registrar is responsible for issuing registration certificates for firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be in the prescribed form and include the prescribed information, including any conditions attached to it.

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to prohibited firearms, restricted firearms, firearms that are neither prohibited firearms nor restricted firearms, cross-

bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

64. (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

- (a) five years after the birthday of the holder next following the day on which it is issued, and
- (b) the expiration of the period for which it is expressed to be issued.

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

- (a) the day on which the holder attains the age of eighteen years, and
- (b) the expiration of the period for which it is expressed to be issued.

(3) A licence that is issued to a business other than a museum expires on the earlier of

- (a) one year after the day on which it is issued, and
- (b) the expiration of the period for which it is expressed to be issued.

[page827]

(4) A licence that is issued to a museum expires on the earlier of

- (a) three years after the day on which it is issued, and
- (b) the expiration of the period for which it is expressed to be issued.

66. A registration certificate for a firearm expires where

- (a) the holder of the registration certificate ceases to be the owner of the firearm; or
- (b) the firearm ceases to be a firearm.

67. (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the same manner and in the same circumstances in which a licence, authorization to carry or authorization to transport may be issued.

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for

- (a) the purpose described in section 28 for which the individual acquired the restricted firearms or handguns; or
- (b) in the case of any of those firearms or handguns that were possessed by the individual on the commencement day, the purpose described in that section that was specified by the individual in the licence application.

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) that are possessed by an individual are not being used for that purpose shall

- (a) give notice of that decision in the prescribed form to the individual; and
- (b) inform the Registrar of that decision.

(4) Subsections (2) and (3) do not apply to a firearm

[page828]

- (a) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;
- (b) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;
- (c) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and
- (d) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

(5) A notice given under paragraph (3)(a) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

69. The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

70. (1) A chief firearms officer who issues a licence, authorization to carry or authorization to transport may revoke it for any good and sufficient reason including, without limiting the generality of the foregoing,

- (a) where the holder of the licence or authorization
 - (i) is no longer or never was eligible to hold the licence or authorization,
 - (ii) contravenes any condition attached to the licence or authorization, or
 - (iii) has been convicted or discharged under section 736 of the Criminal Code of an offence referred to in paragraph 5(2)(a); or
- (b) where, in the case of a business, a person who stands in a prescribed relationship to the business has [page829] been convicted or discharged under section 736 of the Criminal Code of any such offence.

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

71. (1) The Registrar

- (a) may revoke a registration certificate for any good and sufficient reason; and
- (b) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed by a chief firearms officer under section 67 that the firearm is not being used for
 - (i) the purpose for which the individual acquired it, or
 - (ii) in the case of a firearm possessed by the individual on the commencement day, the purpose specified by the individual in the licence application.

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

82. The Commissioner of the Royal Canadian Mounted Police shall, after consulting with the federal Minister and the Solicitor General of Canada, appoint an individual as the Registrar of Firearms.

83. (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

- (a) every licence, registration certificate and authorization that is issued or revoked by the Registrar;
- (b) every application for a licence, registration certificate or authorization that is refused by the Registrar;
- (c) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

[page830]

- (d) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;
- (e) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and
- (f) such other matters as may be prescribed.

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

84. The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

85. (1) The Registrar shall establish and maintain a record of

- (a) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,
 - (i) peace officers,
 - (ii) persons training to become police officers or peace officers under the control and supervision of
 - (A) a police force, or
 - (B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

- (iii) persons or members of a class of persons employed in the public service of Canada or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the Criminal Code to be public officers, and
 - (iv) chief firearms officers and firearms officers; and
- (b) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

[page831]

86. The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

87. (1) A chief firearms officer shall keep a record
of

- (a) every licence and authorization that is issued or revoked by the chief firearms officer;
- (b) every application for a licence or authorization that is refused by the chief firearms officer;
- (c) every prohibition order of which the chief firearms officer is informed under section 89; and
- (d) such other matters as may be prescribed.

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

88. A chief firearms officer to whom the loss, finding, theft or destruction of a firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

89. Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

90. The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

91. (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

(2) For the purposes of this Act and Part III of the Criminal Code, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

92. (1) Records required by section 83 or 85 to be kept by the Registrar may

[page832]

- (a) be in bound or loose-leaf form or in photographic film form; or
- (b) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

93. (1) The Registrar shall, as soon as possible after the end of each calendar year and at such other times as the Solicitor General of Canada may, in writing, request, submit to the Solicitor General a report, in such form and including such information as the Solicitor General may direct, with regard to the administration of this Act.

(2) The Solicitor General of Canada shall have each report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

94. A chief firearms officer shall submit the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Registrar to compile the reports referred to in section 93.

112. (1) Subject to subsections (2) and (3), every person commits an offence who, not having previously committed an offence under this subsection or subsection 91(1) or 92(1) of the Criminal Code, possesses a firearm that is neither a prohibited firearm nor a restricted firearm without being the holder of a registration certificate for the firearm.

(2) Subsection (1) does not apply to

- (a) a person who possesses a firearm while the person is under the direct and immediate supervision of a [page833] person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it;
- (b) a person who comes into possession of a firearm by operation of law and who, within a reasonable period after acquiring possession of it, lawfully disposes of it or obtains a registration certificate for it; or
- (c) a person who possesses a firearm and who is not the holder of a registration certificate for the firearm if the person
 - (i) has borrowed the firearm,
 - (ii) is the holder of a licence under which the person may possess it, and
 - (iii) is in possession of the firearm to hunt or trap in order to sustain himself or herself or his or her family.

(3) Every person who, at any particular time between the commencement day and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is neither a prohibited firearm nor a restricted firearm is deemed for the purposes of subsection (1) to be, until Janu-

ary 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for the firearm.

(4) Where, in any proceedings for an offence under this section, any question arises as to whether a person is the holder of a registration certificate, the onus is on the defendant to prove that the person is the holder of the registration certificate.

115. Every person who commits an offence under section 112, 113 or 114 is guilty of an offence punishable on summary conviction.

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

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

[page834]

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of Justice, Halifax.

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

Solicitors for the intervener the Attorney General of Manitoba: Ladner Downs, Vancouver.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General, Regina.

Solicitor for the intervener the Government of the Northwest Territories: The Department of Justice, Yellowknife.

Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: The Department of Justice, Whitehorse.

Solicitor for the intervener the Federation of Saskatchewan Indian Nations: The Federation of Saskatchewan Indian Nations, Saskatoon.

Solicitors for the intervener the Coalition of Responsible Firearm Owners and Sportsmen: Dallas K. Miller Law Office, Medicine Hat.

Solicitors for the intervener the Law-Abiding Unregistered Firearms Association: Neufeld Law Office, Red Deer.

Solicitors for the intervener the Shooting Federation of Canada: Shaw McLennan & Ironside, Collingwood, Ontario.

Solicitors for the intervener the Association pour la santé publique du Québec inc.: Brochet Dussault Larochelle, Sainte-Foy.

Solicitors for the intervener the Alberta Council of Women's Shelters: Pringle & Associates, Edmonton.

Solicitors for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent [page835] Health and the Canadian Pediatric Society: Fasken Campbell Godfrey, Toronto.

Solicitors for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg: Ruby & Edwardh, Toronto.

cp/d/qlhbb

Indexed as:

Alberta v. Hutterian Brethren of Wilson Colony

**Her Majesty The Queen in Right of the Province of
Alberta, Appellant;**

v.

**Hutterian Brethren of Wilson Colony and Hutterian
Brethren Church of Wilson, Respondents, and
Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of British
Columbia, Canadian Civil Liberties Association, Ontario
Human Rights Commission, Evangelical Fellowship of
Canada and Christian Legal Fellowship, Intervenors.**

[2009] 2 S.C.R. 567

[2009] 2 R.C.S. 567

[2009] S.C.J. No. 37

[2009] A.C.S. no 37

2009 SCC 37

194 C.R.R. (2d) 12

File No.: 32186.

Supreme Court of Canada

Heard: October 7, 2008;

Judgment: July 24, 2009.

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

(203 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Constitutional law -- Charter of Rights -- Freedom of religion -- New regulation requiring photo for all Alberta driver's licences -- Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken -- Whether regulation infringed freedom of religion -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 2(a) -- Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Constitutional law -- Charter of Rights -- Right to equality -- Discrimination based on religion -- New regulation requiring photo for all Alberta driver's [page568] licences -- Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken -- Whether regulation infringed right to equality -- Canadian Charter of Rights and Freedoms, s. 15 -- Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Summary:

Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. Religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion. In 2003, the Province adopted a new regulation and made the photo requirement universal. The photograph taken at the time of issuance of the licence is placed in the Province's facial recognition data bank. There were about 450 Condition Code G licences in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the Second Commandment prohibits them from having their photograph willingly taken and objected to having their photographs taken on religious grounds. The Province proposed two measures to lessen the impact of the universal photo requirement but, since these measures still required that a photograph be taken for placement in the Province's facial recognition data bank, they were rejected by the members of the Wilson Colony. They proposed instead that no photograph be taken and that non-photo driver's licences be issued to them marked "Not to be used for identification purposes". Unable to reach an agreement with the Province, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The case proceeded on the basis that the universal photo requirement infringes s. 2(a) of the *Canadian Charter of Rights and Freedoms*. The claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the adoption of the universal photo requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the chambers judge and the majority of the Court of Appeal held that the infringement of [page569] freedom of religion was not justified under s. 1 of the *Charter*.

Held (LeBel, Fish and Abella JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.: The regulation is justified under s. 1 of the *Charter*. Regulations are measures "prescribed by law" under s. 1, and the objective of the impugned regulation of maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The universal photo requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but also with collateral problems associated with the licensing system. [para. 39] [para. 42] [para. 45]

The regulation satisfies the proportionality test. First, the universal photo requirement is rationally connected to the objective. The Province's evidence demonstrates that the existence of an exemption from the photo requirement would materially increase the vulnerability of the licensing system and the risk of identity-related fraud. Second, the universal photo requirement for all licensed drivers minimally impairs the s. 2(a) right. The impugned measure is reasonably tailored to address the problem of identity theft associated with driver's licences. The evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. The alternative proposed by the claimants would significantly compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage. Without the licence-holder's photograph in the data bank, the risk that the identity of the holder can be stolen and used for fraudulent purposes is significantly increased. Although there are over 700,000 Albertans who do not hold driver's licences and whose pictures do not appear in the data bank, the objective of the driver's licence photo requirement is not to eliminate all identity theft in the province, but rather to maintain the integrity of the driver's licensing system so as to minimize identity theft associated with that system. Within that system, any exemptions, including those for [page570] religious reasons, pose real risk to the integrity of the licensing system. Lastly, where the validity of a law of general application is at stake, the doctrine of reasonable accommodation is not an appropriate substitute for a proper s. 1 *Oakes* analysis. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. [para. 50] [para. 52] [paras. 59-60] [paras. 62-63] [para. 71]

Third, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. The most important of these benefits is the enhancement of the security or integrity of the driver's licensing scheme. It is clear that a photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine the one-to-one and one-to-many photo comparisons used to verify identity. The universal photo requirement will also assist in roadside safety and identification and, eventually, harmonize Alberta's licensing scheme with those in other jurisdictions. With respect to the deleterious effects, the seriousness of a particular limit must be judged on a case-by-case basis. While the impugned regulation imposes a cost on those who choose not to have their photographs taken -- the cost of not being able to drive on the highway -- that cost does not rise to the level of depriving the claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values. To find alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency, but there is no evidence that this would be prohibitive. It is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion.

When the deleterious effects are balanced against the salutary effects of the impugned regulation, the impact of the limit on religious practice associated with the universal photo requirement is proportionate. [para. 4] [paras. 79-80] [para. 82] [para. 91] [paras. 96-98] [para. 100] [para. 103]

The impugned regulation does not infringe s. 15 of the *Charter*. Assuming it could be shown that the regulation creates a distinction on the enumerated ground [page571] of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is therefore no discrimination within the meaning of s. 15. [para. 108]

Per Abella J. (dissenting): The government of Alberta did not discharge its burden of demonstrating that the infringement of the Hutterites' freedom of religion is justified under s. 1 of the *Charter*. [para. 176]

The purpose of the mandatory photo requirement and the use of facial recognition technology is to help prevent identity theft. An exemption to the photo requirement for the Hutterites was in place for 29 years without evidence that the integrity of the licensing system was harmed in any way. In addition, more than 700,000 Albertans have no driver's licence and are therefore not in the facial recognition database. The benefit to that system therefore, of adding the photographs of around 250 Hutterites who may wish to drive, is only marginally useful to the prevention of identity theft. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life. The impugned regulation and the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. This makes the mandatory photo requirement a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence. [para. 148] [paras. 155-156] [para. 158] [paras. 162-164] [para. 170] [para. 174]

The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. On the other hand, the benefits to the province of requiring the Hutterites to be photographed are, at best, marginal. This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony. [paras. 114-116]

Per LeBel J. (dissenting): Abella J.'s comments on the nature of the guarantee of freedom of religion under s. 2(a) of the *Charter* and her opinion that the impugned regulation, which limits freedom of religion, [page572] has not been properly justified under s. 1 of the *Charter* are both agreed with. The regulatory measures in issue have an impact not only on the Hutterites' belief system, but also on the life of the community. The majority's reasons understate the nature and importance of this aspect of the guarantee of freedom of religion. [para. 178] [para. 182]

Under s. 1, courts have only rarely questioned the purpose of a law or regulation or found that it does not meet the rational connection requirement of the proportionality analysis, but this does not mean that courts will never or should never intervene at these earlier stages. It is generally at the minimal impairment and the balancing of effects stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be

reassessed with regard to the means chosen by Parliament or the legislature. The proportionality analysis thus depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action on the one hand, and the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution but that may nevertheless be of high social value or importance on the other. The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake. The stated objective is not an absolute and should not be treated as a given and alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. A court must assess the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis. [para. 188] [paras. 190-191] [paras. 195-196] [para. 199]

In this case, the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft. The driver's licence that it denies is not a privilege as it is not granted at the discretion of governments. Such a licence is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within [page 573] a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on transportation services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. [paras. 200-201]

Per Fish J. (dissenting): For the reasons given by LeBel J., the disposition of the appeal as suggested by Abella J. and LeBel J. is agreed with. [para. 203]

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By McLachlin C.J.

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Series A No. 260-A; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[page574]

By Abella J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *ahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI; *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Bothwell v. Ontario (Minister of Transportation)* (2005), 24 Admin. L.R. (4th) 288; *Hofer v. Hofer*, [1970] S.C.R. 958; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

By LeBel J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Conrad, O'Brien and Slatter JJ.A.), 2007 ABCA 160, 417 A.R. 68, 410 W.A.C. 68, 283 D.L.R. (4th) 136, [2007] 9 W.W.R. 459, 156 C.R.R. (2d) 234, 77 Alta. L.R. (4th) 281, 49 M.V.R. (5th) 45, [2007] A.J. No. 518 (QL), 2007 CarswellAlta 622, affirming a decision of LoVecchio J., 2006 ABQB 338, 398 A.R. 5, 269 D.L.R. (4th) 757, [2006] 8 W.W.R. 190, 141 C.R.R. (2d) 227, 57 Alta. L.R. (4th) 300, 33 M.V.R. (5th) 16, [2006] A.J. No. 523 (QL), 2006 CarswellAlta 576. Appeal allowed, LeBel, Fish and Abella JJ. dissenting.

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[page577]

The judgment of McLachlin C.J. and Binnie, Deschamps and Rothstein JJ. was delivered by
McLACHLIN C.J.:--

I. Introduction

1 The Province of Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974 each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photos taken on religious grounds. In 2003 the Province made the photo requirement universal in order to reduce the risk of driver's licences being used for identity theft, a growing problem in Alberta and the country. All licence holders are now required to have their photos taken for purposes of placement in the Province's facial recognition data bank.

2 The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They object on religious grounds to having their photographs taken. After the religious exemption to the photo requirement was revoked in 2003, Colony members began these proceedings against the Alberta government, alleging a breach of their religious

freedom. The Province has offered to lessen the impact of the universal photo requirement by issuing special licences without photos, relieving Colony members of the need to carry their photos. However, it insists that their photos be taken for purposes of placement in the central data bank. The members of the Wilson Colony have rejected this proposal.

3 The case has proceeded on the basis that the universal photo requirement constitutes a limit on the freedom of religion of Colony members who wish to obtain a driver's licence and thus infringes s. 2(a) of the *Canadian Charter of Rights and Freedoms*. The issue on this appeal is whether this [page578] limit is a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*. If not, the regulation is inconsistent with the *Charter* and is null and void pursuant to s. 52 of the *Constitution Act, 1982*.

4 I conclude that the evidence led by the Province establishes that the universal photo requirement is justified under s. 1 of the *Charter* on the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The goal of setting up a system that minimizes the risk of identity theft associated with driver's licences is a pressing and important public goal. The universal photo requirement is connected to this goal and does not limit freedom of religion more than required to achieve it. Finally, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. Accordingly, I would allow the appeal and uphold the regulation as constitutional.

II. Facts

5 Alberta began issuing driver's licences with photos in 1974. Until 2003, however, religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion.

6 Driver's licences in Alberta are governed by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, and regulations made under it. The power of the Registrar to grant exceptions to the photo requirement which existed previously in s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, was eliminated in May 2003 (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003, s. 3). The new s. 14(1)(b) now requires that the Registrar "must require an image of the applicant's face, for incorporation in the licence, be taken". The amendment also added s. 14(3) which provides for use of the photo thus taken for "facial recognition [page579] software for the purpose of the identification of, or the verification of the identity of, a person who has applied for an operator's licence".

7 Members of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits them from having their photograph willingly taken. This belief is sincerely held.

8 Although the Colony attempts to be self-sufficient, some members need driver's licences so that they can travel outside the Colony to do business and attend to the needs of members. Under the 2003 regulation, members currently holding Condition Code G licences are required to have their photograph taken upon renewal of their licences, resulting in a violation of their religious beliefs. The Colony claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. Mr. Samuel Wurz, the Colony's Secretary-Treasurer, deposed that each Colony member has a specific set of responsibilities assigned to him or her, some of which require the member to drive. If a Colony member cannot carry out these

responsibilities, it "causes our religious commune to function improperly, thereby eroding the fabric of our social, cultural and religious way of life". In his view, the Province is effectively "attempting to force the Hutterian Brethren to make a choice between two of our religious beliefs", a choice they feel they should not have to make.

9 The Province, for its part, led evidence that the adoption of the universal photo requirement in 2003 was connected to a new system aimed at minimizing identity theft associated with driver's licences. The evidence showed that identity theft is a serious and growing problem in Alberta and elsewhere, and that drivers' licences, the most commonly used and accepted form of identification, could be and were being used for identity theft. [page580] The new facial recognition data bank was aimed at reducing the risk of this type of fraud.

10 Under the new system a digital photograph of every licensed driver is placed in a facial recognition data bank. This data bank is connected to facial recognition software which analyses the digital photographs of people who apply for licences. The software performs two kinds of comparison: one-to-one and one-to-many. The one-to-one comparison allows the government to be sure that the person trying to renew or replace a licence is the same person represented by the existing photo in the data bank. The one-to-many comparison allows it to be satisfied that a person applying for a new licence does not already hold another licence in another person's name.

11 A comprehensive photo requirement, whereby all valid licences are associated with a photo in the data bank, is essential to ensuring the efficacy of these mechanisms. To the extent that licences exist without holder photos in the central photo bank, others can appropriate the identity of the licence holder without detection by the facial recognition software. The Province also led evidence that this system was adopted with a view to harmonization with international and interprovincial standards for photo identification.

12 The Province has proposed measures to accommodate the Hutterian claimants' objection to the universal driver's licence photo requirement. The first is that the licence display a photo, but that the licence be carried in a sealed envelope or folder marked with the indication that it is the property of the Province, and that a digital photo be placed in the Province's facial recognition bank. The second is simply that a digital photo be placed in the bank, with no photo accompanying the driver's licence. The aim of these proposals is to minimize the impact of the universal photo requirement on religious beliefs by removing the need for [page581] Colony members to have any direct contact with the photos.

13 The Colony claimants reject both alternatives on the ground that they require a member to have a photo taken. It proposes that no photo be taken, and that non-photo driver's licences be issued to them, marked "Not to be used for identification purposes".

III. History of Proceedings

A. *Alberta Court of Queen's Bench (LoVecchio J.)*, 2006 ABQB 338, 57 Alta. L.R. (4th) 300

14 The chambers judge proceeded on the basis that the universal photo requirement limited Colony members' right to freedom of religion under s. 2(a) of the *Charter*. He went on to find that this limit was not shown to be justified under s. 1 of the *Charter*.

15 The chambers judge defined the government's objective as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and ... the harmonization

of international and interprovincial standards for photo identification" (para. 10), associated with the issuance of motor vehicle driver's licences. He concluded that the objective of preventing identity theft associated with driver's licences, while limited, was "pressing and substantial" (para. 14).

16 The chambers judge found that "the implementation of mandatory photographic licences, together with facial recognition software, is rationally connected to the objective of safeguarding the system of issuing operator's licences from fraud and for that mat[t]er the larger objective of limiting identity theft" (para. 16). He went on to find, however, that the requirement of minimal impairment [page582] was not met, in that the government had not accommodated the "distinctive character of the burdened group ... to the point of undue hardship" (para. 18), citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. The accommodations offered by the Province would still require members to have their photos taken and offend the right. On the other hand, the Colony claimants' proposal that the driver's licence be marked "Not to be used for identification purposes" would satisfy the Colony members' concerns and also meet the government's objectives, since an individual seeking to impersonate the holder would be "significantly limited in the extent to which he or she could use the licence" (para. 28).

17 Although it was unnecessary, in view of his finding on minimal impairment, the chambers judge went on to consider proportionality of effects. He observed that while the requirement of photos combined with facial recognition software "may safeguard the system of issuing licences against fraud, and thereby constitute a useful tool against identity theft in general", this did not "safeguard the identity of the thousands of other individuals to whom operators' licences are never issued because they do not qualify to drive" (para. 31). He concluded: "In this regard, the effects of the measure appear somewhat limited when weighed against the acknowledged incursion upon the religious beliefs of the members of the applicant Colony" (para. 32).

18 The chambers judge concluded that the regulation is inconsistent with the *Charter* "to the extent that it renders a digital photograph mandatory for individuals who claim a valid religious objection" (para. 39). Accordingly, he held that the amendment removing the regulation's discretionary religions exemption was of no force and effect.

[page583]

B. *Alberta Court of Appeal*, 2007 ABCA 160, 77 Alta. L.R. (4th) 281

19 The majority, *per* Conrad J.A. (O'Brien J.A. concurring), dismissed the appeal.

20 Conrad J.A. characterized the purpose of the photo requirement narrowly as preventing licence duplication in order to permit the ready identification of licensed drivers at the roadside and minimize the number of disqualified people operating motor vehicles. Reasoning that the regulation, enacted under the *Traffic Safety Act*, was confined to enhancing traffic safety, she held that the goals of preventing identity theft, fraud and threats to public safety, could not be considered under s. 1. If the Province wished to assert these goals, in her view it should have enacted a law going specifically to these risks. She also noted the absence of legislative debate on the issue, suggesting that this rendered the regulation suspect.

21 Conrad J.A. expressed doubt about whether the photo requirement was rationally connected to the objective of identification associated with traffic safety. Since over 700,000 unlicensed Albertans are not in the facial recognition data bank, granting a few hundred Hutterites an exemption from the photo requirement would not have a significant impact on the number of identities available for unlawful appropriation.

22 However, Conrad J.A. went on to dispose of the case on the ground that the universal photo requirement did not minimally impair the right, because it did not reasonably accommodate Colony members' s. 2(a) religious freedom. She noted that the claimants had enjoyed an exemption from the requirement for close to 30 years, with no evidence of resultant harm. The result, according to Conrad J.A., was that "the impugned regulation offers only a very slight protection against the risk that [page584] a licence will be issued to an individual in a name other than his or her own, while completely infringing the respondents' rights" (para. 46). Conrad J.A. added that the effects of the regulation were disproportionate, in that "the mandatory photo requirement forces the Hutterian Brethren to either breach a sincerely held religious belief against being photographed or to cease driving", which would also have severe practical consequences for individuals in the community (para. 54).

23 Slatter J.A., dissenting, defined one of the goals of the universal photo requirement as maximizing the reliability and integrity of driver's licences as a widely used and respected method of personal identification. He found that the limit on freedom of religion imposed by the photo requirement, while it might not eliminate all identity theft, was rationally connected to the objective of "[m]aking forgery or unauthorized driving more difficult" (para. 99).

24 On minimal impairment, Slatter J.A. proceeded on the basis that the government must show that it has accommodated the right to the point of undue hardship. The accommodations offered by the Province, while they would still limit the Colony members' religion freedom, would go some way to fulfilling the requirements of the Second Commandment, since members would not have to look at their photos. He held that the accommodation proposed by the Colony claimants -- driver's licences marked "Not to be used for identification purposes" -- was no accommodation at all, but simply "an assertion that nothing which infringes the second commandment can ever be justified" (para. 121). In addition, it would prevent police officers from using non-photo licences for the basic function of driver identification. Slatter J.A. found that the Colony claimants' proposal would reduce the efficacy of the system with respect to identity theft. After alluding to harmonization with other systems, Slatter J.A. concluded that "[t]o require [page585] the [Province] to accommodate any further would require it to significantly compromise a central feature of the security of the licensing system, and would amount to undue hardship" (para. 124).

25 Slatter J.A. concluded that the salutary effects of having the photos of all licence holders in the data bank -- regulating traffic safety and ensuring the integrity and reliability of the driver's licence system to the benefit of Albertans -- outweighed the deleterious effects on Colony members' freedom of religion. He observed that the Colony members object only to having their photos taken *voluntarily*, and suggested that the element of state compulsion implied by the photo requirement would "considerably diminish any disobedience to their religious tenets" (para. 126). For those reasons, he took the view that "[i]n a free and democratic society minor infringements of this kind on religious doctrine can be tolerated" (para. 126).

26 Slatter J.A. accordingly concluded that the appeal should be allowed.

IV. Issues

27 A. Freedom of religion

1. The nature of the limit on the s. 2(a) right;
2. Is the limit on the s. 2(a) right justified under s. 1 of the *Charter*?
 - (a) Is the limit prescribed by law?
 - (b) Is the purpose for which the limit is imposed pressing and substantial?

[page586]

(c) Is the means by which the goal is furthered proportionate?

- (i) Is the limit rationally connected to the purpose?
- (ii) Does the limit minimally impair the right?
- (iii) Is the law proportionate in its effect?

(d) Conclusion on justification

B. The claim under s. 15

V. Analysis

A. *Freedom of Religion*

(1) The Nature of the Limit on the Section 2(a) Right

28 Section 2(a) of the *Charter* states that "[e]veryone has ... freedom of conscience and religion".

29 The members of the Colony believe that permitting their photo to be taken violates the Second Commandment: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4). They believe that photographs are "likenesses" within the meaning of the Second Commandment, and want nothing to do with their creation or use. The impact of having a photo taken might involve censure, such as being required to stand during religious services.

30 Given these beliefs, the effect of the universal photo requirement is to place Colony members who wish to obtain driver's licences either in the position of violating their religious commitments, or of foregoing driver's licences. Without the ability of some members of the Colony to obtain driver's licences, Colony members argue that they will not be able to drive to local centres to do business and obtain the goods and services necessary [page587] to the Colony. The regulation, they argue, forces members to choose between obeying the Second Commandment and adhering to their rural communal lifestyle, thereby limiting their religious freedom and violating s. 2(a) of the *Charter*.

31 My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual and collective aspects'". She asserts that "[b]oth ... are engaged in this case." While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the rele-

vance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim - that of the individual claimants for photo-free licences -- into an assertion of a group right.

32 An infringement of s. 2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, *per* Dickson C.J.:

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern [page588] one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]

33 The Province concedes the first element of this s. 2(a) test, sincere belief in a belief or practice that has a nexus with religion. The chambers judge described the concession in the following terms:

The Attorney General does not dispute that the Applicants hold sincere religious beliefs that conflict with the requirement that those who obtain or renew an Alberta operator's licence must permit a digital photograph to be taken and that those beliefs are honestly held. [para. 6]

34 The record does not disclose a concession on the second element of the test -- whether the universal photo requirement interferes with Colony members' religious freedom in a manner that is more than trivial or insubstantial. In order for such a determination to be made, it would need to be shown that the claimants' "religious beliefs or conduct might reasonably or actually be threatened" by the universal photo requirement: see *Edwards Books*, at p. 759. Evidence of a state-imposed cost or burden would not suffice; there would need to be evidence that such a burden was "capable of interfering with religious belief or practice": *Edwards Books*, at p. 759. In the present case, however, the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society.

[page589]

(2) Is the Limit on the Section 2(a) Right Justified Under Section 1 of the Charter?

35 This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

36 Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

37 If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned [page590] measure is a penal statute directly threatening the liberty of the accused. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, *per* McLachlin C.J.

38 With this in mind, I turn to the question of whether the limit on freedom of religion raised in this case has been shown to be justified under s. 1 of the *Charter*.

(a) *Is the Limit Prescribed by Law?*

39 Section 1 requires that before a proportionality analysis is undertaken, the court must satisfy itself that the measure is "prescribed by law". If a limit on a *Charter* right is not "prescribed by law" it cannot be justified under s. 1. Rather, it is a government act, attracting a remedy under s. 24 of the *Charter*. Regulations are measures "prescribed by law" under s. 1 of the *Charter*: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 981; *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645.

40 The majority of the Court of Appeal expressed concern that the challenged measure was adopted by regulation and therefore without [page591] any legislative debate, pursuant to an Act with very different objectives. The respondents take this position much further and advance a general proposition that *Charter*-infringing measures may only be adopted by primary legislation. Concern about overextension of regulatory authority is understandable. Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. However, that is not what has happened here. A photo requirement has been an accepted part of the motor vehicle licensing scheme for decades. It is not a stand-alone identification divorced from the public-safety purpose of the authorizing legislation. Moreover, hostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 71; D.J. Mullan, *Administrative Law: Cases, Text and Materials* (5th ed. 2003), at p. 948. Regulations, passed by Order in Council and applied in accordance with the principles of administrative law and subject to challenge for constitutionality, are the life blood of the administrative state and do not imperil the rule of law. Whether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis.

(b) *Is the Purpose for Which the Limit Is Imposed Pressing and Substantial?*

41 The chambers judge defined the government's objective in imposing a universal photo requirement as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and ... the harmonization of international and interprovincial standards for photo identification" (para. 10). This objective is part of the larger goal of ensuring the integrity [page592] of the system for licensing drivers. As Slatter J.A. explained:

Driver's licences are an important part of the overall regulation of traffic safety. They have become a near universal form of identification. The integrity and reliability of the driver's licence system benefits all Albertans who require, on a routine basis, proof of their identity. The presence of photographs is an important part of the integrity of the system. There unfortunately are significantly large groups of people who seek to exploit the identities of others for financial or other purposes. The overall cost of the activities of this group are very large, and the [Province] (and all Albertans) have an obligation to do whatever they can to minimize the opportunities for identity theft. Photographs on driver's licences will not eliminate all misuse, and the value of the savings that will result are hard to measure. They are likely however to be significant. [para. 127]

42 Maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The purpose of a universal photo requirement is to have a complete digital data bank of facial photos to prevent wrongdoers from using driver's licences as breeder documents for purposes of identity theft. As discussed above (para. 10), the requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence.

43 The chambers judge found that the universal photo requirement was also aimed at harmonization of international and interprovincial standards for photo identification. The evidence supports

the Province's contention that other provinces and nations are moving toward harmonization, and that a feature of this harmonization is likely to be a universal photo requirement for all licence holders. While the fact that other provinces have not yet moved to this requirement arguably undercuts the position that a universal photo requirement is necessary in Alberta now, governments are entitled to act in the present with a view to future developments. [page593] Accordingly, harmonization may be considered as a factor relevant to the Province's goal of ensuring the integrity of the licensing system by reducing identity theft associated with the system.

44 The majority of the Court of Appeal suggested that the goal of the universal photo requirement should be confined to purposes related to traffic safety, since that was the subject of the authorizing Act. However, government regulations may deal both with the primary goal of an enabling law and with collateral concerns resulting from measures adopted to achieve this goal. As Slatter J.A. put it, "[i]t is the height of formality to suggest that the prevention of the misuse of a driver's licence is not one of the purposes of the *Traffic Safety Act*. Provisions that attempt to prevent the misuse or abuse of an enactment are well within the objectives of the enactment" (para. 90).

45 In this case, the government's primary goal is traffic safety, as denoted by the title of the Act. To further this goal, the Act puts in place a system of licensing drivers. A collateral effect of the licensing system is that the driver's licences issued under this system have become generalized identification documents, with the attendant risk that they might be misused for identity theft and the various mischiefs that flow from identity theft. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but with collateral problems associated with the licensing system. It was therefore entitled to adopt a regulation requiring photos of all drivers to be held in a digital photo bank, thereby minimizing the risk of identity theft to the extent possible.

46 Finally, as explained above, the fact that the specific objectives of the impugned regulation were not debated or ratified by the legislature does not render them invalid for the purposes of s. 1. If a regulation is validly enacted pursuant to delegated [page594] legislative authority, its objective can properly be evaluated under the test established in *Oakes*.

47 I conclude that the Province has established that the goal of ensuring the integrity of the driver's licensing system so as to minimize identity theft associated with that system is pressing and substantial. Having established that the limit on the right is a measure "prescribed by law" and that the asserted purpose of the limit is pressing and substantial, the remaining issue is whether the limit is proportionate, in the sense that it is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects.

- (c) *Is the Means by Which the Goal Is Furthered Proportionate?*
- (i) Is the Limit Rationally Connected to the Purpose?

48 At this stage, the Province must show that the universal photo requirement is rationally connected to the goal of preserving the integrity of the driver's licensing system by minimizing the risk of identity theft through the illicit use of driver's licences. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

49 The government argues that a universal system of photo identification for drivers will be more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds. The affidavit evidence filed by the government supports this view.

[page595]

50 Alberta's evidence demonstrates the ways in which the existence of an exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud. As Mr. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, put it in his affidavit supporting Alberta's position, "[o]pportunities for fraud are as numerous as criminals are clever and resourceful". The existence of non-photo licences in the system raises the possibility that a person could hold multiple licences in different names, as long as no more than one of them was a regular photographic licence. As stated by Alberta, "each licensee whose photo is not entered in our database creates an opportunity for impersonation by wrongdoers, because that person's licence can be renewed or replaced by a wrongdoer without being detected by [facial recognition]". A non-photo licence can be obtained and used to obtain credit or enter into other commercial relationships to the detriment of the other parties to the transactions. Without the photographs of all licence holders in the photo identification bank, the assurance of a one-to-one correspondence between individuals and issued licences is lost, and the possibility of driver's licence-based fraud would be increased.

51 The majority of the Alberta Court of Appeal, while deciding the case on the basis of minimum impairment, expressed doubt on whether the universal photo requirement for all holders of driver's licences is rationally connected to the goal of preserving the integrity and security of the driver's licensing system. Conrad J.A. pointed out that many Albertans do not hold driver's licences and concluded that the risk flowing from exempting a few hundred Hutterites from the requirement was "minimal". These concerns confuse rational connection with proportionality of negative and positive effects of the measure. The issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government goal. The balance between positive and negative effects of the measure [page596] falls to be considered at the final stage of the s. 1 analysis.

52 I conclude that the Province has established that the universal photo requirement is rationally related to its goal of protecting the integrity of the driver's licensing system and preventing it from being used for purposes of identity theft.

(ii) Does the Limit Minimally Impair the Right?

53 The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

54 In *RJR-MacDonald*, the minimal impairment analysis was explained as follows, at para. 160:

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.]

In this manner, the legislative goal, which has been found to be pressing and substantial, grounds the minimum impairment analysis. As Aharon Barak, [page597] former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it": "Proportional Effect: The Israeli Experience" (2007), 57 U.T.L.J. 369, at p. 374. President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting proper protection to human rights" (p. 373). The internal limitation arises from the fact that the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage.

55 I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative.

56 The purpose of the limit in this case, I earlier concluded, is to maintain the integrity of the [page598] driver's licensing system by minimizing the risk of driver's licences being used for purposes of identity theft, so as to prevent fraud and various other misuses of the system. The regulation is part of a complex regulatory scheme and is aimed at an emerging and challenging problem. The question, therefore, is whether the means chosen to further its purpose -- the universal photo requirement for all licensed drivers -- is reasonably tailored to address the problem of identity theft associated with driver's licences.

57 The Province proposes alternatives which maintain the universal photo requirement, but minimize its impact on Colony members by eliminating or alleviating the need for them to carry

photos. This would permit the Province to achieve its goal of a maximally efficient photo recognition system to combat fraud associated with driver's licences, while reducing the impact on the members' s. 2(a) rights.

58 However, the Hutterian claimants reject these proposals. For them, the only acceptable measure is one that entirely removes the limit on their s. 2(a) rights. They object to any photo being taken and held in a photo data bank. For them, the only alternative is a driver's licence issued without a photo, stamped with the words, "Not to be used for identification purposes".

59 The problem with the claimants' proposal in the context of the minimum impairment inquiry is that it compromises the Province's goal of minimizing the risk of misuse of driver's licences for identity theft. The stamp "Not to be used for identification purposes" might prevent a person who comes into physical possession of such a licence from using it as a breeder document, but it would not prevent a person from assuming the identity of the licence holder and producing a fake document, [page599] which could not be checked in the absence of a photo in the data bank. As Slatter J.A. pointed out, without the photo in the bank, the bank is neutralized and the risk that the identity of the holder can be stolen and used for fraudulent purposes is increased. The only way to reduce that risk as much as possible is through a universal photo requirement. The claimants' argument that the reduction in risk would be low, since few people are likely to request exemption from the photo requirement, assumes that some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.

60 The claimants' proposal, instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it. An exemption for an unspecified number of religious objectors would mean that the one-to-one correspondence between issued licences and photos in the data bank would be lost. As shown by the Province, this disparity could well be exploited by wrongdoers. Contrary to the suggestion of LeBel J. (para. 201), the evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. In short, the alternative proposed by the claimants would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage.

61 This is not to suggest the Colony members are acting improperly. Freedom of religion cases may often present this "all or nothing" dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people's religious beliefs and practices. The result may be that the justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption the state goal is valid, but at the stage of proportionality [page600] of effects, which is concerned about balancing the benefits of the measure against its negative effects.

62 I conclude that the universal photo requirement minimally impairs the s. 2(a) right. It falls within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing system. All other options would significantly increase the risk of identity theft using driver's licences. The measure seeks to realize the legislative goal in a minimally intrusive way.

63 Much has been made of the fact that over 700,000 Albertans do not hold driver's licences. The argument is that the risk posed by a few hundred potential religious objectors is minuscule as compared to the much larger group of unlicensed persons. This argument is accepted by the dissent. In

my view, it rests on an overly broad view of the objective of the driver's licence photo requirement as being to eliminate all identity theft in the province. Casting the government objective in these broad terms, my colleague Abella J. argues that the risk posed by a few religious dissenters is minimal, when compared to the general risk posed by unlicensed persons. But with respect, that is the wrong comparison. We must take the government's goal as it is. It is not the broad goal of eliminating all identity theft, but the more modest goal of maintaining the integrity of the driver's licensing system so as to minimize identity theft *associated with that system*. The question is whether, within that system, any exemptions, including for religious reasons, pose real risk to the integrity of the licensing system.

[page601]

64 The implication of Justice Abella's reasoning is that because the province tolerates the identity theft risk posed by unlicensed Albertans, it must therefore tolerate the risk associated with non-photographed licensees. On this logic, the province would be required to take the more radical approach of requiring photographic identification for every Albertan, which would directly contravene the respondents' religious beliefs, before it could rely upon a security risk argument in the context of the narrower driver's licensing program. In my opinion, the province has a legitimate interest in ensuring the integrity of its driver's licensing system and guarding against the risk that it will be used to perpetrate fraud. In order to accomplish this goal, it should not be forced to undertake broader measures that it might have resisted for other policy reasons.

65 The courts below approached minimum impairment in a different fashion. First, they conducted the balancing inquiry at the stage of minimal impairment. Second, drawing on this Court's decision in *Multani*, the courts below applied a reasonable accommodation analysis instead of the *Oakes* test.

66 In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test. If the government establishes justification under the *Oakes* test, the law is constitutional. If not, the law is null and void under s. 52 insofar as it is inconsistent with the *Charter*.

[page602]

67 A different analysis applies where a government *action* or administrative *practice* is alleged to violate the claimant's *Charter* rights. If a *Charter* violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act, 1982* but under s. 24(1) of the *Charter*: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61. In such cases, the jurisprudence on the duty to accommodate, which applies to governments and private parties alike, may be helpful "to explain the

burden resulting from the minimal impairment test with respect to a particular individual" (emphasis added): *Multani*, at para. 53, *per* Charron J.

68 Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties -- most commonly an employer and employee -- adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. In *Multani*, Deschamps and Abella JJ. explained:

The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

69 A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants [page603] before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

70 Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

71 In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper [page604] s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.

(iii) Is the Law Proportionate in Its Effect?

72 The third and final step of the proportionality analysis is to determine proportionality of effects. We have seen that the regulation advances an important objective; that its limitation on the Colony members' religious freedom is rationally connected to that goal; and that the means chosen to achieve the government objective -- the universal photo requirement -- meet the requirement of minimal impairment.

73 This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' religious freedom against the benefits associated with the universal photo requirement for driver's licences, is the limit on the right proportionate in effect to the public benefit conferred by the limit?

74 In *Oakes*, Dickson C.J. explained the function of this third and final step of the proportionality analysis:

Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The [page605] more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [pp. 139-40]

75 Despite the importance Dickson C.J. accorded to this stage of the justification analysis, it has not often been used. Indeed, Peter W. Hogg argues that the fourth branch of *Oakes* is actually redundant: *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12. He finds confirmation of this view in the fact that he is unable to locate any case in which this stage of the analysis has been decisive to the outcome. In his opinion, this is because it essentially duplicates the analysis undertaken at the first stage, pressing and substantial objective. If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way which is rationally connected to the objective and minimally impairing of the right, Hogg asks rhetorically, how can the law's effects nonetheless be disproportionate to its objective? In his view, a finding that a law's objective is "pressing and substantial" at the first stage of *Oakes* will *always* produce a conclusion that its effects are proportionate. The real balancing must be done under the heading of minimal impairment and, to a much more limited extent, rational connection.

76 It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis -- pressing goal, rational connection, and minimum impairment -- could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak explains:

[page606]

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right... . It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

77 The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:

The third stage of the proportionality analysis performs a fundamentally distinct role... . The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis [page607] provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]

78 In my view, this is a case where the decisive analysis falls to be done at the final stage of *Oakes*. The first two elements of the proportionality test -- rational connection and minimum impairment -- are satisfied, and the matter stands to be resolved on whether the "deleterious effects of a measure on individuals or groups" outweigh the public benefit that may be gained from the measure. In cases such as this, where the demand is that the right be fully respected without compromise, the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.

1. *Salutary Effects*

79 The first inquiry is into the benefits, or "salutary effects" associated with the legislative goal. Three salutary effects of the universal photo requirement were raised on the evidence: (1) enhancing the security of the driver's licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.

80 The most important of these benefits and the one upon which Alberta principally relies is the enhancement of the security or integrity of the driver's licensing scheme. The photo requirement ensures both a "one-to-one" and "one-to-many" correspondence among licence holders. This makes it possible, through the use of computer software, to ensure that no person holds more than one licence. It is clear on the evidence that the universal photo requirement enhances the security of the [page608] licensing system and thus of Albertans. Mandatory photos represent a significant gain to the integrity and usefulness of the computer comparison system. In short, requiring that *all* licence holders are represented by a digital photo in the data bank will accomplish these security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors. Any exemptions would undermine the certainty with which the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence. This evidence stands effectively uncontradicted.

81 Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised. In this respect, the present case may be contrasted with previous religious freedom cases where this Court has found that the potential risk was too speculative.

82 In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, a risk was held to be overly speculative because there was insufficient evidence that potentially discriminatory beliefs were actually resulting in discriminatory conduct. In the present case, by contrast, it is clear that the photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine one-to-one and one-to-many photo comparisons to verify identity.

83 Similarly, in *Amselem*, the "security concern" posed by the construction of personal succahs was purely speculative because there was no evidence that emergency exits were actually being blocked. The appellants had offered to set up their succahs "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way" (para. 89). The Court noted that "security [page609] concerns, if soundly established, would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom" (para. 88). Here, by contrast, it is established that exempting people from the photo registry creates a real risk to security because it undermines the integrity of the system.

84 The requirement of a photo on a driver's licence serves the additional purpose of assisting police officers in reliably identifying drivers at the roadside. Alberta concedes that this benefit, given the relatively small number of persons who would seek religious exemptions, would not in itself justify limiting freedom of religion. Yet another salutary benefit may flow from eventual harmonization with other licensing systems. This benefit, however, remains to be realized. While these effects may not be determinative, they support the overall salutary effect of the universal photo requirement.

85 In summary, the salutary effects of the universal photo requirement for driver's licences are sufficient, subject to final weighing against the negative impact on the right, to support some restriction of the right. As discussed earlier, a government enacting social legislation is not required to show that the law will in fact produce the forecast benefits. Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.

2. *Deleterious Effects*

86 This brings us to the deleterious effects of the limit on Colony members' exercise of their [page610] s. 2(a) right. At this point, the seriousness of the effects of the limit on Colony members' freedom of religion falls to be addressed. Several points call for discussion.

87 A preliminary observation is that the seriousness of the limit on freedom of religion varies from case to case, depending on "the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society" (*Oakes*, at pp. 139-40).

88 The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy: *Thomson Newspapers*, at para. 125; see also *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391. The most fundamental of these values, and the one relied on in this case, is liberty -- the right of choice on matters of religion. As stated in *Amselem*, per Iacobucci J., religious freedom "revolves around the notion of personal choice and individual autonomy and freedom" (para. 40). The question is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.

89 There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.

[page611]

90 Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application. As recognized by the European Court of Human Rights in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, cited by my colleague Abella J., this pluralistic context also includes "atheists, agnostics, sceptics and the unconcerned" (para. 31). Their interests are equally protected by s. 2(a): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347. In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However,

this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

91 The seriousness of a particular limit must be judged on a case-by-case basis. However, guidance can be found in the jurisprudence. Limits that amount to state compulsion on matters of belief are always very serious. As the U.S. Supreme Court has stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State": *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at p. 851.

[page612]

92 Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. Thus, this Court has held that if the purpose of a law is to interfere with religious practices, the law cannot be upheld: see *Big M Drug Mart, Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.), and *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.). To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof. Such laws will fail at the first stage of *Oakes* and proportionality will not need to be considered.

93 Cases of direct compulsion are straightforward. However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law. In many such cases, the limit does not preclude choice as to religious belief or practice, but it does make it more costly.

94 The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice: see *Edwards Books*. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: *Multani*. The absence of a meaningful choice in such cases renders the impact of the limit very serious.

95 However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the [page613] adherent with a meaningful choice concerning the religious practice at issue. The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the ad-

herents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

96 This returns us to the task at hand -- assessing the seriousness of the limit on religious practice imposed in this case by the regulation's universal photo requirement for driver's licences. This is not a case like *Edwards Books* or *Multani* where the incidental and unintended effect of the law is to deprive the adherent of a meaningful choice as to the religious practice. The impugned regulation, in attempting to secure a social good for the whole of society -- the regulation of driver's licences in a way that minimizes fraud -- imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the highway. But on the evidence before us, that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values.

97 The Hutterian claimants argue that the limit presents them with an invidious choice: the choice between some of its members violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand. However, the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life. The claimants' affidavit says that it is necessary [page614] for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be possible to hire people with driver's licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor. Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.

98 On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver's licences, many do not, for a variety of reasons.

99 I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver's licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.

[page615]

3. *Weighing the Salutary and Deleterious Effects*

100 Having considered the seriousness of the limit in terms of its impact on the claimants' freedom of religion, we must balance these deleterious effects against the salutary effects of the law, in order to determine whether the overall impact of the law is proportionate.

101 The law has an important social goal -- to maintain an effective driver's licence scheme that minimizes the risk of fraud to citizens as a whole. This is not a goal that should lightly be sacrificed. The evidence supports the conclusion that the universal photo requirement addresses a pressing problem and will reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

102 Against this important public benefit must be weighed the impact of the limit on the claimants' religious rights. While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale.

103 Balancing the salutary and deleterious effects of the law, I conclude that the impact of the limit on religious practice associated with the universal photo requirement for obtaining a driver's licence, is proportionate.

(d) *Conclusion on Justification*

104 I conclude that the limit on the Colony members' freedom of religion imposed by the universal photo requirement for holders of driver's licences has been shown to be justified under s. 1 of the *Charter*. The goal of minimizing the risk of fraud associated with driver's licences is pressing [page616] and substantial. The limit is rationally connected to the goal. The limit impairs the right as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly compromise the goal of minimizing the risk. Finally, the measure is proportionate in terms of effects: the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.

B. *The Claim Under Section 15*

105 The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(a) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(a) claim apply to it as well.

106 Briefly, s. 15(1) is "aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds": *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 16. Religion is a ground enumerated in s. 15. As recently restated by this Court in *Kapp*, at para. 17, the test for discrimination under s. 15(1) is as follows:

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

107 The respondents claim that "[r]efusing to issue licences to the Wilson Members who otherwise qualify for such licences simply because they refuse to abandon their religious belief in the Second Commandment, but issuing licences to the comparator group simply because they do not share such religious belief, clearly demeans and infringes [page617] upon the human dignity of the Wilson Members" (Factum, at para. 39). However, photo licences are not issued to other drivers "simply because they do not share such religious belief", but rather because they meet the statutory requirements for issuance of a licence -- which include having a photo taken.

108 Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

VI. Conclusion

109 The impugned regulation is a reasonable limit on religious freedom, demonstrably justified in a free and democratic society. I would therefore allow the appeal. The constitutional questions stated in my order of January 16, 2008 should be answered as follows:

1. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

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

Answer: Yes.

[page618]

3. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

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

Answer: It is not necessary to answer this question.

The following are the reasons delivered by

110 ABELLA J. (dissenting):-- Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the benefits of the infringement outweigh the harm it imposes. This was enunciated by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, where he developed the test under s. 1 for justifying limits to constitutional rights:

Even if an objective is of sufficient importance, ... it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [p. 140]

And in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008), Martha C. Nussbaum similarly observed that:

Some such burdens to religion may have to be borne, if the peace and safety of the state are really at stake, or if there is some other extremely strong state interest. But it seems deeply wrong for the state to put citizens in such a tragic position needlessly, or in matters of less weight. And often matters lying behind [page 619] laws of general applicability are not so weighty. [p. 117]

111 It may be, however, that the nature of the particular religious duty brings it into serious conflict with countervailing and compelling social values and imperatives. As Dickson J. stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, religious freedoms are subject to such limitations

as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others

...

... The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided ... only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [pp. 337 and 346]

112 The issue in this case, therefore, is whether in balancing the benefits of the infringing measure against the harm to the right, the infringement is justified. With respect, unlike the Chief Justice, in my view it is not.

113 The government of Alberta has imposed a mandatory photo requirement for a driver's licence. The stated objective of the measure is to help reduce identity theft through the use of a facial recognition database. The province acknowledges that roadside safety and security are not at issue.

Since the introduction of a photo requirement 29 years earlier, there had been, without incident, an exemption for those like the Hutterites whose religion prohibits them from being photographed.

114 The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises [page620] the autonomous character of their religious community.

115 Unlike the severity of its impact on the Hutterites, the benefits to the province of requiring them to be photographed are, at best, marginal. Over 700,000 Albertans do not have a driver's licence and are therefore not in the province's facial recognition database. There is no evidence that in the context of several hundred thousand unphotographed Albertans, the photos of approximately 250 Hutterites will have any discernable impact on the province's ability to reduce identity theft.

116 This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony.

Background

117 In 1974, the Province of Alberta introduced photographs on driver's licences. Until 2003, the Registrar required photos as a general rule, but could issue a non-photo Condition Code G licence if a person had a sincere religious objection or a temporary medical condition which affected their appearance. The Alberta *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, under the *Traffic Safety Act*, R.S.A. 2000, c. T-6, governed these licences and gave the Registrar discretion to determine whether the exemption from a photograph requirement was justified.

118 The Hutterites of Wilson Colony believe that the Second Commandment, which prohibits idolatry, prohibits them from being photographed. They also believe in communal property and live together in religious colonies. The colonies attempt [page621] to be self-sufficient, and members of the community operate motor vehicles in order to fulfill their responsibilities to the community. Specifically, the Wilson Colony members use motor vehicles to obtain medical services each week for the 48 children and 8 diabetics on the Colony, for community firefighting by volunteer firefighters, and in commercial activity to sustain their community.

119 In May 2003, Alberta amended the regulations to make a photograph mandatory for *all* driver's licences (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003). At the time, there were 453 Condition Code G licences in Alberta. Of those, 56 percent, or about 250, were held by Hutterites (2007 ABCA 160, 77 Alta. L.R. (4th) 281, *per* Conrad J.A., at para. 5).

120 The purpose of the mandatory photograph was primarily to reduce identity theft. Section 3(b) of the amended regulations allows the Registrar to use facial recognition software to verify the identity of all licence applicants. The photograph that is taken at the time of issuance of the licence is incorporated into the province's database. Facial recognition software compares this photograph to all the other photographs in the system, to help ensure that no one has more than one licence in his or her name.

121 As noted earlier, more than 700,000 Albertans do not have a driver's licence and are therefore not in the province's facial recognition database.

122 The Wilson Colony members objected to being photographed. Alberta then proposed two alternatives: first, that they have their photograph taken and printed on their licences. Each licence would then be placed in a special package which the licensee would never be required to open, preventing the licensee from ever coming into physical contact with the printed photo. The photographs would be stored in digital form in the database. [page622] The second proposal was that a photograph would be taken but not actually printed on their licences. Only the digital images would be stored in the facial recognition database.

123 The Wilson Colony members rejected these alternatives since they both required them to contravene the religious prohibition against having their photograph taken. Their proposal was that there be a photoless licence with a stamp indicating that the licence could not be used for identification purposes.

124 The failure to reach an agreement resulted in a constitutional challenge by the members of the Wilson Colony to the mandatory photo requirement. They were successful before the Alberta Court of Queen's Bench (2006 ABQB 338, 57 Alta. L.R. (4th) 300) and the Court of Appeal.

Analysis

125 Alberta conceded that the photo requirement impairs the Wilson Colony members' freedom of religion. Nor did it dispute that the requirement places a distinctive burden on the Colony members, as the chambers judge noted:

Nor does the Attorney General dispute that the requirement that people who wish to obtain or renew an operator's licence is a distinctive burden for those who hold those beliefs.

In short, the Attorney General does not take issue with the proposition that the burden imposed upon the Applicants by Section 14(1)(b) of AR 137/2003 is a breach of the *Charter* Rights of the Applicants under both Section 2(a) and Section 15(1) of the *Charter*. Accordingly, there is no need to engage in an assessment of whether Section 14(1)(b) of AR 320/2002, as amended, violates the guaranteed *Charter* rights of the Applicants. [paras. 6-7]

126 The constitutional guarantee of freedom of conscience and religion is found in s. 2(a) of the *Canadian Charter of Rights and Freedoms*, which states:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[page623]

127 In both *Big M Drug Mart* and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. explained the significance of the right, one that rests on the values of autonomy and dignity. In *Edwards Books*, he characterized freedom of religion as "profoundly personal beliefs that

govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices" (p. 759). In *Big M Drug Mart*, he wrote that

[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

...

... an emphasis on individual conscience and individual judgment ... lies at the heart of our democratic political tradition. [pp. 336 and 346]

It is the centrality of the rights associated with freedom of individual conscience that

underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [p. 346]

128 The European Court of Human Rights espoused a similarly liberal conception of freedom of religion in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A:

... freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up [page624] the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies ... freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.

... freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private" [para. 31]

129 In *ahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI, the European Court of Human Rights compellingly wrote:

Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. [para. 108]

(See also Jeremy Webber "The Irreducibly Religious Content of Freedom of Religion", in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (2006), 178, at p. 184; Charles Taylor, *Philosophical Arguments* (1995), at pp. 225 *et seq.*)

130 Moreover, it is important to recognize that freedom of religion has "both individual and collective aspects" (*Edwards Books*, at p. 781, *per* Dickson C.J.). Wilson J., in her partial dissent in *Edwards Books*, confirmed this dual nature of freedom of religion when she said:

In his commentary on the *Canadian Charter of Rights and Freedoms* Professor Tarnopolsky ... points out that the *Charter* protects group rights as well as individual rights. He distinguishes between individual and group rights on the basis that the assertion of an individual right emphasises the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group whereas the assertion of a group right is based on the claim of [page625] an individual or group of individuals because of membership in a particular identifiable group: see "The Equality Rights", in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 437.

... it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". [Emphasis in original; pp. 808-9.]

Both the individual and group aspects are engaged in this case.

131 The group, or "community", aspect of religious freedom was discussed by the European Court of Human Rights in *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII:

[T]he right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.

Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection [of religious freedom]

In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets [para. 118]

132 This does not mean that the right to freedom of religion cannot yield to a state objective whose benefits outweigh the harm to the right. The assertion of a sincere religious belief or duty does not end the inquiry. As the European Court of Human Rights said in *ahin*:

[page626]

[Freedom of religion] does not protect every act motivated or inspired by a religion or belief

In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected

...

... Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society [paras. 105, 106 and 108]

The nature of the religious right asserted will also be of relevance in balancing benefits and harms.

Section 1

133 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.

134 It is against the scope of the particular constitutional right that the government has the onus of demonstrating that a limit is justified under s. 1 in accordance with the *Oakes* test. The purpose of the *Oakes* analysis is to balance the benefits of the objective with the harmful effects of the infringement. The stages of the *Oakes* test are not watertight compartments: the principle of propor-

tionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed.

135 Dickson C.J. stressed in *Oakes* that the evidence necessary to prove the constituent elements of the s. 1 inquiry "should be cogent and persuasive [page627] and make clear to the Court the consequences of imposing or not imposing the limit" (p. 138).

136 Where, as here, the benefit to the state of the infringing measure is of limited value and the infringement is a deeply harmful one, the overall requirement of proportionality is not met.

Pressing and Substantial Objective

137 At the first stage of the analysis, the government must demonstrate that it has a "pressing and substantial" objective that justifies the infringement of the right. In *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. cautioned that "[c]are must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (para. 144 (emphasis in original)).

138 Alberta acknowledged that it is not attempting to justify the photo requirement on the basis that it allows for quick and efficient driver identification at the side of the road. The exemption to the photograph requirement was in place for 29 years without any demonstrably negative effects on roadside enforcement.

139 Instead, Alberta stated that the purpose of the mandatory photo requirement was to ensure that every individual who has applied for a licence is represented in the Province's facial recognition database. This database helps prevent an individual from applying for a licence in another person's name. Driver's licences are a widely accepted form of identification. False licences can be used to gain other fraudulent documentation. The objective, therefore, is to protect the integrity of the licensing system and its consequential benefit is the minimization of the risk of identity theft.

140 I agree with the majority that this objective is an important one.

[page628]

Rational Connection

141 At the "rational connection" step in the proportionality analysis, the seemingly easiest hurdle in the *Oakes* analysis, the Government must demonstrate that the infringing measure is rationally connected to the legislative goal. The connection must be established on a balance of probabilities (*RJR-MacDonald*, at para. 153; see also Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996), at p. 27).

142 I agree with the majority that the Government has satisfied the rational connection aspect of the s. 1 analysis. As the chambers judge said (at para. 11): "The requirement of a photograph, coupled with facial recognition software, facilitates the government's objective of ensuring that no individual will hold multiple licences under different names." The regulations help prevent an applicant from fraudulently obtaining a licence in the name of another person whose photograph is already in the database.

Minimal Impairment

143 Where I start to part company with the majority, with respect, is at the minimal impairment stage of the analysis. This aspect of the s. 1 analysis has attracted judicial approaches of some elasticity, reflecting an understandable desire both to be respectful of the complexity of developing public policy, while at the same time ensuring that the infringing measure meets its policy objectives no more intrusively than necessary.

144 As McLachlin J. wrote in *RJR-MacDonald*, at para. 160, if the option chosen by the government "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". However, "if the government fails to explain why a significantly less intrusive and equally [page629] effective measure was not chosen, the law may fail".

145 The government must therefore show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective. To be characterized as minimal, the impairment must be "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

146 In assessing whether Alberta's regulation satisfies the minimal impairment stage, the majority rejects the Colony's alternative proposal of a photoless licence stamped with an indication that it not be used for identification purposes, on the grounds that "[t]he only way to reduce that risk [of misusing driver's licences for identity theft] as much as possible is through a universal photo requirement" and "the alternative proposed by the claimants would *significantly* compromise the government's objective" (paras. 59-60 (emphasis in original)). But as discussed later in these reasons, there is no cogent or persuasive evidence of any such dramatic interference with the government's objective.

147 It is not difficult for the state to argue that only the measure it has chosen will *maximize* the attainment of the objective and that all other alternatives are substandard or less effective. And there is no doubt that the wider the use of the photographs, the greater the minimization of the risk. But at the minimal impairment stage, we do not assess whether the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair the right no more than necessary to achieve the objective.

148 In *RJR-MacDonald*, McLachlin J. rejected a complete ban on advertising on the grounds that a full prohibition will only be constitutionally [page630] acceptable at the minimal impairment stage of the analysis if the government can show that only a full prohibition will enable it to achieve its goal. In this case, all of the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. The requirement therefore completely extinguishes the right, and is, accordingly, analogous to the complete ban in *RJR-MacDonald*. It is therefore difficult to conclude that it minimally impairs the Hutterites' religious rights.

149 The minimal impairment stage should not, however, be seen to routinely end the s. 1 analysis. It is possible, for example, to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional. In my view, most of the heavy conceptual lifting and balancing ought to be done at the final step -- proportionality. Proportionality is, after all, what s. 1 is about.

Proportionality

150 It seems to me, with respect, that where the majority's s. 1 analysis fully flounders is in the final stage, where the negative effects of the infringement are balanced against the actual benefits derived from the legislative measure. This is the stage which "provides an opportunity to assess ... whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*" (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 125). The salutary effects that "actually result" from the implementation of the underlying objective must, therefore, be "proportional" to the harmful effects of the limitation on a constitutionally protected right (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 887-88; see also Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 [page631] *Osgoode Hall L.J.* 1, at p. 66, cited by Bastarache J. in *Thomson Newspapers*, at para. 125).

151 In *Edwards Books*, Dickson C.J. articulated the proportionality requirement as follows: the "effects [of the infringing measure] must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights" (p. 768). (See also Aharon Barak, "Proportional Effect: The Israeli Experience" (2007), 57 U.T.L.J. 369, at p. 375.)

152 At this proportionality stage, the "comparison is ... between the loss for the fundamental right, on the one hand, and the gain for the good protected by the law, on the other" (Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007), 57 U.T.L.J. 383, at p. 393). It engages the following questions:

- How deeply is the right infringed?
- What is the degree to which the impugned limitation will advance its underlying objective?

153 Justice Bastarache wrote in *Thomson Newspapers* that the deleterious effects of the measure need to be assessed in light of the "values underlying the *Charter*" (para. 125). This was the approach, in fact, first enunciated by Dickson C.J. in *Oakes*:

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added; p. 136.]

154 Turning to the salutary effects in this case, in my view, the government has not discharged its evidentiary burden or demonstrated that the salutary effects in these circumstances are anything more than a web of speculation (Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two [page632] Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501, at pp. 503-4).

155 The positive impact of the mandatory photo requirement and the use of facial recognition technology is that it is a way to help ensure that individuals will not be able to commit identity theft. But the facial recognition technology is hardly fool-proof. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, acknowledged in his affidavit on behalf of the Government of Alberta, that "facial recognition software is not so ad-

vanced that it can make a definitive determination of whether two photographs are of the same person". The software merely narrows down potentially similar faces to a manageable number. A human investigator must still "eyeball" the pictures to determine if they are the same person.

156 There is, in fact, no evidence from the government to suggest that the Condition Code G licences in place for 29 years as an exemption to the photo requirement, caused any harm at all to the integrity of the licensing system. As a result, there is no basis for determining why the exemption is no longer feasible, or so dramatically obstructs the government's objective that it cannot be re-instated.

157 In his affidavit, Mr. Pendleton noted that "[t]o date, we have been successful in making arrangements to accommodate the concerns of others who have religious reservations regarding a driver's licence photograph" (para. 42). The only example he provided of a problem involving a Condition Code G licence, was a "Caucasian man" who sought a Condition Code G licence, based upon his commitment to native spirituality. He was refused because he was not a member of any recognized organization or denomination that shared his beliefs. This singular example does not seem to me to represent "cogent and persuasive" evidence of the necessity of a mandatory photograph. (See also [page633] *Bothwell v. Ontario (Minister of Transportation)* (2005), 24 Admin. L.R. (4th) 288 (Ont. Div. Ct.).)

158 Seven hundred thousand Albertans are without a driver's licence. That means that 700,000 Albertans have no photograph in the system that can be checked by facial recognition technology. While adding approximately 250 licence holders to the database will reduce some opportunity for identity theft, it is hard to see how it will make a significant impact on preventing it when there are already several hundred thousand unlicensed and therefore unphotographed Albertans. Since there are so many others who are not in the database, the benefit of adding the photographs of the few Hutterites who wish to drive, would be marginal.

159 It is worth noting too that in Alberta, numerous documents are used for identity purposes, including birth certificates, social insurance cards and health cards -- not all of which include a photograph. Nor has Alberta thought it necessary to introduce, for example, a universal identity card to prevent identity theft. This suggests that the risk is not sufficiently compelling to justify universality.

160 The fact that Alberta is seemingly unengaged by the impact on identity theft of over 700,000 Albertans being without a driver's licence, makes it difficult to understand why it feels that the system cannot tolerate 250 or so more exemptions.

161 The majority mentions two ancillary benefits of the mandatory photo requirement: the eventual harmonization of Alberta's licensing scheme with those of other jurisdictions, and assistance in roadside safety and identification. There is no reason to anticipate that any such harmonized scheme would eliminate, rather than protect, religious exemptions. And as for the benefits to roadside identification and safety, Alberta conceded that this was not [page634] the purpose of the photo requirement and that any such benefits were minimal, as evidenced by the fact that this exemption has existed for the last 29 years without incident.

162 The salutary effects of the infringing measure are, therefore, slight and largely hypothetical. The addition of the unphotographed Hutterite licence holders to the system seems only marginally useful to the prevention of identity theft.

163 On the other hand, the harm to the religious rights of the Hutterites weighs more heavily. The majority assesses the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence which may have collateral effects on their way of life. This, with respect, is not a meaningful choice for the Hutterites.

164 The chambers judge found that the mandatory photo requirement threatened the autonomous ability of the respondents to maintain their communal way of life, concluding that "it is essential to [the respondents'] continued existence as a community that some members operate motor vehicles" (para. 2). Conrad J.A. of the Alberta Court of Appeal similarly wrote that the "evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to ... facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs" (para. 6).

165 This self-sufficiency was explained in *Hofer v. Hofer*, [1970] S.C.R. 958, where Ritchie J. wrote that "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony" (p. 968). Quoting the trial judge, [page635] he observed: "To a Hutterian the whole life is the Church... . The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming -- it is the type of livelihood that allows the greatest assurance of independence from the surrounding world" (p. 968). Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church" (p. 969).

166 Historians too have described the intensely self-sufficient and deeply religious nature of the Hutterian community:

The Hutterites live an austere, religiously motivated existence. Divorce, birth control, and ... smoking and drinking are strictly forbidden. The Hutterite faithful do not bear arms, and they abstain from both voting and from holding public office... . But if they stand apart from the mainstream of Canadian society, by the same token they make very few demands upon it. Hutterites never become public charges: all colonies take care of their old and infirm, and most will not even accept family allowance cheques from the government. Hutterites apparently commit no serious crimes.

...

... The Hutterites maintain a private school within each colony, and comply with the minimum standards designated by the province ... [and pay] income tax, corporate tax, and public school tax

...

By presenting so low a profile to the outside world, the Hutterites reduce the attention they attract. Their isolationism, however, makes them easy targets for local fears and apprehensions... .

Their separatism and their peculiarities have made the Hutterites handy scapegoats.

(Morris Davis and Joseph F. Krauter, *The Other Canadians: Profiles of Six Minorities* (1971), at pp. 89, 96, 98 and 99)

[page636]

167 To suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community. When significant sacrifices have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced.

168 In *Edwards Books*, Dickson C.J. held that indirect but non-trivial burdens on religious practice are prohibited by the constitutional guarantee of freedom of religion (pp. 758-59). And in *Big M Drug Mart*, as previously noted, he highlighted "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation" (p. 346). He also noted that

[c]oercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [pp. 336-37]

169 Jeremy Webber argues that the first strand of freedom of religion is freedom from coercion, including

both freedom from coerced religious observance and freedom from interference with religious observance. This was the original ground on which freedom of religion was won. It remains the heartland of the freedom.

("Understanding the Religion in Freedom of Religion", in P. Cane, C. Evans and Z. Robinson, eds., *Law and Religion in Theoretical and Historical Context* (2008), 26, at p. 29)

170 The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically [page637] preserved its religious autonomy through its communal independence.

171 I also have some discomfort with the majority's approach to assessing the seriousness of a religious infringement. It appears to suggest that there is a difference between the constitutional scrutiny of a government program that is "compulsory", and one that is "conditional" or a "privilege". This approach, with great respect, is troubling. It is both novel and inconsistent with the principle enunciated in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (para. 73).

172 The question, it seems to me, is whether the government has acted constitutionally. This should not depend on whether it does so through a law, a regulation, or a licence. Moreover, I have difficulty understanding what is meant by a "privilege" in the context of the provision of government services. As long ago as *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court recognized the profound significance a licence may have on an individual's life or livelihood and that the government is required to exercise its power in administering the licensing system in a fair and constitutional manner.

