EB-2011-0361
EB-2011-0376

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

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other order.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

GOLDCORP'S BOOK OF AUTHORITIES

IAN A. BLUE, Q.C.
GARDINER ROBERTS LLP
Lawyers
Suite 3100, 40 King Street West
Toronto, ON
M5H 3Y2

Tel: (416)865-2962
Fax: (416)865-6636
E-mail: iblue@gardiner-roberts.com

Counsel for Goldcorp

EB-2011-0361
EB-2011-0376

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

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other order.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

INDEX

A. STATUTORY PROVISIONS

B. CASES

13. *Ontario Rental Housing Tribunal v. Metropolitan Toronto Housing Authority (2002), Docket: C36729 (O.C.A.)*

14. *R.J.R. MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311*

15. *Setana Sports N.A. Ltd. v. Score Television Network Ltd. (2009) CarswellOnt 4584 (Spies. J.)*

16. *B(R.) v. Children's Aid Society of Metropolitan Toronto (1992), 10 O.R. (3d) 321*

17. *Horsefield v. Ontario (Registrar of Motion Vehicles) (1999), 44 O.R. (3d) 73*

C. OTHER DOCUMENTS

18. *Ontario Legislature, Debates February 2, 1960, pp. 120-201*

19. *John Willis, Report of the Government Committee on the Organization of Government in Canada (1961), 14 U. of T. L.J. 103*

20. *OEB, RP-002-0120, Notice of Proceeding*

21. *OEB, RP-2002-0120, Phase 1 Policy Decision with Reasons, section entitled: The Proceeding*

22. *Extract from General Counsel's Book, National Energy Board*

TORONTO: 282764\1 (96289)

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B., s. 19

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Energy Act, 1960, S.O. 1960, c. 17, s. 12

GENERAL JURISDICTION AND POWERS

Power to determine law and fact

12.—(1) The Board has as to all matters within its jurisdiction authority to hear and determine all questions of law and of fact and in all matters under this or any other Act shall proceed by order.

Jurisdiction exclusive

(2) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

Powers of Supreme Court exercisable by Board

13. The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect this or any other Act has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.

Hearings

14.—(1) Subject to subsection 4 of section 17, the Board shall not make any order under this or any other Act until it has held a hearing upon notice in such manner and to such persons as the Board directs.

Idem

(2) Hearings before the Board shall be open to the public.

Place of hearing

(3) The Board may hear any application or deal with any matter at any place in Ontario that it appoints.

Adjournments and interim orders

(4) The Board may adjourn any hearing from time to time and may make interim orders pending the final disposition of the matter before it.

Terms and conditions

(5) The Board in making an order may impose such terms and conditions as it deems proper and an order may be general or particular in its application.

Written reasons

(6) The Board shall prepare written reasons for its decisions which shall be kept by the secretary and made available to any person upon the payment of the prescribed fee.

Facts previously determined

(7) No issue of fact, which has been judicially determined by the Board in any application under section 17, may be put in issue in any subsequent application before the Board unless it can be established that a factor material to such determination has materially changed or that there is a party to the

subsequent

Ontario Energy Board Act, 1960, S.O. 1964, C. 74, s. 13

11.—(1) The Board shall adopt an official seal. R.S.O. 1960, c. 271, s. 11 (1). Seal

(2) All orders made by the Board shall be signed by the chairman, a vice-chairman, the secretary or an assistant secretary and sealed with the seal of the Board, and, when purporting to be so signed and sealed, shall be judicially noticed without further proof. R.S.O. 1960, c. 271, s. 11 (2), *amended*. Signing of orders

(3) *The Regulations Act* does not apply to the orders of the Board. R.S.O. 1960, c. 271, s. 11 (3). R.S.O. 1960, c. 349, not to apply

12. No authority given by the Board under this or any other Act shall be assigned without the leave of the Board. *New*. Assignment of authority

13.—(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. Power to determine law and fact

(2) Subject to subsection 2 of section 35, where a proceeding before the Board is commenced by the filing of an application, the Board shall proceed by order. R.S.O. 1960, c. 271, s. 12 (1), *amended*. Applications

(3) Where a proceeding before the Board is commenced by a reference to the Board by the Minister, the Board shall proceed in accordance with the reference. References

(4) Where a proceeding before the Board is commenced by requirement of the Lieutenant Governor in Council, the Board shall proceed in accordance with the requirement. *New*. Orders in council

(5) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. R.S.O. 1960, c. 271, s. 12 (2). Jurisdiction exclusive

14. The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect this or any other Act has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. R.S.O. 1960, c. 271, s. 13. Powers of Supreme Court exercisable by Board

15.—(1) The Board may at any time on its own motion and without a hearing approve the form of a document or give Board's powers, miscellaneous

National Energy Board Act, S.C. 1959, c. 46, ss. 11 and 12

Powers of Board.

10. (1) The Board is a court of record. Board a Court.

(2) The Board shall have an official seal, which shall be judicially noticed. Official seal.

(3) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. Powers as to witnesses, etc.

11. The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter Jurisdiction.

(*a*) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in violation of this Act, or any such regulation, certificate, licence, permit, order or direction, or

(*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

12. The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board so far as it is not inconsistent with this Act, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act and may forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction and, for the purposes of this Act, has full jurisdiction to hear and determine all matters, whether of law or of fact. Mandatory orders.

13. The Board may delegate to one or more of its members, either jointly or severally, all or any of the powers, functions and duties of the Board under this Act, except those under subsection (3) of section 36, section 37, 38, 39, 42, 44, 46, 47, 49, 82, 84 or 88, or under Part IV. Delegation.

Railway Act, R.S.C. 1952, c. 234, s. 33

(*c*) such other matters as appear to the Board to be of public interest in connection with the persons, companies and railways subject to this Act.

Report to be laid before Parliament.

2. The said report shall be forthwith laid before both Houses of Parliament, if then in session, and if not in session then during the first fifteen days of the next ensuing session of Parliament. 1919, c. 68, s. 31.

General Jurisdiction and Powers.

Powers of Railway Committee transferred.

32. Whenever, by an Act or document, the Railway Committee of the Privy Council is given any power or authority, or charged with any duty with regard to any company, railway, matter or thing, such power, authority or duty may, or shall, be exercised by the Board. 1919, c. 68, s. 32.

Jurisdiction.

33. The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,

(*a*) complaining that any company, or person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Board, or any inspecting engineer or other lawful authority, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, or the Special Act, or any such regulation, order, or direction; or

(*b*) requesting the Board to make any order, or give any direction, leave, sanction or approval, which by law it is authorized to make or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done.

Mandatory orders.

2. The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.

Restraining orders.

All powers of a superior court.

3. The Board shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, have all such powers, rights and privileges as are vested in a superior court.

Appointment of receiver not to oust jurisdiction of Board.

4. The fact that a receiver, manager, or other official of any railway, or a receiver of the property of a railway company, has been appointed by any court in Canada or any province thereof, or is managing or operating a railway under the authority of any such court, shall not be a bar to the exercise by the Board of its jurisdiction; but every such receiver, manager, or official shall be bound to manage and operate any such railway in accordance with this Act and with the orders and directions of the Board, whether general or referring particularly to such railway; and every such receiver, manager, or official, and every person acting under him, shall obey all orders of the Board within its jurisdiction in respect of such railway, and be subject to have them enforced against him by the Board, notwithstanding the fact that such receiver, manager, official, or person is appointed by or acts under the authority of any court; and wherever by reason of insolvency, sale under mortgage, or any other cause, a railway or section thereof is operated, managed or held otherwise than by the company, the Board may make any order it deems proper for adapting and applying the provisions of this Act to such case.

Adapting and applying Act.

Certain decisions of Board conclusive.

5. The decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons. 1919, c. 68, s. 33.

Power to make orders and regulations.

34. The Board may make orders or regulations

(*a*) with respect to any matter, act or thing which by this or the Special Act is sanctioned, required to be done, or prohibited;

(*b*) generally for carrying this Act into effect;

(*c*) for exercising any jurisdiction conferred on the Board by any other Act of the Parliament of Canada.

Application.

2. Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof; and the Board may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Board deems expedient; and such orders or regulations may be for such time as the Board deems fit, and may be rescinded, amended, changed, altered or varied as the Board thinks proper.

Penalties.

3. The Board may by regulation or order provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation or order made by the Board shall be liable.

Railways Act, R.S.C. 1906, 37, s. 26

Jurisdiction.

26. The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,—

(a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Board, or any inspecting engineer, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, or the Special Act, or any such regulation, order, or direction; or,

(b) requesting the Board to make any order, or give any direction, sanction or approval, which by law it is authorized to make or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done.

Mandatory orders.

2. The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required or authorized to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.

Restraining orders.

All powers of a superior court.

3. The Board shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights and privileges as are vested in a superior court.

Appointment of receiver not to oust jurisdiction of Board.

4. The fact that a receiver, manager, or other official of any railway, or a receiver of the property of a railway company, has been appointed by any court in Canada or any province thereof, or is managing or operating a railway under the authority of any such court, shall not be a bar to the exercise by the Board of any jurisdiction conferred by this Act; but every such receiver, manager, or official shall be bound to manage and operate any such railway in accordance with this Act and with the orders and directions of the Board, whether general or referring particularly to such railway; and every such receiver, manager, or official, and every person acting under him, shall obey all orders of the Board within its jurisdiction in respect of such railway, and be subject to have them enforced against him by the Board, notwithstanding the fact that such receiver, manager, official, or person is appointed by or acts under the authority of any court.

Decision of Board conclusive.

5. The decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons. 6 E. VII., c. 42, s. 2.

Grand Trunk Pacific Railway.

27. In order to the ascertainment of the true net earnings of,—

(a) the Eastern Division of the Grand Trunk Pacific Railway, for the purposes of the scheduled agreements referred to in the Act passed in the fourth year of His Majesty's reign, chapter twenty-four, intituled *An Act to amend the National Transcontinental Railway Act;* and,

(b) the Grand Trunk Pacific Railway Company, upon its system of railways, at all times while the principal or interest of any bonds made by the said Company and guaranteed by the Government are unpaid by the said Company;

the Board shall, upon the request of the Minister, inquire into, hear and determine any question as to the justness and reasonableness of the apportionment of any through rate or rates between the Grand Trunk Pacific Railway Company and any other transportation company, whether such company is or is not a railway company, or, if a railway company, whether it is or not as such subject to the legislative jurisdiction of the Parliament of Canada.

Government interests.

2. In any such determination the Board shall have due regard to the interests of the Government of Canada as owner of the said Eastern Division, and of the Intercolonial Railway, or as guarantor of any such principal or interest, and to the provisions of the National Transcontinental Railway Act, and of the said Act in amendment thereof, and of the said scheduled agreements.

Net earnings.

3. Although, in any such case, the Grand Trunk Pacific Railway Company has agreed to any apportionment, the net earnings shall be ascertained upon the basis of the receipt by the Grand Trunk Pacific Railway Company of such share of such through rate or rates as, in the opinion of the Board, the said Company should have received under a just and reasonable apportionment; and such agreement shall be material evidence only and not conclusive.

Appeal.

4. Either party to any such question may appeal from any such determination to the Supreme Court of Canada. 4 E. VII., c. 32, s. 4.

Board may act upon its own motion.

28. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto, shall have the same powers as, upon any application or complaint, are vested in it by this Act.

From time to time.

2. Any power or authority vested in the Board under this Act may, though not so expressed in this Act, be exercised from time

Ontario Energy Board Act, loc. cit., s. 31

30. (1) The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board. 2004, c. 23, Sched. B, s. 8.

Same

(2) The Board may make an interim or final order that provides,

(a) by whom and to whom any costs are to be paid;

(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and

(c) when any costs are to be paid. 2003, c. 3, s. 25 (1).

Rules

(3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed. 2003, c. 3, s. 25 (1).

Inclusion of Board costs

(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board. 1998, c. 15, Sched. B, s. 30 (4).

Considerations not limited

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court. 1998, c. 15, Sched. B, s. 30 (5).

Application

(6) This section applies despite section 17.1 of the *Statutory Powers Procedure Act*. 2003, c. 3, s. 25 (2

The Canadian Pacific Railway Company et al. v. The Canadian Oil Companies Limited (1912), 47 S.C.R. 155

1912

THE CANADIAN PACIFIC RAILWAY COMPANY AND THE GRAND TRUNK RAILWAY COMPANY ..... } APPELLANTS;

*April 1, 2.
*June 4.

AND

THE CANADIAN OIL COMPANIES LIMITED ..... } RESPONDENTS.

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } APPELLANTS;

AND

THE BRITISH AMERICAN OIL COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Joint tariff—Power to supersede—Declaratory decree—Jurisdiction.

In January, 1907, certain railway companies in the United States, in connection with the appellant companies, filed through freight tariffs ("joint tariffs") with the Board of Railway Commissioners for Canada fixing the rates of carriage for shipments of goods from the United States into Canada. The tariffs so filed for the first time established a fixed rate for the carriage of petroleum and its products. In October, 1907, and in May, 1908, supplementary tariffs were filed by the foreign companies and concurred in by the Canadian carriers, but they were not sanctioned by the Board. These substituted for the fixed rate on petroleum

---

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

[NOTE.—Leave to appeal to the Privy Council was granted, 13th December, 1912.]

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

a variable rate made up of the sum of the local rates on each side of the border. The respondent companies, iu 1910, applied to the Canadian Board for an order declaring that the appellants had overcharged them by exacting the variable rate for carriage of petroleum, and an order was made by the Board declaring that the rates chargeable were those fixed by the "joint tariff" of January, 1907. The Canadian carriers appealed from this order to the Supreme Court of Canada by leave of the Board on the question of law whether or not this order was right and by leave of a judge on a question of jurisdiction claiming that the Board could not make a declaratory order and grant no consequential relief, and that it could not declare in force a tariff which had ceased to exist.

Held, that sections 26 and 318 of the "Railway Act" authorized the Board to make an order merely declaratory.

Held, also, that the tariff of January, 1907, had not ceased to exist, but was still in force, never having been superseded.

Held, per Davies and Duff JJ., that if the initiating company, or the companies jointly, had power to supersede a joint tariff duly filed they had not in this case taken the proper steps to effect that purpose.

Per Idington and Anglin JJ., that such a tariff could only be superseded by the action, or with the sanction, of the Board.

The order appealed from was, therefore, affirmed.

APPEAL from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an overcharge in rates for carrying petroleum from the United States into Canada.

The Board decided, on application of the oil companies, that the tariff filed in Jan., 1907, was still in force and made an order declaring that the legal rates chargeable on petroleum and its products, in carloads, from shipping points in Ohio and Pennsylvania to Toronto were the fifth-class joint through rates in effect at the time the shipments moved as shewn in the joint through tariffs published and filed with the Board. The railway companies were granted leave by the Board to appeal to the Supreme Court

of Canada on a question of law, namely, — Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter ? Mr. Justice Idington gave them leave to appeal also on a question of jurisdiction.

Chrysler K.C. and *Aimé Geoffrion K.C.* for the appellants.

W. N. Tilley for the respondents.

DAVIES J.—This is an appeal from an order of the Board of Railway Commissioners made on a complaint filed by the respondents whereby it was alleged that the appellants from and after the first of January, 1907, charged excessive tolls for the transportation of petroleum and its products when shipped from certain points in the United States to Toronto and other Canadian points.

The complaint was heard by the Railway Board on May 16th, 1911. The respondents contended and the appellants denied that from and after the date mentioned fifth-class rating applied to petroleum and its products in carloads. The appellants charged the sum of the local rates to and from the Canadian gateways.

The Board's reasons for judgment were given by the Chief Commissioner. The conclusion reached as stated in the last paragraph of the reasons was as follows:—

> Official Classification No. 29 was used by the respondents without any order or direction of the Board, as provided by subsection 4 of section 321. It was, therefore, binding upon them; and the provisions of that classification would apply upon petroleum and its products to points in Canada, unless they have taken some steps within the provisions of the statute to prevent its application. We

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Davies J.

are compelled to conclude that they have not succeeded in so doing, and that petroleum and its products should have carried fifth-class rating at the time the shipments in question moved.

The Board accordingly made an order, dated the 16th of May, 1911, declaring:—

That the legal rates chargeable on petroleum and its products in carloads from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved as shewn in the joint through tariff published and filed with the Board, and in accordance with the Official Classification No. 29 and subsequent issues thereof.

The Board granted leave to the appellants to prosecute an appeal on the question of law as follows:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

Mr. Justice Idington also allowed an appeal on the question of jurisdiction.

The contention of the appellants as I understand it on the question of jurisdiction is that when the complaint was heard by the Railway Board on the 16th May, 1911, the Board had no jurisdiction because the wrong complained of had then been remedied and the order made was and could only be declaratory and could not give the applicant any relief.

The question of the Board's jurisdiction depends largely upon the construction placed upon section 338 of the "Railway Act." In the case of the *Grand Trunk Railway Co.* v. *British American Oil Co.* (1), this court held that joint tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory to be carried by continuous routes to destinations in Canada are effective and binding upon

(1) 43 Can. S.C.R. 311.

Canadian companies participating in the transportation until either superseded or disallowed.

Such joint tariffs had been filed by the foreign companies initiating the carriage of the oil as to the tolls for the carriage of which the complaint was made. If the tariffs had been "superseded" under the 338th section of the Act as contended by the appellants by another tariff justifying the tolls charged that would be a good answer to the complaint.

Mr. Tilley, for the respondents, contended that once a joint tariff for a continuous route from a foreign country to a point in Canada was filed under the 336th section of the Act it remained in force until superseded or disallowed *by the Board,* and that admittedly there had not been any such action by the Board in this case, and further contended that assuming there was power in the company or companies by which the joint tariff was filed to supersede it nothing had been done which could be construed as supersession. The appellants contended that the superseding was something to be done by the foreign company which initiated the joint tariff and that there had been such supersession in the amendments to and alterations of that initial joint tariff subsequently filed by the companies.

Of course if section 338 vests in the Board alone as contended by respondents the power of superseding or disallowing an initial joint tariff then, admittedly that not having been done, no question could arise with respect to the Board's jurisdiction to make the order.

Assuming, however, that the appellants' contention is correct with respect to the company's power to supersede an initial joint tariff after it had been filed then I am of opinion that they had not done so up to the time the complaint was filed.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Davies J.

On the question of jurisdiction I do not entertain any doubt. The Board (section 10) is made a court of record. Section 26 confers upon it power

> to inquire into, hear and determine any application by or on behalf of any party interested

complaining (*inter alia*)

> that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, etc.

The Board has clearly the power to determine all disputes arising as to whether a shipper or a carrier has violated any of the provisions of the Act. It is not necessary for us to consider the extent of the relief the Board may grant in cases where it finds either shipper or carrier guilty of such violation. In the present case it finds in accordance with respondents' contention that the legal rate at the times of the shipments and carriage complained of was the fifth-class rate. Any charge above or beyond that was an overcharge. But the Board did not assume to direct any refund. It left the parties to their legal remedies if they decided to recover such overcharges.

The appellants contend that some limitation must be read into the 26th section of the Act, because if read literally it would confer power upon the Board to determine every complaint of any violation of the Act either of commission or omission and that we might have in cases of railway accidents in which passengers or others were injured the absurdity reached of the Board sitting to determine whether a bell had been rung at a crossing or a whistle blown at the times and places required by the Act.

I venture to think, however, that upon a proper construction of the section no such absurd results could happen. What Parliament conferred upon the Board

was power to determine complaints of failure on the part of a company, *quâ* company, to discharge or obey some statutory duty or obligation either positive or negative imposed upon it *as such company,* not complaints that some subordinate or employee of the company had failed to discharge a duty which the company charged him with and for the neglect to discharge which the company might be liable to the party suffering. That is, in my judgment, the meaning of the language used in section 26, and when so read it carries out fully the underlying idea of the Act, namely, that with private ownership there should be public effective control. Construed as I construe section 26 there does not appear to be either justification or excuse for the courts to read any limitation into the section. The Board has jurisdiction to hear and determine any complaint from an interested party that a company has failed to discharge or obey some statutory duty or obligation binding upon it as a company or violated some prohibition of the Act or they might, under the 49th section, make an interim *ex parte* order as to such failure or violation of their own mere motion and without complaint. Such jurisdiction, however, does not extend to the failure on the part of an employee to discharge a duty with which he was charged by the company alike to it and to the public. It is true that the section speaks of a company or person, but that word person as used in the section does not embrace or include employees of the company who fail in the discharge of the duties with which they are charged by the company. Different considerations would apply where the "Railway Act" or the "special Act" or a regulation of the Board imposed directly upon an individual person or official, as

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Davies J.

distinct from the company he represented, a duty or obligation to do or abstain from doing some act or thing. Beyond that the Act does not profess to go. Nor do I attach any weight to the contention that the order complained of does not profess to give any relief and that the Board had no power to give relief under the circumstances. In my opinion the determination of the facts as to the legal tariff in operation during the period the order covers is one peculiarly fitting for the Board. The mere fact of the company desisting from the violation complained of before the hearing of the complaint does not oust the Board's jurisdiction. Whether they could have supplemented their order with another directing a refund I am not called upon to determine. That question would probably have called for a wider inquiry and a great deal of evidence as to the overcharges paid by different individuals more suitable for the ordinary courts of the land to hear and decide. But that this Board, experienced men on the subject before it, advised by trained experts and possessing in its records at first hand all the evidence necessary to determine the subject-matter of this complaint as to whether in the first place there had been a joint tariff established for the carriage of this oil from the United States to Canada, and secondly, whether that tariff had been superseded by another at the time the complaint was filed, or was then still in force, and lastly, whether the complaint in whole or in part as to overcharges on the oil was well founded, was the proper tribunal to make such determination I have no doubt.

With the results which may follow their finding and order I am not at present concerned. Whether their finding on the facts as expressed in their order

will be binding and conclusive on the ordinary courts of the land in the event of suits being brought to recover the overcharges it would not be proper for me to express any opinion now.

It is sufficient for me to say that in my judgment the Board had jurisdiction to make the order appealed from.

As to the question of law whether the Board placed the proper legal construction on the documents referred to in the reasons for judgment of the Chief Commissioner I can only say that I think it did.

The joint tariff filed by the foreign company gave the Board jurisdiction as determined by us in the *Stoy Case*(1). Whether it was superseded or not by the amended tariffs filed by the foreign company is a question of law, and has been referred in this appeal to us. In my opinion this question of law was properly determined by the Board and therefore having jurisdiction on the subject-matter and having properly determined it the appeal fails.

It is not necessary for us to determine whether the Board has the sole jurisdiction to supersede any such joint tariff so filed or whether the company filing it can supersede it.

If the Board alone had the power to supersede such joint tariff such supersession has admittedly not taken place. If the company has the power it has not expressed it properly and the joint tariff remained in force when the complaint was laid.

I cannot put the argument as to the supplementary tariffs filed and their effect as superseding the joint tariffs more clearly or concisely than it is put by the Chief Commissioner in the following remarks:—

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Davies J.

We do not see how a tariff, changeable as to tolls, at the will of either, without reference to the other, can be said to be a joint tariff. This must mean a tariff that all participating carriers are interested in jointly; not interested jointly in part only, but in the entire tariff; including not only the through or continuous route, but also the through rate or toll. In the case in hand the attempt is not to destroy the entire joint tariff; the continuous route, through billing, accounting, etc., are preserved, but the partnership is attempted to be, in part, dissolved by saying all our other arrangements regarding the carriage of this traffic shall remain, but hereafter each carrier shall fix its own local, and the through rate shall be the sum, or combination of those locals that may be in effect when and as shipments move.

It seems to me that this is just what section 338 was designed to prevent, and this is particularly so with reference to traffic falling under section 336, where Parliament has said such a tariff shall be filed, but has no means of compelling the foreign carrier to comply with its direction. That carrier complying, it seems reasonable to say, unless the Board disallows that joint tariff those shall be the tolls to be charged until you file another joint tariff shewing other or different tolls; when, unless disallowed, those latter shall be the only lawful tolls until again superseded by another joint tariff.

I agree that the appeal should be dismissed with costs.

IDINGTON J.—The question raised by the appeal herein relative to the jurisdiction of the Board of Railway Commissioners for Canada, seems to me after it has been thoroughly argued out to be without foundation.

The respondents' complaint having been lodged against the appellants whilst they persisted in maintaining a rate of tolls found by the Board to have been unjustifiable, the Board would have been derelict in duty if it had refused to continue the hearing simply because the appellants had abandoned the unfounded claims to rates. Not only had the Board the admitted power to have adjudged costs of the inquiry if it had found it just to award same, but also the

power and duty to make a ruling that would guide such like parties in a future dispute of the like kind and enable them to avoid such positions as the Board could not justify. Appellants no doubt felt this, when they appeared before the Board and, without protest, contested the matter on its merits.

It is not necessary to deal with long arguments founded on the hopes or fears of such uses as may or may not be made of the ruling in future or pending litigation, further than to say I think that we cannot here properly pass upon the questions of whether the ruling is or is not a declaration within section 318. I have no opinion thereon.

A question of law which the Board submitted is stated as follows:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

The complaints lodged by respondents against each appellant were identical, were heard together and the judgment of the Chief Commissioner deals with both as founded on the like conditions of fact.

The questions raised therein must turn on the construction to be given sections 336 and 338 of the "Railway Act" supported or illuminated by sections 314, 321, sub-section 4, and other sections of the Act.

As pointed out in the case of *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1), the "Railway Act" does not profess to confer any jurisdiction over foreign railway companies, but recognizes that relations may exist between those companies and the Canadian railway companies which so far as the latter are concerned may, as regards shippers over

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Idington J.

their roads, become the subject of administrative or judicial control in Canada.

The foreign companies, within a recognized area, associate together for the purpose of determining, amongst other things, their dealing with the subject of freight rates, classifications of freight, and through routes and rates; and the appellants have representatives in this association or relations therewith, relative to such subjects, so far as a common purpose may require.

These foreign companies, or the association on behalf of them, had filed joint tariffs with the Board, and then in the month of January, 1907, filed also an official classification, No. 29, which placed the commodities now in question in the fifth class and thereby constituted a common through route and joint tariff and continuous through routes and joint tariffs within the meaning of section 336 of the Act, which reads as follows:—

> 336. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

These several through routes seem to have been continued and operated, over the period in question, by the foreign railway company and the respondents respectively. Neither of the appellants, however, whilst availing themselves thereof adhered to the joint tariff thus constituted in January, 1907, but it is said later on charged the respondent higher tolls than could have been legally collected under such joint tariff or joint tariffs as settled by the filing of No. 29, Official Classification.

They allege in justification that any joint tariff so constituted was subject to variations to be made therein by the foreign companies, or any of them, by means of supplements to the Official Classification.

On the other hand it is urged and has been ruled by the Board that such an official classification coupled with the through rate then existent constituted a joint tariff, or joint tariffs, relative to the commodities in question that could not within the "Railway Act" be departed from by the Canadian companies in such an irregular manner. In other words, the Board holds that the latter cannot abandon the joint tariff and yet continue the through route.

Section 338 of the "Railway Act" is the only means it gives for terminating a joint tariff. It is as follows:

338. Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.

2. The Board may require to be informed by the company of the proportion of toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

One interpretation of this section contended for is that the plain grammatical meaning thereof is just what the words "superseded or disallowed by the Board" imply, and that, therefore, no departure from a joint tariff can be made by a Canadian company without the sanction of the Board.

It is urged, however, that other sections dealing with the subject of joint tariffs indicate that such is not the intention.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Idington J.

There are three other joint tariffs dealt with by the Act — one the passenger specially excepted from the section 338 if the Board says so — another the joint tariff for freight originating in Canada and going to a foreign country, and a third for exclusively Canadian routes, and indirectly, as it were, a fourth which I need not refer to.

The joint tariff for exclusively Canadian routes is in its formation liable to be either the product of the action of the companies or to be imposed by the Board. It is, however, whether directly or indirectly, apt to be so much the creation of the Board that I do not see how the provisions relative thereto or to the ordinary tariff charges on wholly Canadian roads, can help us much to interpret section 338.

There certainly is a degree of liberty given all companies relative to changes of their own tariffs that does not seem in terms extended to the joint tariffs which any of them may take a part in forming. To my mind that fact itself is more instructive than anything which may be drawn from similarity of expression relative to the superseding or of the disallowance by the Board, as, for example, in section 328, sub-section 4, so much dwelt upon. The apparent liberty to change a tariff does not apply to a changing of route such as is the foundation of a joint tariff. In Canada the Board can make or unmake this foundation.

One thing is quite clear in this Act and that is that it was the intention of the legislature to give the Board as effective control as it possibly could over the tolls.

And even if the word "superseded" in section 338 is to imply that the companies concerned may have some liberty of action or some say relative to the

changing of a joint tariff, it does not seem to me consistent with such purpose of control by the Board that the Canadian companies were ever intended to be parties to any scheme that in fact was not, or did not include in it, the actual creation of a joint tariff in any substitution intended to supersede a joint tariff which must be presumed to have received its sanction by the act of filing with, and fact of non-rejection by, the Board. In that way and sense the words of section 338 now in question can each be given effect to.

It does not appear quite clear, on the material before us, how the obvious purpose of the Act, that each change should have the Board's approval, is supposed to have been in any case brought about.

It may arise from regulations that are not in the case or from practice.

It nowhere appears that a change of through route is permissible to the companies without being accompanied by a joint tariff.

The Canadian companies seem bound to have a joint tariff corresponding to each through route over a combination of roads, or parts of roads, and their own, and that of either joining with the foreign companies to constitute it. I have no doubt the objects of section 318 can best be attained by thus holding a check over such combinations.

And even if it be implied that those furnishing a through route may change or supersede the tariff, it must be by means of a joint tariff. The departures herein were not joint tariffs. So the Board has found, and I think, correctly. We must assume, I think, that the freight classification (such as No. 29) in the United States referred to in sub-section 4 of section 321, was the basis of all the Board had impliedly

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Idington J.

sanctioned, and that partial departures therefrom were not within their recognition.

The possible hardship of having to account for tolls collected by the respective appellants in cases not conforming with the preceding principles and accounted for to the foreign companies, is no argument. The Canadian companies must in all such cases conform to Canadian law, and clearly when making a through route be sure they have a corresponding joint tariff, or ask the Board for relief.

Hence this appeal should be dismissed with costs and the question of law submitted be answered in the affirmative.

Canadian Pacific Railway Co. v. *British American Oil Co.*—The question of the jurisdiction of the Board herein raised is somewhat more arguable than in the case of the joint appeal of this appellant and the Grand Trunk Railway Company against the Canadian Oil Companies heard just before this.

It seems clear that a formal complaint, such as I presume the rules of the Board require, was not made until the continuation of the offences in question had been abandoned.

There was, however, a clear complaint in writing to the Board before the appellant abandoned what was objected to and there was, so far as I can see, nothing to prevent the Board acting thereon and for the time being to waive its own regulation I have presumed to exist. The jurisdiction exists, therefore, for reasons I gave in the other case.

The ground respondent's counsel takes under section 318 may be good, but I do not desire to pass upon

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Idington J.

that section till I have to. Nor yet do I desire to cast any doubt upon what support it may or may not give and which respondent may need elsewhere. I have no opinion.

The question of law herein submitted by the Board seems pretty much what I had supposed was disposed of in the case *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1).

What I said in that case, and have said in the other case above mentioned, will furnish my reasons herein and I need not repeat them here. The consequence thereof seems to me to be that the supplements, which are said not to have been dealt with therein and are shewn more fully herein, cannot affect the rights of the parties. The answer to the question submitted ought to be that the filing of the supplements had no legal effect on the joint through rate established 25th of January, 1907, and the appeal ought to be dismissed with costs.

DUFF J.—By the order out of which these appeals arise, (dated the 16th of May, 1911,) the Board of Railway Commissioners for Canada declared that the "legal rates chargeable upon petroleum and its products, in carloads," in respect of certain shipments from certain "shipping points in Pennsylvania and Ohio to Toronto were the fifth-class joint through rates, etc., thereof." From this order both of the railway companies appeal by leave of the Board upon a question of law and upon a question of jurisdiction, by leave under an order made by Mr. Justice Idington.

The question of law, (with which I shall first deal,) is stated in these terms:—

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Duff J.

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

It was agreed on both sides that the point which it was intended to refer was that which was the real point in controversy before the Board, namely, whether the legal effect of the documents mentioned was correctly stated in the declaration I have just quoted.

The complaint of the respondents, the Canadian Oil Co., was that the railway companies had unjustly discriminated against certain shipments of crude oil, (from the shipping points mentioned to Toronto,) by refusing to carry that commodity at the rates prescribed in the tariffs filed. The shipments in question were made between the first of January, 1907, and the thirty-first of December, 1910, and the contention of the applicants, which the Board upheld, was that during the whole of that period the rates legally chargeable on such shipments were the rates referred to in the order of the Board, the rates, that is to say, which were legally chargeable at the dates of the shipments as "joint through rates" for commodities of the fifth class according to the classification mentioned and according to the "joint through tariffs" published and filed with the Board.

For the purposes of the argument on this appeal it was admitted that in consequence of the filing of "Official Classification No. 29," by which "petroleum and its products" were for the first time classified as commodities of the fifth class, the "joint through" rate for commodities of that class must be taken to have become applicable to crude oil, on January 1st,

1907. That point was determined adversely to the railway companies by the judgment of this court in *The Grand Trunk Railway Company* v. *The British American Oil Company* (1), confirming a ruling of the Board.

The contention of the railway companies is that by a series of tariffs filed subsequent to that date "petroleum and its products" were taken out of the category of commodities of the fifth class so far as regards shipments into Canada from the shipping points in question. By these various tariffs the railway companies concerned endeavoured to abrogate the "joint through rate" in force for these commodities in respect of such shipments and to substitute therefor a rate which should be made up of the sum of the local rates (1) from the point of origin to the Canadian gateway, and (2) from the Canadian gateway to the point of destination, which should be in force when the shipment should move. The question referred by the Board is, in substance, the question whether the railway companies have succeeded in accomplishing this. The tariffs upon which the appellants rely are very numerous, but it will be found on examination, (as pointed out in the appellants' factum,) that the methods adopted by the carriers to attain the object they had in view may be classified as follows:—

(1) By a supplement to a joint tariff concurred in by the carriers, providing that the rates to points in Canada shall be the local rates to the frontier plus the local rate beyond.

(2) By providing by joint freight tariffs, containing so-called exceptions to the Official Classification that the Official Classification basis shall not apply to

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Duff J.

points in Canada, but that these rates shall be made on the sum of the totals.

(3) By providing by joint freight tariffs or supplements thereto, that the through rates to points in Canada shall not apply.

(4) By providing by such supplements that no through rates are in effect.

All these methods, if effective, would result in the same thing, namely: — the rate for shipments of the commodities affected from the shipping points in question into Canada would be a variable rate made up of the sum of the local rates in force from time to time, first, from the point of shipment to the Canadian gateway, and secondly, from the Canadian gateway to the terminus of the route. These tariffs were concurred in by all the carriers concerned, but none of them had the sanction of the Board.

The Board has held that these methods were ineffective for the purpose the railway companies had in view. I concur in that opinion and I agree, moreover, with the reasons which were given in support of it by the distinguished and lamented judge who then filled the office of Chief Commissioner.

Each of the shipments in question, it is, of course, admitted, passed over a "continuous route" in part "operated" by one of the appellant companies. In such a case, by section 336 of the "Railway Act," a *"joint tariff for such continuous route"* must be filed, (according to the decision in the case already mentioned,) and the "company or companies" operating the route are required, by section 338, to charge the toll or tolls specified therein "until such tariff is superseded or disallowed by the Board." There has been in this case no action by the Board. It is not strictly

necessary to pass upon the point, but the view I am disposed to take is that the language of the section does not require us to hold that every "joint tariff" is only subject to alteration by the action of the Board; I think there is no satisfactory ground for drawing such a sharp distinction between a "joint tariff" and other freight tariffs. It would not, of course, necessarily follow that every "joint tariff" would be subject to alteration at the will of the parties. It may be, for example, that on the true construction of section 334 a "joint tariff" framed pursuant to an order of the Board under that section remains in force until displaced by the Board itself.