173 The burden under s. 1 is squarely on the government. That is where it should rigorously remain throughout the *Oakes* analysis, without diminution for any reason. The majority's approach -- making the right dependent on a formalistic distinction and characterization of the nature of the law -- creates, even if inadvertently, a legal hierarchy attracting diminishing levels of scrutiny. This not only imperils and contradicts human rights jurisprudence, it risks presumptively shrinking the plenitude of what is captured by freedom of religion in s. 2(a) of the *Charter* by tethering its scope to an artificial stratum of government action. (See McLachlin C.J., "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays [page638] in Pluralism, Religion, and Public Policy* (2004), 12.)

174 The harm to the Hutterites' *Charter* right is substantial and easily ascertainable, but, as previously noted, the benefit of requiring the Hutterites to be photographed for the purposes of reducing identity theft, is not. Hundreds of thousands of Albertans have no driver's licence and their photographs, therefore, are not available in the facial recognition database, to help minimize identity theft. It is not clear to me how having approximately 250 additional Hutterites' photographs in the database will be of any significance in enhancing the government's objective, compared to the seriousness of the intrusion into the Hutterites' religious autonomy.

175 What we are left with is the desire to protect Albertans from the risks and costs associated with identity theft through a mandatory photo requirement, versus the cost to the Hutterites, religious and democratic, of not having their constitutional rights respected. Here, the constitutional right is significantly impaired; the "costs" to the public only slightly so, if at all.

176 Given the disproportion in this case between the harmful effects of the mandatory photo requirement on religious freedom, compared to the minimal salutary effects of requiring photographs from the Hutterites, the government has not discharged its burden of demonstrating that the infringement is justified under s. 1. This makes the mandatory photograph requirement for driver's licences, in the absence of the availability of an exemption on religious grounds, inconsistent with s. 2(a) of the *Charter*.

177 I would therefore dismiss the appeal, but would suspend a declaration of invalidity for one [page639] year to give Alberta an opportunity to fashion a responsive amendment.

The following are the reasons delivered by

LeBEL J. (dissenting):--

I. Introduction

178 I have read the reasons of the Chief Justice and of my colleague Justice Abella. With respect for the other view, I agree with the comments of Justice Abella on the nature of the guarantee of freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*. I share her opin-

ion that the impugned regulation that limits freedom of religion has not been properly justified by the appellant under s. 1 of the *Charter*. As a result, as she proposes, I would dismiss the appeal and uphold the declaration of invalidity of the regulation that requires the members of the Hutterite Colony to have their photos taken as a condition for the renewal or issuance of a driver's licence.

179 After a few short comments on freedom of religion, I will focus my analysis on the interpretation and application of s. 1 of the *Charter*. I have some concerns as to how the reasons of the Chief Justice structure and apply the method of justification of s. 1, in other words, the *Oakes* test, as it is now known.

A. *Freedom of Religion*

180 The constitutional guarantee of freedom of religion has triggered a substantial amount of litigation since the coming into force of the *Charter*. The present appeal illustrates enduring difficulties in respect of its interpretation and application. Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But [page640] the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.

181 That decision reflects the complex and highly textured nature of freedom of religion. The latter is an expression of the right to believe or not. It also includes a right to manifest one's belief or lack of belief, or to express disagreement with the beliefs of others. It also incorporates a right to establish and maintain a community of faith that shares a common understanding of the nature of the human person, of the universe, and of their relationships with a Supreme Being in many religions, especially in the three major Abrahamic faiths, Judaism, Christianity and Islam.

182 Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief system, but also on the life of the community. The reasons of the majority understate the nature and importance of this aspect of the guarantee of freedom of religion. This may perhaps explain the rather cursory treatment of the rights claimed by the respondents in the course of the s. 1 analysis. I will now turn to this aspect of the case.

B. *Section 1: The Oakes Test*

183 As set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, the *Oakes* test has stood at the core of Canadian constitutional law since the early days of the *Charter*. It has been the central issue of much *Charter* litigation. The outcome of complex cases has frequently turned on whether a limitation of a [page641] right was justified under s. 1. In *Oakes*, our Court sought to give meaning and structure to the broad and bald affirmation, in s. 1 of the *Charter*, that constitutional rights could be limited, provided that the limitation could be justified in a manner consistent with the democratic values of Canada. Although courts have struggled in applying or interpreting it, the *Oakes* test has stood the

test of time and remains a critical component of the constitutional ordering of basic rights in Canada.

184 In the context of the values of the democratic society of Canada, courts were assigned the responsibility of final adjudication in the case of conflicts between public authorities and citizens, subject to the derogation or notwithstanding clause in s. 33 of the *Charter* (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-97). In its own way, the *Oakes* test is yet another attempt to determine why and how a law could be found to be just and whether it should be enforced. Many centuries ago, St. Thomas Aquinas put his mind to the same question. For him, a just law was one with a legitimate purpose which relied on reasonable or proportionate means to achieve it. Proportionate burdens should be imposed on citizens (see Thomas Aquinas, *Treatise on Law* (1991), at p. 96). In more modern times, the same idea informed the drafting of the *European Convention of Human Rights*. It inspired the approach of international law in domains like the laws of war (see D. M. Weinstock, "Philosophical Reflections on the *Oakes* Test", in L. B. Tremblay and G. C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (2009), 115, at pp. 115-16; also T. Hurka, "Proportionality in the Morality of War" (2005), 33 *Phil. & Pub. Aff.* 34; G. Van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005), at pp. 23-27; M.-A. Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights", in R. St. J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (1993), 125). The principle of proportionality can even be found in [page642] Canadian criminal law. Self-defence, in s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46, for example, is predicated on the legitimacy of the purpose and the proportionality of the means used to further that purpose.

185 The *Oakes* test belongs to this legal and philosophical tradition. In essence, it is about purpose and means: the legitimacy of the purpose and the proportionality of the means. The use of proportionate means in order to achieve legitimate purposes will justify a limitation of rights under s. 1.

186 As is well known, the *Oakes* test imposes on the state the burden of demonstrating a pressing and substantial objective. This is the purpose part of the test. Then, the state must meet the proportionality requirements. The first requirement of the proportionality test is that there be a rational connection between the purpose and the means. This part of the test is really about the necessity or usefulness of the means in connection with the objective. A law that does not somehow contribute to advancing the stated purpose will not pass constitutional muster. The courts must then review the means themselves by asking whether the means are minimally impairing of the right in question (the "minimal impairment" test). Finally, the court will engage in a balancing of the measure's salutary and deleterious effects (see P.W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.8; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 975-76). The reasons of the Chief Justice focus on the last part of this test in seeking to justify the impugned regulations under s. 1.

187 It has also been said, at times, that context should be considered at the outset of the analysis in order to determine the scope of the deference of courts to government when applying the *Oakes* test (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877). One part of this context should not be forgotten: the constitutional [page643] context itself. The *Charter* is designed to uphold and protect constitutional rights. The justification process under s. 1 is not designed to sidestep constitutional rights on every occasion. Rather, it seeks to define and reconcile these rights with other legitimate interests or even between themselves. The burden of justification

rests on the state, although I will not attempt, within the limited scope of these reasons, to delve any further into the vexed question of what is sufficient evidence or demonstration of justification. The justification process also reflects the democratic life of a state like Canada, which operates under the rule of law, in the tradition of a parliamentary government, within the framework of a federal form of government. Section 1 and the *Oakes* test are designed to reach a proper equilibrium between the rule of law, the roles of courts, Parliament or legislatures, and executives, and the democratic life of our country. In the end, when conflict does arise and cannot be resolved, courts must try to strike a proper balance between competing demands, always mindful of their place within the constitutional and political sphere.

188 In general, courts have only rarely questioned the purpose of a law or regulation in the course of a s. 1 analysis. The threshold of justification remains quite low and laws have almost never been struck down on the basis of an improper purpose (Hogg, at section 38.9(b)). The pressing and compelling purpose test amounts to a *prima facie* review of the legitimacy of the law's objective. Its flexibility reflects the need to avoid too close questioning of the policy reasons underlying a law. Such a review would be better left to the political and parliamentary process. The flexibility of the analysis at this stage results also from the abstract nature of the purpose, which can be expressed by the courts at "various levels of generality" (Hogg, at section 38.9(a); *Thomson Newspapers*, at para. 125, *per* Bastarache J.). Since this objective is often not expressed with much clarity in the law or regulation, its identification and definition at this stage of the analysis often amount to a judicial construct based on such evidence as is available. The nature [page644] of this part of the *Oakes* test should caution courts against treating the purpose with undue emphasis on its sanctity throughout the proportionality analysis, when its nature and effects will have to be more closely questioned.

189 The first part of the *Oakes* test is closely connected to the proportionality analysis. The rational connection analysis requires the courts to determine, for a start, whether the means chosen will somehow advance the stated purpose of the law. At this stage too, courts have rarely found statutes and regulations wanting (Hogg, at section 38.10(a)).

190 This acknowledgment of the realities of constitutional adjudication does not mean that courts will or should never intervene at these earlier stages. However, this situation confirms that, after almost a quarter century of s. 1 jurisprudence, the crux of the matter lies in what may be called the core of the proportionality analysis, the minimal impairment test and the balancing of effects. It is at these stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature.

191 A constitutional scholar, Peter Hogg, has observed that s. 1 litigation really revolves around minimal impairment (at sections 38.11(a) and 38.12). There is more than a kernel of truth to this statement. It may reflect what is really happening in the course of constitutional litigation about s. 1 and the conduct of a proportionality analysis. Indeed, I believe that the proportionality analysis depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action, the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution, but that may nevertheless be of high social value or [page645] importance (see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at paras. 65 and 72).

192 It may be tempting to draw sharp analytical distinctions between the minimal impairment and balancing of effects parts of the *Oakes* test. But determining whether a measure limiting a right successfully meets the justification test should lead to some questioning of the purpose in the course of the proportionality analysis, to determine not only whether an alternative solution could reach the goal, but also to what extent the goal itself ought to be realized. This part of the analysis may confirm the validity of alternative, less intrusive measures.

193 The pull toward a sharp distinction between the two steps of the proportionality analysis, minimal impairment and balancing of effects, is perhaps intensified by semantic difficulties with the minimal impairment test. Courts still use the word "minimal" to characterize the acceptable level of rights impairment, in keeping with the original language used in *Oakes*. This is a strong word that seemed to suggest that, in the justification process, the state would have to show that the measure taken was really the least intrusive possible. It would have to demonstrate that no less drastic measure could be adopted that would achieve the stated legislative purpose. A literal application of such a test might lead, in essence, to courts adopting a libertarian perspective that the state should be constrained and its powers narrowly defined and limited. This understanding of the Constitution might have put Parliament and the legislature in a straitjacket and would have crystallized constitutional arrangements essentially made up of negative rights.

194 In practical terms, the jurisprudence of this Court confirms that minimal does not really mean minimal in the ordinary sense of the word. The *Oakes* test was quickly reinterpreted, so that the question, in the minimal impairment analysis, became whether the right was infringed "as little [page646] as is reasonably possible", within a range of reasonable options (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). The analysis leaves a reasonable margin of action to the state (p. 795, *per* La Forest J.). This is where we now stand, using words that, sometimes, no longer reflect the legal nature of a test.

195 In order to determine whether the measure falls within a range of reasonable options, courts must weigh the purpose against the extent of the infringement. They must look at the range of options that are available within the bounds of a democratic Constitution. A deeper analysis of the purpose is in order at this stage of the proportionality analysis. The stated objective is not an absolute and should not be treated as a given. Moreover, alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. At this stage of the proportionality analysis, the overall objective of the s. 1 analysis remains constant: to preserve constitutional rights, by looking for a solution that will reach a better balance, even if it demands a more restricted understanding of the scope and efficacy of the objectives of the measure. In this sense, courts must execute a holistic proportionality analysis with different legal and analytical components, which remain tightly woven.

196 The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake.

197 For all practical purposes, the reasons of the Chief Justice treat the law's objective as if it were unassailable once the courts engage in the [page647] proportionality analysis. No means that would not allow the objective to be realized to its fullest extent could be considered as a reasonable

alternative. In this respect, the reasons appear inconsistent. First, para. 54 states: "*Less drastic means which do not actually achieve the government's objective are not considered at this stage*", i.e. the minimal impairment stage. Such an approach would severely restrict the ambit of court review of government action and would reduce it to an analysis of the alignment of means with purposes. At other times, however, I note that the reasons seem more alive to this problem. Thus, one may find in the reasons suggestions that "*achieving the objective*" might actually mean looking into whether there exists an alternative means of reaching the objective "*in a real and substantial manner*" (para. 55). What that would actually mean in practical terms may not be as clear as one could wish. Nevertheless, these words appear to signal that, even at the minimal impairment stage, the objective might have to be redefined and circumscribed.

198 Indeed, one wonders how an objective could be satisfied in a real and substantial manner without being read down somewhat. A different approach to the interpretation and application of the *Oakes* test would seem hard to reconcile with previous pronouncements of our Court. Our recent judgment in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, offers a fine example of a different understanding of the nature of the proportionality analysis.

199 In *Charkaoui*, our Court struck down in part, on s. 7 grounds, the security certificate regime set up under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. It accepted that the security of Canada and the protection of intelligence sources were pressing and compelling objectives. Nevertheless, the Court found that alternative measures might give sufficient protection to confidential information. Important as they were, the objectives of the law were not treated as absolute goals, which had to be realized in their perfect integrity. The objectives were recast, in fact, at a [page648] lower level than the state might have wished. The Court assessed the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis (paras. 85-87).

II. Conclusion

200 As to the outcome of this case, I agree with the reasons of Justice Abella and with the substance of her views on the lack of justification for the regulation under s. 1. Religious rights are certainly not unlimited. They may have to be restricted in the context of broader social values. But they are fundamental rights protected by the Constitution. The Government of Alberta had to prove that the limitations on the religious right were justified. Like Justice Abella, I believe that the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft.

201 Moreover, the driver's licence that it denies is not a privilege. It is not granted at the discretion of governments. Every would-be driver is entitled to a licence provided that he or she meets the required conditions and qualifications. Such a licence, as we know, is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on taxi drivers and truck rental services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alterna-

tives. Indeed, the Province's stated purpose is not set in stone and does not need to be achieved at [page649] all costs. The infringing measure was implemented in order to reach a hypothetical objective of minimizing identity theft, by requiring driver's licences with photos. But a small number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden. The photo requirement was not a proportionate limitation of the religious rights at stake.

202 For these reasons and those of my colleague, Justice Abella, I would dismiss the appeal with costs.

The following are the reasons delivered by

203 FISH J. (dissenting):-- Like Justice LeBel, and for the reasons he has given, I agree with Justice Abella and would dispose of the appeal as they both suggest.

Solicitors:

Solicitor for the appellant: Alberta Justice, Edmonton.

Solicitors for the respondents: Peterson & Purvis, Lethbridge.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Ottawa.

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

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Ste-Foy.

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

[page650]

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship: Vincent Dagenais Gibson, Ottawa.

cp/e/qllls/qljyw

Her Majesty The Queen *Appellant*;

and

David Edwin Oakes *Respondent*.

File No.: 17550.

1985: March 12; 1986: February 28.

Present: Dickson C.J. and Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Presumption of innocence (s. 11(d)) — Reverse onus clause — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not reverse onus in violation of s. 11(d) of the Charter — Whether or not reverse onus a reasonable limit to s. 11(d) and justified in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Criminal law — Presumption of innocence — Reverse onus — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not constitutional guarantee of presumption of innocence (s. 11(d) of the Charter) violated.

Respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that respondent was in possession of a narcotic, respondent brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act*. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(d) of the *Canadian Charter of Rights and Freedoms*. The Crown appealed and a constitutional question was stated as to whether

Sa Majesté La Reine *Appelante*;

et

David Edwin Oakes *Intimé*.

^a N° du greffe: 17550.

1985: 12 mars; 1986: 28 février.

Présents: Le juge en chef Dickson et les juges Estey, McIntyre, Chouinard, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Présomption d'innocence (al. 11d)) — Disposition portant inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — L'inversion de la charge de la preuve est-elle contraire à l'al. 11d) de la Charte? — L'inversion de la charge de la preuve apporte-t-elle à l'al. 11d) une limite qui soit raisonnable et justifiée dans une société libre et démocratique? — Charte canadienne des droits et libertés, art. 1, 11d) — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 3(1), (2), 4(1), (2), (3), 8.

Droit criminel — Présomption d'innocence — Inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — Y a-t-il eu violation du droit constitutionnel d'être présumé innocent (al. 11d) de la Charte)?

L'intimé a été accusé d'avoir eu illégalement en sa possession un stupéfiant pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Toutefois, il a été reconnu coupable seulement de possession. Après que le juge du procès eut conclu que, hors de tout doute raisonnable, l'intimé était en possession d'un stupéfiant, ce dernier a présenté une requête en contestation de la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*. Cet article prévoit que si la cour constate que l'accusé était en possession d'un stupéfiant, il est présumé l'avoir été pour en faire le trafic et qu'à moins qu'il ne prouve le contraire, il doit être déclaré coupable de trafic. Le ministère public a interjeté appel devant la Cour d'appel de l'Ontario qui a conclu qu'il s'agissait d'une disposition portant «inversion de la charge de la preuve» qui est inconstitutionnelle pour le motif qu'elle viole la présomption d'innocence maintenant enchâssée dans l'al. 11d) de la *Charte canadienne des droits et libertés*. Le ministère public a formé un

s. 8 of the *Narcotic Control Act* violated s. 11(d) of the *Charter* and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(d) of the *Charter* had been violated, was the issue of whether or not s. 8 of the *Narcotic Control Act* was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*.

Held: The appeal should be dismissed and the constitutional question answered in the affirmative.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ.: Pursuant to s. 8 of the *Narcotic Control Act*, the accused, upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(d) of the *Charter* and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional.

Section 8 of the *Narcotic Control Act* infringes the presumption of innocence in s. 11(d) of the *Charter* by

pourvoi dans le cadre duquel on a formulé la question constitutionnelle de savoir si l'art. 8 de la *Loi sur les stupéfiants* est contraire à l'al. 11d) de la *Charte* et, par conséquent, inopérant. À supposer que l'on conclue qu'il y a eu violation de l'al. 11d) de la *Charte*, cette question constitutionnelle soulève alors la question de savoir si l'art. 8 de la *Loi sur les stupéfiants* constitue une limite raisonnable imposée par une règle de droit et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit une réponse affirmative.

Le juge en chef Dickson et les juges Chouinard, Lamer, Wilson et Le Dain: Aux termes de l'art. 8 de la *Loi sur les stupéfiants*, dès qu'on conclut hors de tout doute raisonnable que l'accusé était en possession d'un stupéfiant, celui-ci a la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession de ce stupéfiant pour en faire le trafic. Une fois prouvée, la possession fait naître à l'encontre de l'accusé la présomption impérative qu'il avait l'intention de se livrer au trafic et il sera reconnu coupable, à moins qu'il ne puisse, par une preuve selon la prépondérance des probabilités, réfuter cette présomption.

La présomption d'innocence est au cœur même du droit criminel; elle est garantie expressément par l'al. 11d) de la *Charte* et implicitement par l'art. 7 qui garantit le droit à la vie, à la liberté et à la sécurité de la personne. Cette présomption a depuis fort longtemps droit de cité en *common law* et son acceptation générale ressort de son inclusion dans les plus importants documents internationaux relatifs aux droits de la personne. Compte tenu de ces documents, le droit d'être présumé innocent tant qu'on n'est pas déclaré coupable exige à tout le moins (1) que la culpabilité soit établie hors de tout doute raisonnable, (2) que ce soit à l'État qu'incombe la charge de la preuve et (3) que les poursuites criminelles se déroulent d'une manière conforme aux procédures légales et à l'équité.

Une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11d). Ce n'est pas parce que la norme requise pour réfuter la présomption est la preuve selon la prépondérance des probabilités qu'une disposition portant inversion de la preuve est constitutionnelle.

L'article 8 de la *Loi sur les stupéfiants* porte atteinte à la présomption d'innocence de l'al. 11d) de la *Charte*

requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The rational connection test — the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision — does not apply to the interpretation of s. 11(d). A basic fact may rationally tend to prove a presumed fact, but still not prove its existence beyond a reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 1 of the *Charter*.

Section 1 of the *Charter* has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitutional Act, 1982*) against which limitations on those rights and freedoms may be measured.

The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as “reasonableness”, “justifiability”, and “free and democratic society” are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be

en obligeant l'accusé à prouver qu'il n'est pas coupable de trafic, une fois la possession établie.

Le critère du lien rationnel—le fait qu'une disposition portant inversion de la charge de la preuve puisse se justifier par l'existence d'un lien rationnel entre le fait établi et le fait présumé—ne s'applique pas à l'interprétation de l'al. 11d). Un fait établi peut rationnellement tendre à prouver un fait présumé sans pour autant en prouver l'existence hors de tout doute raisonnable, un aspect important de la présomption d'innocence. C'est dans le contexte de l'article premier de la *Charte* qu'il convient d'invoquer le critère du lien rationnel.

L'article premier de la *Charte* remplit deux fonctions: premièrement, il garantit les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés.

La charge de prouver qu'une restriction à un droit garanti par la *Charte* est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Les restrictions apportées à des droits garantis par la Constitution constituent nettement des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits énoncés dans la *Charte* sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction.

La norme de preuve applicable aux fins de l'article premier est la preuve selon la prépondérance des probabilités. La preuve hors de tout doute raisonnable imposerait une charge trop lourde à la partie qui cherche à apporter une restriction à un droit, puisque des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que doivent servir les mesures qui apportent une restriction à un droit garanti par la *Charte*, doit être suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes d'une société libre et démocratique ne bénéficient pas d'une protection. Il faut à tout le

characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern that drug trafficking be decreased was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey and McIntyre JJ.: Concurred in the reasons of Dickson C.J. with respect to the relationship between s. 11(d) and s. 1 of the *Charter* but the reasons of Martin J.A. in the court below were adopted for the disposition of all other issues.

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R. v. Shelley, [1981] 2 S.C.R. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. v. Appleby*, [1972] S.C.R. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, considered; *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648, distinguished; *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. v. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Ontario County Court, unreported, June 23, 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Manchuk v.*

moins qu'un objectif se rapporte à des préoccupations sociales, urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important. En deuxième lieu, la partie qui invoque l'article premier doit démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'une sorte de critère de proportionnalité qui comporte trois éléments importants. D'abord, les mesures doivent être équitables et non arbitraires, être soigneusement conçues pour atteindre l'objectif en question et avoir un lien rationnel avec cet objectif. De plus, le moyen choisi doit être de nature à porter le moins possible atteinte au droit en question. Enfin, il doit y avoir proportionnalité entre les effets de la mesure restrictive et l'objectif poursuivi — plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important.

Le souci du législateur de réduire le trafic des stupéfiants est réel et urgent. Son objectif, qui est de protéger la société contre les fléaux liés au trafic des stupéfiants est évident en soi aux fins de l'article premier, et peut justifier dans certains cas l'atteinte à un droit garanti par la Constitution. Il n'existe toutefois pas de lien rationnel entre le fait établi de la possession et le fait présumé de possession à des fins de trafic. La possession d'une quantité infime ou négligeable de stupéfiants ne justifie pas une conclusion de trafic.

Les juges Estey et McIntyre: Les motifs du juge en chef Dickson sont adoptés en ce qui concerne le lien entre l'al. 11d) et l'article premier de la *Charte*. Cependant, il y a adoption des motifs du juge Martin de la Cour d'appel pour ce qui est de statuer sur toutes les autres questions.

Jurisprudence

Arrêts examinés: *R. c. Shelley*, [1981] 2 R.C.S. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. c. Appleby*, [1972] R.C.S. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; distinction faite d'avec l'arrêt: *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648; arrêts mentionnés: *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. c. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Cour de comté de l'Ontario, décision inédite en date du 23 juin 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; Renvoi: *Motor*

The King, [1938] S.C.R. 341; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Stock* (1983), 10 C.C.C. (3d) 319; *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661; *R. v. Holmes* (1983), 41 O.R. (2d) 250; *R. v. Whyte* (1983), 10 C.C.C. (3d) 277; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539; *R. v. T.* (1985), 18 C.C.C. (3d) 125; *R. v. Kowalczyk* (1983), 5 C.C.C. (3d) 25; *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34; *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713; *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 395 U.S. 6 (1969); *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *In Re Winship*, 397 U.S. 358 (1970); *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook E.C.H.R. 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, E.C.H.R., 135; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Bater v. Bater*, [1950] 2 All E.R. 458; *Hanes v. Wawanese Mutual Insurance Co.*, [1963] S.C.R. 154; *Smith v. Smith*, [1952] 2 S.C.R. 312, referred to.

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Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.
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Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, dismissing an appeal of the Crown from a judgment of Walker Prov. Ct. J. convicting the accused of simple possession on a charge of possessing narcotics for the purposes of trafficking contrary to s. 4(2) of the *Narcotic Control Act*. Appeal dismissed.

Julius Isaac, Q.C., Michael R. Dambrot and Donna C. McGillis, for the appellant.

Geoffrey A. Beasley, for the respondent.

The judgment of Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain J.J. was delivered by

THE CHIEF JUSTICE—This appeal concerns the constitutionality of s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. The section provides, in brief, that if the Court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(d) of the *Canadian Charter of Rights and Freedoms*. The Crown has appealed.

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^b Jacobs, Francis. *The European Convention on Human Rights*, Oxford, Clarendon Press, 1975.

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^c Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, qui a rejeté un appel formé par le ministère public contre une décision dans laquelle le juge Walker de la Cour provinciale a reconnu l'accusé coupable de simple possession alors qu'il était inculpé de possession de stupéfiants pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Pourvoi rejeté.

Julius Isaac, c.r., Michael R. Dambrot et Donna C. McGillis, pour l'appelante.

^f *Geoffrey A. Beasley*, pour l'intimé.

Version française du jugement du juge en chef Dickson et des juges Chouinard, Lamer, Wilson et Le Dain rendu par

^g LE JUGE EN CHEF—Ce pourvoi porte sur la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1. L'article 8 prévoit en bref que, si la cour constate que l'accusé était en possession d'un stupéfiant, il est présumé l'avoir été pour en faire le trafic. À moins que l'accusé ne puisse établir le contraire, il doit être déclaré coupable de trafic. La Cour d'appel de l'Ontario a conclu que cet article constitue une disposition portant «inversion de la charge de la preuve», qui est en conséquence inconstitutionnelle pour le motif qu'elle viole l'un des principes fondamentaux de notre système de justice criminelle, savoir la présomption d'innocence qui est maintenant enchâssée dans l'al. 11d) de la *Charte canadienne des droits et libertés*. Le ministère public a formé un pourvoi.

I

Statutory and Constitutional Provisions

Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

Narcotic Control Act, R.S.C. 1970, c. N-1.

3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable

(a) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one year or to both fine and imprisonment; or

(b) upon conviction on indictment, to imprisonment for seven years.

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) No person shall have in his possession a narcotic for the purpose of trafficking.

(3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

8. In any prosecution for a violation of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence as charged but he shall be

I

Les dispositions législatives et constitutionnelles

Avant de passer à l'examen des faits, reproduisons les dispositions législatives et constitutionnelles pertinentes:

Loi sur les stupéfiants, S.R.C. 1970, chap. N-1.

3. (1) Sauf ainsi que l'autorisent la présente loi ou les règlements, nul ne peut avoir un stupéfiant en sa possession.

(2) Quiconque enfreint le paragraphe (1) est coupable d'une infraction et passible,

a) sur déclaration sommaire de culpabilité, pour une première infraction, d'une amende de mille dollars ou d'un emprisonnement de six mois ou à la fois de l'amende et de l'emprisonnement, et pour infraction subséquente, d'une amende de deux mille dollars ou d'un emprisonnement d'un an ou à la fois de l'amende et de l'emprisonnement; ou

b) sur déclaration de culpabilité sur acte d'accusation, d'un emprisonnement de sept ans.

4. (1) Nul ne peut faire le trafic d'un stupéfiant ou d'une substance quelconque qu'il prétend être ou estime être un stupéfiant.

(2) Nul ne peut avoir en sa possession un stupéfiant pour en faire le trafic.

(3) Quiconque enfreint le paragraphe (1) ou (2) est coupable d'un acte criminel et encourt l'emprisonnement à perpétuité.

8. Dans toutes poursuites pour une violation du paragraphe 4(2), si l'accusé n'avoue pas sa culpabilité, le procès doit s'instruire comme s'il s'agissait d'une poursuite pour une infraction prévue par l'article 3, et après que le poursuivant a terminé son exposé et qu'il a été fourni à l'accusé une occasion de présenter une réplique et une défense complètes, la cour doit statuer sur la question de savoir si l'accusé était ou non en possession du stupéfiant contrairement aux dispositions de l'article 3; si la cour constate que l'accusé n'était pas en possession du stupéfiant contrairement aux dispositions de l'article 3; elle doit l'acquitter, mais si elle constate qu'il était en possession du stupéfiant contrairement aux dispositions de l'article 3, il doit être fourni à l'accusé une occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic, et, par la suite, il doit être fourni au poursuivant une occasion d'établir la preuve que l'accusé était en possession du stupéfiant pour en faire le trafic; si celui-ci démontre qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il

convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly.

(Emphasis added.)

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

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

II

Facts

The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*. He elected trial by magistrate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight one gram vials of cannabis resin in the form of hashish oil. Upon a further search conducted at the police station, \$619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for \$150 for his own use, and that the \$619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the *Narcotic Control Act*, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

doit être acquitté de l'infraction dont fait mention l'acte d'accusation, mais il doit être déclaré coupable d'une infraction aux termes de l'article 3 et condamné en conséquence; et si l'accusé ne démontre pas qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l'infraction dont fait mention l'acte d'accusation et condamné en conséquence.

(C'est moi qui souligne.)

Charte canadienne des droits et libertés

11. Tout inculpé a le droit:

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

II

Les faits

L'intimé, David Edwin Oakes, a été accusé d'avoir eu illégalement en sa possession un stupéfiant pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Il a choisi de subir son procès devant un magistrat siégeant sans jury. Au cours du procès, la poursuite a produit des éléments de preuve en vue d'établir que M. Oakes avait été trouvé en possession de huit fioles d'une capacité d'un gramme contenant de la résine de cannabis sous forme d'huile de haschisch. Une fouille effectuée au poste de police a permis de découvrir la somme de 619,45 \$. Monsieur Oakes a dit à la police qu'il avait acheté au prix de 150 \$ dix fioles d'huile de haschisch pour son propre usage et que les 619,45 \$ provenaient d'un chèque d'indemnisation pour un accident de travail. Il a choisi de ne pas présenter de preuve relativement à la possession d'un stupéfiant. Conformément aux dispositions en matière de procédure de l'art. 8 de la *Loi sur les stupéfiants*, le juge du procès a conclu que, hors de tout doute raisonnable, M. Oakes était en possession du stupéfiant.

Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the *Narcotic Control Act*, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(d) of the *Charter*.

III

Judgments

(a) Ontario Provincial Court (*R. v. Oakes* (1982), 38 O.R. (2d) 598)

At trial, Walker Prov. Ct. J. borrowed the words of Laskin C.J. in *R. v. Shelley*, [1981] 2 S.C.R. 196, at p. 202, and found there was no rational or necessary connection between the fact proved, *i.e.*, possession of the drug, and the conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. Ct. J. held that, to the extent that s. 8 of the *Narcotic Control Act* requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(d) of the *Charter*.

Walker Prov. Ct. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b) Ontario Court of Appeal (*R. v. Oakes* (1983), 145 D.L.R. (3d) 123)

Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the *Narcotic Control Act* unconstitutional.

Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the

À la suite de cette conclusion, M. Oakes a présenté une requête en contestation de la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*, qui, selon lui, impose à un accusé l'obligation de prouver qu'il n'était pas en possession d'un stupéfiant pour en faire le trafic et constitue de ce fait une violation de la présomption d'innocence énoncée à l'al. 11d) de la *Charte*.

III

Les jugements

a) Cour provinciale de l'Ontario (*R. v. Oakes* (1982), 38 O.R. (2d) 598)

Au procès, le juge Walker de la Cour provinciale a emprunté les termes utilisés par le juge en chef Laskin dans l'arrêt *R. c. Shelley*, [1981] 2 R.C.S. 196, à la p. 202, et a conclu qu'il n'y avait aucun lien rationnel ou nécessaire entre le fait prouvé, *c.-à-d.* la possession du stupéfiant, et la conclusion qu'on lui demandait de tirer, savoir qu'il s'agissait d'une possession à des fins de trafic. Le juge Walker a conclu que, dans la mesure où l'art. 8 de la *Loi sur les stupéfiants* requiert cette présomption et la déclaration de culpabilité qui en résulte, il va à l'encontre de la présomption d'innocence énoncée à l'al. 11d) de la *Charte* et est en conséquence inopérant.

Le juge Walker a ajouté que l'inversion de la charge de la preuve effectuée par l'art. 8 n'aurait pas été entachée d'invalidité si le ministère public avait produit une preuve de possession ainsi que des éléments de preuve permettant de conclure hors de tout doute raisonnable qu'il s'agissait d'une possession à des fins de trafic. Si cela était fait, il y aurait un lien rationnel suffisant entre le fait de la possession et le fait présumé, *c.-à-d.* le trafic.

b) Cour d'appel de l'Ontario (*R. v. Oakes* (1983), 145 D.L.R. (3d) 123)

La Cour d'appel, s'exprimant par l'intermédiaire du juge Martin, a rejeté à l'unanimité l'appel et déclaré inconstitutionnelle la disposition de l'art. 8 de la *Loi sur les stupéfiants* portant inversion de la charge de la preuve.

Le juge Martin a affirmé qu'en règle générale une disposition qui inverse la charge de la preuve

accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test which he explained as follows, at p. 146:

The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (*e.g.*, possession) must rationally tend to prove the presumed fact (*e.g.*, an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

de manière à obliger l'accusé à prouver selon la prépondérance des probabilités l'inexistence d'un élément essentiel d'une infraction contrevient au droit d'être présumé innocent. Néanmoins, il a conclu que certaines dispositions portant inversion de la charge de la preuve peuvent être constitutionnelles pour peu qu'elles constituent des restrictions raisonnables au droit d'être présumé innocent et que la justification de ces restrictions puisse se démontrer dans le cadre d'une société libre et démocratique.

Le juge Martin a énoncé une question à deux volets qu'il faut se poser pour déterminer si, dans un cas donné, une disposition portant inversion de la charge de la preuve est légitime. Ainsi, il faut d'abord satisfaire à un critère préliminaire que le juge Martin explique de la façon suivante à la p. 146:

[TRADUCTION] Pour décider de la légitimité d'une disposition particulière portant inversion de la charge de la preuve, il faut d'abord et avant tout se demander si cette disposition est justifiable en ce sens qu'il est raisonnable que le législateur impose à l'accusé la charge de la preuve relativement à un élément de l'infraction en cause. Pour répondre à cette question préliminaire il faut prendre en considération un certain nombre de facteurs dont: a) l'ampleur du mal à réprimer, qui peut être mesurée par la gravité du préjudice résultant de l'infraction ou par la fréquence de la perpétration de l'infraction, ou par les deux critères, b) la difficulté que peut éprouver la poursuite à établir le fait présumé, et c) la facilité relative avec laquelle l'accusé pourra prouver l'existence ou l'inexistence du fait présumé. Manifestement, une disposition imposant à l'accusé la charge de la preuve à l'égard d'un fait dont, logiquement, il n'est pas à même de prouver l'existence ou l'inexistence n'est guère justifiable.

Si, après qu'on a dûment tenu compte de la détermination par le législateur de la nécessité d'une telle disposition, la disposition portant inversion de la charge de la preuve répond à ces critères, elle doit alors satisfaire à un autre. Il s'agit de ce que le juge Martin a décrit comme le [TRADUCTION] «critère du lien rationnel». Suivant ce critère, pour être raisonnable, le fait prouvé (par ex., la possession) doit logiquement tendre à établir le fait présumé (par ex., l'intention de faire le trafic). En d'autres termes, le fait prouvé doit soulever la probabilité de l'existence du fait présumé.

In considering s. 8 of the *Narcotic Control Act*, Martin J.A. focused primarily on the second test at p. 147:

I have reached the conclusion that s. 8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic) Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

Martin J.A. added that it is not for courts to attempt to rewrite s. 8 by applying it on a case by case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as "where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion". There would not, therefore, be any need for a statutory presumption.

One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s. 11(d) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(d).

IV

The Issues

The constitutional question in this appeal is stated as follows:

Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(d) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Dans son analyse de l'art. 8 de la *Loi sur les stupéfiants*, le juge Martin s'est arrêté principalement au second critère à la p. 147:

[TRANSCRIPTION] J'en suis venu à la conclusion que l'art. 8 de la *Loi sur les stupéfiants* est inconstitutionnel en raison de l'absence d'un lien rationnel entre le fait prouvé (la possession) et le fait présumé (l'intention de faire le trafic) . . . La simple possession d'une faible quantité d'un stupéfiant ne permet pas de conclure à la possession à des fins de trafic ou encore ne tend même pas à prouver une intention de se livrer au trafic. En outre, du moment que la possession est prouvée, l'art. 8 impose à l'accusé la charge de prouver l'inexistence non pas de quelque élément formel de l'infraction mais de l'essence même de celle-ci.

Le juge Martin ajoute qu'il n'appartient pas aux tribunaux d'essayer de reformuler l'art. 8 en l'appliquant cas par cas. De plus, lorsqu'il existe un lien rationnel entre la possession et l'intention présumée de faire le trafic, comme [TRANSCRIPTION] «dans le cas où la possession d'un stupéfiant est de nature à constituer une indication du trafic de celui-ci, on peut ordinairement compter sur le bon sens du jury pour que celui-ci tire la bonne conclusion». Aucune présomption légale ne serait alors nécessaire.

Une dernière observation s'impose relativement aux motifs du juge Martin. Dans son étude de la question de savoir si l'art. 8 constitue une restriction raisonnable de la protection constitutionnelle accordée à la présomption d'innocence, le juge Martin a rapproché l'al. 11(d) de l'article premier. Il a conclu que l'exigence de l'article premier qu'une restriction soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique constitue la norme applicable à l'interprétation de l'expression «conformément à la loi» que l'on trouve à l'al. 11(d).

IV

Les questions en litige

La question constitutionnelle formulée dans le présent pourvoi est la suivante:

L'article 8 de la *Loi sur les stupéfiants* est-il incompatible avec l'al. 11(d) de la *Charte canadienne des droits et libertés* et, par conséquent, inopérant?

Two specific questions are raised by this general question: (1) does s. 8 of the *Narcotic Control Act* violate s. 11(d) of the *Charter*; and, (2) if it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*? If the answer to (1) is affirmative and the answer to (2) negative, then the constitutional question must be answered in the affirmative.

V

Does s. 8 of the *Narcotic Control Act* Violate s. 11(d) of the *Charter*?

(a) The Meaning of s. 8

Before examining the presumption of innocence contained in s. 11(d) of the *Charter*, it is necessary to clarify the meaning of s. 8 of the *Narcotic Control Act*. The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235 (B.C.C.A.), at p. 247:

(A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.

(B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug

(C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession

(D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).

(E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.

(F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking

Cette question générale soulève deux questions précises: (1) l'article 8 de la *Loi sur les stupéfiants* contrevient-il à l'al. 11d) de la *Charte*? et (2) dans l'affirmative, l'art. 8 constitue-t-il une limite raisonnable imposée par une règle de droit et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, au sens de l'art. 1 de la *Charte*? Dans l'hypothèse d'une réponse affirmative à la première question et d'une réponse négative à la seconde, la question constitutionnelle doit alors recevoir une réponse affirmative.

V

L'article 8 de la *Loi sur les stupéfiants* contrevient-il à l'al. 11d) de la *Charte*?

a) Le sens de l'art. 8

Avant d'examiner la présomption d'innocence énoncée à l'al. 11d) de la *Charte*, il est nécessaire de préciser le sens de l'art. 8 de la *Loi sur les stupéfiants*. Dans l'arrêt *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235 (C.A.C.-B.), à la p. 247, le juge Branca expose clairement les étapes de la procédure prévue par l'art. 8:

[TRADUCTION] A) L'accusé est inculpé de possession d'un stupéfiant prohibé en vue d'en faire le trafic.

B) Le procès de l'accusé relativement à cette accusation est alors instruit comme s'il s'agissait d'une poursuite relativement à une simple accusation de possession du stupéfiant prohibé . . .

C) Lorsque le ministère public a administré sa preuve comme s'il s'agissait d'une poursuite pour simple possession, la loi accorde à l'accusé le droit ou la possibilité de présenter une défense complète relativement à l'accusation de simple possession . . .

D) Ceci fait, la cour doit statuer sur la question de savoir si l'accusé était en possession d'un stupéfiant contrairement à l'art. 3 de la nouvelle Loi. (Possession d'un stupéfiant prohibé).

E) Si la cour conclut à la possession, c'est alors à ce moment que la charge de la preuve est imposée à l'accusé en ce sens qu'on doit lui fournir l'occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic.

F) Quand l'accusé a eu cette possibilité, la poursuite peut alors tenter d'établir que l'accusé était en possession du stupéfiant pour en faire le trafic . . .

(G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.

(H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic

(I) If the accused does not so establish he must then be convicted of the full offence as charged.

Mr. Justice Branca then added at pp. 247-48:

It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

8. . . . if the court finds that the accused was in possession of the narcotic . . . he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking . . . if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged

In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross on Evidence*, 5th ed., at pp. 122-23).

Basic fact presumptions can be further categorized into permissive and mandatory presumptions.

G) C'est alors que la cour doit décider si l'accusé s'est acquitté de l'obligation que lui impose ledit article.

H) Si la cour conclut par l'affirmative, l'accusé doit être acquitté de l'infraction imputée, savoir la possession en vue de faire le trafic, mais, dans ce cas-là, il doit être déclaré coupable de l'infraction de simple possession d'un stupéfiant prohibé . . .

I) Si l'accusé ne réussit pas à démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit alors être reconnu coupable de l'infraction imputée.

Le juge Branca ajoute ensuite, aux pp. 247 et 248:

[TRANSLATION] Il est très clair dans mon esprit que l'art. 8 de la nouvelle Loi exige un procès en deux étapes. À la première étape, la seule question qu'il faut résoudre est de savoir si l'accusé est coupable de simple possession d'un stupéfiant. Cette question doit être tranchée en fonction des éléments de preuve qui se rapportent uniquement à la possession. À la seconde étape, la question à trancher est de savoir si la possession imputée était pour des fins de trafic.

Compte tenu de ces étapes de la procédure, nous devons étudier la nature de la présomption légale établie par l'art. 8 ainsi que le genre de charge qu'elle impose à un accusé. Voici les parties pertinentes de l'art. 8:

8. . . . si elle [la cour] constate qu'il était en possession du stupéfiant . . . il doit être fourni à l'accusé une occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic . . . si l'accusé ne démontre pas qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l'infraction dont fait mention l'acte d'accusation . . .

Pour déterminer le sens de ces mots, il est utile de procéder à un examen général de la nature des présomptions. Les présomptions peuvent être rangées dans deux catégories générales: les présomptions non fondées sur des faits établis et les présomptions fondées sur des faits établis. Une présomption non fondée sur un fait établi est simplement une conclusion qui doit être tirée tant qu'on n'a pas prouvé le contraire. Une présomption fondée sur un fait établi consiste en une conclusion qui repose sur la preuve de ce fait (voir *Cross on Evidence*, 5th ed., aux pp. 122 et 123).

Quant aux présomptions fondées sur des faits établis, elles peuvent créer une faculté ou être

A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (*Cross on Evidence*, *supra*, at p. 124) while the former involve actual legal rules.

To return to s. 8 of the *Narcotic Control Act*, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: *R. v. Carroll* (1983), 147 D.L.R. (3d) 92 (P.E.I.S.C. *in banco*); *R. v. Cook* (1983), 4 C.C.C. (3d) 419 (N.S.C.A.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227 (N.B.C.A.); *R. v. Landry* (1983), 7 C.C.C. (3d) 555 (Que. C.A.); *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (Alta. C.A.)

In some decisions it has been held that s. 8 of the *Narcotic Control Act* is constitutional because

impératives. Dans le cas d'une présomption créant une faculté, dès lors qu'il y a un fait établi, on est libre d'en déduire ou ne pas en déduire le fait présumé. Si, par contre, il s'agit d'une présomption
^a impérative, cette déduction est obligatoire.

Une présomption peut aussi être réfutable ou irréfutable. Si elle est réfutable, il y a trois moyens possibles de combattre le fait présumé. Premièrement, l'accusé pourra avoir simplement à susciter un doute raisonnable quant à l'existence de ce fait. Deuxièmement, il pourra avoir la charge de produire une preuve suffisante pour mettre en doute l'exactitude du fait présumé. Troisièmement, il
^c pourra avoir à s'acquitter d'une charge ultime ou d'une charge de persuasion qui l'oblige à prouver selon la prépondérance des probabilités l'inexistence du fait présumé.

^d Enfin, les présomptions sont souvent décrites comme étant soit des présomptions de droit, soit des présomptions de fait. Ces dernières comportent des [TRADUCTION] «exemples fréquents de preuve
^e indirecte» (*Cross on Evidence*, précité, à la p. 124), alors que les premières comportent des règles de droit expresses.

Revenons à l'art. 8 de la *Loi sur les stupéfiants*.
^f Selon moi, dès qu'on conclut hors de tout doute raisonnable que l'accusé était en possession d'un stupéfiant, celui-ci a la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession de ce stupéfiant pour en
^g faire le trafic. Une fois prouvée, la possession fait naître à l'encontre de l'accusé la présomption de droit impérative qu'il avait l'intention de se livrer au trafic. De plus, l'accusé sera reconnu coupable de l'infraction de trafic, à moins qu'il ne puisse,
^h par une preuve selon la prépondérance des probabilités, réfuter cette présomption. Les cours de plusieurs ressorts ont appuyé cette interprétation de l'art. 8: *R. v. Carroll* (1983), 147 D.L.R. (3d) 92 (C.S.Î.-P.-É. *in banco*); *R. v. Cook* (1983), 4 C.C.C. (3d) 419 (C.A.N.-É.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227 (C.A.N.-B.); *R. v. Landry*, (1983) 7 C.C.C. (3d) 555 (C.A. Qué.); *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (C.A. Alb.)

^j Dans certaines décisions, on a conclu à la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*

it places only an evidentiary burden rather than a legal burden on the accused. The ultimate legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended. (*R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.); *R. v. Fraser* (1982), 138 D.L.R. (3d) 488 (Sask. Q.B.); *R. v. Kupczynski*, (June 23, 1982, unreported, Ont. Co. Ct.))

This same approach was relied on in *R. v. Sharpe* (1961), 131 C.C.C. 75 (Ont. C.A.), a *Canadian Bill of Rights* decision on the presumption of innocence. In that case, a provision in the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, similar to s. 8 of the *Narcotic Control Act*, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In *R. v. Silk*, [1970] 3 C.C.C. (2d) 1 (B.C.C.A.), the British Columbia Court of Appeal held that s. 2(f) of the *Canadian Bill of Rights* had not been infringed because s. 33 of the *Food and Drugs Act*, (now R.S.C. 1970, c. F-27, s. 35) required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in *R. v. Appleby*, [1972] S.C.R. 303, nor in *R. v. Erdman* (1971), 24 C.R.N.S. 216 (B.C.C.A.)

Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the *Narcotic Control Act*. As Ritchie J. found in *R. v. Appleby*, *supra*, (though addressing a different statutory provision) the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word "establish" in s. 8 of the *Narcotic Control Act*, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the

parce qu'il impose à l'accusé une simple charge de présentation plutôt qu'une charge ultime. Le ministère public a toujours la charge ultime de prouver la culpabilité hors de tout doute raisonnable et il n'y a aucune atteinte à la présomption d'innocence. (*R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (C. de comté Ont.); *R. v. Fraser* (1982), 138 D.L.R. (3d) 488 (B.R. Sask.); *R. v. Kupczynski* (décision inédite en date du 23 juin 1982, C. de comté Ont.))

Ce même point de vue a été invoqué dans l'arrêt *R. v. Sharpe* (1961), 131 C.C.C. 75 (C.A. Ont.), où il était question de la présomption d'innocence, mais dans le contexte de la *Déclaration canadienne des droits*. Suivant l'interprétation qu'on a donnée dans cette affaire à une disposition de la *Loi sur l'opium et les drogues narcotiques*, S.R.C. 1952, chap. 201, cette disposition, qui était semblable à l'art. 8 de la *Loi sur les stupéfiants*, ne reportait sur l'accusé que la charge secondaire de produire des éléments de preuve. Quant à la charge principale, elle continuait d'incomber au ministère public. Dans l'arrêt *R. v. Silk*, [1970] 3 C.C.C. (2d) 1 (C.A.C.-B.), la Cour d'appel de la Colombie-Britannique a conclu qu'il n'y avait pas eu violation de l'al. 2f) de la *Déclaration canadienne des droits* parce que l'art. 33 de la *Loi des aliments et drogues* (l'actuel S.R.C. 1970, chap. F-27, art. 35) exigeait simplement d'un accusé qu'il fasse naître un doute raisonnable sur la question de savoir s'il s'agissait d'une possession à des fins de trafic. Toutefois, cet arrêt n'a été suivi ni dans l'arrêt *R. v. Appleby*, [1972] R.C.S. 303, ni dans l'arrêt *R. v. Erdman* (1971), 24 C.R.N.S. 216 (C.A.C.-B.)

Les décisions établissant que seule la charge secondaire ou la charge de présentation est déplacée n'ont aucune force persuasive pour ce qui est de la *Loi sur les stupéfiants*. Comme l'a conclu le juge Ritchie dans l'arrêt *R. v. Appleby*, précité, (quoique relativement à une disposition législative différente), le terme «établir» équivaut à «prouver». En employant le mot «démontrer» à l'art. 8 de la *Loi sur les stupéfiants*, le législateur a voulu imposer à l'accusé une charge ultime. C'est ce qui ressort on ne peut plus clairement de la phrase

narcotic for the purpose of trafficking, he shall be convicted of the offence as charged”.

In the *Appleby* case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, *inter alia*, upon the following passage from the House of Lords’ decision in *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226, at p. 232:

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are “not proved”. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist “unless the contrary is proved”. In such a case the consequence of finding that that particular fact is “disproved” will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact’s being “disproved” there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships’ opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

I conclude that s. 8 of the *Narcotic Control Act* contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the *Narcotic Control Act* offends the right to be “presumed innocent until proven guilty” as guaranteed by s. 11(d) of the *Charter*.

suyvante: «si l’accusé ne démontre pas qu’il n’était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l’infraction dont fait mention l’acte d’accusation».

a

Dans l’arrêt *Appleby*, le juge Ritchie a conclu en outre que l’accusé doit prouver l’inexistence du fait présumé selon la norme de preuve en matière civile, savoir celle de la prépondérance des probabilités. Il a rejeté la norme d’une preuve hors de tout doute raisonnable applicable en matière criminelle, en se fondant notamment sur le passage suivant tiré de l’arrêt de la Chambre des lords *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226, à la p. 232:

[TRADUCTION] En règle générale, dans des procédures criminelles, le défendeur n’a pas à prouver ou à réfuter quelque fait que ce soit: pour qu’il soit acquitté, il suffit que l’un des faits qui, s’il existait, constituerait l’infraction dont il est accusé, «ne soit pas prouvé». Mais il arrive exceptionnellement, comme en l’espèce, que la loi créant une infraction prévoit expressément que si d’autres faits sont prouvés, un fait précis, dont l’existence constitue un élément essentiel de l’infraction, sera présumé ou réputé exister «à moins que le contraire ne soit prouvé». En pareil cas, la conclusion que ce fait précis est «réfuté» entraîne un acquittement, alors que l’absence d’une telle conclusion entraîne une déclaration de culpabilité. Lorsque c’est là le résultat de la «réfutation» d’un fait, il ne peut y avoir, dans l’intérêt public, de motif d’exiger un degré exceptionnel de certitude tel qu’il lève tout doute raisonnable que ce fait n’existe pas. À notre avis, en pareil cas, la règle générale s’applique et il suffit que la cour considère, compte tenu de la preuve à sa disposition, que le fait n’existe probablement pas. Le critère est le même que celui qui s’applique dans les procédures civiles: celui de la prépondérance des probabilités.

Je conclus que l’art. 8 de la *Loi sur les stupéfiants* contient une disposition qui inverse la charge de la preuve en imposant à l’accusé la charge ultime de prouver selon la prépondérance des probabilités qu’il n’était pas en possession d’un stupéfiant pour en faire le trafic. Il est donc nécessaire d’établir si l’art. 8 de la *Loi sur les stupéfiants* porte atteinte au droit d’un inculpé d’être «préssumé innocent tant qu’il n’est pas déclaré coupable», garanti par l’al. 11d) de la *Charte*.

(b) The Presumption of Innocence and s. 11(d) of the Charter

Section 11(d) of the *Charter* constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

To interpret the meaning of s. 11(d), it is important to adopt a purposive approach. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344:

The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms

To identify the underlying purpose of the *Charter* right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to

b) La présomption d'innocence et l'al. 11d) de la Charte

L'alinéa 11d) de la *Charte* enchâsse la présomption d'innocence dans la Constitution qui est la loi suprême du Canada. Par souci de commodité, je reproduis de nouveau cette disposition:

11. Tout inculpé a le droit:

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Il importe dans l'interprétation de l'al. 11d) de tenir compte de son objet. Comme l'a souligné cette Cour dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344:

Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.

À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers . . .

Par conséquent, pour identifier l'objet qui sous-tend le droit garanti par la *Charte* dont il est question en l'espèce, il est important de commencer par comprendre les valeurs fondamentales inhérentes à ce droit.

La présomption d'innocence est un principe consacré qui se trouve au cœur même du droit criminel. Bien qu'elle soit expressément garantie par l'al. 11d) de la *Charte*, la présomption d'innocence relève et fait partie intégrante de la garantie générale du droit à la vie, à la liberté et à la sécurité de la personne, contenue à l'art. 7 de la *Charte* (voir *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, le juge Lamer). La présomption d'innocence a pour effet de sauvegarder la liberté fondamentale et la dignité humaine de toute personne que l'État accuse d'une conduite criminelle. Un individu accusé d'avoir commis une infraction criminelle s'expose à de lourdes conséquences

social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

The presumption of innocence has enjoyed longstanding recognition at common law. In the leading case, *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), Viscount Sankey wrote at pp. 481-82:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the *Woolmington* principle with approval (see, for example, *Manchuk v. The King*, [1938] S.C.R. 341, at p. 349; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1316).

Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(I) of the *Universal Declaration of Human Rights*, adopted December 10, 1948 by the General Assembly of the United Nations, provides:

sociales et personnelles, y compris la possibilité de privation de sa liberté physique, l'opprobre et l'ostracisme de la collectivité, ainsi que d'autres préjudices sociaux, psychologiques et économiques. Vu la gravité de ces conséquences, la présomption d'innocence revêt une importance capitale. Elle garantit qu'un accusé est innocent tant que l'État n'a pas prouvé sa culpabilité hors de tout doute raisonnable. Voilà qui est essentiel dans une société qui prône l'équité et la justice sociale. La présomption d'innocence confirme notre foi en l'humanité; elle est l'expression de notre croyance que, jusqu'à preuve contraire, les gens sont honnêtes et respectueux des lois.

La présomption d'innocence a depuis fort longtemps droit de cité en *common law*. Dans l'arrêt de principe *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), le vicomte Sankey écrit aux pp. 481 et 482:

[TRADUCTION] Dans toute la toile du droit criminel anglais se retrouve toujours un certain fil d'or, soit le devoir de la poursuite de prouver la culpabilité du prévenu, sous réserve de ce que j'ai déjà dit à propos de la défense excipant de l'aliénation mentale et sous réserve, également, de toute exception créée par la loi. Si, à l'issue des débats, la preuve produite, soit par la poursuite, soit par le prévenu, fait naître un doute raisonnable quant à savoir si ce dernier a tué la victime avec préméditation, la poursuite a échoué et le prévenu a droit à un acquittement. Peu importe la nature de l'accusation ou le lieu du procès, le principe obligeant la poursuite à prouver la culpabilité du prévenu est consacré dans la *common law* d'Angleterre et toute tentative d'y porter atteinte doit être repoussée.

Le principe posé dans l'arrêt *Woolmington* a par la suite été cité et approuvé dans des arrêts canadiens (voir, par exemple, *Manchuk v. The King*, [1938] R.C.S. 341, à la p. 349; *R. c. Ville de Sault Ste-Marie*, [1978] 2 R.C.S. 1299, à la p. 1316).

L'acceptation générale du principe de la présomption d'innocence ressort en outre de son inclusion dans les plus importants documents internationaux relatifs aux droits de la personne. Le paragraphe 11(I) de la *Déclaration universelle des droits de l'homme*, adoptée le 10 décembre 1948 par l'Assemblée générale des Nations Unies, dispose:

Article 11

I. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the *International Covenant on Civil and Political Rights*, 1966, art. 14(2) states:

Article 14

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this Covenant, and the Optional Protocol which sets up machinery for implementing the Covenant, on May 19, 1976. Both came into effect on August 19, 1976.

In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(d) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:

Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(d), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

Article 11

I. Toute personne accusée d'un acte délictueux est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie au cours d'un procès public où toutes les garanties nécessaires à sa défense lui auront été assurées.

Le paragraphe 14(2) du *Pacte international relatif aux droits civils et politiques*, 1966, porte:

Article 14

2. Toute personne accusée d'une infraction pénale est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.

Le Canada a adhéré à ce pacte ainsi qu'au Protocole facultatif prévoyant les modalités d'application du Pacte, le 19 mai 1976. Les deux sont entrés en vigueur le 19 août 1976.

Compte tenu de ce qui précède, le droit, prévu par l'al. 11d), d'être présumé innocent tant qu'on n'est pas déclaré coupable exige à tout le moins que, premièrement, la culpabilité soit établie hors de tout doute raisonnable et, deuxièmement, que ce soit à l'État qu'incombe la charge de la preuve. Comme l'affirme le juge Lamer dans l'arrêt *Dubois c. La Reine*, [1985] 2 R.C.S. 350, à la p. 357:

L'alinéa 11d) impose à la poursuite le fardeau de démontrer la culpabilité de l'accusé hors de tout doute raisonnable ainsi que de présenter sa preuve contre l'accusé avant que celui-ci n'ait besoin de répondre, soit en témoignant soit en citant d'autres témoins.

Troisièmement, les poursuites criminelles doivent se dérouler d'une manière conforme aux procédures légales et à l'équité. L'importance de ces dernières ressort de la dernière partie de l'al. 11d) qui pose comme exigence que la culpabilité soit établie «conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable».

(c) Jurisprudence relative aux dispositions portant inversion de la charge de la preuve et à la présomption d'innocence

Ayant étudié le sens général de la présomption d'innocence, je crois qu'il convient maintenant de passer brièvement en revue la jurisprudence canadienne et celle d'autres ressorts traitant des dispositions portant inversion de la charge de la preuve.

(i) The Canadian Bill of Rights Jurisprudence

Section 2(f) of the *Canadian Bill of Rights*, which safeguards the presumption of innocence, provides:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal

The wording of this section closely parallels that of s. 11(d). For this reason, one of the Crown's primary contentions is that the *Canadian Bill of Rights* jurisprudence should be determinative of the outcome of the present appeal.

The leading case decided under s. 2(f) of the *Canadian Bill of Rights* and relied on by the Crown, is *R. v. Appleby*, *supra*. In that case, the accused had challenged s. 224A(1)(a) (now s. 237(1)(a)) of the *Criminal Code*, R.S.C. 1970, c. C-34, which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This Court rejected the arguments of the accused that s. 2(f) had been violated; it relied on the *Woolmington* case which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

It seems to me, therefore, that if *Woolmington's* case is to be accepted, the words "presumed innocent until proved guilty according to law . . ." as they appear in

(i) Jurisprudence relative à la Déclaration canadienne des droits

L'alinéa 2f) de la *Déclaration canadienne des droits*, qui protège la présomption d'innocence, est ainsi rédigé:

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé . . .

Le texte de cette disposition se rapproche de celui de l'al. 11d). Pour cette raison, le ministère public avance parmi ses arguments principaux que ce pourvoi doit être tranché en fonction de la jurisprudence relative à la *Déclaration canadienne des droits*.

L'arrêt de principe portant sur l'al. 2f) de la *Déclaration canadienne des droits*, invoqué par le ministère public, est l'arrêt *R. c. Appleby*, précité. Dans cette affaire, l'accusé avait contesté la validité de l'al. 224A(1)a) (l'actuel al. 237(1)a)) du *Code criminel*, S.R.C. 1970, chap. C-34, qui impose à l'accusé la charge de prouver que, même s'il occupait la place du conducteur d'un véhicule à moteur, il n'était pas entré dans ce véhicule afin de le mettre en marche et que, par conséquent, il n'en n'avait ni la garde ni le contrôle. Cette Cour avait rejeté les arguments de l'accusé portant qu'il y avait eu violation de l'al. 2f); elle s'était alors fondée sur l'arrêt *Woolmington* qui établit qu'on peut par voie de disposition législative déroger à la présomption d'innocence. Comme l'a dit le juge Ritchie dans les motifs qu'il a rédigés au nom de la majorité, aux pp. 315 et 316:

Par conséquent, il me semble que si l'on doit accepter l'affaire *Woolmington*, les termes «du droit à la présomption d'innocence jusqu'à ce que la preuve de sa

s. 2(f) of the *Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

In a concurring opinion, Laskin J. (as he then was) put forward an alternative test. He chose not to follow Ritchie J.'s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(f) of the *Canadian Bill of Rights*, and said at p. 317:

I do not construe s. 2(f) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(f) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(f) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin v. U.S.* (1895), 156 U.S. 432 at 452.

Nevertheless, Laskin J. went on to hold that the presumption of innocence is not violated by "any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown" (p. 318). The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

In a subsequent case, *R. v. Shelley*, *supra*, involving a reverse onus provision regarding

culpabilité ait été établie en conformité de la loi ... » à l'art. 2(f) de la *Déclaration des droits*, doivent être interprétés comme envisageant une loi qui reconnaît l'existence d'exceptions légales déplaçant le fardeau de la preuve en ce qui concerne un élément ou plus d'une infraction, lorsque certains faits précis ont été prouvés par la Couronne relativement à ces éléments.

Dans ses motifs concordants, le juge Laskin (alors juge puîné) a proposé un autre critère. En effet, à la différence du juge Ritchie, il a choisi de ne pas considérer comme une exception légale l'expression «en conformité de la loi» à l'al. 2f) de la *Déclaration canadienne des droits* et, à la p. 317, il a dit ce qui suit:

Je ne considère pas que l'art. 2(f) s'annule lui-même à cause de l'expression «en conformité de la loi» qui y figure. Ainsi, une loi fédérale, en matière criminelle, qui imposerait à l'accusé l'obligation ultime de prouver son innocence relativement à tout élément de l'accusation portée contre lui, enfreindrait l'art. 2(f). Le «droit à la présomption d'innocence» dont parle l'art. 2(f) signifie, en termes populaires, que le fardeau ultime d'établir la culpabilité incombe au ministère public. Si, à la fin des plaidoiries, il existe un doute raisonnable relativement à tout élément de l'accusation, le prévenu doit être acquitté. Plus précisément, la présomption d'innocence donne au prévenu l'avantage initial du droit au silence et l'avantage ultime (après la présentation de la preuve du ministère public et de toute autre preuve pour le compte du prévenu) de tout doute raisonnable: voir *Coffin v. U.S.* (1895), 156 U.S. 432 à 452.

Néanmoins, le juge Laskin a ajouté qu'il n'y a pas de violation de la présomption d'innocence du fait «qu'un prévenu puisse avoir, en vertu d'une loi ou non, l'obligation de présenter une preuve pour neutraliser ou contrecarrer, par une balance des probabilités, l'effet de la preuve du ministère public» (à la p. 318). Selon le juge Laskin, le critère est de savoir si la disposition législative exige une déclaration de culpabilité même s'il subsiste un doute raisonnable quant à la culpabilité de l'accusé. Cela semblerait donc s'opposer à ce qu'une charge ultime soit imposée à l'accusé. Cependant, le juge Laskin a conclu à la validité d'une disposition législative qui paraît avoir eu précisément cet effet.

Par la suite, dans l'arrêt *R. c. Shelley*, précité, où il s'agissait d'une disposition qui inversait la

unlawful importation, Laskin C.J. discussed further the views he had articulated in *Appleby* at p. 200:

This Court held in *R. v. Appleby* that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(f). It would, of course, be clearly incompatible with s. 2(f) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no farther than to require an accused to prove as essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

In addition, Laskin C.J. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, i.e. possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

Although there are important lessons to be learned from the *Canadian Bill of Rights* jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the *Charter*. As this Court held in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter*, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring existing rights. (See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 *per* Wilson J.; *R. v. Therens*, [1985] 1 S.C.R. 613, *per* Le Dain J.) In rejecting the *Canadian Bill of Rights* religion cases as determinative of the meaning of freedom of religion under the

charge de la preuve en matière d'importation illégale, le juge en chef Laskin a développé davantage l'opinion qu'il avait exprimée dans l'arrêt *Appleby* (à la p. 200):

" Dans l'arrêt *R. c. Appleby*, cette Cour a décidé qu'une disposition qui prévoit le déplacement du fardeau de la preuve et qui n'exige rien de plus d'un accusé que la preuve selon la prépondérance des probabilités, ne viole pas nécessairement la présomption d'innocence de l'al. 2f). Bien sûr, il serait vraiment incompatible avec l'al. 2f) qu'une loi oblige un accusé à prouver hors de tout doute raisonnable un fait en litige. Tant que le fardeau n'exige pas d'un accusé plus que la preuve d'un fait essentiel selon la prépondérance des probabilités, il doit s'agir d'un fait essentiel que l'accusé est en mesure d'établir ou de réfuter selon le cas. S'il s'agit d'un fait que l'accusé ne peut raisonnablement être en mesure de prouver, soit qu'il l'ignore ou qu'il ne peut raisonnablement être en mesure de le connaître, cela équivaut à une exigence impossible à remplir.

De plus, le juge en chef Laskin a jeté les bases de l'élaboration d'un «critère du lien rationnel» applicable à la détermination de la validité d'une disposition portant inversion de la charge de la preuve. À la page 202, il tient les propos suivants:

Il me paraît évident en l'espèce qu'il n'y a au dossier aucun lien rationnel ou nécessaire entre le fait prouvé, c.-à-d. la possession de marchandises d'origine étrangère, et la conclusion d'importation illégale que l'accusé doit réfuter en vertu du par. 248(1) pour ne pas être déclaré coupable.

Quoique la jurisprudence portant sur la *Déclaration canadienne des droits* soit très instructive, elle n'est nullement déterminante en ce qui concerne l'interprétation constitutionnelle de la *Charte*. Comme cette Cour l'a conclu dans l'arrêt *R. c. Big M Drug Mart Ltd.*, précité, la *Charte*, en tant que document constitutionnel, diffère fondamentalement du texte législatif qu'est la *Déclaration canadienne des droits*, lequel a été interprété comme ne faisant que reconnaître et déclarer l'existence de droits déjà existants. (Voir également *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, le juge Wilson; *R. c. Therens*, [1985] 1 R.C.S. 613, le juge Le Dain.) En affirmant dans l'arrêt *Big M Drug Mart Ltd.* que les affaires en matière religieuse décidées sous le régime de la *Déclaration canadienne des droits* ne sauraient être déterminantes quant au sens qui

Charter in *R. v. Big M Drug Mart Ltd.*, the Court had occasion to say at pp. 343-44:

I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni*, *supra*, cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(d) of the *Charter* the statutory exceptions acknowledged in *Woolmington* and in *Appleby*. The *Woolmington* case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the *Charter*. I do not, therefore, feel constrained in this case by the interpretation of s. 2(f) of the *Canadian Bill of Rights* presented in the majority judgment in *Appleby*. Section 8 of the *Narcotic Control Act* is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) Canadian Charter Jurisprudence

In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of innocence contained in s. 11(d). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts, in addition to the Ontario Court of Appeal, have held

doit être donné à la liberté de religion garantie par la *Charte*, la Cour a dit, aux pp. 343 et 344:

Je suis d'accord avec l'intimée que la *Charte* vise à établir une norme en fonction de laquelle les lois actuelles et futures seront appréciées. Donc, le sens du concept de la liberté de conscience et de religion ne doit pas être déterminé uniquement en fonction de la mesure dans laquelle les Canadiens jouissaient de ce droit avant la proclamation de la *Charte*. Pour cette raison, l'arrêt *Robertson and Rosetanni*, précité, ne peut être déterminant quant au sens qui doit être donné à la «liberté de conscience et de religion» garantie par la *Charte*. Il nous faut plutôt recourir aux principes distinctifs d'interprétation constitutionnelle applicables à la loi suprême du Canada.

Dans ce contexte, on ne peut que se demander s'il est approprié de voir dans l'expression «conformément à la loi» figurant à l'art. 11(d) de la *Charte* les exceptions légales reconnues dans les arrêts *Woolmington* et *Appleby*. L'arrêt *Woolmington* est le produit d'un système juridique dans lequel les droits de la personne ne sont pas enchâssés dans un document constitutionnel. Au Canada, par contre, nous avons tempéré la primauté du Parlement par l'enchâssement de libertés et de droits importants dans la Constitution. La réserve des exceptions légales établie par le vicomte Sankey ne s'applique manifestement pas dans le contexte canadien, car elle irait à l'encontre de l'objet même de l'enchâssement de la présomption d'innocence dans la *Charte*. C'est pourquoi je ne me sens pas lié en l'espèce par l'interprétation qu'a donnée à l'al. 2(f) de la *Déclaration canadienne des droits* la Cour à la majorité dans l'arrêt *Appleby*. L'article 8 de la *Loi sur les stupéfiants* n'est pas constitutionnel du seul fait qu'il s'agit d'une disposition législative.

(ii) Jurisprudence relative à la Charte canadienne

Outre l'espèce, il y a eu plusieurs autres arrêts de cours d'appel provinciales qui ont traité du sens de la présomption d'innocence énoncée à l'al. 11(d). Ils constituent une jurisprudence détaillée et persuasive qui nous éclaire sur les questions soulevées dans le présent pourvoi. En particulier, outre la Cour d'appel de l'Ontario, six autres cours d'appel ont conclu que l'art. 8 de la *Loi sur les stupéfiants*

that s. 8 of the *Narcotic Control Act* violates the *Charter*: *R. v. Carroll, supra*; *R. v. Cook, supra*; *R. v. O'Day, supra*; *R. v. Stanger, supra*; *R. v. Landry, supra*; *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (B.C.C.A.)

Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (*in banco*) rendered its decision in *R. v. Carroll, supra*. Writing for the majority, MacDonald J. held at p. 105:

Unless a provision falls within s. 1 of the *Charter*, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In a concurring judgment, Mitchell J. commented at pp. 107-08:

Section 11(d) gives an accused person the right to be presumed innocent until proven guilty. It follows that if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the *Narcotic Control Act*, the Court held that s. 11(d) had been violated. As Mitchell J. stated at p. 108:

Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(d) presumption of innocence in its decision in *R. v. Cook, supra*. After reviewing *R. v. Oakes, supra*, and *R. v. Carroll, supra*, Hart J.A. concluded at pp. 435-36:

va à l'encontre de la *Charte*: *R. v. Carroll, précité*; *R. v. Cook, précité*; *R. v. O'Day, précité*; *R. v. Stanger, précité*; *R. v. Landry, précité*; *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (C.A.C.-B.)

a

À la suite de l'arrêt rendu par la Cour d'appel de l'Ontario dans la présente affaire, la Cour suprême de l'Île-du-Prince-Édouard (*in banco*) a rendu l'arrêt *R. v. Carroll, précité*. Le juge MacDonald, qui a rédigé les motifs de la majorité, conclut, à la p. 105:

[TRADUCTION] À moins qu'une disposition ne relève de l'art. 1 de la *Charte*, on ne peut exiger d'un accusé qu'il établisse un élément positif essentiel de la preuve du ministère public, si ce n'est en faisant naître un doute raisonnable. On ne peut pas dire que la présomption d'innocence existe si, en raison du déplacement de la charge de persuasion, la cour est tenue de rendre un verdict de culpabilité même si on peut dire qu'il existe un doute raisonnable.

Dans des motifs concordants, le juge Mitchell explique, aux pp. 107 et 108:

[TRADUCTION] L'alinéa 11d) reconnaît à tout accusé le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable. Il s'ensuit que, si un accusé doit être présumé innocent tant qu'il n'est pas déclaré coupable, aucun verdict de culpabilité ne doit être rendu, à moins que le ministère public n'ait établi chacun des éléments constitutifs du crime.

Appliquant ces conclusions de droit à l'art. 8 de la *Loi sur les stupéfiants*, la cour a conclu à la violation de l'al. 11d). Comme l'affirme le juge Mitchell, à la p. 108:

[TRADUCTION] Sous le régime de l'art. 8, un accusé n'est pas présumé innocent tant qu'il n'est pas déclaré coupable. La présomption d'innocence ne joue que jusqu'au moment où l'on conclut qu'il était en possession d'un stupéfiant. Dès lors que le ministère public établit que l'accusé avait le stupéfiant en sa possession, il est, jusqu'à preuve contraire, présumé avoir eu l'intention de se livrer au trafic.

Dans l'arrêt *R. v. Cook, précité*, la Division d'appel de la Cour suprême de la Nouvelle-Écosse a elle aussi jugé inconstitutionnel l'art. 8 du fait qu'il porte atteinte à la présomption d'innocence énoncée à l'al. 11d). Après avoir examiné les arrêts *R. v. Oakes* et *R. v. Carroll, précités*, le juge Hart conclut, aux pp. 435 et 436:

Section 8 of the *Narcotic Control Act* is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(d) of the *Charter* as being proof "according to law" I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

Although concurring in result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(d).

The test of reasonableness should be available in considering the secondary question under s. 1 of the *Charter*. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(d) of the *Charter* is demonstrably justified in a free and democratic society. (p. 439)

In *R. v. O'Day*, *supra*, the New Brunswick Court of Appeal struck down s. 8 of the *Narcotic Control Act* and registered its agreement with the three earlier provincial appellate level courts.

The Alberta Court of Appeal in *R. v. Stanger*, *supra*, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(d), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in *Oakes* and stated at p. 351 that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Mr. Justice Stevenson also cited MacDonald J.'s comment in *Carroll* that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing

[TRANSLATION] L'article 8 de la *Loi sur les stupéfiants* tente, par le recours à ce qu'il est convenu d'appeler une inversion de la charge de la preuve, de dégager le ministère public de son fardeau normal en matière de preuve. On a connu en droit différents types de dispositions portant inversion de la charge de la preuve et, selon moi, une preuve établie à l'aide d'une telle disposition peut être visée par le texte de l'al. 11d) de la *Charte*, comme ayant été faite «conformément à la loi» . . . Toutefois, à ce que je sache, rien ne justifie la conclusion qu'il serait «conforme à la loi» d'autoriser le recours à une disposition portant inversion de la charge de la preuve qui permet au ministère public de s'aider d'une disposition qui le dispense de produire une preuve probante quelconque visant à établir l'un des éléments essentiels d'une infraction.

Le juge Jones, quoique souscrivant à la conclusion de ses collègues, a soutenu que le critère du caractère raisonnable doit s'appliquer à l'égard de l'article premier et non pas à l'égard de l'expression «conformément à la loi» que l'on trouve à l'al. 11d).

[TRANSLATION] On doit pouvoir recourir au critère du caractère raisonnable dans l'examen de la question secondaire soulevée par l'article premier de la *Charte*. Il importe que ce soit au ministère public qu'il incombe de prouver qu'une loi qui viole l'al. 11d) de la *Charte* est manifestement justifiée dans le cadre d'une société libre et démocratique. (p. 439)

Dans l'arrêt *R. v. O'Day*, précité, la Cour d'appel du Nouveau-Brunswick a déclaré inconstitutionnel l'art. 8 de la *Loi sur les stupéfiants* et a exprimé son approbation des trois arrêts antérieurs rendus par des cours d'appel provinciales.

La Cour d'appel de l'Alberta, dans l'arrêt *R. v. Stanger*, précité, a également conclu à l'inconstitutionnalité de l'art. 8; cette conclusion n'a toutefois pas été unanime. En ce qui concerne le sens de l'al. 11d), le juge Stevenson, qui a rédigé les motifs de la majorité, a paraphrasé les observations faites par le juge Martin dans l'arrêt *Oakes*, disant à la p. 351 que la présomption d'innocence signifie [TRANSLATION] «en premier lieu, qu'un accusé est innocent tant qu'il n'est pas déclaré coupable conformément à la procédure établie et, en deuxième lieu, que la culpabilité doit être prouvée hors de tout doute raisonnable». De plus, le juge Stevenson a cité l'observation du juge MacDonald dans l'ar-

guilt, on any element of the offence charged, beyond a reasonable doubt" (*supra*, p. 98).

I should add that the majority, in *Stanger*, correctly rejected the applicability of the Privy Council decision in *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the *Charter*; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

In *R. v. Landry, supra*, the Quebec Court of Appeal invalidated s. 8 of the *Narcotic Control Act* and extended its conclusions to s. 2(f) of the *Canadian Bill of Rights*. As Malouf J.A. stated at p. 561:

Both the *Bill of Rights* and the *Charter* recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

Finally, in a very brief judgment, *R. v. Stock, supra*, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in *Oakes*. An earlier British Columbia Court of Appeal opinion, *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661 (B.C.C.A.), had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the *Narcotic Control Act*; however, the basis for the denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

There have also been a number of cases in which the meaning of s. 11(d) has been considered in

rêt *Carroll*, précité, portant que la présomption d'innocence vaut [TRADUCTION] «tant que la poursuite a la charge ultime d'établir hors de tout doute raisonnable ... la culpabilité relativement à tout élément de l'infraction imputée» (précité, à la p. 98).

Je tiens à ajouter que c'est avec raison que, dans l'arrêt *Stanger*, la cour à la majorité a jugé inapplicable l'arrêt du Conseil privé *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648. Cette affaire concernait des dispositions de la Constitution de Singapour qui sont sensiblement différentes de celles de la *Charte*; en particulier, elles ne contiennent pas de reconnaissance explicite de la présomption d'innocence. De plus, le Conseil privé n'a pas estimé que ce principe était inhérent aux dispositions générales de la Constitution de Singapour garantissant le caractère équitable des procédures.

Dans l'arrêt *R. v. Landry*, précité, la Cour d'appel du Québec a déclaré invalide l'art. 8 de la *Loi sur les stupéfiants*. Les conclusions de la cour portaient en outre sur l'al. 2f) de la *Déclaration canadienne des droits*, le juge Malouf faisant remarquer, à la p. 561:

[TRADUCTION] La *Déclaration des droits* et la *Charte* reconnaissent toutes deux à l'accusé le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable conformément à la loi. Je ne puis admettre qu'un principe aussi élémentaire et fondamental puisse être écarté par une telle disposition portant inversion de la charge de la preuve.

Finalement, dans l'arrêt très bref *R. v. Stock*, précité, la Cour d'appel de la Colombie-Britannique s'est dite d'accord avec les arrêts de cours d'appel que nous venons d'examiner, approuvant en particulier l'arrêt *Oakes* de la Cour d'appel de l'Ontario. Dans l'arrêt antérieur *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661, la Cour d'appel de la Colombie-Britannique avait rejeté l'appel d'une décision qui avait jugé constitutionnel l'art. 8 de la *Loi sur les stupéfiants*. Cependant, ce rejet était fondé sur des motifs de procédure. La cour n'a pas examiné la constitutionnalité de l'art. 8 en fonction de la présomption d'innocence.

Il y a eu en outre plusieurs arrêts dans lesquels le sens de l'al. 11d) a été étudié en fonction

relation to other legislative provisions; see, for example, *R. v. Holmes* (1983), 41 O.R. (2d) 250 (Ont. C.A.); *R. v. Whyte* (1983), 10 C.C.C. (3d) 277 (B.C.C.A.), leave to appeal to S.C.C. granted; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539 (Ont. C.A.); *R. v. T.* (1985), 18 C.C.C. (3d) 125 (N.S.C.A.); *R. v. Kowalczyk* (1983), 5 C.C.C. (3d) 25 (Man. C.A.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (Man. C.A.); *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713 (Ont. C.A.)

To summarize, the Canadian *Charter* jurisprudence on the presumption of innocence in s. 11(d) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the *Charter*, they are reasonable and demonstrably justified in a free and democratic society.

(iii) United States Jurisprudence

In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions of the *American Bill of Rights* contained in the Fifth and Fourteenth Amendments of the *Constitution of the United States of America*. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will, therefore, merely highlight the major jurisprudential developments.

In *Tot v. United States*, 319 U.S. 463 (1943), Roberts J. outlined the following test at pp. 467-68:

... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn,

d'autres dispositions législatives; voir, par exemple, *R. v. Holmes* (1983), 41 O.R. (2d) 250 (C.A. Ont.); *R. v. Whyte* (1983), 10 C.C.C. (3d) 277 (C.A.C.-B.), autorisation de pourvoi devant la Cour suprême du Canada accordée; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539 (C.A. Ont.); *R. v. T.* (1985), 18 C.C.C. (3d) 125 (C.A.N.-É.); *R. v. Kowalczyk* (1983), 5 C.C.C. (3d) 25 (C.A. Man.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (C.A. Man.); *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713 (C.A. Ont.)

En résumé, la jurisprudence canadienne relative à la présomption d'innocence énoncée à l'al. 11d) de la *Charte* et aux dispositions portant inversion de la charge de la preuve paraît avoir accordé un très haut degré de protection à la présomption d'innocence. Il ne peut y avoir atteinte à ce droit que, comme le dit l'article premier de la *Charte*, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

(iii) Jurisprudence américaine

Aux États-Unis, la présomption d'innocence n'est pas expressément protégée. Au contraire, on a considéré qu'elle découle implicitement des dispositions de l'*American Bill of Rights* relatives au «caractère équitable des procédures», que contiennent les Cinquième et Quatorzième amendements de la *Constitution of the United States of America*. On trouve, dans les motifs que le juge Martin a rédigés pour la Cour d'appel de l'Ontario, un examen approfondi de la jurisprudence américaine, dont je ne soulignerai en conséquence que les points saillants.

Dans la décision *Tot v. United States*, 319 U.S. 463 (1943), le juge Roberts formule le critère suivant, aux pp. 467 et 468:

[TRADUCTION] ... une présomption légale ne saurait jouer s'il n'existe pas de lien rationnel entre le fait prouvé et le fait ultime présumé, si la conclusion à l'existence de l'un à partir de la preuve de l'autre est arbitraire parce que l'expérience générale ne démontre pas de lien entre ces deux faits.

De plus, on a reconnu comme critère accessoire la facilité relative avec laquelle des éléments de preuve peuvent être produits. Dans cette affaire, il

from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudicial reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

In *Leary v. United States*, 395 U.S. 6 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

... a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted that since the statutory presumption was invalid under the above test, "we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (footnote 64).

The United States Supreme Court did answer this question in *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). It held that where a mandatory criminal presumption was imposed by statute, the State may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The

s'agissait d'une présomption, fondée sur la possession d'armes à feu par une personne ayant déjà été déclarée coupable d'un crime violent, que ces armes à feu avaient été illégalement obtenues par le commerce international ou entre états. Soulignons ici que le juge Roberts a fait observer que, même si on avait prouvé l'existence d'un lien rationnel, la présomption légale ne pouvait s'appliquer parce que le fait établi sur lequel on se fondait comportait une déclaration de culpabilité antérieure, préjudiciable à l'accusé. Ce dernier serait donc discrédité aux yeux du jury avant même qu'il n'essaie de réfuter le fait présumé.

Dans la décision *Leary v. United States*, 395 U.S. 6 (1969), à la p. 36, le juge Harlan formule un critère plus sévère pour conclure à l'invalidité:

[TRADUCTION] ... une présomption légale en matière criminelle doit être tenue pour «irrationnelle» ou «arbitraire» et, partant inconstitutionnelle, à moins qu'on ne puisse affirmer avec beaucoup de certitude que le fait présumé découle probablement du fait établi dont il est censé dépendre.

Le juge Harlan a fait remarquer en outre que, vu l'invalidité de la présomption légale selon le critère énoncé ci-dessus, [TRADUCTION] «nous n'avons pas à nous pencher sur la question de savoir si une présomption en matière criminelle qui répond à ce critère doit aussi satisfaire à la norme du «doute raisonnable», applicable dans les affaires criminelles, lorsque la preuve du crime imputé ou d'un élément essentiel de celui-ci dépend de l'application de cette présomption» (note 64).

La Cour suprême des États-Unis a répondu à cette question dans l'arrêt *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). Elle a conclu que, lorsqu'une loi crée une présomption impérative en matière criminelle, l'État ne peut [TRADUCTION] «fonder sa preuve entièrement sur une présomption, à moins que le fait prouvé ne suffise pour justifier la conclusion que l'accusé est coupable hors de tout doute raisonnable» (à la p. 167). Un simple lien rationnel ne suffit pas. Cet arrêt démontre donc le haut degré de protection constitutionnelle accordée au principe selon lequel la culpabilité d'un accusé doit être établie hors de tout doute raisonnable. La raison d'être de ce principe a été bien exprimée par le juge Brennan

rationale for this is well stated by Brennan J. in *In Re Winship*, 397 U.S. 358 (1970), at pp. 363-64:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(iv) European Convention on Human Rights Jurisprudence

As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on *The European Convention on Human Rights* includes a consideration of the legitimacy of reverse onus provisions. Section 6(2) of *The European Convention on Human Rights* reads:

Article 6

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The meaning of s. 6(2) was clarified in the *Pfund-ers Case (Austria v. Italy)* (1963), 6 Yearbook E.C.H.R. 740, at p. 782 and p. 784:

This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

dans l'arrêt *In Re Winship*, 397 U.S. 358 (1970), aux pp. 363 et 364:

[TRADUCTION] Si l'exigence d'une preuve hors de tout doute raisonnable joue dans notre procédure criminelle un rôle si vital, il y a de très bonnes raisons à cela. Pour un accusé qui fait face à des poursuites criminelles, l'enjeu revêt une importance capitale, d'une part en raison de la privation de liberté que risque d'entraîner une déclaration de culpabilité et, d'autre part, à cause de l'opprobre qui en résulterait certainement. Par conséquent, une société qui attache de la valeur à la réputation et à la liberté de chaque citoyen doit se garder de condamner une personne pour la perpétration d'un crime lorsqu'il subsiste un doute raisonnable quant à sa culpabilité.

(iv) Jurisprudence portant sur la Convention européenne des droits de l'homme

d Comme je l'ai déjà mentionné, le droit international dans le domaine des droits de la personne a évolué de manière à protéger le principe de la présomption d'innocence. La jurisprudence relative à la *Convention européenne des droits de l'homme* traite notamment de la légitimité des dispositions portant inversion de la charge de la preuve. Le paragraphe 6(2) de la *Convention européenne des droits de l'homme* est ainsi rédigé:

f Article 6

2. Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.

g Le sens du par. 6(2) a été élucidé dans l'*Affaire Pfunders (Autriche c. Italie)* (1963), 6 Annuaire C.E.D.H. 741, aux pp. 783 et 785:

h Ce texte, aux termes duquel toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie, exige en premier lieu que les membres du tribunal, en remplissant leur fonction, ne partent pas de la conviction ou de la supposition que le prévenu a commis l'acte incriminé. i Autrement dit, la charge de la preuve de la culpabilité incombe au Ministère public, et le doute profite à l'inculpé. De plus, les juges doivent permettre à ce dernier de leur fournir ses contre-preuves. Puis, au moment de prendre leur décision, ils ne doivent arriver à une condamnation que sur la base de preuves directes ou indirectes mais suffisamment fortes, aux yeux de la loi, pour établir la culpabilité de l'intéressé. j

Although the Commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the Commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise (*X against the United Kingdom*, Appl'n. No. 5124/71, Collection of Decisions, E.C.H.R., 135). The Commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

The statutory presumption in the present case is restrictively worded. ... The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

(See discussion in Francis Jacobs, *The European Convention on Human Rights* (Oxford: 1975), pp. 113-14.)

(d) Conclusion Regarding s. 11(d) of the Charter and s. 8 of the Narcotic Control Act

This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(d). We can then proceed to apply these principles to the particulars of s. 8 of the *Narcotic Control Act*.

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a

Bien que la Commission ait reconnu l'importance générale de l'exigence que la poursuite prouve la culpabilité de l'accusé hors de tout doute raisonnable, elle a reconnu aussi le caractère acceptable de certaines exceptions à ce principe. Par exemple, la Commission a conclu à la validité d'une disposition légale portant inversion de la charge de la preuve, disposition selon laquelle l'homme qui cohabite avec une prostituée ou qui est régulièrement en sa compagnie est présumé vivre sciemment de revenus tirés de la prostitution, à moins qu'il ne prouve le contraire (*X contre le Royaume-Uni*, demande n° 5124/71, Recueil des décisions, C.E.D.H. 135). La Commission a souligné l'importance d'examiner le contenu et l'effet d'une disposition législative portant inversion de la charge de la preuve. Elle conclut toutefois, à la p. 135:

[TRANSLATION] La présomption légale en l'espèce est formulée de manière restrictive ... Cette présomption n'est ni irréfutable ni déraisonnable. Obliger la poursuite à obtenir une preuve directe que quelqu'un «vit de revenus immoraux» rendrait, dans la plupart des cas, sa tâche impossible.

(Voir l'analyse de Francis Jacobs, *The European Convention on Human Rights* (Oxford: 1975), aux pp. 113 et 114.)

(d) Conclusion relative à l'al. 11d) de la Charte et à l'art. 8 de la Loi sur les stupéfiants

À partir de cet examen de la jurisprudence, nous sommes en mesure de formuler certaines conclusions générales sur les dispositions portant inversion de la charge de la preuve et sur la présomption d'innocence énoncée à l'al. 11d). Nous pourrions ensuite appliquer ces principes aux dispositions de l'art. 8 de la *Loi sur les stupéfiants*.

Je crois que, d'une manière générale, on doit conclure qu'une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11d). S'il incombe à l'accusé de réfuter selon la prépondérance des probabilités un élément essentiel d'une infraction, une déclaration de culpabilité pourrait être prononcée en dépit de l'existence d'un doute raisonnable. Cela se présenterait si l'accusé

reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the *Rede Lectures*, "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at pp. 11-13:

It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(d), however, the following question arises: if we apply the rational connection test to the consideration of whether s. 11(d) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

The rational connection test approves a provision that forces the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitu-

produisait une preuve suffisante pour soulever un doute raisonnable quant à sa culpabilité, mais ne parvenait pas à convaincre le jury selon la prépondérance des probabilités que le fait présumé est
a inexact.

Ce n'est pas parce que la norme applicable est la norme de preuve en matière civile qu'une disposition portant inversion de la charge de la preuve est
b constitutionnelle. Comme l'a expliqué sir Rupert Cross dans «The Golden Thread of the English Criminal Law: The Burden of Proof», conférence donnée en 1976 à l'Université de Toronto dans le cadre des *Rede Lectures* (aux pp. 11 à 13):

[TRADUCTION] D'aucuns prétendent que des exceptions à la règle posée dans l'arrêt *Woolmington* sont acceptables parce que, lorsque la charge de la preuve relativement à telle question dans une affaire criminelle incombe à l'accusé, celui-ci n'a à convaincre le jury que selon la prépondérance des probabilités, tandis que dans le cas des questions à l'égard desquelles la charge de la preuve incombe au ministère public, le jury doit être convaincu hors de tout doute raisonnable . . . Bien que la norme de preuve soit moins sévère dans le cas de l'accusé qu'elle ne l'est dans le cas de la poursuite, je m'oppose tout de même à toute exception à la règle établie dans l'arrêt *Woolmington* parce que cela ne change rien au fait qu'un jury ou une formation de magistrats peut avoir à déclarer l'accusé coupable même
c
d
e
f s'ils ne sont pas du tout certains de sa culpabilité.

Rappelons ici que certains des arrêts étudiés précédemment ont établi qu'une disposition portant inversion de la charge de la preuve pourrait se justifier par l'existence d'un lien rationnel entre le fait établi et le fait présumé. Il s'agit de ce qu'il est convenu d'appeler maintenant le «critère du lien rationnel». Dans le contexte de l'al. 11d), toutefois, la question suivante se pose: si nous appliquons le critère du lien rationnel à la question de savoir s'il y a eu violation de l'al. 11d), accordons-nous alors une protection adéquate au principe constitutionnel de la présomption d'innocence? Comme le soulignent les professeurs MacKay et Cromwell dans leur article intitulé «Oakes: A Bold Initiative Impeded by Old Ghosts» (1983), 32 C.R. (3d) 221, à la p. 233:

[TRADUCTION] Le critère du lien rationnel a pour effet de sanctionner une disposition qui oblige le juge à conclure à l'existence d'un fait qui peut n'avoir qu'un lien rationnel avec le fait établi. Pourquoi s'ensuit-il

tional right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(d) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the *Charter*. This consideration did not arise under the *Canadian Bill of Rights* because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(d) and s. 1 to overcome the limitations of the *Canadian Bill of Rights* jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(d) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the *Charter* to date (see *R. v. Big M Drug Mart Ltd.*, *supra*; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357).

To return to s. 8 of the *Narcotic Control Act*, I am in no doubt whatsoever that it violates s. 11(d) of the *Charter* by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove he is not guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which

qu'une telle disposition ne porte pas atteinte au droit constitutionnel de voir sa culpabilité prouvée hors de tout doute raisonnable?

^a Un fait établi peut rationnellement tendre à prouver un fait présumé, sans pour autant en prouver l'existence hors de tout doute raisonnable. Un accusé pourrait donc être reconnu coupable malgré l'existence d'un doute raisonnable, ce qui irait à l'encontre de la présomption d'innocence.

^b Je m'empresse d'ajouter que cette mise en doute de la constitutionnalité du «critère du lien rationnel» comme guide d'interprétation de l'al. 11d) ne diminue en rien l'importance de ce critère. C'est toutefois dans le contexte de l'article premier de la *Charte* qu'il convient d'invoquer le critère du lien rationnel. Or, cette question ne s'est pas présentée sous le régime de la *Déclaration canadienne des droits* parce que celle-ci ne contient pas de disposition équivalant à l'article premier. En Cour d'appel en l'espèce, le juge Martin a cherché à combiner l'analyse de l'al. 11d) et celle de l'article premier en vue de surmonter les limites de la jurisprudence portant sur la *Déclaration canadienne des droits*. À mon sens, il est très souhaitable qu'à des fins d'analyse l'article premier et l'al. 11d) restent distincts. Ce partage de l'analyse en deux composantes est compatible avec la façon dont cette Cour a abordé la *Charte* jusqu'à présent (voir *R. c. Big M Drug Mart Ltd.*, précité; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357).

^c Revenons à l'art. 8 de la *Loi sur les stupéfiants*. Je n'ai pas le moindre doute que cet article viole l'al. 11d) de la *Charte* en exigeant de l'accusé qu'il établisse selon la prépondérance des probabilités qu'il n'était pas en possession du stupéfiant pour en faire le trafic. L'article 8 oblige M. Oakes à prouver qu'il n'est pas coupable de l'infraction de trafic. Il se voit ainsi refuser le droit d'être présumé innocent et court en même temps le risque de se voir infliger une peine d'emprisonnement à perpétuité, à moins qu'il ne réussisse à réfuter la présomption. Cela est radicalement et fondamentalement incompatible avec les valeurs sociales de la liberté et de la dignité humaine, que nous faisons nôtres, et va directement à l'encontre de la

we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(d). Let us turn now to s. 1 of the *Charter*.

V

Is s. 8 of the *Narcotic Control Act* a Reasonable and Demonstrably Justified Limit Pursuant to s. 1 of the *Charter*?

The Crown submits that even if s. 8 of the *Narcotic Control Act* violates s. 11(d) of the *Charter*, it can still be upheld as a reasonable limit under s. 1 which, as has been mentioned, provides:

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

The question whether the limit is "prescribed by law" is not contentious in the present case since s. 8 of the *Narcotic Control Act* is a duly enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(d) of the *Charter*, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the *Charter*, and thereby saved from inconsistency with the Constitution.

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra*, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a

présomption d'innocence enchâssée à l'al. 11d). Passons maintenant à l'article premier de la *Charte*.

V

L'article 8 de la *Loi sur les stupéfiants* constitue-t-il une limite raisonnable dont la justification puisse se démontrer, au sens de l'article premier de la *Charte*?

Le ministère public fait valoir que même à supposer que l'art. 8 de la *Loi sur les stupéfiants* contrevienne à l'al. 11d) de la *Charte*, il peut tout de même être déclaré valide pour le motif qu'il constitue une restriction raisonnable au sens de l'article premier qui, rappelons-le, dispose:

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

La question de savoir s'il s'agit d'une restriction apportée «par une règle de droit» ne se pose pas en l'espèce puisque l'art. 8 de la *Loi sur les stupéfiants* est une disposition législative dûment adoptée. Il est toutefois nécessaire de déterminer si, dans le cas de M. Oakes, la restriction au droit garanti par l'al. 11d) de la *Charte* est «raisonnable» et si sa justification peut «se démontrer dans le cadre d'une société libre et démocratique» au sens de l'art. 1 de la *Charte*, de manière à être compatible avec la Constitution.

Il importe de souligner dès l'abord que l'article premier remplit deux fonctions: premièrement, il enchâsse dans la Constitution les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés. En conséquence, tout examen fondé sur l'article premier doit partir de l'idée que la restriction attaquée porte atteinte à des droits et libertés garantis par la Constitution — des droits et des libertés qui font partie de la loi suprême du Canada. Comme le fait remarquer le juge Wilson dans l'arrêt *Singh c. Ministre de l'Emploi et de*

commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.”

A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democrati-

l'Immigration, précité, à la p. 218: « ... il est important de se rappeler que les tribunaux effectuent cette enquête tout en veillant au respect des droits et libertés énoncés dans les autres articles de la *Charte* ».

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression « société libre et démocratique ». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

Toutefois, les droits et libertés garantis par la *Charte* ne sont pas absolus. Il peut être nécessaire de les restreindre lorsque leur exercice empêcherait d'atteindre des objectifs sociaux fondamentalement importants. C'est pourquoi l'article premier prévoit des critères de justification des limites imposées aux droits et libertés garantis par la *Charte*. Ces critères établissent une norme sévère en matière de justification, surtout lorsqu'on les rapproche des deux facteurs contextuels examinés précédemment, savoir la violation d'un droit ou d'une liberté garantis par la Constitution et les principes fondamentaux d'une société libre et démocratique.

La charge de prouver qu'une restriction apportée à un droit ou à une liberté garantis par la *Charte* est raisonnable et que sa justification peut

ic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Il ressort nettement du texte de l'article premier que les restrictions apportées aux droits et libertés énoncés dans la *Charte* constituent des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits et libertés sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction. C'est ce que confirme l'emploi de l'expression «puisse se démontrer» qui indique clairement qu'il appartient à la partie qui cherche à apporter la restriction de démontrer qu'elle est justifiée: *Hunter c. Southam Inc.*, précité.

La norme de preuve aux fins de l'article premier est celle qui s'applique en matière civile, savoir la preuve selon la prépondérance des probabilités. L'autre possibilité, la preuve hors de tout doute raisonnable qui s'applique en matière criminelle, imposerait selon moi une charge trop lourde à la partie qui cherche à apporter la restriction. Des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent tout simplement pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement. En fait, l'expression «dont la justification puisse se démontrer», que l'on trouve à l'article premier de la *Charte*, étaye cette conclusion. La norme générale applicable en matière civile comporte différents degrés de probabilité qui varient en fonction de la nature de chaque espèce: voir Sopinka et Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), à la p. 385. Comme l'explique lord Denning dans *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), à la p. 459:

[TRADUCTION] La preuve peut être faite selon la prépondérance des probabilités, mais cette norme peut comporter des degrés de probabilité. Ce degré dépend de l'objet du litige. Une cour civile, saisie d'une accusation de fraude, exigera naturellement un degré de probabilité plus élevé que celui qu'elle exigerait en examinant si la faute a été établie. Elle n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances.

This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:

I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substan-

Ce passage a été cité et approuvé dans l'arrêt *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, à la p. 161. Un point de vue semblable a été exprimé par le juge Cartwright dans l'arrêt *Smith v. Smith*, [1952] 2 R.C.S. 312, aux pp. 331 et 332:

[TRADUCTION] Je tiens toutefois à souligner que, dans toute action civile, pour pouvoir conclure sans risque à l'exactitude d'une question de fait qui doit être établie, le tribunal doit être convaincu d'une manière raisonnable qui dépendra de l'ensemble des circonstances à partir desquelles il formera son jugement, y compris la gravité des conséquences . . .

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, «proportionné aux circonstances». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction. Voir: *Law Society of Upper Canada c. Skapinker*, précité, à la p. 384; *Singh c. Ministre de l'Emploi et de l'Immigration*, précité, à la p. 217. La cour devra aussi connaître les autres moyens dont disposait le législateur, au moment de prendre sa décision, pour réaliser l'objectif en question. Je dois cependant ajouter qu'il peut arriver que certains éléments constitutifs d'une analyse en vertu de l'article premier soient manifestes ou évidents en soi.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*, doit être «suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution»: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes qui constituent l'essence même d'une société libre et démocratique ne bénéficient pas de la protection de

tial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and demo-

l'article premier. Il faut à tout le moins qu'un objectif se rapporte à des préoccupations urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important.

En deuxième lieu, dès qu'il est reconnu qu'un objectif est suffisamment important, la partie qui invoque l'article premier doit alors démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'une sorte de critère de proportionnalité: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Même si la nature du critère de proportionnalité pourra varier selon les circonstances, les tribunaux devront, dans chaque cas, soupeser les intérêts de la société et ceux de particuliers et de groupes. À mon avis, un critère de proportionnalité comporte trois éléments importants. Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un tel lien rationnel, le moyen choisi doit être de nature à porter «le moins possible» atteinte au droit ou à la liberté en question: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la *Charte* et l'objectif reconnu comme «suffisamment important».

Quant au troisième élément, il est évident que toute mesure attaquée en vertu de l'article premier aura pour effet général de porter atteinte à un droit ou à une liberté garantis par la *Charte*; d'où la nécessité du recours à l'article premier. L'analyse des effets ne doit toutefois pas s'arrêter là. La *Charte* garantit toute une gamme de droits et de libertés à l'égard desquels un nombre presque infini de situations peuvent se présenter. La gravité des restrictions apportées aux droits et libertés garantis par la *Charte* variera en fonction de la nature du droit ou de la liberté faisant l'objet d'une atteinte, de l'ampleur de l'atteinte et du degré d'incompatibilité des mesures restrictives avec les principes inhérents à une société libre et

cratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the *Narcotic Control Act*. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the *Narcotic Control Act*. According to the Crown, s. 8 of the *Narcotic Control Act* is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. (See *Report of the Special Committee on Traffic in Narcotic Drugs*, Appendix to Debates of the Senate, Canada, Session 1955, pp. 690-700; see also *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973).) Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

At the international level, on June 23, 1953, the *Protocol for Limiting and Regulating the Cultiva-*

démocratique. Même si un objectif est suffisamment important et même si on a satisfait aux deux premiers éléments du critère de proportionnalité, il se peut encore qu'en raison de la gravité de ses effets préjudiciables sur des particuliers ou sur des groupes, la mesure ne soit pas justifiée par les objectifs qu'elle est destinée à servir. Plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important pour que la mesure soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Ayant exposé les principes généraux qui régissent une analyse en vertu de l'article premier, nous devons maintenant les appliquer à l'art. 8 de la *Loi sur les stupéfiants*. La disposition portant inversion de la charge de la preuve qui figure à l'art. 8 apporte-t-elle au droit d'être présumé innocent tant que la culpabilité n'est pas prouvée hors de tout doute raisonnable, une restriction raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique?

Comme je l'ai déjà souligné, pour répondre à cette question, il faut commencer par préciser la nature de l'intérêt ou de l'objectif poursuivi par le législateur en adoptant l'art. 8 de la *Loi sur les stupéfiants*. Selon le ministère public, l'art. 8 de la *Loi sur les stupéfiants* vise à refréner le trafic des stupéfiants en facilitant l'obtention d'un verdict de culpabilité contre les trafiquants. À mon avis, le souci du législateur de réduire le trafic des stupéfiants peut être qualifié de réel et urgent. Le problème du trafic des stupéfiants n'a cessé de s'aggraver depuis les années cinquante, et déjà à cette époque ce phénomène suscitait beaucoup d'inquiétude. (Voir *Rapport du Comité spécial chargé d'enquêter sur le trafic des stupéfiants*, appendice aux Débats du Sénat du Canada, session 1955, aux pp. 736 à 747; voir aussi *Rapport final, Commission d'enquête sur l'usage des drogues à des fins non médicales* (Ottawa, 1973).) Pendant toute cette période, des sociétés libres et démocratiques ont adopté de nombreuses mesures tant sur le plan national que sur le plan international.

Sur le plan international, le *Protocole visant à limiter et à réglementer la culture du pavot*, ainsi

tion of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The *Single Convention on Narcotic Drugs, 1961*, was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, . . ."

At the national level, statutory provisions have been enacted by numerous countries which, *inter alia*, attempt to deter drug trafficking by imposing criminal sanctions (see, for example, *Misuse of Drugs Act 1975, 1975 (N.Z.)*, No. 116; *Misuse of Drugs Act 1971, 1971 (U.K.)*, c. 38).

The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous

que la production, le commerce international, le commerce de gros et l'emploi de l'opium, dont le Canada est signataire, a été adopté le 23 juin 1953 dans le cadre de la Conférence des Nations unies sur l'opium tenue à New York. La *Convention unique sur les stupéfiants de 1961* a été conclue à New York le 30 mars 1961. Signé par le Canada le même jour, ce traité est entré en vigueur le 13 décembre 1964. Comme on le dit dans le préambule, «la toxicomanie est un fléau pour l'individu et constitue un danger économique et social pour l'humanité . . .»

Sur le plan national, de nombreux pays ont adopté des dispositions législatives visant notamment, par l'imposition de sanctions pénales, à empêcher le trafic des stupéfiants (voir, par exemple, la *Misuse of Drugs Act 1975, 1975 (N.Z.)*, n° 116; la *Misuse of Drugs Act 1971, 1971 (U.K.)*, chap. 38).

L'objectif de protection de notre société contre les fléaux liés au trafic des stupéfiants est, selon moi, suffisamment important pour justifier dans certains cas l'atteinte à un droit ou à une liberté garantis par la Constitution. De plus, la gravité du trafic des stupéfiants fait qu'il va presque sans dire que sa répression constitue un objectif suffisamment important aux fins de l'article premier. Le ministère public a donc satisfait au premier critère applicable à une analyse en vertu de l'article premier.

L'étape suivante de l'analyse consiste à examiner le moyen choisi par le législateur pour atteindre son objectif. Ce moyen doit être raisonnable et sa justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Soulignons encore une fois que l'application de ce critère de proportionnalité doit commencer par un examen de la rationalité de la disposition: existe-t-il un lien rationnel entre la disposition de l'art. 8 portant inversion de la charge de la preuve et l'objectif consistant à refréner le trafic des stupéfiants? Cela nécessite tout au moins que l'art. 8 soit lui-même rationnel. Il doit exister un lien rationnel entre le fait établi de la possession et le fait présumé de la possession à des fins de trafic, sinon la disposition portant inversion de la charge de la preuve pourrait avoir pour conséquence que

convictions for drug trafficking of persons guilty only of possession of narcotics.

In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

Having concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI

Conclusion

The Ontario Court of Appeal was correct in holding that s. 8 of the *Narcotic Control Act* violates the *Canadian Charter of Rights and Freedoms* and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(d) of the *Charter* which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

Question:

Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(d) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Answer: Yes.

I would, therefore, dismiss the appeal.

des personnes coupables de simple possession de stupéfiants soient erronément et sans justification déclarées coupables de trafic.

^a Selon moi, l'art. 8 ne satisfait pas au critère du lien rationnel. Comme l'a conclu le juge Martin de la Cour d'appel de l'Ontario, la possession d'une quantité infime ou négligeable de stupéfiants ne justifie pas une conclusion de trafic. En d'autres termes, il serait irrationnel de déduire qu'une personne avait l'intention de faire le trafic du seul fait qu'elle était en possession d'une petite quantité de stupéfiants. La présomption requise en vertu de l'art. 8 de la *Loi sur les stupéfiants* est trop large et est susceptible dans certains cas d'entraîner des résultats à la fois irrationnels et inéquitables. ^c Compte tenu de la gravité de l'infraction en question, qui comporte la possibilité d'un emprisonnement à perpétuité, je suis d'autant plus persuadé ^d que le ministère public n'a pas satisfait au premier élément du critère de proportionnalité.

^e Ayant conclu que l'art. 8 ne satisfait pas à ce premier élément de proportionnalité, il n'est pas nécessaire d'examiner les deux autres éléments.

VI

Conclusion

^f C'est à bon droit que la Cour d'appel de l'Ontario a conclu que l'art. 8 de la *Loi sur les stupéfiants* contrevient à la *Charte canadienne des droits et libertés* et qu'il est par conséquent inopérant. ^g L'article 8 apporte au droit garanti par l'al. 11d) de la *Charte* une restriction qui n'est pas raisonnable et dont la justification ne peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier. ^h Par conséquent, la question constitutionnelle reçoit la réponse suivante:

Question:

ⁱ L'article 8 de la *Loi sur les stupéfiants* est-il incompatible avec l'al. 11d) de la *Charte canadienne des droits et libertés* et, par conséquent, inopérant?

Réponse: Oui.

^j Par conséquent, je suis d'avis de rejeter le pourvoi.

The reasons of Estey and McIntyre JJ. were delivered by

ESTEY J.—I would dismiss this appeal. I agree with the conclusions of the Chief Justice with reference to the relationship between s. 11(d) and s. 1 of the *Canadian Charter of Rights and Freedoms*. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitors for the respondent: Cockburn, Foster, Cudmore and Kitely, London.

Version française des motifs des juges Estey et McIntyre rendus par

LE JUGE ESTEY — Je suis d'avis de rejeter ce pourvoi. Je suis d'accord avec les conclusions du Juge en chef quant au lien entre l'al. 11d) et l'article premier de la *Charte canadienne des droits et libertés*. Pour ce qui est de statuer sur toutes les autres questions que soulève le présent pourvoi, je suis d'avis d'adopter les motifs du juge Martin de la Cour d'appel.

Pourvoi rejeté.

Procureur de l'appelante: Roger Tassé, Ottawa.

Procureurs de l'intimé: Cockburn, Foster, Cudmore and Kitely, London.

Case Name:

Club Pro Adult Entertainment Inc. v. Ontario

Between

**Club Pro Adult Entertainment Inc., Domenic Marciano,
Vincenzo Deluca and John Bellisario,
Appellants/Respondents by way of Cross-Appeal, and
Her Majesty the Queen in Right of the Province of
Ontario and the Attorney-General of Ontario,
Respondents/Appellants by way of Cross-Appeal**

[2008] O.J. No. 777

2008 ONCA 158

233 O.A.C. 355

164 A.C.W.S. (3d) 610

42 B.L.R. (4th) 47

2008 CarswellOnt 1106

Dockets: C46557, C46559, C46560, C46561, C46562 and

C46564

Ontario Court of Appeal
Toronto, Ontario

**W.K. Winkler C.J.O., R.P. Armstrong and
G.J. Epstein JJ.A.**

Heard: December 20, 2007.

Judgment: March 3, 2008.

(24 paras.)

Constitutional law -- Constitutional validity of legislation -- Appeal by adult entertainment parlours

from dismissal of majority of claims against Province challenging constitutional validity and legality of Smoke-Free Ontario Act dismissed, and cross-appeal by Ontario allowed -- Act was clearly enacted to promote health of Ontarians, which was within provincial jurisdiction -- No trial necessary to determine Act was intra vires -- Parlours' disagreement with stated purpose of Act not relevant -- Smoke-Free Ontario Act.

Constitutional law -- Division of powers -- Provincial jurisdiction -- Appeal by adult entertainment parlours from dismissal of majority of claims against Province challenging constitutional validity and legality of Smoke-Free Ontario Act dismissed, and cross-appeal by Ontario allowed -- Act was clearly enacted to promote health of Ontarians, which was within provincial jurisdiction -- No trial necessary to determine Act was intra vires -- Parlours' disagreement with stated purpose of Act not relevant -- Constitution Act, 1867, ss. 91, 92.

Appeal by Club Pro et al from orders striking the majority of their claims against Ontario. Ontario cross-appealed from the judge's decision to allow claims relating to division of powers to proceed. Club Pro and the other plaintiffs were owners, employees and patrons of adult entertainment parlours who sought relief against Ontario and the Attorney General in relation to the Smoke-Free Ontario Act. They sought damages under several private law causes of action, and challenged the constitutional validity of the Act on the grounds of division of powers and the Canadian Charter of Rights and Freedoms. Most of the claims were struck on Ontario's motion, as the judge found they disclosed no tenable cause of action. The judge allowed Club Pro to amend the pleadings to argue breach of contract and did not strike the claim the Act was ultra vires by reason of the federal government's criminal law power. She concluded it was arguable that the Act was in pith and substance criminal law. She found a factual matrix was required to determine the Act's purpose and validity, in the sense that it was not extended to people who worked, frequented and resided in exempted places.

HELD: Appeal by Club Pro dismissed; cross-appeal by Ontario allowed. It was obvious that the pith and substance of the Act was to promote the health of Ontarians. It was valid provincial legislation pursuant to the provincial government's jurisdiction over health. The fact Club Pro did not accept the stated purpose of the Act was irrelevant. There was no need for a trial of the issue of the Act's constitutional validity. It was plain and obvious the Act was intra vires Ontario.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982

Constitution Act, 1867, s. 91, s. 92

Ontario Rules of Civil Procedure, Rule 21.01(1)(b), Rule 21.01(3)(d), Rule 25.06, Rule 25.11

Smoke-Free Ontario Act, S.O. 1994, c. 10

Appeal From:

On appeal from the orders of Justice N.J. Spies of the Superior Court of Justice, dated December 18, 2006, with reasons reported at (2006), 150 C.R.R. (2d) 1.

Counsel:

Morris Manning, Q.C. and Timothy Riddell for the appellants/respondents by way of cross-appeal.

Arif Virani and Michael Dunn for the respondents/appellants by way of cross-appeal.

ENDORSEMENT

The following judgment was delivered by

THE COURT:--

I

Background

1 The appellants are owners, employees or patrons of adult entertainment parlours who seek relief against the province and the Attorney General of Ontario in relation to the *Smoke-Free Ontario Act*, S.O. 1994, c. 10. In their statements of claim,¹ the appellants sought damages under several private law causes of action and challenged the constitutional validity of the Act on both division of powers and *Charter* grounds. The respondents moved under rules 21.01(1)(b), 21.01(3)(d), 25.11 and 25.06 of the *Rules of Civil Procedure* for orders striking out all or portions of the statements of claim and dismissing the actions.

2 The motion judge struck most of the causes of action without leave to amend, as no tenable cause of action could be established; however, she allowed the appellants to amend their pleadings to argue breach of contract, and she did not strike the appellants claim that the Act was *ultra vires* by reason of the federal government's criminal law power.

3 The appellants submit that the motion judge applied the wrong test under Rule 21, and that she erred in striking the private law and *Charter* claims. On cross-appeal, the respondents submit that the motion judge erred in allowing the action to proceed on the basis of the division of powers claim.

4 For the reasons that follow, we dismiss the appeal and allow the cross-appeal.

II

Discussion

(i) The Appeal

5 In detailed reasons that spanned 78 pages, the motion judge thoroughly examined the authorities that applied to the motion before her and the allegations in the appellants' 400 paragraph statements of claim.

6 Contrary to the appellants' assertions, there is no uncertainty in the jurisprudence, either with respect to the private law claims or the appellants' constitutional arguments. These are questions that were appropriately determined on the motion to strike.

7 In our view, the motion judge set out the correct test on a motion to strike and correctly applied that test to the claims before her. We find no error in her decision to strike the claims she did. Accordingly, for the reasons of the motion judge, the appeal is dismissed.

(ii)

The Cross-Appeal

8 The motion judge concluded that it is arguable that the SFOA is in pith and substance criminal law, and therefore *ultra vires* the province. Further, the motion judge held that there was a need for a factual matrix to decide the issue.

9 With respect, we disagree with both conclusions.

10 To determine whether a provincial law is validly enacted, the court must (i) determine the "pith and substance" or essential character of the law, and (ii) classify the essential character with reference to the heads of power under ss. 91 and 92 the *Constitution Act*, 1867. When considering the law's "pith and substance", the court examines the purpose and effects of the legislation. See *Reference re: Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at para. 15.

11 In our view, looking at the Act, it is plain and obvious that the pith and substance of the legislation is to promote the health of Ontarians. No extrinsic evidence is required to arrive at this conclusion. As a result, the Act is valid pursuant to the provincial government's jurisdiction over health.

12 Furthermore, the fact that the Act could be interpreted as an attempt by Ontario to suppress the "socially undesirable conduct of smoking" does not detract from the constitutional validity of the Act. As this court recently stated, "it is not enough for the appellants to show that the provisions they attack have a criminal law aspect. In order to succeed, they must establish that the provisions

do not fall within provincial competence or are repugnant to federal legislation." See *R. v. Banks* (2007), 84 O.R. (3d) 1 at para. 31.²

13 Our conclusion on this issue is also supported by the Supreme Court of Canada's statement that the regulation of tobacco use is "a comprehensive and multi-faceted federal and provincial program". See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 36.

14 Accordingly, the division of powers claim should have been struck without leave to amend.

15 We now turn to whether the legitimacy of the federalism claim can be resolved at the pleading stage.

16 On this issue, the motion judge distinguished prior constitutional cases and held that she could rely on the facts as pleaded, provided no additional evidence would call the Act's pith and substance into question. She ultimately concluded that a factual matrix was necessary because the appellants "did not accept the stated purpose of the [Act]," and because the Act has several exemptions.

17 While in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, the Supreme Court made it clear that division of powers cases will only rarely be determined on the pleading, it did not close the door to having such matters summarily decided. In the circumstances present here, this is one of those rare instances where the federalism claim is capable of being resolved on the pleadings.

18 The motion judge said that she was prevented from deciding the issue on the pleadings as a factual matrix was needed:

- (1) to determine the stated purpose of the Act; and
- (2) to determine the validity of the legislation, in the sense that it is not extended to people who work, frequent or reside in the places that allow for certain exemptions.

19 For the following reasons, we disagree.

20 First, it is irrelevant that the appellants do not accept the stated purpose of an Act, especially when the facts as pleaded in the appellants' statements of claim (in particular the comments attributed to the Minister of Health) demonstrate that the province of Ontario passed the legislation for health purposes.

21 Secondly, whether a legislative scheme is sufficiently comprehensive is a question of legislative efficacy, not one of constitutional validity. See *Firearms Reference*, *supra* at para. 57. No extrinsic evidence is necessary to determine the Act's constitutional validity.

22 There is no need for a trial on this issue. It is plain and obvious that the Act is *intra vires* the province.

III

Disposition

23 We therefore dismiss the appeal and allow the cross-appeal. An order will issue striking the appellants' federalism claim without leave to amend.

24 The respondents are entitled to the costs of the appeal and of the cross-appeal fixed at \$20,000 inclusive of G.S.T.

W.K. WINKLER C.J.O.

R.P. ARMSTRONG J.A.

G.J. EPSTEIN J.A.

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1 Originally there were eight virtually identical actions which were subject to eight identical orders by the motion judge. However, the appellants only appeal from six of those eight orders.

2 Released after the release of the motion judge's decision in these matters.

Indexed as:

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

RJR-MacDonald Inc., appellant;

v.

The Attorney General of Canada, respondent.

And between

Imperial Tobacco Ltd., appellant;

v.

The Attorney General of Canada, respondent, and

The Attorney General of Quebec, mis-en-cause, and

The Attorney General for Ontario, the Heart and Stroke

Foundation of Canada, the Canadian Cancer Society, the

**Canadian Council on Smoking and Health, the Canadian Medical
Association, and the Canadian Lung Association, interveners.**

[1995] 3 S.C.R. 199

[1995] S.C.J. No. 68

File Nos.: 23460, 23490.

Supreme Court of Canada

1994: November 29, 30 / 1995: September 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Constitutional law -- Division of powers -- Charter of Rights -- Freedom of expression --
Commercial advertising -- Cigarette advertising banned -- Whether or not legislation validly
enacted under criminal law power or under peace, order and good government clause -- If so,
whether or not Act's provisions infringing s. 2(b) Charter right to freedom of expression -- If so,
whether or not infringements justifiable under s. 1 -- Canadian Charter of Rights and Freedoms, ss.
1, 2(b) -- Constitution Act, 1867, Preamble, s. 91(27) -- Tobacco Products Control Act, S.C. 1988,
c. 20, ss. 4, 5, 6, 8, 9.*

The Tobacco Products Control Act (the "Act") broadly prohibited (with specified exceptions) all advertising and promotion of tobacco products and the sale of a tobacco product unless its package includes prescribed unattributed health warnings and a list of toxic constituents. The legislative scheme targeted three distinct categories of commercial activity: advertising, promotion and labelling. The Act, except for a prohibition on the distribution of free samples of tobacco products, did not proscribe the sale, distribution or use of tobacco products.

These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR-MacDonald Inc. sought a declaration that the Act was wholly ultra vires Parliament and invalid as an unjustified infringement of freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The appellant Imperial Tobacco Ltd. sought the same order, but only in respect of ss. 4 and 5 (advertisement of tobacco products), and ss. 6 and 8 (promotion of tobacco products). The two motions were heard together in the Quebec Superior Court which declared the whole of the Act ultra vires the Parliament of Canada and as well found it to be of no force or effect as an unjustified infringement of s. 2(b) of the Charter. The Quebec Court of Appeal reversed this judgment. The constitutional questions considered by this Court queried:

- (1) whether Parliament had legislative competence to enact the Act under either the peace, order and good government of Canada clause or the criminal law power, and (2)
- whether the Act infringed the right to freedom of expression protected by s. 2(b) of the Charter and, if so, whether it was saved under s. 1.

Held (La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. dissenting): The appeals should be allowed. The first constitutional question dealing with the legislative competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out in s. 2(b) of the Charter and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the Constitution Act, 1982.

Division of Powers

(i) Criminal Law Power

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ. (Sopinka and Major JJ. dissenting): The legislation was validly enacted under the criminal law power.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: The legislation

was validly enacted under the criminal law power, and it was accordingly unnecessary to consider whether it fell under the peace, order and good government clause. The criminal law power is plenary in nature, defined broadly, and not frozen in time or confined to a fixed domain of activity. The legislation must not, however, be colourable; some legitimate public purpose must underlie the prohibition.

The Tobacco Products Control Act is, in pith and substance, criminal law. Parliament's purpose was to prohibit three categories of acts: advertisement of tobacco products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). The penal sanctions accompanying these prohibitions created a *prima facie* indication that the Act was criminal law. The Act also has an underlying criminal public purpose directed at some injurious effect upon the public -- the detrimental health effects caused by tobacco consumption which were clearly demonstrated by the attorney general at trial.

"Health" is not an enumerated head under the Constitution Act, 1867, and may be dealt with by valid federal or provincial legislation depending on the circumstances and nature and scope of the problem in question. The protection of health is one of the ordinary ends of the federal criminal law power. The scope of that power includes, for example, the right to legislate with respect to dangerous goods, including health warnings on dangerous goods. This legislation was not colourable. Its purpose is to protect Canadians against the serious health hazards that flow from the consumption of tobacco. Parliament's decision to criminalize tobacco advertisement and promotion is a valid exercise of the criminal law power. The Act has the requisite "criminal public purpose" even though Parliament has not criminalized the "evil" ultimately aimed at but rather an activity ancillary to the "evil". A prohibition upon the sale or consumption of tobacco is not now a practical policy option, given the addictive nature of tobacco products, and the large number of Canadians who smoke. It would be absurd to limit Parliament's power to legislate in this emerging area of public concern simply because it cannot as a practical matter impose a prohibition more specifically aimed at the evil. The constitutionality of such legislation has recently been upheld in other cases.

The legislation, while not serving a "public purpose commonly recognized as being criminal in nature", is nevertheless a valid exercise of the criminal law power. The definition of the criminal law is not "frozen as of some particular time" and the criminal law power includes the power to create new crimes. The existence of exemptions within the legislation does not transform it from criminal to regulatory legislation. Broad status-based exemptions to criminal legislation do not detract from the legislation's criminal nature; they help define the crime by clarifying its contours.

Per McLachlin J.: Parliament may impose advertising bans and require health warnings on tobacco products under its criminal law power.

Per Sopinka and Major JJ.: Section 9 of the Tobacco Products Control Act falls within Parliament's power under s. 91(27) of the Constitution Act, 1867, but ss. 4, 5, 6, and 8 which prohibit all advertising and promotion of tobacco products and restrict the use of tobacco trademarks, do not.

The criminal law power encompasses the right to legislate against dangerous foods and drugs, including tobacco products.

Manufacturers of tobacco products are under a duty to disclose and warn of the dangers inherent in the consumption of tobacco products and failure to do so can validly constitute a crime.

The prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole lies at the heart of the criminal law. Matters posing a significant and serious risk of harm or causing significant and serious harm to public health, safety or security can be proscribed by Parliament as criminal. Lesser threats to society and its functioning are addressed through non-criminal regulation.

Care must be taken not to overstate the objective because its importance may be exaggerated and the analysis compromised. The objective of the advertising ban and trade mark usage restrictions is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products.

The undesirability of this form of expression does not pose such a grave and serious danger to public health as to make it criminal. The Act lacked a typically criminal public purpose and is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of the criminal law power. Those areas where ancillary activities have been criminalized, rather than the core activity itself, concern matters which have traditionally been subject to criminal sanctions and pose significant and serious dangers in and of themselves. Parliament could have criminalized tobacco use but chose not to.

Broad-based exemptions are a factor which may lead a court to conclude that the proscribed conduct is not truly criminal. The prohibitions on advertising cannot be upheld as a valid exercise of the criminal law power given the broad-based exemptions allowing for tobacco advertising in imported publications and given that the Act does not engage a typically criminal public purpose.

Charter Issues

(i) Infringement

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The impugned sections infringed freedom of expression guaranteed in s. 2(b) of the Charter.

Per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The prohibition on advertising and promotion under the Act infringed appellants' right to freedom of expression under s. 2(b) of the Charter.

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.: The prohibition on advertising and promotion of tobacco products violated the right to free expression. Since freedom of

expression necessarily entails the right to say nothing or the right not to say certain things, the requirement that tobacco manufacturers place an unattributed health warning on tobacco packages combined with the prohibition against displaying any writing on their packaging other than the name, brand name, trade mark, and other information required by legislation too infringed this right. Section 7, which prohibits the free distribution of any tobacco product in any form, is closely connected to the law's objective and should stand.

(ii) Section 1 Analysis

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.: The impugned sections were not justified under s. 1 of the Charter. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would have found the impugned sections justified and therefore saved under s. 1.

Per Sopinka, McLachlin and Major JJ.: The appropriate test in a s. 1 analysis is that found in s. 1 itself: whether the infringement is reasonable and demonstrably justified in a free and democratic society. No conflict exists between the words of s. 1 and the jurisprudence founded upon *Oakes*. The word "demonstrably" in s. 1 is critical: the process is neither one of mere intuition nor of deference to Parliament's choice. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that, before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement.

Context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis. The *Oakes* test must be applied flexibly, having regard to the factual and social context of each case. This contextual approach does not reduce the obligation on the state to demonstrate that the limitation on rights imposed by the law is reasonable and justified. The deference accorded to Parliament may vary with the social context but must not be carried to the point of relieving the government of its Charter-based burden of demonstrating the limits it has imposed on guaranteed rights to be reasonable and justifiable.

To do so would diminish the role of the courts in the constitutional process and weaken the structure of rights. The civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate.

Courts of appeal, as a general rule, decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error. In the context of the s. 1 analysis, more deference may be required where findings are based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy-oriented evidence. Appellate courts generally are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation because the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts.

The objective should not be overstated. The objective relevant to the s. 1 analysis is that of the infringing measure, since only the infringing measure must be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. The objective of the impugned measures, however, is somewhat narrower than the objectives of the wider legislative and policy scheme in which the Act is found. The advertising ban and trade mark usage restrictions are to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products. The mandatory package warning is to discourage people who see the package from tobacco use. Both constitute important objectives. The critical question, however, is not the evil tobacco works generally in our society, but the evil which the legislation addresses.

The extent to which this Court should defer to the trial judge's findings depends on whether the findings relate to purely factual matters or whether they relate to complex social science evidence from which it is difficult to draw firm factual and scientific conclusions. Less deference should be accorded to the trial judge's finding that the complete ban on advertising was not rationally connected to the aim of reducing advertising-induced consumption. Much of the evidence adduced on this point was social science evidence predictive of human behaviour from which it was difficult to draw firm factual conclusions.

The impugned provisions mandating a complete ban and unattributed package warnings do not minimally impair the right to free expression. Under the minimal impairment analysis, the trial judge did not rely on problematic social science data, but on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals as effectively as an outright ban. Nor had the government adduced evidence to show that attributed health warnings would not be as effective as unattributed warnings on tobacco packaging.

The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the Tobacco Products Control Act, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective. Here, no direct evidence of a scientific nature showed a causal link between advertising bans and decrease in tobacco consumption. A link, established on a balance of probabilities and based on reason, existed between certain forms of advertising, warnings and tobacco consumption. No causal connection existed however, whether based on direct evidence or logic and reason, between the objective of decreasing tobacco consumption and s. 8's absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products. Section 8 failed the rational connection test.

A complete ban on a form of expression is more difficult to justify than a partial ban. The government must show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the

justification required by s. 1 to save the violation of free speech is not established.

As a matter of reason and logic, lifestyle advertising is designed to increase consumption. Purely informational or brand preference advertising, however, has not been shown to have this effect. Several less intrusive alternative measures would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

Allowing Parliament to choose such measures as it sees fit by contrasting the importance of Parliament's objective with the low value of the expression at issue raises a number of concerns. First, to argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between objective and deleterious effect contemplated by the third stage of the proportionality analysis in *Oakes*. Second, just as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Third, a great deal of reliance is placed on the fact that the appellants are motivated by profit. Motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.

The requirement that the warning be unattributed pursuant to s. 9 of the Act fails to meet the minimum impairment requirement of proportionality. The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. For the reasons given with respect to the advertising ban, a lower level of constitutional scrutiny is not justified in deciding whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

Per Lamer C.J. and Iacobucci J.: The Tobacco Products Control Act did not minimally impair the appellants' s. 2(b) Charter rights. An attenuated minimal impairment analysis could unduly dilute the s. 1 principles as originally cast in *Oakes* and related cases creating the risk that Charter violations would be too easily justified, with the result that Charter values would be too easily undercut.

The Act was rationally connected to its goal of protecting Canadians from the health risks associated with tobacco use. Rational connection is to be established, upon a civil standard, through reason, logic or common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense but is by no means dispositive or determinative. The Act, however, was not "social engineering". Agreement was expressed with the approach described by La Forest J. relative to appellate court intervention on legislative or social facts found by a trial judge.

Minimal impairment analysis requires consideration of whether or not the legislature turned its mind to alternative and less rights-impairing means to promote its legislative goal. Here, evidence related to the options considered as alternatives to the total ban was withheld from the factual

record. In cases like these involving wide public interest constitutional litigation, government should remain non-adversarial and make full disclosure. The total prohibition on advertising (the full rights-impairing option) is only constitutionally acceptable if information is provided that such a total prohibition is necessary in order for the legislation to achieve a pressing and substantial goal. When the evidence is unclear whether a partial prohibition is as effective as a full prohibition, the Charter requires that the legislature enact the partial denial of the implicated Charter right. The tailoring required to meet minimal impairment was not significant and yet very necessary to the Act's being constitutional.

Section 9 of the Act, requiring the placing of unattributed health warnings, infringed s. 2(b) and was unjustifiable under s. 1 for the reasons of McLachlin J. Sections 4, 5, 6 and 8 should also be struck. Proof might exist for this total and absolute ban on advertising, but without it, there is no justifiable basis for this ban.

Per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The infringement was justifiable under s. 1. Protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is a pressing and substantial objective. It meets the two broad criteria set forth in *Oakes*. First, its objective is of sufficient importance to override a guaranteed right. Second, it meets the proportionality requirements established in *Oakes*. These requirements are not synonymous with nor have they been superseded by those set forth in s. 1 of the Charter. The appropriate "test" is that found in s. 1 itself. The courts are to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society" and must strike a delicate balance between individual rights and community needs. This balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The section 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. An important "synergetic relation" exists between Charter rights and the context in which they are claimed. The *Oakes* requirements therefore must be applied flexibly, having regard to the specific factual and social context of each case. A rigid or formalistic approach should be avoided in order to overcome the risk of losing sight of this relation.

The evidentiary requirements under s. 1 vary substantially depending upon both the nature of the legislation and the nature of the right infringed. Here, both these contextual elements were highly relevant to a proper application of the s. 1 analysis. The application of a "rigorous" civil standard of proof below resulted in a failure to take into account the specific context in which the s. 1 balancing must take place.

The nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence. Despite the lack of definitive scientific explanations of the causes of tobacco addiction, clear evidence does exist of the detrimental social effects of tobacco consumption. Overwhelming evidence was introduced at trial that tobacco consumption is a principal cause of

deadly cancers, heart disease and lung disease, and that tobacco is highly addictive. The most distressing aspect of the evidence is that tobacco consumption is most widespread among the most vulnerable, the young and the less educated, at whom much of the advertising is specifically directed.

The significant gap between an understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption raises a fundamental institutional problem that must be taken into account in undertaking the s. 1 balancing. Strictly applying the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern whenever Parliament wished to address its effects. This would have the effect of virtually paralyzing the operation of government in the socio-economic sphere. To require Parliament to await definitive social science conclusions whenever it wishes to make social policy would impose an unjustifiable and unrealistic limit on legislative power.

The Court has recognized that the Oakes standard of justification should be attenuated when institutional constraints analogous to those in the present cases arise. Although courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny -- that is not so in the sphere of policy-making. Policy-making is a role properly assigned to elected parliamentarians who have the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to ordinary criminal justice legislation, the courts recognize these important institutional differences. The Act in issue is the type of legislation generally accorded a high degree of deference and the considerations addressed in *Irwin Toy* and *McKinney* are applicable.

Expression, depending on its nature, is entitled to varying levels of constitutional protection and requires a contextual, as opposed to an abstract, approach. Although freedom of expression is a fundamental value, other fundamental values are also deserving of protection and consideration by the courts. When these values come into conflict, the courts must make choices based not upon abstract analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. Freedom of expression claims must be weighed in light of their relative connection to a set of even more fundamental or core values which include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. State action placing such values in jeopardy is subject to a searching degree of scrutiny. Where the expression in question is farther from the "core" of freedom of expression values, a lower standard of justification may be applied.

The harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the "core" of freedom of expression values as prostitution, hate-mongering

and pornography. Its sole purpose is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically aimed at the young and most vulnerable. This form of expression must then be accorded a very low degree of protection under s. 1 and an attenuated level of justification is appropriate. The Attorney General need only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act.

The reliance on the trial judge's finding need not be adopted. An appellate court generally may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where that error influenced the trial judge's final conclusion or overall appreciation of the evidence. The trial judge's factual findings in these cases, however, were not of the type that fall within the general rule of appellate "non-interference". The privileged position of the trial judge to appreciate and weigh adjudicative facts does not extend to the assessment of "social" or "legislative" facts that arise in the law-making process. The trial judge's factual findings concerning the connection between tobacco advertising and consumption were therefore entitled to minimal deference.

The legislative means chosen under the Act must be rationally connected to the objective of protecting public health by reducing tobacco consumption, not according to a civil standard of proof, but only to the extent that there was a reasonable basis for believing such connection. A rational connection obviously exists between a prohibition on the distribution of free samples of tobacco products under s. 7 and the protection of public health. One also exists between the prohibition on advertising and promotion of tobacco products under ss. 4, 5, 6, and 8 and the objective of reducing tobacco consumption. Notwithstanding the want of a definitive study connecting tobacco advertising and tobacco consumption, sufficient evidence was adduced at trial to conclude that the objective of reducing tobacco consumption is logically furthered by the prohibition on tobacco advertising and promotion under the Act. The large advertising budgets of the tobacco companies of themselves suggest that advertising not only helps to maintain brand loyalty but also to increase consumption and to induce smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend to both potential smokers and current smokers who would prefer to quit but cannot. Three categories of evidence capable of substantiating this rational connection were disregarded at trial: internal tobacco marketing documents, expert reports, and international materials. The internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a cornerstone of their strategy to reassure current smokers and expand the market by attracting new smokers, primarily among the young. The expert reports introduced at trial attest, at the very least, to the existence of a "body of opinion" supporting the existence of a causal connection between advertising and consumption. It is also significant that by 1990, over 40 countries had adopted measures to restrict or prohibit tobacco advertising.

For the reasons discussed throughout the s. 1 analysis, the legislative means chosen impair the right in question as little as possible, notwithstanding the fact that it imposes a complete prohibition on tobacco advertising and promotion rather than a partial one. The relevance of context is important in s. 1 balancing, particularly at the minimal impairment stage, because it does not require that the

least intrusive measures be used but only that the measures employed were the least intrusive in light of both the legislative objective and the infringed right. The measures taken here to control tobacco products, given the legislative context and the fact that this profit-generated type of expression is far from the "core" of the freedom of expression, satisfied the Oakes minimal impairment requirement. While a complete prohibition on a type of expression is more difficult to justify than a partial prohibition, ample evidence was adduced at trial to demonstrate the government's decision that a full prohibition on advertising was justified and necessary. The measures were the product of an intensive 20-year period of experimenting with less intrusive measures with the cooperation of the provinces and expensive consultation with an array of national and international health groups. Over the course of this period the government adopted a variety of less intrusive measures before determining a full prohibition on advertising was necessary. Parallel developments in the international community have taken place. There has been overwhelming legislative and judicial acceptance of this type of prohibition by other democratic countries. Where governments have instituted partial prohibitions, tobacco companies have devised ingenious tactics to circumvent them. International health organizations support this kind of prohibition.

A proportionality must exist between the deleterious and the salutary effects of the measures. The legislative objective of reducing the number of direct inducements for Canadians to consume these products outweighs the limitation on tobacco companies to advertise inherently dangerous products for profit.

While a legitimate concern was raised with respect to the effect of governmental claims to confidentiality in constitutional cases, the action of the government in these cases was not fatal. The evidence was overwhelming that the prohibition was a reasonable one.

Compelling the tobacco companies to place unattributed health messages on tobacco packages does not infringe their freedom of expression. These messages cannot be taken as being an opinion endorsed by the tobacco companies. They are rather a requirement imposed by government as a condition of participating in a legislated activity. Even if they may infringe a form of expression protected by s. 2(b), they were fully justifiable under s. 1. The warnings do nothing more than bring the dangerous nature of these products to the attention of the consumer. They have no political, social or religious content. Any concern arising from the tobacco companies' being prevented from printing on their packaging the opinion that tobacco products are not harmful, even if it is a technical infringement of their rights, was easily outweighed by the pressing health concerns raised by tobacco consumption, especially to children. The Charter does not require the elimination of "minuscule" constitutional burdens, and legislative action that increases the costs of exercising a right should not be invalidated if the burden is "trivial". Here, the only cost associated with the unattributed health warning requirement was a potential reduction in profits; manufacturers of dangerous products can reasonably be expected to bear this cost.

Disposition

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major J.J.: Sections 4, 8 and 9, and ss. 5 and 6 which are not severable from them, are of no force or effect under s. 52 of the Constitution Act, 1982. Iacobucci J., while declaring the impugned legislation inoperable, would have made a suspensive declaration of invalidity of one year and Cory J., had he found the impugned legislation inoperable, would have agreed with Iacobucci J. in this respect.

Per Lamer C.J. and Sopinka, McLachlin and Major J.J.: Sections 4, 8 and 9 of the Tobacco Products Control Act constitute unjustified infringements on free expression and cannot be severed cleanly from other provisions dealing with promotion and trade mark usage, ss. 5 or 6. Sections 4, 5, 6, 8, and 9 are inconsistent with the Charter and hence are of no force or effect by reason of s. 52 of the Constitution Act, 1982.