However that may be, the Act plainly contemplates that for a "continuous route" to which section 336 applies there shall be a "joint tariff." That being so, then, (assuming the companies operating such route to have in some cases the power to "supersede" by their own action a "joint tariff" once established without invoking the sanction of the Board,) it must be taken, conformably to the principle declared by section 336, that such supersession necessarily involves the establishment of another tariff which itself falls within the category of "joint tariff," within the meaning of that phrase as used in the sections referred to. I agree with the late Chief Commissioner that a tariff of rates made up of variable local rates does not fulfil that condition.

The question of jurisdiction remains. I confess I can entertain no doubt that each of the several orders of the Board of the 16th of May, 1911, records and was intended to record an adjudication by the Board in its judicial capacity upon an issue between the complainants and the company or companies respectively

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Duff J.

against which the complaints were lodged; and I have come to the conclusion that the Board had, under section 26, jurisdiction to make the declarations contained in those orders.

The contention on behalf of the appellants is that the jurisdiction of the Board to adjudicate *inter partes* upon questions of law or of fact is confined to cases in which the Board has jurisdiction to give some consequential relief. The answer to the contention appears to be that sub-section (*a*) of section 26 confers the broadest jurisdiction to decide upon complaints with respect to past offences of omission or commission and the form of the sub-sections (*a*) and (*b*) suggests that the jurisdiction to pass upon such complaints is intended to be exercisable independently of the jurisdiction under sub-section (*b*). There are, obviously, many reasons of good sense and policy why such a jurisdiction should be exercisable by the Board; and I think there is no ground upon which the restriction contended for can be sustained.

ANGLIN J.—The Board of Railway Commissioners, on the application of the Canadian Oil Companies, Limited, made an order in which, following an introductory recital of facts,

> it is declared that the legal rates chargeable on petroleum and its products, in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved, as shewn in the joint through tariffs published and filed with the Board, and in accordance with the Official Classification No. 29, and subsequent issues thereof.

By leave of the Board the railway companies appeal from this order on a question of law formulated by it in this form:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Anglin J.

By leave of my brother Idington they also appeal on the ground that in making the above order the Board acted without jurisdiction. On this branch of the appeal two points are urged:—

(1) That before the Board heard the application the use of the combined local rates complained of had been discontinued and the joint tariff demanded by the applicants had been restored, or brought into force, and the Board was, therefore, not called upon and was not in a position to afford any relief, and should not have proceeded to pronounce a merely declaratory order.

(2) That the order purports to declare illegal rates charged by the United States railways from the points of shipment to the Canadian border.

The substantial grievance of the appellants is that they anticipate that in prospective actions by the Canadian oil companies to recover from them the sums paid for freight on shipments of petroleum from the United States shipping points to Toronto (the freight charges for the entire continuous routes were collected by the Canadian railway companies on delivery to the consignees) in excess of the joint tariff rates which the order of the Board declares to have been in force, that order will, under section 54 of the "Railway Act," be used to establish conclusively their liability to refund.

I shall deal first with the questions of jurisdiction.

By the "Railway Act," notably by sections 26 and 318, the Board is empowered to "inquire, hear and determine" and to "determine" (which involves inquiry, if not hearing) complaints in respect of any-

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Anglin J.

thing which a railway company "has done or is doing" in contravention of that statute, etc. While ordinarily such an inquiry and determination will be had for the purpose of deciding the right of an applicant to some relief and will, in proper cases, result in an order affording such relief, there may arise many cases in which, although the particular practice complained of has ceased, it may be desirable to institute, or to pursue, an investigation and to reach and formulate a determination for the future guidance of the railway company against which complaint has been made and of other railway companies and of the general public in regard to matters kindred to that which forms the subject of inquiry. What the Board may do under section 26 at the instance of a complainant, it may do under section 28 "of its own motion." While I more than gravely doubt that it was the intention of Parliament to constitute the Railway Board a tribunal for the determination of facts in cases of alleged contraventions of the "Railway Act" or of regulations made under that statute or of orders of the Board, etc., merely as a step towards, and to facilitate the prosecution of civil actions brought or to be brought against railway companies by aggrieved persons to obtain relief in damages or otherwise, I entertain no doubt that for the other purposes above indicated the Board possesses the jurisdiction which it has exercised in the present case. There is nothing before us to suggest that its object in making the order appealed from was to enable the respondents to use it under section 54 as a foundation for proceedings in the civil courts. If this order may be so used that is merely an incidental consequence which does not displace the jurisdiction of the Board

to make it and is a phase of the matter with which we are not presently concerned.

The order as drawn affects only the Canadian railways which were before the Board. It does not purport to declare illegal any charges made by the foreign railways which operated those parts of the continuous routes beyond the Canadian gateways. It necessarily deals with the joint tariff which the Board (rightly, having regard to the decision of this court in the *Stoy Case*(1)) holds had been established for the continuous routes operated by the Canadian and foreign railways. It merely declares that, because that joint tariff had not been "superseded or disallowed" in accordance with the provisions of the "Railway Act," it is still binding on the Canadian railways for the entire continuous routes. Whether the effect of this order will be to enable the respondents to recover from the appellant companies the whole amount paid them in excess of the joint tariff rates for the entire continuous routes is a question not now before us. I cannot see in an order which does nothing more than declare that as to the Canadian railways which were before the Board the joint tariff to which they became parties continues to bind them, anything in excess of the jurisdiction conferred by Parliament on the Railway Board.

On the question of law submitted to us I am also of the opinion that the appeal fails. The respondents maintain that if it were competent for the railway companies by their own joint act to "supersede" the joint tariff which became effective on the 1st of January, 1907, under the application of Official Classifica-

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Anglin J.

tion No. 29, adopted pursuant to sub-section 4 of section 321 of the "Railway Act," they did not take effective steps for that purpose. I find it difficult to understand why, having regard to the terms of the consents filed by the Canadian railway companies, (especially that of the Canadian Pacific Railway Company,) in virtue of which the tariffs filed only by the American railway companies have been held to be joint tariffs (1), the filing by the same companies of supplements or amendments to such joint tariffs should not be deemed joint acts of the American and Canadian companies, and, if railway companies had the power of superseding joint tariffs, should not be effective for that purpose. (See section 323, sub-section 3.) But if the railway companies had the power of supersession in regard to a joint tariff I incline to the view that it would properly be exercised only by an amendment or supplementing of the tariff itself and not by filing an exception to a freight classification used under the authority of section 321, sub-section 4. It is, in my opinion, not competent for a railway company operating the Canadian section of a continuous route to or from a point in the United States to use a freight classification in use in the United States subject to a special exception in regard to goods to be carried to or from Canada. The "freight classification in use in the United States," of which the use is authorized by sub-section 4 of section 321, means a freight classification in general use in that country under which goods of the same kind will be treated as in the same class when shipped for carriage to or from Canada as when shipped for local carriage in the United States. I am, therefore, of the

(1) 43 Can. S.C.R. 311.

opinion that if railway companies had the right by their own action to supersede joint tariffs, they could not do so in the case of a joint tariff for a continuous route, partly in Canada and partly in the United States, by specially excepting from a classification in use in the United States, either when adopting it or afterwards, all goods, or any particular kind of goods destined for or shipped from Canadian points. If a railway company sees fit to adopt for such a route a freight classification in use in the United States which contains such an exception, it will, I think, be bound by the classification without the exception. But in the view which I take it is not necessary to dwell further upon, or to definitely determine these questions.

In my opinion upon the proper construction of section 338 of the "Railway Act," it is not competent for two railway companies, one foreign and the other Canadian, which have filed or concurred in the filing of a joint tariff, themselves to "supersede" it. It can be "superseded or disallowed (only) by the Board." Section 338 does not itself confer powers of supersession and disallowance. These powers are given to the Board by section 323, and to the powers so conferred section 338 refers. Domestic "special" tariffs may be superseded within defined limits (section 323, sub-section 3; section 328, sub-section 3; section 328, sub-section 4; section 332, sub-section 3) by the railway company itself filing a new "special" tariff. But section 338 appears to preclude the supersession of joint tariffs, whether purely domestic or partly domestic and partly foreign, by the railway companies, inasmuch as it enacts that such tariffs when duly filed shall bind them until "superseded or disallowed by the Board."

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Anglin J.

In section 328, sub-section 4, and again in section 332, sub-section 3, the supersession of domestic special tariffs by the filing of new special tariffs is provided for. The language used is:—

> Upon any such (special freight) tariff being so (duly) filed, the company shall, until such tariff is superseded, or *is* disallowed by the Board, charge the toll or tolls as specified therein; *and such (special freight) tariff shall supersede any preceding tariff or tariffs or any portion or portions thereof, so far as it reduces or advances the tolls therein.*

In sub-section 3, of section 332, the comma, found after the word "superseded" in sub-section 4, of section 328, is omitted; and for the semi-colon after the word "therein," where it first occurs, a comma is substituted. These differences I regard as purely accidental. But in section 338 the word "is" is dropped before the word "disallowed," and the clause which I have italicized, found in sections 328 and 332, is wholly omitted. These changes were, in my opinion, deliberate. The important clause in section 338 reads:—

> And upon any such joint tariff being so duly filed with the Board, the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls specified therein.

Grammatically, the words "by the Board" apply equally to the two verbs "is superseded or disallowed." Not only do I find no ground for discarding the grammatical construction, but there appear to be several reasons for adhering to it. Comparison with sections 328 and 332 makes it reasonably clear that the departure from the language of those sections was intentional. Under section 323 the Board has a power of supersession in the sense of replacing. "Remplacé" is the translation of "superseded" in the French version of section 338.

The Board's jurisdiction probably does not extend to requiring a foreign company and a domestic company to unite in filing a joint tariff under section 336. (Compare section 335 and note the difference in form.) It apparently has not the power, if a joint tariff once filed has been disallowed or has been withdrawn with its approval, subsequently to require the filing of another joint tariff to take its place. The only means by which it can deal with such cases appears to be to prevent Canadian companies from participating in the operation of continuous international routes until satisfactory joint tariffs are duly filed. But it seems to be the scheme of the Act to enable the Board to retain control once acquired by providing that if a joint tariff has been filed it shall remain operative and binding at least upon Canadian companies interested until the Board sees fit to supersede or disallow it, and by denying to the railway companies in respect of joint tariffs the power, which is given in respect of special domestic tariffs, of superseding or abrogating them by merely filing new special tariffs to replace them.

For these reasons, bowing to the decision of this court in the *Stoy Case* (1), while respectfully adhering to the dissenting opinion which I there expressed, I am of opinion that this appeal should be dismissed with costs.

Canadian Pacific Railway Co. v. *British American Oil Co.* What I have said in regard to the *Canadian Oil Companies Case* applies to this appeal, which should likewise be dismissed with costs.

(1) 43 Can. S.C.R. 311.

1912

CANADIAN PACIFIC RY. CO. v. CANADIAN OIL COS., LTD.

Brodeur J.

BRODEUR J.—I am of opinion that the appeal in each case should be dismissed.

Appeals dismissed with costs.

Solicitor for the appellants, The Canadian Pacific Railway Company: *E. W. Beatty.*

Solicitor for the appellants, The Grand Trunk Railway Co.: *W. H. Biggar.*

Solicitors for the respondents: *Thompson, Tilley & Johnston.*

Canadian Pacific R. Co. v. Canadian Oil Cos. (1913), 19 D.L.R. 64 (JCPC)

ALTA.
S. C.
VOYER
v.
LEPAGE.

willing to have that care shifted upon the defendant, Victoria Lepage.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

IMP.
P. C.

CANADIAN PACIFIC R. CO. v. CANADIAN OIL COS.
CANADIAN PACIFIC R. CO. v. BRITISH AMERICAN OIL CO.

Judicial Committee of the Privy Council, The Lord Chancellor, (Viscount Haldane), Lord Dunedin, Lord Moulton, Lord Parker of Waddington, and Lord Sumner. July 14, 1914.

1. CARRIERS (§ IV B—522)—JOINT THROUGH TOLLS—RAILWAY BOARD—JURISDICTION—ABSENCE OF EXECUTIVE ORDER.

The Board of Railway Commissioners for Canada has jurisdiction by virtue of the Railway Act sec. 26 to make a declaratory order as against the carrier that rates exacted by it between certain dates were illegal, although by reason of a subsequent change in the authorised tariff no executive order was necessary nor was any made by the Board.

[*Canadian Pacific* v. *Canadian Oil Companies*, 47 Can. S.C.R. 155, 14 Can. Ry. Cas. 201, affirmed.]

2. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—STANDARD, COMPETITIVE OR THROUGH TARIFFS—RAILWAY ACT, SEC. 321.

Sec. 321 of the Railway Act (Can.) applies to all tariffs whether standard, competitive or through tariffs.

Statement

CONSOLIDATED appeals from the judgment of Supreme Court of Canada dismissing appeals from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an over-charge in rates for carrying petroleum from the United States to Canada.

The appeals were dismissed.

Sir R. Finlay, K.C., *F. H. Chrysler*, K.C. and *Geoffrey Lawrence*, for the appellants.

Balfour Browne, K.C., for the respondents.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—In these consolidated appeals exception is taken to the unanimous judgment of the Supreme Court of Canada affirming a determination of the Board of Railway Commissioners.

The dispute arose in connection with the through rates charged by the Canadian railway companies on petroleum and its products

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. CANADIAN OIL COS.
Lord Dunedin.

carried from certain points in Ohio and Pennsylvania to Toronto and other points in Canada. The oil companies considering that they were aggrieved by the rates which had been exacted from them since January 1, 1907, presented, in August 1910, three applications to the Board of Railway Commissions against the two Railway companies asking for a declaration that they had been over-charged, in respect that the railway companies had refused to carry petroleum and its products at joint tariff rates for the fifth class in accordance with the official classification.

The three applications were heard together, and judgment was given in all on May 16, 1911. The order pronounced in each case, though not in exactly the same words, was really exactly the same, and it is sufficient here to quote that pronounced in the application of the Canadian Oil Cos. Limited, against the Grand Trunk and the Canadian Pacific which was in these terms:—

> It is declared that the legal rates chargeable on petroleum and its products in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth class joint through rates in effect at the time the said shipments moved, as shown in the joint through tariffs published and filed with the Board, and in accordance with the official classification No. 29, and subsequent issues thereof.
>
> J. P. MABEE,
> Chief Commissioner,
> Board of Railway Commissioners for Canada.

The Board granted leave to the railway companies to prosecute an appeal on the following question of law:—"Did the Board place the proper legal construction on the documents referred to in the judgment"? In addition to this, by means of an application in Chambers, the companies obtained leave from Mr. Justice Idington to raise upon this appeal the additional question of whether the Board had jurisdiction to make the order it did.

The facts which raise the dispute may be very shortly stated. The railway companies in conjunction with the corresponding railway companies in the United States filed a joint tariff which specified certain rates for the different classes, as per the official classification in use in the United States. Up to January 1, 1907 the official classification did not classify petroleum or its products, which were accordingly carried at a special commodity rate, being the sum of the local rates. On January 1, 1907 official

IMP.

P. C.

CANADIAN PACIFIC R. CO. *v.* CANADIAN OIL COS.

Lord Dunedin.

classification No. 29 came into force. This classification inserted petroleum in class 5. The result of this was to apply the fifth class rate to petroleum and its products. In other words, taking a concrete instance of a transit in question, the through rate became 20 cents per 100 lbs. instead of 32 cents per 100 lbs. In order to avoid this result the railway companies filed with the Board documents which they entitled supplements. The wording of those supplements, and the dates at which they were declared to be effective varied somewhat. One illustration will suffice. The Indianapolis Southern Railroad Co. with the concurrence of the two Canadian Railway Companies filed the following:—

> Rates named in above described tariff will not apply on petroleum and its products to points in Canada. Rates to Canadian points will be on basis of lowest combination to and from the Canadian gateways.

The question therefore on the merits is simply whether such a proceeding was effective to relieve the railways from their obligation to carry petroleum at fifth class rates.

The question as to jurisdiction arises thus: The railway companies would not deliver unless the sum of the local rates was paid. The oil companies were therefore forced to pay the higher rate, and this continued up to the time of the presenting of the application to the Railway Commissioners. By the time, however, that the application came to be disposed of, the railway companies of their own free will had consented to carry at fifth class rates. In these circumstances an order of the Board could only be declaratory , as it was unnecessary to pronounce an executive order. And the railway companies contend that such an order is *ultra vires* of the Board.

The Supreme Court of Canada held unanimously that the Board had jurisdiction to make such an order. Their Lordships agree with that view and concur with the reasons set forth in the judgments of the learned Judges of the Supreme Court. Sec. 26 of the Railway Act confers jurisdiction on the Board

> to inquire into, hear, and determine, any application of a party interested complaining that any company . . . has done or is doing any act, matter, or thing, contrary to, or in violation of this Act, or the Special Act.

If the charges exacted were illegal charges because the Acts did not allow them, it seems clear that the railway companies were doing something contrary to or in violation of the Acts, and it

seems impossible to refuse a person interested a declaration to that effect. It was urged by the companies that a declaration was in the circumstances unmeaning as to the future, and would only prejudice them as to the past in a possible action of repetition. It is probably not right to allow considerations as to actions of repetition to enter into the matter if the point on jurisdiction be clear. But even if it were it is evident that the railway companies suffer no real prejudice. Any action for repetition to be successful must begin in substance though not in form by a declaration of right. All pleas of a prejudicial character based on the fact of money in fact paid, settlement with other parties, &c., will be just as good or just as bad as replies in a future petitory action, whether the declaratory finding—if such is justified on the merits—is settled for the first time in that action, or is taken as settled by the determination of the supreme tribunal in this.

Turning now to the merits. Argument was adduced to their Lordships on various topics, embracing the rights of railway companies in Canada to resist joint tariffs filed by American companies, subjects which were dealt with in what is known as the *Stoy Case* (43 Can. S.C.R. 311). In the view of their Lordships such topics do not arise for decision in this action, and their Lordships express no opinion upon them. It seems to their Lordships that there is a short ground of judgment which is conclusive so far as this case is concerned.

All tariffs are composed of two parts, (1) what may be termed the tariff proper and (2) the classification. Now the matter of classification is regulated by sec. 321 of the Railway Act which applies to *all* tariffs, whether standard, special, competitive, or through, and that section is as follows:—

1. The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorise, and the Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests.

4. Any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States.

Joint tariffs for through routes from points outside Canada into Canada (which is the class of traffic referred to in the application) are regulated by sec. 336, which is in the following terms:—

IMP.

P. C.

CANADIAN PACIFIC R. CO. *v.* CANADIAN OIL COS.

Lord Dunedin

As respects all traffic which shall be carried from any point in a foreign country into Canada or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

The effect is prescribed by sec. 338:—

Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign Railway Companies.

The Board may require to be informed by the company of the proportion of the toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

Now in the first case it is admitted that a joint tariff was filed; and it is admitted that the companies did not, so far as the classification is concerned, make use of a classification which the Board has prescribed or authorised, under sec. 321 (1), but availed themselves of the liberty given them by sec. 321 (4) to use a classification in use in the United States. What, however, the railway companies sought to do by means of their so-called supplements was to introduce a classification which was neither a classification in use in the United States—for that ex-hypothesi was No. 29 which they sought to amend—nor a classification authorised by the Board, for no one says that the Board ever authorised the charges proposed by the so-called supplements. This in their Lordships' judgment was quite beyond their powers: with the result that they proceeded to exact charges which were not sanctioned by any joint tariff framed with classification in the way in which the statute permits it to be framed.

Upon this short ground, and without entering into the other matters argued, their Lordships are of opinion that the Supreme Court was right in upholding the jurisdiction of the Board to make the order it did, and in deciding that that order embodied a declaration which was right on the merits; and they will humbly advise His Majesty to dismiss the appeals with costs.

Appeals dismissed.

Re Saskatchewan Power Corporation et al. and TransCanada Pipelines Ltd. (1977), 73 D.L.R. (3d) 544 (F.C.A.)

I agree entirely with the reasons given by Mr. Justice Pigeon and Mr. Justice Dickson for holding that the protection contemplated by s. 5 was available to appellants.

I would answer the constitutional question in the negative and dismiss the appeals.

DE GRANDPRE, J., concurs with LASKIN, C.J.C.

Appeals dismissed.

RE SASKATCHEWAN POWER CORPORATION et al. AND TRANSCANADA PIPELINES LTD.; ATTORNEY-GENERAL OF CANADA, Intervener

Federal Court of Appeal, Pratte, Urie and Le Dain, JJ. February 23, 1977.

Administrative law — Energy regulation — Contract to sell gas with option to repurchase — Whether exercise of option gives rise to contract for sale of gas — National Energy Board Act, R.S.C. 1970, c. N-6, s. 51(2).

Constitutional law — Interprovincial undertaking — Transmission of gas by interprovincial pipeline — Whether federal jurisdiction extends to transmission of gas within Province — British North America Act, 1867, ss. 91(29), 92(10).

By s. 51(2) (am. R.S.C. 1970, c. 27 (1st Supp.), s. 16) of the *National Energy Board Act*, R.S.C. 1970, c. N-6, a company transmitting gas through its pipeline shall file with the Board copies of all contracts it may make for the sale of gas. An agreement was made between S Corp. and T Ltd. whereby S Corp. agreed to sell gas to T Ltd. over a period of five years with an option to repurchase it over the following five years. S Corp. exercised the option, and T Ltd. filed the contract and the notice exercising the option under s. 51(2). S Corp. disputed the application of s. 51(2) and the jurisdiction of the Board. On appeal from a decision of the Board holding that s. 51(2) was applicable, *held*, dismissing the appeal, the transaction amounted to a contract for the sale of gas within the meaning of the subsection, T Ltd.'s offer to sell being accepted by the notice exercising S Corp.'s option. Even though the transaction might take place within a single Province it would fall within the jurisdiction of Parliament in that transmission was to be by means of an interprovincial pipeline.

[*Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Pipe Line Co.*, [1954] 3 D.L.R. 481, [1954] S.C.R. 207, 71 C.R.T.C. 291; *A.-G. Ont. et al. v. Winner et al.; Winner et al. v. S.M.T. (Eastern) Ltd. et al.*, [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225; *The Queen in right of Ontario v. Board of Transport Com'rs* (1967), 65 D.L.R. (2d) 425, [1968] S.C.R. 118, apld]

APPEAL from a decision of the National Energy Board holding certain documents to be governed by s. 51(2) of the *National Energy Board Act* (Can.).

Gordon R. Henderson, Q.C., *Y.A. George Hynna* and *Maurice Sychuk*, for appellants.

John H. Francis and *G.D. Finlayson*, Q.C., for respondent.

Philip G. Griffin, for National Energy Board.

T.B. Smith, Q.C., for Deputy Attorney-General of Canada, intervener.

PRATTE, J.:—This is an appeal from a decision of the National Energy Board finding that certain documents that TransCanada Pipelines Limited had filed with the Board were documents that were required to be filed under s. 51(2) of the *National Energy Board Act*, R.S.C. 1970, c. N-6.

TransCanada Pipelines Limited is a company within the meaning of s. 2 of the *National Energy Board Act* which owns and operates an interprovincial pipeline.[1] On November 1, 1969, it entered into a long-term gas supply contract with the appellants. The contract was made for a period of 12 years, ending October 31, 1981. It provided that during each one of the first six years, TransCanada would purchase certain volumes of gas from the appellants; it also provided that during each one of the last six years, the appellants would be entitled, at their option, to purchase comparable volumes of gas from TransCanada. After the expiry of the first six years, the appellants sent written notices to TransCanada indicating the volumes of gas that they had decided to buy during the years commencing on November 1, 1975, and November 1, 1976. TransCanada forwarded to the Board copies of those notices and of the 1969 contract. Those documents were sent for filing pursuant to s. 51(2) of the *National Energy Board Act*.[2] The appellants

[1]Section 2 of that Act reads in part as follows:

"2. In this Act

. . . . .

'company' means a person having authority under a Special Act to construct or operate pipelines;

. . . . .

'pipeline' means a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property and works connected therewith;" [rep. & sub. R.S.C. 1970, c. 27 (1st Supp.), s. 1(3)]

[2]That section is contained in Part IV of the Act which reads in part as follows:

"PART IV
"TRAFFIC, TOLLS AND TARIFFS

"50. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.

"51(1) A company shall not charge any tolls except tolls specified in a tariff that has been filed with the Board and is in effect.

"(2) Where the gas transmitted by a company through its pipeline is the property of the company, the company shall file with the Board, upon the making thereof, true copies of all the contracts it may make for the sale of gas and amendments from time to time made thereto, and the true copies so filed shall be deemed, for the puposes of this Part, to constitute a tariff pursuant to subsection (1).

"52. All tolls shall be just and reasonable, and shall always, under

apparently felt that the acceptance of those documents for filing constituted a tacit assertion by the Board of its power to regulate the price at which TransCanada had agreed to sell its gas under the 1969 contract. They applied to the Board for an order "refusing the purported filing or directing that the question of the validity of the proposed filing by TransCanada Pipelines Limited of the Gas Purchase Contract dated November 1, 1969, between Saskatchewan Power Corporation as Seller and TransCanada Pipelines Limited as Buyer, be determined by the National Energy Board at a special hearing of the Board".

A hearing was thereafter held at which counsel for the appellants argued that the documents tendered for filing by TransCanada had not to be filed under s. 51(2) because they were evidence, he said, not of a contract made by TransCanada for the sale of gas but, rather, of a contract of exchange.

The Board dismissed the appellants' contention and held that, under s. 51(2), TransCanada was obliged to file the documents that it had sent to the Board.

Counsel for the appellants reiterated before this Court the submission that had been made before the Board and, in addition, argued that the documents were not required to be filed under s. 51(2) for the following reasons:

(a) the contract of 1969 was entered into before the enactment of s. 51(2) in 1970 [R.S.C. 1970, c. 27 (1st Supp.), s. 16];

(b) the contract entered into by the parties does not contemplate that the gas to be acquired by the appellants will be gas transmitted in a pipeline;

---

substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

"53. The Board may disallow any tariff or any portion thereof that it considers to be contrary to any of the provisions of this Act or to any order of the Board, and may require a company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tariffs in lieu of the tariff or portion thereof so disallowed.

"54. The Board may suspend any tariff or any portion thereof before or after the tariff goes into effect.

. . . . .

"61. Where the gas transmitted by a company through its pipeline is the property of the company, the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part, be deemed to be a toll charged by the company to the purchaser for the transmission thereof."

Those sections must be read in the light of the definition of the word "toll" found in s. 2:

" 'toll' includes any toll, rate, charge or allowance charged or made for the shipment, transportation, transmission, care, handling or delivery of hydrocarbons, or for storage or demurrage or the like."

(c) s. 51(2) is *ultra vires* of the Parliament of Canada.

In my view, the Board was correct in finding, contrary to the appellants' submission, that the documents tendered by TransCanada were evidence of a contract for the sale of gas by TransCanada to the appellants. The contract of 1969 provided

(a) for a sale of gas, during the first six years of the contract, by the appellants to TransCanada; and
(b) for a *promise of sale* by TransCanada to the appellants, during the last six years of the contract.

The 1969 contract, in itself, was not a sale which, had s. 51(2) been in force in that year, would have been required to be filed under that section. But, when the appellants, in 1975, notified TransCanada of their decision to take advantage of the promise of sale, then a new contract came into being and that contract, in my view, cannot be characterized as anything but a sale of gas by TransCanada to the appellants.

It follows that the contracts made by TransCanada for the sale of its gas were not entered into in 1969 but in 1975 when the appellants notified TransCanada of their decision to exercise their option. Section 51(2) was enacted in 1970. There is, therefore, no merit in the submission made on behalf of the appellants that the decision under appeal has given a retroactive effect to s. 51(2).

I cannot find any merit, either, in the submission that the sale to the appellants did not fall within s. 51(2) because the documents tendered for filing did not expressly indicate that the gas sold to the appellants was gas that would be transmitted through the pipeline of TransCanada. Section 51(2) applies every time a gas company sells gas which, *in fact*, is transmitted in its pipeline. It is not necessary, for the section to apply, that the origin of the gas be specified in the contract.

According to the appellants' counsel, as I understood him, s. 51(2) would be *ultra vires* of the Parliament of Canada for two reasons: first, because that provision would be part of a scheme to regulate rates of purely intraprovincial as well as interprovincial operations and, second, because it would be part of a scheme to regulate, not only the cost of services to be provided by an interprovincial undertaking, but also the conditions of purely intraprovincial contracts for the sale of gas. Both these arguments, in my view, must be rejected. First, it is now well established that the federal jurisdiction over an interprovincial undertaking includes the power to regulate tolls and extends to all the services provided by the undertaking, including those that are provided entirely within the limits of a Province: *The Queen in right of Ontario v. Board of Transport Com'rs* (1967), 65 D.L.R. (2d) 425, [1968] S.C.R. 118. Second, once it is realized that what is here in issue is the validity of s. 51(2) alone

and not of s. 61, it becomes apparent, in my view, that the power of Parliament to regulate tolls of federal undertakings includes the power to enact a provision such as s. 51(2) which seems necessary to prevent the circumvention of the toll regulation.

For these reasons, I would dismiss the appeal.

URIE, J., concurs with PRATTE and LE DAIN, JJ.

LE DAIN, J.:—This is an appeal, pursuant to s. 18 [rep. & sub. R.S.C. 1970, c. 10 (2nd Supp.), s. 65] of the *National Energy Board Act*, R.S.C. 1970, C.N-6, from a decision of the National Energy Board declaring that a "Gas Purchase Contract" dated November 1, 1969, between the appellants Saskatchewan Power Corporation and Many Islands Pipe Lines Limited (hereinafter referred to collectively as "SPC") and the respondent TransCanada Pipe Lines Limited (hereinafter referred to as "TransCanada") is one which TransCanada was required by the terms of s. 51(2) of the Act to file with the Board, and that it was validly filed pursuant to that section.

The contract, which is between SPC as "seller" and TransCanada as "buyer", contains the following recitals:

> WHEREAS Seller and Buyer have entered into a gas purchase contract dated May 1, 1959, as amended (hereinafter called "the original Contract") with respect to the sale and purchase of gas produced from the Medicine Hat Field in the Province of Alberta and delivered at Success, Saskatchewan;
>
> AND WHEREAS Seller has interests in additional gas in the Medicine Hat Field in the Province of Alberta, and Seller will have a supply of gas available therefrom and desires to sell such gas to Buyer;
>
> AND WHEREAS, subject to the provisions of this Contract, Buyer desires to purchase such gas from Seller;
>
> AND WHEREAS subject to the terms and conditions herein contained Seller desires the right after November 1, 1974 to purchase certain volumes of gas.

The contract provides for the sale by SPC to TransCanada of certain minimum and maximum daily quantities of gas (defined as "natural and/or residue gas") at stipulated prices during each of the contract years in the period November 1, 1969 to October 31, 1974. From November 1, 1974 to October 31, 1981, SPC is to have the right to obtain "redelivery" of gas from TransCanada, as provided in art. XVII of the contract as follows:

> ARTICLE XVII — REDELIVERY OF GAS BY BUYER
>
> 1. Seller shall have the right during the period commencing November 1, 1974 and ending October 31, 1981 to purchase and Buyer shall sell and redeliver to Seller volumes of gas as requested by Seller up to the total volumes of gas purchased by Buyer during the period commencing November 1, 1969 and ending November 1, 1974; provided that
>
> (i) Seller shall give Buyer not less than eighteen (18) months written notice of Seller's nomination for gas for each contract year, and
>
> (ii) Seller may only nominate to have redelivered to Seller a volume up to 16,000,000 Mcf during any contract year, and

(iii) Upon such nomination being made by Seller hereunder Seller shall then be obligated to take and pay for, or nevertheless to pay for if available and not taken, the quantities of gas that Seller has so nominated to be redelivered to Seller by Buyer, and

(iv) Buyer's obligation to redeliver each day shall be up to a daily quantity calculated by dividing the annual volume nominated hereunder by Seller for the contract year by 365 and multiplying the quotient so obtained by 1.33, and

(v) The point of delivery for such redelivery of gas by Buyer to Seller shall be at the existing point of delivery near Success, Saskatchewan, as provided in the original Contract and at the pressure existing in Buyer's pipe line at the time of such redelivery, and

(vi) The price to be paid by Seller to Buyer for all such gas to be redelivered hereunder shall be 23.50¢ per Mcf and if the weighted average BTU content of the gas redelivered in any month is less than 1,000 BTUs per cubic foot the price of the gas shall be decreased in direct proportion to the decrease in the BTU content of such gas from 1,000 BTUs per cubic foot.

Article VIII of the contract of May 1, 1959 (referred to as the "original Contract"), which is to apply *mutatis mutandis* to the contract of November 1, 1969, makes the following provision with respect to delivery:

ARTICLE VIII — DELIVERY PRESSURE AND POINT OF DELIVERY

1. The delivery pressure of the gas delivered hereunder shall be such pressure as shall be necessary to effect delivery thereof into the Buyer's main transmission pipe line.

2. The point of delivery of all gas delivered hereunder shall be at Buyer's main transmission pipe line in the Province of Saskatchewan, at a point to be agreed upon in writing between the parties hereto.

3. Possession of and title to all gas delivered hereunder shall pass from Seller to Buyer at the point where such gas leaves Seller's facilities and enters Buyer's facilities at said point of delivery. Until such delivery, Seller shall be deemed to be in control or possession of, have title to, and be responsible for such gas, and after such delivery Buyer shall be deemed to be in control or possession of, have title to, and be responsible for such gas.

By an agreement dated October 22, 1962, between SPC and TransCanada the point of delivery under the contract of May 1, 1959, is further defined as follows:

The parties hereto covenant and agree that notwithstanding anything contained in the said Contract, the point of delivery for all gas delivered under the said Contract shall be at the point where such gas enters Buyer's facilities near the intersection of Buyer's thirty-four (34) inch pipe line and Seller's ten (10) inch pipe line in Section 26, Township 18, Range 16, West of the 3rd Meridian in the Province of Saskatchewan. All gas delivered under the said Contract at the point of delivery shall be measured and tested at the meter station located in the W/2 of Section 26, Township 18, Range 16, East of the 3rd Meridian in the Province of Saskatchewan.

By agreement dated October 5, 1973, the contract of November 1, 1969, was amended to provide that "Seller's right, pursuant to Article XVII of said Contract, to request redelivery of gas shall commence on April 1, 1975".

By telex and letter dated April 30, 1974, SPC advised TransCanada that it nominated 5,000,000 Mcf of gas for redelivery during the contract year commencing November 1, 1975, as provided in art. XVII of the contract, and by letter dated March 27, 1975, SPC nominated 16,000,000 Mcf of gas for redelivery during the contract year commencing November 1, 1976.

On July 11, 1975, TransCanada filed with the Board copies of the contract of November 1, 1969, as amended, as well as copies of the notices of nomination by SPC pursuant to art. XVII. The letter accompanying the material to be filed stated:

> Pursuant to Section 52(2) (*sic*) of the National Energy Board Act we enclose herewith six (6) copies of a contract entered into between Saskatchewan Power Corporation, Many Island Pipe Lines Limited and TransCanada Pipelines Limited dated 1 November, 1969 and amendments thereto, together with a copy of a Notice sent by Saskatchewan Power Corporation to TransCanada pursuant to Section 17 of the said contract whereby Saskatchewan Power has elected to purchase 5 billion cubic feet of natural gas during the contract year commencing November 1, 1975 as well as a further Notice whereby Saskatchewan Power has elected to purchase 16 Bcf of natural gas during the contract year commencing November 1, 1976.

On July 15, 1975, TransCanada filed a revised application to the Board for "just and reasonable rates and tolls in respect of Canadian gas sales and transportation services to be effective November 1, 1975", and requested the following orders from the Board:

> A. An Order effective November 1, 1975 disallowing any existing rates or tolls currently in effect or which would otherwise come into effect on November 1, 1975 for or in respect of gas sold and for gas transported for others by the Applicant in Canada, and approving new rates or tolls proposed to be charged by the Applicant for such services as set forth in this revised and updated application.
>
> B. An Order approving the tariff provisions filed with this application and disallowing any provisions existing in the present Tariff or in contracts for the various services under consideration in the present application which are inconsistent with the tariff provisions so approved.

The revised application of July 15, 1975, contained the following submission with respect to the contract of November 1, 1969:

> Pursuant to a contract dated November 1, 1969 as amended, SPC has the right during the period commencing November 1, 1975 and ending October 31, 1981 to purchase from TransCanada volumes of gas in a quantity and in a manner which is set out in the said contract which has been filed with the Board. SPC has given the Applicant notice of its election to purchase an annual quantity of 5 Bcf during the contract year November 1, 1975. The Applicant has included the said volumes of gas as part of the test period sales and requests in the present application disallowance of the sales prices set out in the said contract and substitution therefor of the Saskatchewan Zone CD-75 rate proposed in the present application.

By telex to the Board on July 23, 1975, SPC expressed its opposition to the filing of the contract with TransCanada as follows:

> Saskatchewan Power Corporation objects to the filing of the contract included as an attachment to the letter of July 11, 1975, from TransCanada Pipelines

Limited to the National Energy Board without there being a direct representation by Saskatchewan Power Corporation as to the content and nature of that agreement dated November 1, 1969, between Saskatchewan Power Corporation and TransCanada Pipelines Limited.

The Board replied by telex on July 25, 1975, in the following terms:

This contract was filed originally with the Board on April 15, 1971 in TransCanada's first rate application and has been raised as an issue in TransCanada's submission dated July 15, 1975 in its current rate application.

Saskatchewan Power Corporation will have the opportunity to present testimony or argument before the Board at the hearing set down to recommence on 6 August 1975 by Order AO-1-RH-2-75 dated 16 June, 1975.

A notice of motion dated August 6, 1975, was filed by SPC in the rate hearing referred to above as follows:

Take notice that Saskatchewan Power Corporation hereby applies to the National Energy Board for an order refusing the purported filing or directing that the question of the validity of the proposed filing by TransCanada Pipelines Limited of the Gas Purchase Contract dated November 1, 1969 between Saskatchewan Power Corporation as Seller and TransCanada Pipelines Limited as Buyer be determined as a question of law by the National Energy Board at a special hearing of the National Energy Board pursuant to section 12 of the Rules Relating to Practice and Procedure in Proceedings before the National Energy Board at a date to be determined by the National Energy Board before the conclusion of the within hearings.

And further take notice that this motion will be made upon the grounds that:

(i) the contract is between a producer and a pipeline company for an entire and indivisible consideration and is therefore not subject to regulation under Part IV of the National Energy Board Act;

(ii) in the alternative the jurisdiction of the National Energy Board is a question of law which should be resolved in a special hearing between TransCanada Pipelines Limited and Saskatchewan Power Corporation in order to expedite the within rate hearing.

By agreement dated August 6, 1975, SPC and TransCanada made the following amendments respecting redelivery under the contract of November 1, 1969:

1. The said Contract is hereby amended by deleting the figure "16,000,000" where the same appears in Article XVII, Section 1, Subsection (ii) and substituting therefor the figure "17,000,000".

2. Seller hereby cancels and withdraws its Notice dated April 30, 1974 relating to the nomination of 5,000,000 Mcf of gas for the contract year commencing November 1, 1975.

3. The Notice dated March 27, 1975 is hereby amended by deleting therefrom the figure "16,000,000" and substituting therefor the figure "17,000,000".

At the rate hearing on August 8, 1975, counsel for SPC informed the Board that SPC desired a determination of the question raised by its notice of motion in a hearing separate and apart from the rate hearing, and the Chairman of the Board said that that was what the Board proposed to provide. On August 22, 1975, SPC withdrew the notice of motion that it had filed in the rate hearing

and made an application "pursuant to sections 50 and 51 of the National Energy Board Act" in the following terms:

> Saskatchewan Power Corporation hereby applies to the National Energy Board for an order refusing the purported filing or directing that the question of the validity of the proposed filing by TransCanada Pipelines Limited of the Gas Purchase Contract dated November 1, 1969, between Saskatchewan Power Corporation as Seller and TransCanada Pipelines Limited as Buyer, be determined by the National Energy Board at a special hearing of the Board;
>
> And take notice that this application will be made upon the grounds that the contract is between a producer and a pipeline company for an inseparable consideration and is not a divisible contract and it was the intention that an equitable charge on reserves was created upon execution and upon request for redelivery Saskatchewan Power Corporation became the owner in equity and the contract provided for an exchange over its term and the contract is therefore not subject to regulations under Part IV of the National Energy Board Act.

Following a hearing the Board rendered a decision which was released on May 12, 1976. The essential conclusions arrived at by the Board are contained in the following passages from its reasons:

> ...the Board finds that the 1 November 1969 contract is an agreement whereby, in its initial phase, the Applicants sold gas to TransCanada, and whereby in its latter phase, since the option has been exercised, TransCanada will sell gas to the Applicants.
>
> ...the Board finds that the 1 November 1969 contract is one which TransCanada is obliged to file with the Board under the provisions of section 51(2).
>
> ...the Board finds that the 1 November 1969 contract was validly filed pursuant to section 51(2) of the Act.

The provisions of the *National Energy Board Act* that are particularly relevant for purposes of this appeal are ss. 50, 51 [am. R.S.C. 1970, c. 27 (1st Supp.), s. 16] and 61, which read as follows:

> 50. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.
>
> 51(1) A company shall not charge any tolls except tolls specified in a tariff that has been filed with the Board and is in effect.
>
> (2) Where the gas transmitted by a company through its pipeline is the property of the company, the company shall file with the Board, upon the making thereof, true copies of all the contracts it may make for the sale of gas and amendments from time to time made thereto, and the true copies so filed shall be deemed, for the purposes of this Part, to constitute a tariff pursuant to subsection (1).
>
> . . . . .
>
> 61. Where the gas transmitted by a company through its pipeline is the property of the company, the differential between the cost to the company of the gas at the point where it enters the pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part, be deemed to be a toll charged by the company to the purchaser for the transmission thereof.

At the outset of the argument in this Court a question was raised as to whether the Board was empowered to make a binding decision of the kind that was made in this case — that is, a decision of a declaratory nature apparently made outside of, or apart from, the regular exercise of its rate-making jurisdiction. At the conclu-

sion of the hearing material was added to the case to show the circumstances in which the Board was called upon to make its decision. I have set out those circumstances in considerable detail to indicate the relationship of the Board's decision to its powers under the Act. They show that the Board's decision was no mere advisory opinion or interpretative ruling upon a matter not in controversy, but the determination of an issue that was raised initially in rate proceedings and was withdrawn from them to be considered in a separate hearing. The terms of s. 11(*b*)[1] and s. 50 of the Act, respecting the powers of the Board, are broad enough, in my opinion, to include a binding determination, outside of rate proceedings, of an issue as to whether a particular contract must be filed with the Board pursuant to s. 51(2). The Board's determination is sufficiently comprehended in the power under s. 11(*b*) to make "any order ... with respect to any ... act ... that by this Act ... is ... required to be done" and the power under s. 50 to make orders with respect to "all matters relating to traffic, tolls or tariffs". The Board has chosen to call its determination a "decision" but I do not attach any significance, for the purposes of this case, to such distinction as there may be between the words "order" and "decision". It would, moreover, in my opinion, be an unduly restrictive and highly inconvenient interpretation of the powers conferred by these provisions to confine them to orders or decisions of a coercive or prescriptive nature.[2] It seems to me to be an essential aspect of the Board's responsibility for the regulation of tariffs to have the power to determine, as a separate issue, whether s. 51(2) applies to a particular contract so as to make it, once it is filed, a tariff for purposes of the Act.

I turn to the grounds of appeal invoked by the appellants.

---

[1]11. The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

. . . . .

(*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

[2]Any doubt that I might entertain on this question would be dispelled by the suggestion in the decisions of the Supreme Court of Canada that it is disposed to recognize the power of regulatory bodies such as the Board to make orders or decisions of a declaratory nature in appropriate cases. See, for example, *C.P.R. Co. v. Canadian Oil Companies Ltd.* (1912), 47 S.C.R. 155, 14 C.R.C. 201; affirmed 19 D.L.R. 64, [1914] A.C. 1022, in which it was expressly held that the Board had such power; and *Crow's Nest Pass Coal Co. (Ltd.) v. Alberta Natural Gas Co.* (1963), 38 D.L.R. (2d) 311, [1963] S.C.R. 257, and *The Queen in right of Ontario v. Board of Transport Com'rs* (1967), 65 D.L.R. (2d) 425, [1968] S.C.R. 118, in which this power was apparently not questioned

The first contention of the appellants is that the Board erred in law in applying what purported to be the principles applicable to the interpretation of tariffs and in excluding consideration of the circumstances surrounding the contract as an indication of how it should be characterized. Reference was made to the decision of the House of Lords in *Prenn v. Simmonds*, [1971] 3 All E.R. 237, in which Lord Wilberforce said at pp. 239-40:

> In order for the agreement of 6th July 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Comrs v Adamson* ((1877), 2 App Cas 743 at 763, [1874-80] All ER Rep 1 at 11) provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v Longbottom* (1860) 1 E & E 977, [1843-60] All ER Rep 1050) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.

Lord Wilberforce concluded, for purposes of that case, as follows at p. 241:

> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of Dr. Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

The evidence which the appellants sought to have the Board consider in this case was referred to by the Board in its reasons for decision as follows:

> On the basis of emplaining the background to this contract and the intention of SPC at the time it was entered into, the Applicants requested the Board to consider the following facts. SPC is a gas distributor in the Province of Saskatchewan. The requirements of the potash industry in Saskatchewan for natural gas proved difficult to forecast, and by 1969 it became apparent that estimates of gas consumption by that industry were high, and that SPC was receptive to proposals to supply gas to TransCanada in the period 1969 to 1974, in exchange for redeliveries in the 1975 to 1981 period, when SPC's forecast loads would be sufficient to absorb the redelivered volumes of gas. The effect of an exchange agreement was to allow SPC to meet its gas supply objectives.

After stating, "It is the Board's view that in interpreting contracts for the purposes of section 51(2), the same principles should be applied as are used in the interpretation of tariffs", the Board quoted passages from certain decisions of the Board of Transport Commissioners to the effect that tariffs are to be strictly construed, according to their language and not according to what their framers may have intended to say, and concluded as follows:

> On the basis of these rulings as to the interpretation of tariffs and the authorities cited by the parties to the application, the Board considers that, in determining whether a contract is one of sale within the meaning of section 51(2),

> the Board should consider the contract itself plus any agreements which amend it and notices given under it. The Board does not however consider it relevant to refer to evidence relating to the background of the transaction, the intention of one of the parties at the time of negotiation of the contract, or the provisions of other contracts between the parties.

Although one might question the appropriateness of the reference to the principles governing the interpretation of tariffs, as such, since what was in issue was the nature of the contract of November 1, 1969, and not the application of its terms once it was deemed to constitute a tariff, I do not think that in the result the Board was in error in refusing to consider the evidence which the appellants requested it to consider. This evidence was apparently to be relied on to show that what the parties to the contract understood or intended by "redelivery" was exchange or repayment of a loan rather than sale. In my view, this is not a case of the kind to which Lord Wilberforce referred in the *Prenn* case in which reference must be made to mutually known facts to determine the meaning of a word in a contract. I do not think that evidence of the precise reasons why SPC entered into the contract of November 1, 1969, and agreed to the terms and conditions it did, even if such reasons could be shown to have been known to TransCanada at the time, would throw any additional light on the legal characterization of "redelivery" under art. XVII of the contract. That SPC anticipated the possible need to be able to obtain supplies of gas from TransCanada during the years 1974 to 1981 is to be sufficiently inferred from the recitals of the contract and the provisions of art. XVII. The legal significance of the term "redelivery" is not to be determined by evidence of the need to be able to obtain supplies of gas but by the other terms and conditions which form its context in the contract.

The principal contention of the appellant is that the Board erred in law in characterizing the contract of November 1, 1969, as a contract for the sale of gas within the meaning of s. 51(2) of the Act. The Board held that the redelivery provisions in art. XVII of the contract created an option to purchase, and that when SPC exercised this option by the nomination of certain volumes of gas for redelivery a contract of sale was formed. The appellants' position is that the contract of November 1, 1969, is a unitary and indivisible contract for the delivery and redelivery of gas on an exchange or loan basis. Alternatively, they describe the contract as a gas purchase contract for an entire and indivisible consideration of which the right to redelivery is an integral part. They stress the following features of the contract as supporting this construction: the contract as a whole is called a "Gas Purchase Contract"; it is for an overall term of ten years; the terms "redelivery", "redeliver" and "redelivered" are used throughout art. XVII; the quantities which

TransCanada is obliged to redeliver at the option of SPC are approximately those which SPC is obliged to deliver to TransCanada; the price to be paid by SPC for such redelivery is the average of the prices which TransCanada is obliged to pay to SPC, and there is no provision for redetermination of such price to reflect the market price at the time of redelivery. The appellants assert that the prices stipulated in the contract for delivery by SPC to TransCanada and redelivery by TransCanada to SPC are stipulated for accounting purposes only as a measure or record of the quantities delivered and do not detract from the essential nature of the contract as one of exchange or loan.

I agree with the conclusion reached by the Board on this issue. Whatever one may choose to call art. XVII of the contract it is inescapable in my view that it contains an offer to sell, and that nomination of volumes of gas by SPC constitutes an acceptance of that offer. There is therefore formed by such acceptance an agreement to sell or a contract for the sale of gas within the meaning of s. 51(2) of the Act. Copies of this contract were filed with the Board when TransCanada filed the contract of November 1, 1969, together with the notices of nomination. Both the delivery and redelivery aspects of the contract contemplate the transfer of property for a price in money and thus exclude the concept of loan or exchange. There is nothing in the record to support the contention that the prices are stipulated for accounting purposes only. In so far as the emphasis on the word "redelivery" is concerned, it is to be noted that TransCanada is obliged by the terms of art. XVII to "sell and redeliver".

The appellants contend that the Board erred in law in holding that s. 51(2) of the Act applied to the contract because the contract does not in its terms contemplate the interprovincial transmission of gas. Indeed, the appellants argue that the redelivery provisions of the contract do not contemplate transmission at all. Section 51(2) applies where the gas trasmitted by a company through its pipeline is the property of the company. There must be a transmission of gas, and as the definitions[3] of "company" and "pipeline" in-

---

[3]Section 2 of the Act, as amended by R.S.C. 1970 (1st Supp.), c. 27, s. 1(3) [further am. 1974-75, c. 33, s. 265], provides:

> "'company' means a person having authority under a Special Act to construct or operate pipelines;
>
> "'pipeline' means a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property and works connected therewith;"

dicate, a transmission by means of an interprovincial pipeline undertaking. Whether the contract for the sale of gas necessarily involves such transmission is a question of fact; it is not necessary that it be expressly provided for in the contract. In fact, the contract in this case appears to contemplate such transmission. It is clear, I think, from para. (1)(v) of art. XVII of the contract of November 1, 1969, and para. (1) of art. VIII of the original contract of May 1, 1959, as further amplified by the letter agreement of October 22, 1962, all of which have been quoted above, that redelivery is to be at or near Success, Saskatchewan, from TransCanada's main pipeline into SPC's pipeline. TransCanada is a "company" as defined by the Act. That it operates an interprovincial pipeline undertaking is a matter of such common knowledge that one might take judicial notice of it. It is in fact disclosed, for purposes of the record, by the first recital to the contract of May 1, 1959, which reads as follows:

> WHEREAS Buyer operates a gas transmission pipe line system from the Province of Alberta to the City of Toronto in the Province of Ontario and to the City of Montreal in the Province of Quebec;

It is a necessary inference that the "main transmission pipeline" referred to in art. VIII is part of TransCanada's interprovincial pipeline undertaking. Certainly, the onus would be on SPC to show that it is not, and there is no evidence whatever to support such a conclusion. I therefore conclude that the contract for the sale of gas by TransCanada to SPC is one in which the gas would be transmitted by TransCanada through its pipeline as its property, within the meaning of s. 51(2) of the Act.

The appellants further contend that to apply s. 51(2), which came into force on June 26, 1970 (1969-70, c. 65), to the contract of November 1, 1969, would be contrary to the presumptions against retrospective operation and interference with vested rights. Although the terms and conditions that would govern the sale of gas by TransCanada to SPC, with the exception of the quantities to be sold, had been agreed to by the parties as of November 1, 1969, a contract for the sale of gas within the meaning of s. 51(2) was not formed until SPC gave notice to TransCanada on April 30, 1974, and on March 27, 1975, that it nominated certain quantities of gas for redelivery during the contract years commencing November 1, 1975, and November 1, 1976. I cannot see, therefore, how the application of s. 51(2) to the contract for the sale of gas in this case can be said to be a retrospective one, and I do not find it necessary to express an opinion as to whether s. 51(2) should be construed so as to apply to contracts that were formed before it came into force. Nor do I see that the presumption against interference with vested rights can have any application to s. 51(2). The vested rights would be those created by the contract which is required to be filed with

the Board. To the extent that the requirement of filing would constitute interference with such rights it is obviously an interference that is contemplated by the subsection. It is an unavoidable inference from the existence of s. 51(2) and s. 61 that a contract for the sale of gas, which is deemed to be a tariff and to reflect a toll for transmission in the amount for which the gas is sold, is subject to regulation by the Board under the other provisions of Part IV of the Act. To accept the view that the Board cannot interfere with tariffs and tolls to the extent that they have become the subject of prior contractual agreement would defeat the purposes of the Act.

In this Court the appellants put forward certain arguments of a constitutional nature that were apparently not advanced before the Board. The Attorney-General of Canada intervened to make submissions with respect to these arguments. The appellants argued that s. 50, which is the general basis of the Board's jurisdiction under Part IV of the Act, is so broad in its terms as to purport to confer jurisdiction to regulate traffic, tariffs and tolls in respect of intraprovincial undertakings or transactions and is thus *ultra vires* the Parliament of Canada. This contention is without merit. It is obvious from the terms of s. 50, which do not make specific reference to the kind of enterprise or activity in respect of which the Board is to have power to make orders relating to traffic, tolls or tariffs, that its scope must be determined with reference to other provisions of the Act. The definitions of "company" and "pipeline", to which reference has been made, indicate that the purpose or object of the Act is the regulation of interprovincial pipeline undertakings. Section 50 must therefore be construed as intended to apply to such undertakings. There is no basis in the context of the Act as a whole for not applying the presumption that, in enacting s. 50, Parliament intended to remain within its legislative jurisdiction.

The appellants also argued that it would give s. 51(2) an *ultra vires* application to apply it to a transaction of sale which takes place wholly within a Province. It is not clear from the record that the transaction or operation involved in giving effect to the provisions of art. XVII of the contract is to be carried out wholly within the Province of Saskatchewan. The onus of proving this to be a fact, in a challenge to jurisdiction, rests with the appellants. But assuming, for the purposes of argument, that it is a wholly intraprovincial transaction or operation — that is, that the transmission required to give effect to the terms of art. XVII of the contract is one that could be considered to take place wholly within the Province — it would still be one that falls within federal legislative jurisdiction on the necessary assumption, indicated above, that it would be transmission by means of an interprovincial pipeline. Such a pipeline falls, of course, within exclusive federal legislative

jurisdiction by virtue of ss. 92(10)(*a*) and 91(29) of the *British North America Act, 1867*: *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Pipe Line Co.*, [1954] 3 D.L.R. 481, [1954] S.C.R. 207, 71 C.R.T.C. 291. Any transmission through it, even such as might conceivably be considered to take place wholly within a Province, would fall under such jurisdiction as part of an indivisible interprovincial undertaking:*A.-G. Ont. et al. v. Winner et al.; Winner et al. v. S.M.T.(Eastern) Ltd. et al.*, [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657; *The Queen in right of Ontario v. Board of Transport Com'rs* (1967), 65 D.L.R. (2d) 425, [1968] S.C.R. 118. A contract of sale by a pipeline company, involving transmission through its interprovincial pipeline, is a matter that falls within federal jurisdiction with respect to such an undertaking. Parliament must have jurisdiction to regulate the terms and conditions upon which such transmission is made, whether the contract in which they are reflected takes the form of a contract of service or a contract of sale. The fact that a pipeline company owns and sells the product which it transmits does not make it any less a pipeline company subject to regulation as to the consideration which it charges for transmission.

For the foregoing reasons I am of the opinion that the Board did not act beyond its jurisdiction or otherwise err in law in coming to the decision that it did, and I would accordingly dismiss the appeal with costs.

Appeal dismissed.

GORDIE'S AUTO SALES LTD. et al. v. PITRE

New Brunswick Supreme Court, Appeal Division, Hughes, C.J.N.B., Bugold and Ryan, JJ.A. December 29, 1976.

Damages — Breach of contract — Repudiation of contract of employment — Plaintiff receiving unemployment insurance — Whether damages should be reduced.

Master and servant — Repudiation of contract of employment — Damages — Plaintiff receiving unemployment insurance — Whether damages should be reduced.

Unemployment insurance benefits paid to a person after repudiation by an employer of a contract to employ him are not to be taken into account to reduce the damages payable by the employer in an action for breach of contract.

[*Bourgeois v. Tzrop* (1957), 9 D.L.R. (2d) 214; *Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4, [1973] 3 O.R. 69, apld]

Master and servant — Termination of employment — Notice — Indefinite term of employment as shop foreman at $250 per week — Reasonable notice two months.

Ontario v. Canada (Board of Transport Commissioners), [1968] S.C.R. 118

Indexed as:

Ontario v. Canada (Board of Transport Commissioners)

**Her Majesty The Queen in the Right of the Province of Ontario, Appellant; and
Board of Transport Commissioners, Respondent.**

[1968] S.C.R. 118

[1968] R.C.S. 118

Supreme Court of Canada

1967: October 10, 11, November 20.

Present: Cartwright C.J. and Fauteux, Martland, Judson, Ritchie, Hall and Pigeon JJ.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS

Constitutional law — Jurisdiction — Railways — Commuter service operated by provincial government using own rolling stock — Tracks of Canadian National Railways used — Whether tolls charged by province subject to jurisdiction of Board of Transport Commissioners — Whether commuter service within legislative jurisdiction of Parliament of Canada — Desirable that Attorney General of Canada be represented whenever constitutional validity of federal legislation in issue — Commuter Services Act, 1965 (Ont.), c. 17 — B.N.A. Act, 1867, s. 92(10) — Interpretation Act, R.S.C. 1952, c. 158, s. 16 — Railway Act, R.S.C. 1952, c. 234.

The government of Ontario decided to operate a commuter train service, using its own rolling stock but utilizing the Canadian National Railways tracks. The train crews would be those of the Canadiar National Railways performing services for the government of Ontario on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near future. The Board of Transport Commissioners, on an application by the Canadian National Railways to discontinue certain passenger trains on that line, declared that it had jurisdiction in respect of the tolls to be charged by the province in respect of the proposed services. On appeal to this Court by the province of Ontario against that declaration, two questions were raised: (1) Whether the Board of Transport Commissioners has jurisdiction to set the tolls, and (2) Whether the commuter service comes within the jurisdiction of the Parliament of Canada.

Held: The appeal should be dismissed.
As to the first question, the tolls to be charged by the province of Ontario are subject to the jurisdiction of the Board of Transport Commissioners.

The Board has jurisdiction over tolls within the meaning of the Railway Act, R.S.C. 1952, c. 234, and the question is whether the tolls to be charged by the province in this case are tolls within the definition of that word in the Railway Act. The answer to the contention that they will not be charged by the "company" but by Her Majesty is that the definition applies not only to tolls chargec by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers..." While it is true that the rolling

stock belongs to the province of Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls cannot be said not to be "in respect of a railway owned" by the Canadian National Railways.

As to the second question, the commuter service comes within the legislative jurisdiction of the Parliament of Canada as being a local work or undertaking within the meaning of s. 92(10)(a) of the B.N.A. Act, 1867.

The Canadian National Railways, extending beyond the limits of the province of Ontario, is subject to the jurisdiction of the Parliament of Canada, and the question is whether the commuter service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. It is not possible to so hold. The constitutional jurisdiction depends on the character of the railway line and not on the character of a particular service provided on that railway line. The fact that for some purposes the commuter service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view, the commuter service trains are part of the overall operations of the line over which they run. Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.

Droit constitutionnel — Juridiction — Chemins de fer — Service de trains de banlieue exploité par le gouvernement provincial en se servant de son matériel roulant — Utilisation de la voie des Chemins de Fer Nationaux du Canada — Le tarif exigé par la province est-il sujet à la juridiction de la Commission des Transports du Canada — Le service de trains de banlieue tombe-t-il sous la juridiction législative du Parlement du Canada — Désirable que le procureur général du Canada soit représenté chaque fois qu'est soulevée la validité constitutionnelle d'une législation fédérale — Commuter Services Act, 1965 (Ont.), c. 17 — L'Acte de l'Amérique du Nord britannique, 1867, art. 92(10) — Loi d'interprétation, S.R.C. 1952, c. 158, art. 16 — Loi sur les chemins de fer, S.R.C. 1952, c. 234.

Le gouvernement de l'Ontario a décide d'exploiter un service de trains de banlieue, tout en se servant de son matériel roulant mais en utilisant la voie des Chemins de Fer Nationaux du Canada. Le personnel du train devait être celui des Chemins de Fer Nationaux en service auprès du gouvernement de l'Ontario, sur une base d'agence en vertu des termes et conditions devant faire partie d'un contrat formel à être passé tout prochainement. La Commission des Transports du Canada, sur une demande des Chemins de Fer Nationaux de discontinuer certains trains de voyageurs sur la ligne en question, a déclaré qu'elle avait juridiction sur les tarifs devant être exigés par la province relativement au service proposé. Sur appel devant cette Cour par la province de l'Ontario à l'encontre de cette déclaration, deux questions ont été soulevées: (1) La Commission des Transports du Canada a-t-elle juridiction pour établir le tarif, et (2) Le service de trains de banlieue tombe-t-il sous la juridiction du Parlement du Canada.

Arrêt: L'appel doit être rejeté.

Quant à la première question, le tarif devant être exigé par la province de l'Ontario est sujet à la juridiction de la Commission des Transports du Canada.

La Commission a juridiction sur les tarifs dans le sens de la Loi sur les chemins de fer, S.R.C. 1952, c. 234, et le problème est de savoir si le tarif devant être exigé par la province dans le cas présent est un tarif selon la définition de ce mot dans la Loi sur les chemins de fer. La réponse à la prétention que le tarif ne sera pas exigé par la "compagnie" mais par Sa Majesté est que la définition s'applique non seulement au tarif exigé par la "compagnie" mais aussi au tarif exigé "sur un chemin de fer que la compagnie possède ou tient en service, ou relativement à ce chemin de fer, ou pour toute personne agissant au nom de la compagnie ou avec son autorisation ou son consentement, pour le transport des voyageurs..." Il est vrai que le matériel roulant appartient à la province de l'Ontario, mais la voie ferrée sur laquelle ce matériel roule est la voie ferrée de la

"compagnie". En conséquence, on ne peut pas dire que le tarif n'est pas "relativement à un chemin de fer possédé" par les Chemins de Fer Nationaux du Canada.

Quant à la seconde question, le service d'un train de banlieue tombe sous la juridiction législative du Parlement du Canada comme étant un travail ou une entreprise d'une nature locale dans le sens de l'art. 92(10)(a) de L'Acte de l'Amérique du Nord britannique, 1867.

Les Chemins de Fer Nationaux du Canada, s'étendant au-delà des limites de la province de l'Ontario, sont sujets à la juridiction du Parlement du Canada, et le problème est de savoir si on peut dire que le service de trains de banlieue ne fait pas partie de ce chemin de fer. Pour en venir à une telle conclusion, il serait nécessaire de décider que la juridiction fédérale sur les chemins de fer interprovinciaux s'étend seulement aux services interprovinciaux fournis sur ces chemins de fer. Il n'est pas possible de décider de cette façon. La juridiction constitutionnelle dépend du caractère de la ligne de chemin de fer et non pas du caractère des services particuliers fournis sur cette ligne de chemin de fer. Le fait que pour certaines fins le service de trains de banlieue doit être considéré comme un service distinct n'en fait pas une ligne distincte de chemin de fer. Du point de vue physique, le service de trains de banlieue fait partie de l'exploitation entière de la ligne sur laquelle ces trains roulent. Le Parlement du Canada a juridiction sur tout ce qui fait partie physiquement des chemins de fer sujets à sa juridiction.

APPEL d'une décision de la Commission des Transports du Canada. Appel rejeté.

APPEAL from a decision of the Board of Transport Commissioners. Appeal dismissed.

C.F.H. Carson, Q.C., J.R. Houston and D.A. Crosbie, for the appellant.
J.M. Fortier, Q.C., and L. Salembier, for the respondent.

Solicitors for the appellant: Tilley, Carson, Findlay & Wedd, Toronto.
Solicitor for the respondent: J.M. Fortier, Ottawa.

The JOINT OPINION OF THE COURT:-- This case arose in the following way.

Under the authority of the Commuter Services Act, 1965, Statutes of Ontario 1965, c. 17, the Minister of Highways for Ontario decided to operate a Government of Ontario Commuter Service from Toronto westerly to Hamilton and easterly to Pickering utilizing Canadian National Railways' trackage in the entire area of its operation. Although no contract for that purpose has yet been signed, the Canadian National Railways, on July 16, 1965, made an application to the Board of Transport Commissioners for authority to discontinue four passenger trains operating between Toronto and Hamilton. It was stated in the application that the train crews on the Commuter Service would be those of the Canadian National Railways performing services for the Ontario Government on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near future. By the order appealed from authority to discontinue the four trains was given and in addition the Board declared that:

It has jurisdiction in respect of the tolls to be charged by the Province of Ontario in respect of the proposed services.

The appeal by Ontario is against that declaration only and raises two points:

1. Whether the tolls to be charged by Ontario in respect of the Commuter Service are subject to the jurisdiction of the Board of Transport Commissioners;
2. Whether the Commuter Service comes within the legislative jurisdiction of

the Parliament of Canada.

On the first question it is not disputed that the Board of Transport Commissioners has jurisdiction over tolls within the meaning of the Railway Act, R.S.C. 1952, c. 234. The issue is whether the tolls to be charged by Ontario in respect of the Commuter Service are tolls within the definition of this word in the Railway Act. The material part of this definition is as follows:

> (32) 'toll', or 'rate', when used with reference to a railway, means any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf of or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling passengers, for the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof;...

Appellant points out that the tolls in question will not be charged by the "company" within the meaning of the definition since they will be charged by Her Majesty in the right of the Province of Ontario. The answer to this contention is that the definition applies not only to tolls charged by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by an person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers ...". While it is true that the rolling stock used in operating the Commuter Service belongs to Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls cannot be said not to be "in respect of a railway owned" by the Canadian National Railways; they are obviously a charge for the transportation of passengers over this railway by means of such equipment.

It is worth noting that under the Railway Act the rolling stock, is not considered an essential part of the railway. Although it is included in the definition of "railway" it is also included in the definition of "traffic":

> (33) "traffic" means the traffic of passengers, goods and rolling stock;

It should be further noted that under s. 315 of the Railway Act, a railway company is obliged to furnish "suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway". Therefore it cannot be said that the operation of a commuter service by means of rolling stock owned by the Government of Ontario is not an operation of the "railway" within the meaning of the Railway Act. On the contrary, to the extent that the tolls charged to the passengers can be said to be charged in connection with the use of the rolling stock they are expressly covered by the last quoted part of the definition: "and includes any toll ... so charged in connection with rolling stock, or the use thereof ... irrespective of ownership".

It is argued that, although the provisions of the Railway Act respecting tolls might be applicable in such a situation if the rolling stock was owned by ad operated on the account of any other person or corporation, they cannot be applied to Her Majesty in right of the Province of Ontario by reason of s. 16 of the Interpretation Act that was in force at the time the order was made, R.S.C. 1952, c. 158. This section is as follows:

> 16. No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

It should be pointed out that this section does not provide that no enactment applies to Her Majesty unless it is expressly stated therein that Her Majesty is bound thereby but only that no enactment affects the rights of Her Majesty unless it is so stated. Therefore, in order to rely on the rule to exclude Her Majesty from the application of an enactment, it must be show that Her rights are affected thereby.

It was held by the Privy Council in Dominion Building Corporation, Limited v. The King [[1933] A.C. 533, 2 W.W.R. 417, 3 D.L.R. 577, 41 C.R.C. 117.], with respect to a similar enactment of the Ontario Legislature that, at page 549:

> The expression "the rights of His Majesty" in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

This observation is applicable to the present case. Her Majesty in right of Ontario has, apart from an agreement in principle with the Canadian National Railways, no right to operate the Commuter Service and therefore no right to levy tolls for the carriage of passengers over part of the Canadian National Railways lines. Such rights as Ontario has are derived either from such agreement or from the Railway Act and therefore are subject to the conditions prescribed in that Act, one of these being that tolls are within the jurisdiction of the Board of Transport Commissioners.

It appears to us that Ontario can no more claim to be exempt in the operation of the Commuter Service from the application of the general provisions of the Railway Act respecting tolls than British Columbia could claim to be exempt from the general provisions of the Customs and Excise Acts in the operation of its Liquor Control Board, as was held in Attorney-General of British Columbia v. Attorney-General of Canada [[1922], 64 S.C.R. 377, 38 C.C.C. 283, [1923] 1 W.W.R. 241, 1 D.L.R. 223; [1924] A.C. 222, 42 C.C.C. 398, [1923] 3 W.W.R. 1249, 4 D.L.R. 669.]. It is true that in that case, the claim to exemption was based on s. 125 of the B.N.A. Act, however, the decision also involves the application to a provincial government of the general provisions of the Customs and Excise Acts.

On the second question, it is urged that the Commuter Service is operated exclusively within the Province of Ontario and reference is made to the following sentence in the reasons for judgment of the Board:

> The service to be provided will be a service of the Government of Ontario and will not form part of the Canadian National Railway operations.

It must first be pointed out that this sentence comes immediately after the following: "It will use existing C.N.R. trackage". It is therefore apparent that, when the service is said not to "form part of the Canadian National Railways operations" this must be taken in a special sense in considering the operations from an accounting or financial point of view. It cannot be taken as meaning that the Commuter Service will not form part of the physical operations of the railway seeing that the equipment runs on the railway tracks. That this is of substantial importance in the physical operation of the railway appears in the record from uncontradicted evidence. John Howard Spicer, Manager of the Toronto area said:

> We are presently expanding the capacity of our plant to ensure that we can handle this new traffic adequately and also protect the existing traffic that movers on the line. This is one of our more important lines in Ontario and we must ensure that we can handle the traffic well. The new design for facilities will permit this.

How important "the trackage" is in the operation of the Commuter Service appears from what the same witness also said respecting the limited service provided to Hamilton.