Per Iacobucci J.: A suspensive declaration of invalidity of one year should be made. Immediately striking down the legislation would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; the suspensive veto would permit the government to design such legislation while the status quo remains in force.

Per Cory J.: If the impugned legislation were inoperable, agreement was expressed for the reasons of Iacobucci J. that a suspensive declaration of invalidity of one year be made.

Cases Cited

By McLachlin J.

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By Major J.

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General of Canada, [1980] 1 S.C.R. 914; Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338; Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1; R. v. Hauser, [1979] 1 S.C.R. 984; Boggs v. The Queen, [1981] 1 S.C.R. 49; Reference re Alberta Statutes, [1938] S.C.R. 100; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; Morgentaler v. The Queen, [1976] 1 S.C.R. 616; R. v. Furtney, [1991] 3 S.C.R. 89.

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APPEALS from a judgment of the Quebec Court of Appeal (1993), 102 D.L.R. (4th) 289, [1993] R.J.Q. 375, 53 Q.A.C. 79, 48 C.P.R. (3d) 417, allowing appeals from judgments of Chabot J. (1991), 82 D.L.R. (4th) 449, [1991] R.J.Q. 2260, 37 C.P.R. (3d) 193, granting motions for declaratory judgment. Appeals allowed, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. dissenting. The first constitutional question dealing with the legislative competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out in s. 2(b) of the Charter and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the Constitution Act, 1982.

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Alain Gingras, for the mis-en-cause the Attorney General of Quebec.

Claude Joyal, James Mabbutt, Q.C., Paul Évrard, Q.C., Yves LeBlond and Johanne Poirier, for the respondent.

Tanya Lee, for the intervener the Attorney General for Ontario.

Robert W. Cosman, Karl Delwaide and Richard B. Swan, for the interveners the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health,

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Solicitors for the intervener the Canadian Medical Association: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the intervener the Canadian Lung Association: Fasken, Campbell, Godfrey, Toronto.

The following are the reasons delivered by

1 LAMER C.J.:-- I have had the benefit of reading the reasons of my colleagues. I am in agreement with the reasons of my colleague, Justice Iacobucci, but agree with my colleague, Justice McLachlin, as to the disposition.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

2 LA FOREST J. (dissenting):-- The issues in these appeals are whether the Tobacco Products Control Act, S.C. 1988, c. 20 (the "Act"), falls within the legislative competence of the Parliament of Canada under s. 91 of the Constitution Act, 1867, either as criminal law or under the peace, order and good government clause, and if so whether it constitutes an infringement of freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms which is not justified under s. 1 of the Charter. In broad terms, the Act prohibits, subject to specified exceptions, all advertising and promotion of tobacco products, and prohibits the sale of a tobacco product unless the package containing it sets forth prescribed health warnings and a list of the toxic constituents of the product and of the smoke produced from its combustion.

3 These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR - MacDonald Inc. ("RJR") seeks a declaration that the Act is wholly ultra vires the Parliament of Canada and invalid as an unjustified infringement of

Intitulé de la cause :

**Le Syndicat national des employés de l'aluminium d'Arvida inc.
c. Le Procureur général du Canada**

**LE SYNDICAT NATIONAL DES EMPLOYÉS DE L'ALUMINIUM D'ARVIDA
INC., JEAN-MARC CREVIER et MARIE LANGEVIN, demandeurs**

c.

PROCUREUR GÉNÉRAL DU CANADA, défendeur

et

PROCUREUR GÉNÉRAL DU QUÉBEC, intervenant

Et

CONFÉDÉRATION DES SYNDICATS NATIONAUX, requérante

c.

PROCUREUR GÉNÉRAL DU CANADA, intimé

et

PROCUREUR GÉNÉRAL DU QUÉBEC, intervenant

[2003] J.Q. no 15801

[2003] R.J.Q. 3188

J.E. 2003-2229

Nos : 150-05-001538-984, 500-05-048333-999

Cour supérieure du Québec
District de Chicoutimi et de Montréal

L'honorable Clément Gascon, J.C.S.

Entendu : 28, 29, 30 avril, 1, 5, 12, 13, 14, 15, 20, 21
et 22 mai 2003.

Rendu : 5 novembre 2003.

(379 paragr.)

Avocats :

Gilles Grenier (Joli-Coeur, Lacasse, Geoffrion, Jetté), avocats des demandeurs.

Guy Martin (Sauvé et Roy), avocat de la requérante, Confédération des syndicats nationaux.

Jean-Guy Ouellet (Ouellet, Nadon), avocat-conseil de la requérante, Confédération des syndicats nationaux.

Carole Bureau, Linda Mercier, Claude Joyal et James Mabbutt (Côté, Marcoux, Joyal), avocats du Procureur général du Canada.

René Bourassa et Julie Dassylva, Ministère de la Justice, avocats du Procureur général du Québec, intervenant.

JUGEMENT

INTRODUCTION ET VUE D'ENSEMBLE

1 Ce jugement, qui comporte deux volets, traite de la constitutionnalité et de la légalité de certains articles de la Loi sur l'assurance-emploi (Loi)¹ que le Parlement fédéral a adoptée en 1996 en vertu de sa compétence exclusive sur "l'assurance-chômage" prévue au paragraphe 91(2A) de la Loi constitutionnelle de 1867² (Constitution).

2 Le premier volet touche l'étendue de la compétence du Parlement en matière d'assurance-chômage. Plus particulièrement, se pose ici la question de la validité constitutionnelle des articles portant sur les mesures dites "actives" de la Loi, soit les prestations d'emploi, le service national de placement, le travail partagé et les programmes de formation.

3 Le second volet concerne les surplus accumulés au Compte d'assurance-emploi prévu à la Loi qui dépassent, à ce jour, 40 milliards de dollars. À vrai dire, et personne ne s'en cache, le niveau de ces surplus est la raison d'être du litige dont ce jugement dispose.

4 Plus particulièrement, ce deuxième volet soulève deux questions. D'une part, celle de la validité, du point de vue constitutionnel, des articles de la Loi relatifs aux cotisations exigées qui génèrent ces surplus. D'autre part, celle de la légalité de l'utilisation de ces cotisations et de ces surplus par le gouvernement fédéral.

5 Aussi bien le dire dès maintenant, le Tribunal estime que les articles de la Loi portant sur les mesures actives sont constitutionnellement valides, tout comme ceux relatifs aux cotisations exigées. De plus, le Tribunal est d'avis qu'à la lumière de la preuve présentée, on ne peut conclure que le gouvernement fédéral aurait utilisé illégalement ou se serait approprié de façon illicite ces surplus qui apparaissent toujours au crédit du Compte d'assurance-emploi.

6 Avant d'aborder l'analyse et la discussion des motifs qui sous-tendent ces conclusions, il convient de résumer brièvement les recours entrepris, de cerner les prétentions avancées par les parties et de préciser les questions que le Tribunal doit trancher.

LES RECOURS ENTREPRIS ET LES PRÉTENTIONS DES PARTIES

7 Les questions à résoudre en l'espèce s'inscrivent dans le cadre de deux recours de nature déclaratoire où le Procureur général du Canada est défendeur.

8 Le Syndicat national des employés de l'aluminium d'Arvida inc. (Syndicat d'Arvida)³ a intenté le premier par voie d'action et la Confédération des syndicats nationaux (CSN) le second, par voie de requête⁴.

9 Les points en litige étant essentiellement les mêmes et le défendeur identique, les recours ont été réunis et ont fait l'objet d'une audience commune.

a) Le recours et les prétentions du Syndicat d'Arvida

10 Dans ses conclusions, le Syndicat d'Arvida demande, premièrement, de déclarer inconstitutionnels :

- les articles de la partie II de la Loi touchant les prestations d'emploi et le service national de placement (art. 2 (définitions "cotisation patronale" et "prestation d'emploi) et art. 56 à 65.2);
- les articles sur le travail partagé et les programmes de formation (art. 24 et 25); et
- certaines autres dispositions de la Loi reliées à ces mesures actives (art. 77(1)b),c),d), 79, 109c)(iii), 135 et 153.1).

11 En somme, il s'agit de toutes les dispositions législatives portant sur les mesures actives. À la différence des prestations de chômage de la Loi qui sont des mesures passives de soutien du revenu pour les personnes admissibles, les mesures actives, elles, visent plutôt à aider les prestataires à retourner ou à demeurer sur le marché du travail.

12 Deuxièmement, le Syndicat d'Arvida demande de déclarer que les cotisations exigées des employeurs et des employés en vertu des articles 66, 66.1 et 66.2 de la Loi sont "illégales en regard de la Constitution canadienne".

13 Troisièmement, le Syndicat d'Arvida demande enfin de déclarer que les surplus du Compte d'assurance-emploi appartiennent aux cotisants du régime, soit les employeurs et les employés.

14 Les motifs avancés au soutien de ces demandes se résument ainsi.

15 Selon le Syndicat d'Arvida, les mesures actives de la Loi relatives aux prestations d'emploi, au service national de placement, au travail partagé et aux programmes de formation excèdent la compétence du Parlement en matière d'assurance-chômage. Selon lui, par ces dispositions, le Parlement empiéterait sur les compétences des législatures provinciales.

16 Le Syndicat d'Arvida invoque à l'appui l'interprétation littérale, grammaticale et historique de la compétence fédérale en matière d'assurance-chômage qui se limiterait au seul versement de prestations de chômage⁵.

17 Au surplus, soutient-il, le Parlement ne saurait justifier sa compétence sur les mesures actives de la Loi en se fondant sur le pouvoir fédéral de dépenser puisque cette approche serait contraire au "principe fédéral canadien".

18 Au sujet de la question des cotisations exigées pour financer à la fois les prestations de chômage et les mesures actives de la Loi, le Syndicat d'Arvida plaide que ces cotisations sont en réalité une taxe déguisée imposée de façon délibérée et excessive par le Parlement. Il ajoute que ces cotisations constituent ainsi une taxe illégale adoptée en violation de l'article 53 de la Constitution. Enfin, dit-il, il s'agit d'une taxe imposée par le Parlement aux législatures provinciales contrairement à l'article 125 de la Constitution.

19 En dernier lieu, à propos de la question des surplus accumulés au Compte d'assurance-emploi, le Syndicat d'Arvida soutient que le gouvernement fédéral ne peut se financer au moyen de ces sur-

plus car ces sommes appartiennent non pas à l'État mais bien aux employeurs et employés cotisant au régime instauré par la Loi.

20 À ce stade-ci, les arguments avancés par le Syndicat d'Arvida nécessitent deux derniers commentaires. D'abord, bien qu'initialement, il dénonçait aussi les critères d'admissibilité aux prestations de chômage de la Loi comme étant discriminatoires et contraires à l'article 15 de la Charte canadienne des droits et libertés⁶, le Syndicat d'Arvida a retiré ce moyen et n'en a pas traité à l'audience.

21 Également, bien que sa procédure initiale soulevait l'illégalité des taux de cotisation fixés en vertu de l'article 66 de la Loi, le Syndicat d'Arvida a retranché ce moyen qui n'a pas fait l'objet de débat à l'audience. Il a cependant maintenu sa prétention quant à l'invalidité constitutionnelle des dispositions permettant de fixer ces taux de cotisation.

b) Les recours et les prétentions de la CSN

22 Dans les conclusions de sa requête en jugement déclaratoire, la CSN, tout comme le Syndicat d'Arvida, recherche d'abord une déclaration voulant que les revenus des cotisations d'assurance-emploi ne puissent servir qu'au versement de prestations de chômage. En conséquence, l'utilisation de ces revenus à des fins autres serait illégale, nulle et inconstitutionnelle. De ce fait, la CSN conclut elle aussi, en premier lieu, à l'inconstitutionnalité des mesures actives de la Loi.

23 Comme pour le Syndicat d'Arvida, il s'agit là des articles touchant les prestations d'emploi et le service national de placement (art. 2 (définition "prestation d'emploi) et art. 56 à 65), le travail partagé et les programmes de formation (art. 24 et 25), et quelques autres dispositions de la Loi pertinentes aux mesures actives (art. 72c), 75c)d)e), 77(1)b)c)d), 77(2), 78, 79, 109c)(iii) et 135).

24 En second lieu, la CSN demande de déclarer inconstitutionnel l'article 66 portant sur les cotisations exigées en vertu de la Loi.

25 Enfin, en troisième lieu, elle demande de déclarer que le surplus cumulatif du Compte d'assurance-emploi appartient aux cotisants du régime et ne peut servir qu'à en améliorer la couverture.

26 Les motifs invoqués par la CSN pour justifier ces conclusions se rapprochent sensiblement de ceux du Syndicat d'Arvida quoiqu'ils ne soient pas en tous points identiques.

27 Dans un premier temps, en ce qui a trait à la question de l'inconstitutionnalité des mesures actives de la Loi, la CSN prétend que la compétence du Parlement en matière d'assurance-chômage doit être directement reliée au "caractère assurantiel" du régime. Il s'ensuit donc que le Parlement ne peut affecter les cotisations d'assurance-emploi à d'autres fins qu'au versement de prestations de chômage.

28 De plus, selon la CSN, sans participation financière de l'État fédéral au Compte d'assurance-emploi, il serait inconstitutionnel de financer les prestations d'emploi et autres mesures actives par le biais de ce Compte, car celles-ci ne relèvent pas de la compétence fédérale en matière d'assurance-chômage.

29 Dans un deuxième temps, elle avance que le mode de fixation des taux de cotisation établi en vertu de la Loi ne tient plus compte des prestations versées par le régime. Par le fait même, cela éliminerait le lien fondamental entre les cotisations reçues et les prestations versées et dénaturerait illégalement l'objet même du régime. En conséquence, conclut-elle, ce mécanisme de financement est contraire à la finalité du régime et inconstitutionnel.

30 Elle soutient même que les nombreux changements apportés au régime d'assurance-emploi actuel fait en sorte que le Canada ne respecterait plus ses obligations internationales.

31 Dans un troisième et dernier temps, la CSN plaide que le Parlement ne peut ni utiliser ni affecter les surplus du Compte d'assurance-emploi autrement que pour atteindre les objectifs et la finalité du régime, soit le paiement de prestations de chômage. Elle demande donc de déclarer que le surplus cumulatif du Compte d'assurance-emploi appartient aux cotisants du régime et ne peut servir qu'à l'amélioration de sa couverture qui, selon elle, a sensiblement diminué depuis 1996.

c) Les prétentions du Procureur général du Canada

32 Le Procureur général du Canada a produit une défense à l'action déclaratoire du Syndicat d'Arvida⁷ et une contestation écrite à la requête en jugement déclaratoire de la CSN⁸.

33 Sans surprise, le Procureur général conteste les prétentions d'inconstitutionnalité des articles relatifs aux mesures actives de la Loi et aux cotisations exigées en vertu de celle-ci, tout comme celles voulant que les surplus accumulés au Compte d'assurance-emploi appartiennent aux cotisants du régime.

34 Essentiellement, à propos de la question de la constitutionnalité des mesures actives, il répond que de telles mesures ont toujours fait partie de l'exercice de la compétence du Parlement en matière d'assurance-chômage, et ce, depuis l'amendement constitutionnel de 1940 qui lui a octroyé cette compétence. Selon lui, il est inapproprié de considérer la compétence constitutionnelle en matière d'assurance-chômage d'une façon aussi limitée et hermétique que celle proposée par le Syndicat d'Arvida et la CSN.

35 À l'égard de la question du financement du Compte d'assurance-emploi et des cotisations exigées en vertu de la Loi, il rétorque que l'existence ou non d'une contribution du Parlement au régime de même que la présence d'un déficit ou d'un surplus dans le Compte d'assurance-emploi n'ont aucune pertinence sur la détermination de la constitutionnalité des dispositions de la Loi relatives aux cotisations exigées.

36 Toujours selon le Procureur général, l'argument avancé par le Syndicat d'Arvida et la CSN vise non pas la légalité des articles pertinents, mais le niveau des taux de cotisation exigés en vertu de la Loi. Or, cette question qui n'est plus soulevée en l'espèce ne relèverait pas de la compétence de la Cour supérieure, mais bien de celle de la Cour fédérale.

37 Quant à la question des surplus, il soutient que le Compte d'assurance-emploi appartient au Trésor et non aux cotisants du régime.

38 En terminant, il convient de souligner que le Procureur général avait initialement soulevé l'absence d'intérêt du Syndicat d'Arvida et de la CSN pour agir en l'espèce, mais il a abandonné ce moyen à l'audience.

d) La position du Procureur général du Québec

39 Quoique intervenant dans les deux dossiers, le Procureur général du Québec a eu un rôle somme toute discret dans le débat. Il n'a déposé aucune procédure écrite et ses représentations à l'audience n'ont touché que la question du pouvoir fédéral de dépenser.

40 Il n'en a fait aucune sur la question de l'étendue de la compétence fédérale en matière d'assurance-chômage, ni sur celles des cotisations exigées et des surplus accumulés au Compte d'assurance-emploi.

e) La preuve faite à l'audience

41 Compte tenu de la nature déclaratoire des recours entrepris et des questions constitutionnelles en litige, les parties ont présenté, d'une part, une preuve documentaire volumineuse, de nature extrinsèque, sur les points suivants :

- l'historique de la compétence du Parlement en matière d'assurance-chômage;
- l'historique de l'évolution des dispositions législatives pertinentes qui ont précédé celles de la Loi;
- les débats parlementaires qui ont entouré l'adoption de la première loi sur l'assurance-chômage et la Loi actuelle;
- les débats parlementaires touchant les surplus accumulés au Compte d'assurance-emploi et leur impact sur les budgets fédéraux des dernières années;
- l'évolution des Comptes publics du Canada et du Compte d'assurance-emploi depuis l'adoption de la Loi.

42 Les parties ont aussi produit différents rapports du vérificateur général du Canada et de l'actuaire en chef de Développement des ressources humaines Canada (DRHC) sur les taux de cotisation de l'assurance-emploi.

43 D'autre part, deux experts, Ruth Rose en demande et Guy Lacroix en défense, ont témoigné au sujet de la couverture présente du régime d'assurance-emploi, plus particulièrement dans le contexte de l'analyse de l'indicateur RPC (rapport prestataires/chômeurs) et de son utilité actuelle.

44 Finalement, le Procureur général du Canada a fait entendre deux experts pour expliquer, dans un premier temps, la teneur du Compte d'assurance-emploi (Chantal Clément, c.a.) et, dans un deuxième temps, le mécanisme de consolidation de ce Compte dans les états financiers du gouvernement fédéral inclus aux Comptes publics du Canada (Louise Breton, c.a.).

45 Les éléments pertinents de cette preuve documentaire, de ces rapports d'expertises et de cette preuve testimoniale seront, le cas échéant, identifiés dans l'analyse et la discussion des questions que le Tribunal doit résoudre et qu'il y a lieu maintenant de préciser.

LES QUESTIONS EN LITIGE

46 À la lumière de ce qui précède, le Tribunal doit trancher trois questions :

- 1) Les articles de la Loi portant sur les mesures actives, soit les articles de la partie II sur les prestations d'emploi et le service national de placement, les articles sur le travail partagé et les programmes de formation, et les autres dispositions de la Loi reliées à ces mesures actives, sont-ils constitutionnellement valides?
- 2) Les articles de la Loi relatifs aux cotisations exigées, soit les articles 66, 66.1 et 66.2, sont-ils valides du point de vue constitutionnel?

- 3) À la lumière de la preuve faite, est-il exact de prétendre que le gouvernement fédéral aurait utilisé et se serait approprié, et ce, illégalement, les surplus accumulés au Compte d'assurance-emploi?

ANALYSE ET DISCUSSION

- 1) Les articles de la Loi portant sur les mesures actives, soit les articles de la partie II sur les prestations d'emploi et le service national de placement, les articles sur le travail partagé et les programmes de formation, et les autres dispositions de la Loi reliées à ces mesures actives, sont-ils constitutionnellement valides?
- 47** Pour répondre à la première question, il faut analyser les points suivants :
- a) Le test constitutionnel applicable;
 - b) Le caractère véritable des articles attaqués eu égard à :
 - i. Leur contenu;
 - ii. L'analyse de leur objet;
 - iii. Leur évolution historique;
 - iv. L'étendue de la compétence fédérale en matière d'assurance-chômage;
 - c) Les autres prétentions du Syndicat d'Arvida et de la CSN sur :
 - i. L'interprétation restrictive de cette compétence fédérale;
 - ii. L'absence de contributions monétaires du gouvernement fédéral et la preuve faite à l'audience;
 - d) La position du Procureur général du Québec;
 - e) L'incidence du pouvoir fédéral de dépenser en l'espèce.

- a) Le test constitutionnel applicable

48 Récemment, dans l'arrêt *Ministre de la Justice du Québec*⁹ (Renvoi relatif au projet de loi C-7), la Cour d'appel a rappelé que, face à une contestation partielle d'une législation comme en l'espèce, il faut appliquer un test en trois étapes pour déterminer la constitutionnalité des dispositions attaquées.

49 Reprenant les étapes de ce test telles que résumées par le juge LeBel dans l'arrêt *Bande Kitkatla*¹⁰, la Cour d'appel a indiqué qu'il fallait alors répondre à trois questions :

1. Les dispositions contestées empiètent-elles sur une compétence provinciale et dans quelle mesure?
2. Si les dispositions contestées empiètent sur une compétence provinciale, font-elles néanmoins partie d'un régime législatif fédéral valide?
3. Si les dispositions contestées font partie d'un régime législatif fédéral valide, y sont-elles suffisamment intégrées?¹¹.

50 Ce test exige donc d'examiner, en premier lieu, l'objet des dispositions contestées pour déterminer si, par leur caractère véritable, elles relèvent ou non d'un des chefs de compétence du Parlement¹².

51 Ce n'est que lorsque les dispositions contestées empiètent sur une compétence provinciale qu'il y a lieu de déterminer, en second lieu, si elles font néanmoins partie d'un régime législatif fédéral valide et, le cas échéant, si elles y sont suffisamment intégrées.

52 Pour cerner l'objet et le caractère véritable des dispositions contestées de la Loi, il y a lieu, d'une part, d'analyser le contenu des articles attaqués pour établir ce qu'ils font et pourquoi, bref, leur caractéristique dominante¹³. D'autre part, il convient d'analyser l'évolution historique de la Loi en relation avec les articles attaqués. Enfin, il importe de définir les paramètres de la compétence fédérale en matière d'assurance-chômage à laquelle le Procureur général du Canada rattache le caractère véritable des dispositions contestées.

53 Cela dit, dans la recherche de l'objet et du caractère véritable des articles attaqués, le Tribunal doit s'en tenir au rôle qui est le sien. Comme la Cour d'appel l'a énoncé dans cet arrêt Renvoi relatif au projet de loi C-7¹⁴ :

Lorsque les tribunaux doivent se pencher sur une question concernant la validité constitutionnelle d'une mesure législative, il ne leur appartient pas d'en évaluer le mérite, l'opportunité ou l'efficacité. [...]

b) Le caractère véritable des articles attaqués

i. Le contenu des dispositions visées

54 Quant à cette première question, les articles dont la validité constitutionnelle est attaquée englobent toutes les mesures actives de la Loi.

- Les prestations d'emploi et le service national de placement

55 Dans un premier temps, il s'agit des articles 56 à 65.2 de la Loi, soit la partie II intitulée "Prestations d'emploi et service national de placement".

56 L'article 56 définit l'objet de la partie II :

56. La présente partie a pour objet d'aider à maintenir un régime d'assurance-emploi durable par la mise sur pied de prestations d'emploi pour les participants et par le maintien d'un service national de placement.

(Le Tribunal souligne)

57 L'objet déclaré est donc de soutenir un régime d'assurance-emploi durable par deux moyens, soit les prestations d'emploi aux participants et le service national de placement. On y note d'un côté le lien établi entre les "participants" et les prestations d'emploi instaurées par la Loi et de l'autre, le caractère de continuité (le "maintien") du service national de placement.

58 L'article 57 donne les lignes directrices applicables aux prestations d'emploi et aux mesures de soutien prévues à cette partie. Ces lignes directrices recherchent notamment une harmonisation avec les projets d'emploi provinciaux, une réduction de la dépendance aux prestations de chômage et une coopération et un partenariat avec les gouvernements, employeurs et organismes communautaires (paragraphe 57(1). Les lignes directrices insistent sur la concertation requise avec les gouvernements provinciaux et la recherche d'accords avec les provinces (paragraphe 57(2) et 57(3).

59 L'article 58 définit le terme "participant" de la partie II :

58. (1) Dans la présente partie, "participant" désigne l'assuré qui demande de l'aide dans le cadre d'une prestation d'emploi et qui, à la date de la demande, est un chômeur à l'égard de qui, selon le cas :
- a) une période de prestations a été établie ou a pris fin au cours des trente-six derniers mois;
 - b) une période de prestations a été établie au cours des soixante derniers mois et qui :
 - (i) a bénéficié de prestations spéciales, au titre de l'article 22 ou 23, au cours de la période de prestations,
 - (ii) a subséquemment quitté le marché du travail pour prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption,
 - (iii) tente de réintégrer le marché du travail
- (2) Pour l'application du paragraphe (1), "période de prestations" s'entend en outre d'une période de prestations établie au titre de la Loi sur l'assurance-chômage et "prestations spéciales" s'entend en outre des prestations visées aux articles 18 ou 20 de cette loi.

(Le Tribunal souligne)

60 On retient de cet article qu'un "participant" qui reçoit des prestations d'emploi est avant tout un "assuré" qui demande de l'aide et qui est, à la date de la demande, un "chômeur" bénéficiant ou ayant bénéficié soit de "prestations", soit de "prestations spéciales".

61 Les termes "assuré", "emploi assurable", "prestations" et "prestations spéciales" sont définis à l'article 2 :

"assuré" Personne qui exerce ou a exercé un emploi assurable.

"emploi assurable" S'entend au sens de l'article 5.

"prestations" Prestation payable en application de la partie I. En est exclue la prestation d'emploi.

"prestations spéciales" Prestations versées pour une raison mentionnée au paragraphe 12(3).

(Le Tribunal souligne)

62 La partie I de la Loi à laquelle on réfère s'intitule "Prestations de chômage", tandis que les paragraphes 5(1) et (2) et 12(3) auxquels renvoient ces définitions édictent ceci :

5. (1) Sous réserve du paragraphe (2), est un emploi assurable :

- a) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
- b) l'emploi du genre visé à l'alinéa a), exercé au Canada au service de Sa Majesté du chef du Canada;
- c) l'emploi à titre de membre des Forces canadiennes ou d'une force policière;
- d) un emploi prévu par règlement pris en vertu des paragraphes (4) et (5);
- e) l'emploi d'un particulier au Canada à titre de promoteur ou coordonnateur d'un projet dans le cadre d'une prestation d'emploi.

(2) N'est pas un emploi assurable :

- a) l'emploi occasionnel à des fins autres que celles de l'activité professionnelle ou de l'entreprise de l'employeur;
- b) l'emploi d'une personne au service d'une personne morale si cette personne contrôle plus de quarante pour cent des actions avec droit de vote de cette personne morale;
- c) l'emploi exercé au Canada et relevant de Sa Majesté du chef d'une province;
- d) l'emploi exercé au Canada au service du gouvernement d'un pays étranger ou de celui d'une subdivision politique d'un tel pays;
- e) l'emploi exercé au Canada au service d'un organisme international;
- f) l'emploi exercé au Canada dans le cadre d'un programme d'échange mais non rétribué par un employeur résidant au Canada;
- g) l'emploi qui constitue un échange de travail ou de services;
- h) l'emploi exclu par règlement pris en vertu du présent article;
- i) l'emploi dans le cadre duquel l'employeur et l'employé ont entre eux un lien de dépendance.

[...]

12. [...]

- (3) [...], le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations est :
- a) dans le cas d'une grossesse, quinze semaines;
 - b) dans le cas de soins à donner à un ou plusieurs nouveau-nés du prestataire ou à un ou plusieurs enfants placés chez le prestataire en vue de leur adoption, 35 semaines;
 - c) dans le cas d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement, quinze semaines.

(Le Tribunal souligne)

63 Ainsi, les prestations d'emploi instaurées par la Loi ne sont qu'au bénéfice d'une personne qui :

- exerce ou a exercé un emploi assurable;
- a, de ce fait, cotisé au régime d'assurance-emploi à une certaine période (articles 67 et 82 de la Loi);
- est chômeur au moment de la demande de prestations d'emploi; et
- reçoit des prestations de chômage ou des prestations spéciales ou en a reçues lors d'une période antérieure définie à la Loi.

64 Tout bénéficiaire de prestations d'emploi doit donc à la fois avoir cotisé au régime, être chômeur et soit avoir reçu ou recevoir des prestations de chômage ou prestations spéciales en vertu de la Loi.

65 À l'article 59, la Loi précise quelles sont les prestations d'emploi prévues à la partie II :

59. La Commission peut mettre sur pied des prestations d'emploi en vue d'aider les participants à obtenir un emploi, notamment des prestations visant à :
- a) inciter les employeurs à les engager;
 - b) les encourager, au moyen d'incitatifs tels que les suppléments temporaires de revenu, à accepter un emploi;
 - c) les aider à créer leur entreprise ou à devenir travailleurs indépendants;
 - d) leur fournir des occasions d'emploi qui leur permettent d'acquérir une expérience de travail en vue d'améliorer leurs possibilités de trouver un emploi durable;
 - e) les aider à acquérir des compétences - de nature générale ou spécialisée - liées à l'emploi.

(Le Tribunal souligne)

66 Comme l'établit cet article, ces prestations d'emploi, au nombre de cinq, sont destinées à aider un "participant" à trouver un emploi et à réintégrer le marché du travail. Elles incluent des subventions salariales, des suppléments de rémunération, une aide au travail indépendant, des partenariats pour la création d'emplois et des prêts et subventions de perfectionnement.

67 Par ailleurs, à l'article 60, la partie II traite du service national de placement. Le paragraphe (1) en précise le rôle comme suit :

60. (1) La Commission maintient un service national de placement fournissant de l'information sur les possibilités d'emploi au Canada en vue d'aider les travailleurs à trouver un emploi convenable et les employeurs à trouver des travailleurs répondant à leurs besoins.

(Le Tribunal souligne)

68 Ainsi, l'un des objectifs du service national de placement est d'aider les travailleurs à trouver un emploi convenable.

69 Le reste de la partie II comporte des dispositions relatives au soutien financier pour la mise en oeuvre des prestations d'emploi (art. 61). On y prévoit aussi la possibilité de conclure des accords d'administration des prestations d'emploi et des mesures de soutien soit avec un ministère, un gouvernement ou un organisme public canadien (art. 62 et 63).

70 Finalement, l'article 64 précise que les décisions de la Commission de l'assurance-emploi du Canada (Commission) relatives à une prestation d'emploi ou à une mesure de soutien ne sont normalement pas susceptibles d'appel, tandis que les articles 65 à 65.2 traitent du remboursement des trop-perçus, le cas échéant, et des pénalités y afférentes.

- Le travail partagé et les programmes de formation

71 Dans un deuxième temps, les articles attaqués par le Syndicat d'Arvida et la CSN incluent l'article 24 de la partie I touchant le versement de prestations pour travail partagé aux "prestataires" qui remplissent les conditions requises.

72 Cet article 24 ne vise que des prestataires, soit une "personne qui demande ou qui a demandé des prestations en vertu de la présente loi" (art. 2(1)). Selon le paragraphe 24(3), ces personnes sont réputées être en chômage, capables de travailler et disponibles à cette fin, même lorsqu'elles exercent un emploi en travail partagé. Le fait d'occuper un emploi aux termes d'un accord de travail partagé ne fait donc pas perdre à ces "prestataires" les avantages que la Loi leur confère autrement.

73 La contestation constitutionnelle du Syndicat d'Arvida et de la CSN vise également l'article 25 de la Loi qui régit cette fois les cours ou programmes d'instruction et de formation qu'un "prestataire" peut suivre à ses frais ou dans le cadre de prestations d'emploi.

74 Comme pour l'article 24, l'article 25 prévoit qu'un prestataire est réputé être en chômage, capable de travailler et disponible à cette fin pour toute période durant laquelle il suit un tel cours ou

programme de formation. Cela ne s'adresse qu'aux "prestataires" en vertu de la Loi et vise à ne pas priver des avantages de la Loi ces personnes qui suivent ces cours ou programmes de formation.

- Les autres articles de la Loi reliés aux mesures actives

75 Dans un troisième temps, le Syndicat d'Arvida et la CSN joignent aux articles dont ils attaquent la validité constitutionnelle les autres dispositions de la Loi qui sont liées aux prestations d'emploi, au service national de placement, au travail partagé et aux programmes de formation.

76 Ces dispositions incluent plus précisément :

- la définition de "prestation d'emploi" à l'article 2;
- la référence, au paragraphe 72c), aux sommes reçues pour des prêts consentis en vertu de la partie II;
- les références, aux paragraphes 75c), d) et e), aux sommes portées au crédit du Compte d'assurance-emploi découlant de l'application de la partie II;
- les références, aux paragraphes 77(1)b), c), d) et 77(2), aux montants pouvant être portés au débit du Compte d'assurance-emploi découlant encore une fois de l'application de la partie II;
- les références, aux articles 78 et 79, aux plafonds des sommes qui peuvent être versées en vertu de la partie II, de même que les estimations budgétaires de ces sommes;
- la référence, au paragraphe 109c)(iii), à des projets pilotes qui incluent des employés ou groupes autres que des prestataires en vertu de la Loi;
- La référence à l'article 65.1 de la partie II dans l'article 135;
- L'article 153.1 qui prévoit des prestations spéciales pour les personnes qui deviennent ou redeviennent membres de la population active au sens du paragraphe 7(4).

77 On constate de cette énumération que, mis à part les articles 153.1 et 109c)(iii), toutes ces dispositions sont directement ou indirectement reliées à l'une ou l'autre des catégories suivantes :

- les cinq types de prestations d'emploi définis à la partie II;
- le service national de placement prévu à la partie II;
- le travail partagé régi par l'article 24;
- les cours ou programmes de formation de l'article 25.

78 Dans leur argumentation, le Syndicat d'Arvida et la CSN concluent au caractère inconstitutionnel de tous ces autres articles (incluant les articles 153.1 et 109c)(iii), précisément à cause de leur interrelation étroite avec ces quatre catégories de mesures actives.

79 Puisque les articles 153.1 et 109c)(iii) de la Loi n'ont pas été traités distinctement dans les représentations faites en demande, le Tribunal en disposera de la même façon que les autres articles attaqués.

ii. L'analyse de l'objet des articles visés

80 En ce qui concerne d'abord les articles sur les prestations d'emploi, l'analyse de leur contenu révèle que leur caractéristique dominante est de soutenir un régime d'assurance-emploi durable. Les moyens choisis sont l'établissement de prestations qui visent à aider les "participants" à trouver ou

garder un emploi et à réintégrer le marché du travail. Seuls les "participants" y ont accès, ce qui n'inclut que les personnes assurées en vertu de la Loi et qui sont "chômeurs" au moment de la demande de prestations. Bref, seules les personnes qui ont exercé ou qui exercent un emploi assurable, et qui ont donc cotisé au régime, peuvent en bénéficier.

81 La preuve révèle pourquoi ces prestations d'emploi font dorénavant partie de la Loi à sa partie II. Dans le document "La sécurité sociale dans le Canada de demain; De l'assurance-chômage à l'assurance-emploi : Un document d'information"¹⁵, il est précisé :

L'assurance-chômage a été initialement conçue comme une assurance contre le risque de chômage temporaire dans quelques secteurs d'activité. Elle doit maintenant fonctionner dans une économie où le risque de chômage structurel, y compris le chômage périodique et de longue durée, augmente dans la plupart des secteurs de l'économie.

Le remplacement du revenu ne peut à lui seul ramener les emplois perdus par suite de changement structurel. Les travailleurs en chômage qui n'ont pas les compétences professionnelles nécessaires de même que les travailleurs qui se trouvent fréquemment en chômage n'obtiennent pas l'aide dont ils ont besoin pour devenir plus productifs. Les programmes du marché du travail doivent créer des débouchés et aider les chômeurs à retrouver du travail. Une prémisses de base des options de réforme proposées dans le présent document est que si les gens ont plus de possibilités d'acquérir des compétences qui correspondent aux besoins du marché du travail local, ils auront plus de chance de trouver un emploi et de contribuer à une saine économie.

(Le Tribunal souligne)

82 Ainsi, selon la preuve, les changements économiques et structurels de la société canadienne feraient en sorte que celle-ci est dorénavant confrontée à un chômage structurel et de longue durée plutôt qu'à un chômage de nature temporaire, tel qu'il existait au moment où le régime d'assurance-chômage a été initialement conçu. Pour pallier le chômage structurel et de longue durée, le régime devrait ainsi assumer un nouveau rôle et viser à créer de nouveaux débouchés pour les travailleurs en chômage.

83 Également, comme l'explique le document "Un système d'emploi pour le Canada du XXI^e siècle"¹⁶, le passage aux mesures plus actives s'inscrirait dans la gestion responsable d'un régime d'assurance. Selon cette preuve, l'approche active commanderait l'instauration de mesures visant à aider les chômeurs canadiens à trouver de l'emploi, ce qui impliquerait une vision différente du rôle traditionnellement passif de soutien au revenu des chômeurs :

L'assurance-emploi comporte d'importants changements structurels par rapport aux prestations d'assurance-chômage. L'assurance-emploi représente également une nouvelle façon de dépenser les fonds d'assurance, c'est-à-dire en augmentant

l'investissement direct dans les possibilités d'emploi et de travail qui s'offrent aux chômeurs canadiens.

Cette importante orientation, ce passage des mesures passives de soutien du revenu aux services actifs visant le marché du travail, s'inspire des initiatives prises par d'autres pays, notamment le Japon et l'Allemagne. Pour tirer le maximum des avantages économiques découlant du changement technologique, la plupart des pays industrialisés ont de plus en plus recours à des mesures actives d'aide à l'emploi. Le Canada ne devrait pas agir différemment.

Cette approche active est tout à fait conforme au principe de la gestion responsable d'un régime d'assurance dont l'objet est de verser des prestations aux personnes qui ont perdu leur emploi. Tous les assureurs prudents cherchent à réduire l'exposition de leurs clients aux risques, et à limiter ainsi leurs responsabilités et leurs coûts. L'assurance-emploi ne peut faire exception à la règle. Voilà pourquoi il importe tant d'aider les chômeurs canadiens à trouver de l'emploi : moins il y aura de personnes touchant des prestations, plus le fonds sera solide et plus l'ensemble des Canadiens y trouveront leur compte.

(Le Tribunal souligne)

84 La preuve indique aussi que dans la documentation qui a circulé au moment de l'annonce du nouveau régime d'assurance-emploi (auparavant assurance-chômage), le gouvernement du Canada a insisté sur la réalité des changements technologiques radicaux survenus dans le marché du travail pour justifier cette nouvelle approche. Ces changements seraient tels que les chômeurs canadiens ont besoin d'une aide à l'emploi plus directe pour réintégrer le marché du travail et pour faire face à l'adaptation requise pour y retourner le plus rapidement possible¹⁷.

85 Le Tribunal estime qu'il faut retenir ce qui suit de l'étude de ces articles et de cette preuve quant aux prestations d'emploi.

86 Tant dans l'expression de l'objet déclaré de la partie II de la Loi que dans les explications fournies par le législateur fédéral sur le but recherché par ces mesures actives, il ressort que leur objet premier est le soutien au régime d'assurance-emploi par le biais de mesures nouvelles adaptées à une réalité sociale et économique différente.

87 Pour les prestations d'emploi, on constate ainsi que l'objectif recherché par le législateur fédéral est de fournir aux assurés du régime une protection additionnelle qui répond aux besoins évolutifs de la société canadienne en matière de chômage.

88 Comme l'a déjà écrit la Cour suprême¹⁸, pour évaluer la validité d'une législation, on ne peut ignorer le but que le législateur compte atteindre. La doctrine parle même de la considération nécessaire des objectifs sociaux et économiques qu'une loi cherche à réaliser¹⁹.

89 Ici, ce but se traduit par des articles sur les prestations d'emploi dont l'aspect dominant est de soutenir un régime efficace, durable et rentable d'assurance-emploi, adapté à la réalité contemporaine du marché du travail au Canada.

90 En ce qui concerne maintenant le service national de placement décrit à l'article 60, sa caractéristique dominante est d'aider les travailleurs à trouver un emploi convenable et à éviter ou arrêter le chômage. Son objectif le plus important vise à soutenir le régime d'assurance en favorisant un retour au travail rapide des prestataires, ce qui ne peut qu'aider à rendre le régime tout aussi utile qu'économique et efficace.

91 La preuve révèle qu'historiquement, les bureaux de placement publics ont été l'un des moyens de prédilection de lutte contre le chômage. Les expériences antérieures vécues dans d'autres pays avant l'adoption de la première loi canadienne sur l'assurance-chômage en 1935²⁰ démontraient déjà qu'un service de placement efficace était le fondement même de tout régime d'assurance-chômage. Aussi loin qu'à cette époque, il semblait acquis qu'il était impossible d'avoir un programme national d'assurance-chômage sans service de placement national²¹.

92 On peut comprendre pourquoi. Tout régime d'assurance qui vise à indemniser temporairement ses assurés pour un risque particulier a un intérêt manifeste à avoir pour corollaire la mise en place de mécanismes efficaces visant à réduire le plus rapidement possible la durée de cette compensation.

93 Depuis leurs origines, les lois fédérales en matière d'assurance-chômage ont, de fait, toujours inclus un volet touchant un service national de placement.

94 Ainsi, tout comme pour les prestations d'emploi, le caractère véritable de l'article 60 touchant le service national de placement demeure la mise en place d'un mécanisme de soutien essentiel au régime d'assurance-emploi et dont l'objectif est le retour au travail le plus rapide possible du prestataire.

95 Pour ce qui est cette fois de l'article touchant le travail partagé, sa caractéristique dominante est, là encore, d'être lié à l'objectif de préserver les emplois des prestataires potentiels et d'éviter des mises à pied et des situations de chômage.

96 Pour atteindre cet objectif, cet article prévoit qu'un prestataire, même s'il exerce un emploi en travail partagé, est tout de même réputé être en chômage, capable de travailler et disponible à cette fin, dans la mesure où il remplit les conditions prévues à la Loi. L'objectif est clair : préserver les emplois en ne pénalisant pas les prestataires qui adhèrent à des programmes de cette nature.

97 Bref, de cette façon, la Loi limite le risque ou l'étendue de réclamations potentielles au régime en favorisant un mécanisme par lequel un prestataire peut adhérer à un programme de travail partagé, donc réduit, sans être autrement pénalisé. L'objet visé est toujours de soutenir un régime efficace et durable d'assurance-emploi par une mesure qui cherche à limiter le risque de réclamations.

98 À cet égard, comme pour le service national de placement, la Loi n'innove pas puisque des dispositions sur le travail partagé existent depuis au moins 1977 dans les différentes lois fédérales sur l'assurance-chômage.

99 Enfin, pour ce qui est des cours et programmes de formation, l'article 25 de la Loi vise à protéger les prestataires dans les situations où ils cherchent à acquérir de nouvelles connaissances pour pallier un risque futur de chômage.

100 Le caractère véritable de cette disposition est donc de protéger le prestataire en présumant qu'il est toujours en chômage, capable de travailler et disponible à cette fin, même dans le cas où il suit un cours ou un programme de formation auquel il a pu être dirigé par la Commission.

101 Le but recherché apparaît ici aussi manifeste, soit la mise en place de mesures pour inciter les prestataires à poser les gestes requis pour retourner au travail et ainsi cesser leur dépendance au régime d'assurance-emploi.

102 Cette analyse des dispositions contestées de la Loi démontre donc que leur caractère véritable est l'établissement de mesures de soutien au régime d'assurance-emploi. Ces mesures sont actives et préventives et visent à pallier les risques de chômage de trop longue durée et à favoriser le retour au travail le plus rapide et le plus efficace possible des prestataires.

103 De fait, la preuve révèle que le coût des prestations de chômage de la partie I est nettement supérieur à celui des prestations d'emploi et mesures de soutien de la partie II²², ce qui confirme leur rôle accessoire au sein du régime d'assurance-emploi. L'article 78 de la Loi prévoit même un plafond aux sommes qui peuvent être portées au débit du Compte d'assurance-emploi aux fins de la partie II.

104 En définitive, le contenu de ces articles de la Loi portant sur les mesures actives montre que leur caractère véritable est directement rattaché au régime d'assurance-emploi, soit à la catégorie de sujets "assurance-chômage" qui relève du Parlement.

105 Mais ce n'est pas tout. Au-delà de ce que cette analyse des dispositions révèle quant à leur caractère véritable, ces articles se rattachent aussi à une Loi qui, dans son l'évolution historique, a toujours inclus des dispositions similaires de nature active. Qui plus est, l'interprétation de la compétence du Parlement en matière d'assurance-chômage confirme que le caractère véritable de ces dispositions fait indéniablement partie de ce que les tribunaux ont reconnu comme étant la compétence fédérale en matière d'assurance-chômage.

iii. L'évolution historique de la Loi

106 Sous ce rapport, l'évolution historique des différentes lois fédérales en matière d'assurance-chômage confirme que des mesures actives de la nature de celles attaquées par le Syndicat d'Arvida et la CSN ont, de tout temps, fait partie de l'exercice de la compétence fédérale dans ce domaine.

107 La première loi sur le sujet, soit la Loi de 1935, juxtaposait déjà au régime d'assurance contre le chômage un service national de placement. Son titre le mentionnait et son préambule faisait état de la nécessité de "[...] procurer un service national de placement et d'assurance contre le chômage, [...]".

108 Tant le Conseil privé²³ que la Cour suprême²⁴ ont jugé que par cette Loi de 1935, le Parlement s'arrogeait une compétence appartenant aux provinces, car il légiférait en matière d'assurance sociale et d'assurance touchant les droits civils des employeurs et des employés. Or, cette déclaration d'inconstitutionnalité visait non seulement le régime d'assurance-chômage en tant que tel, mais aussi les dispositions régissant le service national de placement puisque les deux instances les ont considérées comme étant intrinsèquement liées au régime lui-même.

109 En effet, sur le service national de placement inclus dans la Loi de 1935, les deux instances ont affirmé ceci :

- Le Conseil privé²⁵ :

[...] In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed up with the insurance provisions of Part III. that it is impossible to sever them. [...]

- La Cour suprême²⁶ :

By themselves the provisions of Part II and of certain portions of Parts IV and V might be unobjectionable but in my opinion they are so inextricably interwoven with the powers of the Commission set up under Part I and with the scheme of unemployment insurance referred to in Part III that they must stand or fall according to the validity or otherwise of sections 15 to 38 inclusive which form Part III.

(Le Tribunal souligne)

110 Ces arrêts ont mené à l'amendement constitutionnel de 1940 qui a ajouté le paragraphe 91(2A) à la Constitution, soit la catégorie de sujets "L'assurance-chômage" ou, dans sa version anglaise, "the class of subjects "Unemployment insurance"".

111 À la suite de cet amendement constitutionnel, le Parlement a adopté la "Loi établissant une commission d'assurance-chômage, une assurance contre le chômage ainsi qu'un service national de placement, et visant d'autres fins connexes"²⁷ (Loi de 1940).

112 Comme son titre l'indique, et de façon similaire à la Loi de 1935, la Loi de 1940 comprenait aussi un régime d'assurance contre le chômage et un service national de placement. Les articles 28 et 31 de cette Loi de 1940 prévoyaient de plus la possibilité de cours d'études et de formation pour faciliter le retour au travail.

113 Ainsi, dès l'origine de l'exercice de la compétence fédérale en matière d'assurance-chômage, la loi prévoyait à la fois un service national de placement et certaines mesures de formation pour les assurés du régime.

114 Comme l'a déjà souligné le juge Beetz dans l'arrêt *Martin Service Station*²⁸, "[...] L'historique d'une législation fournit un point de départ qui peut s'avérer utile [sans être décisif par contre] à la détermination d'une compétence législative particulière; [...]".

115 En 1971, la législation évoluait de nouveau à la suite de l'adoption de la Loi de 1971 sur l'assurance-chômage²⁹ (Loi de 1971). Tout en étendant la couverture d'assurance-chômage à un plus grand nombre d'employés, la Loi de 1971 établissait qu'un prestataire remplissait toujours les conditions d'admissibilité même s'il était en cours de formation. La Loi de 1971 comportait encore des dispositions sur le service national de placement.

116 Six ans plus tard, la Loi de 1971 fut modifiée par la Loi régissant l'emploi et l'immigration³⁰ (Loi de 1977). À compter de cette date, la notion de travail partagé visant à préserver des emplois

existants et à éviter la mise à pied de nombreux assurés fut instaurée (art. 37). Les programmes de formation étaient maintenus et s'adressaient aux assurés du régime, tandis que les programmes de création d'emploi permettaient aux prestataires de travailler sur une base volontaire à différents projets dans leur collectivité, sans pour autant mettre en péril leur droit de recevoir des prestations.

117 Ainsi, quand la Loi actuelle prévoit un service national de placement, des cours de formation pour les assurés du régime et des mesures visant le travail partagé, elle s'inscrit dans une continuité de l'évolution historique des lois fédérales en matière d'assurance-chômage.

118 À la différence des prestations de chômage, ces mesures touchant le service national de placement, le travail partagé et les cours de formation constituent des mesures actives plutôt que passives qui favorisent un retour au travail plus rapide des prestataires et la préservation des emplois existants.

119 Là où la Loi innove, c'est au niveau des prestations d'emploi qui constituent une forme de mesures actives différente des précédentes.

120 Toutefois, le fait que la Loi innove à ce chapitre a peu d'influence, car l'évolution historique de l'exercice de la compétence fédérale en matière d'assurance-chômage démontre que celle-ci a toujours inclus une forme quelconque de mesures actives, et ce, depuis ses débuts.

121 C'est d'ailleurs ainsi que cette compétence fédérale du paragraphe 91(2A) de la Constitution a été comprise et interprétée au fil des ans.

iv. La compétence fédérale en assurance-chômage

122 Pour délimiter les paramètres de la compétence fédérale en matière d'assurance-chômage, on doit d'abord la situer dans une perspective historique.

123 En cette matière, le législateur fédéral a initialement adopté la Loi de 1935. Quitte à le répéter, il a soumis l'examen de sa validité constitutionnelle à la Cour suprême et au Conseil privé en 1936 et 1937. Les deux instances ont décrété que la Loi de 1935 dans sa totalité était inconstitutionnelle et ultra vires des pouvoirs du Parlement. Selon les deux cours, tous les aspects de la Loi de 1935 étaient intrinsèquement liés les uns aux autres. Bref, ils faisaient partie d'un ensemble et l'ensemble fut jugé inconstitutionnel.

124 Dès 1940, l'amendement constitutionnel du paragraphe 91(2A) était adopté avec, il faut le souligner, l'accord unanime des neuf provinces faisant alors partie du Canada³¹. L'objectif apparaissait clair, soit de permettre au Parlement de "réadopter", cette fois validement, la Loi de 1935. La Loi de 1940 qui suivit l'amendement constitutionnel du paragraphe 91(2A) était d'ailleurs identique à la Loi de 1935 à quelques exceptions mineures près.

125 De ce contexte historique, deux constatations s'imposent.

126 Premièrement, il est logique de penser que la compréhension qu'avaient les législateurs de l'époque de l'étendue de la compétence en matière d'assurance-chômage ait été fortement influencée par la teneur des propos du Conseil privé et de la Cour suprême à qui la validité de la Loi de 1935 avait été soumise.

127 À ce sujet, dans l'arrêt *Attorney-General for Ontario c. Canada Temperance Federation*³² portant sur la Loi de tempérance du Canada³³, le Conseil privé a déjà dit :

[...] on constitutional questions, it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by Governments and subjects. [...]"

128 Or, en 1936 et 1937, le Conseil privé et la Cour suprême avaient considéré que le régime d'assurance-chômage et la Loi de 1935 formaient un tout, y compris en ce qui concerne ses dispositions portant sur un service national de placement. Si tout cet ensemble avait été jugé inconstitutionnel parce qu'il s'adressait, dans son entièreté, à une matière "d'assurance contre le chômage", comment alors ne pas concevoir que le gouvernement fédéral et les provinces, qui avaient unanimement convenu de conférer au Parlement la compétence en matière "d'assurance-chômage", n'aient pas compris l'expression de la même façon.

129 L'adoption de la Loi de 1940, qui n'a fait l'objet d'aucune contestation que ce soit par les législatures provinciales, en est le juste reflet.

130 Deuxièmement, il est tout aussi logique de croire que l'utilisation de l'expression "L'assurance-chômage" pour définir la compétence fédérale en la matière correspond à la compréhension qu'on en avait à l'époque. Comme le soulignait la Cour suprême dans l'affaire *R. c. Big M Drug Mart*³⁴, "[l]'objet d'une loi est fonction de l'intention de ceux qui l'ont rédigée et adoptée à l'époque, et non pas d'un facteur variable quelconque".

131 Or, la preuve a démontré qu'en 1940, un régime d'assurance-chômage, et partant une compétence en cette matière, ne se concevait pas sans le corollaire d'un service national de placement et donc, sans une forme de mesures actives visant à favoriser le retour au travail rapide du bénéficiaire du régime.

132 Ces deux constatations tirées de ce contexte historique mènent à la conclusion suivante.

133 Contrairement à ce que plaident le Syndicat d'Arvida et la CSN, la compétence fédérale en matière d'assurance-chômage ne peut être limitée à un simple régime d'assurance contre le chômage et au seul versement de prestations de chômage. Bref, la compétence fédérale en cette matière ne se limite pas à un régime qui perçoit des cotisations pour, par la suite, verser des prestations à des chômeurs en cas de perte involontaire d'emploi, sans plus.

134 Cette compétence comporte plutôt un volet de mesures à caractère actif qui, en 1940, s'exprimait par le biais de la création d'un service national de placement et la mise en place de cours de formation. De telles mesures se voulaient alors un complément au régime d'assurance en tant que tel, afin de minimiser le risque d'un chômage trop long et favoriser un retour au travail rapide. L'objectif manifeste étant de faire en sorte de verser des prestations de chômage le moins longtemps possible.

135 Cela dit, les interprétations des tribunaux supérieurs qui suivirent l'exercice par le Parlement de sa compétence en matière d'assurance chômage ont confirmé que cette compétence n'est pas limitée à une seule notion d'assurance contre le chômage et de versement de prestations de chômage.

136 D'abord, dans l'arrêt *Martin Service Station*³⁵, la Cour suprême se refusa de voir de façon limitée la compétence fédérale en matière d'assurance-chômage. Le juge Beetz souligna ainsi que "[m]ême si l'on accepte, [...], la prétention de l'appelante selon laquelle la compétence du Parlement en vertu du par. (2A) de l'art. 91 de la Constitution, [...], doit être limitée par un aspect assurance, il ne s'ensuit pas, [...], que les personnes établies à leur propre compte n'encourent jamais de risque

assurable de chômage [...], [ou que] le Parlement s'est éloigné du cadre de l'assurance" en adoptant des dispositions les concernant. En parlant des personnes travaillant à leur compte, le juge Beetz ajouta³⁶ :

[...] C'est principalement dans le but de protéger ces derniers du risque de manquer de travail et d'être contraints à l'inactivité que la portée de la législation a été élargie. Qu'ils travaillent à leur propre compte ou en vertu d'un contrat de service, les conducteurs de taxi et d'autobus par exemple sont exposés au risque de manquer de travail. À mon avis, c'est là un risque assurable, du moins dans le cadre d'une assurance publique obligatoire qui n'a pas été conçue pour être appliquée selon de rigoureux principes actuariels, pourvu qu'elle respecte en gros la nature d'un système d'assurance, y compris la protection contre le risque et un régime de cotisations.

(Le Tribunal souligne)

137 Ainsi, selon la Cour suprême, dans la mesure où l'exercice de la compétence respecte "en gros" la nature d'un système d'assurance, il s'agit là d'un exercice qui cadre avec la compétence fédérale en matière d'assurance-chômage.

138 Ensuite, dans l'arrêt Hills³⁷, la juge L'Heureux-Dubé s'exprima ainsi quant à l'objectif de la Loi de 1971 :

Au fil des ans, l'objectif premier de la loi originale est demeuré inchangé. Les nombreuses modifications qui y ont été apportées étaient destinées à assouplir les conditions d'admissibilité et à augmenter les prestations et les cotisations afin d'éliminer les injustices. Elles visaient en outre à favoriser la création d'emplois et à coordonner les autres programmes d'aide sociale. Le changement, s'il en est, réside plutôt dans le fait qu'on soit passé de l'objectif principal de protection à l'objectif du marché du travail. Par le partage à l'échelle nationale tant du risque que du coût du chômage, la Loi a toujours conservé son caractère de régime d'assurance.

(Le Tribunal souligne)

139 Tout compte fait, déjà en 1988, la Cour suprême notait dans la loi un certain changement de l'objectif principal de protection à celui du marché du travail, tout en soulignant que, même dans une telle perspective, la loi conservait toujours son caractère de régime d'assurance.

140 Dans un arrêt subséquent, Tétreault-Gadoury³⁸, le juge La Forest mentionna cette fois ceci relativement à l'objet de la Loi de 1971 :

Il faut se demander d'abord si les objectifs de la loi sont suffisamment importants pour l'emporter sur un droit reconnu par la Charte. Comme l'a fait remarquer le juge Lacombe, [1988] A.C.F. no 818, précité, à la p. 262, citant l'arrêt *Bliss c. Procureur général (Can.)*, [1979] 1 R.C.S. 183, aux pp. 185 et 186, l'objet de la Loi de 1971 sur l'assurance-chômage est, et a toujours été, "d'établir un régime d'assurance sociale aux fins d'indemniser les chômeurs pour la perte de revenus provenant de leur emploi et d'assurer leur sécurité économique et sociale pendant un certain temps et les aider ainsi à retourner sur le marché du travail".

(Le Tribunal souligne)

141 En décrivant la loi fédérale sur l'assurance-chômage, le juge La Forest réfère à l'établissement d'un régime d'assurance sociale ayant trois objectifs : indemniser les chômeurs, assurer leur sécurité pendant un certain temps et les aider à retourner sur le marché du travail.

142 Enfin, dans l'arrêt *Williams c. Canada*³⁹, le juge Gonthier s'exprimait comme suit :

Dans l'arrêt *Tétreault-Gadoury c. Canada* (Commission de l'emploi et de l'immigration), [1991] 2 R.C.S. 22, à la p. 41, notre Cour cite les propos du juge Lacombe, dans cette affaire, suivant lesquels la Loi de 1971 sur l'assurance-chômage a pour objet "d'établir un régime d'assurance sociale aux fins d'indemniser les chômeurs pour la perte de revenus provenant de leur emploi et d'assurer leur sécurité économique et sociale pendant un certain temps et les aider ainsi à retourner sur le marché du travail". Il ressort de ce passage que l'objet des prestations d'assurance-chômage est orienté vers le passé, le présent et l'avenir. L'admissibilité aux prestations dépend de l'exercice, dans le passé, d'un emploi donnant droit aux prestations.

Ces prestations visent à fournir un revenu et une sécurité pour le présent, en remplacement du revenu d'emploi perdu. Cependant, les prestations sont également orientées vers l'avenir en ce qu'elles permettent au bénéficiaire de trouver un nouvel emploi, sans souffrir de privations et tout en éprouvant un sentiment de sécurité.

(Le Tribunal souligne)

143 Encore une fois, commentant l'exercice de la compétence fédérale en matière d'assurance-chômage, le juge Gonthier notait l'objectif important de permettre aux bénéficiaires de trouver un nouvel emploi.

144 À partir de cette analyse historique, et devant l'interprétation que les tribunaux supérieurs ont donnée à la compétence fédérale en matière d'assurance-chômage, on ne peut que constater qu'un des objets mêmes de cette compétence est de favoriser le retour au travail des assurés, prestataires

ou participants au régime. Bien avant l'adoption de la Loi actuelle, le service national de placement, le travail partagé et les cours et programmes de formation s'inscrivaient dans cette perspective. En 1996, la Loi a innové en y ajoutant d'autres mesures actives, soit les prestations d'emploi.

145 Or, tout comme pour les mesures actives qui les avaient précédées, les prestations d'emploi partagent le même objectif de favoriser le retour au travail des participants, soit les personnes qui ont cotisé au régime. Il s'ensuit que les prestations d'emploi doivent être vues comme faisant partie de l'exercice de la compétence exclusive fédérale en "assurance-chômage", au même titre que le service national de placement, le travail partagé et les cours et programmes de formation.

146 En effet, la Constitution doit être interprétée de manière souple et évolutive. On doit l'adapter aux changements et aux nouvelles réalités. Déjà en 1930, le Conseil privé en faisait état⁴⁰ :

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention": Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's Canadian Constitution, 3rd ed., p. 347.

(Le Tribunal souligne)

147 Dans la même veine et plusieurs années plus tard, dans l'arrêt *Martin Service Station*⁴¹, en parlant justement de la compétence fédérale sur l'assurance-chômage, le juge Beetz mentionnait qu'une "compétence législative est essentiellement dynamique".

148 La doctrine reconnue en matière constitutionnelle confirme ces règles d'interprétation⁴² :

[...] The doctrine of progressive interpretation is one of the means by which the Constitution Act, 1867 has been able to adapt to the changes in Canadian society. What this doctrine stipulates is that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. For example, the phrase "undertakings

connecting the provinces with any other or others of the provinces" (s. 92(10)(a) includes an interprovincial telephone system, although the telephone was unknown in 1867; the phrase "criminal law" (s. 91(27) "is not confined to what was criminal by the law of England or of any province in 1867"; the phrase "banking" (s. 91(15) is not confined to "the extent and kind of business actually carried on by banks in Canada in 1867". On the contrary, the words of the Act are to be given a "progressive interpretation", so that they are continuously adapted to new conditions and new ideas.

[...]

The idea underlying the doctrine of progressive interpretation is that the Constitution Act, 1867, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute, which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures. It must be remembered too that the Constitution Act, 1867, like other federal constitutions, differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts.

(Le Tribunal souligne)

149 Le Tribunal est d'avis qu'il faut appliquer ces principes d'interprétation constitutionnels aux prestations d'emploi de la Loi qui sont attaquées. D'une part, en ayant en mémoire la vision initiale de la compétence fédérale en matière d'assurance-chômage, telle que jugée par le Conseil privé et la Cour suprême et telle que comprise par les législateurs de l'époque; d'autre part, en faisant preuve de la même ouverture d'esprit que celle des tribunaux supérieurs dans la qualification de cette compétence.

150 En appliquant ces principes ici, on constate aisément que la notion d'"assurance-chômage" a grandement évolué au fil des ans. Initialement, le régime d'assurance-chômage cherchait à contrôler le chômage dans une optique "assurance" et par une approche "placement".

151 Au début, l'aspect "assurance" était limité à la couverture de "risques non prévisibles". Il excluait des risques autrement prévisibles comme, par exemple, la plupart du chômage saisonnier. L'évolution du régime a graduellement étendu cet aspect "assurance", à un point tel qu'il a couvert des risques de chômage éminemment prévisibles sans qu'on ne remette en question l'exercice de la compétence du Parlement en la matière.

152 De la même façon, le contrôle initial du chômage par l'aspect "placement" du régime a, lui aussi, graduellement évolué. On y a successivement ajouté des cours et des programmes de formation, des mesures de travail partagé et maintenant, des prestations d'emploi, toujours avec le même dénominateur commun de soutien au régime par des mesures actives destinées aux personnes qui y participent.

153 Pour terminer, on ne peut ignorer que l'expression "l'assurance-chômage" du paragraphe 91(2A) de la Constitution est, de surcroît, une "catégorie de sujets" sur laquelle le Parlement détient l'autorité législative exclusive pour "toutes les matières" qui en font partie. Or, si cette catégorie de sujets a toujours compris à la fois un aspect "assurance" et un aspect "mesures actives", les prestations d'emploi, au même titre que les autres mesures actives, se doivent d'être elles aussi une matière tombant dans cette catégorie.

154 Dans le contexte de la Loi, les prestations d'emploi ne peuvent être considérées comme étant une matière tombant dans la catégorie de sujets "propriété et droits civils" du paragraphe 92(13) de la Constitution. Pas plus que les cours ou les programmes de formation de la Loi ne peuvent être vus comme tombant dans le domaine de l'éducation de l'article 93 de la Constitution.

155 Dans un cas comme dans l'autre, l'objet des dispositions n'est ni l'éducation, ni la propriété et les droits civils, mais bien la mise en place de mesures de soutien à un régime d'assurance-emploi qui soit efficace, économique et durable.

156 En conclusion, le Tribunal considère que la compétence fédérale en matière d'assurance-chômage s'étend à toutes les mesures actives attaquées de la Loi, y compris les prestations d'emploi. En effet, ces mesures s'inscrivent précisément dans l'un des objets mêmes de cette compétence, soit celui de favoriser le maintien ou le retour au travail par des mesures destinées aux assurés du régime, dans un objectif manifeste de réduire, autant que faire se peut, la durée pendant laquelle des prestations de chômage devraient autrement leur être versées.

c) Les autres prétentions du Syndicat d'Arvida et de la CSN

i. L'interprétation restrictive de la compétence fédérale

157 Malgré ce qui précède, le Syndicat d'Arvida et la CSN opposent en premier lieu que la compétence fédérale du paragraphe 91(2A) devrait être interprétée de façon restrictive. Il ne s'agirait pas d'une compétence générale en matière sociale, mais bien d'une compétence qui doit être liée à un régime d'assurance contre le risque de chômage.

158 Pour justifier leurs prétentions, ils soulignent que la compétence conférée au Parlement par le paragraphe 91(2A) est une exception à la compétence des législatures provinciales en matière d'assurance, de questions sociales et de propriété et droits civils. Puisqu'il s'agit d'une exception, elle devrait être interprétée de façon limitative et restreinte aux seuls aspects d'assurance et de protection contre le risque involontaire de chômage ainsi qu'au versement de prestations de chômage qui en découlent.

159 Pour soutenir cette position, le Syndicat d'Arvida et la CSN s'appuient sur les débats de la Chambre des communes du 25 juin 1940 portant sur la "modification à l'Acte de l'Amérique du Nord britannique afin d'assurer l'établissement d'un système d'assurance-chômage uniforme et obligatoire".

160 Plus particulièrement, ils réfèrent à l'exposé du premier ministre de l'époque relatif à cet amendement constitutionnel, notamment au fait que la demande d'amendement portait précisément sur l'assurance-chômage, sans quoi l'approbation des provinces aurait été plus difficile à obtenir⁴³.

161 Ils se réfèrent aussi aux propos du premier ministre précédent qui disait lors des débats sur l'adoption de la Loi de 1935⁴⁴ :

On notera que l'expression employée est la suivante : assurance contre le chômage. Il serait donc bien de comprendre, dès le début, qu'il s'agit d'une mesure d'assurance, et non pas d'une mesure de secours.

162 Également, ils invoquent les échanges de correspondance entre les premiers ministres du Québec et du Canada qui, disent-ils, établissent que l'objet visé par l'amendement constitutionnel était une compétence limitée du Parlement en matière d'assurance contre le chômage⁴⁵.

163 Enfin, ils plaident le sens usuel à donner à l'expression utilisée dans l'amendement, soit les mots "unemployment insurance" que les dictionnaires définissent ainsi⁴⁶ :

[...] : social insurance against involuntary unemployment that provides unemployment compensation for a limited period to unemployed workers; [...]

164 Il est vrai que l'on peut considérer le sens usuel des mots utilisés même pour comprendre une disposition de nature constitutionnelle. La Cour suprême l'a déjà fait en ce qui concerne le paragraphe 91(2) de la Constitution intitulé "The regulation of trade and commerce"⁴⁷.

165 En outre, il est exact qu'une preuve extrinsèque tirée des débats parlementaires ou des relations épistolaires entre les premiers ministres de l'époque est admissible pour aider à cerner le caractère et l'intention véritable d'une disposition législative et le contexte factuel qui a présidé à son avènement⁴⁸. Si elle est admissible, une telle preuve doit par contre avoir une valeur probante pertinente au débat, sans quoi son utilité est faible⁴⁹.

166 Cela dit, il ne s'ensuit pas pour autant que l'amendement constitutionnel du paragraphe 91(2A) doive déboucher sur une interprétation aussi restrictive que celle proposée par le Syndicat d'Arvida et la CSN.

167 D'abord, il n'y a aucune raison de ne pas appliquer à cet amendement les principes d'interprétation constitutionnels évolutifs et dynamiques déjà discutés. Après tout, l'amendement dont il s'agit a fait l'objet d'un accord unanime des provinces alors parties du Canada.

168 Ensuite, même en adoptant l'approche suggérée par le sens usuel des mots ou la portée restreinte qu'attribuent le Syndicat d'Arvida et la CSN aux débats parlementaires de l'époque, il n'en reste pas moins que la compétence fédérale en matière d'assurance-chômage ne se limite pas au seul paiement de prestations de chômage aux assurés du régime. Une telle vision ferait fi notamment de l'interprétation donnée par le Conseil privé et la Cour suprême à ce que comprend l'assurance-chômage.

169 Le Syndicat d'Arvida et la CSN vont jusqu'à suggérer dans leur argumentation que la compétence fédérale en matière d'assurance-chômage ne comprend pas le droit de mettre en place un service national de placement, tel que celui prévu à l'article 60 de la Loi. Adhérer à cette position serait contraire non seulement à ce qu'ont conclu le Conseil privé et la Cour suprême dans leurs arrêts, mais également à la conception historique de l'époque de tout régime d'assurance-chômage.

170 De plus, tel que le démontre l'analyse qui précède, les mesures actives de la Loi ont toutes un lien direct avec le régime d'assurance-emploi en ce qu'elles sont offertes aux prestataires ou bénéficiaires de celui-ci. Dans un tel contexte, il est difficile de prétendre qu'il n'y a pas de lien entre, d'une part, ces prestations d'emploi, ce travail partagé et ces cours de formation et, d'autre part, cet aspect "assurance" du régime puisque ce sont soit les prestataires, soit les participants au régime qui peuvent bénéficier de ces mesures.

171 Enfin, on ne peut non plus dissocier ces mesures de nature préventive de l'aspect "assurance" propre au régime car elles visent à faire en sorte que le coût des prestations de chômage à verser et leur durée soient diminués le plus efficacement possible.