> Q. Now, if this facility was constructed at Bayview, Mr. Spicer, would it in any way enable the Ontario Government utilizing C.N. facilities to operate more frequent commuter trains into Hamilton?
>
> A. Not without the expansion of the physical plant between Bayview and Burlington. The main problem we have at the present time is that the stretch of track between Burlington and Bayview is our highest traffic density portion of the entire line. Over that stretch of track we have all the traffic coming out of our hump yard, down the Halton Subdivision connecting into the Oakville Subdivision at Burlington. And of course we have all the trains going to London and Chicago and also down to Niagara Falls. So that over that short stretch of line we have an extreme density of trains. We don't feel that our existing plant has sufficient capacity to handle anything like the proposed commuter service. This is why we were forced to restrict our operations to two trains in each direction, the equivalent of our present commuter service to this area. To handle more trains than this or any significant more larger number of trains than this we would have to add lines, new rail lines, and of course they would have to be fully signalled, crossover networks would have to be put in to tie into the existing mainlines that we have through here. So this would be a very expensive part of the entire project and I believe we made an estimate on it that the cost of extending the commuter service through this approximately three-mile stretch would equal the entire capital cost of installing the commuter service on the rest of the area,...

On the basis of what has just been said as to the nature of the Commuter Service it remains to be seen whether it can be said to be a local work or undertaking within the meaning of head 10 of s. 92 of The British North America Act:

> 10. Local Works and Undertakings other than such as are of the following Classes:--
>
> (a) Lines or Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (c) Such Works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

It is, of course, admitted that the Canadian National Railways extends beyond the limits of the Province of Ontario. Therefore it is clear that this railway is subject to the jurisdiction of the Parliament of Canada. The only question is whether the Commuter Service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. This is clearly not possible. In Winner v. S.M.T. (Eastern) Ltd. [[1951] S.C.R. 887, 4 D.L.R. 529, 68 C.R.T.C. 41.], Rand J. said at p. 923:

> The analogy of railways and telegraphs was pressed upon us. These works are

> specifically named, and it is the clear implication that their total functioning was to be under a single legislature. But even they are limited to essential objects: Attorney General for British Columbia v. C.P.R. (1950 A.C. 122), in which a hotel operated by the company was held not to be part of the railway...
>
> Kellock J. said at p. 929:
>
> > The words, 'Lines of ships' and 'railways', as used in the section, no doubt include all traffic carried by such means, but that is because these undertakings are specifically mentioned and, being mentioned, include everything normally understood by those words...

In the Privy Council the judgment of this court was varied by taking a wider view of the operations included in an international or interprovincial bus service. No doubt was cast on the correctness of the views expressed in the passages just quoted (Attorney-General for Ontario v. Winner [[1954] A.C. 541 at 580, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225.]):

> Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

In the present case, the constitutional jurisdiction depends ont he character of the railway line not on the character of a particular service provided on that railway line. The fact that for some purposes the Commuter Service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the Commuter Service trains are part of the overall operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction. In Canadian Pacific Railway v. Notre-Dame de Bonsecours [[1899] A.C. 367.], Lord Watson said at p. 372:

> ...the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management,...

In Attorney General for Alberta v. Attorney-General for Canada [[1915] A.C. 363, 19 C.R.C. 153, 22 D.L.R. 501.], Lord Moulton said at p. 370:

> By s. 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations.

Hotels operated by railways were held to be separate undertakings only because they are not "a part of, or used in connection with the operation of a railway system". Canadian Pacific Railway

v. Attorney-General for British Columbia [[1950] A.C. 122 at 147, 1 W.W.R. 220, 64 C.R.T.C. 266, 1 D.L.R. 721.].

Counsel for appellant did not contend that the Commuter Service wholly escaped federal legislative jurisdiction, he conceded that for such matters as signals and safety, the commuter trains would be subject to the same rules as other trains. It is, of course, obvious that no railway could be operated with trains on the same line not governed by the same set of rules; as Davies J. said in City of Toronto v. Grand Trunk Railway Company [(1906), 37 S.C.R. 232 at 243.]:

> There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings.

Counsel for appellant also felt obliged to concede that the train crews would be subject to federal labour laws not provincial. This cannot be true on any other basis than that the commuter service is not a distinct undertaking but part of the railway operations from the physical point of view. The criterion for the application of the labour laws as well as for the application of the safety rules is the same: whether the undertaking connects the province with any other.

The decision in Luscar Collieries, Limited v. McDonald et al. [[1925] S.C.R. 460, 31 C.R.C. 267, 3 D.L.R. 225; [1927] A.C. 925, 3 W.W.R. 454, 4 D.L.R. 85.], shows that even a work which is of itself local, such as a provincial railway, may become a part of a federal undertaking by being put under the same management through an agreement with the latter. It thereby becomes part of a railway connecting the province with other provinces. There again the criterion of the jurisdiction is the fact that the operations are a part of the interprovincial system.

It must also be noted that in this last mentioned case, the order of the railway Board which was affirmed on appeal to this Court was, as in the present case, an order declaring only that the Board had jurisdiction.

Before concluding, two observations should be made.

In his reasons for judgment, the dissenting Commissioner said: "I am of the opinion the requirements of the Railway Act can be adequately and properly met by the simple process of the railway filing with the Board, as a tariff, the agreement which it has or will have with the Province and which must contain a full disclosure of the remuneration the railway will receive for the carriage and services it performs". It may well be that after considering all relevant circumstances the Board will come to the conclusion that it need not exercise its jurisdiction over the tolls charged to passengers and will find it sufficient to consider the adequacy of the charges made by the railway company to Ontario under the terms of the contemplated agreement. However, the question on this appeal is not whether the Board should in fact exercise its jurisdiction but whether it does have jurisdiction.

In the second place, it must be said that while at the hearing of this appeal the Court had the benefit of a thorough argument from both sides on the first question, no one appeared to oppose appellant on the constitutional issue. Counsel for the Board of Transport Commissioners declined to offer argument on that point in view of the Board's practice to refrain from dealing with such issues and the Attorney-General of Canada was not represented at the hearing. It is undesirable that this Court should be obliged to rule upon constitutional issues without the benefit of argument for both sides and the hope is expressed that, in the future, whenever the constitutional validity or application of federal legislation is in issue, this Court will always have the benefit of argument by counsel on behalf of the Attorney-General of Canada.

On the whole, we are of opinion that the appeal should be dismissed. There should be no order as to costs.

Appeal dismissed; no order as to costs.

Snopko v. Union Gas Ltd. (2010) ONCA 248

CITATION: Snopko v. Union Gas Ltd., 2010 ONCA 248
DATE: 20100407
DOCKET: C49977

COURT OF APPEAL FOR ONTARIO

Sharpe, MacFarland and Watt JJ.A.

BETWEEN

Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight

Plaintiffs (Appellants)

and

Union Gas Ltd. and Ram Petroleums Ltd.

Defendants (Respondents)

Donald R. Good., for the appellants

Crawford Smith, for the respondents

Heard: January 22, 2010

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated January 6, 2009.

Sharpe J.A.:

[1] This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

[2] The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

[3] In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

[4] In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty

payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

[5] In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement, Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

[6] On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

[7] Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

[8] The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

[9] Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

[10] Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

[11] Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the

appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

[12] On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

[13] The appellants advance the following claims against Union:

- *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
- *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
- *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
- *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
- *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

[14] The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the

agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

[15] In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

[16] Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

[17] The Act provides as follows with respect to the regulation of gas storage areas:

> **Gas storage areas**
>
> 36.1 (1) The Board may by order,
>
> (a) designate an area as a gas storage area for the purposes of this Act; or
>
> (b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).
>
> **Transition**
>
> (2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1) (a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2 (2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2 (3).

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional

> Court, in which case that section applies and section 33 of this Act does not apply.

[18] In addition, s. 19 of the Act provides as follows:

> **Power to determine law and fact**
>
> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

[19] The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

[20] The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

[21] While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

[22] Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

[23] The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

[24] I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of

the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

[25] The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

[26] In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

[27] Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

[28] In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

[29] By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

[30] In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

[31] As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

[32] For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

"Robert J. Sharpe J.A."
"I agree J. MacFarland J.A."
"I agree David Watt J.A."

RELEASED: April 07, 2010

Ontario Rental Housing Tribunal v. Metropolitan Toronto Housing Authority (2002), Docket: C36729 (O.C.A.)

DATE: 20020625
DOCKET: C36729

COURT OF APPEAL FOR ONTARIO

ABELLA, CHARRON and CRONK JJ.A.

B E T W E E N :	)	
	)	
ONTARIO RENTAL HOUSING TRIBUNAL	)	Susan J. Freeborn, for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
METROPOLITAN TORONTO HOUSING AUTHORITY	)	Lorenzo D. Policelli, for the Respondent Metropolitan Toronto Housing Authority
	)	
Respondent	)	
	)	
- and -	)	
	)	
SARAH GODWIN et al., being various Tenants of 30 Charles Street West, Toronto, as per the attached Schedule "A"	)	Tracy Heffernan, for the Respondents Sarah Godwin et al.
	)	
Respondents	)	Heard: March 13, 2002

On appeal from the order of Justice John O'Driscoll dated March 24, 2000, sitting as a single judge of the Superior Court of Justice (reasons reported at (2000), 50 O.R. (3d) 207).

CRONK J.A.:

1. [1] The issue in this case concerns the jurisdiction of the Ontario Rental Housing Tribunal (the "Tribunal") to permit the applicants in a multi-party residential tenancy hearing under s. 32(1) cl. (6) of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 (the "*Act*") to lead oral evidence from a group of tenants who formed a

subset of a larger number of tenants claiming rent abatements from their landlord, in lieu of calling each individual tenant to testify.

I. THE FACTS

2. [2] In the summer of 1999, the Metropolitan Toronto Housing Authority (now known as the Toronto Community Housing Corporation) (the "Authority") undertook repairs to the balconies and exteriors of apartments in a building in Toronto reserved as student family housing for the University of Toronto. Numerous tenants of the building alleged that the repairs resulted in disruption and inconvenience to them and interfered with the enjoyment of their rental premises. As a result, on July 20, 1999, the respondent Sarah Godwin and more than 300 other tenants (the "Tenants") applied under the *Act* for a determination that the Authority, as landlord, had substantially interfered with the reasonable enjoyment of their rental units and for a consequential rent abatement. Initially, the application was signed by Ms. Godwin, through her agent, with an attached list of names and telephone and apartment numbers of the other applicants.

3. [3] On September 16, 1999, counsel for the Tenants informed the Tribunal that the Tenants wished to present oral evidence in support of their claims against the Authority by calling eleven tenants to testify on behalf of all of the Tenants, instead of calling each involved tenant as a witness (the "Tenants' Proposal"). The Tenants also intended to rely upon documentary evidence, including surveys completed by approximately 160 of the Tenants. The Authority objected to the Tenants' Proposal, alleging that the Authority would be prejudiced by it. The Authority also sought an order from the Tribunal severing the applications to require a separate hearing concerning each application and asserted that the Tribunal lacked jurisdiction to combine the applications.

4. [4] By interim order dated September 24, 1999, a member of the Tribunal directed that the Tenants' applications be combined under s. 173 of the *Act* and that the Tenants' Proposal could proceed. That interim order also required the Tenants to provide the Authority and the Tribunal, prior to the hearing, with written notice of: a) the names of the eleven witnesses who would be testifying at the hearing, b) a description of the facts and evidence to which the witnesses would testify, and c) a list of signatures of those tenants who wished to be parties to the application. The Authority did not seek a stay or judicial review of that interim order.

5. [5] Thereafter, disclosure was made by the Tenants and the Authority of their respective anticipated evidence. By letter to the Tribunal dated November 16, 1999, the Authority asserted that the eleven tenants proposed to be called as witnesses by the Tenants were not representative of all of the Tenants and argued, accordingly, that *viva voce* evidence would be required at the hearing from all of the Tenants.

6. [6] When the hearing commenced on November 19, 1999, the Authority renewed its objection to the Tenants' Proposal on the basis that it, in effect, contemplated a representative application before the Tribunal and that the Tribunal lacked jurisdiction to permit such an application. That objection led to a further interim order by a member of the Tribunal, dated December 31, 1999 (the "Challenged Order"), by which the Tribunal ruled that it would not disallow the Tenants' Proposal.

7. [7] The Authority applied for leave under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 to seek judicial review of the Challenged Order before a single judge of the Superior Court of Justice on an urgent basis. By order dated March 24, 2000, Justice O'Driscoll granted leave, quashed the Challenged Order on jurisdictional grounds and prohibited the Tribunal from continuing the rent abatement hearing as a "representative proceeding". The Tribunal, with leave of this court, appeals that decision. On October 12, 2000, the Tenants settled their claims against the Authority through mediation. As a result, the hearing did not proceed. Nevertheless, they support the Tribunal on this appeal. For the reasons that follow, I would allow the appeal.

II. THE ISSUE

8. [8] The issue for determination on this appeal is whether the Tribunal had jurisdiction to make the Challenged Order. In order to decide this issue, it is necessary to review the statutory framework which governs the Tribunal's jurisdiction in connection with applications of the type commenced by the Tenants. In addition, in view of the reasons of the applications judge, it is necessary to consider wehther s. 13 of the *Act* gives rise to a right to cross-examine each of the Tenants, thereby effectively precluding the Tribunal from making the Challenged Order.

III. ANALYSIS

(1) The Statutory Framework

(a) The Tribunal's Authority Under the *Act*

9. [9] The Tenants' application was brought under s. 32(1) cl. (6) of the *Act*. By the combined operation of that section and s. 35(1)(b), a tenant may apply to the Tribunal for an order determining that a landlord has substantially interfered with the tenant's reasonable enjoyment of rental premises and, if the Tribunal makes such a determination, the Tribunal may order an abatement of rent, among other relief.

10. [10] As relevant here, the key provisions of the *Act* read as follows:

Tribunal's jurisdiction

157. (2) The Tribunal has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

....

Power to determine law and fact

162. The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act.

....

Committee shall adopt rules

164. (2) [The Rules and Guidelines Committee established under s. 164(1) of the *Act*] shall adopt rules of practice and procedure governing the practice and procedure before the Tribunal under the authority of this section and section 25.1 of the *Statutory Powers Procedure Act*.

Expeditious procedures

171. The Tribunal shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and to be heard on the matter.

Form of application

172. (1) An application shall be filed with the Tribunal in

the form approved by the Tribunal, shall be accompanied by the prescribed information and shall be signed by the applicant.

Application filed by agent

(2) An applicant may give an agent written authorization to sign an application and, if the applicant does so, the Tribunal may require the agent to file a copy of the authorization.

Combining applications

173. (1) A tenant may combine several applications into one application.

(2) Two or more tenants of a residential complex may together file an application that may be filed by a tenant if each tenant applying in the application signs it.

....

Add or remove parties

174. (2) The Tribunal may add or remove parties as the Tribunal considers appropriate.

....

Applications joined

185. (1) Despite the *Statutory Powers Procedure Act*, the Tribunal may direct that two or more applications be joined or heard together if the Tribunal believes it would be fair to determine the issues raised by them together.

(b)TheTribunal's Authority Under the*StatutoryPowers Procedure Act*

11. [11] By operation of s. 184(1) of the *Act*, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "*SPPA*") applies to tenant applications under s. 32(1) cl. (6).

12. [12] The Tribunal derives authority under the *SPPA* in diverse ways to determine its own procedures and to govern its own processes. Under the *SPPA*, in its discretion, the Tribunal may:

(1) make rules of general or particular application governing the practice and procedure before it (s. 25.1);

(2) determine its own procedures and practices and, for that purpose, may "make orders with respect to the procedures and practices that apply in any particular proceeding" (s. 25.0.1(a)) and "establish rules under s. 25.1" (s. 25.0.1(b));

(3) make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes (s. 23(1));

(4) admit as evidence at a hearing any oral testimony and any document or other thing relevant to the subject-matter of the proceeding, unless such evidence is inadmissible by reason of any privilege, the *Act* or any other statute, and may act on such evidence and exclude anything unduly repetitious (ss. 15(1) and (2)); and

(5) make interim decisions and orders and impose conditions on such decisions or orders (ss. 16.1(1) and (2)).

(c) The Tribunal's Rules of Practice

13. [13] In accordance with its powers under s. 164 of the *Act* and s. 25.1 of the *SPPA*, the Tribunal has developed Rules of Practice. Rule 2.2 provides that a member of the Tribunal "may decide the procedure to be followed for an application and may make specific procedural directions or orders at any time and may impose such conditions as are appropriate and fair". Section 2 of the *SPPA* requires that rules made under s. 25.1 receive a liberal interpretation to "secure the just, most expeditious and cost-effective determination of every proceeding on its merits". (See, to similar effect, Rule 1.1 of the Tribunal's Rules of Practice).

(d) Approach to Interpretation of the Tribunal's Jurisdiction

14. [14] The *Act* replaced the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7 (the "*LTA*"). It is agreed among the parties that the purpose of the *Act* is to consolidate and revise the law with respect to residential tenancies. As stated by the Minister of Municipal Affairs and Housing on introduction of the *Act* in the legislature for third reading, one of the clear goals of the *Act* is "to streamline administration and cut red tape to create a faster, fairer, less costly system of rent control" (J. Fleming, *Residential Tenancies in Ontario* (Toronto and Vancouver: Butterworths, 1998) at p. 12,

quoting from *Hansard*, Orders of the Day (18 November 1997) at 1600). To that end, the *Act* is tenant-centred. It is designed to protect tenants while easing rent control restrictions on landlords. (See J. Fleming, *Residential Tenancies in Ontario*, at pp. 8-10).

15. [15] The *Act* confers exclusive jurisdiction on the Tribunal to determine all applications under the *Act* and with respect to all matters in which jurisdiction is conferred on the Tribunal by the *Act* (s. 157(2)). It also vests power in the Tribunal to hear and determine questions of law and fact concerning matters within the Tribunal's jurisdiction under the *Act* (s. 162).

16. [16] In my view, the purpose of the *Act* is to encourage speedy, fair and efficient access to justice in residential tenancy matters. The *Act* provides direction to the Tribunal, in ss. 164 and 171, to achieve that legislative purpose. The intention of the legislature is stated in clear, unambiguous and mandatory terms in s. 171 of the *Act*. It is useful to again repeat the direction to the Tribunal provided by that section:

> 171. The Tribunal shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and to be heard on the matter.

17. [17] The *Act* also seeks to provide the Tribunal with the legal means necessary to accomplish the purpose of the legislation. Those means include wide discretionary powers over matters of procedure and process, including in connection with the joinder or removal of parties (s. 174(2)), the combining of applications (s.173), and the methods of determining questions arising in a proceeding (s. 171).

18. [18] In addition, because the *SPPA* applies to certain types of hearings held by the Tribunal, including a hearing of the type initiated here, the Tribunal's power over its own procedures and processes is confirmed by s. 25.0.1 of the *SPPA* and the rule-making authority conferred on the Tribunal under s. 164 of the *Act* and s. 25.1 of the *SPPA*. The Tribunal's discretion to formulate suitable procedures and directions for the hearing of applications, including tenant applications, is also enunciated in Rule 2.2 of the Tribunal's own Rules of Practice.

19. [19] The statutory framework that governs the Tribunal's jurisdiction in connection with applications, including applications for rent abatements, argues for an expansive view of the Tribunal's

jurisdiction over the presentation of evidence before the Tribunal. In my view, a liberal interpretive approach should govern interpretation of a remedial statute such as the *Act*, in a manner consistent with its tenant protection focus. In addition, both s. 2 of the *SPPA* and Rule 1.1 of the Tribunal's Rules of Practice contemplate that the rules of the Tribunal, including Rule 2.2, are to receive a liberal construction.

20. **(2) The Jurisdiction of the Tribunal in Relation to the Challenged Order**

21. [20] Section 19 of the *LTA* provided:

> Where more than one person has a common interest in respect of an application under this Part [Part IV] one or more of those persons may be authorized by a judge of the Ontario Court (General Division) to make or defend an application on behalf of or for the benefit of all.

22. [21] Section 119 of the *LTA* was contained in Part IV of that statute, which set out procedural provisions relating to residential tenants. Under s. 119, representative applications under the *LTA* by residential tenants were permitted, with leave of a judge of the Ontario Court (General Division). The current *Act* contains no provision directly analogous to s. 119 of the *LTA*. Conversely, and of significance in my view, the *LTA* contained no provisions analogous to s. 171 or s. 173 of the current *Act*.

23. [22] The applications judge noted the omission from the *Act* of a provision similar to s. 119 of the *LTA* and the unreported decision of Molloy J. in *Thompson v. Metropolitan Toronto Housing Authority* dated November 26, 1996 (Ont. Gen. Div.), in which claims for rent abatements by 125 tenants proceeded as a representative action under s. 119 of the *LTA*. He concluded:

> The power given to the Tribunal under s. 171 of the [*Act*] cannot be interpreted as bestowing jurisdiction upon the Tribunal to allow any type of proceedings so long as the method is the "most expeditious". Such an interpretation would render unnecessary the power of joinder under s. 173(2) of the [*Act*]. It would also negate the right of the responding parties under s. 13 to cross-examine each applicant regarding alleged losses.
>
> In *General Motors of Canada Limited v. Naken et al.*, [1983] 1 S.C.R. 72, 93, Estey J. (for the Court) pointed out that "joinder of actions" and "representative actions" were not synonymous. He said that a representative action/class

proceeding was "one stage beyond that contemplated" by a joinder of actions.

....

In summary, it is my conclusion that the Tribunal was without jurisdiction to make the [Challenged Order]. In the alternative, if the Tribunal was vested with the jurisdiction to consider the question, the Tribunal's impugned decision is patently unreasonable.

24. [23] In reaching those conclusions, the applications judge formed the view that the effect of the Challenged Order was to authorize a representative action of the type envisaged by s. 119 of the *LTA*. In deciding that leave should be granted to the Authority to seek judicial review on an urgent basis, the applications judge stated:

In my view, *whether the Tribunal had jurisdiction to allow a representative action is a bedrock issue* that should be decided before the Tribunal embarked on a four (4) day hearing. If the Tribunal lacked *such jurisdiction*, then the hearing would be fatally flawed and be a waste of time and money for all the parties.... [Emphasis added]

25. [24] That characterization of the jurisdictional question at issue formed the basis for the applications judge's subsequent reasoning. This appears from his references, after framing the jurisdictional question, to s. 119 of the *LTA*, former Rule 75 of the *Rules of Civil Procedure* (which similarly authorized representative actions), and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (which established in Ontario the right to initiate class proceedings).

26. [25] With respect, I do not agree that the Challenged Order authorized a representative action or application of the type envisaged by the statutory and regulatory authorities cited by the applications judge. I also do not agree with the Authority's submission before this court that the absence in the *Act* of a provision akin to s. 119 of the *LTA* establishes that the legislature intended to preclude approaches to the presentation of evidence in hearings before the Tribunal of the type envisaged by the Tenants' Proposal.

27. [26] Section 119 of the *LTA* authorized the bringing of a representative action. As noted by the applications judge, the term "representative action" is defined by Black's Law Dictionary, 7th ed. (St. Paul, Minn.: West Group, 1999) as a "class action" or a

"derivative action". The same dictionary defines the term "class action" as "a lawsuit in which a single person or a small group of people represent the interests of a larger group". Thus, "representing the interests of a larger group" is a defining element of a representative proceeding. That element was embodied in: a) s. 119 of the *LTA*, which referred to one or more persons making or defending an application "on behalf of or for the benefit of all", and b) in former Rule 75 of the *Rules of Civil Procedure*, which referred to one or more persons suing or being sued, or defending "on behalf of, or for the benefit of all". It is also integral to the concept of class proceedings under the *Class Proceedings Act, 1992* pursuant to which one or more persons may seek to pursue an action on behalf of many unnamed persons having a common interest.

28. [27] In this case, no tenant was authorized to act for, or represent the interests of, all of the Tenants. No tenant claimed to represent all of the Tenants. None of the proposed eleven witnesses was identified as a representative applicant on behalf of all of the Tenants. No order was sought from the Tribunal to appoint one or more tenants to represent the interests of all of the Tenants. To the extent that the claims of any of the Tenants extended beyond a common rent abatement, and involved compensatory relief personal to them, the normal demonstration of proof of the individual claimed losses would be required.

29. [28] Moreover, the Challenged Order did not purport to grant authorization for a representative application on behalf of, or to appoint a representative tenant for, unnamed persons. To the contrary, the Tribunal required that all tenants who wished to participate in the hearing, sign the application for rent abatement. By that procedure, the applicants' identities were disclosed to the Authority. The location of their rental units and the nature of the repairs carried out at each unit were facts within the knowledge of the Authority. Once disclosure of the names of all of the applicants was made, the Tribunal had clear jurisdiction under s. 173 of the *Act* to entertain one application which combined several tenant applications. The Tribunal member who made the Challenged Order stated:

> According to Ms. Summers Interim Order issued on September 24, 1999 this hearing will proceed as a combined multi-tenant application under Subsection 173(2) of the [*Act*]. Her interim order required that all applicants ensure that they have provided their signatures to this application. Therefore, the Landlord's submission that the

form of this proceeding constitutes a representative action that is not authorized by the [*Act*], is erroneous.

30. [29] The Tenants' Proposal, at its core, concerned the suggested method by which the Tenants intended to lead *viva voce* evidence on common issues. To the extent that the circumstances or losses of individual tenants varied, and were uncommon, the Challenged Order protected against prejudice to the Authority. The Challenged Order states:

> The Landlord is not prejudiced by this approach [the Tenants' Proposal] because overall the abatement will reflect the average experience. Also, to ensure this result, it is open to the Landlord to call evidence to refute that the evidence submitted by the Tenants is in fact representative and to call other Tenants as witnesses.
>
> A list of all witnesses and a description of the facts/evidence to which they will testify shall be provided to the other party and the Tribunal at least two weeks prior to the hearing date.

31. [30] The Challenged Order approved an expeditious procedural method for the introduction of oral evidence at a multi-party hearing so as to facilitate determination by the Tribunal of the questions arising in the Tenants' combined application. It did so in a manner which provided for procedural and adjudicative fairness to the Authority by ensuring that disclosure was made to the Authority of the case it would be required to meet and by preserving the Authority's right to call further evidence to contest the Tenants' evidence. The Challenged Order was thus a direct response to the requirements of the mandatory direction set out in s. 171 of the *Act*.

32. [31] Without approval by the Tribunal of the Tenants' Proposal, the Tenants would have been obliged to lead *viva voce* evidence at the hearing from numerous, perhaps hundreds, of the Tenants. Alternatively, multiple hearings to adjudicate each tenant's claim would have been necessary. Under either scenario, lengthy and repetitious evidence would have been required, at great cost, on many common issues. Such an impractical result, in my view, would offend s. 171 and the remedial purpose, goals and tenant protection focus of the *Act* as a whole. The *Act* seeks to avoid a multiplicity of similar proceedings. Section 15 of the *SPPA* empowers the Tribunal to exclude unduly repetitious evidence.

R.J.R. MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

Source: http://scc.lexum.org/en/1994/1994scr1-311/1994scr1-311.html

RJR -- MacDonald Inc. *v.* Canada (Attorney General), [1994] 1 S.C.R. 311

RJR -- MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada,
the Canadian Cancer Society,
the Canadian Council on Smoking and Health, and
Physicians for a Smoke-Free Canada ***Interveners on the application for interlocutory relief***

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada,
the Canadian Cancer Society,
the Canadian Council on Smoking and Health, and
Physicians for a Smoke-Free Canada **Interveners on the application for interlocutory relief**

Indexed as: RJR -- MacDonald Inc. *v.* Canada (Attorney General)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

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

applications for interlocutory relief

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) -- Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

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

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

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

Held: The applications should be dismissed.

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

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

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

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

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

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

and third stages of the *Metropolitan Stores* test.

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

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

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

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

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

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

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

Cases Cited

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

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 24(1).

Code of Civil Procedure of Québec, art. 523.

Constitution Act, 1867, s. 91.

Fisheries Act, R.S.C. 1970 c. F-14.

Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).

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

Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(*a*).

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17 (*f*), 18.

Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following *Tobacco Products Control Regulations, amendment*, SOR/93-389.) In *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284.

Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed.

Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.

Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

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

Colin K. Irving, for the applicant RJR -- MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Leb{oe}uf*, for the respondent.

W. Ian C. Binnie, *Q.C.*, and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

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

Sopinka and Cory JJ. --

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory

legislation which will soon be heard by this Court.

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

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

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

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

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

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

of 60 days following a judgment validating the Act.

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

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

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

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

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

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

II. Relevant Statutory Provisions

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

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

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

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

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

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

III. Courts Below

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

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

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

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

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

Court of Appeal (on the application for a stay)

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

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

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

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

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

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

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

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

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

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

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

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

IV. Jurisdiction

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

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

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

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

Supreme Court Act

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

Rules of the Supreme Court of Canada

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

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

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

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

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible

pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

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

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

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

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

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

resolution of the dispute the enforcement of the regulations would be stayed.

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

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

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act,* S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms.*

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

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

(i) There is a serious constitutional issue to be determined.

(ii)Compliance with the new regulations will cause irreparable harm.

(iii)The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

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

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

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

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

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

Are there, then, special considerations or tests which must be applied by the courts when *Charter*

violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

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

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

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

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

B. *The Strength of the Plaintiff's Case*

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

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties

involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

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

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

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

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

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

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

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

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

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

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

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

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by

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

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

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

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

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

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

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

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs

of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

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

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

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

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

C. *Irreparable Harm*

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

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely

affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

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

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

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

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

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

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

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

E. *Summary*

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

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

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

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

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

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

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

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

B. *Irreparable Harm*

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

expense.

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

C. *Balance of Inconvenience*

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

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

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

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

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

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

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

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

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

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

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

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

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

Applications dismissed.

Solicitors for the applicant RJR -- MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

___* See Erratum, [1994] 1 S.C.R. iv

Setana Sports N.A. Ltd. v. Score Television Network Ltd. (2009) CarswellOnt 4584 (Spies. J.)

2009 CarswellOnt 4584,

C

2009 CarswellOnt 4584

Setanta Sports NA Ltd. v. **Score** Television Network Ltd.

SETANTA SPORTS NA LTD., ROGERS SPORTSNET INC., and 68788482 CANADA INC. carrying on business as **SETANTA** SPORTS (CANADA) (Plaintiffs) and THE **SCORE** TELEVISION NETWORK LTD. (Defendant)

Ontario Superior Court of Justice

Spies J.

Heard: July 24, 2009
Judgment: July 31, 2009
Docket: CV-09-382682

Counsel: Timothy Pinos, Casey M. Chisick, Peter J. Henein for Plaintiffs / Moving Parties

R. Paul Steep, Thomas N.T. Sutton, Junior Sirivar for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Remedies --- Injunctions — Availability of injunctions — Injunctions in specific contexts — Intangible property rights — Miscellaneous

Broadcast rights — Plaintiff S (NA) Ltd., subsidiary of SH Ltd., ran US sports channel, and plaintiff SNet Inc. ran Canadian channel — Defendant STN Ltd. provided sports programming — In 2006, S (NA) Ltd. and defendant entered into letter agreement (LA) giving S (NA) Ltd. exclusive Canadian sublicense to broadcast high profile soccer games (games) for three seasons beginning in 2007 and SH Ltd. signed LA as S (NA) Ltd.'s guarantor — S (NA) Ltd. and Canadian broadcaster, R Ltd., entered into joint venture creating Canadian subsidiary to carry on business as S (Canada), 687 Inc. — S (NA) Ltd. sublicensed rights under LA to plaintiffs, SNet Inc. and 687 Inc. who broadcast games for one season — In June, 2009, SH Ltd. went into receivership and defendant wrote S (NA) Ltd. alleging insolvency was breach of fundamental term of LA justifying LA's immediate termination, offered SNet Inc. and 687 Inc. potentially reduced broadcast rights at higher fee, and returned S (NA) Ltd.'s $951,833 payment for final season — Plaintiffs brought motion for interlocutory injunction — Injunction granted — If plaintiffs paid defendants $951,833 by August 5, 2009, defendant was restrained from terminating or otherwise interfering with plaintiffs' rights under LA — From fact that LA did not require SH Ltd.'s direct participation, did not refer to anyone's solvency or insolvency or contain tests therefor for validity of guarantee, it could be concluded that S (NA) Ltd. did not breach LA, so defendant did not have right to terminate and S (NA) Ltd. therefore met threshold test of establishing strong prima facie case — Plaintiffs would all likely suffer irreparable harm if injunction not granted — While there was no direct evidence 687 Inc. and SNet Inc. would suffer decline in viewership if unable to broadcast games, significant drop in all plaintiffs' subscribers could be reasonably inferred from loss of popular games —

Losses could not be calculated as decline in viewership might be attributable to other factors — It was reasonable to infer ripple effect on viewership of other programming and likely irreparable, unquantifiable drop in ad revenue — Negative publicity and effect on plaintiffs' relationships with other program suppliers and distributors would likely cast perception that all plaintiffs other than S Net Inc. were not financially viable, jeopardizing business in both countries and causing unquantifiable losses — When purporting to terminate LA, defendant no doubt knew it would result in S (NA) Ltd. breaching sub-sublicence agreements, causing SNet and 687 Inc. losses — Balance of convenience favoured granting injunction.

Remedies --- Injunctions — Procedure on application — Parties — Proper party

Plaintiff S (NA) Ltd., subsidiary of SH Ltd., ran US sports channel, and plaintiff SNet Inc. ran Canadian channel — Defendant STN Ltd. provided sports programming — In 2006, S (NA) Ltd. and defendant entered into letter agreement (LA) giving S (NA) Ltd. exclusive Canadian sublicense to broadcast high profile soccer games (games) for three seasons beginning in 2007 and SH Ltd. signed LA as S (NA) Ltd.'s guarantor — S (NA) Ltd. and Canadian broadcaster, R Ltd., entered into joint venture creating Canadian subsidiary to carry on business as S (Canada), 687 Inc. — S (NA) Ltd. sublicensed rights under LA to plaintiffs, SNet Inc. and 687 Inc. who broadcast games for one season — In June, 2009, SH Ltd. went into receivership and defendant wrote S (NA) Ltd. alleging insolvency was breach of fundamental term of LA justifying LA's immediate termination, offered SNet Inc. and 687 Inc. potentially reduced broadcast rights at higher fee, and returned S (NA) Ltd.'s $951,833 payment for final season — Plaintiffs brought motion for interlocutory injunction to prevent defendant from acting on termination notice, and issue arose as to whether SNet Inc. and 687 Inc. had standing to claim injunctive relief — SNet Inc. and 687 Inc. had standing to claim injunctive relief — Basis of SNet Inc. and 687 Inc.'s claim was not breach of contract but alleged inducement of breach of agreements or interference with contractual relations, so there was no basis for defendant's submission that motion should be dismissed on grounds of lack of privity of contract between S Net Inc. and 687 Inc. and S (NA) Ltd. — There was no known principle of law suggesting injunctive relief was not available to plaintiff apprehending irreparable harm from defendant's tortious conduct — Fact that claims made by SNet Inc. and 687 Inc. sounded in tort was not automatic bar to injunctive relief sought.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Strength of applicant's case

Plaintiff S (NA) Ltd., subsidiary of SH Ltd., ran US sports channel, and plaintiff SNet Inc. ran Canadian channel — Defendant STN Ltd. provided sports programming — In 2006, S (NA) Ltd. and defendant entered into letter agreement (LA) giving S (NA) Ltd. exclusive Canadian sublicense to broadcast high profile soccer games (games) for three seasons beginning in 2007 and SH Ltd. signed LA as S (NA) Ltd.'s guarantor — S (NA) Ltd. and Canadian broadcaster, R Ltd., entered into joint venture creating Canadian subsidiary to carry on business as S (Canada), 687 Inc. — S (NA) Ltd. sublicensed rights under LA to plaintiffs, SNet Inc. and 687 Inc. who broadcast games for one season — In June, 2009, SH Ltd. went into receivership and defendant wrote S (NA) Ltd. alleging insolvency was breach of fundamental term of LA justifying LA's immediate termination, offered SNet Inc. and 687 Inc. potentially reduced broadcast rights at higher fee, and returned S (NA) Ltd.'s $951,833 payment for final season — Plaintiffs brought motion for interlocutory injunction to prevent defendant from acting on termination notice, and issue arose as whether plaintiffs met applicable test for granting injunction — Since S (NA) Ltd. did not breach term of LA, defendant did not have right to terminate LA and S (NA) Ltd. therefore met threshold test of establishing strong prima facie case on merits — By signing LA, SH Ltd. guaranteed S (NA) Ltd.'s obligation under LA but assumed no direct obligation of performance — Only reasonable inference to be drawn was that SH Ltd. signed agreement only as guarantor — LA, though, did not expressly refer to any party's solvency or insolvency, and contained no solvency or financial assets test for validity of guarantee — Guarantee remained in place by operation of law as bankruptcy of guarantor did not discharge guarantor and there was no principle of insolvency law that voided guarantee due to guarantor's insolvency — S (NA) Ltd. did not breach any term of LA and was prepared to pay full amount owing under balance of LA — LA placed onus on S (NA) Ltd. to secure SH Ltd.'s guarantee — There was no evidence to support submission that defendant's agreement to sublicence was dependent on ensuring direct participation of SH

Ltd. — There was no precedent for proposition that term could be implied permitting termination without notice of performance contract on guarantor's insolvency when guarantor had no performance obligations under contract — When defendant purported to terminate LA, defendant no doubt knew this would likely result in S (NA) Ltd. being in breach of sub-sublicence agreements and that SNet and 687 Inc. would suffer damages as result.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Irreparable harm

Plaintiff S (NA) Ltd., subsidiary of SH Ltd., ran US sports channel, and plaintiff SNet Inc. ran Canadian channel — Defendant STN Ltd. provided sports programming — In 2006, S (NA) Ltd. and defendant entered into letter agreement (LA) giving S (NA) Ltd. exclusive Canadian sublicense to broadcast high profile soccer games (games) for three seasons beginning in 2007 and SH Ltd. signed LA as S (NA) Ltd.'s guarantor — S (NA) Ltd. and Canadian broadcaster, R Ltd., entered into joint venture creating Canadian subsidiary to carry on business as S (Canada), 687 Inc. — S (NA) Ltd. sublicensed rights under LA to plaintiffs, SNet Inc. and 687 Inc. who broadcast games for one season — In June, 2009, SH Ltd. went into receivership and defendant wrote S (NA) Ltd. alleging insolvency was breach of fundamental term of LA justifying LA's immediate termination, offered SNet Inc. and 687 Inc. potentially reduced broadcast rights at higher fee, and returned S (NA) Ltd.'s $951,833 payment for final season — Plaintiffs brought motion for interlocutory injunction to prevent defendant from acting on termination notice, and issue arose as to whether plaintiffs were likely to suffer irreparable harm if injunction was not granted — Plaintiffs were likely to suffer irreparable harm if injunction was not granted — Without ability to broadcast games, plaintiffs' subscriber numbers would fall and, given games' popularity, it was reasonable to infer significant drop — While there was no direct evidence that 687 Inc. and SNet Inc. would suffer decline in viewership if unable to broadcast games, reasonable inference could be drawn that that would be inevitable result — Nor would it be possible to calculate loss given inability to attribute decline to absence of games or other reason like economic downturn — It was reasonable to infer ripple effect on viewership of other programming and likely irreparable, unquantifiable drop in ad revenue — 687 Inc. was just building goodwill with audience and advertisers and had no track record to analyze because games were only broadcast one year — Fact that games were small part of SNet Inc.'s programming hours was not determinative, as unquantifiable nature of likely loss was important — Publicity from termination and effect on relationship with other program suppliers and distributors would likely cast perception that both 687 Inc. and S (NA) Ltd. were not financially viable, damaging reputation and jeopardizing Canadian and US business, causing unquantifiable losses, although same was unlikely to occur with respect to SNet Inc. given association with R Ltd. — Nor was S (NA) Ltd.'s possible insolvency to be considered as source of irreparable harm as that could be attributed to SH Ltd.'s insolvency.

Guarantee and indemnity --- Guarantee — Contract of guarantee — Interpretation — Contracts of guarantee distinguished from original promise

Plaintiff S (NA) Ltd., subsidiary of SH Ltd., ran US sports channel, and plaintiff SNet Inc. ran Canadian channel — Defendant STN Ltd. provided sports programming — In 2006, S (NA) Ltd. and defendant entered into letter agreement (LA) giving S (NA) Ltd. exclusive Canadian sublicense to broadcast high profile soccer games (games) for three seasons beginning in 2007 and SH Ltd. signed LA as S (NA) Ltd.'s guarantor — S (NA) Ltd. and Canadian broadcaster, R Ltd., entered into joint venture creating Canadian subsidiary to carry on business as S (Canada), 687 Inc. — S (NA) Ltd. sublicensed rights under LA to plaintiffs, SNet Inc. and 687 Inc. who broadcast games for one season — In June, 2009, SH Ltd. went into receivership and defendant wrote S (NA) Ltd. alleging insolvency was breach of fundamental term of LA justifying LA's immediate termination, offered SNet Inc. and 687 Inc. potentially reduced broadcast rights at higher fee, and returned S (NA) Ltd.'s $951,833 payment for final season — Plaintiffs brought motion for interlocutory injunction to prevent defendant from acting on termination notice, and issue arose as whether plaintiffs met applicable test for granting injunction — Since S (NA) Ltd. did not breach term of LA, defendant did not have right to terminate LA and S (NA) Ltd. therefore met threshold test of establishing strong prima facie case on merits — By signing LA, SH Ltd. guaranteed S (NA) Ltd.'s obligation under LA but assumed no direct obligation of performance — Only reasonable inference to be drawn was that SH Ltd. signed agreement only

as guarantor — LA, though, did not expressly refer to any party's solvency or insolvency, and contained no solvency or financial assets test for validity of guarantee — Guarantee remained in place by operation of law as bankruptcy of guarantor did not discharge guarantor and there was no principle of insolvency law that voided guarantee due to guarantor's insolvency — S (NA) Ltd. did not breach any term of LA and was prepared to pay full amount owing under balance of LA — LA placed onus on S (NA) Ltd. to secure SH Ltd.'s guarantee — There was no evidence to support submission that defendant's agreement to sublicence was dependent on ensuring direct participation of SH Ltd. — There was no precedent for proposition that term could be implied permitting termination without notice of performance contract on guarantor's insolvency when guarantor had no performance obligations under contract — When defendant purported to terminate LA, defendant no doubt knew this would likely result in S (NA) Ltd. being in breach of sub-sublicence agreements and that SNet and 687 Inc. would suffer damages as result.

Contracts --- Construction and interpretation — Implied terms — Term — Other terms.

Contracts --- Performance or breach — Collateral contracts.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Balance of convenience.

Cases considered by *Spies J.*:

Bank of British Columbia v. Turbo Resources Ltd. (1983), 148 D.L.R. (3d) 598, 1983 CarswellAlta 112, 27 Alta. L.R. (2d) 17, 46 A.R. 22, 23 B.L.R. 152 (Alta. C.A.) — referred to

Double Hitch Enterprises Ltd. (Receiver of) v. National Hockey League (1994), 1994 CarswellOnt 2399 (Ont. Gen. Div. [Commercial List]) — considered

Drouillard v. Cogeco Cable Inc. (2007), 2007 C.L.L.C. 210-034, 2007 CarswellOnt 2624, 2007 ONCA 322, 223 O.A.C. 350, 86 O.R. (3d) 431, 282 D.L.R. (4th) 644, 57 C.C.E.L. (3d) 14, 48 C.C.L.T. (3d) 119 (Ont. C.A.) — referred to

Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd. (2005), 2005 CarswellOnt 1954, 6 B.L.R. (4th) 182 (Ont. S.C.J.) — referred to

Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd. (1961), [1962] 2 Q.B. 26, [1962] 1 All E.R. 474, 2 Ll. L. Rep. 478 (Eng. C.A.) — considered

Irwin Toy Ltd. v. General Sportcraft Co. (1996), 1996 CarswellOnt 2637, 9 O.T.C. 349 (Ont. Gen. Div.) — considered

J. LeBar Seafoods Inc., Re (1981), 1981 CarswellOnt 175, 38 C.B.R. (N.S.) 64 (Ont. Bktcy.) — referred to

Kanda Tsushin Kogyo Co. v. Coveley (1997), 96 O.A.C. 324, 1997 CarswellOnt 80 (Ont. Div. Ct.) — referred to

Liquor Depot at Riverbend Square Ltd. v. Time for Wine Ltd. (1997), 10 R.P.R. (3d) 217, [1997] 8 W.W.R. 656, 203 A.R. 382, 1997 CarswellAlta 572, 52 Alta. L.R. (3d) 84 (Alta. Q.B.) — distinguished

Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp. (2009), 2009 CarswellOnt 2280 (Ont. S.C.J.) — considered

Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada (2003), 25 C.P.R. (4th) 417, 65 O.R. (3d) 30, 17 C.C.L.T. (3d) 149, 227 D.L.R. (4th) 458, 172 O.A.C. 202, 2003 CarswellOnt 1944 (Ont. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 2003 CarswellOnt 2038 (Ont. C.A.) — referred to

Syncrude Canada Ltd. v. Hunter Engineering Co. (1989), (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 92 N.R. 1, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 1 S.C.R. 426, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 3 W.W.R. 385, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 57 D.L.R. (4th) 321, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 35 B.C.L.R. (2d) 145, 1989 CarswellBC 37, 1989 CarswellBC 703 (S.C.C.) — considered

TDL Group Ltd. v. 1060284 Ontario Ltd. (2001), 2001 CarswellOnt 3304, 150 O.A.C. 354 (Ont. Div. Ct.) — referred to

Welch & Pridmore Systems Ltd. v. Townson & Alexander Management Consultants Inc. (1992), 45 C.P.R. (3d) 500, 1992 CarswellOnt 756 (Ont. Gen. Div.) — considered

674834 Ontario Ltd. v. Culligan of Canada Ltd. (2007), 2007 CarswellOnt 1564, 28 B.L.R. (4th) 281 (Ont. S.C.J.) — referred to

1323257 Ontario Ltd. v. Hyundai Auto Canada Corp. (2009), 55 B.L.R. (4th) 265, 2009 CarswellOnt 88 (Ont. S.C.J.) — referred to

Words and phrases considered

mandatory injunction

. . . [A]n order that establishes a new right never agreed to is mandatory, while an order requiring the parties to act in accordance with an agreement is prohibitive.

Words and phrases considered

prohibitive injunction

. . . [A]n order that establishes a new right never agreed to is mandatory, while an order requiring the parties to act in accordance with an agreement is prohibitive.

MOTION by broadcasters for interlocutory injunction to prevent network from terminating sublicence agreement.

***Spies J.*:**

Overview

1 The plaintiffs bring this motion for an interlocutory injunction to prevent the defendant, The Score Network Television Network Ltd. ("The Score"), from acting upon a termination notice sent on June 25, 2009, unilaterally terminating a sublicence agreement (also referred to as the "letter agreement") with Setanta Sports North America Ltd. ("Setanta NA").[FN1] The letter agreement grants an exclusive sublicence to Setanta NA to broadcast certain F.A. Premier League ("FAPL" or "Premier League") soccer games in Canada for three seasons commencing with the 2007/2008 season. The FAPL is a high profile English soccer league with a global audience.

2 The sublicence agreement is in the form of a letter of agreement entered into between The Score and Setanta NA on December 1, 2006. Setanta NA's parent company at the time, Setanta Holdings Ltd. ("Setanta Holdings") also signed the letter agreement and the parties understood that Setanta Holdings thereby provided a guarantee of all of Setanta NA's obligations under the contract. There is a dispute as to whether Setanta Holdings is, in law, a party to the letter agreement.

3 Setanta NA further sublicensed its rights under the letter agreement to the plaintiff Rogers Sportsnet Inc. ("Sportsnet"), an indirect subsidiary of Rogers Communications Inc., and to the plaintiff 6878482 Canada Inc., carrying on business as Setanta Sports (Canada) ("Setanta Canada"), a joint venture of Setanta NA and Rogers Broadcasting Limited. Rogers is the majority shareholder of that venture.

4 There is no dispute that apart from some relatively minor delays in Setanta NA making some of the payments to The Score as they came due under the letter agreement, that Setanta Canada and Sportsnet broadcast the FAPL games without any concern or complaint by The Score for the first two seasons of the letter agreement.

5 On June 23, 2009, Setanta Holdings went into receivership. Two days later, The Score sent a letter to Setanta NA and Setanta Holdings taking the position that the insolvency of Setanta Holdings was a breach of a fundamental term of the letter agreement and that accordingly the sublicence was terminated with immediate effect.

6 The 2009/2010 FAPL season, which is the final season governed by the letter agreement, begins on August 15, 2009. That season will end in July 2010. There is no dispute that the decision on this motion will effectively determine the rights of the parties to this action with respect to who has control of the rights to broadcast this upcoming FAPL season of soccer games in Canada.

The Issues

7 An injunction is an extraordinary equitable remedy and the plaintiffs must establish on a balance of probabilities that they have met the applicable test for granting such relief. In this case there is not only a dispute on whether the plaintiffs have met all of the elements of the test, but there is also an issue as to which threshold for granting an injunction should apply. The central legal issues can be summarized as follows:

(a) Do the plaintiffs Sportsnet and Setanta Canada have standing to claim injunctive relief?

(b) Do the plaintiffs have to establish only a serious issue to be tried on the merits or must they meet the higher threshold of a strong *prima facie* case?

(c) Will any of the plaintiffs suffer irreparable harm if the injunction is not granted?

(d) Where does the balance of convenience lie?

(e) Is the undertaking of the plaintiffs as to damages sufficient?

Factual Background

8 Before turning to the issues, I will summarize some of the factual background of this dispute.

The Parties

9 The plaintiff, Setanta NA, owns and operates Setanta Sports, a television channel launched in the United States in 2005 to broadcast live and tape-delayed sports events, primarily soccer and rugby. The plaintiff, Sportsnet, is an indirect subsidiary of Rogers Communications Inc. Sportsnet owns and operates Rogers Sportsnet, a Canadian English-language cable television sports specialty television channel. The plaintiff, Setanta Canada, is the product of a joint venture agreement, described below, between Setanta NA and Rogers Broadcasting Limited. The defendant, The Score, operates an English-language specialty service devoted primarily to the broadcast of a variety of sports-related programming.

The Premier League

10 The FAPL is an English professional league for soccer clubs and is at the top of the English soccer league system as England's primary soccer competition. It is the world's most watched sporting league and the world's most lucrative soccer league.

11 The Score acknowledges that television has played a major role in the history of the Premier League. The FAPL sells its television rights on a collective basis, typically in a competitive bidding process. The process for the sale of Premier League rights for the three seasons beginning in 2010 has now begun.

The Score's Licence with the Premier League

12 On November 30, 2006, The Score was awarded the exclusive right to broadcast all of the Premier League games in Canada for the three seasons beginning with the 2007-2008 season. These rights were acquired by The Score following a competitive bidding process in which The Score was successful over its competitors including Sportsnet.

13 The Score had initially responded to the FAPL's Invitation to Tender with a bid for the Canadian broadcast rights to three games in each of three seasons but after being selected as a "Short-listed Bidder," The Score was informed that the FAPL intended to combine two live packages into one, such that The Score would have to bid on a much larger number of games or not bid at all. Around this time, Roger Hall, the Managing Director of Setanta NA, approached The Score and indicated that, if The Score was the successful bidder, Setanta would be interested in sublicensing a significant number of the live games for broadcast on a new Setanta-branded premium subscription channel in Canada.

The Sublicence Agreement

14 On December 1, 2006, The Score entered into the FAPL Agreement with Setanta NA. Under the FAPL Agreement, The Score granted an exclusive sublicence to Setanta NA of all the rights that it had licensed from the FAPL, save for retaining the rights to one live FAPL match per week (the "FAPL Rights").

15 In consideration of the FAPL Rights, Setanta NA agreed to pay The Score USD$3,150,000 (net of applicable

taxes), less USD$600,000 for the rights retained by The Score to be paid in accordance with a payment schedule.

16 Paragraph 6 of the letter agreement provides as follows:

> Setanta [NA] will provide The Score with a guarantee of Setanta Sports Holdings Ltd., its parent company, pursuant to which Setanta Sports Holdings Ltd. will unconditionally guarantee all of the obligations of Setanta [NA] under this letter of agreement and under any long-form sublicense agreement as described below.

17 It is significant that under this term of the letter agreement, Setanta NA agreed to provide The Score with a guarantee of Setanta Holdings. As I have already stated the parties agree that by signing the letter agreement Setanta Holdings thereby provided the required guarantee. There is a dispute, however, as to whether or not Setanta Holdings is a party to the letter agreement, which I will come to.

18 Although the letter agreement provides that it represents a binding legal agreement between the parties, it also contemplated the execution of a long-form sublicence agreement. The Score provided a first draft of the long-form agreement in the beginning of June 2009, two and one half years after execution of the letter agreement. That draft contained a draft form of guarantee for Setanta Holdings. Neither agreement, however, was finalized and signed before this dispute erupted. As the letter agreement provides that it shall not be amended except by written agreement of the parties, there is no doubt that it is the operative agreement for the determination of the rights of the parties.

The Setanta Canada Joint Venture

19 In the negotiations and discussions between Setanta NA and The Score in 2006, The Score indicated that it wanted to enter a joint venture with Setanta NA to operate a Setanta-branded specialty service in Canada. Setanta NA discussed such a joint venture not only with The Score, but also a number of other Canadian entities, including Rogers.

20 In June 2007, The Score learned that Setanta NA intended to enter into a joint venture with Rogers. Although there is no dispute that Setanta NA had no obligation, contractual or otherwise, to enter into a joint venture with The Score, there can be no doubt that The Score was displeased by the decision of Setanta NA to instead enter into a joint venture with Rogers. However, there is no dispute that this was not prohibited by the terms of the letter agreement.

21 On October 2, 2007, Setanta NA formally entered into the joint venture agreement with Rogers to operate a new specialty service that would be devoted primarily to the coverage of soccer, cricket and rugby. Under the joint venture agreement, the new service would be operated by Setanta Canada.

22 On October 17, 2007, the CRTC granted an application by Rogers for a broadcasting licence to operate a new English-language Category 2 specialty service that would be devoted primarily to the coverage of soccer, cricket and rugby. The new service was to be called Sportsnet 2. Rogers' application to the CRTC was made with the Setanta Canada joint venture in mind.

23 In December 2007, with the joint venture agreement already executed, Rogers made its second application to the CRTC, this time on behalf of Setanta Canada, for a licence to operate a service to be known as Setanta Canada under the same conditions previously approved in relation to Sportsnet 2. In a decision dated July 15, 2008, the CRTC approved this further application. Setanta Canada was launched in September, 2008.

24 Although The Score was aware of the joint venture between Setanta NA and Rogers before the first FAPL game was broadcast by either Setanta Canada, no objection was raised, nor was it ever suggested that The Score

wanted to end the FAPL Agreement because of the involvement of Rogers. The Score was aware that Rogers had a majority interest in Setanta Canada.

Setanta NA's Sublicence Agreements with Sportsnet and Setanta Canada

25 Setanta NA has entered into the following agreements to sublicense the FAPL Rights that it has licensed from The Score:

(a) a Programme Licensing Agreement, dated August 15, 2008, with Rogers and Setanta Canada (the "Setanta Canada Agreement"); and

(b) a Television License Agreement, effective as of August 1, 2007, with Sportsnet (the "Sportsnet Agreement").

26 There is no dispute that Setanta NA was entitled to enter into these two further sublicensing agreements without the prior approval of The Score.

27 Under the Setanta Canada Agreement, which was entered into after the first season, Setanta NA agreed to sublicense a variety of programming, including the FAPL Rights, to Setanta Canada for exploitation on its specialty service, on certain specific terms, for a term of 10 years from the effective date of that agreement (subject only to the expiration of the licence term for particular programming).

28 Under the Sportsnet Agreement, which was in place for the first season of the letter agreement, Setanta NA granted to Sportsnet a licence to broadcast 31 Saturday morning FAPL matches, and one additional FAPL match on the last weekend of the season, via a variety of nonstandard television formats in Canada for three years commencing at the start of the 2007/2008 FAPL season and ending at the end of the last weekend of the 2009/2010 FAPL season. The licence is exclusive to Sportsnet in relation to the live exhibition of each match. In consideration of these rights, Sportsnet is required to pay CDN$300,000 per season, payable on August 1st, to Setanta NA.

Broadcast of FAPL Matches by Setanta Canada and Sportsnet

29 During the 2007/2008 season, before the formation of Setanta Canada and Setanta NA and Rogers obtaining a CRTC licence, the FAPL Rights granted to Setanta NA were exploited primarily by making individual matches available on a pay-per-view basis through various cable providers throughout Canada. Sportsnet also aired one FAPL match per week, with each match airing twice, once live and once as a replay.

The Insolvency of Setanta Holdings

30 On June 23, 2009, without any prior notice to The Score, Setanta Holdings announced the appointment of a private receiver to wind-up its affairs as an insolvent company. It appointed Deloitte as administrator of Setanta Holdings and certain of Setanta's subsidiary companies, such as Setanta Media, which provided online content for all of Setanta's text services and broadband broadcasting. Setanta Holdings' operations and broadcasts in the United Kingdom also ceased that day. Setanta Holdings took this step because it was insolvent and, despite significant efforts by its founders Messrs. O'Rourke and Ryan, had been unable to raise additional financing to fund its operations.

The Termination Notice and the Events that Followed

31 By letter dated June 25, 2009, The Score purported to terminate the FAPL Agreement. In the letter, The

Score asserted that the insolvency of Setanta Holdings, and "its consequent inability to guarantee the obligations of [Setanta NA]," constituted the breach of a "fundamental term" of the FAPL Agreement and justified the termination of that agreement "with immediate effect."

32 Also on the same day, very shortly after the termination letter was received by Setanta NA, The Score contacted Sportsnet and Setanta Canada and offered to license the FAPL Rights directly to them on terms similar to the FAPL Agreement, except that The Score would be entitled to broadcast two games each week, rather than one, during the 2009/2010 season; the licence fee for the 2009/2010 season would be increased, Sportsnet would be required to enter into an agreement with The Score in relation to FAPL broadcast rights beyond the current season, pursuant to which, if The Score were to bid successfully for those rights, Sportsnet would continue to sublicense one Saturday match per week, whereas, if Sportsnet were the successful bidder, The Score would be entitled to sublicense two Sunday matches per week.

33 By letter dated July 3, 2009, Setanta NA's legal counsel, advised The Score that, in the view of Setanta NA, there was no basis for The Score's purported termination of the FAPL Agreement and that by signing the letter agreement, Setanta Holdings provided its guarantee of the obligations of Setanta NA under the letter agreement as required by clause 6 and stated "that obligation remains in place." Setanta NA's counsel also advised The Score that Setanta NA had taken steps to wire to The Score the full licence fee payable in relation to the final season of the FAPL Agreement. Accordingly, the amount of USD$951,833.00 was wired to The Score by Setanta Canada, on behalf of Setanta NA, on July 3, 2009. The Score rejected the payment wired by Setanta Canada and also returned the payment by Setanta Canada of an invoice from The Score for the next installment owing under the letter agreement.

The Acquisition of Setanta NA by Sabloss

34 Prior to the appointment of the administrator, Setanta NA was a wholly-owned subsidiary of Setanta Holdings. On or around June 25, 2009, a new private company, Sabloss Limited ("Sabloss"), purchased the shares of Setanta NA from the administrator. The plaintiffs have put no financial statements for Sabloss or any other information of merit concerning Sabloss before the Court despite the fact that Sabloss' owners were previously involved with Setanta Holdings (and continued to be through their private receiver) and are regularly in contact with Roger Hall, the Managing Director International of Setanta NA who has made them aware of these proceedings.

35 The Score submitted that the strongest adverse influence should be drawn from the plaintiffs' failure to adduce any evidence from Mr. O'Rourke, Mr. Ryan or anyone else at Setanta Holdings or Sabloss. Given the conclusions I have come to, drawing such an adverse inference would not impact on my decision.

Do the Plaintiffs Sportsnet and Setanta Canada Have Standing to Claim Injunctive Relief?

36 The Score submits that as a preliminary matter, this Court must determine whether Sportsnet and Setanta Canada have standing to seek the relief sought on this motion. The plaintiffs seek to restrain The Score from terminating the letter agreement between it and Setanta NA and there is no doubt that there is no privity of contract between either Sportsnet or Setanta Canada and The Score which would give rise to a cause of action for breach of contract. Accordingly, The Score submits that neither can seek an injunction restraining The Score from terminating an agreement to which they are not parties, and that this motion, insofar as it is advanced on behalf of Sportsnet and Setanta Canada, should be dismissed on this basis alone.

37 I do not accept this submission as the basis for the claim made by Sportsnet and Setanta Canada as set out in the Statement of Claim is not breach of contract but rather an allegation that by purporting to terminate the letter agreement, with the knowledge of the further agreements between Setanta NA and Sportsnet and Setanta Canada, The Score has sought to induce a breach of those agreements by Setanta NA or in the alternative, by its wrongful

act, interfered with the contractual relations between Setanta NA and each of Sportsnet and Setanta Canada.

38 Mr. Sutton, who made this submission on behalf of The Score, relies on the case of *Liquor Depot at Riverbend Square Ltd. v. Time for Wine Ltd.*[FN2], but in that case the party in question, the Liquor Depot, had no privity of contract with the defendant and had only pleaded breach of contract. That is clearly not the case before me.

39 Mr. Sutton also submitted that he is not aware of any case where an injunction had been granted to restrain the torts of either inducing breach of contract or wrongful interference with contractual relations. That of course does not mean it cannot be done. I know of no principle of law that would suggest that injunctive relief is not available if a plaintiff apprehends irreparable harm from tortuous conduct by a defendant. In my view the fact the claims made by Sportsnet and Setanta Canada sound in tort is not an automatic bar to the injunctive relief that they seek.

Do the Plaintiffs Have to Establish Only a Serious Issue to Be Tried on the Merits or Must They Meet the Higher Threshold of a Strong Prima Facie Case?

40 The test for granting an interlocutory injunction as set out in the well known case of *RJR-MacDonald*[FN3] requires the Court to consider the following three factors:

(a) whether the plaintiff has presented a serious issued to be tried,

(b) whether the plaintiff would suffer irreparable harm if the remedy for the defendant's misconduct were left to be awarded at trial; and

(c) whether the balance of convenience favours the plaintiff.

41 On the first branch of this tripartite test, the court may raise the threshold so as to consider whether the plaintiff has a "strong *prima facie* case". The defendant submits that this higher threshold has been applied in two separate circumstances that are relevant to this case: namely, in the case of mandatory injunctions and where the proposed injunction would, in effect, be the same as a final order. It is submitted that either one of these circumstances would, on its own, warrant the application of the higher threshold. The plaintiffs submit that the applicable standard is a serious question to be tried, as opposed to a *prima facie* case but take the position that they meet either threshold.

Are the plaintiffs claiming a mandatory injunction?

42 The parties agree that the standard of a *prima facie* case is applied where the relief sought by the moving party is mandatory, as opposed to prohibitive, in nature. Simply put, an order that establishes a new right never agreed to is mandatory, while an order requiring the parties to act in accordance with an agreement is prohibitive. Mr. Steep argues that without Rogers' financial support, neither Setanta NA nor Setanta Canada would be in a financial position to seek injunctive relief and that the proposed injunction would effectively create a new contractual right in favour of Setanta NA as it would allow it to transfer Setanta Holding's guarantee obligations under the letter agreement to a third party, namely Rogers, when no such right exists under the contract and no right to transfer is available without the consent of The Score.

43 I do not accept this submission. Although the role of Rogers may be relevant to other aspects of this motion, the plaintiffs have not sought to support or transfer the guarantee given by Setanta Holdings to Rogers. I will consider the merits of the plaintiffs' claim in light of the terms of the letter agreement. On that basis, in my view, the order sought by the plaintiffs is clearly prohibitive in nature. They seek to prevent The Score from unilaterally terminating the letter agreement. The courts have repeatedly held that orders seeking to prevent one party from terminating a contract are prohibitive in nature.[FN4]

Does the Relief Sought by the Plaintiffs have the Effect of a Final Order?

44 As Justice Perell stated in *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*,[FN5] the higher threshold of showing a strong *prima facie* case is also required where:

> the outcome of the interlocutory injunction, practically speaking, will make proceeding to trial pointless for one party or when the plaintiff's right can only be exercised immediately or not at all.

45 That is clearly this case in that the parties have conceded that my decision will, for all practical purposes, decide the issue save for any lingering question of damages. If I grant the injunction, my decision from The Score's perspective will have the effect of a final judgment. The final season of soccer games begins in only two weeks and the season will be over in a year's time. Even an expedited trial could not be arranged until well into the final season.

46 Accordingly, I find that the plaintiffs must demonstrate a strong *prima facie* case, not just a serious question to be tried. In his authoritative text *Injunctions and Specific Performance*[FN6], Justice Robert Sharpe states that the question of whether the plaintiff has shown a strong *prima facie* case "probably means no more than, if the court had to finally decide the matter on its merits, on the basis of the material before it, would the plaintiff succeed?" I agree with the observation of Perell J. in the *Quizno's* case, however, that this does not mean that the plaintiffs must actually prove their case.[FN7]

Do the Plaintiffs Have a Strong Prima Facie Case?

The Enforceability of the Guarantee

47 Turning to the merits of the plaintiffs' claims, as a preliminary comment I should say that without the evidence of the parties, in my view it would not be clear that by signing the letter agreement Setanta Holdings had in fact given its guarantee. It did not expressly sign the letter agreement as guarantor, and paragraph 6 of the agreement requires Setanta NA to provide The Score with a guarantee. This ambiguity, however, can be resolved by having regard to the evidence of the parties, and in particular the admission of Mr. Levy who conceded in cross-examination that when Setanta Holdings signed the letter agreement The Score took it that they were giving their guarantee to the agreement as a party thereto.

48 Accordingly, I am satisfied that at the very least, by signing the letter agreement Setanta Holdings guaranteed all of the obligation of Setanta NA under the letter agreement as provided for in paragraph 6 of that agreement. My conclusion in this regard is confirmed by the fact that The Score did not ask Setanta NA to provide a guarantee from Setanta Holdings for two and a half years following the execution of the letter agreement. The first draft of the long form agreement did contain a separate guarantee to be executed by Setanta Holdings but this would be expected given the parties intended from the outset to enter into a long form sublicence agreement.

49 I accept Mr. Pinos' submission that as a matter of law this guarantee Setanta Holdings gave when it signed the licence agreement remains in place in that as a matter of law, the bankruptcy of a guarantor does not discharge the guarantor.[FN8] Although Mr. Steep argued that there is no evidence as to how the guarantee has been dealt with in the receivership proceedings, in my view that is not the relevant consideration when considering its enforceability. I know of no principle of insolvency law that would void the guarantee as a result of the insolvency of the guarantor.

50 Accordingly, a determination of the merits of the plaintiffs' case depends in the first instance on a determination of the central issue of whether or not The Score was entitled to terminate the sublicence without notice in light of the insolvency of Setanta Holdings.

Is There a Right to Terminate?

51 Mr. Pinos submits that there is no basis in the letter agreement for the termination of the agreement by The Score as a consequence of the insolvency of Setanta Holdings as guarantor. As he points out, the letter agreement makes no express reference at all to the solvency or insolvency of any party, including Setanta Holdings, and contains no solvency or financial assets test for the validity of the guarantee.

52 In response, The Score submits that paragraph 5 of the letter agreement requires Setanta NA to:

> ...comply with such other terms and conditions as apply to The Score as set out in the FAPL Tender and any long-form agreement required pursuant thereto, including but not limited to, all license terms, conditions (and payment commitments) on terms and conditions of any standstill agreement.

53 Section 14.1 of The Score's "long-form agreement" with the Premier League provides:

> 14 Termination
>
> 14.1 This Agreement may be terminated with immediate effect by either party by written notice to the other party given at any time after the occurrence of any of the following events:...
>
> 14.1
>
> (b) if any meeting of creditors of such other party is held or any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement as defined in the *Insolvency Act* 1986) is proposed or entered into by or in relation to such other party;
>
> (c) if a supervisor, receiver, administrator, administrative receiver or other encumbrancer takes possession of or is appointed over or any distress, execution or other process is levied or enforced (and is not discharged within seven days) upon the whole or any substantial part of the assets of such other party;
>
> (d) if such other party ceases or threatens to cease to carry on business or is or becomes unable to pay its debts within the meaning of Section 123 of the *Insolvency Act* 1986;
>
> (e) if a petition is presented, or a meeting is convened for the purpose of considering a resolution, for the making of an administration order, the winding-up, bankruptcy or dissolution of such other party; or
>
> (f) if an event which is analogous to any of the foregoing under the laws of the Territory shall occur in relation to such other party.
>
> In the case of a notice of termination given by the Premier League, the expression the "other party" (as used in this Clause 14.1) shall include the Guarantor, Setanta and the Setanta Sub-Licensee and a breach of the material terms hereof shall include a breach of the Guarantee by the Guarantor and a breach of this Agreement which is caused by an act or omission on the part of Setanta or the Setanta Sub-Licensee.[emphasis added by The Score]

54 The Score submits that the letter agreement incorporated by reference the provisions of Section 14 such that

The Score would stand in the shoes of the Premier League vis-à-vis its sublicence with Setanta Holdings and Setanta NA and that Setanta Holding's insolvency and Setanta NA's perilous financial situation clearly entitled The Score to terminate the sublicence agreement.

55 I do not accept this submission for two reasons. First of all, Section 14 of the long form agreement between The Score and the Premier League sets out in what circumstances the parties to that agreement may terminate that agreement and the reference to "Guarantor" is a reference to the parent company of The Score. Furthermore, the language in paragraph 14 relied upon by The Score only applies in the event of a termination by the Premier League. The letter agreement only required Setanta NA to comply with such other "terms and conditions as apply to The Score" in its long-form agreement with the Premier League. In my view, the incorporation of that agreement by reference into the letter agreement does not mean that The Score can step in the shoes of the Premier League to take advantage of the Premier League's rights to terminate its agreement with The Score in certain circumstances. I note, as well, that The Score did not rely upon its agreement with the Premier League as a basis for its termination of the sublicence nor is there any evidence that the Premier League has taken the position that there has been any breach on the part of Setanta NA.

56 In the absence of an express term in the letter agreement justifying the termination, I turn to whether or not a term can be implied permitting termination of the letter agreement in light of the insolvency of Setanta Holdings.

57 Mr. Steep relies upon the case of *Double Hitch Enterprises Ltd. (Receiver of) v. National Hockey League*, where Farley J. noted:

> The court will imply a term into a contract where it is necessary in a commercial sense to give commercial efficacy to the contract, or where the term is one which the parties must obviously have intended ...Where reliability of service is an implied term and the party performing the service becomes insolvent, the courts have held that in such circumstances, it is reasonable for the innocent party to conclude that reliability of service has been seriously impaired ... It would seem reasonable to me that the Joint Venture had grounds to terminate DH's services for promotion when it found that it was hopelessly insolvent ...[FN9]

58 In the *Double Hitch* case, however, the party who had become insolvent was the party with primary responsibility for performing the service, which in this case by analogy would be Setanta NA. Furthermore, Double Hitch was already in breach in that it had failed to post a significant letter of credit. Although The Score makes some compelling arguments as to Setanta NA's financial distress, Setanta NA has not breached any term of the letter agreement and, in fact, is prepared to ensure that the full amount owing under the balance of the letter agreement is paid into court or directly to The Score as a term of securing an injunction. Furthermore, the letter agreement imposes no direct obligation of performance on Setanta Holdings.

59 The Score has argued that it agreed to sub-license the rights to Setanta NA on the express condition that Setanta Holdings also be a party to the sub-license agreement and that Setanta Holdings directly and unconditionally participate in the letter agreement. This is disputed by the evidence of Mr. Hall who further asserts that Setanta NA did not understand that the requested guarantee related to anything more than Setanta NA's financial obligations.