172 À tout événement, le Tribunal estime que même si on retenait les arguments du Syndicat d'Arvida et de la CSN voulant que ces mesures actives ne relèvent pas de la compétence fédérale en matière d'assurance-chômage et empiètent sur les compétences des législatures, ces mesures constitueraient néanmoins des dispositions qui font partie d'un régime législatif fédéral valide et qui y sont suffisamment intégrées⁵⁰.

173 En effet, personne ne conteste ici que la Loi constitue un régime législatif fédéral valide. Or, que ce soit au niveau des prestations d'emploi, du service national de placement, du travail partagé ou des cours de formation, toutes ces mesures actives ont un lien fonctionnel et rationnel avec l'ensemble de la Loi.

174 À vrai dire, les articles touchant ces mesures actives sont intimement liés au mécanisme de la Loi et n'ont de sens que par rapport aux autres articles de la Loi auxquels ils sont intégrés. On ne peut affirmer que ces mesures ont un contenu indépendant du reste de la Loi, puisqu'elles s'adressent directement aux assurés du régime qui ont occupé un emploi assurable, payé des cotisations et rempli les autres conditions que la Loi prévoit.

175 Tout comme pour les prestations de chômage, ces mesures actives ne sont que d'ordre temporaire et liées directement au retour au travail des bénéficiaires justement à cause de leur interrelation avec le régime instauré par la Loi.

176 Cet argument d'interprétation restrictive de la compétence fédérale du paragraphe 91(2A) doit donc être rejeté.

ii. L'absence de contributions monétaires du gouvernement fédéral et la preuve faite à l'audience

177 En second lieu, le Syndicat d'Arvida et la CSN font valoir que l'absence de contributions monétaires de l'État fédéral au régime édicté par la Loi depuis 1996 et les changements draconiens à la couverture du régime relatés par les experts Rose et Lacroix établissent que ces dispositions sur les mesures actives n'ont plus aucune corrélation avec l'exercice de la compétence fédérale en matière d'assurance-chômage, telle que comprise au moment de son adoption en 1940.

178 Le Tribunal ne peut retenir ces prétentions.

179 D'abord, l'absence de contributions monétaires de l'État fédéral au régime d'assurance-emploi, qui selon la preuve date de 1990, ne rend aucunement inconstitutionnels les articles attaqués touchant les mesures actives. Il s'agit là d'une question à saveur politique, et non juridique, qui touche les mécanismes choisis pour l'exercice de la compétence. L'efficacité et l'opportunité de ces mécanismes ne sont pas des questions qui sont du ressort des tribunaux⁵¹.

180 Ensuite, la preuve des experts touchant la couverture actuelle du régime concerne la prétendue baisse de générosité de la Loi, ce qui n'est pas non plus du ressort des tribunaux.

181 Au surplus, cette preuve n'est d'aucune utilité à la solution des questions soumises au Tribunal. En effet, l'essentiel des propos des experts Rose et Lacroix s'adressait à l'entendue de la couverture du régime et à la critique des indicateurs choisis pour en analyser l'efficacité.

182 Il appert que ces experts divergent d'opinion sur les pourcentages respectifs à attribuer à l'influence qu'ont le resserrement du régime et les changements du marché du travail sur ces indicateurs. Or, le Tribunal n'a pas à trancher entre leurs versions, car l'étendue de la couverture actuelle du régime d'assurance-emploi, peu importe l'indicateur retenu, n'a rien à voir avec la détermination de la constitutionnalité des articles de la Loi visant les mesures actives.

d) La position du Procureur général du Québec

183 Bien que les procureurs généraux de toutes les législatures provinciales aient été avisés du litige et invités à intervenir en l'instance, aucun ne l'a fait, mis à part celui du Québec.

184 Quant à ce dernier, il a adopté une position "neutre" sur la question de la constitutionnalité des mesures actives établies par la Loi. Bref, il n'a appuyé ni le Syndicat d'Arvida ou la CSN, ni le Procureur général du Canada.

185 En définitive, les législatures, dont on dit les pouvoirs usurpés par l'exercice de la compétence du Parlement en matière d'assurance-chômage, ne contestent pas cet exercice. La preuve révèle même que, suivant l'application des dispositions de la partie II de la Loi, onze ententes sont intervenues entre le gouvernement du Canada et les provinces et territoires, dont la province de Québec⁵².

186 Le Tribunal se doit de noter que les législatures ne soutiennent pas le Syndicat d'Arvida et la CSN dans leurs prétentions. Bien qu'en soi, cela ne suffise pas pour conclure à la constitutionnalité des articles attaqués, on ne peut par contre l'ignorer en matière constitutionnelle.

187 En effet, suivant le principe de présomption de constitutionnalité des lois, c'est à la partie qui conteste la validité constitutionnelle de dispositions d'assumer le fardeau de démontrer la justesse de ses prétentions⁵³.

188 Or, cette absence de contestation des législatures provinciales dont la compétence aurait été prétendument usurpée appuie la conclusion voulant que le Syndicat d'Arvida et la CSN ne se soient pas déchargés du fardeau qui est le leur d'établir que les articles de la Loi touchant les mesures actives excèdent la compétence du Parlement.

e) Le pouvoir fédéral de dépenser

189 En terminant sur cette première question, le Tribunal souligne que le Syndicat d'Arvida et la CSN ont longuement argumenté que les articles attaqués de la Loi touchant les mesures actives ne pouvaient se justifier par l'exercice du pouvoir fédéral de dépenser. Ils ont été appuyés sur ce point par le Procureur général du Québec, dont l'intervention s'est limitée exclusivement à cet argument.

190 Malgré l'intérêt évident du sujet, il n'est pas nécessaire de trancher ici cette partie du débat touchant l'étendue du pouvoir fédéral de dépenser, puisque le Tribunal conclut que les articles attaqués de la Loi sur les mesures actives entrent dans l'exercice de la compétence fédérale en matière d'assurance-chômage.

2) Les articles de la Loi relatifs aux cotisations exigées, soit les articles 66, 66.1 et 66.2, sont-ils valides du point de vue constitutionnel?

191 Pour résoudre la deuxième question touchant la validité constitutionnelle des articles 66, 66.1 et 66.2 de la Loi, il y a lieu d'examiner ce qui suit :

- a) Le caractère véritable des articles attaqués eu égard à leur contenu et à leur historique;
- b) Les prétentions du Syndicat d'Arvida et de la CSN sur :
 - i. L'effet de l'application de ces articles;
 - ii. Leur caractère imprécis;
 - iii. La taxe dite "déguisée" ou "illégale";
 - iv. La taxation des législatures provinciales par le Parlement;
 - v. Le droit international.

192 Tout comme pour la première, cette deuxième question requiert ainsi d'examiner les dispositions contestées de la Loi pour en déterminer le caractère véritable et, ensuite, établir si elles relèvent ou non de la compétence du Parlement. Ici aussi, il convient d'analyser le contenu des articles attaqués et leur évolution historique pour en cerner la caractéristique dominante et en définir l'objet.

- a) Le caractère véritable des articles attaqués eu égard à leur contenu et à leur historique

193 Les dispositions relatives aux cotisations exigées dont le Syndicat d'Arvida et la CSN contestent la validité constitutionnelle sont les articles 66, 66.1 et 66.2 qui se trouvent à la partie III de la Loi intitulée "Cotisations et autres questions financières".

194 L'article 66 couvre les années 1997 à 2001 et prescrit :

- 66. Pour chaque année, la Commission fixe, avec l'agrément du gouverneur en conseil, sur la recommandation du ministre et du ministre des Finances, le taux de cotisation qui, à son avis, permet le mieux, au cours d'un cycle économique, d'assurer un apport de revenus suffisant pour couvrir les débits autorisés sur le Compte d'assurance-emploi et maintenir une certaine stabilité des taux.

(Le Tribunal souligne)

195 Pour les années 2002 et 2003, l'article 66.1 édicte⁵⁴ :

66.1 Par dérogation à l'article 66, le taux de cotisation pour l'année 2002 et celui pour l'année 2003 sont fixés par le gouverneur en conseil sur la recommandation du ministre et du ministre des Finances.

(Le Tribunal souligne)

196 Enfin, pour l'année 2004, l'article 66.2 prévoit⁵⁵ :

66.2 Par dérogation à l'article 66, le taux de cotisation pour l'année 2004 est fixé à 1,98 %.

(Le Tribunal souligne)

197 Ainsi, de 1997 à 2001, c'est la Commission qui a fixé les taux de cotisation avec l'accord du Cabinet, sur recommandation du ministre du Développement des ressources humaines et du ministre des Finances.

198 Pour ce faire, l'article 66 prescrivait un taux de cotisation qui devait assurer un apport de revenus suffisant pour couvrir les débits autorisés au Compte d'assurance-emploi au cours d'un cycle économique, tout en maintenant une certaine stabilité dans les taux. Durant cette période, ce mécanisme d'établissement du taux de cotisation faisait donc référence à une relation directe entre les cotisations (soit un niveau de revenus suffisant) et les prestations (soit les débits sur le Compte d'assurance-emploi), tout en prévoyant que les taux établis devaient être stables au cours d'un cycle économique.

199 Pour 2002 et 2003, la situation a changé. Les paramètres prévus à l'article 66 pour l'établissement des taux de cotisation ont été écartés. Pour ces deux années, le Cabinet a fixé les taux de cotisation, sur recommandation du ministre du Développement des ressources humaines et du ministre des Finances.

200 Pour l'année 2004, ce n'est ni la Commission ni le Cabinet qui doivent fixer le taux de cotisation. Il est prévu spécifiquement à la Loi. Bref, c'est le Parlement, par l'adoption de l'article 66.2, qui le fixe.

201 Ce constat étant fait, il apparaît indéniable que ces articles 66, 66.1 et 66.2 ont pour objet soit de fixer directement les taux de cotisation, soit de prévoir les mécanismes qui le permettent, afin de déterminer ce qui doit être payé par les employeurs et les employés en vertu de la Loi. Par leur objet et par leurs effets, le caractère véritable de ces dispositions est donc directement relié à l'exercice même de la compétence du Parlement en matière d'assurance-chômage, soit au financement du régime.

202 Comme en témoigne l'historique de l'évolution des dispositions analogues des lois fédérales en matière d'assurance-chômage, l'imposition de tels taux de cotisation est à la base même de l'exercice de la compétence fédérale en cette matière depuis ses débuts.

203 À l'origine, la Loi de 1940 prévoyait à son article 17 que les "taux de contribution" étaient ceux prévus à l'annexe II de la loi. Cette annexe établissait les échelles des contributions tant du patron que de la personne employée, selon des taux hebdomadaires fixés par catégorie de personnes employées. À cette époque, le Parlement, en adoptant la Loi de 1940, fixait ainsi lui-même les taux dans l'exercice de sa compétence en matière d'assurance-chômage.

204 La situation est demeurée la même jusqu'en 1955 au moment où la Loi concernant la Loi sur l'assurance-chômage⁵⁶ (Loi de 1955) a été adoptée. Selon l'article 37 de cette loi, les "taux de contribution" étaient ceux prévus à une table apparaissant à la fin du paragraphe 1. En adoptant la Loi de 1955, le Parlement fixait donc encore les taux, tout comme dans la Loi de 1940. Cette situation a ainsi prévalu jusqu'en 1971, soit pendant près de 31 ans.

205 À partir de 1971, les mécanismes d'établissement des taux de cotisation ont changé. Affaire de flexibilité sans doute, compte tenu d'une économie moins stable et sujette à plus de soubresauts. Ainsi, à son article 62, la Loi de 1971 prévoyait que la Commission d'assurance-chômage, avec l'accord du Cabinet, fixait dorénavant les taux de cotisation pour chaque année, de telle sorte qu'ils couvrent "le coût de base rajusté des prestations de la présente loi au cours de l'année, déterminé en vertu de l'article 63".

206 L'article 63 prescrivait le mécanisme pour l'établissement des taux de cotisation. Ceux-ci étaient fixés en fonction du coût de base moyen des prestations pour l'année établi à partir des expériences des trois années précédentes, tout en tenant compte des montants nécessaires annuellement pour compenser ou réduire le déficit ou l'excédent du Compte d'assurance-chômage.

207 Tel que le confirment notamment les Lois révisées du Canada de 1985⁵⁷, un tel mécanisme est demeuré en vigueur pour la majeure partie de la période allant de 1971 à l'adoption de la Loi en 1996, sauf pour les années 1990 à 1992⁵⁸, 1995 et 1996⁵⁹. Pour ces cinq années, l'article 48.1 a été ajouté afin de déroger à l'article 48 (anciennement 62 de la Loi de 1971) et prescrire le taux de cotisation directement dans la loi, comme lors de la période antérieure à 1971.

208 Selon la preuve, le mécanisme de fixation des taux de cotisation établis par la Commission d'assurance-chômage en fonction du coût de base rajusté des prestations causait des difficultés. La méthode de calcul n'assurait pas une flexibilité suffisante pour, entre autres, accumuler les fonds nécessaires au Compte d'assurance-chômage advenant des périodes de récession plus sévères et donc, des périodes de chômage plus importantes⁶⁰.

209 Notamment, la conséquence suivante en découlait. Lorsqu'en période de récession, les déficits accumulés au Compte augmentaient de façon importante, cela entraînait, selon la formule de la Loi, la fixation de taux de cotisation plus élevés alors que la situation économique commandait au contraire qu'ils soient abaissés.

210 L'article 66 de la Loi a donc été adopté en 1996 pour pallier ce problème en assouplissant la méthode de calcul.

211 Ainsi, cet article prévoyait la fixation d'un taux de cotisation qui, d'un côté, tenait compte d'un apport de revenus (donc de cotisations) suffisant pour couvrir les débits autorisés sur le Compte d'assurance-emploi (donc les prestations). De l'autre côté, le mécanisme prévoyait par contre que les taux devaient assurer un tel apport au cours "d'un cycle économique", tout en maintenant "une certaine stabilité".

212 Ce bref historique révèle donc ceci.

213 Initialement et pour les trente et une premières années du régime d'assurance-chômage, le Parlement, par l'adoption des Lois de 1940 et de 1955, fixait les taux de cotisation.

214 Pendant les vingt-cinq années suivantes, soit de 1971 à 1996, la Commission d'assurance-chômage les fixait en fonction du coût de base rajusté des prestations, le tout selon un mécanisme décrété dans la loi, donc par le Parlement. Il y a toutefois eu de nombreuses années d'exception au début de la décennie 1990 alors que le Parlement a repris son rôle des années initiales.

215 À compter de 1997 et pendant cinq ans, la Commission a fixé les taux avec l'approbation du Cabinet selon un mécanisme prévoyant une relation entre les cotisations reçues et les prestations versées qui tienne compte d'un objectif de stabilité des taux dans un cycle économique donné.

216 En 2002 et 2003, la mécanique de fixation des taux est tombée dans le giron du Cabinet, sans autre précision. À compter de 2004, le taux étant fixé dans la Loi, le Parlement reprend le rôle qu'il avait assumé à ce chapitre durant les trente et une premières années du régime et au début des années 1990. En définitive, à ce chapitre, c'est un retour à la case départ.

217 Cela dit, que ce soit en regard de l'analyse du contenu des articles ou de leur évolution historique, une conclusion demeure. L'imposition d'un taux de cotisation aux employeurs et employés touche une matière qui relève et a toujours relevé de la compétence exclusive du Parlement, soit le financement du régime d'assurance-emploi créé par la Loi.

218 Lorsqu'il s'agit de dégager le caractère véritable d'une loi qui prévoit l'imposition d'un droit, la Cour suprême a, de fait, souligné ceci dans l'arrêt *Ontario Home Builders' Association*⁶¹ :

Cette démarche est aussi analogue à celle adoptée dans les décisions traitant de lois fédérales contestées pour le motif que l'imposition d'un droit - qui, selon les autorités fédérales, avait été adoptée conformément au par. 91(3) de la Loi constitutionnelle de 1867 - équivalait à la réglementation d'une matière relevant de la compétence exclusive des provinces. Les tribunaux ont toujours déterminé en premier lieu à quoi se rapportait, de par son caractère véritable, la loi fédérale prévoyant l'imposition d'un droit, et ensuite si cette loi avait trait à un domaine relevant de la compétence exclusive du gouvernement fédéral ou des provinces. C'est la démarche qu'a adoptée le juge en chef Laskin dans le Renvoi relatif à la Loi sur l'organisation du marché des produits agricoles, précité (voir également, entre autres : *Attorney-General of British Columbia c. Attorney-General of Canada*, [1924] A.C. 222, *Attorney-General for Canada c. Attorney-General for British Columbia*, [1930] A.C. 111, et *In re The Insurance Act of Canada*, [1932] A.C. 41; est également pertinent l'arrêt *Bank of Toronto c. Lambe* (1887), 12 App. Cas. 575 (où le Conseil privé a confirmé, comme ayant trait à la taxation en vertu du par. 92(2) - et non pas aux banques - une loi provinciale prévoyant une taxe sur les banques).

(Le Tribunal souligne)

219 En appliquant cette démarche ici, le Tribunal conclut que les articles en question et la Loi elle-même ont trait à un domaine qui relève de la compétence exclusive du gouvernement fédéral.

b) Les prétentions du Syndicat d'Arvida et de la CSN

220 D'ailleurs, devant cette constatation, on note que le Syndicat d'Arvida et la CSN ne soutiennent pas tant que ces articles 66, 66.1 et 66.2 empiètent sur les compétences des législatures provinciales. Ils prétendent plutôt que par leur effet et leur imprécision, ils dénatureraient le mécanisme d'établissement des taux de cotisation à l'assurance-emploi.

221 Depuis 1996, soulignent-ils, les taux de cotisation ne maintiennent plus la corrélation requise entre le niveau des cotisations perçues et celui des prestations versées. Cela rendrait les mécanismes

qui permettent de les fixer contrairement à la finalité même du régime d'assurance-emploi et donc, inconstitutionnels.

222 Ils prétendent aussi que ces dispositions seraient inconstitutionnelles, car elles constitueraient une taxe "déguisée" adoptée en violation de la Constitution.

i. L'effet de l'application des articles 66, 66.1 et 66.2

223 Dans un premier temps, les prétentions du Syndicat d'Arvida et de la CSN sur l'inconstitutionnalité des articles 66, 66.1 et 66.2 de la Loi s'articulent autour de ce que révèle la preuve quant à l'impact de la mise en place du nouveau mécanisme d'établissement des taux de cotisation de l'article 66.

224 Selon eux, depuis la mise en place de ce nouveau mécanisme, les surplus accumulés au Compte d'assurance-emploi ont augmenté de façon importante et démesurée⁶². D'un déficit de près de 7 milliards de dollars au 31 mars 1994, le Compte d'assurance-emploi est passé à un surplus dépassant 7 milliards au 31 mars 1997, pour culminer à un excédent de plus de 40 milliards au 31 mars 2002.

225 Selon le Syndicat d'Arvida et la CSN, la preuve démontre que depuis 1999, le niveau de ces surplus accumulés au Compte d'assurance-emploi a été fortement critiqué par le vérificateur général du Canada⁶³.

226 Pour l'exercice clos au 31 mars 1999, le rapport du vérificateur général comporte une mention dans l'état supplémentaire relatif au Compte d'assurance-emploi soulignant que l'excédent du Compte avait alors atteint 21 milliards de dollars et qu'il serait souhaitable de clarifier les facteurs servant à établir un niveau approprié de réserve⁶⁴.

227 Pour l'exercice clos au 31 mars 2000, il dénonce plus vigoureusement dans ses observations et points saillants ce qu'il qualifie de "Manque de clarté quant à la méthode d'établissement des taux de cotisation à l'assurance-emploi"⁶⁵.

228 Pour les exercices clos au 31 mars 2001 et au 31 mars 2002, le vérificateur général du Canada est encore plus direct et dit ne pouvoir conclure que l'esprit de la Loi a été respecté lors de l'établissement des taux de cotisation compte tenu de leur niveau anormalement élevé⁶⁶.

229 Ces critiques échelonnées de 1999 à 2002 sont toutes de même nature. Selon le vérificateur général, le solde du Compte d'assurance-emploi dépasse largement la réserve maximale jugée suffisante par l'actuaire en chef de DRHC. Précisons ici que ces critiques visent directement les taux de cotisation en eux-mêmes et insistent sur l'absence d'explications valables fournies sur le niveau du solde qui serait adéquat selon le gouvernement fédéral, nonobstant les recommandations de cet actuaire en chef.

230 La preuve révèle par ailleurs ce qui suit sur la position de l'actuaire en chef de DRHC quant aux taux de cotisation de l'assurance-emploi. Dans ses rapports pour les années 1998⁶⁷, 1999⁶⁸, 2000⁶⁹ et 2001⁷⁰, il énonce qu'à son avis, les taux de cotisation établis sont trop élevés. Il estime qu'une réserve maximale de 10 à 15 milliards de dollars dans le Compte d'assurance-emploi permettrait, en cas de récession, d'éponger tous les coûts à survenir au cours de celle-ci, tout en évitant un déficit cumulatif ou une hausse des taux de cotisation.

231 Par contre, l'actuaire en chef souligne que le fait de conserver des réserves importantes au Compte n'est pas inédit. Par exemple, en 1946, les réserves représentaient dix fois le montant annuel

des prestations et en 1956, quatre fois. En comparaison, au 31 mars 2002, les réserves de plus de 40 milliards de dollars représentent environ trois fois le montant annuel des prestations.

232 Un constat toutefois demeure selon le Syndicat d'Arvida et la CSN. Depuis 1999, les surplus accumulés au Compte d'assurance-emploi dépassent largement le niveau jugé suffisant tant par le vérificateur général du Canada que par l'actuaire en chef de DRHC et la preuve ne révèle aucune explication permettant de justifier leur niveau actuel.

233 Prenant appui sur cette preuve non contredite, le Syndicat d'Arvida et la CSN plaident que par leur effet qui permet l'accumulation de surplus démesurés de plus de 40 milliards, les articles 66, 66.1 et 66.2 seraient inconstitutionnels.

234 Soit dit avec égards, le Tribunal ne peut en arriver à la même conclusion. À vrai dire, le discours tenu par le Syndicat d'Arvida et la CSN à ce chapitre est, somme toute, contradictoire.

235 D'un côté, ils attaquent le caractère dit "illégal et inconstitutionnel" de ces trois articles alors que de l'autre, ils reconnaissent que si les surplus étaient limités à environ 15 milliards plutôt que 40, conformément à ce que recommandent l'actuaire en chef de DRHC et le vérificateur général, ils n'auraient rien à dire.

236 Cette dichotomie illustre bien la teneur réelle du problème qui ne se situe pas au niveau du libellé des articles ou de leur caractère illégal ou inconstitutionnel, mais plutôt au niveau de l'application qui en est faite par les instances concernées. Il est d'ailleurs manifeste que ce que recommande l'actuaire en chef de DRHC et ce que décrit le vérificateur général dans leurs rapports est directement relié aux taux de cotisation imposés qui seraient trop élevés.

237 Or, selon le Tribunal, le noeud de cet aspect du litige se situe justement au niveau des taux eux-mêmes alors que ceux-ci ne sont pas contestés en l'espèce.

238 Effectivement, tel que le précise le résumé des prétentions des parties, ni le Syndicat d'Arvida ni la CSN ne soulèvent ici l'illégalité des taux de cotisation fixés en vertu des articles 66, 66.1 et 66.2 de la Loi. Ils n'attaquent que l'inconstitutionnalité des articles qui permettent de les fixer, lesquels relèvent manifestement de la compétence exclusive du Parlement.

239 À ce propos, et ceci explique sans doute pourquoi ce moyen a été retiré, la question de la légalité de ces taux aurait, à première vue, relevé non pas de la compétence de la Cour supérieure, mais bien de celle de la Cour fédérale. Il semble en effet qu'il se serait alors agi de rendre un jugement déclaratoire contre un "office fédéral" pour qui seule la Cour fédérale aurait compétence⁷¹, ce qui inclut à la fois la Commission et le Cabinet qui ont fixé les taux de 1997 à 2003.

240 En fin de compte, on cherche en vain en vertu de quoi les articles en tant que tels seraient inconstitutionnels en raison du fait que leur application serait prétendument exagérée ou illicite. À ce chapitre, la contestation, si elle était soulevée, relèverait bien plus du droit administratif que du droit constitutionnel.

241 Dans un autre ordre d'idées, le Syndicat d'Arvida et la CSN ajoutent également ceci sur le caractère inconstitutionnel des articles dû aux effets de leur application.

242 Selon la preuve, les surplus accumulés au Compte d'assurance-emploi dépassent de près du triple le maximum de la fourchette identifiée par l'actuaire en chef de DRHC, soit 15 milliards de dollars. À un tel niveau, les surplus accumulés n'ont absolument aucun lien avec ce qui est nécessaire à la couverture du régime d'assurance-emploi, particulièrement dans un contexte où, disent-ils,

ces surplus s'accumulent au détriment de cette couverture et des services requis par les chômeurs canadiens.

243 Pour le Syndicat d'Arvida et la CSN, il s'agit là de surplus accumulés à cause de taux de cotisation fixés sciemment à des niveaux exagérés. La preuve démontrerait, selon eux, qu'une telle accumulation était non seulement prévisible, mais qu'elle a été faite de façon délibérée. Ces surplus accumulés, disent-ils, permettraient ainsi au gouvernement fédéral de dépenser les cotisations perçues des travailleurs canadiens pour d'autres fins que le régime d'assurance-emploi et en dehors de son champ de compétence, comme pour les mesures actives.

244 Cette autre prétention ne peut être retenue non plus.

245 Il est d'abord inutile de revenir sur les dépenses faites pour les mesures actives de la Loi puisque le Tribunal a déjà conclu que celles-ci tombent dans le champ de compétence du Parlement en matière d'assurance-chômage.

246 En ce qui a trait cette fois à l'argument de l'utilisation de ces sommes pour des fins autres que le versement de prestations de chômage, le Tribunal est d'avis qu'il ne s'agit pas d'une question qui touche la compétence constitutionnelle du Parlement d'adopter les articles en question. Cela concerne plutôt l'utilisation "illégal" ou l'appropriation "illicite" de ces surplus par le gouvernement fédéral. Or, c'est la troisième question dont dispose ce jugement qui en traite.

ii. Le caractère imprécis des articles attaqués

247 Dans un deuxième temps, le Syndicat d'Arvida et la CSN invoquent le caractère imprécis des articles 66, 66.1 et 66.2 de la Loi pour soutenir leur contestation constitutionnelle.

248 Cette imprécision permettrait l'accumulation des surplus démesurés du Compte d'assurance-emploi et la disproportion que l'on constate entre le montant des cotisations perçues et celui des prestations versées. Le régime même d'assurance-emploi serait par conséquent dénaturé puisqu'il ferait en sorte d'éliminer la corrélation nécessaire entre le montant des cotisations perçues et celui des prestations versées.

249 Le Tribunal juge cette prétention sans fondement et, à tout événement, non pertinente dans la considération du caractère constitutionnel des dispositions contestées.

250 Premièrement, on ne peut affirmer que le texte même de l'article 66 de la Loi dissocie totalement le montant des cotisations perçues de celui des prestations versées. Au contraire, la disposition réfère précisément à un apport de revenus suffisant pour couvrir les débits autorisés sur le Compte d'assurance-emploi, ce qui constitue une référence précise aux crédits et débits prévus à la Loi.

251 Deuxièmement, en ce qui concerne l'article 66.1, le pouvoir est délégué au Cabinet. Bien que la disposition soit muette quant aux critères applicables, rien ne permet de conclure de la preuve soumise que le montant des cotisations nécessaire pour couvrir les prestations à verser ne soit pas pris en compte dans l'établissement des taux. La preuve est simplement silencieuse à ce sujet.

252 Troisièmement, l'article 66.2 constitue ni plus ni moins un retour à la case départ puisque le Parlement fixe dans la Loi le taux de cotisation pour l'année 2004, tout comme il l'avait fait dans la Loi de 1940, dans la Loi de 1955 et au début des années 1990. Aucun argument n'a été avancé pour indiquer en vertu de quoi une telle façon de procéder, qui a existé pendant plus de trente ans, serait illégale ou inconstitutionnelle.

253 Enfin, aucune autorité n'a été soumise par le Syndicat d'Arvida ou la CSN pour appuyer cet argument d'inconstitutionnalité des articles au motif d'"imprécision".

iii. La taxe dite déguisée ou illégale

254 Dans un troisième temps, le Syndicat d'Arvida et la CSN soumettent que les taux de cotisation fixés par les articles 66, 66.1 et 66.2 de la Loi sont en réalité une taxe plutôt qu'un prélèvement de nature réglementaire. Cela étant, il en découlerait deux conséquences au niveau constitutionnel.

255 D'abord, en vertu de l'article 53 de la Constitution, seul le Parlement a le pouvoir d'imposer une taxe, ce qui n'est pas le cas pour la Commission ou le Cabinet. Ensuite, en vertu de l'article 125 de la Constitution, une législature provinciale ne peut être sujette à taxation et donc, leur imposer les taux de cotisation prévus à ces articles serait inconstitutionnel.

256 Avec égards, ces arguments ne résistent pas à l'analyse.

257 En effet, à la lumière des principes applicables, les taux de cotisation fixés en vertu de la Loi ne sont pas des taxes, mais bien des frais réglementaires. De plus, même un pouvoir de taxation qui serait du ressort exclusif du Parlement selon l'article 53 peut être délégué si cela est fait de façon claire et explicite, ce qui est le cas pour les articles 66 et 66.1. Enfin, l'article 125 de la Constitution n'a aucune application dans les faits puisque si les législatures provinciales, et particulièrement celle du Québec, sont assujetties aux taux de cotisation de la Loi, c'est par choix et non par obligation.

258 Le Syndicat d'Arvida et la CSN invoquent l'arrêt *Première nation de Westbank*⁷² où la Cour suprême a revu les critères permettant de distinguer une taxe d'une redevance de nature réglementaire. Au sujet de cette distinction, le juge Gonthier y a souligné :

Le point de départ naturel en matière de qualification des prélèvements gouvernementaux est l'arrêt de notre Cour *Lawson c. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] R.C.S. 357, aux pp. 362 et 363. Dans cet arrêt, le juge Duff, plus tard Juge en chef, a expliqué que les redevances contestées étaient des taxes parce qu'elles étaient : (1) exigibles en vertu de la loi, (2) imposées sous l'autorité de la législature, (3) imposées par un organisme public, (4) pour une fin d'intérêt public. Le juge Duff a également souligné que les redevances en cause étaient obligatoires et touchaient un grand nombre de personnes.

Ces indicateurs d'une "taxation" ont récemment été adoptés par notre Cour dans *Succession Eurig*, précité, par. 15. Le juge Major, pour la majorité de la Cour, a ajouté un autre élément possible pour qualifier un prélèvement gouvernemental, disant au par. 21 qu'"il est un autre facteur qui permet généralement de distinguer des frais d'une taxe : il doit y avoir un rapport entre la somme exigée et le coût du service fourni". Il s'agit d'une précision utile, car elle aide à faire la distinction entre les taxes et les frais d'utilisation qui sont un sous-ensemble des "redevances de nature réglementaire".

(Le Tribunal souligne)

259 Appliquant cette décision aux faits en l'espèce, le Syndicat d'Arvida et la CSN prétendent que les taux de cotisation établis par la Commission et le Cabinet en vertu des articles 66 et 66.1 sont 1. exigibles en vertu de la Loi, 2. imposés sous l'autorité du Parlement, 3. perçus par un organisme public, soit le receveur général du Canada selon l'article 82, le tout, 4. à des fins d'intérêt public, soit aux fins d'assurance-emploi. Ils soulignent enfin qu'il n'y a 5. aucune relation entre les sommes exigées et les coûts des services que fournit la Loi.

260 S'appuyant sur l'arrêt *Succession Eurig*⁷³ de la Cour suprême, ils ajoutent qu'il n'y a aucun "rapport raisonnable" entre les taux de cotisation exigés et les services fournis aux assurés, prestataires ou participants en vertu de la Loi, comme le démontrent notamment les surplus accumulés qui sont excessifs et démesurés.

261 Enfin, ils précisent que les Comptes publics du Canada⁷⁴ démontrent bien que ces surplus sont considérés par le gouvernement fédéral comme des impôts et des taxes. Ils constitueraient même sa principale source de revenus après l'impôt sur le revenu des particuliers.

262 Bref, selon le Syndicat d'Arvida et la CSN, tout ce qui excède le niveau de réserve suffisant établi par l'actuaire en chef de DRHC, soit 15 milliards de dollars, ne peut être qualifié de frais réglementaires. Il s'agirait d'une taxe.

263 En ce qui concerne l'article 66, cet argument ne saurait s'appliquer. En effet, le mécanisme de cet article prévoit précisément une relation directe entre les revenus du régime et les dépenses de celui-ci, tout en référant à la nécessité de maintenir une stabilité des taux en fonction des cycles économiques. Les taux de cotisation ne sont donc pas imposés dans le cadre d'un régime de réglementation qui respecte tous les facteurs identifiés dans l'arrêt *Westbank*⁷⁵ pour être qualifiés de taxe.

264 Ensuite, quoique le niveau des taux ait permis d'accumuler des surplus élevés et, aux yeux de plusieurs, démesurés, on ne peut conclure qu'il y ait absence de rapport entre le niveau des taux de cotisation et la nature des services qu'offre le régime d'assurance-emploi. Particulièrement dans un contexte où, comme il en sera traité à la question suivante, les surplus accumulés continuent d'apparaître au crédit du Compte d'assurance-emploi et donc, d'être disponibles pour couvrir les débits à venir qu'autorise la Loi.

265 Par ailleurs, même si certains pourraient voir dans les taux de cotisation des articles 66 et 66.1 l'imposition d'une taxe, dans l'arrêt *Ontario English Catholic Teachers' Association*⁷⁶, la Cour suprême a déjà décidé que la délégation d'un pouvoir de taxation est constitutionnelle si elle est faite dans un langage explicite et non ambigu. Tel que l'exprime le juge Iacobucci dans cet arrêt, lorsque l'autorité permet expressément et clairement à un organisme d'imposer une taxe, les exigences du principe "d'aucune taxation sans représentation" que protège l'article 53 de Constitution sont respectées.

266 En l'espèce, même si les taux de cotisation étaient vus comme une taxe, la délégation de ce pouvoir à la Commission, à l'article 66, ou au Cabinet, à l'article 66.1, est explicite, ne souffre d'aucune ambiguïté et est incluse dans une Loi qui a été dûment adoptée par le Parlement.

267 Enfin, quitte à le redire, pour ce qui est de l'article 66.2, cet argument avancé par le Syndicat d'Arvida et la CSN quant à l'article 53 de la Constitution ne peut avoir d'application puisque c'est le Parlement lui-même qui fixe le taux dans la Loi, comme il l'avait fait de 1940 à 1971 et au début des années 1990 sans que personne ne dise mot.

268 En terminant, il y a lieu d'ajouter que puisque le Parlement a compétence sur l'assurance-chômage, même si les taux de cotisation devaient être considérés comme une taxe, cette distinction serait sans conséquence en l'espèce, comme la Cour suprême l'a déjà dit⁷⁷ :

[...] Si, par contre, le gouvernement fédéral établit une taxe essentiellement à des fins de réglementation ou si cette taxe est indissociable d'une réglementation plus générale, comme c'est le cas des "contribution d'ajustement" dont il est question dans le Renvoi relatif à la Loi sur l'organisation du marché des produits agricoles, S.R.C. 1970, chap. A-7 et autres, [1978] 2 R.C.S. 1198, ou des primes d'assurance-chômage dans l'affaire *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, il ne s'agit pas véritablement de "taxation" et l'article 125 ne s'applique pas.

(Le Tribunal souligne)

iv. La taxation des législatures provinciales par le Parlement

269 Le Syndicat d'Arvida complète son argumentation sur cette deuxième question en avançant que l'imposition des taux de cotisation des articles 66, 66.1 et 66.2 de la Loi aux législatures provinciales, notamment celle du Québec, constitue une taxation illégale d'un ordre de gouvernement par un autre, en violation de l'article 125 de la Constitution.

270 Il n'y a pas lieu de dissenter longuement sur cet argument que ne soulève aucune des législatures provinciales, ni même le Procureur général du Québec qui est pourtant intervenu en l'espèce.

271 En effet, en vertu du paragraphe 5(4)d) de la Loi, la Commission peut inclure les "emplois au service de Sa Majesté du chef d'une province" dans les "emplois assurables" lorsque le gouvernement de la province convient de renoncer à l'exclusion du paragraphe 5(2)c) de la Loi afin de faire assurer ses employés.

272 Or, les arrêtés en conseil et décrets mis en preuve et adoptés relativement à "l'application de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-emploi"⁷⁸ démontrent que le gouvernement du Québec a précisément convenu de faire assurer tous ses employés en vertu de la Loi.

273 Devant une telle preuve, on ne peut sérieusement prétendre que les taux de cotisation des articles 66, 66.1 et 66.2 de la Loi sont une taxe "imposée" par un ordre de gouvernement à un autre. C'est par choix, et non par obligation, que le gouvernement du Québec a convenu de faire assurer ses employés au sens de la Loi et donc, d'être assujetti aux taux de cotisation de celle-ci. L'article 125 de la Constitution ne peut avoir d'application dans une telle situation, puisque rien n'empêche un gouvernement de se soumettre volontairement aux taxes ou prélèvements d'un autre ordre de gouvernement, tel que le Québec l'a fait dans le contexte de l'instance.

v. Le droit international

274 En terminant sur les questions constitutionnelles, la CSN allègue aux paragraphes 97 et 98 de sa procédure que les normes d'admissibilité de la Loi contreviendraient aux obligations internationales du Canada.

275 La CSN réfère en ce sens au Pacte international relatif aux droits économiques, sociaux et culturels des Nations-Unies⁷⁹ qui reconnaît à toute personne le droit aux assurances sociales⁸⁰. La CSN invoque à ce chapitre des extraits du Rapport du comité des Nations-Unies sur les droits économiques, sociaux et culturels du 4 décembre 1998 qui feraient état de certaines inquiétudes quant aux restrictions apportées par le Canada aux bénéfices de ses programmes d'assurance-chômage⁸¹.

276 Quoique la CSN n'ait pas insisté sur cet argument, il convient d'en disposer brièvement puisqu'il a été soulevé.

277 D'abord, ces obligations internationales du Canada, si elles existent, n'ont aucune incidence sur l'analyse de la validité constitutionnelle des articles qui sont attaqués en l'espèce⁸². En effet, on n'a pas fait la démonstration ici que le Pacte dont il s'agit ait été mis en vigueur au Canada par le Parlement. Dans l'arrêt Baker⁸³ de la Cour suprême, la juge L'Heureux-Dubé a déjà indiqué que dans un tel cas, les dispositions d'une convention ou traité international n'ont pas d'application directe au Canada.

278 Ensuite, les commentaires auxquels la CSN réfère n'ont aucune pertinence au débat en l'espèce. En effet, ils ne concernent ni les mesures actives, ni les taux de cotisation de la Loi. Ils s'adressent plutôt au resserrement des critères d'admissibilité aux prestations de chômage, bref, à ce qui semble à première vue concerner la partie I de la Loi, et non à ce qui fait l'objet du présent litige.

- 3) À la lumière de la preuve faite, est-il exact de prétendre que le gouvernement fédéral aurait utilisé et se serait approprié, et ce, illégalement, les surplus accumulés au Compte d'assurance-emploi?

279 La troisième question touchant les surplus accumulés au Compte d'assurance-emploi commande l'étude des sujets suivants :

- a) Les articles de la Loi relatifs au Compte d'assurance-emploi;
- b) Ce que constituent les Comptes publics du Canada;
- c) Ce que révèlent les états financiers 2002 du Canada;
- d) La position du Syndicat d'Arvida et de la CSN sur les prétendues utilisation et appropriation illégales des surplus accumulés par le gouvernement fédéral; et
- e) À qui appartiennent ces surplus accumulés.

280 Contrairement aux deux premières questions en litige qui sont constitutionnelles, cette troisième question est essentiellement factuelle et liée à la teneur de la preuve faite à l'audience.

281 À cet égard, le Syndicat d'Arvida et la CSN avancent que le gouvernement fédéral aurait utilisé les surplus accumulés du Compte d'assurance-emploi pour, d'une part, réduire son déficit accumulé et, d'autre part, soit bonifier l'excédent de ses exercices financiers, soit en réduire le déficit, le tout au détriment des chômeurs canadiens.

282 À ce chapitre, ils s'appuient principalement sur :

- les exposés financiers du ministre des Finances lors de la présentation des budgets du gouvernement fédéral de 1994 à 2002⁸⁴;

- certains débats parlementaires de la Chambre des communes à l'occasion de la présentation de ces budgets⁸⁵;
- certains débats parlementaires de la Chambre des communes lors de questions portant sur le Compte d'assurance-emploi⁸⁶;
- les états financiers du gouvernement du Canada et les autres informations financières contenues aux Comptes publics du Canada⁸⁷.

283 De l'analyse de ces divers documents, le Syndicat d'Arvida et la CSN concluent que le gouvernement fédéral se serait illégalement approprié ces surplus.

284 Or, la preuve présentée devant le Tribunal n'appuie pas ces prétentions. Voici plutôt ce qu'elle révèle en ce qui concerne ces surplus accumulés en vertu la Loi au Compte d'assurance-emploi.

a) Les articles de la Loi relatifs au Compte d'assurance emploi

285 Pour comprendre cette preuve, il faut d'abord analyser les dispositions de la Loi qui traitent du Compte d'assurance-emploi. Ce sont les articles 71 et suivants de la partie III "Cotisations et autres questions financières", section "Compte d'assurance-emploi".

286 On y prévoit d'abord que le Compte d'assurance-emploi est un compte ouvert parmi les "comptes du Canada" (art. 71).

287 On indique ensuite à l'article 72 que toutes les sommes reçues en application des différentes parties de la Loi sont versées au "Trésor" (en anglais, au "Consolidated Revenue Fund").

288 La Loi ne définit pas le "Trésor" ou le "Consolidated Revenue Fund". Ces termes ne sont pas définis non plus dans la Loi d'Interprétation⁸⁸.

289 Quant à la Constitution, si elle fait référence à ce "Consolidated Revenue Fund" ou Fonds consolidé de revenu, notamment aux articles 102 et 106, elle ne l'explicite pas. Elle édicte par contre que :

102. Tous les droits et revenus que les législatures respectives du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, avant et à l'époque de l'union, avaient le pouvoir d'approprier, sauf ceux réservés par la présente loi aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par la présente loi, formeront un fonds consolidé de revenu pour être approprié au service public du Canada de la manière et soumis aux charges prévues par la présente loi.
106. Sujet aux différents paiements dont est grevé par la présente loi le fonds consolidé de revenu du Canada, ce fonds sera approprié par le parlement du Canada au service public.

(Le Tribunal souligne)

290 On retrouve cependant une définition du "Trésor" ou "Consolidated Revenue Fund" dans la Loi sur la gestion des finances publiques⁸⁹ :

"Trésor" Le total des fonds publics en dépôt au crédit du receveur général.

291 L'expression "Fonds publics" y est, quant à elle, définie comme suit :

"Fonds publics" Fonds appartenant au Canada, perçus ou reçus par le receveur général ou un autre fonctionnaire public agissant en sa qualité officielle ou toute autre personne autorisée à en percevoir ou recevoir. [...]

292 Il s'ensuit que les sommes perçues en vertu de la Loi font partie des fonds publics du Canada en dépôt au crédit du receveur général.

293 Enfin, les articles 73 et suivants complètent cette section de la partie III de la Loi et expliquent le fonctionnement et la composition du Compte d'assurance-emploi.

294 D'une part, pour ce qui est des crédits qui sont portés au Compte d'assurance-emploi et qui, de façon corollaire, sont débités au Trésor, ils sont énumérés aux articles 73, 74 et 75 de la Loi. Ils comprennent principalement les cotisations prévues à la Loi.

295 D'autre part, l'article 77 de la Loi prescrit les sommes qui sont portées au débit du Compte d'assurance-emploi et qui, de façon corollaire, sont payées sur le Trésor. Y sont mentionnées, entre autres, toutes les sommes versées à titre de prestations en vertu de la Loi.

296 Ainsi, en vertu de ces articles 73 à 77, si les cotisations payées en vertu de la Loi sont versées au Trésor, celles-ci sont par ailleurs créditées chaque année au Compte d'assurance-emploi, avec un débit correspondant au Trésor. De même, si toutes les prestations payables en vertu de la Loi le sont par le Trésor, elles sont réciproquement portées au débit du Compte d'assurance-emploi.

297 Sur le fonctionnement de ce Compte, il est utile d'ajouter qu'en vertu de l'article 76 de la Loi, le ministre des Finances peut autoriser le versement d'intérêts sur le solde créditeur du Compte d'assurance-emploi. À l'inverse, l'article 80 de la Loi prévoit que si le solde créditeur du Compte d'assurance-emploi est insuffisant pour payer les débits du Compte, le même ministre peut autoriser des avances au Compte qui sont alors prélevées sur le Trésor. Selon cet article, ces avances peuvent comporter le remboursement d'un intérêt au Trésor qui est alors débité au Compte d'assurance-emploi.

298 Les observations suivantes découlent donc de l'étude de ces dispositions concernant le Compte d'assurance-emploi :

- a) Les sommes reçues ou perçues en application de la Loi sont versées au Trésor, soit aux fonds publics appartenant au Canada. L'article 86 de la Loi confirme ce fait en précisant que les cotisations payables par un employeur en vertu de la Loi "constituent des créances de Sa Majesté";
- b) Chaque fois que le Compte d'assurance-emploi est crédité de sommes telles que des cotisations perçues, le Trésor en est débité. Chaque fois que le Compte d'assurance-emploi est débité de sommes telles que des prestations versées, elles sont payées sur le Trésor;

- c) L'article 77 de la Loi spécifie les seules sommes qui peuvent être portées au débit du Compte d'assurance-emploi;
- d) La Loi prévoit le paiement d'un intérêt au crédit du Compte d'assurance-emploi lorsque le solde du Compte est créditeur, de même que la réception d'avances prélevées sur le Trésor lorsque le Compte d'assurance-emploi a un solde débiteur.

299 On constate ainsi que la Loi encadre de façon précise les crédits et débits du Compte d'assurance-emploi. De plus, bien que les sommes perçues selon la Loi soient versées au Trésor, il n'en reste pas moins que le Compte a une "existence indépendante" telle que la Loi lui permet même de recevoir des intérêts de la part du Trésor quand son solde est créditeur.

b) Les Comptes publics du Canada

300 Voilà pour les articles pertinents de la Loi. Maintenant, conformément à ce que prescrit l'article 71 de la Loi, la preuve révèle que le Compte d'assurance-emploi est considéré comme un compte à fins déterminées faisant partie des Comptes publics du Canada.

301 Les Comptes publics du Canada constituent le rapport financier du gouvernement du Canada préparé par le receveur général pour chaque exercice⁹⁰, conformément aux exigences de l'article 64 de la Loi sur la gestion des finances publiques. L'exercice du gouvernement fédéral se termine le 31 mars de chaque année et ce rapport englobe ses opérations financières au cours d'un exercice donné. Les Comptes publics du Canada sont publiés en deux volumes. Le volume 1 comporte notamment les états financiers vérifiés du gouvernement du Canada (section 1) et une analyse des comptes consolidés à ces états financiers, dont le Compte d'assurance-emploi (section 4).

302 Le Compte d'assurance-emploi est un compte à fins déterminées puisque sa loi habilitante exige que ses recettes soient affectées à une fin particulière (art. 77 de la Loi). En raison du caractère spécial des fonds d'un compte à fins déterminées tel que le Compte d'assurance-emploi, on doit faire les entrées requises dans le grand livre général du gouvernement du Canada afin de s'assurer que les fonds sont utilisés pour les fins auxquelles ils ont été reçus. Ceci permet un meilleur contrôle et une gestion adéquate des sommes reçues⁹¹.

303 Toutefois, même si des états financiers vérifiés séparés sont préparés annuellement pour le Compte d'assurance-emploi, ce Compte est considéré comme faisant partie du "périmètre comptable" du gouvernement du Canada⁹². Or, toutes les entités faisant partie de ce "périmètre comptable" doivent être consolidées aux états financiers du gouvernement. Conséquemment, le Compte d'assurance-emploi, bien qu'il soit un compte à fins déterminées, est néanmoins consolidé avec les recettes, les dépenses et le déficit accumulé du gouvernement du Canada⁹³. En fait, une telle consolidation s'apparenterait à celle que l'on retrouve dans le cadre d'entités privées⁹⁴.

304 La consolidation du Compte d'assurance-emploi aux Comptes publics du Canada n'est pas nouvelle. Elle est antérieure à la Loi et date de 1986⁹⁵. Selon le rapport d'expertise et le témoignage de madame Breton, cette consolidation a été introduite sur recommandation du vérificateur général de l'époque⁹⁶. Cette façon de faire serait d'ailleurs conforme aux conventions comptables du gouvernement et aux recommandations du Conseil de comptabilité du secteur public de l'Institut canadien des comptables agréés⁹⁷.

305 Dans ses observations sur les états financiers du gouvernement du Canada pour l'exercice clos le 31 mars 2002⁹⁸, la vérificatrice générale souligne d'ailleurs ceci à ce sujet :

[...] Depuis 1986, ses recettes, ses dépenses, ses actifs et ses passifs ont été consolidés ou combinés avec ceux des autres programmes du gouvernement dans les états financiers du gouvernement. La consolidation de l'assurance-emploi avec les autres programmes constitue un traitement comptable approprié puisqu'il s'agit d'un programme du gouvernement au même titre que tout autre programme : [...] Le fait de ne pas consolider tous les programmes du gouvernement donnerait lieu à des rapports morcelés et il serait difficile de saisir la taille réelle et l'ampleur du gouvernement. Je maintiens donc mon appui à la manière, c'est-à-dire la consolidation, dont le gouvernement présente le programme d'assurance emploi dans ses états financiers sommaires.

(Le Tribunal souligne)

306 Ainsi, selon la preuve, la consolidation du Compte d'assurance-emploi aux états financiers du gouvernement du Canada non seulement précède la Loi, mais constitue un traitement comptable approprié qui reçoit l'aval de la vérificatrice générale. De plus, puisque cette consolidation existe depuis bien avant l'adoption de la Loi, la présentation des états financiers du gouvernement du Canada à ce chapitre est similaire de 1997 à 2002.

307 Pour les besoins de ce jugement, il est donc inutile de revoir cette présentation pour toutes et chacune des années 1997 à 2002. Pour illustrer la situation du Compte d'assurance-emploi dans les Comptes publics du Canada, il suffit de prendre pour exemple les états financiers de l'exercice clos le 31 mars 2002, soit les plus récents parmi ceux mis en preuve.

308 Or, ces états financiers 2002 révèlent ce qui suit.

c) Les états financiers 2002 du Canada

309 D'abord, à l'état des recettes, des dépenses et du déficit accumulé du gouvernement du Canada, on note que les cotisations d'assurance-emploi sont incluses dans les recettes tandis que les prestations versées en vertu de la Loi font partie des dépenses⁹⁹.

310 Il s'ensuit que si les cotisations reçues surpassent les prestations versées (ce qui, pour l'exercice clos le 31 mars 2002, s'avérerait vrai dans un ordre de plus de 4,2 milliards de dollars), ceci permet d'augmenter d'autant l'excédent de l'exercice du gouvernement du Canada dans une année donnée. Par exemple, au 31 mars 2002, cet excédent se chiffrait à 8,9 milliards, dont 4,2 milliards provenaient du Compte d'assurance-emploi. La vérificatrice générale l'a d'ailleurs noté dans les points saillants de ses informations supplémentaires pour cet exercice¹⁰⁰.

311 Ensuite, dans les notes aux états financiers du gouvernement du Canada pour cet exercice, on explique ce qui est inclus dans le déficit accumulé du gouvernement. On y retrouve entre autres les comptes consolidés, dont le Compte d'assurance-emploi. Dans ces notes, on peut clairement voir qu'à la fin de l'exercice clos le 31 mars 2002, le Compte d'assurance-emploi permet de réduire de 39,4 milliards de dollars le déficit accumulé du gouvernement qui se chiffre ainsi à environ 536 milliards de dollars plutôt que 576 milliards¹⁰¹.

312 Il ne fait donc pas de doute que pour l'exercice clos le 31 mars 2002, la consolidation du Compte d'assurance-emploi dans les états financiers du gouvernement du Canada a un effet bénéfique, tant sur le déficit accumulé que sur l'excédent de l'exercice. Aux fins de la présentation des états financiers du gouvernement, cette consolidation permet de montrer à la fois un excédent supérieur pour l'exercice et un déficit accumulé réduit.

313 Toutefois, ce n'est là qu'un volet de la situation. L'autre volet des Comptes publics du Canada pour l'exercice clos au 31 mars 2002 montre ceci.

314 Dans la section 4 du volume 1 des Comptes publics du Canada portant sur l'analyse des comptes consolidés se retrouve, entre autres, celle du Compte d'assurance-emploi. Dans les états financiers vérifiés du Compte d'assurance-emploi au 31 mars 2002 qu'on y présente, on note ce qui suit.

315 D'une part, à l'actif du bilan est inscrit le "Solde du compte auprès du receveur général du Canada" établi à 39,7 milliards de dollars¹⁰².

316 D'autre part, cette référence au "Solde du compte" dans l'actif du bilan renvoie à la note 7 des états financiers. Cette note traite des intérêts versés sur le solde créditeur du Compte d'assurance-emploi conformément à l'article 76 de la Loi¹⁰³. On y précise les taux d'intérêt qui ont été portés au crédit du Compte et au débit du Trésor pendant l'exercice.

317 De cette preuve, le Tribunal estime qu'on doit donc conclure ceci.

318 D'un côté, il est exact de dire que la consolidation du Compte d'assurance-emploi aux états financiers du gouvernement du Canada a un effet bénéfique sur leur présentation. Toutefois, de l'autre, il n'en reste pas moins qu'au bilan vérifié du Compte d'assurance-emploi apparaît un solde créditeur auprès du receveur général du Canada.

319 Les états financiers du gouvernement du Canada démontrent de fait clairement que le solde du Compte d'assurance-emploi est créditeur pour la totalité du montant des surplus accumulés à celui-ci. Or, tel que le prescrit l'article 77 de la Loi, ce solde créditeur ne peut être réduit que par les débits que la Loi autorise au Compte.

320 Comme l'explique la vérificatrice générale dans les informations supplémentaires et points saillants joints aux états financiers du gouvernement du Canada¹⁰⁴ :

Les cotisations de l'assurance-emploi, comme la majorité des autres recettes du gouvernement, sont versées dans le compte bancaire du gouvernement; il n'y a pas de compte bancaire séparé pour l'excédent de l'assurance-emploi de 40 milliards de dollars au 31 mars 2002.

(Le Tribunal souligne)

321 En consolidant le Compte d'assurance-emploi aux états financiers du gouvernement du Canada, les Comptes publics du Canada démontrent donc à la population que ce Compte a un effet bénéfique direct sur l'excédent de l'exercice et sur le déficit accumulé à la fin de l'exercice.

322 Cependant, à l'intérieur même du "périmètre comptable" du gouvernement, il est clair que le Trésor, par l'entremise du receveur général du Canada, est redevable envers le Compte d'assurance-emploi pour couvrir tous les débits que la Loi autorise, et ce, jusqu'à concurrence du montant de ces surplus accumulés.

323 C'est ce qu'a expliqué madame Clément lors de son interrogatoire¹⁰⁵.

324 Comme cet expert l'a aussi exprimé, si, hypothétiquement, une récession majeure frappait le Canada et qu'instantanément, le Compte d'assurance-emploi devait verser des prestations de 5 milliards de dollars, ces sommes devraient alors être payées par le Trésor¹⁰⁶.

325 Dans une telle éventualité, le solde créditeur du Compte serait réduit d'autant. Si cela s'était produit, par exemple, au cours de l'exercice clos au 31 mars 2002, on aurait dans ce cas-là complètement éliminé l'excédent de l'exercice du Compte pour le transformer en déficit avec, bien évidemment, les conséquences néfastes que cela comporterait sur les états financiers du gouvernement par l'effet de la consolidation.

326 Dans une situation comme celle qui a prévalu à la fin de l'exercice clos le 31 mars 2002, il est manifeste que l'excédent généré par le Compte d'assurance-emploi et les surplus qui y sont accumulés permettent au gouvernement du Canada de présenter un excédent nettement plus élevé et de clamer une réduction importante de son déficit accumulé.

327 Toutefois, puisque le Compte d'assurance-emploi est un compte à fins déterminées qui comporte un solde créditeur, le corollaire de cette réalité a des conséquences. Lorsque ce solde devra être réduit parce que trop élevé et donc, lorsque l'état des résultats du Compte d'assurance-emploi démontrera un déficit plutôt qu'un excédent afin justement d'abaisser ce solde créditeur, cela réduira alors l'excédent consolidé des états financiers du gouvernement pour l'année visée, tout en augmentant d'autant le déficit accumulé à la fin de l'année.

328 Ainsi, d'un côté, les choix politiques actuels permettent au gouvernement fédéral de présenter aujourd'hui des excédents importants à ses exercices financiers et des réductions majeures de son déficit grâce notamment au niveau élevé des excédents et des surplus accumulés du Compte d'assurance-emploi. De l'autre côté, ces mêmes choix risquent par contre de devenir demain le tendon d'Achille des états financiers futurs du Canada lorsque les choix politiques à venir commanderont de réduire le solde créditeur trop élevé de ces surplus accumulés.

329 Quoique ce soit là les constatations qui se dégagent de la preuve, il n'appartient pas au Tribunal, sous réserve de la légalité des taux de cotisation qui permettent de générer ces surplus et qu'on ne soulève pas ici, de juger ces choix politiques qui relèvent du gouvernement, ni d'arbitrer les débats ou points de vue divergents qui peuvent en découler. À ce chapitre, les électeurs sont les juges ultimes de ces choix.

d) La position du Syndicat d'Arvida et de la CSN

330 Cela dit, quand le Syndicat d'Arvida et la CSN plaident que le gouvernement du Canada s'est "illégalement approprié" ces surplus accumulés du Compte d'assurance-emploi, la preuve ne corrobore pas leur argument.

331 Qui dit appropriation illégale, dit faire d'une chose sa propriété et se l'attribuer de manière illicite. Or, ce n'est pas le cas ici.

332 Si le gouvernement du Canada s'était "approprié" ces surplus, ils n'apparaîtraient pas au bilan du Compte d'assurance-emploi comme solde créditeur auprès du receveur général du Canada. Au contraire, les Comptes publics du Canada démontrent clairement que le solde du Compte d'assurance-emploi est créditeur jusqu'à concurrence du montant des surplus accumulés. La nature de ce solde créditeur ne change pas du simple fait qu'aux fins de présentation de ses états financiers au public, le Compte d'assurance-emploi est consolidé dans les recettes, dépenses et déficits accumulés du gouvernement.

333 Le Syndicat d'Arvida et la CSN plaident également que le gouvernement du Canada "utiliserait illégalement" ces surplus accumulés à d'autres fins qu'au versement de prestations en vertu de la Loi. Ils s'appuient sur les déclarations du ministre des Finances qui, disent-ils, aurait avoué financer d'autres programmes au moyen de ces surplus.

334 Le Tribunal n'est pas d'accord.

335 D'abord, les propos du ministre des Finances auxquels le Syndicat d'Arvida et la CSN ont référé en citant de nombreux extraits des débats de la Chambre des communes sur le sujet n'ont pas la portée qu'on veut leur attribuer. Les passages les plus clairs sont ceux des 27 mai 1998, 28 mai 1998 et 3 octobre 2001 où le ministre des Finances a dit :

27 mai 1998¹⁰⁷ :

[...] : Monsieur le Président, est-ce immoral de financer le Fonds transitoire de création d'emplois? Est-ce immoral de mettre de l'argent dans le domaine de la santé et de l'éducation? Est-ce immoral d'aider les jeunes, ceux qui ont besoin de travail, aider les mères célibataires? Si c'est la moralité du Bloc québécois, ce n'est pas la moralité des Québécois et des Québécoises ni des Canadiens et des Canadiennes.

28 mai 1998¹⁰⁸ :

[...] : Monsieur le Président, tout l'argent du gouvernement, qu'il soit perçu sous forme de cotisations à la caisse d'assurance-emploi, de taxe de vente ou d'impôt sur le revenu, appartient aux Canadiens.

3 octobre 2001¹⁰⁹ :

[...] : Monsieur le Président, tout d'abord, le député sait fort bien que les surplus du compte d'assurance-emploi, c'est de l'argent qui est utilisé pour la santé, pour les programmes d'infrastructures et pour la création d'emplois.

336 On ne peut certes conclure sur la seule base de tels propos que le gouvernement du Canada "utilise illégalement" les surplus accumulés du Compte d'assurance-emploi.

337 Ensuite, même si elles sont comptabilisées séparément au Compte d'assurance-emploi, toutes les sommes reçues ou perçues en vertu de la Loi sont versées au Trésor comme toute autre somme perçue par le gouvernement du Canada. C'est d'ailleurs ce que la Loi prescrit.

338 Or, si les sommes reçues et perçues en vertu de la Loi sont dûment versées au Trésor et que les crédits appropriés sont correctement portés au Compte d'assurance-emploi conformément à la Loi, l'utilisation de ces recettes par le gouvernement du Canada ne peut être illégale.

339 Enfin, le Syndicat d'Arvida et la CSN insistent sur le fait que les recettes versées au Trésor en application de la Loi ne sauraient servir qu'au paiement des prestations prévues à la Loi et devraient être réservées à cette seule fin. À ce niveau, leur argument se résume à dire que tout l'argent perçu en vertu de la Loi devrait être placé dans un endroit isolé, une sorte de "bas de laine", où il ne pourrait servir qu'aux fins prévues à la Loi.

340 Avec égards, non seulement la Loi ne l'impose pas, mais c'est là bien mal comprendre tant la présentation des Comptes publics du Canada que le monde de la finance.

341 Prenons comme hypothèse que le solde créditeur du Compte d'assurance-emploi ait été "déposé" dans le compte courant d'une banque à charte plutôt qu'auprès du Trésor. Dans un tel cas, il est clair que dans ses opérations quotidiennes, cette banque utiliserait les sommes déposées pour ses affaires bancaires : elle en placerait une partie dans des véhicules particuliers avec des rendements distincts, elle en prêterait une autre partie à ses emprunteurs à des taux variables, etc.

342 Une chose est certaine toutefois. Dans un tel scénario, l'ensemble de la somme ne serait pas conservé tel quel par cette banque en numéraire dans un coffre-fort spécifique pour les seules fins du Compte.

343 La situation n'est pas différente pour le Trésor. Les sommes lui ont été versées car la Loi le prescrit. Dans ses opérations, le gouvernement utilise les fonds publics que constitue le Trésor pour les fins requises, comme le ferait par exemple une banque à charte dans le cadre de ses affaires. Il n'y a rien d'anormal à cela et, de toute façon, là n'est pas la question.

344 Ce qui importe, c'est que les états financiers du gouvernement du Canada démontrent clairement que le Compte d'assurance-emploi a un solde créditeur et que la Loi prévoit qu'il ne peut être réduit que pour les débits qu'elle autorise. Énoncé simplement, ce n'est pas parce qu'il s'agit d'une écriture comptable que sa valeur est moindre.

345 Évidemment, comme tout solde créditeur, sa valeur est tributaire de la solvabilité du débiteur. À ce titre, le Compte d'assurance-emploi peut difficilement trouver mieux. Son solde créditeur est auprès du Trésor, soit le receveur général du Canada. Sur les marchés financiers mondiaux, pour une somme frisant les 40 milliards de dollars, il s'agit certes d'un débiteur au moins aussi solide que les meilleures institutions financières ou autres entités similaires offrant des placements dits sûrs. Bref, le risque de ce solde créditeur est lié à la santé financière du gouvernement canadien sur les marchés financiers mondiaux, sans plus.

346 À ce sujet, la situation que crée la Loi actuelle n'a rien de nouveau. En effet, la Loi de 1940 prévoyait un mécanisme similaire pour ce qui était alors la Caisse d'assurance-chômage. Déjà, aux articles 77 et 78 de cette loi, on prévoyait que le Fonds du revenu consolidé comportait un compte spécial appelé la Caisse d'assurance-chômage. On décrétait que les crédits de la Caisse devaient être placés en obligations émises ou garanties par le gouvernement du Canada, à moins d'être requis pour les objets de la loi. Ces placements ne pouvaient être vendus ou échangés que pour d'autres titres similaires.

347 La preuve documentaire révèle d'ailleurs qu'à cette époque, cela permettait de réduire l'inflation et d'aider le gouvernement à financer l'effort de guerre, puisque les cotisations étaient investies

en obligations du gouvernement du Canada¹¹⁰. La Loi de 1955 comportait des dispositions analogues à l'article 85.

348 Il n'y a vraiment pas de différence entre ce qui prévalait à l'époque et ce qui existe aujourd'hui. En effet, placer les crédits dans des obligations émises ou garanties par le gouvernement du Canada et noter dans des états financiers un solde créditeur auprès du receveur général du Canada revient au même. Dans les deux cas, le débiteur est le receveur général du Canada.

349 Mentionnons enfin que dans la Loi de 1971, les articles 131 et suivants prévoyaient déjà un mécanisme identique à celui de la Loi actuelle. Les cotisations reçues étaient versées au Fonds du revenu consolidé et le Compte d'assurance-chômage en était crédité. La Loi de 1985 était au même effet aux articles 112 et suivants, à la différence qu'à compter de cette époque, on référait au Trésor plutôt qu'au Fonds du revenu consolidé.

350 Malgré cela, durant les 25 années qui ont précédé la Loi actuelle, personne ne décriait ces mécanismes, ni n'invoquait "l'utilisation illégale" par le gouvernement du Canada de ce qui était alors les déficits répétés du Compte d'assurance-chômage.

351 En définitive, rien ne permet de conclure que le gouvernement du Canada "utilise illégalement" ces surplus accumulés en agissant comme il le fait.

352 Malgré l'ensemble de cette preuve, le Syndicat d'Arvida et la CSN rétorquent en terminant que le gouvernement du Canada, par la présentation de ses états financiers, "laisse croire" que rien n'est dû au Compte d'assurance-emploi et que les surplus accumulés sont fondus et disparaissent dans les recettes de ses exercices financiers et dans la réduction de son déficit accumulé.

353 Si certains concluent en ce sens, telle n'est toutefois pas la réalité de la preuve administrée en l'espèce. Le Tribunal ne doit pas juger sur la base de perceptions, mais bien en fonction de la réalité que la preuve révèle.

e) À qui appartiennent les surplus

354 Enfin, et certains diront surtout, le Syndicat d'Arvida et la CSN plaident que les surplus accumulés au Compte d'assurance-emploi appartiennent aux employeurs et employés cotisant au régime d'assurance-emploi.

355 À la lecture de la Loi, le Tribunal estime qu'ils ont tort.

356 À ce chapitre, la Loi est claire. Les cotisations et, par voie de conséquence, les surplus qu'elles génèrent sont versés au Trésor.

357 D'une part, en vertu de la Loi sur la gestion des finances publiques, le Trésor, c'est le total des fonds publics au crédit du receveur général alors que les fonds publics sont des fonds appartenant au Canada. La Constitution dit de plus que le Fonds du revenu consolidé, appelé aujourd'hui le Trésor, est approprié par le Parlement.

358 D'autre part, l'article 86 prescrit que les cotisations, intérêts et pénalités et autres sommes payables en vertu de la Loi, qui doivent être versés au Trésor selon l'article 72, sont des créances de Sa Majesté.

359 On ne peut donc conclure que les cotisations ou les surplus qu'elles génèrent appartiennent aux cotisants au régime tel que le proposent le Syndicat d'Arvida et la CSN. Au mieux, si ces sommes "appartiennent" à quelqu'un, c'est au "Trésor", à qui elles sont versées, à "Sa Majesté", qui a les

droits de créance sur les sommes à percevoir en vertu de la Loi, ou au "Canada", à qui appartiennent les fonds publics qui constituent le Trésor.

360 Cela dit, il ne s'ensuit pas pour autant que le gouvernement fédéral puisse faire ce qu'il veut avec ces sommes. La Loi est précise à cet égard. Les débits qui peuvent être portés au solde autrement créditeur du Compte d'assurance-emploi sont ceux prévus à l'article 77, rien de plus. Par exemple, dans l'état actuel de la Loi, le gouvernement du Canada ne pourrait faire disparaître le solde créditeur du Compte d'assurance-emploi en payant sur le Trésor des sommes à des fins autres que celles prévues à cet article.

361 Tout compte fait, ce que reprochent ici le Syndicat d'Arvida et la CSN au Procureur général du Canada est essentiellement de nature politique. Ils prétendent que les surplus accumulés sont trop élevés et devraient être retournés sans délai aux chômeurs canadiens. Ils reprochent au gouvernement du Canada de garder délibérément ces surplus à un niveau élevé, tout en affectant les sommes à d'autres fins.

362 Toutefois, selon la preuve, les sommes dont il s'agit apparaissent toujours au solde créditeur du Compte d'assurance-emploi conformément à la Loi. Peut-être que les choix politiques actuels feront en sorte que ces surplus bénéficieront aux chômeurs de demain ou d'une prochaine génération plutôt qu'aux chômeurs d'aujourd'hui. Encore une fois cependant, toujours sous réserve de la légalité des taux de cotisation qui créent ces surplus et dont le Tribunal n'est pas saisi ici, il appartient aux électeurs et non aux tribunaux de se prononcer sur la justesse de ces choix.

363 Par contre, du point de vue strictement juridique, quoi que l'on puisse penser de ces choix politiques, ils ne permettent pas de conclure qu'en agissant comme il le fait, le gouvernement du Canada se serait illégalement approprié ou aurait utilisé de façon illicite les surplus accumulés au Compte d'assurance-emploi.

CONCLUSION

364 Au terme de cette analyse et de cette discussion, le Tribunal estime donc qu'on doit répondre par l'affirmative aux deux premières questions en litige et par la négative à la troisième.

365 Le Tribunal est d'avis que les articles de la Loi portant sur les mesures actives, soit les articles de la partie II sur les prestations d'emploi et le service national de placement, les articles sur le travail partagé et les programmes de formation et les autres dispositions de la Loi reliées à ces mesures actives, sont constitutionnellement valides.