60 The evidence filed on behalf of The Score does not support its position that Setanta Holdings was a party to the letter agreement, let alone a party that would directly participate in the operational aspects of the agreement. The term "the parties" is not defined in the letter agreement. Mr. Steep argues that given the term is plural that it must refer to Setanta NA and Setanta Holdings as they were the two parties that signed the letter accepting the terms of the agreement as set in the letter by The Score. This, however, is not a reasonable interpretation of the letter agreement. First of all the letter sets out obligations of The Score to the agreement. Furthermore, there are no obligations set out that apply directly to Setanta Holdings. In fact, in reference to the guarantee of Setanta Holdings, the onus is on Setanta NA to secure the guarantee. Had the parties intended that Setanta Holdings be a party to the agreement,

paragraph 6 would simply have provided that Setanta Holdings was thereby providing its guarantee. The only reasonable inference to be drawn from the language of the letter agreement is that when Setanta Holdings signed the agreement, it did so as guarantor and not a party. I note that this is how the draft long-form agreement was prepared by The Score. It clearly provides that only The Score and Setanta NA are parties, with Setanta Holdings providing a separate guarantee.

61 I have considered whether or not such a term that Setanta Holdings was to be a direct participant in the letter agreement should be implied. The Score relies upon the history of the negotiation of the letter agreement and submits that The Score would not have entered into the letter agreement without the direct participation and unconditional guarantee of Setanta Holdings. Having reviewed the evidence in support of this position, it is clear that once The Score knew that the contracting party was to be Setanta NA that it immediately asked for a guarantee of the parent, Setanta Holdings. It is also clear that the guarantee was to apply to all of Setanta NA's obligations, not only the financial ones. I do not accept, however, that there is any evidence to support the submission that The Score's agreement to the sublicence was dependent on ensuring the direct participations of Setanta Holdings. Although Mr. Steep has advanced some compelling arguments why The Score may have wanted Setanta Holdings' direct participation at the time, the terms of the letter agreement do not reflect such an intention. The only obligation that applies indirectly to Setanta Holdings in the letter agreement is the obligation of Setanta NA to provide the guarantee of Setanta Holdings. For the reasons already stated, in my view Setanta Holdings was not even a party to the letter agreement.

62 In my view what is most significant given the issues in this case, is the fact that the letter agreement does not impose any obligations on Setanta Holdings to perform any aspect of the agreement in the event there has been no breach by Setanta NA. Its role is limited to that of a guarantor of the obligations of Setanta NA. Counsel did not provide any precedent for the proposition that a court could imply a term permitting termination without notice of a performance contract upon the insolvency of a guarantor, when that guarantor has no direct performance obligations under the contract.

63 I have also considered whether or not The Score could properly terminate the letter agreement on the basis that the insolvency of Setanta Holdings was a fundamental breach of agreement entitling The Score to terminate the agreement. The law concerning fundamental breach was considered by Farley J. in the *Double Hitch* case. He referred to the decision of *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*[FN10] and the principle that a breach which entitles the innocent party to terminate the contract is one that goes "so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words, is the whole contract frustrated?" In determining whether or not a breach goes to the root of the contract, all the circumstances of the commercial setting of the contract must be considered.[FN11] The plaintiffs have also provided me with the Supreme Court of Canada's decision in *Syncrude Canada Ltd. v. Hunter Engineering Co.*,[FN12] and our Court of Appeal's decision of *Shelanu Inc. v. Print Three Franchising Corp.*[FN13] for the proposition that for there to be a fundamental breach of contract, one party to the contract must have failed to perform a primary obligation which has deprived the other party, in this case The Score, of substantially the whole benefit of the contract.

64 All of this analysis, however, presumes a breach of the contract. In this case, having found that the insolvency of Setanta Holdings does not breach either an express or implied term of the contract, and given Setanta NA has not breached it obligations under the letter agreement, there has been no breach of the sublicence and there can, therefore, be no fundamental breach. I should add that even if I had found that the insolvency of Setanta Holdings constituted a breach of the letter agreement, given there has been no breach by Setanta NA of any of the performance terms of the agreement and given the tender of the balance of the amount owing, I would not have found that such a breach has deprived The Score of substantially the whole of the contract.

Conclusion of Strong Prima Facie Case

65 Accordingly, although the concern The Score has as to the future viability of Setanta NA may be reasonable,

as discussed in some detail below, since Setanta NA has not breached any of the terms of the letter agreement, I have concluded that the plaintiffs have established a strong *prima facie* case that The Score did not have the right to terminate the sublicence as a result of the insolvency of Setanta Holdings.

66 Having come to this conclusion, I find that Setanta Holdings has established a strong *prima facie* claim for breach of contract. As for the other plaintiffs, as there is no privity of contract, I must consider the merits of their tort claims for inducing breach of contract and wrongful interference with contractual relations.

67 The elements of the tort of inducing breach of contract were set out and considered by our Court of Appeal in *Drouillard v. Cogeco Cable Inc.*[FN14] There is no dispute that Sportsnet and Setanta Canada have valid and enforceable contracts with Setanta NA and that at the time of the purported termination The Score was aware of these contracts. There can also be no doubt that when The Score purported to terminate the letter agreement that it must have known that this would likely result in Setanta NA being in breach of the sub-sublicence agreements and that Sportsnet and Setanta Canada would suffer damages as a result. Accordingly, I find that Sportsnet and Setanta Canada have a strong *prima face* case for inducing breach of contract.

68 I come to the same conclusion with respect to the claim of Sportsnet and Setanta Canada based on the tort of wrongful or intentional interference with economic relations, as described by the Court of Appeal in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* [FN15]. Again, in terms of intent, it is sufficient if The Score was in some measure directed against these plaintiffs even if its predominant purpose was to advance its own interests. Having found a strong *prima facie* case for breach of contract, I also conclude that these plaintiffs have a strong *prima facie* case in establishing that the interference by The Score in the sub-sublicences was by unlawful means.

69 For these reasons, I conclude that each of the plaintiffs have met the initial threshold of establishing a strong *prima facie* case on the merits.

Will Any of the Plaintiffs Suffer Irreparable Harm If the Injunction Is Not Granted?

70 The plaintiffs submit that The Score's purported termination of the letter agreement is likely to cause irreparable harm to each of the plaintiffs. In summary, it is submitted that given that the new FAPL season is commencing in a matter of weeks, the loss of this high-profile and popular programming - which both the plaintiffs and the defendant acknowledge has "marquee" value - will cause the plaintiffs to suffer not only a loss of profits, but also severe damage to their reputation and goodwill with advertisers, program suppliers, distributors and, especially, their audiences and expose Setanta NA to the consequences of the breach of its agreements with Setanta Canada and Sportsnet.

71 Setanta Canada contracts with local cable or satellite companies to make its station available to them and then the local cable or satellite companies will contract with the viewers who wish to subscribe to include Setanta Canada in their cable or satellite packages. These subscriptions cost $15.00 on a month by month basis and can be cancelled at any time. At present, Setanta Canada receives remuneration based on 70,000 subscribers, of which Setanta Canada retains 50% of the subscription price. On any given broadcast day, Setanta Canada airs anywhere from three to seven FAPL matches. The games that are currently being broadcast are replays of classic games. Sportsnet continues to air one FAPL match per week during the regular season, with each match airing twice, once live and once as a replay.

72 Both Setanta Canada and Sportsnet have been promoting the new FAPL season through advertising and on the Setanta Canada website. Once the insolvency of Setanta Holdings became known in the industry, Setanta Canada sent out an e-mail communiqué to all of its distributors, assuring them that the state of Setanta's international operations would have no effect on Setanta Canada or its program schedule.

Breach of Setanta NA's contractual obligations

73 There is no doubt that the termination of the letter agreement would render Setanta NA unable to meet its obligations under the Sportsnet Agreement as that agreement only deals with the FAPL programming. As for the Setanta Canada agreement, Mr. Hall testified that if Setanta NA lost the Canadian broadcast rights for the Premier League games, it is possible that that would not be a breach entitling Rogers to terminate the Setanta Canada Agreement. Mr. Hinds, however, testified that if Setanta NA could not deliver the Canadian broadcast rights for the Premier League games to Setanta Canada that would amount to a serious breach of the agreement.

74 Although the FAPL programming is only part of what is licensed under the Setanta Canada agreement, it is clearly a significant program under that agreement since the FAPL content was identified by Setanta NA and Rogers as "must-bid programming" in relation to which Setanta NA is required to bid for the exclusive Canadian television rights for use on the Setanta Canada service. In my view, given the representations and warranties in the Setanta Canada Agreement, it is at least probable that the termination of the sublicence would expose Setanta NA to likely termination of the agreement by Setanta Canada.

75 Without setting out in detail the consequences that might flow from an inability on the part of Setanta NA to deliver the final season of the Premier League soccer games, it seems likely that at a minimum Setanta NA would have an obligation to credit or refund a portion of the licence fees payable under these agreements. In addition Setanta Canada's agreement includes an indemnity from Setanta NA for any losses arising from breach of the agreement and it can assert other remedies in law and equity. As for the Sportsnet Agreement, although Sportsnet expressly waived any claim for damages, losses, loss of profits or other indirect loss of profits or other indirect loss which could be asserted as a result of Setanta NA withdrawing the FAPL programming, it is not clear that this provision would govern in these circumstances as the termination of the letter agreement is not one of the events listed justifying Setanta NA withdrawing the programming.

76 In any event, exposure Setanta NA has to Setanta Canada and Sportsnet for refunding licence fees and even damages is clearly quantifiable and so the only possible source of irreparable harm to Setanta NA must flow from the fact of the likely termination of those agreements, which I will come to.

77 The defendant submits that no irreparable harm can or will befall either Setanta Canada or Sportsnet in that in their respective contracts with Setanta NA, both of these parties recognized that there was a risk that Setanta NA would be unable to sub-license Premier League game broadcasts to them and both agreements built in remedies in the event that at any time during these relationships Premier League games were not available. It is submitted that the parties thereby expressly bargained for the risk that these broadcast rights might not be available. In the case of Setanta Canada, it is further submitted that as its agreement is for a ten year period, both Setanta NA and Rogers knew that there was a risk that Setanta NA might not always be successful in securing these rights for some or all of the remaining eight years. It is also submitted that if these parties failed to provide sufficient remedies in their agreements to protect themselves against that which they knew may happen, it was at their own peril.

78 I do not accept these submissions. First of all, the fact that Setanta Canada and Sportsnet both negotiated remedies in the event of a breach of their agreements by Setanta NA does not mean that they could not suffer irreparable harm as a result of the early and unlawful termination of the letter agreement by The Score and the resulting inability of Setanta NA to provide the programming that they contracted for. The suggestion that they are disentitled to relief because they failed to negotiate sufficient remedies, in my view is without merit particularly if I find the harm they will suffer is irreparable. Their only remedy then would be an injunction against Setanta NA which would be pointless. As I matter of law I have found that they have a valid cause of action against The Score in these circumstances, giving them a remedy in damages. The issue is whether or not they are also entitled to injunctive relief.

79 The defendant has also argued what I would characterize as a mitigation of damages argument in that if Rogers was entitled to terminate the Setanta Canada Agreement on the basis of Setanta NA losing the Canadian broadcast rights for Premier League games, Rogers would then be free from its obligation to bid for other programming free from any obligation to Setanta Canada. That, of course, would require Rogers to deal directly with The Score and it would in my view, be totally speculative to presume that it could enter into a commercially reasonable agreement with The Score.

80 In summary then I will proceed to consider whether or not Setanta NA could suffer irreparable harm from the termination of the letter agreement, apart from the consequences it would face under either the Setanta Canada Agreement and the Sportsnet Agreement and in addition consider the evidence of harm to Setanta Canada and Sportsnet resulting from the inability to broadcast the next season of the FAPL programming.

Damage to audience relationships

81 The plaintiffs rely on market research conducted by Setanta NA that they submit shows that, for about 80% of Setanta NA subscribers, FAPL programming is the main reason for subscribing. Mr. Steep submits that for a number of reasons this evidence is wholly unreliable and should be given no weight. First of all, at the outset of his cross-examination, Mr. Hinds corrected this evidence by indicating the 80% figure was for all of Setanta NA's subscribers in Canada, the United States and the Caribbean and that he did not have separate statistics for just Canada. Furthermore, this was an in-house survey done solely by Setanta NA and Setanta Canada did not participate in the survey process at all. The survey was an e-mail based survey and Mr. Hinds was unable to identify the size of the sample and he did not know how many Canadian subscribers, if any, responded to the survey.

82 I accept Mr. Steep's submissions with respect to the survey evidence and will therefore not take it into account. Having said that, although the evidence tendered by the plaintiffs must not be speculative, I can draw reasonable inferences from the facts.

83 Mr. Hinds in his affidavit asserts that FAPL programming is the most important programming element on Setanta Canada. On cross-examination he conceded that before making this statement he did not undertake any financial analysis. He went on to state that an analysis was done in 2006-2007 when the decision to go ahead with Setanta Canada but he did not review that analysis before swearing his affidavit but added that he also relied on his own knowledge of the importance of the Premier League in making the statement.

84 There can be no doubt that the ability to broadcast Premier League soccer games is a very important commercial commodity. As Mr. Levy of The Score put it, factors including the quality of Premier League soccer and the public's appetite for the game have seen the value of the Premier League's TV rights soar. The Score broadcast one two-hour soccer game a week for the 2005-2006 seasons and when cross-examined, Mr. Levy admitted that in that year viewership was very loyal and fan feedback was positive in that fans returned fairly consistently on a weekly basis to watch the games. Because of the conditions of its licence. The Score must be very selective in terms of live event programs that they telecast. It has described the Premier League games as a marquee property; what Mr. Levy admitted as the NHL of soccer. For The Score, Mr. Levy conceded that viewership increased marginally, and that as a high profile product there were other benefits outside of the two hour program such as a lead-in to other programming, persuading viewers to remain tuned to the station after the games are complete and the generation of greater advertising revenue for the station. Recognizing the value of the rights to broadcast FAPL games, The Score has sought and no doubt will, if the injunction is not granted, seek to license the rights to these soccer games under a more lucrative deal than they entered into with Setanta NA. The importance of the FAPL Rights is also reinforced by the fact that FAPL content was identified by Setanta NA and Rogers as "must-bid programming" as I have already stated.

85 As for Sportsnet, it is only entitled to broadcast one game per week and so it cannot be said the Premier

League content is at all central to its business. Sportsnet submits, however, that it has invested considerable effort, and a good deal of on-air promotional time, into establishing itself as a premier destination in Canada for professional soccer coverage. Mr. Levy deposed that two years ago Sportsnet went from broadcasting three Premier League games per week down to one per week and actually experienced an increase in pre-tax profit. This, however, was on a company wide basis and presumably the increase in profit could have been as a result of any number of reasons.

Damage to advertiser relationships

86 The plaintiffs submit that the inability of Sportsnet and Setanta Canada to broadcast FAPL matches during the 2009/2010 season would create audience confusion and jeopardize important relationships with advertisers. It is submitted that a television channel's relationships with its audience and its advertisers are highly valuable commodities that are built slowly, over an extended period of time. It is also submitted that these games are also valuable as a lead-in to other programming, persuading viewers to remain tuned to the station after the games are complete, which in turn, generates greater advertising revenue for the station.

Damage to reputation and relationships with program suppliers and distributors

87 Mr. Hinds asserts that the television industry is very small and the loss of program rights is a serious matter that tends to be a subject of conversation throughout the industry. I do not know if this evidence was challenged but I accept that word gets around quickly in this industry-The Score apparently knew almost immediately of the private receivership of Setanta Holdings although it complains that it was not given notice. The insolvency of Setanta Holdings must now be well known in the industry. Mr. Hinds has deposed that suppliers and distributors will come to the mistaken conclusion that Setanta Canada lost the FAPL Rights because Setanta NA could not meet its financial obligations. They are likely to question the viability of Setanta Canada as a licensee which could compromise Setanta Canada's ability to secure rights to other programming in the future.

88 According to Messrs. Hinds and Hall, the same concern is true for Setanta NA. In its case, the perception that Setanta NA is unable to meet its financial obligations would have serious implications for its U.S. business, which is the primary vehicle for rights and distribution agreements. The reputational effect of its losing the FAPL Rights would compromise its ability to secure other rights on a pan-North American basis, which in turn would threaten the viability of its entire North American operation. Further, they allege that the relationships between Setanta Canada, Setanta NA, and the distributors who carry their signals throughout North America would be seriously compromised by the loss of the FAPL Rights in that these distributors would be less interested in the Setanta signal without the FAPL content and they would also be likely to question the ongoing viability of Setanta NA and Setanta Canada as programming services. It is alleged that the effect on Setanta's reputation (presumably a reference to both Setanta NA and Setanta Canada) would be very significant.

89 Mr. Hinds further deposes that these concerns are exacerbated by the fact that Setanta Canada is still in its infancy as a specialty service and is still struggling to build goodwill with program suppliers and, especially, with distributors. He asserts that once a distributor loses confidence in Setanta Canada and decides not to continue to offer it, that relationship will be very difficult to restore.

Potential breach of Setanta Canada's conditions of licence

90 In his affidavit Mr. Hinds alleges that losing access to Premier League content would be particularly damaging to Setanta Canada in that a condition of its licence imposed by the CRTC is that its programming be "devoted primarily to the coverage of soccer, cricket and rugby" and, in particular, that it include "exclusive international soccer matches from professional leagues and tournaments." It is submitted that there is no guarantee that these conditions could be met without the content that is made available pursuant to the FAPL Agreement and that The Score's

conduct could thus cause Setanta Canada to breach a condition of licence.

91 Although the position taken by Mr. Hinds appears to be arguable, I am not satisfied that the evidence in support is sufficiently reliable to be considered. In cross-examination Mr. Hinds confirmed that he has had no direct conversations with the CRTC as to whether or not Setanta Canada would be in violation of its licence in the event that it did not have Premier League games to broadcast and he is not an expert in broadcasting licensing. Furthermore, a copy of Setanta Canada's broadcasting licence was not produced.

Conclusion on Irreparable Harm

92 In *RJR-MacDonald* the Supreme Court described the "irreparable harm" requirement as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other....Examples of the former include instances where one party will be put out of business by the court's decision...; where one party will suffer permanent market loss or irrevocable damage to its business reputation... (at paras. 58-59)

93 Although I do not accept that the plaintiffs have established that Setanta Canada's viewership will fall by 80% if it loses the Premier League programming, considering all of the evidence I do have, I have no difficulty in concluding that without the ability to broadcast those soccer games that the number of subscribers will fall. Given the nature of Premier League soccer as described by all parties, and the fact that Setanta Canada has the right to broadcast the vast bulk of these soccer games in Canada, it is reasonable to infer that the drop will be significant. Although the numbers would be much smaller, given that Sportsnet is only entitled to broadcast one game per week, it is reasonable to assume that the inability to broadcast Premier League soccer games would adversely affect the number of its viewers. In this regard I refer again to the fact that The Score experienced an increase in viewership, albeit marginal, from showing one Premier League soccer game per week, and after the purported termination sought to keep two games rather than one for itself.

94 In reaching these conclusions I must emphasize that I have considered the fact that in the absence of the survey, there is no direct evidence that Setanta Canada and Sportsnet will suffer a decline in viewership if they are unable to broadcast Premier League programs. For the reasons I have already given, I am however of the view that that will be inevitable. Although evidence as to irreparable harm must be clear and not speculative,[FN16] that does not mean that the court can not draw reasonable inferences from the facts, which is what I have done in this regard.

95 Regardless of the quantum of the drop in viewership, in my view it will not be possible to calculate the loss given the inability to determine if the number of subscriptions is falling because of the inability to provide these Premier League games or for other reasons, including the current economic downturn. Some of the issues The Score relies upon with respect to the survey evidence illustrate this difficulty. This is beyond a case where it is only difficult for the court, in my view it would not be possible and damages would not be an adequate remedy.

96 Similarly, given the evidence I have already referred to of Mr. Levy, it is reasonable to infer that there will be some ripple effect on the viewership of other programming and with it the likelihood of decreased advertising revenue. Again, in my view, the loss of advertising revenue attributable to the loss of the Premier League games would be irreparable in that these losses would be impossible to quantify and damages would not be an adequate remedy.

97 I should add that I accept the assertion by Mr. Hinds in his affidavit that the fact that Setanta Canada is still in a building stage, struggling to build goodwill with its audience and advertisers will compound its problems. Furthermore, the inability to calculate damages suffered by Setanta Canada is compounded by the fact that Setanta Canada has only had these rights for one year and with only one season under its belt has no track record that can be analyzed. In *Welch & Pridmore Systems Ltd. v. Townson & Alexander Management Consultants Inc.*, Rutherford J. held that, in the case of an attempted termination by the defendant of an exclusive licence to teach customized training course, an interlocutory injunction was appropriate as the plaintiff had only operated a year and "fruit of the first year's labour which will be reaped in the months and years ahead cannot be measured with reference only to receivables to date".[FN17]

98 Although I also accept that the loss of the FAPL Rights and the resulting loss of subscribers if significant could render the Setanta Canada business unviable, I have not relied on this in reaching my conclusion on irreparable harm as I simply do not have enough information about Setanta Canada's business and other programming to reach that conclusion.

99 The fact that the Premier League games are only a small part of Sportsnet's programming in terms of hours of programming is not a determinative factor. It is the unquantifiable nature of the likely loss, not its quantum that it is important. In the case of *Irwin Toy Ltd. v. General Sportcraft Co.*[FN18]., the court granted an injunction to prevent one party from terminating a licence agreement notwithstanding that the licence agreement in issue represented only 3-4% of the plaintiff's sales. The court in that case noted that in addition to a potential loss of customers that "if ... a pall hangs over the circumstances of the accounts termination the ripple effect [on loss of good will and diminution of reputation] may well be incalculable...."

100 In addition I also accept there will be negative publicity from a termination for Setanta NA and that its relationship with other program suppliers and distributors will likely come into question because there will no doubt be a public perception that Setanta NA is not financially viable because of the insolvency of Setanta Holdings. This damage to its reputation will have implications for its business in the United States, which is the primary vehicle for its rights and distribution agreements, which loss will be impossible to quantify. I accept Mr. Steep's argument, however, that since Setanta NA did not record any goodwill, such as branding, the Setanta name or trademarks, on its balance sheet, there can be no irreparable harm to goodwill. There is nevertheless the likelihood of irreparable harm to reputation.

101 Mr. Steep submits that no irreparable harm will befall Setanta NA in that it is has never been a financially viable operation and now, without the financial and operational support of its parent, Setanta Holdings, it can longer operate as a going concern. It is submitted that this situation was not caused by The Score's termination of the letter agreement and there is no evidence from Setanta NA that an injunctive order will have any impact on its current inability to continue operations beyond a matter of months, at the most. I will deal with the financial health of Setanta NA when I come to the balance of convenience. At the moment Setanta NA is still a solvent company and in my view its financial health is not a relevant consideration in determining whether or not Setanta NA will suffer irreparable harm *as a result of the unlawful termination of the letter agreement by The Score.* Having said this, in my view I should not consider the possible insolvency of Setanta NA as a source of irreparable harm as that could clearly be more directly a result of the insolvency of Setanta Holdings for the reasons I will come to.

102 In addition to the foregoing, I also accept there will be negative publicity from a termination which will likely affect Setanta Canada's relationships with other program suppliers and distributors, as Setanta Canada's viability as a licensee will likely come into question because of its connection to Setanta NA. as an indirect subsidiary of Rogers. I would not come to the same conclusion with respect to Sportsnet given its association with Rogers.

103 For these reasons I have concluded that all of the plaintiffs, especially Setanta Canada, would likely suffer

irreparable harm if the injunction is not granted.

Where Does the Balance of Convenience Lie?

104 The balance of convenience aspect of the test requires the court to determine which of the two parties will suffer the greater harm from the granting or the refusal to grant an interlocutory injunction pending a decision on the merits. In doing this, the court may consider the comparative strength of each party's case.[FN19] In this case of course I have already found that the plaintiffs have satisfied the higher threshold of having a strong *prima facie* case.

105 The plaintiffs submit that the balance of convenience is in favour of granting the injunction. It is their position that The Score will suffer no disadvantage and will in fact continue to enjoy substantially all the benefit of the FAPL Agreement. It is submitted that there is no evidence that the insolvency of Setanta Holdings will impact on Setanta NA's ability to perform its obligations under the letter agreement and there has been no disruption in Setanta NA's performance of these obligations. It is further submitted that since Setanta Holdings entered receivership, all of its companies and business units were acquired by Sabloss Limited, which is owned and controlled by the original founders of Setanta Holdings and that all of these entities are solvent. They allege that The Score is motivated by considerations related to its own financial and/or competitive self-interest and the desire to improve its position under the letter agreement.

106 In response, Mr. Steep submits that the balance of convenience favours The Score. He argues that if the injunctive relief is granted, The Score will be saddled with a relationship with parties it did not contract with; Setanta Canada and Rogers, it will have lost the opportunity to broadcast the games itself and sub-license some of them to a reliable counterparty on appropriate commercial terms, and The Score will be put at risk that Setanta Canada ceases operations at some mid-point in the Premier League season at a point where it would likely be impossible for The Score to place all of the games either on its own station or alternative networks.

107 A consideration of the balance of convenience does require a consideration of the financial viability of Setanta NA and a determination of its relevance. A great deal of evidence concerning the financial status of Setanta NA was filed and the plaintiffs contest the defence proposition that it is essentially now a shell. Without reviewing the evidence in detail, I accept Mr. Steep's submission that although Setanta NA is technically solvent, it is in serious financial distress and that it seems certain that it will need funding from a third party in order to carry on. Historically it relied heavily on its now insolvent parent to fund its operations, to fund its capital requirements, and to provide resources such as signal transmissions facilities and a common website. I also accept that that could have an impact on its ability to provide the broadcast services contemplated by the letter agreement. Furthermore, there is no evidence of formal arrangements in place with Sabloss or with Rogers for financing. Having said that, the primary concern of The Score seems to be that Rogers will step into the void and they argue that they never would have contracted with Rogers; given Rogers will no doubt be a competitor in the next round of bidding for the Canadian FAPL rights. In The Score's factum it is submitted that at its core, this motion is a thinly veiled attempt by Rogers to insert itself into a contract to which it is not a party and that Setanta NA is not the true party applying for this injunction but rather it is Rogers through its ownership interest in Setanta Canada. It is further submitted that without Rogers' financial support, neither Setanta NA nor Setanta Canada would be in a financial position to seek injunction relief.

108 Although I understand The Score's concerns, I find that they are not relevant to a consideration of the balance of convenience for two main reasons. First of all, the ongoing financial health of Setanta NA was not a term of the letter agreement and I have rejected The Score's argument that the letter agreement contemplated the direct participation of Setanta Holdings. Having found that the plaintiffs have a strong *prima facie* case that there has been no breach of the letter agreement it seems that The Score cannot rely on this evidence as it did not bargain for the right to terminate the letter agreement if Setanta NA suffered financial distress short of breaching its performance obligations under the agreement. In my view it is premature to assume that Setanta NA will breach the agreement.

109 Furthermore, if as The Score suspects, Rogers provides some financial support, I do not accept the submission that that will fundamentally change the bargain. The Score did not seek to limit Setanta NA's ability to sublicence the FAPL rights and having entered into the sublicence agreements with Rogers I see no reason why Rogers could not provide funding even if that is distasteful to The Score. To find otherwise would be to give The Score a right it did not bargain for when the letter agreement was entered into.

110 Mr. Steep has also asked me to consider the conduct of the founders of Setanta Holdings; Messrs. O'Rourke and Ryan. He argues that what Messrs. O'Rourke and Ryan have done through the private receivership is reorganized the Setanta group of companies in a manner that saddles Setanta Holdings with the debt and maroons The Score's guarantee with this insolvent entity. The founders stripped Setanta Holdings of its value and left behind only liabilities and the now worthless guarantee so that they can, for their own benefit, rebuild the Setanta group anew on the basis of a new relationship with Rogers. He also points out that they have not come forward to provide a meaningful guarantee of the obligations of Setanta NA.

111 Although the steps taken by Messrs O'Rourke and Ryan in terms of the private receivership raise questions, they are not parties in this action and however their conduct may be characterized I am not satisfied that it could in any way disentitle Setanta NA to an injunction, nor was that suggested.

112 For these reasons I do not accept Mr. Steep's submission that the status quo would be altered if the injunction is granted. The circumstances of the relationship between the parties has changed because of the insolvency of Setanta Holdings and the resulting financial distress of Setanta NA but not in a way that puts Setanta NA in breach of the letter agreement. Given my decision to require the plaintiffs to pay the balance owing under the letter agreement into court, the only remaining risk of harm is if Setanta NA breaches any of its non-monetary performance obligations under the letter agreement. This injunction would not prevent The Score from seeking to terminate the letter agreement if there were such a material change in the facts. For now, having found that the plaintiffs have a strong *prima facie* case and will likely suffer irreparable harm, and given the conclusion I have come to on the adequacy of the undertaking as to damages, I am satisfied that the balance of convenience favours granting the injunction.

Is the Undertaking of the Plaintiffs as to Damages Sufficient?

113 The Score submits that the undertaking to pay damages provided by Setanta NA is wholly inadequate and worthless given Setanta NA's perilous financial situation. The Score also complains that permitting Rogers on behalf of Setanta Canada to pay Setanta NA's licence fees to The Score would unilaterally amend the letter agreement to which they are not parties, forcing The Score to accept payment from a company controlled by their competitor Rogers, which is not the relationship that The Score bargained for.

114 As I have already concluded, the fact that Rogers is involved in the subsublicencing of the FAPL rights is not a matter that The Score has any control over. Considering the terms of the letter agreement, I see no basis upon which The Score has any say as to the source of the funds Setanta NA uses to make the payments owing under the letter agreement.

115 Although there are concerns with respect to the financial viability of Setanta NA, no such concern was expressed with respect to Setanta Canada and Sportsnet. In his affidavit, Mr. Hinds states that he is authorized by each of the plaintiffs to offer their undertaking as to damages in the event that an injunction is granted. On cross-examination, Mr. Hinds indicated that the authorization that he received from Setanta NA was an oral authorization from Mr. Hall which has not subsequently been put into writing. Mr. Hall, however, has filed an affidavit sworn July 20, 2009 in which he states that he has reviewed the affidavit of Mr. Hinds and that he agrees unreservedly with its contents. In my view this is confirmation of the giving of an undertaking to this Court by Setanta NA. The issue then is the adequacy of the undertaking.

116 Mr. Pinos advised me that as a term of the granting of the injunction, his clients would be prepared to pay the entire balance owing under the letter agreement into Court or directly to The Score notwithstanding the fact that it is not entirely due at this time. In the circumstances given the financial uncertainly with respect to The Score, and notwithstanding there are no issues with the adequacy of the undertaking given by Setanta Canada and Sportsnet, in my view that would be a reasonable term and I so order. I have used the sum already tendered as it was not suggested that that amount is in error.

Disposition

117 For all of these reasons, provided the plaintiffs pay the sum of USD$951,833.00 to The Score, on or before 5:00 p.m. on Wednesday, August 5, 2009, in payment of the total amount owing under the balance of the payment schedule set out in the letter agreement, an interlocutory injunction is granted restraining the defendant from:

(a) terminating the December 1, 2006 letter agreement between The Score and Setanta NA;

(b) offering or contracting the broadcasting rights licensed under the letter agreement to any other person;

(c) doing anything directly or indirectly that prevents Setanta NA, and its sublicensees, Sportsnet and Setanta Canada from exercising their full rights and entitlements under the letter agreement and the sublicences granted by Setanta NA pursuant thereto; and

(d) indicating to any third party that the letter agreement, the rights derived by Setanta NA pursuant thereto, or the sublicences granted by Setanta NA to Setanta Canada or Sportsnet, have been terminated, or making any public statement to that effect.

118 While my decision has been under reserve, the parties were able to resolve the issue of costs. In accordance with that agreement, costs are awarded to the plaintiffs in the amount of $50,000, all inclusive, on a partial indemnity scale.

119 I wish to conclude by thanking counsel for their thorough and extremely well crafted materials and oral argument and for all of their assistance to the Court.

Motion granted.

FN1 The Score takes the position that Setanta Holdings Ltd. is also a party to this agreement which is considered below.

FN2 1997 CarswellAlta 572 (Alta. Q.B.) at paras. 42, 45-46 and 58.

FN3 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 43, *supra* at 334 *Check*

FN4 See for example *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.*, [2009] O.J. No. 95 (Ont. S.C.J.) at paras. 29-35, [injunction to prevent termination of car dealership agreement], *674834 Ontario Ltd. v. Culligan of Canada Ltd.*, [2007] O.J. No. 979 (Ont. S.C.J.) at paras. 25, 26, 37, and 39, [injunction to prevent termination of a licence to distribute bottled water], *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2001] O.J. No. 3614 (Ont. Div. Ct.) at paras. 2-9, [injunction to prevent termination of franchise agreement].

FN5 [2009] O.J. No. 1743 (Ont. S.C.J.) at para. 38

FN6 Canada Law Book: Aurora, 2008, loose leaf

FN7 *Quizno's supra* at para. 40.

FN8 See for example *J. LeBar Seafoods Inc., Re* (1981), 38 C.B.R. (N.S.) 64 (Ont. Bktcy.) at paras. 12-13

FN9 1994 CarswellOnt 2399 (Ont. Gen. Div. [Commercial List]) at para. 22

FN10 (1961), [1962] 2 Q.B. 26 (Eng. C.A.)

FN11 *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 148 D.L.R. (3d) 598 (Alta. C.A.), at 608

FN12 [1989] 1 S.C.R. 426 (S.C.C.) at paras. 136-138

FN13 [2003] O.J. No. 1919 (Ont. C.A.) at paras. 113-118

FN14 (2007), 86 O.R. (3d) 431 (Ont. C.A.)

FN15 [2003] O.J. No. 2062 (Ont. C.A.)

FN16 *Kanda Tsushin Kogyo Co. v. Coveley* (1997), 96 O.A.C. 324 (Ont. Div. Ct.) at para. 14

FN17 [1992] O.J. No. 2271 (Ont. Gen. Div.), at 3, see also *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd.*, [2005] O.J. No. 1970 (Ont. S.C.J.) at para. 86

FN18 [1996] O.J. No. 2543 (Ont. Gen. Div.) at para. 10

FN19 *Quizno's supra* at para 46

END OF DOCUMENT

B(R.) v. Children's Aid Society of Metropolitan Toronto (1992), 10 O.R. (3d) 321

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

B. (R.) v. **Children's Aid** Society of Metropolitan Toronto

R.B. and B.B. v. **CHILDREN'S AID** SOCIETY OF METROPOLITAN TORONTO and OFFICIAL GUARDIAN, FOR S.B., an infant; ATTORNEY GENERAL OF ONTARIO (Intervenant)

Ontario Court of Appeal

Houlden, Goodman and Tarnopolsky JJ.A.

Heard: April 21-24, **1992**
Judgment: September 15, **1992**
Docket: Doc. CA C8358

Counsel: *W. Glen How, Q.C.*, *John M. Burns*, and *Linda How*, for appellants.

Heather L. Katarynych, for Children's Aid Society of Metropolitan Toronto.

Debra Paulseth, for respondent Official Guardian.

Janet E. Minor and *Robert E. Charney*, for intervenant, Attorney General of Ontario.

Subject: Family; Civil Practice and Procedure

Practice **--- Costs** — Effect of success of proceedings — Successful party deprived of **costs** — Grounds — Miscellaneous grounds.

Children — Child protection — Temporary committal — Constitutional rights — Parents opposing surgery and blood transfusion based on religious grounds — Child made temporary ward of Children's Aid Society and surgery carried out — Parents pursuing appeal of constitutional rights — No Charter right to family autonomy — Parents' right to freedom of religion overridden by state interest in protecting health and life of child — Any violation of parental rights saved by s. 1 of Charter — Appeal dismissed — Canadian Charter of Rights and Freedoms, s. 1.

Costs — Discretion of court — Parents being unsuccessful in opposing granting of wardship to Children's Aid Society based on religious grounds — Trial judge awarding parents **costs** against Attorney General in light of importance of issue — No error made by judge — Appeal dismissed.

The child was born prematurely and suffered from a number of serious illnesses. The doctors decided that the child

needed surgery and that she would require a blood transfusion. The parents refused to consent to the treatment based on religious grounds. A 72-hour temporary wardship was obtained and it was extended twice. During the course of the order, an operation and transfusion were completed. The Attorney General of Ontario was an intervenor in the case and **costs** were awarded against him.

The parents appealed the wardship decision on the basis that their rights under ss. 2(*a*) and 7 of the *Charter* had been infringed, and the Attorney General appealed the order about **costs**.

Held:

The appeals were dismissed.

Per Tarnopolsky J.A.

Under s. 19 of the *Child Welfare Act* (Ont.), the judge decided whether the child was in need of protection, not the doctors. The hearing was conducted according to the principles of fundamental justice. Section 7 of the *Charter* does not guarantee a right to family autonomy. The parents' right to freedom of religion and their right to choose their child's medical treatment according to their religious beliefs were protected by s. 2(*a*) of the *Charter* only as long as their beliefs did not impede the overriding state concern with the health and life of a child. Any violation of the parents' s. 2(*a*) rights was saved by s. 1.

On the issue of **costs**, the Attorney General was successful and was not involved in any misconduct. The parents, however, had opposed the state action because of their religious beliefs; they did not initiate the proceedings. The judge below had correctly exercised his discretion in awarding **costs** to the unsuccessful party based on the importance of the issue.

Per Goodman J.A. (concurring)

The parents' appeal should be dismissed. Although **costs** should be awarded against a successful party only in exceptional cases, the court should not interfere with the discretion exercised by the judge below in his award of **costs** to the parents. Accordingly, the cross-appeal should also be dismissed.

Per Houlden J.A. (dissenting in part)

Except for the matter of **costs**, the conclusions reached by Tarnopolsky J.A. were satisfactory. It would create a dangerous precedent to award **costs** against the Attorney General where he intervened to defend the validity of the *Child Welfare Act* and was successful before the judge below in upholding its validity. The cross-appeal should be allowed and the order for **costs** should be set aside. There should be no **costs** of the appeal to the court below.

Cases considered:

Per Tarnopolsky J.A.

B.C.G.E.U., Re, (sub nom. *B.C.G.E.U. v. British Columbia (Attorney General)*) [1988] 2 S.C.R. 214, [1988] 6 W.W.R. 577, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, 30 C.P.C. (2d) 221, 88 C.L.L.C. 14,047, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 53 D.L.R. (4th) 1, 44 C.C.C. (3d) 289 — *considered*

B. (S.), Re (1983), 36 R.F.L. (2d) 70 (Ont. Fam. Ct.) [affirmed (July 17, 1985), Docs. Toronto 9141 and 9246, Webb D.C.J. (Ont. Dist. Ct.), reversed (sub nom. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*)

(1988), 15 R.F.L. (3d) 388, 63 O.R. (2d) 385, 47 D.L.R. (4th) 388 (C.A.)] — *referred to*

B. (S.), Re (sub nom. *B. (S.M.) v. Children's Aid Society of Metropolitan Toronto (Municipality)*) (1983), 36 R.F.L. (2d) 80 (Ont. Fam. Ct.) [affirmed (July 17, 1985), Docs. Toronto 9141 and 9246, Webb D.C.J. (Ont. Dist. Ct.), reversed (sub nom. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*) (1988), 15 R.F.L. (3d) 388, 63 O.R. (2d) 385, 47 D.L.R. (4th) 388 (C.A.)] — *referred to*

B. (S.), Re (July 17, 1985), Docs. Toronto 9141 and 9246, Webb D.C.J. (Ont. Dist. Ct.) [reversed (sub nom. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*) (1988), 15 R.F.L. (3d) 388, 63 O.R. (2d) 385, 47 D.L.R. (4th) 388 (C.A.)] — *referred to*

B. (S.), Re (sub nom. *B. (R.) v. Children's Aid Society of Metropolitan Toronto)*) (1988), 15 R.F.L. (3d) 388, 63 O.R. (2d) 385, 47 D.L.R. (4th) 388 (C.A.) — *referred to*

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 27 B.L.R. 297, 33 Alta. L.R. (2d) 193, (sub nom. *Director of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 55 A.R. 291, 55 N.R. 241, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 11 D.L.R. (4th) 461, 84 D.T.C. 6467 — *referred to*

Canadian Newspapers Co. v. Canada (Attorney General) (1986), 12 C.P.C. (2d) 203, 56 O.R. (2d) 240, 32 D.L.R. (4th) 292 at 304, 27 C.R.R. 52 (H.C.) — *referred to*

Chiarelli v. Canada (Minister of Employment & Immigration), [1992] 1 S.C.R. 711, 2 Admin. L.R. (2d) 125, 16 Imm. L.R. (2d) 1, 135 N.R. 161, 90 D.L.R. (4th) 289, 8 C.R.R. (2d) 234, 72 C.C.C. (3d) 214 — *considered*

Corp. of the Canadian Civil Liberties Assn. v. Ontario (Minister of Education) (sub nom. *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*) (1990), 65 D.L.R. (4th) 1, 71 O.R. (2d) 341, 37 O.A.C. 93, 46 C.R.R. 316 (C.A.) — *referred to*

Cotroni c. Centre de Prévention de Montréal, (sub nom. *United States v. Cotroni; United States v. El Zein)* [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 96 N.R. 321, 23 Q.A.C. 182, 42 C.R.R. 101 — *referred to*

Eve, Re, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 13 C.P.C. (2d) 6, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773 — *referred to*

Hepton v. Maat, [1957] S.C.R. 606, 10 D.L.R. (2d) 1 — *referred to*

Irwin Toy Ltd. c. Québec (Procureur général), [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* 39 C.R.R. 193 — *referred to*

Malette v. Shulman (1990), 2 C.C.L.T. (2d) 1, 72 O.R. (2d) 417, 67 D.L.R. (4th) 321, 37 O.A.C. 281 (C.A.) — *distinguished*

Pearlman v. Law Society (Manitoba), (sub nom. *Pearlman v. Manitoba Law Society Judicial Committee)* [1991] 2 S.C.R. 869, 2 Admin. L.R. (2d) 185, [1991] 6 W.W.R. 289, 84 D.L.R. (4th) 105, 130 N.R. 121, 75 Man. R. (2d) 81, 6 W.A.C. 81, 6 C.R.R. (2d) 259 — *referred to*

R. v. Beare, [1988] 2 S.C.R. 387, 66 C.R. (3d) 97, [1989] 1 W.W.R. 97, 45 C.C.C. (3d) 57, 36 C.R.R. 90, 55 D.L.R. (4th) 481, 88 N.R. 205, 71 Sask. R. 1 — *considered*

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 — *considered*

R. v. Chaulk, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, 119 N.R. 161, [1991] 2 W.W.R. 385, 69 Man. R. (2d) 161, 62 C.C.C. (3d) 193, 1 C.R.R. (2d) 1 — *followed*

R. v. Jones, [1986] 2 S.C.R. 284, 69 N.R. 241, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 73 A.R. 133, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63 — *considered*

R. v. L. (T.P.), [1987] 2 S.C.R. 309, (sub nom. *R. v. L.)* 80 N.R. 161, 61 C.R. (3d) 1, 82 N.S.R. (2d) 271, 207 A.P.R. 271, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 32 C.R.R. 41 — *referred to*

R. v. Morgentaler, [1988] 1 S.C.R. 30, 82 N.R. 1, 62 C.R. (3d) 1, 26 O.A.C. 1, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 37 C.C.C. (3d) 449 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 65 N.R. 87, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 18 C.R.R. 308 — *referred to*

R. v. Tutton (1985), 6 O.A.C. 367, 44 C.R. (3d) 193, 18 C.C.C. (3d) 328, 14 C.R.R. 314 (C.A.), affirmed [1989] 1 S.C.R. 1392, 13 M.V.R. (2d) 161, 69 C.R. (3d) 289, 48 C.C.C. (3d) 129, 98 N.R. 19, 35 O.A.C. 1 — *referred to*

R. v. Videoflicks Ltd., (sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1 — *referred to*

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R 145, 48 C.R. (3d) 289, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30 — *considered*

Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 58 N.R. 1, 17 D.L.R. (4th) 422 — *considered*

Per Houlden J.A. (dissenting in part)

Schachter v. Canada, [1992] 2 S.C.R. 679, 92 C.L.L.C. 14,036, 139 N.R. 1, 93 D.L.R. (4th) 1, 10 C.R.R. (2d) 1 — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 1

s. 2(*a*)

s. 7

s. 15(1)

s. 24(1)

Child and Family Services Act, 1984, S.O. 1984, c. 55 [R.S.O. 1990, c. C.11] —

s. 208

Child Welfare Act, R.S.O. 1980, c. 66 [repealed by Child and Family Services Act, 1984, S.O. 1984, c. 55, s. 208] —

s. 19(1)(*b*)(ix)

s. 21

s. 27

s. 28

s. 28(1)

s. 28(10)

s. 28(12)

s. 30(1)2

s. 32

s. 41

Children's Protection Act, The, R.S.O. 1927, c. 279.

Courts of Justice Act, 1984, S.O. 1984, c. 11 [R.S.O. 1990, c. C.43] —

s. 122 [am. S.O. 1989, c. 55, s. 21] [R.S.O. 1990, c. C.43, s. 109]

s. 122(4) [R.S.O. 1990, c. C.43, s. 109(4)]

s. 141 [am. S.O. 1984, c. 64, s. 9] [R.S.O. 1990, c. C.43, s. 131]

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 109

s. 131

Immigration Act, 1976, S.C. 1976-77, c. 52 [R.S.C. 1985, c. I-2] —

s. 27(1)(*d*)(ii) [R.S.C. 1985, c. I-2, s. 27(1)(*d*)(ii)]

s. 32(2) [R.S.C. 1985, c. I-2, s. 32(2)] [re-en. R.S.C. 1985, c. 28 (4th Supp.), s. 11(1)]

Immunization of School Pupils Act, 1982, S.O. 1982, c. 41.

School Act, R.S.A. 1980, c. S-3 —

s. 142(1) [am. S.A. 1990, c. 36, s. 44]

s. 143(1)(*a*)

s. 143(1)(*e*)

s. 180(1)

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48 [R.S.C. 1985, c. U-1] —

s. 32

Rules considered:

Ontario, Rules of Civil Procedure —

r. 57.01

r. 57.01(1)(*d*)

r. 57.01(1)(*f*)(i)

Appeal by parents from decision of Whealy D.C.J. finding child in need of protection and awarding temporary wardship to Children's Aid Society, pursuant to the *Child Welfare Act* (Ont.), to permit surgery and blood transfusion, unreported (February 10, 1989), Docs. York 9141 and 9246 (Ont. Dist. Ct.); Appeal by Attorney General of Ontario from order as to **costs**, unreported (June 9, 1989), Docs. York 9141 and 9246, Whealy D.C.J. (Ont. Dist. Ct.).

***Tarnopolsky J.A.*:**

Nature of the Appeal

1 This appeal originates from the order of Main Prov. J., dated July 31, 1983 [now reported at *Re B. (S.)* (1983), 36 R.F.L. (2d) 70 (Ont. Fam. Ct.)], and the order of Walmsley A.C. Prov. J., made September 15, 1983 [now reported at *Re B. (S.)* (sub nom. *B. (S.M.) v. Children's Aid Society of Metropolitan Toronto (Municipality)*) (1983), 36

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

R.F.L. (2d) 80 (Ont. Fam. Ct.)]. The order of Main Prov. J. granted wardship of S.B. to the Children's Aid Society of Metropolitan Toronto (the "C.A.S."). The order was made pursuant to ss. 19(1)(*b*)(ix), 27, 28, and 32 of the *Child Welfare Act*, R.S.O. 1980, c.66, and committed S. to the Society's care and custody. The order of Walmsley A.C. Prov. J. terminated this wardship.

2 During the course of the order of Main Prov. J., which was extended twice, S. received a blood transfusion as part of an examination and operation for suspected glaucoma. The transfusion was contrary to the wishes and beliefs of her parents.

3 Both the orders of Main Prov. J. and Walmsley A.C. Prov. J. were appealed to the District Court by S.'s parents. The Society countered with a motion to dismiss. On July 17, 1985, Webb D.C.J. acceded to the Society's motion on the grounds that:

> (i) the transfusion had been administered and the wardship terminated, thereby leaving no lis between the parties;
>
> (ii) the *Child Welfare Act* had been repealed and replaced by s. 208 of the *Child and Family Services Act, 1984*, S.O. 1984, c.55, thus rendering the whole issue moot [unreported *Re B. (S.)* (July 17, 1985), Docs. Toronto 9141 and 9246, Webb D.C.J. (Ont. Dist. Ct.)].

4 On further appeal to this court [now reported at *Re B. (S.)* (sub nom. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*) (1988), 15 R.F.L. (3d) 388, 63 O.R. (2d) 385, 47 D.L.R. (4th) 388], it was held that the learned District Court judge had erred as there remained the issues of interference with the rights of the parents in determining their child's medical treatment, and of the constitutionality of the *Child Welfare Act*. These issues were referred back to the District Court and a hearing of the appeals, including the constitutional question, was ordered on the merits.

5 This appeal is taken by S.'s parents from the order of Whealy D.C.J., dated February 10, 1989, dismissing their appeals from the Provincial Court orders [unreported (February 10, 1989), Docs. York 9141 and 9246, Whealy D.C.J. (Ont. Dist. Ct.)]. The respondent/intervenant Attorney General cross-appeals from the order of Whealy D.C.J. dated June 9, 1989, ordering the Attorney General to pay the party and party **costs** of the appellants [unreported, Docs. York 9141 and 9246, Whealy D.C.J. (Ont. Dist. Ct.)].

Facts

6 S. was born approximately four weeks prematurely at the Etobicoke General Hospital on June 25, 1983. Because of her physical condition she was transferred almost immediately to the Sick Children's Hospital in Toronto. Within the next few weeks she exhibited, to the doctors responsible for her care and treatment, many physical ailments, including patent ductus arteriosus, sepsis, bradycardia, intraventricular hemorrhage, and anemia. Consequently, she received a number of medical treatments, including an umbilical artery catheter and emergency treatment for sepsis. (During the whole time in question she was under intensive care on life-support systems.) Her parents consented to all of the treatments provided during those initial few weeks of S.'s life.

7 At the request of the appellants, the attending physicians avoided the use of blood transfusions in the treatment of S. The parents, who are Jehovah's Witnesses and, as such, object to blood transfusions, made this request primarily for these religious reasons. They also suggested then, and stridently on this appeal, that the blood transfusion was unnecessary. At the original hearing on July 31, 1983, S.'s father provided the following testimony during examination-in-chief:

> Q. So now they're proposing, as you know, in this matter, you've been here, to give this baby a blood trans-

fusion?

A. Yes.

Q. All right, and so what is your position regarding that particular treatment?

A. I object to that treatment of blood transfusion.

Q. And why is that?

A. Because I am a believer in the Bible and in God's law and the Bible says that his law is perfect and I cannot allow my child to have a blood transfusion because his word says that this is not proper.

Q. Now, do you have any other reasons?

A. Other than the fact that there has been no evidence presented here today by Dr. Perlman or by any other doctor that I've spoken to in the past which has shown that a blood transfusion is going to help, they have not said anything that it's going to help.

Q. Have you discussed with them the medical values of blood transfusion?

A. I have told the doctors, Dr. Pape and Dr. Perlman, that I was, that it was not for them to use any alternative treatment. I've suggested to them on numerous occasions that they give the baby some iron to build his [sic] blood, but they did not.

Q. They did not do so. Have you read something to indicate that that might be helpful?

A. My wife has had problems with low blood and she has received iron and it has helped.

Q. So what was their answer to that request?

A. They didn't indicate that that was a course they wanted to take.

Q. Did they deny that there was such a proper course, such a course to be taken?

A. They didn't indicate any course besides the blood transfusion.

Q. And did they indicate to you that this treatment they were proposing would have any serious benefit to the child?

A. No.

8 At the same hearing S.'s mother stated in examination-in-chief:

I'm objecting to blood transfusion because of my religious belief, because I believe that God word is right and it's not that I don't love my baby. I want my baby, but I believe that this treatment will have more damage to the baby, because all the problem that does occur from blood transfusion. But that's not the reason. I'm not worried about the problem that occur from blood transfusion. I am concerned about our right as parents. It seems that

our right is being, it want to be taken away from us. I don't really think that's fair.

9 On July 30 S.'s hemoglobin level had dropped to such an extent that the attending physicians stated that they believed her life was in danger. The July 31 hearing was precipitated by the view of the attendingneonatologist, Dr. Perlman, that S. might require a blood transfusion in order to treat potentially life-threatening congestive heart failure. The 72-hour wardship was granted on the basis of the evidence of Dr. Perlman that a transfusion might be necessary and that it would not be for experimentation purposes. It was the conclusion of Main Prov. J. that an increase in hemoglobin may assist in the heart deficiency and the overall health of the child. Main Prov. J. made no specific terms of the wardship other than ordering that S. "be a ward of and committed to the care and custody of the Children's Aid Society of Metropolitan Toronto," with reasonable access to the parents.

10 The adjournment of August 3 and the hearing of August 18 simply confirmed and continued the order of July 31.

11 By August 18, 1983, the date of the next hearing, no blood transfusion had been necessary or administered. Drs. Pape and Swyer were then the attending neonatologists. Dr. Pape testified that, although S. was in a much-improved state, her hemoglobin was still at a level (48) which would run a real risk. However, Dr. Pape said that the situation had not reached the point that the risk posed by S.'s condition outweighed the risk of blood transfusion and the need to defer to the parents' religious beliefs. Similarly, Dr. Swyer testified that S.'s condition was improving but was still extremely marginal. He stated that it was very important to maintain the ability to transfuse in case S. deteriorated and went into heart failure.

12 Dr. Morin, head of ophthalmology at the Sick Children's Hospital, testified that S. appeared to have infantile glaucoma and needed to be examined and, potentially, operated upon, preferably within one week. The foundation for this view was that S. had an enlarged, hazy cornea. He stated that intraocular pressure would be another indicator of whether she in fact suffered from glaucoma, but that it could not be tested for without putting the infant to sleep. He added that an examination and operation could only be done with clearance from the neonatologist, the hematologist, and the anesthetists. According to him and Dr. Pape, the examination and operation could only be performed under anesthesia. Dr. Morin deferred to Dr. Swyer regarding the decision whether, in order to employ a general anesthetic, the use of a blood transfusion was necessary.

13 Main Prov. J., in ordering a further 21-day wardship, reasoned that he ought to consider prospects and possibilities, one of which was death. He held that, on the facts before him, intervention was absolutely essential. The terms of that order were the same as the first one of July 31.

14 On August 23, after a blood transfusion, Dr. Morin examined and operated on S.'s eyes. Her condition improved in several respects after the transfusion, although Whealy D.C.J. found that it is uncertain whether she would have so recovered in any event. When the wardship terminated on September 15, 1983, the C.A.S. felt that S.'s condition was sufficiently improved that no further order was necessary or sought.

Issues

15 The appellants raised the following issues on this appeal:

1. Did Whealy D.C.J. err in his findings of fact regarding:

   (a) the need for the eye surgery performed by Dr. Morin;

   (b) the need for a blood transfusion in conjunction with the anesthetic used in the eye surgery;

(c) any other need for a blood transfusion in the non-surgical treatment of S.?

2. Was the appellants' right, under s. 7 of the *Charter*, not to be denied liberty except in accordance with the principles of fundamental justice, violated by the definition of "child in need of protection" in s. 19(1)(*b*)(ix) and the powers in ss. 30(1)2 and 41, and the procedures in ss. 21, 27, 28(1), (10), and (12)?

3. Did those sections of the *Child Welfare Act* violate the appellants' freedom of religion as guaranteed by s. 2(*a*) of the *Charter*?

4. If those provisions of the *Child Welfare Act* did violate s. 2(*a*) of the *Charter*, is the legislation justified under s. 1?

5. What remedy is "appropriate and just in the circumstances"?

In addition, the respondent Attorney General raises one further issue:

6. Did Whealy D.C.J. err in awarding **costs** against the respondent/intervenant Attorney General?

Issue 1: Should this Court Disrupt the Findings of Fact Made by Whealy D.C.J.?

The Need for the Eye Surgery Performed by Dr. Morin

16 Whealy D.C.J. heard evidence from Dr. Morin and Dr. McCormick, a pediatric ophthalmologist at the British Columbia Children's Hospital, with respect to whether the eye surgery performed on S. was necessary at the time.

17 Dr. McCormick's evidence was that S. did not suffer from infantile glaucoma and that there had been no urgent need for an eye examination. He did not see or examine S. at the time in issue in this appeal.

18 Dr. Morin defended his 1983 diagnosis. He testified that it was based on S.'s large hazy corneas. The clearing of her eyes following surgery, he said in 1988, was evidence that there had been glaucoma, although he admitted that a number of things could have contributed to the clearing. He testified that, because the cornea was hazy during the examination, he had difficulty obtaining a view of the left drainage angle, which would have aided in his diagnosis. He stated also that S. did not have high introcular pressure, but had the features of infantile glaucoma.

19 Whealy D.C.J. held that, where there was a conflict between the evidence of Drs. McCormick and Morin, he relied on the evidence of Dr. Morin. He reasoned that, while Dr. Morin was the fifth ophthal mologist to see S. and a number of doctors had reported congenital glaucoma, Dr. McCormick's suspicion was without foundation. He also found that Dr. Morin was an expert in infantile glaucoma, while Dr. McCormick was not.

20 The appellants submit that the discrepancy between the evidence of Drs. Morin and McCormick is explained by the evidence of Dr. Spitzer, chair of epidemiology at McGill University in Montreal, who testified that the observation powers and opinions of doctors are incredibly fallible because they are subject to classification schemes and so report impressions, rather than observations.

21 The respondents submit that Whealy D.C.J. correctly decided that the controversy must be resolved in favour of their witnesses. They note that Dr. McCormick agreed that if Dr. Morin's diagnosis was correct, the surgery was necessary and that he agreed that he was not qualified to question S.'s course of treatment.

22 I cannot see any reason to differ with the conclusions of Whealy D.C.J. on this issue. I add that the appellants appear to be attacking Dr. Morin's basis for performing surgery, despite the fact that the anesthetic and blood transfusion were administered in order to reach a diagnosis prior to the operation. It is worth noting, however, that the conclusion of Whealy D.C.J. on this issue is quite important to the *Charter* issues raised below. This conclusion indicates that the manner and timing of the procedures were "in the best interests" of the child's health, i.e., the saving of her vision.

(b) The Need for a Blood Transfusion in Conjunction with the Anesthetic Used in the Eye Survey

23 Whealy D.C.J. heard various witnesses on this issue, concluding that the evidence of Dr. Steward, anesthetist-in-chief at British Columbia Children's Hospital, and Dr. Johnson, chief of the anesthesia department at the Children's Hospital of Eastern Ontario, was to be preferred over any competing evidence. Their testimony was that the use of blood in the anesthetic management of S. was appropriate in that it reduced the risk of congestive heart failure.

24 The appellants point to certain aspects of Dr. Steward's evidence which do not support his view. First, they say that he agreed that general anesthesia can be safely administered to pediatric patients with hemoglobins in the 40-50 range. Second, although his 1983 advice to raise S.'s hemoglobin level was based on his opinion that she was severely anemic, had residual pulmonary disease, and was on the borderline of congestive heart failure, he admitted in 1988 that the cardiologists' findings between August 3 and 23, 1983, revealed no evidence of congestive heart failure and that there was no actual diagnosis of lung disease. The respondents refer to the fact that, in his 1988 testimony, Dr. Steward agreed that S. was developing clinical signs of congestive heart failure on July 31.

25 Dr. Furman, anesthesia director at the Cook-Fort Worth Children's Medical Center in Fort Worth, Texas, testified on this issue that the blood transfusion actually employed was not necessary. He stated that it is a myth that a hemoglobin level of 40 is the minimum acceptable for a general anesthesia. Whealy D.C.J., in his reasons, discarded this evidence, noting that, in any event, no doctor who testified agreed with that standard level. The appellants submit that it is relevant that this doctor regarded a blood transfusion as needlessly increasing the risks to S., in light of the cardiologists' findings in August 1983, which revealed no evidence of congestive heart failure. The respondents point out, however, that Dr. Furman also testified that he believes blood transfusions can be useful. They submit that the disagreement between Dr. Furman's evidence and that of Dr. Steward is related to the seriousness of S.'s condition before surgery and that Dr. Furman agreed that if S. did have the condition perceived by Dr. Steward, she would have been an appropriate candidate for a general anesthetic. As well, it is submitted that, according to Drs. Pape and Johnson, Dr. Furman's evidence underestimated the severity of S.'s condition.

(c) The Need for a Blood Transfusion in the Non-surgical Treatment of S.

26 Before Whealy D.C.J., the appellants adduced evidence to show that risks were inherent in blood transfusions to the extent that it ought to have been left entirely to the parents to decide whether such an intervention was to be employed on S. There was, however, no evidence that the parents would ever have agreed to such intervention.

27 On this issue Whealy D.C.J. accepted the evidence of Dr. Andrew-O'Brodovich, associate professor of pediatrics at McMaster University, Hamilton. She testified that, between July 28 and August 22, 1983, a transfusion would have greatly increased S.'s ability to deliver oxygen to vital organs. The margin of safety, she said, was greatly reduced by not giving her a transfusion. The appellants submit that this adoption of her opinion ignored the following admission under cross-examination:

> A. We are now, Your Honour, moving into an area where I cannot comment on as an expert. That is profusion [sic], the ability of our heart to respond, the ability of our lungs to respond, and I could not comment

> as an expert witness on that aspect.
>
> Q. So you really can't give an opinion as to the full compensatory ability of [S.] at this point in time?
>
> A. I cannot comment as an expert on the ability of her heart and her lungs to compensate for the degree of anaemia.

According to the appellants, Dr. Andrew-O'Brodovich also agreed that the blood transfusion question was in the grey area at the relevant time and she deferred to the opinion of the attending neonatologists as to the need for a transfusion.

28 Dr. Sinclair, professor of pediatrics at McMaster University, Hamilton, testified that a blood transfusion in these circumstances represents a medically accepted standard of practice. Whealy D.C.J. stated that, wherever there was a contradiction in the evidence, he had found it necessary to rely on Dr. Sinclair, who "gave the most dependable evidence of anyone who did not treat [S.]." The appellants submit that, because Dr. Sinclair testified that S. was in a "grey" area on August 23, 1983, the decision to give her a blood transfusion was controversial. The respondents refer to the fact that Dr. Sinclair agreed that S. was developing clinical signs of congestive heart failure on July 31. In my view, the appellants' submission does no more than repeat the view taken by Main Prov. J. It was never said at the Provincial Court hearings that S. was in immediate need of a transfusion, only that she may come to require one.

29 Dr. Scherz, an expert in pediatrics from the Multicare Medical Center in Tacoma, Washington, testified that alternatives to blood transfusion would have been appropriate in the circumstances. Whealy D.C.J. disregarded that evidence, noting that the doctor did not deal with the issue of oxygen-carrying capacity in the red blood cells while under general anesthetic in an infant with all the complications that S. had. He concluded that the doctor's notion not to use blood transfusions was experimental in itself. The appellants submit that Dr. Scherz's evidence was persuasive.

30 Dr. Spence, associate professor of surgery at the Robert Wood Johnson Medical School in Camden, New Jersey, gave evidence that seriously ill patients have a very good chance of survival if operated upon promptly, without blood transfusions. Whealy D.C.J. did not take account of this approach, describing it as on the cutting edge at the time of appeal, and not generally accepted practice in 1983. The appellants argue that what Dr. Spence's evidence discloses is a pre-1983 view that many accepted transfusion practices are without a scientific base. The respondents point to the doctor's testimony that transfusions can be lifesaving. In my view, this evidence does not address itself to the real issue faced by Whealy D.C.J., which is whether the transfusion was medically necessary in this case.

Issue 2: Was the Appellants' Right Not To Be Deprived of Liberty except in Accordance with the Principles of Fundamental Justice, as Guaranteed by s. 7 of the Charter, Violated by the Definition of "child in need of protection" in s. 19(1)(b)(ix) and the Powers in ss. 30(1)2 and 41, and the Procedures in ss. 21, 27, 28(1), (10), and (12)?

(a) The Scheme of the Legislation

31 Whealy D.C.J. ruled that the impugned provisions did not violate s. 7 of the *Charter*. Those provisions are triggered by the definition given to the phrase "child in need of protection" in s. 19(1)(*b*)(ix):

> [A] child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

32 Under the Act various authorities are provided with the following powers once they perceive a child is in need of protection:

> *21.* — (1) A police officer, a Director, a local director or a person authorized by a Director or the local director, who has reasonable and probable grounds to believe that any child is apparently in need of protection, may,
>
> (*a*) without warrant take the child to a place of safety and detain the child there until the matter can be brought before a court; or
>
> (*b*) apply to a court for an order requiring the person in whose charge the child is to produce the child before a court at the time and place named in the order.
>
> (2) A police officer, a Director, a local director or a person authorized by a Director or by a local director who has reasonable and probable grounds to believe that a child actually or apparently under sixteen years of age has departed or has been removed from the lawful care and custody of a society without the consent of the society, may without warrant take the child to a place of safety and detain the child there.
>
> (3) Where a person authorized under subsection (1) or (2) has reasonable and probable grounds to believe that a child referred to in subsection (1) or (2) is on any premises, the person may without warrant enter the premises, if need be by force, and without warrant search for and remove the child from the premises.
>
> (4) The provisions of the *Statutory Powers Procedure Act* do not apply to proceedings under this section.

33 Once authorities have exercised any of the powers listed above, they become subject to the following procedures in order that the court can review and evaluate the course of conduct taken and the proper solution:

> *27.* — (1) As soon as is practicable and within five days of detaining a child in a place of safety under subsection 21(1) or clause 22(1)(*a*) or subsection 22(2), or of assuming the care of a child under section 23, as the case may be,
>
> (*a*) the matter shall be brought before a court to determine whether the child is a child in need of protection;
>
> (*b*) the child shall be returned to the parent or other person in whose charge the child was immediately prior to the child's apprehension or to the assumption of the child's care, as the case may be, but, where there is an outstanding order for custody of the child, the child shall be placed with the person entitled to custody of the child under the order; or
>
> (*c*) an agreement shall be entered into under section 25.
>
> (2) A child who has been detained pursuant to subsection 21(2) or clause 22(1)(*b*) in an observation and detention home established or designated under the *Provincial Courts Act* that has been designated as a place of safety, shall, as soon as is practicable after the commencement of the detention, be brought before the court and the court shall make an order,
>
> (*a*)confirming the child's detention for a period or periods that shall not in total exceed thirty days; or
>
> (*b*)discharging the child from the observation and detention home,

and upon completion of the period of detention or the discharge, as the case may be, the child shall be removed from the observation and detention home for transfer back into the care of the society.

. . . . .

28(10) Where, in the opinion of the court, prompt service of any notice required under subsection (6) of this section or subsection 23(6) cannot be effected and any delay might endanger the health or safety of the child, the court may dispense with the requirements of those subsections.

. . . . .

28(12) A court may from time to time adjourn a hearing but no such adjournment shall, subject to subsection (13) and subsection 29(1), be for more than thirty clear days, and pending final disposition of the hearing,

(*a*) where a society shows cause why the child should remain or should be placed, as the case may be, in the temporary care and custody of the society, the court shall order that the child remain or be placed in the temporary care and custody of the society; or

(*b*) where sufficient cause has not been shown why the child should remain or be placed, as the case may be, in the temporary care and custody of a society, the court shall order that the child be returned to or remain in the care and custody of the parent or other person in whose charge the child was immediately prior to,

(i) the child's detention, or

(ii) the production of the child before the court by the parent or other person,

unless the court is satisfied that some other order for care and custody of the child should be made, in which case, the court may make such other order for the temporary care and custody of the child as the court considers advisable pending final disposition of the hearing, except an order placing the child in a training school established under the *Training Schools Act*, or placing the child in an observation and detention home established or designated under the *Provincial Courts Act* that has not been designated under this Act as a place of safety.

. . . . .

30. — (1) Where a court finds a child to be a child in need of protection pursuant to section 28, the court shall make ... one of the following orders that the court considers to be in the best interests of the child, namely:

. . . . .

2. That the child be made a ward of and committed to the care and custody of the society having jurisdiction in the area where the judge hearing the case presides at the time of the hearing, for such period, not exceeding twelve months, as in the circumstances of the case the court considers advisable.

34 Whealy D.C.J. held that, in general, s. 19(1)(*b*)(ix) of the Act does not delegate to a doctor the decision of whether a child is in need of protection. With specific reference to the way in which the section was employed in this case, he noted with approval that Main Prov. J. placed the civil onus on the state; he granted only a restricted order; a delay was granted so that the appellants could bring forth medical evidence; and, in recognition of the parental concerns, no blood transfusions were administered between July 31 and August 19.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

35 I agree with that view. Section 19, in triggering the other impugned provisions, by defining a "child in need of protection," does not delegate to physicians the determination of who fits within that section. The definition is qualified by two distinct requirements, only one of which must be met to warrant intervention. The first is that the parents have acted contrary to the recommendations of a medical practitioner. The second is that the treatment is "necessary for the child's health [and] well-being." In the latter case, the ultimate decision is obviously in the court's hands. Even with the former requirement, the complementary provisions, set out above, put into the hands of the courts as expeditiously as possible the ultimate determination of what is necessary for the child's health and well-being. Although the recommending doctors' views will undoubtedly be important, it is open to the parents to establish before the court that any treatment is not necessary or that a medical practitioner's recommendation is not well-founded. In many cases there will be conflicting evidence (to which the appellants make extensive reference in this case). This fact highlights even more clearly that it is the trier of fact who will ultimatelydetermine whether a child is "in need of protection."

(b) Does the Effect of the Child Welfare Act in this Case Violate s. 7 of the Charter?

36 With respect to the rights which are guaranteed under s. 7 of the *Charter*, Whealy D.C.J. held that the child has an individual right to have decisions made by the parents with respect to her health, but that there is no guaranteed right to "family autonomy." He reasoned that s. 7 cannot be invoked against the right of the infant to live. As I shall illustrate, I agree with that approach, although I would add that in this case the concern was not only with life but with the quality of that life.

37 The appellants submit further that "family autonomy," including the liberty of parents to make health care choices for their children, is guaranteed by s. 7. They submit further, argued that this right, which must be consistent with the infant's s. 7 rights, is violated by the scheme of the *Child Welfare Act*. While s. 19(1)(*b*)(ix) assumes that medical opinion is always right, review of medical opinion, including that with respect to blood transfusion practice, shows the contrary. The appellants argue further that in this case there is value derived from the family autonomy exercised by them in that S. made "great progress" in the absence of blood transfusions. They refer also to sociological and ethical evidence, as well as the common law to support their claim for their version of familial autonomy.

38 The respondents reply with the submission that s. 7 does not guarantee family autonomy; it only confers individual rights on family members. The parental duty to act in the best interests of the child, they submit, is not a "liberty" interest. Even if it is, such an interest does not include the right to deprive the child of her right to life or best health possible in circumstances of current health knowledge. The respondents argue that the order made by Main Prov. J., under s. 19(1)(*b*)(ix), ensured that S.'s s. 7 rights were protected through the provision of all proper medical care.