366 Le Tribunal considère également que les articles de la Loi relatifs aux cotisations exigées, soit les articles 66, 66.1 et 66.2, sont valides du point de vue constitutionnel.

367 Enfin, le Tribunal conclut qu'à la lumière de la preuve faite, il est inexact de prétendre que le gouvernement fédéral aurait utilisé et se serait approprié, et ce, illégalement, les surplus accumulés au Compte d'assurance-emploi. Ces surplus accumulés n'appartiennent pas aux cotisants du régime. Au mieux, ils appartiennent au Trésor, à sa Majesté ou au Canada, sujets toutefois à ce que prescrit l'article 77 de la Loi quant aux débits qui peuvent réduire le niveau de ces surplus.

368 Compte tenu de ces réponses aux questions en litige, il n'y a pas lieu d'accorder les conclusions déclaratoires recherchées par le Syndicat d'Arvida et la CSN. Les deux recours entrepris doivent donc être rejetés.

LES DÉPENS

369 Reste maintenant la question des dépens. Règle générale, la partie qui succombe doit les supporter. En l'espèce, le Tribunal estime cependant qu'il y a lieu d'y faire exception. Voici pourquoi.

370

Comme le souligne l'introduction, la véritable raison d'être du litige dont ce jugement dispose est l'ampleur des surplus accumulés au Compte d'assurance-emploi. Tant le Syndicat d'Arvida que la CSN reconnaissent que, n'eût été du niveau de ces surplus, il est probable que les recours entrepris n'auraient pas été intentés.

371 Or, selon la preuve analysée par le Tribunal, on doit reconnaître que le gouvernement fédéral est loin d'avoir été limpide quant à sa position sur ces surplus accumulés. Les nombreux extraits des débats parlementaires relatifs aux budgets fédéraux des dernières années font état de réponses somme toute nébuleuses et ambiguës à ce sujet, malgré les interrogations répétées.

372 Devant la preuve documentaire et testimoniale présentée, il eût pourtant été facile de rassurer les cotisants au régime d'assurance-emploi en leur précisant que ces surplus apparaissent toujours au crédit du Compte d'assurance-emploi et que ces crédits ne peuvent être diminués qu'en fonction de ce que la Loi permet à l'article 77.

373 Non seulement cela ne semble pas avoir été fait, mais dans son argumentation, le Procureur général du Canada a même affirmé que, selon lui, le Trésor peut faire ce qu'il veut avec ces surplus, ce qui est en soi inexact à la lecture des dispositions pertinentes de la Loi¹¹¹.

374 Qui plus est, et bien que ce ne soit pas là l'objet du litige que le Tribunal est appelé à trancher, il n'en reste pas moins que malgré leur ampleur, critiquée tant par le vérificateur général du Canada que par l'actuaire en chef de DRHC, on cherche en vain dans la preuve des justifications ou des explications quant au maintien de ces surplus au niveau où ils se trouvent.

375 Dans ce contexte, ne serait-ce que pour avoir permis de clarifier certaines ambiguïtés, on ne peut reprocher au Syndicat d'Arvida et à la CSN de s'être adressés aux tribunaux. Même si leurs procédures sont rejetées et bien que l'objet du litige ait largement dépassé la seule question de ces surplus accumulés, la nécessité de clarifier cette situation se justifiait dans les faits, particulièrement eu égard à l'importance du régime d'assurance-emploi dans la société canadienne.

376 Usant de la discrétion qui est la sienne en cette matière, le Tribunal n'accordera donc pas de dépens au Procureur général du Canada dans les circonstances.

377 PAR CES MOTIFS, LE TRIBUNAL :

Dans le dossier no 150-05-001538-984 :

378 REJETTE l'action déclaratoire des demandeurs, sans frais.

Dans le dossier no 500-05-048333-999 :

379 REJETTE la requête pour jugement déclaratoire de la requérante, sans frais.

CLÉMENT GASCON, J.C.S.

cp/i/qw/qlisl/qlrcr/qlkan

1 L.C. 1996, c. 23.

2 Loi constitutionnelle de 1867, 30 & 31 Vict., R.-U., c. 3.

3 C.S. Chicoutimi, no 150-05-001538-984, action déclaratoire initiale datée du 29 septembre 1998.

4 C.S. Montréal, no 500-05-048333-999, requête en jugement déclaratoire selon l'article 453 C.p.c. datée du 19 février 1999.

5 Paragraphes 40 à 51 de l'action déclaratoire amendée du 20 mars 2003.

6 Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982 [annexe B de la Loi de 1982 sur le Canada (1982, R.-U., c. 11)].

7 Défense du 11 février 1999 dans le dossier C.S. Chicoutimi, no 150-05-001538-984.

8 Contestation écrite du 17 septembre 1999 dans le dossier C.S. Montréal, no 500-05-048333-999.

9 Québec (Ministre de la Justice) c. Canada (Ministre de la Justice), [2003] R.J.Q. 1118 (C.A.).

10 Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture), [2002] 2 R.C.S. 146, par. 58.

11 Voir à ce sujet Renvoi relatif au projet de loi C-7, précité, note 9, par. 62.

12 Global Securities Corp. c. British Columbia (Securities Commission), [2000] 1 R.C.S. 494, 505 et 506.

13 Peter W. HOGG, Constitutional Law of Canada, Third Edition, Toronto, Carswell, 1992, p. 376 et 377.

14 Renvoi relatif au projet de loi C-7, précité, note 9, par. 62; voir aussi General Motors of Canada c. City National Leasing, [1989] 1 R.C.S. 641, 666 et 667.

15 Pièce D-5, p. 21.

16 Pièce D-6, p. 23.

17 Pièce D-7, Communiqué : Le ministre Axworthy annonce un nouveau système d'assurance-emploi : un nouveau système qui remplacera l'actuel Régime d'assurance-chômage, 1^{er} décembre 1995, fiche d'information 2, p. 1; voir aussi pièce D-9, Aperçu de l'évolution du

marché du travail au Canada de 1940 à nos jours; Politique stratégique, novembre 2000, p. 30.

18 R. c. Big M Drug Mart, [1985] 1 R.C.S. 295, 331.

19 P.W. HOGG, *op. cit.*, note 13, p. 383.

20 Pièce D-1, "Loi constituant une commission de placement et d'assurances sociales, établissant un service national de placement, une assurance contre le chômage, des secours aux chômeurs et d'autres formes d'assurance et de sécurité sociales, et visant les fins qui s'y rattachent", S.C. 1935, c. 38 (Loi de 1935).

21 Pièce D-4, John HUNTER, "L'emploi : un défi, Politiques et programmes d'emploi fédéraux, 1900 à 1990", Hull, Centre de renseignements Affaires publiques, gouvernement du Canada, 1993, p. 9 et 75.

22 Voir pièce D-17-1, Comptes publics du Canada 2002, volume I, Compte d'assurance-emploi, p. 4.22.

23 Attorney-General for Canada c. Attorney-General for Ontario, [1937] A.C. 355.

24 Re The Employment and Social Insurance Act, [1936] R.C.S. 427.

25 Attorney-General for Canada c. Attorney-General for Ontario, précité, note 23, 367

26 Re The Employment and Social Insurance Act, précité, note 24, 456.

27 S.C. 1940, c. 44.

28 Martin Service Station c. Ministre du Revenu national, [1977] 2 R.C.S. 996, 1006.

29 S.C. 1970-71-72, c. 48.

30 S.C. 1976-77, c. 54.

31 Voir pièce R-6, Débats de la Chambre des communes, vol. II, 1940, p. 1145; P.W. HOGG, *Constitutional Law of Canada*, Fourth Edition, Toronto, Carswell, 1994, p. 63; Renvoi : Compétence du Parlement relativement à la Chambre haute, [1980] 1 R.C.S. 54, 63 et 64.

32 [1946] A.C. 193, 206.

33 R.C.S. 1927, c. 196.

34 Précité, note 18, 335.

35 Martin Service Station c. Ministre du Revenu national, précité, note 28, 1004.

36 Id., 1005.

37 Hills c. Canada (Procureur général), [1988] 1 R.C.S. 513, 535.

38 Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration), [1991] 2 R.C.S. 22, 41.

39 [1992] 1 R.C.S. 877, 894 et 895.

40 Edwards c. Attorney-General for Canada, [1930] A.C. 124, 136 et 137; voir également Attorney-General for Alberta c. Attorney-General for Canada, [1947] A.C. 503, 516 et 517.

41 Martin Service Station c. Ministre du Revenu national, précité, note 28, 1006.

42 P.W. HOGG, op. cit., note 13, p. 413 et 414.

43 Pièce R-6, Débats de la Chambre des communes, vol. II, 1940, p. 1154.

44 Pièce R-2, Débats de la Chambre des communes, 12 février 1935, p. 722.

45 Pièce R-5, Lettre de l'hon. Mackenzie King à l'hon. Maurice Duplessis le 26 novembre 1937 (Addendum aux procès-verbaux des Débats de la Chambre des communes du 25 juin 1940).

46 Frederick C. MISH, éditeur en chef, Merriam-Webster's Collegiate Dictionary, Tenth Edition, s.v. "unemployment insurance".

47 Re Exported Natural Gas Tax, [1982] 1 R.C.S. 1004, 1074.

48 Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture), précité, note 10, par. 52 et 53; Henri BRUN et Guy TREMBLAY, Droit constitutionnel, 4e édition, Cowansville, Éd. Yvon Blais, 2002, p. 451 et 452; R. c. Morgentaler, [1993] 3 R.C.S. 463, 483-485; Renvoi relatif à la Loi de 1979 sur la location résidentielle, [1981] 1 R.C.S. 714, 721-724; Renvoi relatif à la Loi anti-inflation, [1976] 2 R.C.S. 373.

49 P.W. HOGG, op. cit., note 13, p. 1291.

50 General Motors of Canada c. City National Leasing, [1989] 1 R.C.S. 641, 671 et 672; Renvoi relatif à la taxe sur les produits et services, [1992] 2 R.C.S. 445, 471.

51 Renvoi relatif au projet de loi C-7, précité, note 9.

52 Pièce P-15, Assurance-emploi; Rapport de contrôle et d'évaluation 1999, p. 36.

53 P.W. HOGG, op. cit, note 13, p. 396; Pierre-André COTÉ, *Interprétation des lois*, 3e éd., Montréal, Éditions Thémis, 1999, p. 470.

54 Loi modifiant la Loi sur l'assurance-emploi et le Règlement sur l'assurance-emploi (pêche); L.C. 2001, c. 5, art. 9.

55 Loi portant exécution de certaines dispositions du budget déposé au Parlement le 18 février 2003, Projet de loi C-28 (adopté le 27 mai 2003), 2e session, 37e législature (Can.), art. 21.

56 S.C. 1955, c. 50.

57 Voir Loi concernant l'assurance-chômage au Canada, L.R.C. (1985), c. U-1, art. 48 et 49 (Loi de 1985).

58 Loi modifiant la Loi sur l'assurance-chômage et la Loi sur le ministère et sur la Commission de l'emploi et de l'immigration, L.C. 1990, c. 40, art. 30.

59 Loi modificative portant exécution de certaines dispositions du budget déposé au Parlement le 22 février 1994 (Loi d'exécution du budget 1994), L.C. 1994, c. 18, art. 26.

60 Voir pièce D-5, p. 90, 91 et 92 et pièce D-7, Fiche d'information 7, p. 2.

61 Ontario Home Builders' Association c. Conseil scolaire de la région de York, [1996] 2 R.C.S. 929, 1018.

62 Pièce D-18, Rapport d'expertise préparé par Éric Flynn et Chantal Clément, c.a., Compte d'assurance-emploi, 9 novembre 1999, p. 4 et 5.

63 Quoiqu'en 2002, le rapport émane plutôt de la "vérificatrice générale", le Tribunal réfère globalement au "vérificateur général" afin d'alléger le texte de cette partie du jugement.

64 Pièce D-17, annexe C, Comptes publics du Canada 1999, p. 4.18.

65 Pièce R-45, p. 11.

66 Pièce D-17-1, p. 1.5, 1.31, 1.34 et 1.35.

67 Pièce R-20, p. 8, 9, 11 et 12.

68 Pièce R-27, p. 7, 9 et 10.

69 Pièce R-42, p. 8, 11 et 12.

70 Pièce P-30, p. 9, 10, 11 et 12.

71 Loi sur la Cour fédérale, L.R.C. (1985) c. F-7, art. 18(1) et art. 2(1), la définition de "office fédéral".

72 Première nation de Westbank c. B.C. Hydro, [1999] 3 R.C.S. 134, 148.

73 Succession Eurig (Re), [1998] 2 R.C.S. 565, 578 et 579.

74 Voir, par exemple, pièce D-17-1 pour l'exercice clos au 31 mars 2002.

75 Première nation de Westbank c. B.C. Hydro, précité, note 72, 149.

76 OECTA c. Ontario (P.G.), [2001] 1 R.C.S. 470, 521.

77 Re Exported Natural Gas Tax, précité, note 47, 1070.

78 Pièce P-34.

79 Pièce R-30, Pacte international relatif aux droits économiques, sociaux et culturels, Nations-Unies, recueil des traités, vol. 993, 1976, p. 13.

80 Pièce R-30, Pacte international relatif aux droits économiques, sociaux et culturels, Nations-Unies, recueil des traités, vol. 993, 1976, art. 9.

81 Pièce R-31, Rapport du comité des droits économiques, sociaux et culturels, 4 décembre 1998, Genève, p. 2 et 3.

82 P.W. HOGG, op. cit, note 13, p. 285 et 286.

83 Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration), [1999] 2 R.C.S. 817, 861.

84 Voir notamment les extraits suivants des Débats de la Chambre des communes, pièces R-46-4, R-46-6, R-46-8, R-46-12, R-46-21, R-46-24 et R-46-29.

85 Voir notamment les extraits suivants des Débats de la Chambre des communes, pièces R-46-9, R-46-10, R-46-11, R-46-13, R-46-15, R-46-16, R-46-17, R-46-18, R-46-19, R-46-22, R-46-23, R-46-26, R-46-27, R-46-28, R-46-30, R-46-31 et R-46-32.

86 Voir notamment les extraits suivants des Débats de la Chambre des communes, pièces R-46-9, R-46-10, R-46-11, R-46-13, R-46-15, R-46-16, R-46-17, R-46-18, R-46-19, R-46-22, R-46-23, R-46-26, R-46-27, R-46-28, R-46-30, R-46-31 et R-46-32.

87 Voir pièce D-17-1, Comptes publics du Canada 2002; pièce R-41, Comptes publics du Canada 2000; pièce D-17, annexe C, Comptes publics du Canada 1999; pièce R-40, Comptes publics du Canada 1998; pièce R-39, Comptes publics du Canada 1997.

88 L.R.C. (1985), c. I-21.

89 L.R.C. (1985), c. F-11.

90 Pièce D-17-1, Comptes publics du Canada 2002, volume 1, Introduction.

91 Pièce D-17, rapport d'expertise de Louise Breton, c.a., Consolidation du Compte d'assurance-emploi dans les états financiers du gouvernement présentés dans les comptes publics du Canada, p. 3, 9 et 10.

92 Voir pièce D-17-1, p. 4.18.

93 Pièce D-17, rapport d'expertise de Louise Breton, c.a., p. 3, 9 et 10.

94 Témoignage de Louise Breton, c.a., transcription du 1er mai 2003, p. 123 et 124.

95 Voir pièce R-16.

96 Témoignage de Louise Breton, c.a., transcription du 1er mai 2003, p. 119-121.

97 Pièce D-17, rapport d'expertise de Louise Breton, c.a., p. 8 et 10.

98 Pièce D-17-1, Comptes publics du Canada 2002, volume 1, p. 1.32.

99 Pièce D-17-1, p. 1.8.

100 Pièce D-17-1, p. 1.32.

101 Pièce D-17-1, p. 1.16.

102 Pièce D-17-1, p. 4.17.

103 Pièce D-17-1, p. 4.20.

104 Pièce D-17-1, p. 1.34.

105 Interrogatoire de Chantal Clément, 1er mai 2003, p. 83-86.

106 Interrogatoire de Chantal Clément, 1er mai 2003, p. 85 et 86.

107 Pièce P-46-16, p. 7274.

108 Pièce P-46-17, p. 7359.

109 Pièce P-46-27, p. 5909.

110 Pièce D-4, J. Hunter, op. cit., note 21, p. 98.

111 Transcription du 21 mai 2003, page 45, ligne 18; voir également discussions aux pages 46 à 55.

Indexed as:

Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing)

Between

**Domus Architects, plaintiff, and
Her Majesty the Queen in Right of The Province of Ontario as
represented by the Ministry of Municipal Affairs and Housing,
defendant**

[2001] O.J. No. 3597

[2001] O.T.C. 657

32 C.P.C. (5th) 117

108 A.C.W.S. (3d) 86

Court File No. 13776/01

Ontario Superior Court of Justice

Belch J.

Heard: May 26 and June 5, 2001.

Judgment: September 4, 2001.

(55 paras.)

Practice -- Discovery -- Discovery of Crown -- What documents must be produced -- Privileged documents, state or public documents -- Privileged documents, power of court to inspect -- Costs -- Party and party costs -- Unsuccessful party -- Against the Crown or governmental bodies -- Crown -- Crown privilege or prerogative -- Parliamentary privilege of provincial legislature -- Cabinet discussions -- Public interest privilege.

Appeal by Domus from the dismissal of its application for production of cabinet documents. Cross-appeal by the Ministry from an order to produce cabinet documents for judicial inspection and from an order to pay costs to the unsuccessful party on the motion. Domus had brought an

action against the Ministry for loss of profits on cancelled public housing contracts. On a motion to produce certain cabinet documents, a Master ordered production of the documents to the court for inspection to determine relevance. After the inspection, the Master determined production of the documents was not in the public interest and they were not produced to Domus. Costs of \$19,000 were ordered against the Ministry on the motion.

HELD: Appeal dismissed, cross-appeal allowed. Access to the cabinet discussions would not have assisted Domus in establishing its loss of profits. Domus did not present evidence to establish the relevance of the documents. A cabinet official's affidavit citing the confidentiality of the documents, stating that the documents did not specifically address the Domus projects, that they did not relate to the formulation of policy, and that they related to a subject which was highly controversial, was sufficient to establish that production of the documents was not in the public interest. The appeal by the Ministry from the costs order was allowed because the Crown was entitled to its day in court and was successful at least in part on the original motion and was entirely successful on appeal. Costs of the original motion were fixed at \$5,000, payable to the Crown in the cause.

Counsel:

John Zuber, for the plaintiff.

Leah Price, for the defendant Her Majesty the Queen.

1 BELCH J.:-- The defendant, Her Majesty the Queen in Right of Ontario (HMQ) appeals from the order of Master Polika, dated March 13th, 2001 for an order:

- (a) setting aside that portion of the order of Master Polika wherein he found that the documents listed in subparagraphs 1(i), 1(ii) and 1(iii) of the Amended Notice of Motion (the Cabinet documents) meet the "semblance of relevance" test, and ordered that the Cabinet documents be produced to him for inspection;
- (b) varying the order of Master Polika, by substituting for the order in relation to the Cabinet documents, an order dismissing the plaintiff's motion for production of the Cabinet documents; and
- (c) granting its costs of this appeal.

2 The plaintiff, Domus Architects (Domus), opposes the motion.

3 Domus cross-appeals from the April 3rd, 2001 order of Master Polika for an order:

- (a) setting aside that portion of the order of Master Polika where he ordered

that the following documents, although relevant should not be produced for inspection:

- (i) an application and submission to Management Board of Cabinet (MB 20) dated March 18th, 1996;
- (ii) Cabinet submission dated July 19th, 1995 prepared by the Ministry of Municipal Affairs and Housing entitled 'Review of Non-Profit Housing Developments'; and
- (iii) summary report to Cabinet dated July 21st, 1995 prepared by the Ministry of Municipal Affairs and Housing (collectively referred to as "Cabinet documents").

- (b) varying the order of Master Polika by substituting for the order, an order requiring production of all or any part of the Cabinet documents; and
- (c) their costs of this cross-appeal.

4 HMQ brings a motion for leave to appeal from the costs order of Master Polika, and if granted,

- (a) for an order quashing and setting aside the costs order;
- (b) an order substituting for the costs order made by the Master, an order that costs of the motions before him be to the successful party in the cause on a party and party basis; and
- (c) an order for the costs of this motion on a solicitor-client basis payable forthwith.

5 The plaintiff also opposes the motion for leave.

Background

6 Reading from the factum of HMQ, the plaintiff is a firm of architects that provided architectural services to three non-profit corporations (Corporations) which were named as defendants in three separate actions. Each of the Corporations had proposed housing projects and participated in a non-profit housing program called the "Jobs Ontario Homes" program. This program was funded by loans to corporations such as these Corporations, which loans were facilitated by the Crown.

7 On June 28th, 1995 the Premier of Ontario announced a 30-day moratorium on the further development of non-profit housing under the Jobs Ontario Homes program and other similar non-profit housing programs. On July 25th, 1995 the Minister of Municipal Affairs and Housing announced cancellation of provincial funding for 385 non-profit housing projects. The projects the Corporations had proposed were three of those 385 projects.

8 The Corporations were notified of the cancellation of funding for their projects and were asked to participate in a close-out process. Under this process, invoices for services rendered by service providers, including invoices by the Corporations' architects were to be reviewed and funding made available for all legitimate services within the program guidelines up to July 25th, 1995.

9 The plaintiff was paid for all services provided to the Corporations. The plaintiff executed releases in or about September of 1996 which released HMQ and the Corporations from any claims for any damage or loss, however arising, which heretofore may have been or may hereafter be sustained ... in respect of services rendered to the Corporations.

10 The releases did not however release the defendants from claims relating to

- (iv) loss of profit or termination expenses; or
- (v) expenses resulting from termination of such things as office leases, equipment rental agreements, or employment contracts that arise as a result of the termination of any contract for services which existed between the non-profit and the releasor in relation to the non-profit housing project.

11 Domus agrees that the facts stated by HMQ in relation to the background of the litigation are essentially a correct summary.

12 On September 2nd, 1999 the plaintiff delivered a notice of motion for an order for production of the Cabinet documents. During a case conference, the Master was advised that the Crown intended to claim Cabinet privilege and to deliver an affidavit sworn by the Secretary of Cabinet in response to the motion.

13 The Crown delivered an affidavit sworn January 18th, 2000 by Rita Burak, the then Secretary of Cabinet and Clerk of the Executive Council, and the most senior public servant in Ontario. In that affidavit she deposes that she caused a search to be made in order to locate documents falling with the parameters of the motion. She indicated that she found the three documents hereinbefore referred to as the Cabinet documents. Ms. Burak stated the Crown's position with regard to the documents was that they were not relevant to the proceedings, or in the alternative, that they are subject to Cabinet or public interest privilege and solicitor-client privilege.

14 The Crown did not admit relevance in the Domus case nor voluntarily produce the documents for inspection. Accordingly, the court was required to make a ruling based on the pleadings as to whether it would order the documents produced to the court for its inspection.

The Master's Rulings

15 On March 13th, 2001 the Master ruled that the Cabinet documents met the "semblance of relevancy" test and on the issue of Cabinet privilege, that he was in doubt as to where the balance should tip, and accordingly the documents should be produced to him for inspection.

16 The Master released a second decision on April 24th, 2001. Reading from paragraph 9 of that decision ...

After inspection of the three documents, the issue I am faced with on this motion is a consideration of the:

balance between two competing public interests, the necessity for the proper administration of justice, "that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in the litigation" and "that certain information regarding government activities should not be disclosed in the public interest."

From paragraph 10:

I find that in this case the balance is in favour of HMQ. The documents in question will add virtually nothing to the fair disposition of the issues in this action. Notwithstanding that the documents relate to decisions made approximately five or more years ago, disclosure of the information today could have an adverse effect on governmental activities and should not be disclosed in the public interest. On the facts before me the potential effect on governmental activities far outweighs their marginal relevance to the matters in issue in this action and accordingly the three documents need not be produced for inspection.

17 And concerning costs, the Master decided in paragraph 22,

In the circumstances herein, the issue of costs on the motion should not be further prolonged by assessment. I have received full argument and this is an appropriate case, where given HMQ's conduct, costs should be fixed and ordered payable forthwith. Taking into account all of the aforesaid factors and the submissions made, costs are fixed at \$19,000 inclusive of GST and disbursements payable by HMQ to the plaintiff forthwith.

Issues

18 The issues for this court's determination are:

1. Should the court inspect these three documents?
2. Should HMQ be required to produce the three documents to the plaintiff?
3. Are the documents protected by solicitor-client privilege?

Decision

19 For the reasons that follow it is my decision this court should not inspect the three documents, HMQ should not be required to produce the documents to the plaintiff, and given the answer to question two, there is no need to discuss the issue of solicitor-client privilege.

Arguments of the Parties

20 HMQ argues:

- (a) the learned Master erred in holding that the Cabinet documents meet the "semblance of relevance" test;
- (b) the learned Master erred in not giving any weight to the views of the Secretary of Cabinet;
- (c) the learned Master erred in failing to consider the fact that the Cabinet documents make no mention of the plaintiff, or of the specific projects in which the plaintiff was involved;
- (d) the learned Master erred in failing to consider and apply the following elements of the test laid down in *Carey v. Ontario*, [1986] 2 S.C.R. 637:
 - (vi) that the documents concern the decision-making process at the highest level of government;
 - (vii) that there is a keen public interest in the subject matter;
 - (viii) that the case is of little importance and there is no need to produce the documents to ensure that it can be adequately and fairly tried;
 - (ix) that the documents deal with formulation of policy on a broad basis and are not concerned with a transaction made in the implementation of that policy; and
 - (x) that the documents are of more than mere historical interest.
- (e) the learned Master erred in concluding that the Cabinet documents "may have directly affected the interest of the plaintiff herein" contrary to the evidence;
- (f) the learned Master erred in failing to hold that the Cabinet documents need not be produced; and
- (g) the learned Master erred in his interpretation of the law governing the privileges and immunities of the Crown.

21 The grounds for the appeal of Domus are:

- (a) the learned Master erred in not ordering production of the Cabinet

documents after inspecting the documents after specifically finding on March 13th, 2001 the following:

- (i) it is to be noted that the test is "semblance of relevance" and when one takes into account the criteria used to locate the documents and their description in Ms. Burak's affidavit, they meet that test and I so find;
 - (ii) the alternative position of HMQ is to claim Cabinet or public interest privilege and solicitor-client privilege over these documents. In respect of the latter Ms. Burak states that the documents contain legal advice. From their description in her affidavit that is not patent. There is no indication who prepared the documents, from whom the legal advice emanates, that is from a lawyer or a non-lawyer, or any other facts in relation to the claim;
 - (iii) it must be stressed that what is in issue is not the deliberations of Cabinet, but disclosure of material emanating from a ministry of government which was used to make decisions by Cabinet, which may have directly affected the interests of the plaintiff herein. If anything, the knowledge that such recommendations might potentially see the light of day would enhance the quality of such recommendations;
 - (iv) in such cases, as held by the Court, what is in issue is a balance between two competing public interests, the necessity for the proper administration of justice "that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in the litigation" and "that certain information regarding government's activities should not be disclosed in the public interest."
- (b) the learned Master erred in not specifically finding that the Crown (the persons intending to protect the documents from disclosure) bear the onus of establishing that they should not be produced;
 - (c) the learned Master erred in not specifically finding that disclosure may be necessary for the fair determination of issues and saving costs by the determination of the facts upon which the decision will depend, with specific reference to *Carey v. Ontario*, supra.
- (a) I should add that I much prefer the approach of Lord Scarman and Lord Templeman in the *Air Canada* case, that the court may under

R.S.C. Order 24 R.13 inspect the document, and, if not found to be outbalanced on the basis of some public interest, produce not only when this is likely to assist the plaintiff's case or damage the defendant's, but also where it may assist any of the parties to the proceedings. Disclosure may as they indicate be necessary for a fair determination of the issues and for saving costs even when it does not directly assist the plaintiff's case; see for example Lord Scarman at page 535;

- (b) "It should be mentioned, however that in the Air Canada case two of the law Lords (Lord Scarman and Lord Templeman) were of the view that it was sufficient if the documents might assist any of the parties to the proceedings. They adopted the view of the trial judge that documents are necessary for fairly disclosing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts upon which the decision in the cause will depend.'; see Lord Scarman, at page 535.

- (d) the learned Master erred in not disclosing the Cabinet documents specifically after finding that,
 - (i) the plaintiff also advances his claim on the basis of HMQ inducing a breach of the Architectural Services Agreement, on the basis of negligent misrepresentation and on the basis of breach of duty of care or in the alternative, breach of fiduciary duty or in the further alternative breach of trust; and
 - (ii) HMQ further pleads that the decision to cancel funding reflected a change in policy related to reducing expenditures and deficit elimination in the face of high provincial debt and persistent high employment and especially in the light of the reasons in *Carey v. Ontario* (1986), 14 C.P.C. (2d) 10 per LaForest J. (S.C.C.) which provide in part as follows:

The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purposes for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed.

- (e) the learned Master erred in fact and law in not ordering the Cabinet documents to be disclosed.

22 HMQ's argument with respect to costs is:

- (a) the learned Master erred in principle in making his costs order;
- (b) the Master made findings contrary to the evidence;
- (c) the Master made a punitive order of costs against the Crown even though:
 - (i) the Crown was ultimately successful on the contested issues; and
 - (ii) there was no delay or misconduct on the part of the Crown;
- (d) Section 133 of the Courts of Justice Act and Rule 57 of the Rules of Civil Procedure.

23 Domus submits there are insufficient grounds that the Master erred in exercising his discretion in making the costs Order and leave should be refused, but if leave is granted the Master did not err in making the costs Order, properly exercising his discretion, therefore the Order ought not to be disturbed.

Analysis and Conclusion

Relevance

24 In the Master's decision of March 13th, 2001, reading from paragraph 50, he sets out the general test of relevance.

The general test of relevance applicable to both production of documents and to questions asked at examinations for discovery is semblance of relevance to the matters in issue as delineated by the pleadings. Underlying that very low test is the premise that admissibility and weight should be left to the trial judge and should not govern the production of documents or questions asked at examinations for discovery.

25 Given the low threshold, the Master decided to inspect the documents in question.

26 However, the low threshold of this test presents difficulty when dealing with Cabinet privilege. By the time the trial judge makes a ruling, it is already too late if the ruling is against admissibility but the documents were ordered released for discovery.

27 Further, with respect to relevance, and given the release the parties signed, a release that neither party questioned as to its authenticity or effect, this trial is about loss of profit.

28 It is difficult to see how access to Cabinet discussions terminating the projects would assist the plaintiff in establishing its profit loss. Having already been paid to the time when the release was signed, surely, this action is all about the plaintiff's role in overseeing the projects to conclusion and what the plaintiff would normally have been paid in that capacity.

29 I am not satisfied that the plaintiff has presented any evidence to establish relevancy of the Cabinet documents. That in itself is sufficient to answer the issues that have been raised, however, if I am wrong in my conclusion I turn now to address the general nature of Cabinet privilege.

30 The law in this area is established in *Carey*, supra. *Carey* is also a case involving production of Ontario Cabinet documents. In that case, the government admitted the documents were relevant.

31 The reported cases involving the release of Cabinet documents follow an established pattern. A litigant requests the release of the documents, the government objects, and the Secretary for the Cabinet, the Minister responsible or other official provides an affidavit or certificate dealing with the documents in question. At page 654 of *Carey*, (S.C.R.), supra, Justice LaForest writing for the Court refers to the affidavit in this way:

In making a claim of public interest immunity the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. Examples of how this should be done appear in *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.) and *Goguen v. Gibson*, [1983] 2 F.C. 463 (C.A.), where the Minister described with as much detail as the nature of the subject matter would allow the precise policy matter sought to be protected from disclosure.

And again, at page 666, commenting on the certificate in *Burmah*, supra, there is a suggestion that the Minister should be specific and motivated in the making of the certificate or affidavit.

The Minister had not contented himself with a claim of a blanket character that such documents should not be revealed in the public interest. Rather, he had fully set forth why they should be withheld, namely, that they concern discussions at a very high level of specific government policies, policies identified as being of the highest national and political importance.

32 In *Carey*, supra, Justice LaForest writes at 656,

The principal argument for withholding the documents described in the affidavit is that their disclosure would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the

public interest ... The principles of joint responsibility of the members of Cabinet, and of Cabinet solidarity, are basic to Canadian Constitutional law and must be maintained and preserved in the public interest.

and at 657,

I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance.

33 Another reason for the withholding of documents is the importance of the business of government. At page 659, Justice LaForest continues,

While some of these remarks may seem somewhat dated, I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment, making Cabinet government unmanageable. What I would quarrel with is the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation.

34 The issue of timing is also important. See page 664,

Nor, the court thought, should protection from disclosure last forever. The length of time the immunity should last would depend on the subject matter.

35 Justice LaForest sets out a summary and application of the principles on pages 670 and 671.

The foregoing authorities, and particularly, the Smallwood case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little

public interest is involved.

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

I would repeat that no claim is made here on the basis of the nature of the policy discussed in the documents. If the certificate had particularized that their divulgence should be withheld on the ground, for example, that they relate or would affect such matters as national security or diplomatic relations, that would be another matter. If the certificate was properly framed, the court might in such a case well agree to their being withheld even without inspection: see in this context *Goguen v. Gibson*, *supra*. For on such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long.

36 The Supreme Court of Canada also acknowledges the difficult position that plaintiffs find themselves in when making arguments about documents that they have not been able to read. At page 678, commenting upon the decision of the Ontario Court of Appeal:

... All the submissions on behalf of Carey came down to, it concluded, is that the documents are relevant to his case and that, accordingly, they either could or might assist him. This was no more than "a bare unsupported assertion ... that something to help him may be found" in the documents; Carey's case stopped far short of showing "some concrete ground for belief" which would take the case beyond mere speculation.

Justice LaForest continues:

What troubles me about this approach is that it puts on a plaintiff burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject matter of the action and what one party was doing in relation to the relevant transactions at the time.

37 In Carey, unlike our case, it was not a general decision by Cabinet but a specific decision relating to the very subject matter of the litigation in that case, namely, the operation and conveyancing involving Minaki Lodge in Northern Ontario.

38 Justice LaForest, in disagreeing with the approach of the Court of Appeal says at page 679,

... I cannot help concluding that the documents are likely (though one cannot really tell without inspecting them) to assist Carey's case. The whole of the surrounding circumstances is, I think, sufficient to give a "concrete ground" for that view. I cannot agree that under the known circumstances the attempt to obtain disclosure can be categorized as a mere "fishing expedition".

39 In concluding, Justice LaForest writes at page 682, quoting a New Zealand judge with approval from the decision *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 NZLR 290 (C.A.) at 295:

If the balance of public interest can be seen to support the claim of immunity without prior inspection by the Judge then the consequential decision against production will be made without further ado. In that regard the certificate itself should demonstrate with sufficient particularity what is the nature and the significance of the documents both in terms of any need to preserve their confidentiality on the one hand and for the actual litigation on the other. But where this is not the position, where the Judge has been left uncertain, it is difficult to understand how his own inspection could affect in any way the confidentiality which might deserve protection. And in that situation I think it would be wrong to put aside such a direct and practical means of resolving the difficulty. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the Judge himself grasping at air. That cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or the other.

and further at page 308,

... once the documents are admitted to relate to the case, as they are here, they should be available for inspection unless there is some reason shown why in the interests of public policy that course should not be followed. And the onus of establishing that they should not be produced for inspection must lie on the party which seeks a departure from the general rule.

40 The decision of *Masse et A. v. A.A. Ontario*, [1996] O.J. No. 363, Court File No. 590/95 (Ont.Div.Court), unreported, also dealt with a motion that raised the question of public interest immunity or Cabinet privilege. The production of a document prepared by the Ministry of Social

Services and submitted to Cabinet for consideration prior to reductions in social assistance in Ontario which were announced July 21st, 1995, was sought to be compelled.

41 The applicants argued

... the document is relevant to arguments they intend to make relating to certain Regulations being ultra vires their enabling legislation and also to Charter arguments. They argue the document is fundamental to their case and will assist this Court to understand what the government thought were the purposes of the statutes and regulations.

The Attorney General refuses production based on the basis of general public interest immunity and the approach taken in *Re Carey*, supra.

The Attorney General also argues the document was merely "an advice giving" document. The Attorney General filed an affidavit sworn by Rita Burak Secretary of Cabinet and Clerk of the Executive Council. That affidavit outlined the basis on which privilege was asserted and included assertions the document was used in connection with Government and Cabinet consideration to reform of the social assistance system which formed part of a larger policy agenda of the Government. The affidavit outlined a number of issues which were being considered, rate reductions being merely one of those issues.

Re Carey indicates that Cabinet documents like other evidence, must be disclosed unless that disclosure would interfere with public interest notwithstanding there is a general regime of secrecy that surrounds high level government decisions.

In determining whether Cabinet documents should be produced that decision indicates a balancing of competing interests must be considered.

Included in that process is consideration of the level of the decision-making process, the nature of the policy concerned, the contents of the document and the timing of when the information is to be revealed. The nature of the litigation involved and the extent to which facts may be proved without the document sought are also to be considered.

Re Carey noted revelations of Cabinet decisions and planning at a developmental stage when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet Government.

In this case the affidavit of Rita Burak indicates the document in question was part of an ongoing social policy reform at the developmental stage.

In considering the factors outlined in Re Carey we are satisfied that the document should not be produced at this time. If, during further argument there are grounds for renewing the application it may be re-considered.

42 In the present case, the government has not admitted relevance.

43 On January 18th, 2000 Rita Burak swore an affidavit for use in this proceeding.

44 In addition to addressing the issue of candour and Cabinet confidentiality, the affidavit sets out specifics with respect to the documents. Paragraph 6 states:

6. I have personally reviewed the documents described in paragraph 4 above. They all share the following characteristics:
 - (a) they were prepared at the request of and for the use of Cabinet;
 - (b) they were prepared by public servants who are subject to the confidentiality requirements of the Public Service Act and its regulations and who have sworn an oath of secrecy under section 10 of that Act;
 - (c) they were used and considered by Cabinet;
 - (d) they contain highly confidential fiscal and legal advice and information;
 - (e) they concern the decision-making process at the highest level of government;
 - (f) they pre-date the inception of this litigation;
 - (g) they make no mention of the plaintiffs, or of the specific projects in which the plaintiffs were involved;
 - (h) they relate to the formulation of overall policy in relation to non-profit housing, or in the case of the MB20, deal with the global funding of the policy decisions which had been taken by government;
 - (i) they were prepared in the expectation of confidence;
 - (j) they would qualify, in my opinion, for exemption from disclosure under subsection 12(1)(b) of the Freedom of Information and Privacy Act; and
 - (k) they relate to a subject (provincial involvement in non-profit housing) which was, and remains, highly controversial and in which there was (and

remains) keen public interest.

45 After identifying that the documents relate to the cancellation of funding for all non-profit housing projects, Ms. Burak goes on to state that the "non-profit housing policy formulation process did not end with Cabinet's 1995 decision to cancel funding", that subsequent legislation also used the "same information and analysis as is contained in the documents in issue", and that

As is apparent from the newspapers and other media, the issue of provincial involvement in and administration of non-profit or social housing remains extremely controversial. The policy-formulation process is ongoing. The information, analysis and recommendations contained in the documents in issue therefore remain subject to confidentiality concerns.

46 In *Masse*, supra, the Divisional Court accepted Rita Burak as an official capable of swearing an affidavit in circumstances such as these, and also accepted the contents of her affidavit.

47 As noted in *Carey*, supra, the Court is more likely to accept the affidavit if it is specific as to why the privilege is claimed. In the limited endorsement of the Divisional Court in *Masse*, supra, the affidavit is comparable to the present one and follows similar acts of reducing government spending in 1995, and was "part of an ongoing social policy reform at the developmental stage."

48 Taking all matters into consideration, namely, no admission the documents are relevant; an affidavit from an official; the affidavit is specific; candour and government business are cited as reasons; as for timing, the matter is ongoing; and there exists the Divisional Court's decision in *Masse*, supra, made under similar circumstances, I am satisfied it would not be in the public interest to produce these documents.

49 The plaintiff urges the court to inspect the documents in question, but given my finding on relevance and public interest, I find it is not necessary to inspect the documents.

50 In addition, a ruling on the issue of solicitor-client privilege is not required, given the findings.

51 Accordingly, the cross-motion for production to the plaintiff, fails.

Costs

52 Leave to appeal costs is granted and costs on that motion are awarded to HMQ and the quantum fixed by agreement at \$500.

53 The Master's award of costs in the amount of \$19,000 is set aside. Although this award was made on a solicitor-client scale to denounce conduct, I am satisfied the Crown was entitled to its day in court on the issue of privilege and was successful at least in part before the Master and was successful on this appeal.

54 Costs on the original Motion are awarded to the Crown in the cause and fixed at \$5,000.

55 Costs of this Motion are awarded to the Crown and by agreement fixed at \$4,000.

BELCH J.

cp/d/qlrme/qldah

Case Name:

**British Columbia Teachers' Federation v. British
Columbia (Attorney General)**

Between

**British Columbia Teachers' Federation, Federation of
Post-Secondary Educators of British Columbia, British
Columbia Division of the Canadian Union of Public
Employees, British Columbia Nurses' Union and Marcia
Toms, Plaintiffs, and
Attorney General of British Columbia, Defendant**

[2008] B.C.J. No. 2414

2008 BCSC 1699

[2009] 7 W.W.R. 161

91 B.C.L.R. (4th) 345

304 D.L.R. (4th) 588

2008 CarswellBC 2700

172 A.C.W.S. (3d) 877

Docket: S085226

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

E. Rice J.

Heard: October 22-24, 2008.

Judgment: December 8, 2008.

(85 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Interrogatories -- Striking interrogatories -- Person who may be examined -- Range of examination -- Relevancy -- Production and inspection of documents -- Relevancy -- Motion by the defendant for orders to prevent the examination for discovery of the Chief of Staff for the officer of the British Columbia Premier, to strike the plaintiffs' demand for documents and to strike out the plaintiffs' interrogatory allowed and cross-application by the plaintiffs to compel answers to the interrogatory dismissed -- Only extrinsic evidence pertaining to government deliberations which related to the legislative purpose and intent of the legislature as a whole was admissible in a constitutional case.

Motion by the defendant for orders to prevent the examination for discovery of the Chief of Staff for the officer of the British Columbia Premier, to strike the plaintiffs' demand for documents and to strike out the plaintiffs' interrogatory. The plaintiffs challenged s. 235.1 of the Election Act of British Columbia as unconstitutional as it infringed their rights under sections 2(b), 2(d) and 3 of the Charter. The plaintiffs sought the right to review documents on a broad scale and issued an extensive interrogatory. The position of the plaintiffs was that the information sought was important to determine the legislative purpose of the impugned legislation as well as the purpose of the government that introduced the legislation and that the examination of both purposes was appropriate in Charter litigation.

HELD: Application allowed and cross-application dismissed. Only extrinsic evidence pertaining to government deliberations which related to the legislative purpose and intent of the legislature as a whole was admissible in a constitutional case.

Statutes, Regulations and Rules Cited:

Canada Elections Act, S.C. 2000, c. 9, s. 350, s. 407

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2(b), s. 2(d), s. 3

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 52

Election Act, RSBC 1996, CHAPTER 106, 235.1

Rules of Court, Rule 19(24), Rule 26, Rule 26(1.2), Rule 27, Rule 29, Rule 29(7)

Counsel:

Counsel for Plaintiffs BCTF, BCNU and M. Toms: J.J.M. Arvay, Q.C.

Counsel for Plaintiffs CUPE BC and FPSE: L. McGrady, Q.C.

Counsel for Defendant: C.E. Jones.

[Editor's note: A corrigendum was released by the Court June 17, 2009; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

E. RICE J.:--

INTRODUCTION

1 This is a motion by the defendant, the Attorney General of British Columbia ("AG") for orders to prevent the examination for discovery of Martyn Brown, Chief of Staff for the office of the British Columbia Premier, on the grounds that Mr. Brown is not a person whom the plaintiffs are entitled to examine under Rule 27, as the questioning does not relate "to a matter in question in the action" ; to strike the plaintiffs' demand for documents under Rule 19(24), or to be excused from compliance under Rule 26(1.2); and to strike out the plaintiffs' interrogatory under Rule 29(7), "on the grounds that it is not necessary for disposing fairly of the action".

2 The AG's position is that no discovery should be permitted except as it pertains to the Legislature's deliberations. This is because it is not the purpose or intent of those in government who developed and introduced the legislation that is relevant: it is the purpose of the legislation. In the circumstances, says the AG, no examination for discovery is necessary or permitted under the *Rules of Court*. The information sought is irrelevant to the issues of the case.

3 The plaintiffs (the "teachers") reject the AG's position and claim the right to review documents on a broad scale. They have issued an extensive interrogatory. They also seek to examine one or more appropriate representatives of the British Columbia government.

4 The plaintiffs commenced this action by writ of summons and statement of claim issued originally on September 19, 2008. Since then, they have issued an amended statement of claim. They delivered an interrogatory on August 20, 2008 and a demand for discovery of documents on September 12, 2008. On October 21, 2008 they delivered a Notice of Appointment to Examine Mr. Martyn Brown, Chief of Staff of the Premier, as a representative of the defendant. They also made a cross-application for orders to compel attendance for examinations for discovery, disclosure of documents and answers to the interrogatories.

5 The plaintiffs seek disclosure of documents of the following kinds:

- * All documents that might be relevant to the issues raised in the Statement of Claim or in the Statement of Defence;
- * Any relevant documents that were before Cabinet or any Minister at the time the challenged provisions were being drafted, debated or in any way considered or discussed;
- * Any documents exchanged between a member of the Cabinet and any non-sitting member, employee or officer of the Liberal Party dealing with the subject matter of the challenged provisions from the time of the provincial general election of May 17, 2005 to the date of Royal Assent to the challenged legislation on May 29, 2008;
- * Any documents relevant to the issue of closure that were before Cabinet at the time the motion to seek closure on May 6, 2008 was being considered, discussed, or implemented;
- * Any documents the Defendant examined in determining that the challenged provisions constituted reasonable limits as pleaded by the Defendant in its Statement of Defence;

- * Any documents examined by the Defendant in concluding that spending in excess of the statutory limit threatens to undermine voters' abilities to be adequately informed of all views, or that unlimited third party spending is harmful;
- * Any documents examined by the Defendant in concluding that the challenged provisions enhance the right to vote by providing greater balance to political discourse and permitting greater participation in the electoral process;
- * Any documents examined by the Defendant to support its claim that the challenged provisions aid in the achievement of the three objectives set out in the Statement of Defence;
- * Any documents from or about other democratic societies relied on by the Defendant in drafting the challenged provisions;
- * A copy of any current government policy concerning advertising in the 88 days prior to a provincial general election;
- * All documents that provide details of all advertising expenditures in the 12-month period prior to the provincial general elections of May 16, 2001 and of May 17, 2005, expressed on a month-by-month basis;
- * All documents that pertain to the advertising budget anticipated for the period from September 1, 2008 to May 31, 2009, expressed on a month-by-month basis.

6 The teachers' interrogatory contains 17 questions, among which the following are included:

- * Identify all documents, as defined in the *Rules of Court*, which were used by the government to formulate, draft and amend the provisions of Bill 42 at issue in these proceedings.
- * What was the government's purpose in proposing each of the following:
 - a) the amendment of the definition of election advertising?
 - b) the limits on spending on election advertising by third parties?
 - c) the application of those limits outside the election campaign period?
 - d) the exemption of the government from the third party spending limits?
 - e) modifying the spending limit on political parties to a fixed sum rather than an amount per candidate?
- * What was the need for each of these proposals or the "mischief" it was designed to address?
- * Did comments from the "political" side of government factor in to the government's decision making with respect to Bill 42?
- * Does the government anticipate enacting legislation in the 60 days prior to the next general election campaign?

7 By agreement of the parties, this hearing will be confined to the question of relevance. Questions of privilege will be left for a later date. It is also agreed that to the extent, if any, the court or-

ders answers to be provided to the interrogatories, the court will attempt to provide guidelines to assist the parties in determining the practical effects of the ruling.

BACKGROUND

8 The plaintiffs, five public-sector labour unions and one individual union member, challenge s. 235.1 of the British Columbia *Election Act* as unconstitutional:

235.1(1) In respect of a general election conducted in accordance with section 23(2) of the *Constitution Act*, an individual or organization other than a candidate, registered political party or registered constituency association must not sponsor, directly or indirectly, election advertising during the period beginning 60 days before the campaign period and ending at the end of the campaign period

(a) such that the total value of that election advertising is greater than

- (i) \$3 000 in relation to a single electoral district, and
- (ii) \$150 000 overall, or

(b) in combination with one or more individuals or organizations, or both, such that the total value of the election advertising sponsored by those individuals and organizations is greater than

- (i) \$3 000 in relation to a single electoral district, and
- (ii) \$150 000 overall.

- (2) In respect of a general election conducted other than in accordance with section 23(2) of the *Constitution Act*, the limits under subsection (1) do not apply to the period beginning 60 days before campaign period, but do apply to the campaign period.
- (3) In respect of a by-election, the limits under subsection (1) do not apply to the period beginning 60 days before campaign period, but the limits under subsection (1)(a)(i) and (b)(i) do apply to the campaign period.
- (4) Section 204 applies to adjust the amounts under this section.

9 The plaintiffs say that this section of the provincial *Election Act* is an unjustifiable infringement of the plaintiffs' right to freedom of expression, the right to vote and the right to freedom of association guaranteed by ss. 2(b), 3 and 2(d) of the *Charter of Rights and Freedoms*. They seek an order that it is of no force and effect pursuant to s. 52 of the *Constitution Act*, 1982.

10 Similar third-party restrictions on spending during federal campaign periods (the 28-day period prior to election) were upheld by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, [*Harper*].

11 In *Harper*, the Supreme Court of Canada considered, amongst other things, s. 350 of the *Canada Elections Act*, which limited third party spending to \$150,000 during the election period (only \$3,000 of which could be used to support or oppose a particular candidate). The Court found these restrictions to be constitutional even though they violated freedom of expression because they promoted electoral fairness and the perception that elections are fair.

12 The teachers acknowledge similarities between the provisions of the *Canada Elections Act* and the British Columbia *Election Act*, but point to what they describe as the seven essential differences. It is on these differences that they found their argument of unconstitutionality.

13 First, the B.C. statute limitations extend into the pre-campaign period, which is 60 days before the actual campaign period, as well as during the 28 days of the campaign period itself. Second, whereas the federal legislation (s. 407) specifically provides that government spending may be an election expense, the B.C. legislation states that the limits it imposes do not effect the carrying out of necessary government functions. Third, in British Columbia, a wealthy individual may register and control a political party which has only two members, and donate \$4.4 million to it, which it may then spend during an election campaign. To be registered at the federal level, a party must have 250 members and is limited to spending less than \$50,000 per candidate, which effectively limits the party to spending \$1,000 per supporter. Fourth, the B.C. *Election Act* applies not only to supporters and opponents of a political party or candidate, but it restricts what is called "issue advertising". Fifth, the *Act* was enacted by the legislature with only the most limited debate in the Legislative Assembly, as the government unilaterally invoked closure. Sixth, the B.C. *Act* and the federal *Act* approach in different ways the practice of splitting into groups for spending purposes. Seventh, the evidence of social political context was not evident in *Harper*. In respect of the B.C. *Election Act*, the evidence allegedly shows, with one exception, that only unions had spent in excess of \$150,000 during the election campaign, while supporters of the Liberal Party, particularly corporations, made far more in contributions to the Liberal Party than supporters, including unions, made to the NDP.

POSITIONS OF THE PARTIES

(a) Argument of the AG

14 The AG argues that evidence with respect to the legislative history and legislative purpose is permitted in some facial constitutional challenges, but it is limited to material related to the Legislature's deliberative activities. Its position is therefore that no discovery of documents should be permitted beyond the public documents related to the Legislature's deliberations, and no examination for discovery is necessary or permitted under the *Rules of Court*.

15 The AG concedes that the traditional view that legislation must be read as speaking for itself has been supplanted in the *Charter* era by a broader willingness to accept certain other extrinsic evidence as part of the "legislative history". Nonetheless, the AG maintains that the "relevant purpose" in the drafting of statutes is the legislature's purpose, and not the government's or the government's employees' purpose.

16 According to the AG, the plaintiffs' attempt to learn more about the "political side" of the Premier's office is irrelevant as the law is clear that "political, economic, social or partisan considerations" motivating individual members of government are not to be taken into account in considering the constitutionality of a statute: *Sawridge Band v. Canada*, 2005 FC 1476, [2006] 1 C.N.L.R. 292 (F.C.) [*Sawridge Band*]. Likewise, their questions concerning public complaints regarding the electoral system or the proposed remedy are out of bounds. According to the AG, the plaintiffs' own documents leave little doubt that their inquiry in this action is into the "ultimate or strategic motives of some government players", rather than "the purpose of the statute", directly contrary to the Supreme Court of Canada's decision in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513 [*Delisle*].

17 On behalf of the AG a number of cases are cited. Not all of them support the traditional view. The AG, however, maintains that information and documents beyond public information related to legislative deliberation are irrelevant to the issues in the case.

(b) Argument of the teachers

18 The teachers say that the evidence sought and obtained on discovery will be used to prove infringements of the rights and freedoms in question, and also to refute the government's claim that such infringements are prescribed by law in a free and democratic society. The government may be in possession of documents or information that would assist the plaintiffs in proving that Bill 42, either in its purpose or effect, infringes their rights or freedoms. They argue that discovery is important beyond determining the objective of an impugned act or provision. Section 1 of the *Charter* requires the law to determine if the law is rationally connected to the objective, whether the law minimally impairs the rights of freedoms in question and whether the deleterious effects of the law outweigh its salutary effects: *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]. The teachers are entitled to information that would allow them to refute any part of the *Oakes* analysis.

19 According to the teachers, it is now appropriate in *Charter* litigation to consider not only the legislative purpose, but the purpose of the government that introduced the legislation. It is, say the teachers, an utter fiction to treat government (or the executive branch) and the Legislature as having no connection. The government, particularly a majority government, in practice controls the operations of the Legislature, and it is the government which must justify the legislation that it has introduced and pushed through the legislative approval process. In this case, in as much as the amendments challenged were made law by the invocation of closure, thus depriving the public of learning of the Legislature's purpose, there is all the more reason to disregard the formal distinctions between the two bodies.

20 The teachers argue that the AG, in order to succeed on its application, must convince the court that every document that could be produced and every question that could be asked is evidence of a nature that has been determined by the courts to be inadmissible.

21 The teachers submit that the courts have tended to consider extrinsic evidence related to the options considered by government in their lawmaking, and not, as the AG suggests, only those options actually voted on by the Legislature. Neither, say the teachers, have the courts limited their analysis to reports and studies placed before the legislature. It is therefore impossible, say the teachers, for this court to conclude that all of the evidence "behind the curtain" in this case constitutes the type of extrinsic evidence which has been rejected by courts as inadmissible. It cannot be said that every interrogatory that has been asked, and every question that could possibly be asked on discovery is, and could only be, directed to the opinions and motives of individual civil servants. Nor can it be said (without even seeing them) that all of the documents on the list of documents the Attorney General refuses to produce are similarly unreliable and unhelpful: *MacMillan Bloedel Ltd. v. British Columbia* (1984), 16 D.L.R. (4th) 151 (B.C.S.C.) [*MacMillan Bloedel*], at paras. 11-13.

22 The teachers argue that the restrictions on third party spending and Bill 42, had they been limited to the campaign period, and had other differences with the federal statute not been so severe, the legislation might have been unassailable in light of *Harper*. The objective then would have been clear on the face of the legislation with minimal assistance from extrinsic evidence. However, differences between the federal legislation and Bill 42 offer the plaintiffs the chance to question whether the objective is other than electoral fairness.

23 The teachers say they should be able to discover whether the extension of the law's restriction to thirty days prior to the campaign period, and the expanded definition of election advertising, the exemption of the government for restrictions of third party advertising, and that fact that marginal parties have the same spending limits as mainstream parties, may have some objective other than electoral fairness.

24 The teachers contend that it is not implausible to suggest that the government's objective was simply to control the information that it wants the electorate to have as it prepares for the May 2009 election. This would not be an objective that is pressing and substantial.

25 Likewise, it is not implausible to suggest, again by way of example, that the government's purpose was to blunt the influence that unions - and the various community and public interest groups and individuals with which they are often aligned in pursuit of social justice and other important social, economic and environmental causes - might have in the forthcoming election. If this was the objective, it would not be one that is pressing and substantial.

26 The plaintiffs make a point in this case of stating that they were not consulted prior to the enactment of Bill 42. They would like to know if the government did in fact consult anyone and, if so, why, and what influence that consultation might have had in formulating the Bill.

27 The teachers place great reliance on the decisions of Burnyeat J. in *Health Services and Support Facilities Assn. v. British Columbia*, 2002 BCSC 1509, [2002] B.C.J. No. 2464 [*Health Services 2002*], and the Supreme Court of Canada in its final decision on the merits (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391).

28 The teachers submit that Burnyeat J.'s decision in *Health Services 2002* refutes two of the AG's propositions; firstly, that the only relevant objective can be that of the Legislature, and not of the government; and, secondly, that the only relevant evidence in this case is information in the public domain relating to the Legislature's deliberations.

29 While they realize that *Health Services 2002* pertains to issues of public interest immunity, the teachers argue that comments at para. 38 are equally applicable to the present case:

[38] Eighth, I am satisfied that the interests of the administration of justice are best served by production of the documents. While the development of the: "... efficient, flexible and cost-effective delivery of health care and support services to residents of British Columbia" is undoubtedly of considerable importance, disclosure is of more importance at a time when more open government is sought by the public and when the faith of the public in government institutions can be reinforced if the result of the litigation is that the Defendant was acting in accordance with the Charter. It may be said that secrecy breeds distrust and that information breeds confidence. The principle of the Rule of Law requires that the actions of government and public officials should be confined within the limits of their lawful authority including a determination of whether those actions are in contravention of the Charter. The Plaintiffs have raised a very important issue and it is in the interests of the administration of justice that documents be produced to allow the parties to fully canvass the issues raised by the Statement of Claim and the Statement of Defence.

30 The Supreme Court of Canada's decision in *Health Services* made it clear that it is not bound to accept the objective as asserted by the Attorney General:

143 The government set out its objectives for enacting the Act as follows:

The objective of the Act is to improve the delivery of health care services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.

144 These are pressing and substantial objectives. We agree with the respondent that the health care crisis in British Columbia is an important contextual factor in support of the conclusion that these objectives are pressing and substantial ... We also agree with the respondent that this Court's recent ruling in *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.), that governments are constitutionally obliged to provide public health care of a reasonable standard within a reasonable time, at least in some circumstances, reinforces the importance of the objectives, particularly of the main objective of delivering improved health care services.

145 The appellants argue that the objectives behind the legislation are not pressing and substantial on two bases. First, they contend that the objective is framed too broadly and is not linked to the specific harm that the legislation is aimed at addressing. Second, they argue that the evidence suggests that the true objective behind the Act is to increase the rights of management, and to save costs, which constitute a suspect basis for finding a pressing and substantial objective ...

146 We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.

147 The appellants' contention that cutting costs and increasing the power of management are also objectives of the legislation has merit. The record indicates that at least part of the government's intention in enacting the Act was to cut costs and increase the rights of management ... To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.*, [2004] 3 S.C.R. 381 and *Martin*, [2003] 2 S.C.R. 504, indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary con-

straints" ... Nor, on the facts of this case, is it clear that increasing management power is an objective that is "pressing and substantial in a free and democratic society". However, this does not detract from the fact that the government has established other pressing and substantial objectives.

31 Therefore, say the teachers, the interrogatories, documents, and evidence on examination for discovery must not be restricted as the AG contends. Evidence on the government's files is admissible if it is reliable and probative of an issue in that case, and is not inadmissible simply because it comes from "behind the curtain".

EVIDENCE

32 To support their claim, the teachers provided extracts from the *2005 General Election Financing Report - Amended 1*, obtained from the Elections BC website. The table shows that trade unions provided \$1,495 to the BC Liberal Party (out of total contributions of \$11,396,025) and \$1,853,891 to the BC NDP (out of total contributions of \$5,969,467). The *2001 General Election Financing Report - Amended 2* shows that trade unions provided \$1,050 to the BC Liberal Party (out of total contributions of \$6,506,504) and \$680,125 to the BC NDP (out of total contributions of \$2,375,108).

33 According to the *2005 Report of the Chief Electoral Officer on the 38th Provincial General Election*, obtained from the Elections BC website, the total number of registered election advertising sponsors was 129. The number of registered election advertising sponsors that spent more than \$150,000 was 7. These sponsors and their approximate contributions were as follows:

1. the BC Government and Service Employees' Union - \$431,251;
2. the British Columbia Teachers' Federation - \$874,964;
3. the federation of Post-Secondary Educators of BC - \$209,602;
4. the Hospital Employees' Union - \$257,282;
5. the British Columbia Nurses' Union - \$257,282;
6. the Independent Contractors and Businesses Association of BC spent \$612,100; and
7. the Mining Association of British Columbia - \$160,000.

34 According to the *2001 Report of the Chief Electoral Officer on the 37th Provincial General Election*, obtained from the Elections BC website, the total number of registered election advertising sponsors was 14. During that election campaign, no registered election advertising sponsors spent more than \$150,000.

35 Hansard records that the AG, when he introduced Bill 42, said that the Bill "encompasses a number of recommendations that have been made by the "Chief Electoral Officer" and "enacts a number of other changes for regularly scheduled elections". He referred also to the *Canada Elections Act* and the *Harper* decision, and concerning new limits on third party spending he said:

These changes to spending limits ... are a response to the effects of set-date elections. For those elections, everybody knows when the campaign will begin, and it is important to ensure that the pre-campaign period does not become a spending spree, a free-for-all, to the detriment of parties and candidates that lack significant financial resources.

Hansard, May 5, 2008, p. 11957

36 On May 27, 2008, during a second reading of the Bill, the Government House Leader, Michael de Jong referred to the Chief Electoral Officer's 2006 report, and, with respect to the pre-campaign, stated:

In effect, could the purpose behind the spending limits that exist during the writ period be frustrated if there was no regulation at all in the period immediately preceding the campaign? Within his report [the Chief Electoral Officer] makes the observation that there is some validity to that concern ...

Hansard, May 27, 2008, 12939

37 Mr. de Jong also acknowledged concerns raised by the limit on third party spending prior to an election campaign, and whether 120 days is "perhaps too long". He said:

To put it bluntly, upon reflection, the government agrees. The government thinks that 120 days is too long, and that's why the Attorney General has tabled amendments ... [that] ... would reduce that period from 120 days to 60 days.

Hansard, May 27, 2008, p. 12937

LAW

38 According to Rule 27, a party may examine "any party adverse in interest" but only "relating to any matter in question in the action ...".

39 Discovery by interrogatories is permitted under Rule 29. In *Tse-Ching v. Wesbild Holdings Ltd.* (1994), 98 B.C.L.R. (2d) 92, the British Columbia Supreme Court summarized the limits on the use of interrogatories: they must only be used to obtain admissions of fact that are necessary to prove in order to establish one's case and to provide a foundation for cross-examination at discovery; they must be relevant; and they must not be in the nature of cross-examination. They also must not be used as a "fishing expedition": *Hoyt v. Insurance Corp. of British Columbia*, 2001 BCCA 154, 89 B.C.L.R. (3d) 44.

40 For discovery of documents, a party must deliver up, within 21 days of demand, all documents that are in the parties possession or control relating to "every matter in question in the action" (Rule 26).

41 The test for relevance on an application for discovery of documents is broad. The classic statement is still that of Brett L.J. in *Cie. Financière & Commerciale du Pac. v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.), at 63:

... every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

42 In *Charter* litigation, the general rule is that the legislative history of a challenged statute is admissible to determine whether the purpose of the challenged statute was to infringe a *Charter* right: see *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, at 745-749, 35 D.L.R. (4th) 1, where parliamentary debates and a law reform commission report were admitted as evidence). Legislative history may also be used to determine whether the statute is justified as a reasonable limit under s. 1: see *Edwards Books*, *supra*, at 769-772; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at 983-984, 58 D.L.R. (4th) 577.

43 The analysis begins with the text of the enactment. When the meaning of the provision is clear on its face, extrinsic evidence is of little assistance in determining whether the provision is consistent with the *Charter*. It is the statute alone which represents the "corporate will of the legislature": *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348. If, however, extrinsic evidence is determined to be relevant in aiding the court's interpretation of the impugned provision, then that evidence must have an institutional quality - that is, it must reflect the intent of the Legislature as a whole, and not merely the motivations of individual civil servants or members of the Legislature. There are no absolute rules concerning the admission of extrinsic evidence - the court must consider in each particular case what evidence would be helpful in deciding the question at issue: *MacMillan Bloedel*, at para. 10. If the court considers that extrinsic evidence in the form of documents may be relevant to the issue of constitutional validity, the court may inspect them to determine their actual relevance.

44 The courts have traditionally been cautious in extending the types of extrinsic evidence admissible in constitutional cases beyond "the usual evidence from Hansard and relevant reports and studies, and deliberations of those legislative committees that addressed revisions to the Statutes": Russell J. in *Sawridge Band*. Professor Hogg, in *Constitutional Law of Canada*, 5th ed. (Scarborough, Ontario: Thomson Carswell, 2007), at 60-2, lists the following as types of government documents that have been found to be relevant and admissible:

- a) Reports of royal commission, law reform commission or parliamentary committees recommending that a statute be enacted;
- b) Government policy papers recommending that a statute be enacted;
- c) Reports or studies produced outside government existing at the time of the enactment and relied upon by the government introducing the legislation;
- d) Earlier versions of the statute;
- e) Statements by ministers or members of Parliament and testimony or expert witnesses before a parliamentary committee;
- f) Speeches in the Parliament or Legislature when the bill is being debated.

45 The case law suggests a gradual relaxation of the restrictions on admissibility.

46 In *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, it was acknowledged that statements made in Hansard could be, albeit cautiously, referred to in determining the purpose of the legislation. Sopinka J., speaking for the court, held that the trial judge had properly admitted excerpts from Hansard in the case. At 483-84, he set out the limits for the admission of extrinsic evidence in constitutional challenges:

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is

relevant and not inherently unreliable ... This clearly includes related legislation ... and evidence of the "mischief" at which the legislation is directed ... It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

The former exclusionary rule regarding evidence of legislative history has gradually been relaxed ... but until recently the courts have balked at admitting evidence of legislative debates and speeches ... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established.

47 In *Heywood*, *supra*, at 788, Cory J., for the majority of the court, provided the following caution regarding the use even of Hansard debates in defining legislative purpose:

The main problem with the use of legislative history is its reliability. First, the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole. Thus, it may be said that the corporate will of the legislature is only found in the text of provisions, which are passed into law. Second, the political nature of Parliamentary debates brings into question the reliability of the statements made. Different members of the legislature may have different purposes in putting forward their positions. That is to say the statements of a member made in the heat of debate or in committee hearings may not reflect even that member's position at the time of the final vote on the legislation. [Emphasis added]

48 In *Newfoundland (Treasury Board) v. Newfoundland Assn. of Public Employees*, 2002 NLCA 72, 221 D.L.R. (4th) 513, Marshall J.A. wrote for the court that reference to Hansard represented a "wide evidentiary latitude":

613 It can be concluded ... that the practice ... of making use of legislative history to determine legislative intent in statutory constructions in the context of applications of s. 1 of the *Charter*, had been endorsed three years earlier in Criminal Code (Man.). It follows that this endorsement would include resort to extrinsic evidence such as the legislative history gleanable from Hansard. It is noted that such recourse to the record of legislative debates would be in keeping with judicial policy to allow wide evidentiary latitude in addressing justifications under s. 1 of the Charter of fundamentally entrenched rights' violations. [Emphasis added]

49 In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1991), 2 O.R. (3d) 65, 78 D.L.R. (4th) 333 (C.A.), there was a challenge to the validity of the *Retail Business Holidays Act*, which prohibited certain businesses from opening on Sundays and other holidays. The applicants issued summonses to the former Minister of Labour and Solicitor General. A

motion by the Attorney General to quash the summonses had been dismissed, and both were cross-examined in court about what they had said in the Legislature and their rationale for putting forward and supporting the 1989 amendments. On appeal of the merits, the Court of Appeal took the opportunity to criticize the decision of the trial judge to admit the evidence of the cabinet members, holding, at 111, that:

It is a usurpation of the legislative process to call as witnesses the Ministers who introduced the amendment to these statutes into the legislature and have government legislation stand or fall on their testimony. These Ministers are not the legislature. The respondents appear to have thought that they were entitled to treat both [Minister] Smith and [Minister] Sorbara as if they were officers of a corporation involved in private litigation.

50 The Supreme Court of Canada has carefully separated analysis of legislative purpose (which may be relevant) from the motives of individual members of government (which cannot be). In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25, the court held that the testimonies of individual members of a municipal council were not admissible in determining the constitutional validity of a municipal bylaw. The court again distinguished between legislative purpose and the motives of individual members, and held, at para. 45, that only the former was relevant:

[45] The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications ...

51 In *Delisle*, *supra*, the Court drew the important difference between the motives of some "government players" and the purpose of the statute:

[20] ... Cory and Iacobucci JJ. draw our attention to the Report of the Preparatory Committee, the social and historical context, the expert reports and the Crown's own submissions in this appeal. That, in my view, confuses possible ultimate or strategic motives of some government players with the purpose of the statute. [emphasis in original]

52 The legislation under attack in *Delisle* excluded the RCMP from collective bargaining through a certified bargain agent. The majority held, at para. 17, that the court was concerned with the purpose of the law, not the subjective intention of those who proposed the enactment:

[17] Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect that was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they are voting. This is more important than speculation on the subjective intention of those who proposed the enactment. [Emphasis added]

53 In *Ontario Teachers' Federation v. Ontario (Attorney General)* (1998), 39 O.R. (3d) 140, 17 C.P.C. (4th) 58 (Ont. Ct. Gen. Div.), Blair J. considered the admissibility of evidence of the Honourable David Johnson, Minister of Education and Training, and Mr. Guy Giorno, Director of Policy in the Office of the Premier. The challenge was to the constitutional validity of certain aspects of the Ontario government's recent statutory changes in the area of public and secondary school education.

54 The applicants in *Ontario Teachers' Federation* hoped to demonstrate that the amendment in issue was not made for legitimate labour relations reasons, but was instead a reprisal against principals and vice-principals for participating in a job action. The applicants took the position that testimony of government officials was necessary to establish the colourable purpose for enacting the legislation and was therefore relevant to the constitutional issue. Blair J. undertook a comprehensive review of the cases and wrote, at para. 16:

[16] While the authorities have developed to the point where it is permissible for courts to examine extrinsic evidence in the context of *Charter* and other challenges to the constitutional validity of legislation, they do not support the extension of that exercise to the consideration of the testimony of individual members of the legislature - including Ministers in charge of introducing legislation - or of civil servants or political advisors.

He continued, at paras. 21 and 22:

[21] The argument advanced by Mr. Goldblatt and Mr. Cavalluzzo that this application arises in unique circumstances - a *Charter* challenge based upon a "reprisal legislation" argument - and that the applicants should be able to seek evidence lying behind the particular conduct of the government actors perceived to be most responsible for it, is intriguing and does have some attraction at first glance. What is submitted, essentially, is that the evidence is sought not so much for its bearing on the purpose of the legislation - that purpose being self-evident, namely to exclude the principals and vice-principals from the bargaining units - but rather for its bearing on the purpose of legislating. While the individual sworn testimony of members of the legislature, ministers, and policy advisors, may not be admissible with respect to the former issue -- so the argument goes -- why should those attacking the legislation on the ground that it is fatally tainted for *Charter* purposes by the motivation behind its introduction, not be permitted to have access to the best evidence of the motivation of those most responsible for initiating it?

[22] One reason is the general concern mentioned above, namely, the risk of turning the court process into an extended battleground for extracting information pertaining to the ongoing political debate over the targeted legislation - as opposed to being a process for determining the Charter and other legal parameters within which governments must act. In the end, however, the argument founders on the same shoal as that which is fatal to the attempt to take sworn testimony from such persons in relation to the purpose of the legislation: it is the purpose and intention of that "incorporeal body" known as the legislature, not of its individual members or of those who support the legislators, which are pertinent to the court's efforts. For the same reason that the testimony of such individuals -- including documentary evidence related to that testimony -- is not admissible to aid the court in determining the purpose of the legislation, it is not admissible to aid in determining the purpose behind the enactment of the legislation. [Emphasis added]

55 Mr. Justice Blair carefully distinguished between the purpose of the legislation and the purpose of legislating, and concluded that only the former was relevant to the court's analysis. He concluded, at para. 20:

In my opinion, it would be an unwarranted extension of the concepts underlying the court's resort to aids such as Hansard, royal commission reports, government policy papers and other such sources bearing upon the history and background of the legislation, to broaden those concepts to apply to the sworn testimony and out-of-legislature views and opinions of ministers and members of the legislature. It would also be inconsistent with the weight of existing authority on the subject.

56 Mr. Justice Blair's decision to quash the summonses was not appealed, and the constitutional validity of the legislation was upheld by Justice Southey. An appeal of Justice Southey's decision was dismissed: *Ontario Teachers' Federation v. Ontario (Attorney General)* (2000), 49 O.R. (3d) 257 (C.A.). In affirming Blair J.'s reasoning, Goudge J.A. for the unanimous Ontario Court of Appeal wrote:

[32] [T]he search for legislative purpose in Charter analysis focuses primarily on the wording of the impugned provision itself and its legislative context. While the court can consider admissible extrinsic evidence of purpose, it must be careful to ensure that the evidence has an institutional quality that reflects the intention of the legislature and not just the individual motivation of a particular member of the Government.

...

[34] ... The provision itself and its statutory context remain vital sign posts in the search for legislative purpose, because they are the actual manifestations of that purpose. Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply indi-

vidual concerns. The former are appropriately part of the Charter analysis. The latter are left to be sanctioned at the ballot box. [Emphasis added]

57 A similar concern was reflected by the Supreme Court in *Delisle*, *supra*, at para. 17:

Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*. Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*.

58 Nor is a court interested in determining the political motivations for legislation; such may be simply assumed, but are not relevant. Abella J.A. (as she then was) in *Ontario Federation of Anglers & Hunters v. Ontario*, [2002] O.J. No. 1445, 211 D.L.R. (4th) 741 (C.A.), described at paras. 50-54 the irrelevance of matters of political expediency and public concerns when considering the validity of legislation:

[I]t is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process. Whether one characterizes taking public opinion into account as political expediency or political reality, taking it into account is a valid function of political decision making.

Similarly, attempting to influence the government to change a practice ... is an accepted feature of our system of government.

59 And in *Sawridge Band*, *supra*, Russell J. noted at Schedule "A", that:

Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.

When the government takes political or partisan considerations into account, therefore, this does not, by itself, give rise to an inference of impropriety ...

I do not believe that the kind of evidence that Mr. Crombie, and other former politicians and advisers, propose to give is necessary in a situation such as the present where the Court will have readily available to it the usual evidence from Hansard and relevant reports and studies, and deliberations of those legislative committees that addressed revisions to the Statutes.

60 The teachers rely on several cases in which the Supreme Court of Canada has said that there must be a proper evidentiary foundation in *Charter* cases.

61 In *Irwin Toy*, *supra*, the Court wrote, at paras. 67 and 68:

The respondent claimed that the legislative debates provide no evidence of the intention of the government in enacting ss. 248 and 249 and therefore argued that all other evidence is superfluous. Yet, the following statement of the Minister responsible for the legislation, commenting on why the government chose the thirteen-year-old age limit, gives an adequate sense of the general purpose underlying the legislation ...

... **One might wonder why the Attorney General did not tender in evidence certain reports and studies that were used by the government** both in enacting the legislation and subsequently in reviewing its operation. ... [Emphasis added]

62 The importance of disclosure in *Charter* cases was emphasized by the Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1. The Clerk of the Privy Council had issued a certificate pursuant to s. 39 of the *Canada Evidence Act* prohibiting the disclosure of Cabinet documents. McLachlin, La Forest and Iacobucci JJ. critiqued the Government's decision to assert privilege over the documents. These documents would have been relevant to determining what alternatives were available to the Government in crafting a complete ban on tobacco advertising. First, within his analysis of minimal impairment under s. 1, La Forest J. stated, at para. 101:

The appellants are right to argue that claims to confidentiality have the effect of withholding from the factual record evidence relating to available governmental options and thus compromise the ability of courts in some cases to evaluate the constitutionality of governmental actions properly. [Emphasis added]

63 In regard to the fact that the government had presented no evidence to defend the total ban, McLachlin J. also stated, at para. 166:

This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced ... In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

Iacobucci J. stated, at para. 186:

Minimal impairment analysis requires this Court to consider whether the legislature turned its mind to alternative and less rights-impairing means to promote the legislative goal in question. In these appeals, I am concerned by the fact that the Attorney General of Canada chose to withhold from the factual record evidence related to the options it had considered as alternatives to the total ban it chose to put in place ... These cases are of wide public interest constitutional litigation in which the government should remain non-adversarial and make full disclosure. Without this requirement, courts will be constrained to decide the constitutionality of legislation without full information. In any event, the burden of proof at the s. 1 stage lies solely with the government.

64 Professor Hogg states that *RJR-MacDonald* represents a "radical change in the attitude of the Supreme Court of Canada to legislative history", a statement on which the teachers rely. However, it should be noted that, in this case, McLachlin J. was critiquing the government's decision to assert privilege; the issue was not whether the documents were relevant.

ANALYSIS

65 In order for the teachers to succeed on their application, they must show that the documents they seek, the evidence sought from Mr. Brown and the questions asked in the interrogatory are relevant to an issue in the litigation. These types of evidence will not be admissible unless they have the proper "institutional quality"; statements and documents reflecting the opinions of individual members of the Legislature rather than the intention of the Legislature as a whole will not be admitted.

66 The teachers submit that the remarks of the AG and the House Leader provide clues to the objective of the legislation, and the government's thinking, but not enough to properly conclude a s. 1 analysis. They submit that the legislative record is inadequate as a means of determining whether the *Act* is rationally connected to its objective, or whether or not it minimally impairs the *Charter* rights or freedoms in question, and whether the *Act's* beneficial effects outweigh its deleterious effects.

67 The teachers say that to restrict the factual record to the very limited debate in the legislative assembly, which was cut off arbitrarily by the government through closure, keeps unanswered a number of significant questions. For example, on what basis did the government conclude that electoral fairness could be compromised by a third party advertisement that aired 120 days before the campaign even began? Did the government consider any alternatives to an extension of third party spending limits beyond the campaign? Did the government consider the negative effect of limiting public comment while the Legislature was still in session? If the objective was to create a more level playing field, during, and even prior to the election campaign, why did the government exempt its own advertising?

68 The teachers say it may be relevant to consider other options available to the government short of legislating. They suggest that where the government is raising a s. 1 defence, it may be relevant to consider what other options were available to the government short of introducing the legislation. If that were relevant, then discovery might be permitted on that ground. The AG answers that the government official in charge of the legislation would not know, and would not be able to conceive

of any policy option to the problem of third party election advertising short of a cap on such spending. Granted that the legislation could be drafted this way or that, with a longer or shorter period, a higher or lower amount. But this was squarely the Legislature's decision and in fact the Legislature did consider alternative regimes (it amended the legislation to change its restrictive period from 120 to 60 days and that changed the balance between party/candid spending and third party spending).

69 The teachers' position has not been embraced by the courts, even in *Charter* cases where the one question might be whether and to what extent less intrusive measures were available to address the mischief to which the legislation was directed. They have not been able to point to any decision which suggests that, in a challenge to the constitutionality of the legislation, extrinsic evidence should be expanded to include evidence from "behind the curtain": i.e. information other than that relating to the deliberations of the Legislature. The decision of Burnyeat J. in *Health Services 2002*, on which the teachers rely heavily, is distinguishable from the present case.

70 In *Health Services 2002*, the impugned legislation effectively nullified some aspects of contracts that were in place between the government's designated health authorities and the public sector unions. The case began as more than a bare challenge to statute validity. It also comprised an action for damages alleging breach of fiduciary duty by the government. In its list of documents, the Crown claimed privilege over a number of documents, arguing as well that some or all were irrelevant.

71 While the question of relevance is considered by the learned judge, his decision, along with a later decision of the Supreme Court of Canada offers no authority at all on the question of examination for discovery of government officials, as that question was not before the Court. The passing references concerning whether a particular document was relevant were dealt with by analogy only with the non-constitutional cases *Gloucester Properties Ltd. v. British Columbia (Environment and Land Use Committee)* (1981), 129 D.L.R. (3d) 275, [1982] 1 W.W.R. 449 (B.C.C.A.) and *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161.

72 The Supreme Court of Canada struck down Bill 29, recognizing for the time that there was a constitutional right, under section 2(d) of the *Charter*, requiring, arguably, consultation with the affected unions before agreements reached through collective bargaining could be seriously impaired. It found that such consultation had not occurred. The Court looked first to the legislative provisions and found that they offered little indication of non-legislative options available to address the costs of public sector wages in the health system. It is a fact that the Court might honour Bill 29 to consider other options studied by the government, and the teachers maintain the case shows clearly that evidence of government deliberations in constitutional cases is admissible. However, the AG submitted that the Court in the Bill 29 case was far more restrained than the teachers suggest. Beginning at para. 151 of its reasons, the Court in Bill 29 examined each of the provisions in question and found that they bore little evidence of a search for a minimally impairing solution. It appears that the Court had already reached its conclusion on the facts before the extrinsic evidence was considered, and what followed was essentially criticism of the government's behaviour in introducing Bill 29.

73 Importantly, the Court gave no indication that it intended to upset the decades of jurisprudence, including its own, regarding the relevance of non-legislative history in constitutional cases, or to sweep aside the traditional curtain separating the Legislature from the machinery of government. There was no discussion on scope of document discovery, and indeed there was no issue at all with respect to examination for discovery of government officials.

74 Ultimately, the decision was the product of a particular set of facts regarding a struggle between government objectives and those of the unions, and the decision of the government to take a particular path to resolve the dispute. Therefore, any broader application of the Supreme Court of Canada's apparent reference to non-legislative facts in the context of a s. 1 "minimal impairment" analysis should be approached cautiously.

75 The Bill 29 case imposes an obligation on similar to the duty to consult established cases of Aboriginal title, but the duty to consult does not arise in this case. A duty to consult with affected persons prior to the enactment of statutes has never been recognized.

CONCLUSIONS

76 In my view, the authorities support a broad analysis of relevance in constitutional cases. However, there is no reason to depart in this case from the general rule that extrinsic evidence pertaining to government deliberations, in order to be admissible, must relate to legislative purpose and the intent of the Legislature as a whole.

77 In considering whether such evidence is admissible, it is essential to avoid politicizing the judicial process. The courts must not become a secondary forum for debating the merits of government decisions. Cross-examining politicians on their motivations for introducing legislation is unlikely to aid in examining the purpose of the legislation.

78 It is not as if the inadmissibility of evidence regarding the government's purpose enures only to the benefit of government. As the Court in *Delisle* recognized, paying heed to documents or testimony of persons who are in government, and particularly on the "political side" of government (to use the plaintiffs' term), would simply invite politicians and civil servants to make self-serving statements of high purpose and pure intent in an effort to save an otherwise unconstitutional statute. In the same way that a bad governmental purpose cannot render otherwise constitutional legislation invalid, likewise a demonstration of pure motives has never (and should never) weigh to save a statute that goes beyond legislative authority or constitutes an unjustifiable infringement on the rights of the citizenry.

79 The restrictions recognized by Blair J. and the Ontario Court of Appeal, and the distinction urged here between the deliberations of the legislative and executive branches, are cogent. Were it otherwise, then identical pieces of legislation enacted in different provinces could be found simultaneously constitutional or unconstitutional depending on the intentions or actions of the government in introducing the legislation. This simply cannot be the case.

80 The AG points out that, if the teachers are correct, every time a constitutional challenge is raised in the courts, the government would be obliged to provide a senior political aide to justify and explain the evolution of thought underpinning the challenged legislation, and to provide all the documents and correspondence any member of the government has had on the topic. It would risk turning every constitutional case into "political theatre", with the courts asked to pass judgment on the legitimacy of government motivations in introducing legislation. To permit this attack on the sovereign autonomy of the Legislature would imperil public confidence in both government and the courts, and the nature of their respective roles.

ORDERS

81 The plaintiffs' Notice to Examine Mr. Martyn Brown for discovery is set aside. The proper examinee will be an appropriate person designated by the defendant.

82 The plaintiffs' interrogatory is set aside, the questions in the main being irrelevant.

83 The plaintiffs' Notice of Demand for Documents is set aside, the questions in the main being irrelevant.

84 The plaintiffs' cross-application to compel answers to the interrogatory, to respond to the Demand for Documents, and to compel attendance of Mr. Brown for examination for discovery is dismissed.

85 This Court does not propose to re-draft the teachers' interrogatory or to suggest specific revisions. However, a few comments are set out:

- * The questions must be directed to an individual on matters within his or her knowledge;
- * The questions should not be vague or too broad;
- * Questions concerning the government's motivation, need, understanding or purpose must be re-drafted to refer only to the Legislature (questions 2, 3, 6(a), 6(c), 6(d));
- * Questions concerning the identity of individual officials or members of the government involved in the formulation of the legislation are impermissible (4(a), 6(b));
- * Questions concerning the identity of any outside individuals or organizations are impermissible (questions 11, 12);
- * Questions which concern speculation on future events are impermissible (questions 15(c), 16, 17);
- * Questions concerning the "political" side of government are impermissible (questions 13, 14).

E. RICE J.

* * * * *

Corrigendum

Released: June 17, 2009

Reasons for Judgment of Mr. Justice E. Rice dated December 8, 2008 have been edited.

- * *On page 18, paragraph 37, the cite reference after the quote should read:*

Hansard, May 27, 2008, p. 12937.

cp/e/qlrxc/qlmrz/qlbrl/qlaxw/qlbrl/qlced/qlrds/qlana

Thorne's Hardware Limited, Kent Lines Limited, Canaport Limited and Irving Oil Limited *Appellants*;

and

Her Majesty The Queen and National Harbours Board *Respondents*.

File No.: 16381.

1982: May 19; 1983: February 8.

Present: Ritchie, Dickson, Beetz, Lamer and Wilson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Order in Council — Extension of harbour limits — Limits extended to include private harbour facilities — Whether Order in Council passed for improper motives — Whether Order in Council valid — National Harbours Board Act, R.S.C. 1970, c. N-8, s. 7 — Harbour of Saint John Boundaries Determined, SOR/77-621.

Shipping — Harbours — By-law — Imposition of harbour dues — Vessels using private harbour facilities — Whether National Harbours Board exercising jurisdiction over private property — Riparian rights — Tolls or taxes — Whether By-law applicable to appellants — National Harbours Board Act, R.S.C. 1970, c. N-8, ss. 8, 14(1)(e) — Tariff of Harbour Dues, SOR/69-111.

Appellants challenged in the Federal Court (1) the validity of an order in council extending the limits of the port of Saint John so as to include appellants' berth and harbour facilities and (2) the applicability to them of a National Harbours Board's By-law imposing harbour dues on all vessels entering or using the port. The Trial Division held the Order in Council *intra vires* the powers of the Governor in Council but the By-law to be inapplicable to the appellants. The Court of Appeal disagreed with the trial judge on the second point. Hence this appeal to determine whether the appellants are obliged to pay harbour dues.

Held: The appeal should be dismissed.

The appellants alleged that the Order in Council extending the limits of St. John Harbour had been passed for improper motives to increase harbour revenues. It is neither the Court's duty nor its right to investigate the federal Cabinet's motives. There is evi-

Thorne's Hardware Limited, Kent Lines Limited, Canaport Limited et Irving Oil Limited *Appelantes*;

^a et

Sa Majesté La Reine et le Conseil des ports nationaux *Intimés*.

N° du greffe: 16381.

^b

1982: 19 mai; 1983: 8 février.

Présents: Les juges Ritchie, Dickson, Beetz, Lamer et Wilson.

^c EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Décret — Extension des limites d'un port — Limites étendues de manière à comprendre des installations portuaires privées — Le décret a-t-il été pris pour des motifs irréguliers? — Validité du décret — Loi sur le Conseil des ports nationaux, S.R.C. 1970, chap. N-8, art. 7 — Limites du port de Saint-Jean déterminées, DORS/77-621.

^e

Navigation — Ports — Règlement — Droits de port exigés — Navires utilisant des installations portuaires privées — Le Conseil des ports nationaux exerce-t-il une juridiction sur des biens privés? — Droits riverains — Droits ou impôts — Applicabilité du règlement aux appelantes — Loi sur le Conseil des ports nationaux, S.R.C. 1970, chap. N-8, art. 8, 14(1)(e) — Tarif des droits de port, DORS/69-111.

^g Les appelantes ont contesté en Cour fédérale (1) la validité d'un décret étendant les limites du port de Saint-Jean de manière à comprendre leurs installations portuaires et (2) l'applicabilité à elles d'un règlement du Conseil des ports nationaux exigeant des droits de port à l'égard de tous les navires qui entrent dans le port ou qui utilisent ses installations. La Division de première instance a conclu que le gouverneur en conseil avait compétence pour prendre le décret, mais que le règlement ne s'appliquait pas aux appelantes. La Cour d'appel n'a pas partagé l'avis du juge de première instance sur le second point. D'où le pourvoi visant à déterminer si les appelantes sont tenues au paiement des droits de port.

Arrêt: Le pourvoi est rejeté.

^j Les appelantes allèguent que le décret étendant les limites du port de Saint-Jean a été pris pour des motifs irréguliers afin d'augmenter les revenus provenant du port. La Cour n'a ni le droit ni l'obligation de mener une enquête sur les motifs du cabinet fédéral. Il ressort de la

dence that increase in revenues was one consideration, but not the only one. The trial judge found that the rationalization of marine activity in the area was also an objective. The matter was one of economic policy and politics. The Court cannot inquire into the validity of the beliefs upon which the Governor in Council acted. It should also be noted that the appellants were given ample opportunity to express their opposition. The appellants argued further that s. 7 of the *National Harbours Board Act*, which authorizes expansion of harbour limits, requires it to be for the "administration, management and control" of the harbour, and that expansion for increased revenues did not fall within this. However, rationalization of marine activities, as found by the trial judge, does clearly fall within s. 7. Accordingly, the appellants' challenge to the validity of the Order in Council extending St. John Harbour fails.

The appellants' second argument is that the harbour tolls do not apply to them. They invoke s. 8 of the *National Harbours Board Act* which says that the Board has no jurisdiction or control over private property or rights. The appellants claimed that harbour tolls interfered with their right of access to their private facilities. There is no authority to say that an economic interference with a riparian right is actionable. In any event, the right interfered with is the right of approaching from a distance, *i.e.* entering the harbour—a public right—not the private right of access to facilities. Thus the appellants' argument of expropriation without compensation also fails as there was no expropriation. Even if the Board were interfering with a private right of access, it is not exercising jurisdiction or control over private property or rights as prohibited by s. 8. Furthermore, s. 8 stipulates "unless otherwise specifically provided for"; s. 14(1)(e) specifically allows the imposition of tolls.

The appellants further submitted that the charge is, against it, a tax (for the purpose of raising revenue) not a toll (for the purpose of covering costs of services) and that only the latter is authorized. The appellants contended they were not being provided any services. Assuming, *arguendo*, that the Board is restricted to levying charges to cover the costs of services, it does not follow that the charge must be related to the cost of services to that particular vessel. There is nothing to indicate that the tolls are imposed to cover anything other than the costs of services. The charges are not *ultra vires* as taxes. The appellants are subject to the tolls.

preuve que l'accroissement des revenus n'a été qu'une considération parmi tant d'autres. Le juge de première instance a conclu qu'on visait également la rationalisation des activités maritimes de la région. Il s'agit d'une question d'ordre économique et politique. La Cour ne peut s'enquérir du bien-fondé des motifs qui ont incité le gouverneur en conseil à agir. Il est à noter d'ailleurs que les occasions n'ont pas manqué aux appelantes d'exprimer leur opposition. Les appelantes font valoir en outre que l'art. 7 de la *Loi sur le Conseil des ports nationaux*, qui autorise l'extension des limites d'un port, exige que cette extension se fasse pour «l'administration, la gestion et la régie» du port, ce qui n'est pas le cas d'une extension en vue d'obtenir un accroissement des revenus. Toutefois, la rationalisation des activités maritimes mentionnée par le juge de première instance relève manifestement de l'art. 7. Par conséquent, les appelantes échouent dans leur contestation de la validité du décret ordonnant l'extension du port de Saint-Jean.

Les appelantes allèguent en deuxième lieu l'inapplicabilité à elles des droits de port. Elles invoquent à l'appui l'art. 8 de la *Loi sur le Conseil des ports nationaux*, qui porte que le Conseil n'a aucune juridiction ni régie sur les droits ou biens privés. Les appelantes prétendent que les droits de port constituent une atteinte à leur droit d'accès à leurs installations privées. Aucune jurisprudence n'établit qu'une atteinte d'ordre économique à un droit riverain donne lieu à une action judiciaire. En tout état de cause, ce à quoi on porte atteinte est le droit d'approcher de loin, *c.-à-d.* le droit public d'entrer dans le port, et non pas le droit privé d'accès aux installations. Ainsi, l'argument d'expropriation sans indemnisation mis de l'avant par les appelantes échoue également, car il n'y a pas eu d'expropriation. Même si le Conseil porte atteinte à un droit privé d'accès, il ne viole pas l'interdiction opposée par l'art. 8 à l'exercice de la juridiction ou de la régie sur les droits ou biens privés. De plus, l'art. 8 contient l'expression «sauf disposition expresse» et l'al. 14(1)e autorise expressément l'imposition de droits.

Les appelantes soutiennent enfin que les paiements exigés d'elles sont des impôts (destinés à produire des revenus) et non pas des droits (destinés à couvrir les coûts des services) et que seuls ces derniers sont autorisés. Les appelantes prétendent qu'aucun service ne leur est fourni. À supposer, aux fins de la discussion, que le Conseil soit limité à la perception de droits destinés à couvrir les coûts des services, il ne s'ensuit pas que ces droits doivent se rapporter au coût des services fournis à un navire en particulier. Rien n'indique que les droits ont pour objet de pourvoir à autre chose que les coûts des services. Les droits en cause n'étant pas des impôts, ils ne sont pas *ultra vires*. Les appelantes sont tenues au paiement de ces droits.

Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494; *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427; *Reference re Chemical Regulations*, [1943] S.C.R. 1; *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662; *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329; *Attorney-General v. Conservators of the Thames* (1862), 1 H & M Ch. 1; *Manchester Ship Canada Co. v. Upper Mersey Navigation Commissioners*, [1958] 2 Lloyd's Rep. 81; *Foreman v. Free Fishers of Whitstable*, (1869) L.R. 4 H.L. 266, referred to.

APPEAL from a judgment of the Federal Court of Appeal, [1981] 2 F.C. 393, (1980) 124 D.L.R. (3d) 622, 38 N.R. 293, allowing the Board's appeal and dismissing appellants' cross-appeal from a judgment of Dubé J., [1980] 2 F.C. 3, (1980) 109 D.L.R. (3d) 94. Appeal dismissed.

Raynold Langlois and Michel St-Pierre, for the appellants.

Jean-Claude Ruelland and Paul Plourde, for the respondents.

The judgment of the Court was delivered by

DICKSON J.—The issue is whether the appellants are obliged to pay harbour dues imposed by the National Harbours Board on ships entering or using the port of Saint John, New Brunswick. Two questions arise: (i) is federal Order in Council P.C. 1977-2115 extending the limits of the port of Saint John so as to include the appellant's riparian property "void, unlawful, unjust, discriminatory and *ultra vires*" the Governor in Council?; (ii) is National Harbours Board By-law B-1, *Tariff of Harbour Dues*, imposing harbour dues on all vessels entering or using the port of Saint John, applicable to the appellants in the circumstances of this case?

Jurisprudence: Procureur général du Canada c. Inuit Tapirisat of Canada, [1980] 2 R.C.S. 735; *R. v. National Fish Co.*, [1931] R.C. de l'É. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494; *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427; *Reference re Chemical Regulations*, [1943] R.C.S. 1; *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662; *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329; *Attorney-General v. Conservators of the Thames* (1862), 1 H & M Ch. 1; *Manchester Ship Canada Co. v. Upper Mersey Navigation Commissioners*, [1958] 2 Lloyd's Rep. 81; *Foreman v. Free Fishers of Whitstable*, (1869) L.R. 4 H.L. 266.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1981] 2 C.F. 393, (1980) 124 D.L.R. (3d) 622, 38 N.R. 293, qui a accueilli l'appel du Conseil et rejeté l'appel incident des appelantes formés par suite d'un jugement du juge Dubé, [1980] 2 C.F. 3, (1980) 109 D.L.R. (3d) 94. Pourvoi rejeté.

Raynold Langlois et Michel St-Pierre, pour les appelantes.

Jean-Claude Ruelland et Paul Plourde, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE DICKSON—La question est de savoir si les appelantes sont tenues au paiement des droits de port imposés par le Conseil des ports nationaux sur les navires qui entrent dans le port de Saint-Jean (Nouveau-Brunswick) ou qui font usage des installations portuaires de Saint-Jean. Deux questions se posent: (i) le décret fédéral C.P. 1977-2115, qui étend les limites du port de Saint-Jean de manière à comprendre la propriété riveraine des appelantes, est-il «nul, illégal, injuste, discriminatoire et *ultra vires*» du gouverneur en conseil?; (ii) dans les circonstances de l'espèce, le règlement B-1, *Tarif des droits de port*, par lequel le Conseil des ports nationaux impose des droits de port à l'égard de tous les navires qui entrent dans le port de Saint-Jean ou qui utilisent ses installations, s'applique-t-il aux appelantes?

I

Facts and Procedural History

The appellants are Irving Oil Limited and its wholly owned subsidiaries, Thorne's Hardware Limited, Kent Lines Limited and Canaport Limited. For many years Irving Oil received crude oil shipments at the port of Saint John. In 1969 Irving decided to build new deep water liquid bulk terminal facilities beyond the territorial limits of the port. To that end Thorne's Hardware acquired a water lot of 1,380 acres at Mispéc Point outside the harbour.

In 1971 Canaport Limited acquired part of the water lot. Facilities were constructed, at a cost of \$43,000,000 for crude oil tankers operated by Kent Lines Limited which came to discharge cargoes of oil into storage tanks adjacent to the water lot. The petroleum products were taken by pipeline from the storage tanks to the Irving Oil refinery at Courtenay Bay, some five miles from Mispéc Point.

On July 27, 1977 the Governor in Council passed Order in Council P.C. 1977-2115 extending the limits of the port of Saint John. As a result, the water lot of the appellants was brought within the limits of the port. The National Harbours Board claimed jurisdiction over the tankers which anchored at Mispéc Point and, more important for the purposes of the present proceedings, claimed harbour dues in respect of the vessels, pursuant to By-law B-1 to which I have referred. The dues are not insubstantial. The appellants paid the Board in respect of the period July 1977 to November 1979 harbour dues of \$128,033.

The appellants sought relief in the Federal Court. They claimed the Order in Council extending the harbour limits was beyond the powers of the Governor in Council on two main grounds: (i) the Order in Council was passed for improper motives, namely, to permit the National Harbours Board to collect harbour dues from Kent Lines Limited without offering any service in return, and (ii) the Order in Council constituted, for the appellants, a form of expropriation without compensation.

I

Les faits et la procédure

Les appelantes sont Irving Oil Limited et ses filiales en propriété exclusive, Thorne's Hardware Limited, Kent Lines Limited et Canaport Limited. Pendant bien des années Irving Oil recevait des cargaisons de pétrole brut au port de Saint-Jean. En 1969 Irving a décidé de construire hors des limites du port un terminal en eau profonde. À cet effet, Thorne's Hardware s'est portée acquéreur d'un lot d'eau d'une superficie de 1 380 acres situé à Mispéc Point hors des limites du port.

En 1971 Canaport Limited a acquis une partie du lot d'eau. Des installations ont été construites, à un coût de 43 000 000 \$, pour les pétroliers de Kent Lines Limited qui venaient décharger leurs cargaisons de pétrole brut dans des réservoirs adjacents au lot d'eau. Les produits pétroliers étaient alors acheminés par pipeline depuis les réservoirs jusqu'à la raffinerie d'Irving Oil qui se trouve à Courtenay Bay, à quelque cinq milles de Mispéc Point.

Le 27 juillet 1977, le gouverneur en conseil a pris le décret C.P. 1977-2115 qui étendait les limites du port de Saint-Jean. Cela a eu pour effet d'inclure le lot d'eau des appelantes dans les limites du port. Le Conseil des ports nationaux a revendiqué compétence sur les pétroliers qui mouillent à Mispéc Point et, ce qui est encore plus important en l'espèce, il a exigé, conformément au règlement B-1 susmentionné, le paiement de droits de port à l'égard de ces navires. Les droits ne sont pas négligeables. Pour la période de juillet 1977 à novembre 1979, les appelantes ont payé au Conseil des droits de port totalisant 128 033 \$.

Les appelantes ont demandé à la Cour fédérale de remédier à cette situation, faisant valoir que le décret portant extension des limites du port dépasse les pouvoirs du gouverneur en conseil, pour deux raisons principales: (i) il a été pris pour des motifs irréguliers, savoir pour permettre au Conseil des ports nationaux de percevoir des droits de port de Kent Lines Limited sans offrir aucun service en contrepartie et (ii) il constitue pour les appelantes une sorte d'expropriation sans indemnisation.

It was also contended that By-law B-1—the *Tariff of Harbour Dues*—was inapplicable to the appellants because: (i) it was an improper exercise by the Board of jurisdiction over private property rights within a harbour, contrary to s. 8 of the *National Harbours Board Act*, R.S.C. 1970, c. N-8 and (ii) it was a form of taxation beyond the powers of the National Harbours Board. The appellants claimed reimbursement of \$128,033.

In the Trial Division of the Federal Court, [1980] 2 F.C. 3, Dubé J. held the Order in Council *intra vires* and that, in the circumstances, the Order in Council could not be attacked on the ground of bad faith on the part of the Governor in Council. On the second point, however, namely, the applicability of By-law B-1 to the appellants, the judge held that the National Harbours Board could not exact tolls from vessels making use of their own facilities and receiving no services from the port. It appeared inequitable that the Board could claim dues from ships entering the port and proceeding toward their own installations, which were in place before the extension of the limits of the port, thus treating them in the same manner as other vessels using harbour facilities constructed at taxpayers' expense. The judge directed the Board to refund the appellants \$128,033.

The National Harbours Board appealed and the appellants cross-appealed. A unanimous Federal Court of Appeal (Pratte, Le Dain, Hyde JJ.) [1981] 2 F.C. 393 allowed the Board's appeal and dismissed the cross-appeal. The Court agreed with Mr. Justice Dubé that the Order in Council could not be successfully challenged on the ground of improper motive or discrimination. On the By-law B-1 point the Court, differing from Justice Dubé, held the Board was not exercising any jurisdiction or control over the private property or rights of the appellants in requiring the appellants' vessels to pay the same dues as other vessels entering the port of Saint John; such dues were payable by vessels entering the harbour whether or not port

On a soutenu en outre que le règlement B-1—*Tarif des droits de port*—ne s'applique pas aux appelantes parce que: (i) il représente un exercice irrégulier par le Conseil de compétence sur les droits de propriété privés à l'intérieur d'un port, contrairement à l'art. 8 de la *Loi sur le Conseil des ports nationaux*, S.R.C. 1970, chap. N-8 et (ii) il établit un mode de taxation qui ne relève pas des pouvoirs du Conseil des ports nationaux. Les appelantes ont demandé le remboursement du montant de 128 033 \$.

En Division de première instance de la Cour fédérale, [1980] 2 C.F. 3, le juge Dubé a conclu que le décret relève de la compétence du Conseil et que, dans les circonstances, il ne peut faire l'objet d'une attaque fondée sur la mauvaise foi du gouverneur en conseil. Toutefois, sur le second point, concernant l'applicabilité du règlement B-1 aux appelantes, le juge a conclu que le Conseil des ports nationaux ne peut exiger de droits à l'égard de navires qui se servent de leurs propres installations, sans recevoir aucun service du port. Il paraissait inéquitable que le Conseil puisse exiger le paiement de droits à l'égard de navires entrant dans le port et se dirigeant vers leurs propres installations, lesquelles existaient avant l'extension des limites du port, de la même façon qu'il le fait dans le cas des navires qui font usage d'installations portuaires construites aux frais des contribuables. Le juge a ordonné au Conseil de rembourser aux appelantes le montant de 128 033 \$.

Le Conseil des ports nationaux a porté la décision en appel et les appelantes ont formé un appel incident. La Cour d'appel fédérale à l'unanimité (les juges Pratte, Le Dain et Hyde) [1981] 2 C.F. 393 ont accueilli l'appel du Conseil et rejeté l'appel incident. La Cour a été d'accord avec le juge Dubé pour dire qu'une attaque contre le décret fondée sur l'existence d'un motif irrégulier ou de discrimination ne pouvait réussir. Pour ce qui est de l'argument concernant le règlement B-1, la Cour n'a pas partagé l'avis du juge Dubé et a conclu que le Conseil n'exerce aucune compétence ou autorité sur les biens privés ou les droits des appelantes en exigeant à l'égard des navires de ces dernières le paiement des mêmes droits que ceux exigés à

services were rendered to the vessels. I agree with the Federal Court of Appeal.

l'égard des autres navires entrant dans le port de Saint-Jean; les droits en cause sont dus par les navires qui entrent dans le port, même s'ils ne bénéficient pas des services offerts par le port. Je suis d'accord avec la Cour d'appel fédérale.

II

The Bad Faith Argument

The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

In passing Order in Council P.C. 1977-2115 on July 27, 1977, the federal Cabinet acted under statutory authority deriving from s. 7(2) of the *National Harbours Board Act* which provides that the Saint John harbour boundaries are those described in the schedule to the Act, "or as may be determined from time to time by order of the Governor in Council".

The appellants attack the Order in Council expanding the harbour limits on the basis that it was passed for the sole purpose of increasing the National Harbour Board's revenues. They say this amounts to "bad faith" on the part of the Governor in Council. They also argue that harbour expansion for this reason is not within the scope of

II

L'argument alléguant mauvaise foi

La simple attribution par la loi d'un pouvoir au gouverneur en conseil ne signifie pas que son exercice échappe au contrôle judiciaire: *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735, à la p. 748. Je n'ai pas le moindre doute sur le droit des cours d'intervenir dans les cas où il y a non-respect des conditions prescrites par la loi et, par conséquent, défaut de compétence fatal. Le droit et la compétence sont susceptibles d'examen judiciaire et les cours ont le pouvoir de veiller à ce que les procédures prévues par la loi soient suivies à la lettre: *R. v. National Fish Co.*, [1931] R.C. de l'É. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494, à la p. 533. Les décisions prises par le gouverneur en conseil sur des questions de commodité publique et de politique générale sont sans appel et ne peuvent être examinées par voie de procédures judiciaires. Comme je l'ai déjà indiqué, bien qu'un décret du Conseil puisse être annulé pour incompétence ou pour tout autre motif péremptoire, seul un cas flagrant pourrait justifier une pareille mesure. Tel n'est pas le cas ici.

Lorsqu'il a pris le décret C.P. 1977-2115 le 27 juillet 1977, le cabinet fédéral a agi en vertu du pouvoir que confère le par. 7(2) de la *Loi sur le Conseil des ports nationaux* aux termes duquel les limites du port de Saint-Jean sont celles décrites à l'annexe de la Loi, «ou celles que détermine, à l'occasion, un décret du gouverneur en conseil».

Alléguant qu'il avait pour seul objet d'augmenter les revenus du Conseil des ports nationaux, les appelantes attaquent le décret qui étend les limites du port. Elles prétendent qu'en cela le gouverneur en conseil a fait preuve de «mauvaise foi» et soutiennent en outre que l'extension du port à cette fin excède la compétence que le par. 7(2) de la Loi

the jurisdiction conferred on the federal Cabinet by s. 7(2) of the Act and is therefore *ultra vires*.

The Federal Court of Appeal answered this submission in these words (at p. 395):

The reasons the Governor in Council may have had for exercising this authority, in addition to being unknown to us, are of little importance, since I do not see how they could affect the validity of the Order. I would add that a desire to increase the revenues of a harbour appears to me to be a justifiable reason for extending the harbour's boundaries.

Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council, *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427, at p. 445; *Reference re Chemical Regulations*, [1943] S.C.R. 1, at p. 12. The position is as stated by Audette J. in *R. v. National Fish Co.* (*supra*, at pp. 80-81):

... the Parliament of Canada has undoubtedly full and plenary power to legislate both in respect of the provisions contained in the Act and in the Regulations, even if in the result the tax or fee imposed were excessive, prohibitive, oppressive or discriminative. The suggestion made in this case that the regulations are oppressive and prohibitive is not one that would induce a Court of law to inquire into the power of Parliament to authorize the making of such regulations, or to place any limitation upon the ability of Parliament to tax either oppressively or benignantly. The supreme legislative power of Parliament in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it were, the only remedy is an appeal to those by whom the legislature is elected.

I agree with the Federal Court of Appeal that the government's reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, eco-

confère au cabinet fédéral et est par conséquent *ultra vires*.

Voici la réponse de la Cour d'appel fédérale à cet argument (à la p. 395):

Les motifs qui ont pu inciter le gouverneur en conseil à exercer ce pouvoir, outre qu'ils nous sont inconnus, importent peu, car je ne vois pas comment ils pourraient affecter la validité du décret. J'ajoute que le désir d'augmenter les revenus d'un port me paraît être un motif qui justifie la décision d'étendre les limites.

L'avocat des appelantes reproche à la Cour d'appel fédérale d'avoir omis d'examiner et d'apprécier la preuve afin de déterminer si le gouverneur en conseil a été animé par des motifs irréguliers en prenant le décret attaqué. On nous invite à entreprendre cet examen, mais j'estime avec égards qu'il faut décliner cette invitation. Nous n'avons ni le droit ni l'obligation de mener une enquête sur les motifs qui ont pu inciter le cabinet fédéral à prendre le décret, *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427, à la p. 445; *Reference re Chemical Regulations*, [1943] R.C.S. 1, à la p. 12. Le principe applicable est celui énoncé par le juge Audette dans l'arrêt *R. v. National Fish Co.* (précité, aux pp. 80 et 81):

[TRADUCTION] ... Il ne fait pas de doute que le Parlement du Canada est doté d'un pouvoir plein et entier de légiférer tant à l'égard des dispositions de la Loi qu'à l'égard de celles de son règlement d'application, et ce, même si l'impôt ou les droits exigés sont en définitive excessifs, prohibitifs, oppressifs ou discriminatoires. On allègue en l'espèce qu'il s'agit d'un règlement à la fois oppressif et prohibitif, mais cela ne suffit pas pour qu'une cour de justice fasse enquête sur le pouvoir du Parlement d'autoriser la prise de ce règlement ou pour qu'elle impose une limite quelconque au pouvoir du Parlement de créer un impôt, que celui-ci soit oppressif ou libéral. Le pouvoir souverain du Parlement de légiférer dans tout domaine comporte toujours le risque d'abus; toutefois, il ne faut pas supposer qu'il sera irrégulièrement exercé et, s'il l'était, le seul recours serait de s'adresser à l'électorat.

Je suis d'accord avec la Cour d'appel fédérale qu'on ignore en réalité les raisons qu'a pu avoir le gouvernement de procéder à l'extension du port. Les gouvernements ne publient pas les motifs de leurs décisions; ils peuvent être mus par une foule

conomic, social or partisan considerations. There is, however, in the record, a "Memorandum to the Minister" dated June 27, 1977, which casts some light upon the reasons which prompted the National Harbours Board to recommend the extension of the harbour limits:

MEMORANDUM TO THE MINISTER

Submission to Governor in Council Port of Saint John

The attached submission recommends to Governor in Council the extension of harbour limits of the Port of Saint John to include both the Lorneville and Canaport areas in the Bay of Fundy.

Following several years of policy planning at the local level, a port development master plan was prepared in 1971 for the Saint John Port and Industrial Development Commission by Swan Wooster Engineering Co. Ltd. with the co-operation of the Province of New Brunswick. One of the recommendations was to extend the port limits to include the area designated for development of the Canaport and Lorneville projects. Similar zones were suggested in the Urban Region Impact Study which were concurred in by the City of Saint John. The Honourable Roméo Leblanc and Premier Hatfield have been made aware of the intention to extend the port limits and both are in agreement. The extension has also been approved by the Port Authority. Representatives of Irving Oil Limited have recently recorded objection with copies to the Prime Minister and Cabinet Ministers although their agent brought the matter to the attention of Mr. A.L. Irving when the National Harbours Board granted major changes and concessions urgently required a few years ago.

Irving Oil Limited developed the Canaport deep water liquid bulk terminal facilities at Mispéc Point. In order to accommodate larger vessels in the area, the Canadian Coast Guard upgraded the navigational aids and established a Vessel Traffic Management System. While these facilities serve vessels other than those using Canaport, a large portion of the \$1.8 million initial expenditure and annual Operating and Maintenance expenditures of approximately the base figure could be allocated to the large crude carrier traffic.

de considérations d'ordre politique, économique ou social, ou par leur propre intérêt. Cependant, le dossier contient une [TRADUCTION] «Note de service à l'intention du ministre» en date du 27 juin 1977, qui nous éclaire un peu quant aux motifs qui ont pu inciter le Conseil des ports nationaux à recommander l'extension des limites du port:

[TRADUCTION]

b NOTE DE SERVICE À L'INTENTION DU MINISTRE

Document à l'intention du gouverneur en conseil Port de Saint-Jean

Le document ci-joint recommande au gouverneur en conseil l'extension des limites du port de Saint-Jean de manière qu'il comprenne les régions de Lorneville et de Canaport dans la baie de Fundy.

Après plusieurs années d'élaboration de politique au niveau local, Swan Wooster Engineering Co. Ltd. avec le concours de la province du Nouveau-Brunswick a établi en 1971, pour le compte de la Saint John Port and Industrial Development Commission, un plan directeur en vue de l'aménagement du port. Ce plan directeur recommandait entre autres l'extension des limites du port de manière à comprendre la superficie dont l'aménagement était prévu dans le cadre des projets de Canaport et de Lorneville. L'étude des répercussions sur la région urbaine contient une proposition semblable qui a reçu l'approbation de la ville de Saint-Jean. L'honorable Roméo Leblanc et le premier ministre Hatfield ont été mis au courant de l'intention d'étendre les limites du port et ils sont d'accord. L'Autorité portuaire a également approuvé l'extension. Les représentants d'Irving Oil Limited ont récemment signalé leur opposition, envoyant des copies au Premier ministre et aux membres du Cabinet, et ce malgré le fait que leur mandataire a attiré l'affaire à l'attention de M. A.L. Irving au moment où le Conseil des ports nationaux a fait d'importantes modifications et concessions lorsque celles-ci s'imposaient il y a quelques années.

Irving Oil Limited a construit à Mispéc Point le terminal en eau profonde de Canaport. Pour que de plus grands navires puissent être reçus à cet endroit, la Garde côtière canadienne a amélioré les aides à la navigation et établi un système de gestion du trafic maritime. Bien que cela serve à d'autres navires que ceux qui utilisent les installations de Canaport, une partie considérable des dépenses initiales de 1.8 millions de dollars et des dépenses annuelles au titre de l'exploitation et de l'entretien, dont le montant correspond approximativement au chiffre de base, pourrait être imputée à la circulation de pétroliers de grande capacité.

Considerable interest has been shown in developing liquified natural gas facilities at Lorneville. This should result in a substantial increase in vessel traffic in the area and should improve social and economic conditions in the area.

It is estimated that the extension of limits will generate additional port revenues of \$130,000 through charges levied against owners of vessels supplying the refinery. Further additional revenues will also result from vessels servicing the liquified natural gas and any other facilities developed at Lorneville.

In the Trial Division Judge Dubé said this (at p. 5)

It appears from reading the documents entered in evidence that one of the very important factors prompting extension of the Saint John Harbour was undoubtedly the increase in revenue from this harbour. On the other hand, it also appears that other very valid reasons existed in favour of extension of the harbour, in particular the rationalization of shipping activities in the entire area of the harbour.

There was evidence before Mr. Justice Dubé from which one could conclude that the collection of harbour dues was not an unimportant consideration in the decision to extend the harbour boundaries. In a letter dated April 13, 1972 the Port Manager wrote to the Chairman of the National Harbours Board.

Incidentally, and as I mentioned during the interview with the Board, I recommended an extension of the harbour limits in 1968 just prior to the Irving Canaport development, as per letter of June 24, 1968, your file 474-S1-0; a copy of my letter is attached.

Since the Irving Canaport facility has been in use we have been losing harbour dues from tankers that used to unload within the present harbour limits. In 1971 over 2 million tons of crude oil were unloaded at Canaport. The harbour dues which the Board could have collected in 1971 had the harbour limits been extended amounted to \$18,187.11 (1,212,474 gross tons). With the Lorneville deepwater site now developing, the harbour dues' revenue would represent a substantial amount of revenue to the port in the future.

There was also ample evidence before Mr. Justice Dubé from which one might conclude that the

La construction d'installations pour le gaz naturel liquéfié à Lorneville a suscité un vif intérêt. Cela devrait entraîner une augmentation sensible du trafic maritime dans la région, améliorant par le fait même ses conditions sociales et économiques.

Il est prévu que l'extension des limites produira, grâce aux droits de port prélevés auprès des propriétaires de navires alimentant la raffinerie, des revenus supplémentaires de l'ordre de \$130,000. D'autres revenus supplémentaires proviendront des navires qui assurent le service des installations pour le gaz naturel liquéfié et de toutes autres installations construites à Lorneville.

En Division de première instance, le juge Dubé a dit (à la p. 5):

Il paraît à la lecture des documents mis en preuve qu'un des facteurs, très important, motivant l'extension du port de Saint-Jean était sûrement l'accroissement des revenus de ce port. Par contre, il appert également que d'autres raisons très valables militaient en faveur de l'expansion du port, plus particulièrement la rationalisation des activités maritimes de toute cette région portuaire.

On pouvait conclure à partir de la preuve produite devant le juge Dubé que la perception de droits de port n'a pas été la moindre des considérations qui ont motivé la décision d'étendre les limites du port. Dans une lettre datée du 13 avril 1972 adressée au président du Conseil des ports nationaux, le directeur du port a dit:

[TRADUCTION] Incidemment, comme je l'ai mentionné au cours de l'entrevue avec le Conseil, j'ai recommandé en 1968, soit peu avant la construction des installations d'Irving à Canaport (voir ma lettre du 24 juin 1968, votre référence 474-S1-0, dont copie est jointe), l'extension des limites du port.

Depuis que les installations d'Irving à Canaport sont en usage, nous perdons les droits de port autrefois payés à l'égard des pétroliers dont le déchargement devait s'effectuer dans les limites actuelles du port. En 1971, plus de 2 millions de tonnes de pétrole brut ont été déchargées à Canaport. S'il y avait eu extension des limites du port, le Conseil aurait pu percevoir en 1971 \$18,187.11 (1,212,474 tonnes fortes) en droits de port. Maintenant que la construction des installations en eau profonde à Lorneville est lancée, on peut s'attendre à ce que, dans l'avenir, d'importants revenus proviennent de la perception de droits de port.

En outre la preuve soumise au juge Dubé pouvait permettre de conclure que l'accroissement pré-

expectation of increased revenues was not the only reason for expanding the harbour. In a letter dated June 24, 1968, to the National Harbours Board, the Port Manager said:

The new City limits established on January 1, 1967, as a result of amalgamation, take in the area from Musquash Head to Mispic Bay and it is a natural step to extend the harbour limits in order to tie in with these new limits.

The most important reason for extending the harbour limits from the standpoint of Federal control is to place under one central authority (N.H.B.) all ocean-going vessels and other related major harbour activities.

I have no doubt that Justice Dubé had factors like these in mind when he said that one of the reasons for expanding the harbour was "rationalization" of maritime activity in the region.

Furthermore, the harbour was expanded not only to include Mispic Point in the east, but also to include a new facility at Lorneville to the west of the original harbour.

I have referred to these several pieces of evidence, not for the purpose of canvassing the considerations which may have motivated the Governor in Council in passing the Order in Council but to show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence. The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

I wish to make one further observation on this point. Irving Oil Limited and its associated companies were not denied an opportunity to be heard. On November 29, 1976 Mr. A. L. Irving, President, Irving Oil Limited, sent a telex to the Honourable Otto Lang, then Minister of Transport, voicing strong objection to the inclusion of Canaport in any extension of Saint John Harbour limits. This was followed by a further telex on December 28, 1976 to which Mr. Lang replied on January 18, 1977 in these terms:

visible des revenus n'était pas le seul motif de l'extension du port. Dans une lettre du 24 juin 1968 adressée au Conseil des ports nationaux, le directeur du port a dit:

a [TRADUCTION] Les nouvelles limites de la ville fixées le 1^{er} janvier 1967, par suite d'une fusion, comprennent la région entre Musquash Head et Mispic Bay, et il est naturel d'étendre les limites du port en conséquence.

b Du point de vue des autorités fédérales, la raison la plus sérieuse pour l'extension des limites du port est de mettre sous une administration centrale (le C.P.N.) l'ensemble des navires de haute mer ainsi que les importantes activités portuaires reliées à ces navires.

c Je n'ai pas le moindre doute que c'est ce que le juge Dubé avait à l'esprit quand il a dit que l'une des raisons de l'extension du port était la «rationalisation» des activités maritimes de la région.

d De plus, le port a été étendu de manière à comprendre non seulement Mispic Point à l'est, mais aussi les nouvelles installations à Lorneville, à l'ouest du port primitif.

e Je mentionne ces différents éléments de preuve non pas pour examiner les considérations qui ont pu motiver le gouverneur en conseil à prendre le décret, mais pour démontrer que l'extension du port a été une question économique et politique plutôt qu'une question de compétence ou de droit pur. Le gouverneur en conseil a manifestement cru avoir des motifs raisonnables de prendre le décret *f* C.P. 1977-2115 qui étendait les limites du port de Saint-Jean et nous ne pouvons nous enquerir de la validité de ces motifs afin de déterminer la validité du décret.

h Je tiens à ajouter à cet égard qu'Irving Oil Limited et ses filiales n'ont pas été privées de la possibilité d'être entendues. Le 29 novembre 1976, M. A.L. Irving, président d'Irving Oil Limited, dans un télex à l'honorable Otto Lang, alors ministre des Transports, a signalé sa vive opposition à l'inclusion de Canaport dans une extension éventuelle des limites du port de Saint-Jean. Cela a été *i* suivi, le 28 décembre 1976, d'un autre télex auquel M. Lang a donné, le 18 janvier 1977, la réponse suivante:

Dear Mr. Irving:

I would like to acknowledge receipt of your recent telegram regarding the proposed extension of harbour limits at Saint John, N.B.

Substantial federal funds were involved in providing navigational aids and vessel traffic management to permit operations at the Canaport project to proceed.

When major changes and concessions were urgently required by Irving Oil Limited and its associated companies in various leases of property in Courtenay Bay, the National Harbours Board adjusted its policies to meet the urgent request. Mr. K. McKenzie who was your agent in the matter was asked to bring to your attention the proposed extension of harbour limits to include the total city waterfront as suggested by Swan Wooster in their port planning study for the City of Saint John in 1972.

The result of the extension would be the levying of harbour dues by the National Harbours Board against the vessels which are understood to be foreign vessels using Canadian waters.

In view of the foregoing, I would suggest that the extension of the limits is fair and reasonable.

This was followed by a lengthy letter to Mr. Lang dated March 29, 1977 from Mr. Hector C. Boulay, Corporate Executive, Irving Oil Limited. Mr. Lang replied on May 4, 1977. Mr. Boulay wrote again on May 31, 1977. In this correspondence the position of Irving Oil Limited was explained forcefully and in detail.

The appellants also argue that the Order in Council expanding the harbour is *ultra vires* because it is not in conformity with the objects of s. 7(2) of the Act, pursuant to which the Order in Council was passed. Section 7 provides:

7. (1) The Board, for the purpose of and as provided for in this Act, has jurisdiction over the following harbours: Halifax, Saint John, Chicoutimi, Quebec, Trois-Rivières, Montreal and Vancouver, and likewise has administration, management and control of

(a) all works and property that on the 1st day of October 1936 were administered, managed and controlled by any of the Corporations;

(b) all other harbours and works and property of Canada that the Governor in Council may transfer to the Board for administration, management and control.

[TRADUCTION] Monsieur Irving,

J'accuse réception de votre télégramme récent concernant le projet d'extension des limites du port de Saint-Jean (Nouveau-Brunswick).

Le fédéral a dépensé d'importantes sommes pour fournir des aides à la navigation et une gestion du trafic maritime afin que les installations de Canaport puissent être exploitées.

Quand Irving Oil Limited et ses filiales ont eu un besoin urgent de modifications et de concessions importantes relativement à divers baux afférents à des propriétés situées dans Courtenay Bay, le Conseil des ports nationaux a modifié ses politiques pour répondre à leur demande instantane. On a chargé M. K. McKenzie, qui vous a représenté dans cette affaire, d'attirer votre attention sur le projet d'étendre les limites du port de manière qu'elles comprennent l'ensemble de la partie de la ville qui longe la mer, comme l'a proposé Swan Wooster dans le rapport sur l'aménagement du port préparé pour la ville de Saint-Jean en 1972.

L'extension aura pour résultat que le Conseil des ports nationaux percevra des droits de port à l'égard des navires étrangers qui naviguent dans les eaux canadiennes.

Compte tenu de ce qui précède, j'estime que l'extension des limites est juste et raisonnable.

M. Hector C. Boulay, directeur d'Irving Oil Limited, a par la suite fait parvenir à M. Lang une longue lettre datée du 29 mars 1977. Celui-ci y a répondu le 4 mai 1977. M. Boulay lui a écrit de nouveau le 31 mai 1977. Cette correspondance contient un exposé à la fois énergique et détaillé de la position d'Irving Oil Limited.

Les appelantes allèguent en outre que le décret qui étend le port est *ultra vires* parce qu'il n'est pas conforme aux objets du par. 7(2) de la Loi, en vertu duquel le décret a été pris. L'article 7 dispose:

7. (1) Aux fins de la présente loi et selon qu'il y est prévu, le Conseil a juridiction sur les ports suivants: Halifax, Saint-Jean, Chicoutimi, Québec, Trois-Rivières, Montréal et Vancouver; et il administre, gère et régit de la même manière

a) tous les ouvrages et biens qui, le 1^{er} octobre 1936, étaient administrés, gérés et régis par l'une des corporations;

b) tous autres ports, ouvrages et biens du Canada que le gouverneur en conseil peut transférer au Conseil pour qu'il les administre, gère et régisse.

(2) The boundaries of the harbours of Halifax, Saint John, Chicoutimi, Quebec, Trois-Rivières, Montreal and Vancouver are as described in the schedule, or as may be determined from time to time by order of the Governor in Council and any such order shall be published in the *Canada Gazette*.

The appellants acknowledge that s. 7 does give the federal Cabinet jurisdiction to expand the harbour limits. They say, however, that this can only be done with an eye to the "administration, management and control" of the harbour and that the section does not authorize expansion for the purpose of increasing the Board's revenues.

I have already pointed out that the port was not expanded only for the purpose of increasing revenues, and that "rationalization" of maritime activity in the area was also an important factor. It seems to me that "rationalization" in the sense indicated above easily falls within the scope of the powers conferred by s. 7(2).

For the above reasons then the appellants' first submission must fail.

III

Is By-law B-1 applicable to the appellants?

Since the Order in Council was, in my view, validly passed and since its effect was to bring the Mispec Point facility within the harbour boundaries it would seem reasonable to conclude that vessels using that facility would become subject to the Board's jurisdiction and tolls.

The statutory authority to levy such tolls is found in s. 14(1)(e) of the Act:

14. (1) The Governor in Council may make by-laws, not inconsistent with the provisions of this Act, for the direction, conduct and government of the Board and its employees, and the administration, management and control of the several harbours, works and property under its jurisdiction including

(e) the imposition and collection of tolls on vessels or aircraft entering, using or leaving any of the harbours; on passengers; on cargoes; on goods or cargoes of any kind brought into or taken from any of the harbours or any property under the administration of the Board, or landed, shipped, transhipped or stored at

(2) Les limites des ports d'Halifax, Saint-Jean, Chicoutimi, Québec, Trois-Rivières, Montréal et Vancouver sont celles que décrit l'annexe, ou celles que détermine, à l'occasion, un décret du gouverneur en conseil, lequel décret doit être publié dans la *Gazette du Canada*.

Les appelantes reconnaissent que l'art. 7 confère effectivement au cabinet fédéral compétence pour étendre les limites du port. Elles prétendent cependant que cela peut se faire seulement en vue de «l'administration, gestion et régie» du port et que l'art. 7 n'autorise nullement l'extension pour augmenter les revenus du Conseil.

J'ai déjà souligné que le port n'a pas été étendu à la seule fin d'accroître les revenus et que la «rationalisation» des activités maritimes de la région a également été un facteur important. Il me semble que la «rationalisation», au sens déjà indiqué, relève facilement des pouvoirs que confère le par. 7(2).

Donc, pour ces motifs, le premier argument des appelantes doit être rejeté.

III

Le règlement B-1 s'applique-t-il aux appelantes?

Puisque le décret du conseil a été, selon moi, valablement pris et qu'il a pour effet d'inclure les installations de Mispec Point dans les limites du port, il paraît raisonnable de conclure que les navires faisant usage de ces installations sont assujettis à l'autorité du Conseil et aux droits qu'il exige.

C'est l'al. 14(1)e) de la Loi qui attribue le pouvoir de percevoir ces droits:

14. (1) Le gouverneur en conseil peut établir des règlements, non incompatibles avec les dispositions de la présente loi, pour la direction, la conduite et la gouverne du Conseil et de ses employés, ainsi que pour l'administration, la gestion et la régie des divers ports, ouvrages et biens sous sa juridiction, y compris

e) l'imposition et la perception de droits sur les navires ou aéronefs qui entrent dans les ports, en font usage ou en sortent; sur les passagers; sur les cargaisons; sur les marchandises ou cargaisons de toute nature qui ont été introduites dans l'un des ports ou l'une des propriétés relevant de l'administration du

any of the harbours or on any property under the administration of the Board or moved across property under the administration of the Board; for the use of any property under the administration of the Board or for any service performed by the Board; and the stipulation of the terms and conditions (including any affecting the civil liability of the Board in the event of negligence on the part of any officer or employee of the Board) upon which such use may be made or service performed. [Emphasis added.]

The appellants present several ingenious arguments in support of the claim that By-law B-1 is inapplicable to the appellants. The main argument centres on s. 8 of the *National Harbours Board Act* which reads:

8. Unless otherwise specifically provided for in this Act, nothing in section 7 shall be deemed to give the Board jurisdiction over or control of private property or rights within any of the harbours under the jurisdiction of the Board.

The appellants cite high and vintage authority to the effect that the owner of riparian property has a right of access from his land to the water, and from the water to his land. For example, *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662; *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329; *Attorney-General v. Conservators of the Thames* (1862), 1 H & M Ch. 1. The cases also show that this is a private property right, to be distinguished from the public right of navigation on the water. The right of access can be vindicated by an action for damages or by injunction.

The appellants argue that when someone docks his own vessel at his own riparian lot, the imposition of harbour dues on the vessel amounts to an interference with the riparian owner's private right of access, and since s. 8 of the Act precludes the Board from exercising jurisdiction or control over "private property or rights", the By-law imposing tolls on harbour users must be inapplicable to Kent Lines Limited's vessels docking at the Mispéc Point facilities. I think the appellants' submission fails for several reasons.

Conseil ou qui en ont été prises, ou qui ont été débarquées, expédiées, transbordées ou emmagasinées dans l'un des ports ou sur l'une des propriétés ressortissant au Conseil, ou qui ont été déplacées à travers des propriétés dont l'administration relève du Conseil; pour l'usage de tout bien ressortissant au Conseil ou pour tout service rendu par le Conseil; et la stipulation des termes et conditions (y compris toute modalité visant la responsabilité civile du Conseil en cas de négligence de la part d'un fonctionnaire ou employé du Conseil) auxquels un tel usage peut être fait ou un tel service rendu. [C'est moi qui souligne.]

Les appelantes invoquent plusieurs arguments astucieux pour faire valoir que le règlement B-1 ne leur est pas applicable. L'argument principal repose sur l'art. 8 de la *Loi sur les ports nationaux*, dont voici le texte:

8. Sauf disposition expresse de la présente loi, rien à l'article 7 n'est censé conférer au Conseil la juridiction ou la régie sur des droits ou biens privés dans les limites de l'un quelconque des ports relevant du Conseil.

Les appelantes citent d'importantes décisions de vieille date à l'appui de l'argument selon lequel le propriétaire riverain a un droit d'accès à l'eau depuis son bien-fonds et à son bien-fonds depuis l'eau. Par exemple, *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662; *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329; *Attorney-General v. Conservators of the Thames* (1862), 1 H & M Ch. 1. Il se dégage également de ces arrêts qu'il s'agit d'un droit de propriété privé qui est à ce titre différent du droit public de naviguer sur les eaux. On peut défendre son droit d'accès soit par action en dommages-intérêts, soit par injonction.

Les appelantes font valoir que lorsqu'une personne amarre son propre bateau sur son propre terrain riverain, l'imposition de droits de port sur le bateau constitue une atteinte au droit privé d'accès du propriétaire riverain, et puisque l'art. 8 de la Loi empêche le Conseil d'exercer compétence ou autorité sur les «droits ou biens privés», le règlement qui impose des droits aux usagers du port doit être inapplicable aux navires de Kent Lines Limited qui s'amarrent aux installations de Mispéc Point. J'estime que l'argument des appelantes doit être écarté pour plusieurs raisons.

Although the cases relied on do show that access to and from the water is an incident of riparian ownership, each of them involved a physical obstruction to access. No authority is cited for the proposition that economic impediment can constitute an interference with this right. Indeed, in *Attorney-General v. Conservators of the Thames, supra*, it was held that a wharf that did not totally block access to a riparian neighbour's water lot, but did force the neighbour to take a longer and more expensive route to his water lot, did not amount to an obstruction to the private right. The case involved very different facts, but it may lend support to the view that economic barriers will not constitute interference.

It is obvious that nothing in the Tariff at issue here interferes with or affects in any physical sense the right of access from the waters of the Bay of Fundy to the riparian frontage. Oil tankers may anchor and discharge their cargoes without impediment.

The appellants' submission is unsupported by authority. In effect, they ask the Court to expand the law of riparian ownership to recognize a new property right. If there is nothing fatal in the fact that the appellants' case is novel, is it supported by sound principle?

It must be remembered that when the vessels enter the harbour they are exercising a public right and not a private right and it is upon entry that harbour dues become payable. If there is in this case an interference with a right, the right interfered with is not, as Vice-Chancellor Sir W. Page Wood noted in *Attorney-General v. Conservators of the Thames, supra*, at p. 33, the private right of access, which still remains, but the right of approaching from a distance, which forms part of the public right of navigation.

The practical implications of the appellants' argument must not be overlooked. The facts of the case are somewhat unusual. There is one parent company and three subsidiary companies. One of

Bien que les arrêts invoqués établissent effectivement que la propriété riveraine comporte un droit d'accès à l'eau depuis le bien-fonds et au bien-fonds depuis l'eau, il y avait, dans chaque cas, un obstacle matériel qui interdisait l'accès. Aucune jurisprudence citée ne vient appuyer la proposition selon laquelle un empêchement d'ordre économique peut constituer une atteinte à ce droit. En fait, dans l'affaire *Attorney-General v. Conservators of the Thames*, précitée, il a été jugé qu'un quai qui n'interdit pas totalement l'accès au lot d'eau d'un propriétaire riverain voisin, mais qui obligeait celui-ci à gagner son lot d'eau par une voie plus longue et plus coûteuse, ne représentait pas une atteinte au droit privé. L'affaire mettait en cause des faits très différents, mais elle peut servir à appuyer le point de vue selon lequel les obstacles économiques ne constituent pas une telle atteinte.

Il est évident que les droits de port présentement en cause ne portent nullement atteinte d'une façon matérielle au droit d'accès aux terrains riverains depuis les eaux de la baie de Fundy ni ne le touchent. Les pétroliers peuvent mouiller et être déchargés de leurs cargaisons sans entrave.

Aucune jurisprudence n'appuie l'argument des appelantes. En réalité, elles demandent à la Cour d'étendre le droit en matière de propriété riveraine de manière à reconnaître un nouveau droit de propriété. Si l'originalité de l'argument des appelantes n'est pas en soi fatale, existe-t-il un principe solide qui l'appuie?

Il faut se rappeler que lorsque les navires entrent dans le port, ils exercent un droit public et non un droit privé, et c'est à l'entrée que les droits de port deviennent exigibles. Si, en l'espèce, on a porté atteinte à un droit, le droit ainsi touché, comme l'a noté le vice-chancelier Sir W. Page Wood dans l'affaire *Attorney-General v. Conservators of the Thames*, précitée, à la p. 33, n'est pas le droit privé d'accès qui demeure entier, mais le droit d'approcher de loin, qui fait partie du droit public de naviguer.

Il ne faut pas négliger les conséquences pratiques de l'argument des appelantes. Les faits de l'espèce sont assez inhabituels. Il y a une compagnie mère et trois filiales. Une de ces compagnies,

the companies, Kent Lines Limited, is claiming exemption from harbour dues because others of the companies, namely Canaport Limited and Irving Oil Limited, constructed harbour facilities at no cost to the taxpayer. Are the vessels of Kent Lines to be free of harbour dues in perpetuity? If the ownership of Kent Lines or of Canaport, for example, were to change tomorrow would the immunity of Kent Lines from harbour dues continue unabated? Under what circumstances does the immunity continue? I do not wish to be aridly technical but it seems to me the appellants' proposition might well lead to difficulty in its application.

Even if the riparian owner's right of access did include the right to avoid harbour dues, it is far from clear that the language of s. 8 would be apt to prohibit the Board from infringing that right. Section 8 says that nothing in s. 7 gives the Board "jurisdiction over or control of private property or rights" within the harbour. Section 7 gives the Board jurisdiction over seven Canadian harbours, over "all works and property" that was "administered, managed and controlled" by the Board's predecessors, and over "all other harbours and works and property of Canada" that the government transfers to the Board. In the Federal Court of Appeal Mr. Justice Pratte said (at pp. 396-97):

According to section 8, the Board may not exercise jurisdiction over or control of "private property or rights within" a harbour. In the present case the "private property" in question consists of the respondents' harbour installations. It does not seem to me that the Board has exercised any jurisdiction or control over these installations by requiring that vessels travelling thereto pay the same dues as all other vessels entering the Saint John Harbour. The situation would be different, of course, if the Board had claimed to regulate the manner in which the respondents used their harbour installations or if the Board had regulated access to these installations directly, by requiring those using them to pay dues, for example. This was not the situation here, however. The National Harbours Board did not exercise any jurisdiction or control over the respondents' property, it simply regulated the right of movement in the Saint John Harbour: this right is neither a private right nor private property of the respondents.

I agree that the imposition of harbour dues on vessels who use the Saint John Harbour does not

Kent Lines Limited, réclame une exemption des droits de port parce que deux autres, savoir Canaport Limited et Irving Oil Limited, ont construit des installations portuaires sans frais pour le contribuable. Les navires de Kent Lines doivent-ils être exemptés de droits de port à perpétuité? Si la propriété de Kent Lines ou de Canaport, par exemple, devait changer demain, est-ce que Kent Lines continuerait à jouir de la même exonération? Dans quelles circonstances peut-elle continuer à en jouir? Je ne veux pas me montrer excessivement technique, mais il me semble que l'argument des appelantes pourrait bien entraîner des difficultés d'application.

Même si le droit d'accès du propriétaire riverain comportait effectivement le droit à l'exonération des droits de port, il est loin d'être clair que la formulation de l'art. 8 suffirait à empêcher le Conseil d'y porter atteinte. L'article 8 dit que rien à l'art. 7 ne confère au Conseil «la juridiction ou la régie sur des droits ou biens privés» dans les limites du port. L'article 7 attribue au Conseil juridiction sur sept ports canadiens, sur «tous les ouvrages et biens» qui étaient administrés, gérés et régis par ses prédécesseurs, et sur «tous autres ports, ouvrages et biens du Canada» que le gouvernement transfère au Conseil. En Cour d'appel fédérale, le juge Pratte a dit (aux pp. 396 et 397):

Suivant l'article 8, le Conseil ne peut exercer aucune juridiction ou régie «sur des droits ou biens privés dans les limites» d'un port. En l'espèce, les «biens privés» dont il s'agit, ce sont les installations portuaires des intimées. Or, le Conseil ne me semble avoir exercé aucune juridiction ou régie sur ces installations en exigeant que les navires qui s'y dirigent paient les mêmes droits que tous les autres navires pénétrant dans le port de Saint-Jean. Il en serait autrement, bien sûr, si le Conseil avait prétendu réglementer la façon dont les intimées devaient utiliser leurs installations portuaires ou, encore, si le Conseil avait réglementé directement l'accès à ces installations, par exemple, en imposant des droits à ceux qui les utilisent. Mais telle n'est pas la situation ici. Le Conseil des ports nationaux n'a exercé aucune juridiction ou contrôle sur les biens des intimées, il a tout simplement réglementé le droit de circuler dans le port de Saint-Jean: ce droit n'est ni un droit ni un bien privé des intimées.

Je suis d'accord pour dire que l'imposition de droits de port sur les navires utilisant le port de

amount to an exercise of "jurisdiction over or control of" private property within the meaning of s. 8.

The appellants' submission fails even if we assume both that the riparian owner has a right to use his property free of harbour dues, and also that the imposition of tolls amounts to an exercise of "jurisdiction or control" within the meaning of s. 8. The appellants' problem would then be that s. 8 begins with the words "unless otherwise specifically provided for in this Act". In other words the s. 8 limitation on the Board's jurisdiction is expressly made subject to other sections of the Act that give the Board particular powers. Section 14(1)(e) expressly gives the Board jurisdiction to make by-laws respecting "the imposition and collection of tolls on vessels or aircraft entering, using or leaving any of the harbours".

IV

Tolls and Taxes

The appellants' third argument relies on the wording of s. 14(1)(e), which permits the Board to impose "tolls" on ships entering the harbour. The appellants cite authority such as *Manchester Ship Canada Co. v. Upper Mersey Navigation Commissioners*, [1958] 2 Lloyd's Rep. 81 at p. 90, to the effect that "tolls" is a term to be distinguished from "taxes", the difference being that "tolls" are charged to defray the cost of providing particular government services, while "taxes" are imposed for the purpose of raising revenue. The appellants say the Board provides no services to users of its Mispic Point facility; the payments exacted by the Board are "taxes" rather than "tolls" and the Board has no jurisdiction to impose such charges under s. 14(1)(e).

The trial judge apparently concluded that the Board provides no services to vessels using the dock at Mispic Point. He also agreed with the appellants' submission that the "tolls" were really taxes, and were therefore *ultra vires* the Board. The Federal Court of Appeal disagreed, holding

Saint-Jean n'équivaut pas à l'exercice de «la juridiction ou la régie sur» des biens privés au sens de l'art. 8.

^a L'argument des appelantes doit être rejeté, à supposer même que le propriétaire riverain ait le droit de se servir de son bien sans être tenu au paiement de droits de port et à supposer également que le fait d'exiger des droits équivaille à l'exercice ^b de «juridiction» ou de «régie» au sens de l'art. 8. Les appelantes buteraient alors sur un autre problème puisque l'art. 8 commence par les mots «sauf disposition expresse de la présente loi». En d'autres termes, la restriction apportée par l'art. 8 ^c à la juridiction du Conseil est expressément soumise à d'autres articles de la Loi qui confèrent au Conseil des pouvoirs particuliers. L'alinéa 14(1)e) l'habilite expressément à établir des règlements ^d concernant «l'imposition et la perception de droits sur les navires ou aéronefs qui entrent dans les ports, en font usage ou en sortent».

IV

Droits et impôts

Le troisième argument des appelantes est fondé sur la formulation de l'al. 14(1)e) qui autorise le Conseil à imposer des «droits» sur les navires qui entrent dans le port. Les appelantes citent de la jurisprudence comme l'affaire *Manchester Ship Canada Co. v. Upper Mersey Navigation Commissioners*, [1958] 2 Lloyd's Rep. 81, à la p. 90, portant qu'il y a une distinction à faire entre ^g «droits» et «impôts», la différence étant que les «droits» sont exigés pour couvrir le coût de certains services gouvernementaux, alors que les «impôts» sont établis pour produire des revenus. Les appelantes allèguent que le Conseil ne fournit aucun ^h service aux usagers des installations de Mispic Point; les paiements exigés par le Conseil seraient donc des «impôts» plutôt que des «droits» et ne relèveraient pas de la compétence que lui confère ⁱ l'al. 14(1)e).

Le premier juge a apparemment conclu que le Conseil ne fournit aucun service aux navires faisant usage du dock à Mispic Point. Il a également retenu l'argument des appelantes selon lesquelles ^j les «droits» sont en réalité des impôts de sorte que le Conseil n'a pas compétence pour les exiger. La

that s. 14 explicitly authorizes the imposition of "tolls" on any vessel entering the harbour, whether or not the Board rendered any service to the vessel charged. Mr. Justice Pratte said (at p. 397):

It is clear from reading the By-law in question that the dues it imposes are "payable in respect of each vessel that enters or operates within a harbour", regardless of whether or not services have been provided to the vessel. It seems to me, moreover, that the imposition of such dues is authorized by the early part of paragraph 14(1)(e) of the Act.

I shall assume, *arguendo*, that the appellants are right in their contention that the word "tolls" in s. 14(1)(e) restricts the Board to charges reasonably related to the costs of operating the harbour. It does not follow, however, that a toll imposed on a particular vessel pursuant to s. 14 must be related to the cost of services provided to that vessel. Nor do the appellants cite any authority to this effect. Indeed one of the cases the appellants rely on appears to be authority to the contrary. In *Foreman v. Free Fishers of Whitstable*, (1869) L.R. 4 H.L. 266, the plaintiffs brought an action to recover "anchorage dues" allegedly owed by the defendants. In that case Lord Chelmsford said (at p. 285):

I find nothing in the authorities to warrant the argument of the learned counsel that the benefit conferred by the owner of the port must be precisely that in respect of which the toll is demanded. On the contrary, it appears from Lord Hale, *De Portibus Maris*, chap. 6, that, "though A. may have the property of a creek, or harbour, or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of the property and the interest of franchise be several and divided". And he afterwards mentions anchorage as a toll arising from the *jus dominii* or franchise of a port. In this case it is clear that the anchorage toll would not be payable in respect of any benefit which the anchoring vessel derived from the owner of the franchise.

Even if the word "tolls" in s. 14 limits the Board to charges reasonably related to the cost of providing harbour services, a toll levied against a particu-

Cour d'appel fédérale, ne partageant pas cet avis, a jugé que l'art. 14 autorise expressément l'imposition de «droits» sur tout navire qui entre dans le port, sans que le Conseil fournisse un service quelconque à ce navire. Le juge Pratte a dit (à la p. 397):

Il est clair à la lecture du Règlement dont il s'agit que les droits qu'il impose sont «exigibles à l'égard de tout navire qui entre dans un port ou qui y est utilisé», sans égard au fait que des services aient ou n'aient pas été rendus à ce navire. Il me semble, de plus, que l'imposition de pareils droits est autorisée par le début de l'alinéa 14(1)e de la Loi.

Je vais supposer, aux fins de la discussion, que les appelantes ont raison de soutenir que le mot «droits» qui figure à l'al. 14(1)e limite le Conseil à la perception des seuls frais raisonnablement reliés aux coûts d'exploitation du port. Il ne s'ensuit pas, cependant, qu'un droit imposé en vertu de l'art. 14 sur un navire en particulier doit se rapporter au coût des services fournis à ce navire. Les appelantes ne citent d'ailleurs aucun arrêt en ce sens. En fait, un des arrêts invoqués par les appelantes paraît appuyer le point de vue contraire. Dans l'affaire *Foreman v. Free Fishers of Whitstable*, (1869) L.R. 4 H.L. 266, les demandeurs avaient intenté une action en recouvrement des «droits de mouillage» qui leur auraient été dus par les défendeurs. Dans cette affaire lord Chelmsford a dit (à la p. 285):

[TRADUCTION] Je ne trouve rien dans la jurisprudence qui justifie l'argument du savant avocat selon lequel l'avantage conféré par le propriétaire du port doit être celui-là même à l'égard duquel les droits sont exigés. Au contraire, il se dégage de l'ouvrage de lord Hale *De Portibus Maris*, au chap. 6, que «bien qu'A puisse avoir la propriété d'une crique, d'un mouillage ou d'une rivière navigable, le Roi peut néanmoins accorder à B le libre accès à un port s'y trouvant; ainsi, le droit de propriété et le droit de franchise sont séparés et distincts». Il ajoute que le droit de percevoir des droits de mouillage découle du *jus dominii* ou du droit de franchise afférent à un port. En l'espèce il est évident que les droits de mouillage ne seraient pas exigibles à l'égard d'un avantage qu'un navire tire du titulaire du droit de franchise.

Même si le mot «droits» qui figure à l'art. 14 limite le Conseil à la perception des frais raisonnablement reliés au coût de la fourniture des services

lar vessel need not be based on the actual cost of services rendered to that vessel. To show that the Board's fees were *ultra vires* as "taxes" it would at least be necessary to show that the Board's revenues were significantly greater than the cost of providing harbour facilities and services to the public and no such showing was attempted here. Indeed, a memorandum dated July 22, 1969 written to the National Harbours Board by Vice-Chairman of the Board indicates that the port of Saint John suffered net operating losses amounting to \$644,049 and \$781,222 in the years 1968 and 1967 respectively.

V

Expropriation without Compensation

The appellants' final submission is that the imposition of tolls on vessels entering the harbour in order to use the Mispic Point facilities amounts to expropriation of private property without compensation.

I have concluded, however, that the riparian owner has no private right to operate his wharf free of harbour dues. It follows that the Board has not "expropriated" any property right belonging to the appellants. The fourth submission therefore falls with the second.

VI

To sum up, if one accepts the proposition that harbour limits may be increased and the further proposition that tolls may be imposed in order to defray the costs of operating the harbour, I cannot possibly see how persons having riparian rights within the extended area can be exempted in perpetuity from payment of the harbour tolls.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Langlois, Drouin & Associés, Quebec.

Solicitor for the respondents: R. Tassé, Ottawa.

portuaires, il n'est pas nécessaire que les droits exigés à l'égard d'un navire en particulier soient fondés sur le coût réel des services fournis à ce navire. Pour prouver que les droits exigés par le Conseil sont des «impôts» et, partant, excèdent sa compétence, il faudrait à tout le moins établir que ses revenus dépassent largement les coûts occasionnés par la fourniture au public d'installations et de services portuaires; en l'espèce, on n'a même pas essayé de le démontrer. En fait, il se dégage d'une note de service en date du 22 juillet 1969 que le vice-président du Conseil a adressée au Conseil des ports nationaux que l'exploitation du port de Saint-Jean a entraîné des pertes nettes de l'ordre de 644 049 \$ et de 781 222 \$ pour les années 1968 et 1967 respectivement.

V

d Expropriation sans indemnisation

Les appelantes font valoir en dernier lieu que le fait d'exiger des droits à l'égard des navires entrant dans le port en vue de se servir des installations de Mispic Point constitue une expropriation d'un bien privé sans indemnisation.

J'ai conclu, cependant, que le propriétaire riverain n'a aucun droit privé d'exploiter son quai en bénéficiant d'une exemption des droits de port. Il s'ensuit que le Conseil n'a «exproprié» aucun droit de propriété appartenant aux appelantes. Le rejet du deuxième moyen entraîne donc le rejet du quatrième.

g

VI

En résumé, si l'on accepte la proposition que les limites d'un port peuvent être étendues et que des droits peuvent être imposés pour couvrir les coûts de l'exploitation du port, je vois mal comment les titulaires de droits riverains à l'intérieur des nouvelles limites peuvent jouir à perpétuité d'une exemption du paiement des droits de port.

i Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelantes: Langlois, Drouin & Associés, Québec.

j

Procureur des intimés: R. Tassé, Ottawa.

Indexed as:

**Ontario Black Bear/Ontario Sportsmen and Resource Users Assn.
v. Ontario**

Between

**Ontario Black Bear/Ontario Sportsmen and Resource Users
Association, plaintiff (respondent), and
Her Majesty the Queen in Right of Ontario, defendant (moving
party)**

And between

**Ontario Black Bear/Ontario Sportsmen and Resource Users
Association, plaintiff (respondent), and
Michael Harris, John Snobelen, The Schad Foundation and Robert
Schad, defendants (moving party)**

[2000] O.J. No. 263

[2000] O.T.C. 65

19 Admin. L.R. (3d) 29

94 A.C.W.S. (3d) 878

Court File Nos. 19200/99 and 19257/99

Ontario Superior Court of Justice

Cameron J.

Heard: December 20, 1999.

Judgment: February 1, 2000.

(81 paras.)

Crown -- Authority of ministers, exercise of -- Policy statements, judicial review -- Actions against crown, defences, bars or exclusions -- Policies or policy decisions - - Contracts with crown -- Torts by and against the crown -- Interference with economic relations -- By enactment of legislation.

Motions by the defendants, the provincial Crown, Harris, Snobelen, Schad and The Schad Foundation, to dismiss the action by Ontario Black Bear/Ontario Sportsmen and Resource Users Associa-

tion against them as being frivolous, vexatious or an abuse of process. The Association moved for an order to certify their action as a class proceeding and the defendants sought to preclude the certification. The Association provided guide and accommodation services to persons wishing to engage in hunting black bears in Ontario. Harris was the Premier of Ontario and Snobelen was the Minister of Natural Resources. Schad headed the Schad Foundation, a charitable organization. The action concerned legislation which eliminated the spring bear hunt in Ontario. Snobelen stated that the hunt was being eliminated to prevent orphaning of bear cubs. The Association argued that Harris and Snobelen were influenced into passing the legislation after Schad threatened to campaign against the government if the hunt was not cancelled. The Association alleged that the decision was made for purely political reasons and that the legislation interfered with the economic relations between the Association and its clients. The Association further alleged that the Crown breached its fiduciary duty and its contractual obligations to the Association.

HELD: Motions allowed in part. The claims against Schad, Harris and Snobelen regarding economic interference were struck. The court would not interfere in the decisions made by Harris and Snobelen because they were purely political. Schad did not act improperly, but merely exercised his right to free speech inherent in democratic societies. The Association failed to establish that Schad's activities constituted a wrong giving rise to a claim for damages. The Association was granted leave to amend its statement claim to allow it add facts to support its claim of breach of contract against the Crown. The claim of breach of fiduciary duty had no basis. If the contract action survived, a class proceeding could be certified at a later date.

Statutes, Regulations and Rules Cited:

Fish and Wildlife Conservation Act, S.O. 1997, c. 41, ss. 6(a), 32(2), 63, 112, 113, 113(1).

Ontario Rules of Civil Procedure, Rules 21.01(1)(a), 21.01(1)(b), 21.03(3)(d), 25.11(b), 25.11(c), 25.06(8).

Regulation 665/98, ss. 25, 58, 60.

Regulation 670/98.

Counsel:

Mark H. Arnold, for the plaintiffs.

Robert E. Charney and Hart Schwartz, for Her Majesty the Queen, Michael D. Harris and John Snobelen.

Andrew J. Roman, for The Schad Foundation and Robert Schad.

CAMERON J.:--

INDEX

The Motions

The Parties

Allegations of Fact

- (a) The Spring Bear Hunt
- (b) The Legislative Scheme
 - (i) Fish and Wildlife Conservation Act
 - (ii) Hunting Regulations
 - (iii) Hunting Open Season
- (c) Eliminating the Spring Bear Hunt

The Two Groups of Actions

- (1) OFAH Application for Judicial Review
- (2) Ontario Black Bear Association Action

Plaintiff's Abandoned Intervention in OFAH Application

Motions to Strike Pleadings

The Crown, the Premier, and the Minister

- (a) Cause of Action for Change of Law
- (b) Cause of Action for Policy Decision
- (c) Cause of Action for Political Decision

The Schads

Claims Struck out Against Individuals

Claims Against the Crown

- (a) Detrimental Reliance or Promissory Estoppel
- (b) Breach of Contract
- (c) Breach of Fiduciary Duty

Class Proceeding Hearing

Costs

The Motions

1 The defendants in each of the actions move to:

- (1) (a) dismiss the action under Rule 21.01(3)(d) as being frivolous, vexatious or an abuse of the process of the court;
- (b) strike out the statement of claim under:
 - (i) Rule 21.01(1)(a) and (b) on the grounds that it discloses no reasonable cause of action;
 - (ii) Rule 25.11 (b) and (c) on the grounds that it is scandalous, frivolous, vexatious or an abuse of the process of the court;

- (iii) Rule 25.06(8) on the grounds that the misrepresentation, breach of trust and malice alleged is not pleaded with sufficient particularity.
- (c) preclude the plaintiffs from bringing a motion to certify its class proceedings until after the Divisional Court has determined, in a related proceeding commenced by other persons, whether the regulation canceling the spring bear hunt in Ontario is *intra vires*.
- (2) The defendants, The Schad Foundation and Robert Schad (the "Schads") move to have their names struck from of the style of cause.
- (3) The plaintiff moves in both actions under Rule 37.03(3) and (4) for an order granting leave for the hearing of a motion for an order certifying each of the actions as a class proceeding and appointing the plaintiff as a representative of the class under s. 2 of the Class Proceedings Act, S.O. 1992, c. 6 to take place in Sault Ste Marie, Ontario.

The Parties

2 The plaintiff is a trade association whose members provide accommodation, outfitting and guiding services to hunters of black bears in Ontario. The plaintiff has 335 members but the size of the class is estimated to be about 800 businesses and individuals. Messrs. Harris and Snobelen were at the relevant times the Premier of Ontario (the "Premier") and the Minister ("Minister") of the Ministry of Natural Resources ("MNR"), respectively, of Ontario. Robert Schad is a business executive and The Schad Foundation is a charitable foundation located in Ontario.

Allegations of Fact

(a) The Spring Bear Hunt

3 It is alleged in the statements of claim that prior to 1999 it was legal to hunt bears in the spring and that the government entered into contracts granting tourist camp operators the right, for a fee, to provide guiding and baiting services to licensed resident and non-resident hunters on Crown lands including in Black Bear Management Areas. The contracts provided for a one year renewal at a fee to be set by the MNR.

4 The tourist camp operators contracted with domestic and foreign hunting parties to provide accommodation, outfitting and guiding services.

5 In December 1997, the Legislative Assembly of Ontario passed the Fish and Wild Life Conservation Act, S.O. 1997, c. 41 ("FWCA"). The legislation would abolish the regulation of tourist camp operators by contracts and substitute for it regulation by a licensing system. The FWCA was proclaimed in force on January 1, 1999.

6 In the late autumn of 1998 there was extensive public debate and lobbying of the government by those favouring and those opposed to the spring bear hunt. On December 17, 1998 the Minister told the bear hunting industry generally that:

- (a) from a conservation perspective, the spring bear hunt did not pose a threat to the Ontario black bear population;

- (b) Ontario had one of the largest black bear populations in North America, estimated to be between 75,000 and 100,000;
- (c) in his opinion, the spring was the best time to hunt black bears to avoid orphaning cubs;
- (d) Ontario's current annual bear harvest is within the recommended sustainability guidelines and is closely monitored by MNR staff to ensure that the population remains at its current stable level;
- (e) the issues being raised by those concerned about the spring bear hunt and the use of dogs focus on differing societal values rather than conservation;
- (f) spring is the best time to hunt bears because it tends to target males;
- (g) hunting during the spring reduces the chance of hunters encountering a female bear 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;
- (h) it is illegal in Ontario to shoot cubs or females with cubs during the spring season;
- (i) the MNR strictly enforces its regulations;
- (j) female bears are careful mothers and their behavior, as well as care on the part of hunters and the strict laws protecting female bears in the spring, will help to ensure that females with cubs are not taken.

- (b) The Legislative Scheme
- (i) Fish and Wildlife Conservation Act

7 Hunting, trapping and related activities respecting wildlife in Ontario have, since January 1, 1999, been regulated by the FWCA. The general purposes of this legislation are to provide for a scheme of wildlife conservation and management, including the establishment of ethical, humane and responsible hunting practices, sustaining healthy populations of wildlife for future generations, regulating the commercialization of wildlife, and public safety. The FWCA and regulations made under it recognize that hunting is a legitimate recreational use of many species of wildlife in Ontario. The FWCA permits and supports a broad range of hunting and conservation activities.

8 Section 6(a) of the FWCA provides that "except under the authority of a licence and in accordance with the regulations, a person shall not hunt or trap a black bear ...". Section 32(2) requires a person to have a licence in order to provide black bear hunting services. Section 63 provides that a person shall not hold more than one licence to hunt a black bear.

9 The authority of the Lieutenant Governor in Council to make regulations is set out in s. 112 of the FWCA. The authority of the Minister to make regulations is set out in s. 113 of the FWCA.

(ii) Hunting Regulations

10 The regulations in Ontario governing the hunting of black bears are made under the FWCA. They are set out in the Regulations 665/98 and 670/98 filed December 17, 1998 and Regulation 88/99 made and filed March 4, 1999.

11 Part II of O. Reg. 665/98 provides for licensing generally and is applicable to black bear hunting.

12 Part IV, s. 25 of O. Reg. 665/98 prohibits hunting except during the open season set out in Regulation 670/98, which is applicable to the species and to the area.

13 Part X of O. Reg. 665/98 relates only to bear hunting. It specifies licensing requirements for hunters and regulates bear hunting service providers. "Bear hunting services" means bear guiding or baiting services rendered by a person to non-Ontario resident bear hunters. Section 57 specifies the areas that may be designated on the licence in which the holder may provide bear hunting services.

14 Section 58 provides that a person who holds a licence to hunt bear shall not kill more than one bear under the licence.

15 Section 60 establishes a scheme to regulate bear hunting by non-Ontario residents. With limited exceptions, it requires non-resident hunters to contract for bear-hunting services with the holder of a bear hunting services licence.

(iii) Hunting Open Season

16 Section 113(1) of the FWCA authorizes the Minister to "make regulations prescribing open seasons or closed seasons for wildlife".

17 Regulation 670/98 made by the minister under s. 113 of the FWCA established the open season for wildlife (subject to special restricted seasons in provincial parks). Prior to March 4, 1999, the regulation prescribed a spring open season for black bears (from April 15 to June 15 or June 30) and a fall open season for black bears (from September 1 to October 15 or October 31). Black bears are the only game mammals for which a spring hunting season was permitted.

(c) Eliminating the Spring Bear Hunt

18 On January 15, 1999, the Minister, without prior warning, announced that he intended to pass a regulation to eliminate the spring bear hunt in Ontario. The reason given by the government for doing this was to prevent the killing of female bears and the orphaning of their cubs, which might result in the deaths of the cubs.

19 On March 4, 1999, O. Reg. 670/98 was amended by Regulation 88/99, which deleted from the open season table in O. Reg. 670/88 the spring open season for black bear (April 15 to June 15).

20 The plaintiff alleges that during the first week of January 1999 the defendant Robert Schadt met with the Premier, who was also the leader of the Progressive Conservative Party in Ontario, and threatened that the Schads would campaign heavily against the Progressive Conservative candidates in the forthcoming 1999 provincial election if the government did not cancel the spring bear hunt. The plaintiff further alleges that this threat caused the Premier and the Minister to eliminate the spring bear hunt.

The Two Groups of Actions

(1) The OFAH Application for Judicial Review

21 On April 12, 1999, the Ontario Federation of Anglers and Hunters ("OFAH"), The Northern Ontario Tourist Outfitters Association ("NOTO") and others, including several outfitters and guides, brought an application for judicial review (the "Application") against Her Majesty the Queen in Right of Ontario and the Honourable John Snobelen, Minister of Natural Resources, challenging the validity of O. Reg. 670/98 as amended by Regulation 88/99 to cancel the spring bear hunt. The

grounds for the Application include a claim which is identical to the claim advanced in the plaintiff's statement of claim in this proceeding, namely that O. Reg. 88/99 was ultra vires the FWCA because it was passed for an improper purpose. The Application alleges that "the decision to ban the spring bear hunt was done solely for political expediency in response to a two million dollar campaign by industrialist Robert Schad ...".

22 In addition, the Application alleges that the cancellation of the spring bear hunt infringes The Canadian Charter of Rights and Freedoms (the "Charter") ss. 2(b) (freedom of expression) and s. 7 (liberty and security of the person). In contrast, the statements of claim in these two civil actions do not rely on the Charter or seek any relief or remedy under the Charter.

23 In addition, the applicants in the Application brought a motion in Kenora for an interim injunction under s. 6(2) and (4) of the Judicial Review Procedures Act, R.S.O. 1990, c. J.1, to suspend the operation of O. Reg. 88/99 until the merits of the Application could be heard by a full panel of the Divisional Court. The application for an interim injunction was dismissed by Mr. Justice Stach of this court on April 28, 1999.

24 The plaintiff in these actions was not a party to the judicial review and did not participate in the Application for an interim injunction before Mr. Justice Stach. NOTO has withdrawn from the Application.

25 The Application is scheduled to be heard in Thunder Bay from June 12-16, 2000. The only issue in the Application is whether O. Reg. 88/99 cancelling the spring bear hunt was intra vires the Minister.

(2) Ontario Black Bear Association Actions

26 Following the release of Mr. Justice Stach's decision on the interim injunction motion in the Application, the plaintiff in this case commenced these two civil actions against the government defendants. The first action, dated October 5, 1999 (Court File No. 19200/99) is against Her Majesty the Queen in Right of Ontario. In its original form, it was also against the Minister but it was discontinued as against him on October 18, 1999.

27 The second action, dated October 6, 1999 (Court File No. 19257/99) is against the Premier, the Minister and the Schads.

28 In both civil actions the plaintiff alleges that "the promulgation of Ontario Regulation 88/99 (cancelling the Spring bear hunt) was for an improper purpose relating to the political and electoral concerns and goals of the government, Snobelen and Harris, rather than for legitimate and lawful purposes, and was thereby ultra vires the Fish and Wildlife Conservation Act".

29 In both civil actions the plaintiff claims \$40 million in damages arising out of the making of the regulation to cancel the spring bear hunt.

30 In the action against the Premier, the Minister and the Schads, the plaintiff's claims are based on allegations of:

- (1) collusion and conspiracy by the defendants which injured the plaintiff by knowingly departing, or causing the government to depart, from the law alleging that they acted in their personal and political interest rather than for the purposes of the FWCA;

- (2) intentional interference with economic relations;
- (3) detrimental reliance;
- (4) misfeasance of public office; and
- (5) negligence.

31 The action against the Crown bases its claims on:

- (1) detrimental reliance;
- (2) intentional interference with economic relations;
- (3) negligence;
- (4) breach of contract; and
- (5) breach of fiduciary duty, alleging:
 - (a) The banning of the spring bear hunt repudiated the right of the plaintiff and its members to conduct a lawful business with respect to the spring bear hunt;
 - (b) The promulgation of O. Reg. 88/99 was for an improper purpose, namely, the political and electoral concerns and goals of the government and to confer a benefit on the Schads;
 - (c) The passing of O. Reg. 88/99 was not based on sound scientific or biological evidence;
 - (d) The passing of O. Reg. 88/99 was done summarily without adequate notice to the plaintiff; and
 - (e) The acts done by "the defendants" were not done in pursuance of any statutory or other public duty or authority.

No statement of defence has yet been served.

Plaintiffs' Abandoned Intervention in OFAH Application

32 The plaintiff sought to intervene in the OFAH Application under Rule 13.01 on the ground, inter alia, that "the interests of this proposed intervenor may be adversely affected by a judgment in the application for judicial review".

33 The Attorney General of Ontario consented to this proposed intervention on the condition that it will not have to serve the plaintiff with a statement of defence until 30 days after the decision in the Application or 30 days after the certification of the class proceedings, whichever is later.

34 On November 1, 1999, the plaintiff's motion to intervene in the Application was dismissed by Mr. Justice Hartt on the ground that it was "premature". The plaintiff then brought a motion to set aside or vary the decision of Hartt J., returnable before a panel of three justices of the Divisional Court.

35 On December 7, 1999, the plaintiff abandoned its motion to set aside and vary the decision of Mr. Justice Hartt.

Motions to Strike Pleadings

36 Rule 21.01(1) authorizes the court to strike out a pleading, or a distinct and separate part of a pleading, only if it is plain and obvious or beyond reasonable doubt, that the pleading discloses no reasonable cause of action and cannot succeed. On such a motion the court must restrict its consid-

eration to the pleadings and not speculate as to the facts. It must accept as true the facts alleged in the pleading unless they are patently ridiculous or incapable of proof. The complexity of the pleading or the novelty of the cause of action does not warrant striking the pleading unless the law on the issue is fully settled in the jurisprudence: *Carey Canada Inc. v. Hunt*, [1990] 2 S.C.R. 959 at p. 980; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 at p. 6 (C.A.); *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (C.A.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.); and *Montgomery v. Scholl-Plough Canada Inc.* (1989), 70 O.R. (2d) 385 at p. 388 (H.C.J.).

37 Rule 21.01 (3)(d) permits stay or dismissal of the action if it is frivolous or vexatious or otherwise an abuse of the process of the court. Rule 25.11(b) and (c) permits striking out all or a part of a pleading for the same reasons.

The Crown, the Premier and the Minister

(a) Cause of Action for Change of Law

38 The law is clear that no one has a vested right in the continuance of a law or a cause of action against the government or the Crown based upon the passing of a valid statute or regulation which deprives the plaintiff of a benefit he or she had before the change in the law and which does not constitute an expropriation by government: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at pp. 282-283 which denied a taxpayer's claim based on loss of a benefit available prior to a change in the income tax law; *Cosyns v. The Queen* (1992), 7 O.R. (3d) 641 (Div. Ct.) at p. 655-656) which struck out claims by a tobacco farmer alleging federal and provincial taxes on tobacco products were contrary to the Charter because they reflected policy changes having a adverse impact on his livelihood; *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127 (C.A.) at p. 135 which struck out, as disclosing no reasonable cause of action, claims for damages and a declaration based on amendments to rent control legislation which retroactively revoked landlords' prior rights to increase rents for residential premises where the change did not amount to an expropriation of property by the state; and *Reclamation Systems Inc. v. Rae* (1996), 27 O.R. (3d) 419 (Gen. Div.) which struck out as disclosing no reasonable cause of action a claim for negligent misrepresentation and loss of a non-contract bargain where Premier Rae promised to the plaintiff, in respect of its proposal to establish a waste disposal site on the Niagara escarpment, that the government would comply with the environmental assessment process. Subsequently a member of the government introduced in the legislature a bill which was passed into law prohibiting waste disposal sites on the Niagara escarpment.

39 It is fundamental to a liberal democracy that the government must be free to change its policy and change legislation to meet changing societal needs: *Reclamation Systems* at p. 448.

(b) Cause of Action for Policy Decision

40 Policy or planning decisions by governments or municipal councils, being those based on financial, economic, social or political factors, and generally made by high ranking government officials, are immune from private claims in tort even if the decisions are ultimately held by a court to be invalid. Governments should not be restricted by the courts in making policy decisions. Operational decisions, being administrative decisions, adjudicative decrees or decisions implementing policy and generally made by lower ranking government officials, do not carry such immunity and may be the subject of tort liability: *Weldbridge Holdings Ltd. v. Winnipeg* (1970), 22 D.L.R. (3d) 470 (S.C.C.) at pp. 477-478, rejecting a builder's claim for negligence after his property on which he

had incurred expenses was rezoned; *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at pp. 1238-1245 where a claim for damages based on tort was allowed where road safety inspections were, in the circumstances, the result of operational decisions; *Guimond v. Quebec (A.G.)*, [1996] 3 S.C.R. 347 at pp. 357-359 which rejected the plaintiff's claim for damages in tort for imprisonment for non-payment of fines; *Brown v. British Columbia* (1994), 112 D.L.R. (4th) 1, (S.C.C.) at pp. 9-12 rejecting a claim in tort where road maintenance schedules based on seasonal expectations and financial considerations were found to be a policy decision.

41 The statements of claim refer to the Minister's statement that the reason for cancelling the spring bear hunt was because "the government will not tolerate cubs been (sic) orphaned by hunters mistakenly shooting mother bears in the spring ... that stopping the hunt is the only protection for the animals".

42 This stated purpose is clearly within the scope and purpose of the FWCA and the regulatory powers given to the Minister under the FWCA. The FWCA is directed to conservation of wildlife, public safety and ethical and responsible hunting practices directed to animal welfare. The abolition of the spring bear hunt could be directed to the conservation of bear cubs which may die if they are orphaned in the spring as well as to preventing the cruelty to them resulting from the killing of their mothers.

(c) Cause of Action for Political Decision

43 The plaintiff's statements of claim allege that the decision to cancel the spring bear hunt was made for political reasons, namely to reduce the political opposition at the next election and so improve the government's chances of electoral success. It was a decision made at the highest level of government. It was inherently a policy decision in nature, there being no policy which it might be said to implement. Accordingly O. Reg. 88/99 implementing the policy decision cannot be the foundation for an action in tort.

44 Even if the regulation is ultimately held to be invalid because it was passed in bad faith, or for improper reasons or as being technically invalid, it cannot found a cause of action for conspiracy inducing breach of contract, detrimental reliance, negligence, or misfeasance of public office.

45 The plaintiff suggests in its statements of claim that the Premier and Minister acted for an improper purpose, namely political and electoral concerns, to reduce the campaigning threatened by the Schads against the government's candidates in the upcoming provincial election with a view to persuading voters to vote against the government's candidates. In reacting to such threats the government was doing nothing more than assessing public opinion, or its potential, and reacting to that assessment. Governments frequently amend laws for these reasons. These reasons are the political reasons to which the Supreme Court of Canada has referred in *Weldbridge* and *Just* as justifying, in whole or in part, policy decisions which the court has said should be immune from tort liability. As Chief Justice Dickson said in *Thornes Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at p. 113:

It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council ...

and at p. 115

... the government's reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations.

46 The political history of Canada is replete with government decisions to do, or to refrain from doing, some act within its powers for purely or substantially political reasons. It is not the business of the courts to interfere in such decisions, subject to passing on their validity based on compliance with the Constitution Act and constitutional conventions. The government is answerable directly to the voters for politically motivated decisions. The voters render their decision at the ballot box.

47 The plaintiff has cited cases permitting claims against Ministers of the Crown for damages based on malicious prosecution, for false imprisonment and for abuse of process: *McTaggart v. Ontario* (1991), 6 O.R. (3d) 456, citing *Nelles v. Ontario*, [1989] 2 S.C.R. 170, *Teamlini v. O.P.P.* (1990), 73 O.R. (2d) 664 (C.A.). The allegation of malice is essentially a deliberate and improper purpose in the use of the office of a minister. However the law is clear that enacting legislation for a political purpose is not improper: see *Dickson C.J.C. in Thornes Hardware*, above. Further, a prosecution could fairly be said to be an administrative rather than a policy decision and so not subject to immunity: see *Cory J. in Just* at p. 1242 above.

The Schads

48 Freedom of expression is a fundamental right guaranteed by s. 2(b) of the Charter. The free exchange of ideas is essential to the proper functioning and preservation of a free and democratic society. It is subject only to the reasonable limitations one would find in such a society. Those limitations would prevent threats of violence or invocations to violence or other criminal activity. The limitations would also include prohibition shown to be reasonable in such a society based on the fundamental values of the society.

49 It is a hallmark of our democratic society that individuals and institutions be free to legitimately lobby and try to persuade government to change a policy without fear of civil liability. Any change in government policy is bound to affect the interests of other people who benefit from the existing policy: see *Thorvaldson v. Saskatchewan* [1990] S.J. No. 120 (Quicklaw) 4, (Sask. Q.B.) per Halvorson J.

50 Legitimate lobbying would clearly exclude bribery, threats of violence and political conduct clearly prohibited by law. Legitimate lobbying would clearly include a threat to engage in legitimate political campaigning including financial support of a party and its candidates, peaceful political activity and advertising in support of candidates for office in an effort to legitimately encourage voters to vote for candidates who will, if elected, enact laws in support of the lobbyist's position. The plaintiff has alleged in the statements of claim nothing more than legitimate lobbying.

51 The plaintiff has presented no authority, and I am aware of none, that the activities of the Schads described in the statement of claim would constitute a wrong giving rise to a right to claim for damages.

52 As a matter of public policy, our law ought not to permit by threat of civil action the intimidation of free expression by legitimate lobbying with its implied threat of legitimate political activity. Legitimate lobbying and financial and personal support of political activity are fundamental activities encouraged and protected by the values of our free and democratic society. The losers in a lobbying campaign ought not to be able to sue the winners for being more persuasive. This is, of

course, subject to the protections provided by the Charter and valid legislation enacted by Parliament or a provincial legislature.

53 In as much as the Schads have the constitutional right to express their views, there must be a concomitant right in the government to listen to those views.

54 While there is no clear jurisprudence specifically on point settling this issue against the plaintiff, it is plain and obvious to me, beyond any reasonable question, that the plaintiff's claims against the Schads based on their legitimate lobbying efforts would not succeed in a court in Ontario.

55 The plaintiff's claims are based on the passing of Ontario Regulation 88/99 which changed the law. Neither of the Schads was a member of the government nor had either of them any power to change the law. Accordingly they cannot be the cause of the damage to the plaintiff's members.

Claims Struck out Against Individuals

56 For these reasons alone I would strike out the claims against the Schads, the Premier and the Minister and the claims of intentional interference with economic relations and negligence against the Crown and any claim which might be made for negligent misrepresentation.

Claims Against the Crown

57 There remain to be considered the claims against the Crown for detrimental reliance, breach of contract and breach of fiduciary duty.

(a) Detrimental Reliance or Promissory Estoppel

58 It is clear from *Gustavson Drilling, Cosyns, A & L. Investments and Reclamation Systems*, cited above, as enunciated in *Gustavson Drilling* at pp. 282-283:

No one has a vested right of continuance of the law as it stood in the past. In tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The doctrine of legitimate expectations does not apply to a body exercising purely legislative functions including a purely ministerial decision based on broad grounds of public policy. A minister cannot fetter his or her own freedom, or that of Parliament or the Legislative Assembly, to change laws.

59 A government and a legislature must be left free to change policy to reflect changing social needs; to permit otherwise in the name of legitimate expectations would paralyze parliament, the legislature and ministerial powers to respond to changing social circumstances: see *Reference Re: Canada Assistance Plan*, [1991] 2 S.C.R. 525 at pp. 557-560.

60 If the plaintiff is basing its claim on the Minister's statement of policy on December 17, 1998, the Minister was merely stating government policy on that date. There was no pleading or undertaking in the statement that he would continue the policy for any length of time nor was there any pleading of any suggestion in the statement that he would never change the policy.

61 The plaintiff suggests that a change of government policy a month after a statement of policy violates the principles of fundamental justice. This argument failed in both *Cosyns* at pp. 655-656, and *A & L Investments* at pp. 134-135.

62 In *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130 Denning J. stated at p. 134:

There has been a series of decisions in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured ... they are not cases of estoppel in the strict sense. They are really promises - promises intended to be binding, intended to be acted on, and in fact are acted on ... The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.

The purpose of the doctrine is not to enforce a promise but to prevent injustice. Our courts are not prepared to allow equity to overrule the common law requirement of consideration before a contract can be formed to create an enforceable obligation.

63 Promissory estoppel has five components:

- (1) There must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made;
- (2) There must be a clear promise or representation made by the party against whom the estoppel is raised establishing his or her intent to be bound by what he has said;
- (3) There must have been reliance, by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised;
- (4) The party to whom the representation was made must have acted upon it to his detriment; and
- (5) The promisee must have acted equitably.

See Fridman, *The Law of Contract*, 3rd ed. 1994, Carswell, Toronto, at pp. 129-136 cited with approval in *Reclamation Systems* at p. 450.

64 There is substantial modern authority to the effect that a plaintiff cannot assert promissory estoppel or detrimental reliance as a cause of action, that is to use it as a sword; and that it can only be used as a defence, or a shield, to prevent a promisor under an existing legal relationship from asserting a legal right which he or she would otherwise have been able to assert under the relationship in the absence of the promise or undertaking: *Reclamation Systems* at pp. 456-457 citing *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (C.A.) and *Canadian Superior Oil Ltd. v. Paddon Hughes Development Co.*, [1970] S.C.R. 932.

65 However, in S.M. Waddams, *The Law of Contract*, 4th ed. 1998, Canada Law Book, Toronto, at para. 195 the author notes that statements which amount, in effect, to promises to pay benefits have been recognized by the courts as inducing reliance and that the courts have protected that reliance even though there is no bargain, and in the ordinary sense, no contract. The author goes on to state that several cases have denied the necessity for a prior legal relationship between the parties. He cites in support *Grendon v. Guildford City Association Football Club Ltd.*, [1975] 3 W.L.R. 251

(C.A.); *Burberry Mortgage Finance and Savings Ltd. v. Hindsbank Holdings Ltd.*, [1989] 1 N.Z.L.R. 356 (C.A.); *Waltons Stores v. Maher* (1988), 164 C.L.R. 387 (High Court of Australia)

66 *Burberry Mortgage* deals with the use of estoppel where there is a legal relationship other than under a contract. However it deals with the use of estoppel as a defence rather than as a foundation for a cause of action. *Walton's Stores*, affirming the New South Wales Court of Appeal, permitted its use to found a cause of action. The plaintiff started to incur costs in the belief the defendant had agreed or would agree to lease a property. The defendant knew the plaintiff was incurring the costs in the belief the defendant had agreed or would agree, to lease the property. The court found the defendant's failure to warn the plaintiff that there was no contract was an unconscionable inducement which warranted the plaintiff's action (see p. 407-408 per Mason C.J. and Wilson J.). There is no discussion in the case of restricting the use of promissory estoppel to a situation where there is an existing legal relationship and then only as a defence. *Walton's Stores* is clearly not the law in Ontario as determined in *Canadian Superior Oil and Gilbert Steel*.

67 It would strike me as unfair that a minister of the Crown could make a statement as to a certain state of the law in the future, which is not pleaded, with the intent that certain people rely on it, which is not pleaded, and that when those people rely on it to their detriment before the statement is withdrawn, these people would not have a cause of action for a loss arising out of such intended reliance.

68 There is no allegation in the statement of claim that the Minister made the December 17 statement as a statement of intention to retain such policy sufficiently far into the future to cover the period of the spring bear hunt in April to June 1999 and with the intention that the plaintiffs could rely on such statement for the purpose of committing to contracts to prepare for the spring bear hunt.

(b) Breach of Contract

69 There is no principle warranting Crown immunity from a claim based on breach of contract.

70 The plaintiff pleads the year to year contracts commencing in 1989 between the government and the tourist operators giving the operators the right to provide guiding or baiting services to hunters on Crown lands in Black Bear Management Areas. These Bear Management Area Agreements contained a right to renew for one year at a fee to be determined by the MNR. The plaintiff further pleads that in reliance on the statements in the Minister's statement on December 17, 1998 and other unspecified statements and the fact that there had been a spring bear hunt for 38 years, the plaintiff's members continued their preparation for the spring bear hunt, including soliciting and booking hunters and making financial commitments to service the hunters. The plaintiff then pleads that the failure to renew the Bear Management Area Agreements constitutes a breach of contract.

71 There is no pleading that either the Bear Management Area Agreements or the renewals provided for a spring bear hunt. The spring bear hunt was only provided in regulations, the Minister's statement or the fact there had been spring bear hunts for some years preceding 1999. As discussed earlier, there is no vested right in the continuation of the regulation permitting the spring bear hunt. The Minister's statement of December 17, 1998 was a statement of current policy. There is no allegation that it constituted a commitment to continue the policy into the spring of 1999.

72 Further, the plaintiff's members had reasonable notice, on passing of the FWCA in December 1997, that the Bear Management Area Agreements would be replaced by a licensing system.

73 However, the plaintiff suggests, but does not clearly plead, that the Minister had a purpose in making the statement on December 17, 1998 or he would not have made it. If the Minister intended the industry to rely on the statement for the purpose of planning and making commitments for the spring bear hunt in 1999 and in reasonable reliance on that intent the plaintiff's members proceeded to make such commitments, they may have a cause of action for breach of contract, if not for detrimental reliance.

74 A cause of action should not be struck out because of bad drafting of the pleading. At the same time, the claim for breach of contract or detrimental reliance based on the Minister's statement constituting an offer or a firm commitment has not been adequately pleaded. If the Minister intended that the industry rely on the statement as a promise to allow the hunt in the spring of 1999 to enable them to make future commitments and maintain the stability of their businesses to the benefit of Ontarians, it strikes me as unfair that the Crown should escape liability for costs incurred in reasonable reliance on or accepting that commitment and before the commitment was withdrawn.

75 I strike these claims with leave to the plaintiff to amend the statement of claim against the Crown within 30 days to plead sufficient facts to constitute a cause of action which has some prospect of success.

(c) Breach of Fiduciary Duty.

76 Facts giving rise to a fiduciary duty have three general characteristics:

- (1) the fiduciary has scope for the exercise of some discretion or power;
- (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
- (3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

See Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136.

77 The plaintiffs' argument is premised on the government or Crown having a fiduciary duty only to the plaintiff. However the beneficiaries of the powers of the Crown and the government are all the people of Ontario, of which the plaintiff and its members are only a part. In exercising its powers as a fiduciary the Crown and its government must consider the interests and opinions of all the people of Ontario, including those opposed to the spring bear hunt, the need for the preservation of black bears in Ontario as a hunting resource in the future and other relevant factors. As noted earlier, no one person or group of people has a vested right to the law as it stood in the past.

78 The pleading of a breach of fiduciary duty should be struck out.

Class Proceeding Hearing

79 The claim in the action against the individuals having been struck out, and the claims in the action against the Crown having been struck out subject to possible amendment, this issue becomes moot. If the action against the Crown survives, I would allow the plaintiff's motion for certification to be brought in Sault Ste Marie. The action was commenced there and trial is to take place there. While Crown counsel have their office in Toronto they also have an office in Sault Ste Marie. Some of the plaintiff's members reside in the region and most probably reside in Northern Ontario.

80 If a claim for breach of contract or detrimental reliance ultimately survives, I would not delay the motion for certification pending the hearing by the Divisional Court on the validity of the legislation. Those claims would survive a finding of either validity or invalidity. If the motion for certification fails, it will be necessary for each individual member of the class to decide on his or her course of action. The cost of such a motion and possible liability for costs is an economic decision for the plaintiff's members. Costs

81 Costs may be spoken to.

cp/d/qlmcc/qlalm

tory provisions including means of limiting liability — see ss. 5, 6, 8, 9, 10 — all without suing the newspaper or its publisher?

The argument of the plaintiff seems principally to be that amendments must be allowed unless they cannot be compensated for in costs or by adjournments. In the present case, it is essential to consider whether the plaintiff's framing of the case, as indicated above, is legally sound or not. No authorities are cited on either side, except the section of the *Libel and Slander Act*, which seems to mean that an action for libel in a newspaper must be against the newspaper. The present case is not — the plaintiff does not sue the newspaper.

In my opinion, the answer to the question posed above at the outset, is no. All that the defendant who uttered the slander can be liable for is the results of that slander unless the newspaper is also sued, in compliance with the Act. To hold otherwise would permit a plaintiff to claim the greater damages which flow only from the newspaper libel in an action for slander without suing the paper and without complying with the *Libel and Slander Act*. That cannot have been the legislative intention.

The principle that one who himself makes a defamatory statement may be held responsible for republication of it by others, if the original maker of the statement is found to have authorized, even impliedly, such republication, does not support the amendments granted in the present case.

The appeal must be allowed, and amendments granted by the order under appeal are struck out, with liberty to the plaintiff to redraft the statement of claim to assert a claim of slander only against the one defendant sued. Any such redraft to be delivered within 30 days of this date.

Costs of appeal to defendant on the cause.

Order accordingly.

**Re Ontario Teachers' Federation et al.
and Attorney General of Ontario**

[Indexed as: Ontario Teachers' Federation v. Ontario (Attorney General)]

Ontario Court (General Division), R.A. Blair J.

February 16, 1998

Charter of Rights and Freedoms — Evidence — Examination of witnesses in Charter challenge — Applicants challenging constitutionality of legislation and asserting that legislation passed for improper motive — Applicants seeking to examine Cabinet Minister and Director of Pol-

a 1cy in Office of Premier with respect to reasons for proposing and enacting legislation — Testimony of proposed witnesses irrelevant and inadmissible — Summonses to witnesses quashed — Canadian Charter of Rights and Freedoms — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03.

b Civil procedure — Evidence — Applicants challenging constitutionality of legislation and asserting that legislation passed for improper motive — Applicants seeking to examine Cabinet Minister and Director of Policy in Office of Premier with respect to reasons for proposing and enacting legislation — Testimony of proposed witnesses irrelevant and inadmissible — Summonses to witnesses quashed — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03.

c The applicants applied for a declaration that provisions of the *Education Quality Improvement Act, 1997* which excluded principals and vice-principals in public and separate schools from the teachers' bargaining units, precluded their associations from being certified and barred them from access to collective bargaining infringed rights protected by ss. 2(b), (d), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The applicants alleged that the impugned provisions were passed for an improper purpose in that they were a retaliatory response to the participation by principals and vice-principals in an anti-government protest. In preparation for argument of the application, the applicants sought to examine the Minister of Education and Training and the Director of Policy in the Office of the Premier as witnesses on the application, pursuant to rule 39.03 of the Rules of Civil Procedure. The Attorney General of Ontario and the Director of Policy moved to set aside the summonses served in connection with those examinations.

Held, the motions should be granted and the summonses quashed.

e The testimony of the proposed witnesses was irrelevant and inadmissible. It would be an unwarranted extension of the concepts underlying the court's resort to such aids as Hansard, royal commission reports, government policy papers and other such sources bearing upon the history and background of the legislation to broaden those concepts to apply to the sworn testimony and out-of-legislature views and opinions of ministers and members of the legislature. If the evidence of the Minister of Education was not helpful, clearly the evidence of the Director of Policy had even less claim to admissibility.

f *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 39, 110 D.L.R. (4th) 343, 19 C.R.R. (2d) 345, 21 C.P.C. (3d) 49 (Gen. Div.); *Seaway Trust Co. v. Ontario* (1983), 143 D.L.R. (3d) 623, 5 C.R.R. 257, 35 C.P.C. 124 (Ont. Div. Ct.), **distd**

g *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 125 N.S.R. (2d) 81, 107 D.L.R. (4th) 537, 157 N.R. 97, 349 A.P.R. 81, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179, **consd**

Other cases referred to

h *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (C.A.); *New Brunswick Broadcasting Co. v. Donahoe*, [1993] 1 S.C.R. 319, 118 N.S.R. (2d) 181, 100 D.L.R. (4th) 212, 146 N.R. 161, 327 A.P.R. 181, 13 C.R.R. (2d) 1; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co.* (1991), 2 O.R. (3d) 65, 44 O.A.C. 179, 78 D.L.R. (4th) 333, 5 C.R.R. (2d) 204, 91 C.L.L.C. 14,013, 4 M.P.L.R. (2d) 113 (C.A.); *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348, 174 N.R. 81, 24 C.R.R. (2d) 189, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133; *R. v. S. (G.)* (1988), 67 O.R. (2d) 198, 31 O.A.C. 161, 38 C.R.R. 322, 46 C.C.C. (3d) 332 (C.A.) [affd [1990] 2 S.C.R. 294, 41 O.A.C. 269, 107 N.R. 217, 49

C.R.R. 109, 57 C.C.C. (3d) 92, 77 C.R. (3d) 303]; *Upper Churchill Water Rights Reversion Act (Re)*, [1984] 1 S.C.R. 297, 47 Nfld. & P.E.I.R. 125, 8 D.L.R. (4th) 1, 53 N.R. 268, 139 A.P.R. 125 *sub nom. Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*

a

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 2(b), (d), 7, 15

Education Act, R.S.O. 1990, c. E.2

Labour Relations Act, R.S.O. 1990, c. L.2

b

Loan and Trust Corporations Act, R.S.O. 1990, c. L.25

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03

Authorities referred to

Hogg, P.W., *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell, 1992), vol. 2, pp. 57-2 to 57-3

c

MOTIONS to quash summonses to witnesses.

Janet E. Minor and Robert E. Charney, for moving party (respondent).

d

Russell D. Laishley, for Guy Giorno.

Howard Goldblatt, for Ontario Public School Teachers' Federation and certain individuals.

Paul J.J. Cavalluzzo, for Ontario English Catholic Teachers' Association and Linda Frost.

e

R.A. BLAIR J.: —

Background

These are motions to quash two summonses to witnesses issued to the Honourable David Johnson, Minister of Education and Training, and to Mr. Guy Giorno, Director of Policy in the Office of the Premier. They arise in the context of an application attacking the constitutional validity of certain aspects of the Ontario government's recent statutory changes in the area of public and secondary school education.

f

g

The applicants in the proceedings are the Ontario Teachers' Federation and its five provincial affiliates which function as the statutory bargaining agents for public and separate school teachers in this province, the executives of those bodies, and individual principals and vice-principals in the school systems. On the application, they challenge the constitutional validity of several provisions of the Ontario government's recently enacted *Education Quality Improvement Act, 1997* which was formerly — and often still is — referred to as "Bill 160". Also attacked is the con-

h

- a stitutional validity of certain amendments to related legislation. The thrust of the impugned legislation is to exclude principals and vice-principals in public and separate schools from the teachers' bargaining units, to preclude their associations from being certified as bargaining agents under the *Labour Relations Act*, R.S.O. 1990, c. L.2, and, generally, to preclude them from access to collective bargaining.
- b Prior to these amendments (since 1975) principals and vice-principals were mandatory members of the teachers' bargaining units but were prohibited from striking. At the time of the enactment of the legislation, the Ontario Teachers' Federation (the "OTF") and its affiliates represented over 126,000 teachers, including over 8,000 principals and vice-principals.
- c The major changes introduced by the current government in the educational sector have been the subject of much heated debate and action in the political arena. Although the question of inclusion or exclusion of principals and vice-principals from the teachers' bargaining units has been discussed for some time —
- d since as long ago as 1995 — and although Ministry officials had indicated in August of 1997 that they would be excluded in the forthcoming *Education Act* (R.S.O. 1990, c. E.2) amendments, the government did not initially pursue that route, and when Bill 160 was first introduced on September 22, 1997 the principals and vice-principals were not excluded.
- e In the weeks following the introduction of the bill there were extensive negotiations between the OTF and its affiliates and the government. The government could not satisfy its opponents, however, and commencing October 27, 1997 most of the teachers in the province withdrew their professional services. The majority of principals and vice-principals joined in this exercise.
- f On October 30th — on the eve of interlocutory injunction proceedings in which the Attorney General was seeking to enjoin what the government characterizes as "an illegal strike" and what the teachers and their supporters maintain is a "political protest against the government" — the government introduced certain amendments to Bill 160. Included in those amendments was one which excluded principals and vice-principals from the collective bargaining process.
- g This amendment, needless to say, has been controversial. The applicants allege that these provisions infringe rights protected by ss. 2(b), (d), 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and that they amount to "reprisal legislation" designed not for legitimate legislative purposes, but simply to punish the principals and vice-principals for having exercised their basic democratic rights to protest against the government.
- h

They seek a declaration that the impugned sections of the *Education Quality Improvement Act, 1997*, and of other related statutes, are of no force and effect because they constitute an unjustifiable infringement of the *Charter* rights just mentioned.

The Motion and the Arguments of the Parties

In preparation for argument of the application — which is scheduled to be heard on March 2, 3 and 4, 1998 — the applicants seek to examine David Johnson, the Minister of Education and Training and Guy Giorno, Director of Policy in the Office of the Premier, as witnesses on the application, pursuant to rule 39.03 of the Rules of Civil Procedure.

The Minister and Mr. Giorno are summonsed to attend for examination, and to bring with them the following documents and things:

- (a) all documents, correspondence, memoranda, reports, notes, minutes of meetings, and any and all other material in [their] possession or control *relating to the decision*, in introducing Bill 160, *to allow principals and vice-principals to remain in* the teacher bargaining units and to be members of and be represented by the OTF and its affiliates, and to allow principals and vice-principals to have continued access to collective bargaining; and
- (b) all documents, correspondence, memoranda, reports, notes, minutes of meetings, and any and all other material in [their] possession or control *relating to the subsequent decision to amend* the provisions of Bill 160 so as *to exclude* principals and vice-principals from the teacher bargaining units, to exclude principals and vice-principals from membership in and representation by the OTF and its affiliates, and to deny principals and vice-principals access to collective bargaining.

(Emphasis added)

It is clear that the scope of the examination sought into the details of the Minister's actions and role — and those of the Premier's Office — not only in respect of the provisions of the legislation and amendments themselves, but also in respect of the political dynamics between the teachers and the government in regard to them, is extremely broad.

These motions are brought on the part of the Attorney General of Ontario and Mr. Giorno, to set aside the summonses served in connection with those examinations.

The applicants submit that the amendments made to Bill 160 relating to principals and vice-principals — and which completely reversed the government's initial position in the bill on the issue — were made as a reprisal for their participation in, or support for, the withdrawal of professional services, which began three days before the amendment was introduced. The Attorney

a General argues that the decision was based on public policy objectives earlier articulated by the Ministry of Education, but the applicants submit the decision to remove principals and vice-principals from the teachers' bargaining units required the approval of the Premier's office and would not have been made solely based on policy objectives. In so far as the applicants believe that the decision was motivated by improper purposes (i.e., as a reprisal or retaliation), they contend that the testimony of these individuals is relevant to the issue of the constitutional validity of the amendments to the legislation — including the reasons for proposing and enacting it.

b On behalf of the Attorney General, Ms. Minor argues that the summons to the Minister should be set aside on the following grounds:

- c (c) that it constitutes an abuse of process;
- (d) that the testimony of an individual member of the Legislature is irrelevant and inadmissible to the constitutional validity of legislation; and,
- d (e) that mandating members of the Legislature to testify about their statements in the house or their reasons for voting violates the constitutional principle of parliamentary privilege.

e On behalf of Mr. Giorno, Mr. Laishley adopts the argument of the Attorney General, submitting that if the evidence of a Minister of the Crown is not admissible, then the evidence of a member of the ministerial office — a much lower official — must likewise be inadmissible. Alternatively, however, he submits that even if the Attorney General's motion to quash is denied, the summons relating to Mr. Giorno should still be quashed, since Mr. Giorno's examination would be irrelevant (if the Minister were required to testify), and because no reasonable evidentiary basis has been established to support the need or ability of Mr. Giorno to testify on any issue relevant to the main application.

f *Law and Analysis*

g The motions succeed.

h What is at issue on the application is the constitutional validity of the impugned provisions in the legislation and the purpose of that legislation. The applicants contend that it has been enacted for a "colourable" — i.e., an improper or extraneous — purpose. While the authorities have developed to the point where it is permissible for courts to examine extrinsic evidence in the context of *Charter* and other challenges to the constitutional validity of legislation, they do not support the extension of that exercise to the consideration of the testimony of individual mem-

bers of the legislature — including Ministers in charge of introducing legislation — or of civil servants or political advisors.

Legislation implementing fundamental changes in society inevitably invokes passionate and robust debate. Arguments of one sort or another based upon infringement of the *Charter* are not infrequently put forward. While I do not suggest for a moment that such is the case on the instant application, it seems to me that if those opposing legislative initiatives are to have access to the outside testimony and documentation of members of the legislature, Ministers of the Crown, civil servants and policy advisors connected with the implementation of the targeted legislation through the simple means of launching a *Charter* challenge in the courts based on allegations of “colourability”, the implications are significant for the courts, and for the differing functions which the courts and the broader political arena have in society. There may be no end to such skirmishes. The courts — and the discovery process inherent in the court process — will become simply another extension of the legislative floor. That is not the intention of the legislative process, or of the provisions of rule 39.03 of the Rules of Civil Procedure, in my view.

While this more general concern may not in itself be sufficient to preclude examinations such as those sought in the summonses which are the subject-matter of these motions, if the evidence sought were otherwise relevant and admissible to the issues which are the subject of the proceedings, the testimony of Minister Johnston and of Mr. Giorno is not relevant and admissible in that regard, in my view. Nonetheless, the separation of the roles of the legislature, the Executive and the courts is a factor not to be ignored. In this respect, the following remarks of Madam Justice McLachlin in *New Brunswick Broadcasting Co. v. Donahoe*, [1993] 1 S.C.R. 319 at p. 389, 100 D.L.R. (4th) 212, are worth noting:

I add this. Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

The authority which Mr. Cavalluzzo puts forward as most closely paralleling the situation at hand is the decision of the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537. In that case, the court looked at extracts from the legislative debates of the Nova Scotia legislature in order to assess whether legislation which prohibited private abortion clinics on the professed grounds of regulating

a privatization of health (a "provincial matter" under the distribu-
 tion of federal/provincial powers) or whether it was in pith and
 substance criminal law legislation (a "federal matter"). It was
 held that the legislation was a "colourable" attempt by the prov-
 ince to legislate in the federal field under the guise of legislating
 in the provincial domain. Sopinka J., speaking for the court, held
 b that the trial judge had properly admitted excerpts from Han-
 sard in the case. At pp. 483-84, he set out the parameters for the
 admission of extrinsic evidence in constitutional cases:

c In determining the background, context and purpose of challenged legisla-
 tion, *the court is entitled to refer to extrinsic evidence of various kinds pro-
 vided it is relevant and not inherently unreliable . . .* This clearly includes
 related legislation . . . and evidence of the "mischief" at which the legislation
 is directed . . . It also *includes legislative history, in the sense of the events
 that occurred during drafting and enactment*; as Ritchie J., concurring in
Reference re Anti-Inflation Act, supra, wrote at p. 437, it is "not only permis-
 sible but essential" to consider the material the legislature had before it
 when the statute was enacted.

d The former exclusionary rule regarding evidence of legislative history has
 gradually been relaxed . . . but until recently the courts have balked at
 admitting evidence of legislative debates and speeches . . . The main criti-
 cism of such evidence has been that it cannot represent the "intent" of the
 legislature, an incorporeal body, but that is equally true of other forms of leg-
 islative history. Provided that the court remains mindful of the limited reli-
 ability and weight of Hansard evidence, it should be admitted as relevant to
 e both the background and the purpose of legislation. Indeed, its admissibility
 in constitutional cases to aid in determining the background and purpose of
 legislation now appears well established.

(Emphasis added; some citations omitted)

f I take from the foregoing that the categories or "various kinds"
 of extrinsic evidence that may be admissible in cases of this
 nature are not closed, but that the general nature of such evi-
 dence will be along the lines of those classes referred to. I also
 note that the extension of the concept to even the admission of
 excerpts from Hansard is somewhat guarded. In my opinion, it
 would be an unwarranted extension of the concepts underlying
 g the court's resort to aids such as Hansard, royal commission
 reports, government policy papers and other such sources bear-
 ing upon the history and background of the legislation, to
 broaden those concepts to apply to the sworn testimony and out-
 of-legislature views and opinions of ministers and members of
 h the legislature. It would also be inconsistent with the weight of
 existing authority on the subject: see *R. v. Heywood*, [1994] 3
 S.C.R. 761 at p. 788, 120 D.L.R. (4th) 348, *per* Cory J.; *Re Upper
 Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at pp.
 318-19, 8 D.L.R. (4th) 1, *per* McIntyre J.; *R. v. S.(G.)* (1988), 67
 O.R. (2d) 198, 46 C.C.C. (3d) 332 (C.A.); *Peel (Regional Munici-*

pality) v. *Great Atlantic & Pacific Co.* (1991), 2 O.R. (3d) 65 at p. 111, 78 D.L.R. (4th) 333 (C.A.), *per* Finlayson J.A.; P.W. Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell, 1992), vol. 2, at pp. 57-2 to 57-3.

The argument advanced by Mr. Goldblatt and Mr. Cavalluzzo that this application arises in unique circumstances — a *Charter* challenge based upon a “reprisal legislation” argument — and that the applicants should be able to seek evidence lying behind the particular conduct of the government actors perceived to be most responsible for it, is intriguing and does have some attraction at first glance. What is submitted, essentially, is that the evidence is sought not so much for its bearing on the *purpose of the legislation* — that purpose being self-evident, namely to exclude the principals and vice-principals from the bargaining units — but rather for its bearing on the *purpose of legislating*. While the individual sworn testimony of members of the legislature, ministers, and policy advisors, may not be admissible with respect to the former issue — so the argument goes — why should those attacking the legislation on the ground that it is fatally tainted for *Charter* purposes by the motivation behind its introduction, not be permitted to have access to the best evidence of the motivation of those most responsible for initiating it?

One reason is the general concern mentioned above, namely, the risk of turning the court process into an extended battleground for extracting information pertaining to the ongoing *political debate* over the targeted legislation — as opposed to being a process for determining the *Charter* and other legal parameters within which governments must act. In the end, however, the argument founders on the same shoal as that which is fatal to the attempt to take sworn testimony from such persons in relation to the purpose of the legislation: it is the purpose and intention of that “incorporeal body” known as *the legislature*, not of its individual members or of those who support the legislators, which are pertinent to the court’s efforts. For the same reason that the testimony of such individuals — including documentary evidence related to that testimony — is not admissible to aid the court in determining the purpose of the legislation, it is not admissible to aid in determining the purpose behind the enactment of the legislation.

Counsel for the teachers’ federations submit that the sort of examination they seek is supported by the decisions in this court of Southey J., at trial, in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co.*, *supra*; of Adams J. in *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 39, 110 D.L.R. (4th) 343 (Gen. Div.); and of Sirois J. in *Seaway Trust Co. v. Ontario* (1983), 143 D.L.R. (3d) 623, 5 C.R.R. 257 (Ont. Div. Ct.). I do not agree.

a While the majority of the Court of Appeal did not deal with the question of the correctness of Southey J. having admitted the evidence of Ministers of the Crown, in *Peel*, Dubin C.J.O. expressed some reservations about the process followed at trial, and Finlayson J.A. — albeit speaking for himself — was very firm in his disapproval of the concept. Finlayson J.A. said (at p. 111):

b Under what would have to be considered “legislative evidence”, the respondents led testimony of Ministers of the Crown as to the purpose and effect of the amendments to the Act and the *Employment Standards Act*. In my opinion, it was improper to subpoena Ministers of the Crown to give testimony at a hearing such as this. It is a usurpation of the legislative process to call as witnesses the Ministers who introduced the amendments to these statutes into the legislature and have government legislation stand or fall on their testimony. These Ministers are not the legislature. The respondents appear c to have thought that they were entitled to treat both Mrs. Smith and Mr. Sorbara as if they were officers of a corporation involved in private litigation.

d *Dieleman* involved an attempt to examine the Attorney General of Ontario with regard to her decision to commence an action for an injunction in the public interest to restrain picketing in front of abortion clinics. The examination was permitted. However, Adams J. distinguished the case from *Peel* precisely on the basis that he was not dealing with — as Finlayson J.A. had been — “the propriety of calling Ministers as witnesses and having legislation stand or fall on their testimony”: *Dieleman*, *supra*, at e p. 45. What the applicants are seeking to do here, in my view, is to call Minister Johnston and Mr. Giorno for the express purpose of having the impugned legislation on this application “stand or fall on their testimony” (amongst other evidence, admittedly). Consequently, *Dieleman* does not support the applicants’ position on the motion, in my opinion.

f *Seaway Trust Co. v. Ontario* is also distinguishable from the present case. There, Sirois J. had to deal with a situation involving both an attack on the constitutional validity of legislation and an attack on an order-in-council issued pursuant to that legislation. The *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25, g had been amended to permit the Lieutenant Governor in Council to permit the Registrar in effect to take over the operation of a loan and trust company in relatively Draconian fashion. Certain conditions precedent were required to be met, however, before an order-in-council could issue, and the testimony of the Minister h and the various Ministry witnesses who were permitted to be examined was relevant to that issue. Thus, the evidence in question could be said to relate not to whether the legislation itself would stand or fall, on *Charter* grounds, but to whether the factual basis existed for the issuance of the order-in-council. Again,

then, the case dealt with a situation different from the circumstances of this application.

I am satisfied, therefore, that the proposed examinations should not be permitted to proceed. It follows that if Minister Johnston is not properly the subject of a summons to witness in the circumstances of this case, neither is Mr. Giorno. If the evidence of a Minister of the Crown is not helpful, the evidence of "a lesser light" (not to disparage the position of Mr. Giorno, but to adopt the language of the British Columbia Court of Appeal, in *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (C.A.) at p. 202), "has even less claim to admissibility".

In light of my foregoing conclusions, it is not necessary to decide this matter on the basis of the parliamentary privilege argument put forward by Ms. Minor. Nor is it necessary to deal with the additional arguments put forward on behalf of Mr. Giorno.

Disposition

Accordingly, for the reasons expressed above, the motions are allowed and an order is granted quashing the summonses to witnesses dated February 5, 1998, issued at the request of the applicants, to the Honourable David Johnston, Minister of Education and Training, and to Guy Giorno.

Motions granted.

Pupiec v. Dereniowski et al.

[Indexed as: Pupiec v. Dereniowski]

*Court of Appeal for Ontario, Finlayson and Carthy JJ.A. and
MacPherson J. (ad hoc) May 14, 1998*

Actions — Bars — Ex turpi causa non oritur actio — Defendants defrauding financial institutional to obtain funds to purchase property from plaintiff — Plaintiff party to fraud — Plaintiff suing defendants for losses arising from purchase — Court should not assist plaintiff where its damages flowing from illegal or immoral act — Trial judge erring by awarding judgment in proportion to guilt.

The defendant ET, acting on behalf of the appellant FNH Inc., put together a proposal whereby the defendants BD and RD purchased a rooming house property from the plaintiff BP. ET and BD obtained financing for the purchase from a financial institution by fraudulently misrepresenting the value of the rooming house. BP was a party to the fraud. As part payment for the sale of the rooming house, BP received two vendor take back mortgages for \$50,000 and \$40,000. The mortgages went into default, and BP sued for her losses. The trial judge held that