39 The decision of the Supreme Court of Canada in *R. v. Jones*, [1986] 2 S.C.R. 284, 69 N.R. 241, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 73 A.R. 133, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63, considers issues which bear similarity to those raised in this appeal. In that case the appellant argued that the Alberta *School Act*, R.S.A. 1980, c. S-3, ss. 142(1), 143(1)(*a*), (*e*), and 180(1), deprived him, in a manner contrary to the principles of fundamental justice, of his liberty to educate his children as he pleased. Under the Act he was required to send his children to school, which he refused to do. It was open to him under the Act, however, to seek an exemption excusing the pupil from attending a school over which the school board had control. This he also refused to do. As a consequence, he was charged with truancy.

40 For purposes of this appeal, it is useful to explore some of the submissions made in support of the appellant in *Jones*. They were referred to by La Forest J., at pp. 301-302 [S.C.R.]:

> Counsel for the appellant submits that by being subjected to penal sanctions for failing to send his children to a

> school under the control of a board, he is being deprived of his liberty in a way that is not in accordance with fundamental justice. This deprivation, he says, arises in two ways: first, by depriving the appellant of his right to bring up his children in a manner he sees fit, and secondly, by providing penal sanctions. ...
>
> 'Liberty' as used in s. 7 of the *Charter*, the appellant contends, should be given the generous interpretation accorded that word in the Due Process Clause of the Constitution of the United States where the right of a parent to educate his children is grounded not only in the protection of religion assured by that Constitution but also in the liberty proclaimed in the Due Process Clause. He referred, among other cases, to *Meyer v. State of Nebraska*, 262 U.S. 390 (1923) at p. 399, where the following statement appears:
>
> > While the Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.
>
> Liberty in s. 7, the appellant claims, includes the right, as it does in the United States, to bring up his children in the manner he deems fit. The impugned provisions of the *School Act*, he adds, deprived him of that right in a manner that is not in accordance with the principles of fundamental justice.

41 I perceive the following similarities between the submissions made by the appellant in that case and those made in this appeal: first, the appellants submit that the state restriction denied their liberty by restricting their ability to raise their children as they desired; second, the appellants submit that those liberties were denied in a manner contrary to the principles of fundamental justice. Because of those similarities, the approach to the issues taken by La Forest J. are instructive.

42 La Forest J. did not address the question of the content of the appellant's s. 7 liberty. He stopped short of that step because the threshold requirement, that the operation of the state restriction violate the principles of fundamental justice, had not been met. At pp. 302-303, 307-308, he asserted:

> I find it unnecessary to deal with the appellant's contention regarding the meaning of liberty, because in my view, *even assuming that liberty as used in s. 7 does include the right of parents to educate their children as they see fit, he has not been deprived of that liberty in a manner that violates s. 7 of the Charter. ... The essential question for present purposes is whether, assuming the appellant's argument regarding the meaning of liberty is correct, he has been deprived of that liberty contrary to the principles of fundamental justice.*
>
> . . . . .
>
> The provision under which the appellant is charged is one dealing with truancy generally. It does not *per se* violate the claimed liberty. It does so only if those charged with its administration use it as a device for unduly infringing on such liberty. If this occurred, the *Charter* defence would come into play. That, however, is not the case here.
>
> I, therefore, think that the appellant's argument regarding s. 7 of the *Charter* also fails.

[Emphasis added.]

43 By the same reasoning, in this case the extent of the appellants' liberty need not be considered unless that

which is claimed as a liberty has been denied in a manner that is contrary to the principles of fundamental justice. Specifically, the question is whether the impugned provisions of the *Child Welfare Act* operate in violation of those principles.

44 On this issue Whealy D.C.J. held that, whatever parental liberty might be guaranteed by s. 7, the principles of fundamental justice would prevent them from being invoked in a case such as this. He said [at p. 22 unreported]:

> When an infant, totally incapable of making any decision, is in a life threatening situation and the appropriate treatment is denied or refused by its parents, it cannot be said that any potential protection as given under section 7 for the family unit can be invoked against the right of the infant to live. Section 7 addresses itself also to 'the principles of fundamental justice'. It can hardly be said that the principles of fundamental justice could be invoked to deny a child a chance to live.
>
> It is worth noting as well that the rights set out in section 7 are conditional and not absolute. The rights therein set out can be interfered with if done in accordance with the principles of fundamental justice. The scheme of the *Child Welfare Act*, in my view, meets all the tests of fundamental justice, including a fair hearing before an impartial judicial tribunal.

45 The appellants take issue with that conclusion. They submit that the application of the Act in this case has caused the following violations of the principles of fundamental justice: (a) Dr. Perlman did not disclose a contrary view which he had received on consultation with respect to congestive heart failure, (b) the rushed form of proceedings did not allow for full argument, (c) there is a lack of clear legal standard in that the legal decision is made by the physician whose own biases and pressures bear on the decision. I will address each of these concerns in turn.

46 The respondents submit that if a s. 19(1)(*b*)(ix) order denies the parents' liberty interest, this denial is in accordance with the principles of fundamental justice. They submit that the decision appealed from was made by an impartial tribunal in accordance with the rules of procedural fairness. Specifically, they contend that the principles of fundamental justice permit the court to proceed expeditiously in emergency situations.

47 No authority provides a clear guideline as to how the principles of fundamental justice apply to this case. One can only look to general directions set out by the Supreme Court. It was made clear by Lamer J. in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, at pp. 501-504 [S.C.R.], that the term is not limited to procedural fairness. He went on to characterize the principles as follows, at p. 503 [S.C.R.]:

> [T]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. ... [Such an approach] provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

48 These principles, it has been held, "are not immutable; rather, they vary according to the context in which they are invoked": *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309, (sub nom. *R. v. L.)* 80 N.R. 161, 61 C.R. (3d) 1, 82 N.S.R. (2d) 271, 207 A.P.R. 271, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 32 C.R.R. 41, at p. 361 [S.C.R.]; *Pearlman v. Law Society (Manitoba)*, (sub nom. *Pearlman v. Manitoba Law Society Judicial Committee)* [1991] 2 S.C.R. 869, 2 Admin. L.R. (2d) 185, [1991] 6 W.W.R. 289, 84 D.L.R. (4th) 105, 130 N.R. 121, 75 Man. R. (2d) 81, 6 W.A.C. 81, 6 C.R.R. (2d) 259, at p. 884 [S.C.R.]. In *R. v. Beare*, [1988] 2 S.C.R. 387, 66 C.R. (3d) 97, [1989] 1 W.W.R. 97, 45 C.C.C. (3d) 57, 36 C.R.R. 90, 55 D.L.R. (4th) 481, 88 N.R. 205, 71 Sask. R. 1, La Forest J. elaborated how the "basic tenets ... of our legal system" are to be discerned in a given case. With specific reference to the case before him, he asserted, at pp. 402-403 [S.C.R.]:

> Consistent with this approach, the Court in R. v. Lyons, [1987] 2 S.C.R. 309, at p. 327, held that to determine whether a legislative scheme for the indeterminate detention of dangerous offendersviolated the principles of fundamental justice, it was necessary to examine that scheme in light of the basic principles of penal policy that had animated legislative and judicial practice in Canada and other common law jurisdictions. Here we are engaged in assessing law enforcement measures, specifically in the context of a person charged with an offence, and it is relevant then to consider them against the applicable principles and policies that have animated legislative and judicial practice in the field.

49 Recently, the same approach was taken by Sopinka J. in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 2 Admin. L.R. (2d) 125, 16 Imm. L.R. (2d) 1, 135 N.R. 161, 90 D.L.R. (4th) 289, 8 C.R.R. (2d) 234, 72 C.C.C. (3d) 214. In that case the respondent's position was that ss. 27(1)(*d*)(ii) and 32(2) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, were contrary to principles of fundamental justice. The argument was that the violation arose from the fact that the provisions were mandatory and required that deportation be ordered, without regard to the circumstances of the offence or the offender. In addressing the principles of fundamental justice in s. 7, Sopinka J. quoted, at p. 732 [S.C.R.], from Lamer J. in *Re British Columbia Motor Vehicle Act*, supra, at p. 513 [[1985] 2 S.C.R.]:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

[Emphasis added by Lamer J.] He then went on to note, at pp. 732-733:

> The importance of a contextual approach to the interpretation of s. 7 was emphasized by Cory J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 226:
>
> > It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.
>
> He noted that under a contextual approach, constitutional standards developed in the criminal context could not automatically be applied to regulatory offences. Similarly in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, McLachlin J. adopted at p. 848 a contextual approach which 'takes into account the nature of the decision to be made'. She concluded that in defining the fundamental justice relevant to extradition, the Court must draw upon the principles and policies underlying extradition law and procedure.
>
> Thus in determining the scope of principles of fundamental justiceas they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

50 There is no doubt that, with respect to this appeal, the "applicable principles and policies that have animated legislative and judicial practice in the field," as stated by La Forest J. in *Beare*, are those common law principles upon which the judicial role of parens patriae has been founded. The respondent has illustrated the significance which our courts have traditionally attached to the welfare of children and their willingness to infringe upon the sanctity of the family unit in order to achieve such welfare. The Supreme Court of Canada, in *Hepton v. Maat*, [1957] S.C.R. 606, 10 D.L.R. (2d) 1, at pp. 607-608 [S.C.R.], elucidated that tradition:

> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents: when through a failure, with or without parental fault, to furnish that protection, that welfare is

> threatened, the community, represented by the Sovereign, is, on the broadest social and na tional grounds, justified in displacing the parents and assuming their duties.

51 A similar view was expressed more recently by the Supreme Court in *Re Eve, (*sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 13 C.P.C. (2d) 6, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773, at pp. 425-426 [S.C.R.]. In that case La Forest J. stressed the breadth of the parens patriae jurisdiction, at p. 411 [S.C.R.]:

> [E]ven where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit.
>
> . . . . .
>
> [T]he situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed cannot, be defined.

52 A summary of the concepts underlying child welfare systems is found in an article by M.L. McCall entitled "An Analysis of Responsibilities in Child Welfare Systems" (1990) 8 Can. J. Fam. L. 345, at pp. 347-348:

> Barnhorst, in examining recent Canadian legislative changes, discusses the two primary philosophies underlying child welfare schemes. The first perspective he calls non-legalistic and interventionist. This view assumes that, while parents have the primary responsibility for children, this responsibility is shared with the community. When parents' actions are detrimental to their children, the state has a duty to intervene at an early stage to prevent the development of future problems. It can be assumedthat parents would probably not take advantage of preventive services if participation were on a voluntary basis. Accordingly, child welfare legislation provides broad discretion to agencies and judges, who purport to act in the best interests of the children.
>
> . . . . .
>
> This view has been challenged in recent years. Concern has arisen that children may be more likely to be harmed by intervention than helped. *A recent trend moves toward a more legalistic and non-intrusive approach that suggests that parents should be left alone to raise their children unless they fail to meet certain clear minimum standards of care.* Above that level, preventive or other services should be available on a voluntary basis. The discretion of agencies and judges is limited by the inclusion of procedural safeguards for both parents and children. Several arguments are made in support of this approach. First, *it is consistent with current notions of family privacy and autonomy* (which are similar to the notions prevailing prior to the development of the child welfare system). Second, it is commonly accepted that there is no single 'best' way to raise children. Finally, it is doubtful that involuntary intervention actually improves the situations of children.

[Emphasis added.] McCall points out that "Ontario legislation fall[s] at the non-intrusive end of the spectrum" [at p. 348].

53 As far as the common law of this country is concerned, it has always placed a child's right to life above the parents' religious objections to treatment, as is illustrated by Ed. Schollenberg in "Medical care disputes and the best interests of the child: integrating the medical evidence" (1989) 18 Man. L.J. 308, at p. 321:

> As illustrated by the Alberta case of *Re D.*, the issue is sometimes clear-cut. A full-term baby developed an extremely serious infection, requiring intensive therapy, including transfusions. In a review after the fact, there could be no denying the gravity of the illness or the lack of any real alternative. Arguments thus were strictly

> regarding the rights of the parents. The Court held that the right of the child to health overrode any rights of the parents. It noted an earlier Supreme Court discussion of freedom of religion that held that the freedom includes the right to profess and disseminate one's faith but not to avoid compliance with provincial laws. On that same note, in a post-*Charter* case, the Supreme Court held that the *Charter* does not preclude the legislature from imposing any burdens on the practice of religion. Thus, put simply, courts will not allow a child to die because of a parent's religious objection to treatment.

54 In my view, the authorities just cited illustrate that the protection of a child's right to life and to health is a basic tenet of our legal system. Legislation which addresses that objective in a manner that is not procedurally unfair must necessarily be in accordance with the principles of fundamental justice.

55 I would also note that consideration of *Malette v. Shulman* (1990), 2 C.C.L.T. (2d) 1, 72 O.R. (2d) 417, 67 D.L.R. (4th) 321, 37 O.A.C. 281 , a decision of this court, would add little to this discussion, despite some factual similarities to this case.

56 In *Malette* a civil action between a member of the Jehovah's Witnesses and the doctor who administered a blood transfusion to her, Robins J.A. recognized the state's "strong interest" in protecting the lives of its citizens, but concluded that this interest must give way to a competent adult's stronger interest in directing the course of her life. However, he also observed, at p. 429 [O.R.], that "[t]here clearly are circumstances where this interest may override the individual's right to self-determination." As examples, he referred to the government's interest in eliminating a health threat to the community or in prohibiting life-threatening activities.

57 I believe an analogous and equally pressing government interest arises when the health of a child is at stake, for it cannot be said that a minor has the freedom to direct the course of its life. When a parental decision would have the effect of endangering a child's life or well-being, then the state has a legitimate interest in intervention until the child acquires the legal capacity to choose for itself. In this sense, the reasoning in *Malette* is to be distinguished because of Robins J.A.'s careful qualification of its ratio to competent adults. Furthermore, *Malette* cannot be regarded as an affirmation of any guarantee of parental liberty as that case dealt with individual, not family, rights.

58 I shall return, therefore, to the procedural matters in the court below, which the appellants suggest were in violation of the principles of fundamental justice.

59 The appellants complain of the lack of disclosure at the summary protection hearing held before Main Prov. J. on July 31. In particular, they feel aggrieved by the fact that Dr. Perlman did not disclose a contrary view which he had received, on consultation, with respect to congestive heart failure. At that initial hearing Dr. Perlman testified that:

> [T]he patient has evidence of severe congestive heart failure, as shown by a gross enlargement of the liver, as I mentioned earlier, from three to six, to seven millimetres palpable as evidenced by x-ray findings of edema of the lungs, and as evidenced by a need for greatly increased intervention with the ventilator and with the addition of oxygen.

He also said:

> We could wait with the blood transfusion until the last moment and that is obviously always a temptation in this situation where one is doing their best to deal with the parents' beliefs at the same time as treating their child. On the other hand, if it is a vicious circle situation as I see it, then the longer the delay, the more likely is it that we won't be able to snatch the baby back from the threshold of death. So that I prefer to give the blood transfusion shortly before we reach that threshold.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

When asked by the court whether there was "no other way to break this vicious cycle that you speak of, apart from blood transfusion," he replied: "we have attempted other methods and not succeeded."

60 At the 1988 hearing before Whealy D.C.J., Dr. Pape testified. She has provided an affidavit at the initial hearing, in which she concurred with Dr. Perlman that S. suffered from congestive heart failure. In 1988 she testified that Dr. Perlman had consulted with Dr. Benson, a cardiologist, prior to the initial hearing and that Dr. Benson's view had been that there was "no evidence of congestive heart failure."

61 In my view, although the testimony of Dr. Perlman ought to have included reference to his consultation with Dr. Benson, that shortfall was not so significant that it denied the appellants a fair hearing. What Dr. Perlman failed to disclose was an opinion with which he and Dr. Pape disagreed. It may be worth noting that Dr. Pape referred to Dr. Benson as "a cardiologist who was even more junior than I was as a neonatologist" and that Dr. Perlman was the senior attending neonatologist. Dr. Perlman took a number of views and much information into account and came to the conclusion that S. suffered from congestive heart failure. I would not go so far, however, as to suggest that the omission caused no unfairness. The appellants were disadvantaged in their ability to obtain evidence to refute the testimony of Dr. Perlman.

62 In any event, that problem is merely evidence of the appellants' more general complaint about the form of proceedings. There is no doubt that the procedural conditions of initial wardship are not ideal. The parents receive a very short notice period and are at a clear disadvantage in terms of the information available to them. They are highly dependent on the degree of disclosure provided by the medical personnel involved in the case.

63 The Supreme Court of Canada has made it clear that procedural fairness, in particular, is to be judged in a contextual manner, despite certain characteristic requirements. In *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 58 N.R. 1, 17 D.L.R. (4th) 422, at pp. 212-213 [S.C.R.], Wilson J. gave some sense of what fundamental justice requires:

> All counsel were agreed that at a minimum the concept of 'fundamental justice' as it appears in s. 7 of the *Charter* includes the notion of procedural fairness articulated by Fauteaux C.J. in *Duke v. The Queen*, [1972] S.C.R. 917. At page 923 he said:
>
> > Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.
>
> Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? This seems to be the question we have to answer and, in approaching it, I am prepared to accept ... that procedural fairness may demand different things in different contexts.

64 It is clear from the nature of the proceedings in this case that, if the claims of the applicant [Children's Aid Society of Metropolitan Toronto] are assumed to be correct, an emergency situation existed. That context must lend meaning to the proper standard of procedural fairness. In *Re B.C.G.E.U.* (sub nom. *B.C.G.E.U. v. British Columbia (Attorney General)*), [1988] 2 S.C.R. 214, [1988] 6 W.W.R. 577, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, 30 C.P.C. (2d) 221, 88 C.L.L.C. 14,047, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 53 D.L.R. (4th) 1, 44 C.C.C. (3d) 289, a similar emergency was perceived by the court to exist. Although the circumstances of that case differ greatly from those presently before the court, the following passage is instructive as an illustration of the degree to which courts should be willing to bend traditional rules of fairness where the circumstances so dictate. Dickson C.J.C. said, at pp. 245-

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

246 [S.C.R.]:

> Assuming for the purposes of the argument that the effect of the injunction was to deny the Union members' right to liberty protected by s. 7, the denial of that right was fully in accordance with the principles of fundamental justice. While *ex parte* injunctions are the exception rather than the rule, it is well-established that a judge does have the discretion to make such an order in appropriate circumstances. An injunction plainly does not violate s. 7 of the *Charter* solely because it was granted *ex parte*. Where the circumstances are such that the delay necessary to give notice might result in an immediate and serious violation of rights, an *ex parte* injunction may be issued. The effect of the injunction was to put the appellants on notice that their conduct was unlawful and that it would be sanctioned if it continued. In the circumstances, the order of McEachern C.J.S.C. constituted a minimal interference with the procedural rights of those who had set out on a deliberate course of action which could only result in a massive disruption of the activities of the courts and consequent interference with the legal and constitutional rights of all citizens of British Columbia. Given that context, it can hardly be said that the order violated fundamental justice.

65 Despite the differences in the conduct of the affected parties and in the resulting procedure employed, this language implies that drastic conditions may dictate interference with persons' usual procedural rights. Conditions which may trigger such interference will be such that the usual procedure obstructs the ability of the court to deal with a serious concern in a sufficiently timely fashion.

66 In my view, the respondents are correct that the procedures outlined in s. 28 of the *Child Welfare Act* ensure that the interests of the parents are given full judicial protection. Pursuant to that provision, witnesses were summoned at the initial hearing on July 31, 1983, to give evidence and produce records. The parents were notified of the hearing, although not until the day on which it was held. The parents were represented by counsel, and they, too, gave evidence. Their counsel, who is extensively experienced in issues of this kind, was permitted to cross-examine all of the witnesses called by the C.A.S. As well, there was no suggestion that the judge hearing the application was in any way biased. In light of the dire need for preventive action, which was revealed by the evidence presented at the hearing, it is my opinion that the hearing was conducted in accordance with the principles of fundamental justice.

67 The appellants also argue that there is a lack of clear legal standard provided for by the impugned provisions. They rely on the remarks of Dickson C.J.C. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 82 N.R. 1, 62 C.R. (3d) 1, 26 O.A.C. 1, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 37 C.C.C. (3d) 449, with respect to the legal standards applied by therapeutic abortion committees. However, the appellants' submissions on this point, with one exception, depend on their view that s. 19(1)(*b*)(ix) delegates to a medical practitioner the legal decision as to medical procedures to be undertaken. Because I stated earlierthat, in my view, that presumption is an inaccurate portrayal of the scheme of the *Child Welfare Act*, I will not deal with this argument extensively.

68 In any event, the test provided in s. 19(1)(*b*)(ix), that treatment be "necessary for the child's health or well-being," is sufficiently clear that it cannot be described as "open-ended." In support of this view, I note that in *Jones*, supra, La Forest J. pointed out that an imprecise legal standard can be necessary and not contrary to the principles of fundamental justice. He said, at p. 306 [S.C.R.]:

> Counsel for the appellant also noted that in *Hunter* the Court insisted on the necessity of objective standards in making a decision. Here, he claims there are no objective standards by which efficient instruction is to be judged. To this I would reply that there can be no precise definition of what constitutes efficient education. The question must necessarily be left for someone to determine. Of course, it cannot be decided in the abstract or in an arbitrary manner. The discretion accorded by s. 143(1)(*a*) must necessarily be determined in accordance with the requirements of the *School Act* as they operate in a practical setting. *While some guidelines could probably be spelled out, in many if not all aspects, simply requiring efficient instruction may, from a practical standpoint, be as precise a standard as the nature of the subject-matter will allow; in any event, such a standard in this*

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

context is not unreasonable.

[Emphasis added.]

69 In conclusion, therefore, it is my view that the appellants have not been deprived of their liberty in a manner contrary to the principles of fundamental justice.

Issue 3: Did the Impugned Sections of the Child Welfare Act Violate s. 2(a) of the Charter?

70 With respect to s. 2(*a*) of the *Charter*, Whealy D.C.J. held that the *Child Welfare Act*, R.S.O. 1980, c. 66, which originated as *The Children's Protection Act*, R.S.O. 1927, c. 279, was not *aimed* at Jehovah's Witnesses because they did not adopt refusal to accept blood transfusions as a religious tenet until 1945. On that basis, as well as upon such authorities as *Hepton v. Maat*, supra; (1985), 6 O.A.C. 367, 44 C.R. (3d) 193, 18 C.C.C (3d) 328, 14 C.R.R. 314 (C.A.) (affirmed with no discussion of s. 2(*a*), [1989] 1 S.C.R. 1392, 13 M.V.R. (2d) 161, 69 C.R. (3d) 289, 48 C.C.C. (3d) 129, 98 N.R. 19, 35 O.A.C. 1), he held that the Act did not violate s. 2(*a*). In my view, the conclusion of Whealy D.C.J. with respect to the purpose of the legislation is correct and need not be considered further in this appeal. However, it is necessary to consider whether the *effect* of the legislation violates s. 2(*a*).

71 The appellants submit that Whealy D.C.J. erred in focusing on the intent of the 1927 legislation without considering adverse effects. They argue that this court, in *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (sub nom. *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*) (1990), 65 D.L.R. (4th) 1, 71 O.R. (2d) 341, 37 O.A.C. 93, 46 C.R.R. 316, at p. 364 [O.R.], and the Supreme Court of Canada in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, at p. 353 [S.C.R.], and in *R. v. Oakes*, [1986] 1 S.C.R. 103, 65 N.R. 87, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 18 C.R.R. 308, at p. 136 [S.C.R.], have identified the importance of the existence of and respect for religious diversity, as has the Ontario legislature in the *Immunization of School Pupils Act, 1982*, S.O. 1982, c. 41. They submit that the adjudicative facts tendered in this case illustrate the adverseeffect of the *Child Welfare Act* on themselves. They argue further that the "constitutional" evidence indicates that Jehovah's Witnesses are a discrete and insular minority and are subject to disadvantage in the entire social, political, and legal scheme of our society.

72 The respondents submit that the parents' freedom of religion with respect to their children does not extend to the imposition of religious practices which threaten the health of the child.

73 The starting point for analysis under s. 2(*a*) is the Supreme Court's decision in *Big M Drug Mart*, supra. In that case the court held that the effect of a law can be a basis for its invalidation. Dickson C.J.C. made this point clearly, at p. 331 [S.C.R.]:

> In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actualeffects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

The Chief Justice reiterated this opinion in *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, at p. 753 [S.C.R.].

74 In this case the effect of the impugned legislation in the case before this court is clear. It prevents S.'s parents

from practising their religion in as much as that practice entails preventing their child from receiving a blood transfusion as a means of medical treatment. The issue here, of course, is whether the right to freedom of religion extends to protect that practice where a trial judge concludes that to do so may endanger the life or health of the child.

75 The fundamental approach to interpretation of rights guaranteed under the *Charter* was originally set out by Dickson C.J.C. in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, 27 B.L.R. 297, 33 Alta. L.R. (2d) 193, (sub nom. *Director of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 55 A.R. 291, 55 N.R. 241, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 11 D.L.R. (4th) 461, 84 D.T.C. 6467. He again referred to that approach in *Big M Drug Mart*, at p. 344 [S.C.R.], where he wrote:

> In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. 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 ... of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

[Emphasis added by Dickson C.J.C.]

76 Applying the statement of Dickson C.J.C. in *Big M Drug Mart*, that "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," it is my view that the analysis set out in the previous section with respect to the principles of fundamental justice must be part of the context surrounding the interpretation of the extent of the rights guaranteed by s. 2(*a*).

77 With that context in mind, it is necessary to consider whether the appellants' purported rights fall within the scope of s. 2(*a*). It is evident, from the language of Dickson C.J.C. in *Big M Drug Mart*, that one purpose of s. 2(*a*) is to protect one's right to practise and teach a religious perspective freely. He said, at pp. 336-337:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The 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. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion 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. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

> fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

78 Although this passage points to a very broad conception of freedom of religion, the final sentence suggests that such freedom must be subject to overriding concerns. Without, at this stage, deciding whether such a limitation is to be determined within the context of s. 1 of the *Charter*, it is necessary first to try to discern what the scope of the concern for health is. In this regard Dickson C.J.C. referred, in *Big M Drug Mart*, to the purposive approach. He asserted, at p. 344:

> At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

79 Although it was not necessary, in the context of that case, to examine fully the limits upon freedom of religion, their existence was acknowledged in this statement, at pp. 346-347:

> 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.
>
> . . . . .
>
> For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. *I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(a) might otherwise prohibit.*

[Emphasis added.]

80 Undoubtedly, an effect of the *Child Welfare Act* in this case is to coerce the appellants not to manifest their views by controlling the treatment provided to the child. The preservation of life and health, however, which is the target of that Act, is fundamental to the Canadian legal system. It is difficult to imagine what vital interest would justify governmental coercion if not the preservation of the life or health of an infant.

81 To demonstrate the magnitude of the child's right to life and death, one need only compare the view taken by the majority in *Jones*, supra, with respect to education. At p. 299 [[1986] 2 S.C.R.], La Forest J. wrote:

> No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens.

It is trite to say that the life or health of a child is even more substantial a state interest than the child's education.

82 Therefore, in my opinion, the appellants' right to choose medical treatment for their child in accordance with their religious beliefs is protected by s. 2(*a*) only so long as it does not impede the vital and overriding state concern with the life and health of a child.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

83 The question is whether such a limitation, referred to by Dickson C.J.C. as early as his decision in *Big M Drug Mart*, excludes such medical treatment from s. 2(*a*) of the *Charter* or is a reasonable limit under s. 1 thereof. As did La Forest J. in *Jones*, and Dickson C.J.C. in *Edwards Books*, supra, I believe that the question of whether a restriction on freedom of religion is constitutionally valid is a question under s. 1. I will, therefore, proceed to so consider it.

Issue 4: If the Impugned Provisions Violate s. 2(a) of the Charter, Are the Provisions Justified under s. 1?

84 Whealy D.C.J. referred briefly to the s. 1 issue, stating that any s. 7 violation would easily survive s. 1.

85 The s. 1 test was set out most recently by Lamer C.J.C. for the majority of the Supreme Court in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, 119 N.R. 161, [1991] 2 W.W.R. 385, 69 Man. R. (2d) 161, 62 C.C.C. (3d) 193, 1 C.R.R. (2d) 1, at pp. 1335-1356 [S.C.R.]:

> The procedure to be followed when the state is attempting to justify a limit on a right of freedom under s. 1 was set out by this Court in *Oakes, supra*:
>
> > 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
> >
> > 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
> >
> > > (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
> > >
> > > (b) impair the right or freedom in question as 'little as possible'; and
> > >
> > > (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

86 I shall follow those four branches of the test in the analysis which follows.

87 The appellants submit that the statute's objective is to provide physicians with consent for treatment and protection from civil liability, and that this is not a pressing and substantial concern. The respondents characterize the objective of the legislation as being to protect the life and health of children. This objective, they submit, especially given the vulnerability of children, warrants overriding freedom of religion or autonomy of parents.

88 Earlier, I discussed the objective of the legislation. That analysis, which now places me in agreement with the respondents, applies under this heading. The objective of saving the life or health of a child is a pressing and substantial concern.

89 With respect to the rational connection standard, Professor Peter W. Hogg, in "Section 1 Revisited" (1992) 1 N.J.C.L. 1, at p. 14, provided the following references to other Supreme Court decisions:

> 'The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose.' The law must be 'carefully designed to achieve the objective in question'; it should not be 'arbitrary, unfair or based on irrational considerations.'

90 The appellants submits that the measures chosen, a summary and hurriedly convened hearing, are irrational and unfair. The respondents argue in favour of the measures chosen, which they characterize as a wardship order put in the hands of an impartial court and limited to circumstances where the proposed care is proper and necessary.

91 Professor Hogg also argues that this aspect of the test is not particularly significant, at p. 16:

> According to my count, at the time of writing (1990), *Oakes* is the only case where a law has been held not to satisfy the requirement of rational connection. All the other section 1 cases where the objective has been approved have turned on the requirement of least drastic means. If I am right that *Oakes* could have been decided more easily on the basis of least drastic means, one is forced to conclude that the requirement of rational connection has very little work to do.

92 Even assuming this aspect of the test is more significant than Professor Hogg suggests, this would not be a case where legislation should be found to be not rationally connected to its objective. The connection between the means used in this case and the objective of the *Child Welfare Act* is obvious. In order for the state to obtain treatment which is perceived, by expert medical evidence accepted by the tribunal, as necessary to preserve a child's health, the C.A.S. can expediently seek an order of the court granting wardship. The state must obtain the authority which ordinarily belongs to the parents. The hurried manner of proceeding is directed at the emergency which is frequently inherent in the course of events the Act seeks to avert.

93 On the penultimate branch of the *Oakes* test, the appellants argue that the order removing S. from her parents' control did not minimally impair their right under ss. 2(*a*) and 7; it vested the C.A.S. with total discretion over elective surgery. The respondents submit that the impairment is minimal in that the legislation ensures that the parents' religious beliefs will be accommodated where medically accepted alternatives to blood transfusions are available.

94 Professor Hogg describes this portion of the test as "the least drastic means" aspect. He adds that the requirement "has turned out to be the heart and soul of section 1 justification" [at p. 17]. He suggests that "[i]f section 1 is to offer any real prospect of justification, the judges have to pay some degree of deference to legislative choices" [at p. 18]. He refers to such deference as "a margin of appreciation," a term which is borrowed from the decision in *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) 39 C.R.R. 193, at p. 999 [S.C.R.]. After describing several cases in which the approach was used, he writes, at pp. 22-23:

> [T]he Court was willing to defer to the legislative choice on the basis that the choice was within a margin of appreciation, a zone of discretion in which reasonable legislators could disagree while still respecting the *Charter* right. The result makes for an unpredictable jurisprudence, but there is no practical way to avoid uncertainty in the application of the requirement of least drastic means.

95 Having considered the cases which examine this aspect of the test, I do not think that a factual review of them is helpful. I note only what La Forest J. said in *Cotroni c. Centre de Prévention de Montréal*, (sub nom. *United States v. Cotroni*; *United States v. El Zein*) [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 96 N.R. 321, 23 Q.A.C. 182, 42 C.R.R. 101, at pp. 1489-1490 [S.C.R.]:

> In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

96 In my opinion, where a blood transfusion may be necessary to save the life of a child or to protect it from a serious handicap, it is difficult to imagine a means of ensuring that treatment is provided once the actual necessity arises which is a less restrictive means than that employed in this case. The appellants' rights were only impeded once a court came to the conclusion that the exercise of those rights would endanger the health of the child.

97 The last branch of the *Oakes* test is the requirement of proportionate effect. Professor Hogg is firm in his belief that no effort should be expended on this branch. At pp. 23-24, he says:

> The decided cases provide no examples of the application of this fourth step. So far as I can tell, it has never had any influence on the outcome of any case. I think that the reason for this is that it is redundant.
>
> . . . . .
>
> [A]n affirmative answer to the first step — sufficiently important objective — will always yield an affirmative answer to the fourth step — proportionate effect.

I would not attempt to quarrel with the reasoning of Professor Hogg. In any event, it is not necessary to address this branch of the test in this case as it was, in practical effect, dealt with under the first branch.

98 Accordingly, it is my view that any violation of s. 2(*a*) would be saved by s. 1.

Issue 5: What Remedy is "appropriate and just in the circumstances"?

99 Given what I have said above, this question need not be discussed.

Issue 6 Did Whealy D.C.J. Err in Awarding Costs against the Respondent Attorney General?

100 The respondents submit that the award of **costs** against them was an error in the exercise of discretion in that (1) the respondents were completely successful in the suit; (2) there was no misconduct on the part of the Attorney General; (3) available resources are irrelevant to the decision; (4) if available resources are relevant, there is no evidence as to the appellants' or the Attorney General's resources; (5) the order will encourage marginal applications for constitutional challenges; (6) the purpose of allowing this "test case" to proceed was to benefit the appellants and those of their faith.

101 One cannot but agree with the first two assertions. That the respondents are completely successful is obvious. That there was no misconduct on the part of the Attorney General is equally obvious, and Whealy D.C.J. explicitly so found. However, both s. 141 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11 (now s. 131), and r. 57.01 of the *Rules of Civil Procedure* contemplate **costs** being granted to the unsuccessful party, and for reasons *not* involving misconduct on the part of the successful party.

102 Equally, I agree with submissions (3) and (4). However, I do not agree with counsel for the Attorney General that the reference to available resources was a factor in the decision to award **costs** to the unsuccessful appellants. In fact, although he did not say so specifically, I believe that Whealy D.C.J. rejected availability of resources as being a factor. He made reference to the support of the appellants by members of their church and then went on to assert [at p. 3, per reasons dated June 9, 1989]: "It is equally true, however, that all other parties at this appeal have for all practical purposes unlimited resources." Then he expressed his agreement with Osler J. in *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 12 C.P.C. (2d) 203, 56 O.R. (2d) 240, 32 D.L.R. (4th) 292 at 304, 27 C.R.R. 52 (H.C.), when the latter asserted, at p. 242 [O.R.]:

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

> While it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden, it is equally desirable that the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged.

This is hardly an endorsement of resorting to the Crown "as an unlimited source of funds with the result that marginal applications would be encouraged." Rather, I believe, he set this factor aside in favour of three others that he referred to, and which I think militate in favour of upholding his decision. Since he did not indicate these in order of importance, I will deal with them in the order I think important.

103 First of all, it is important to note that "the litigation was originally triggered by an act of the state in the guise of the Children's Aid Society of Metropolitan Toronto" [at p. 3]. It was not the parents of S. who initiated these proceedings. They merely responded to protect what they considered to be their rights as parents. The fact that I have concluded that the state has a right to intervene to protect the life or well-being of a child, even over the objections of parents, does not lessen the fact that they were responding to state action.

104 I must add that this is probably not reason enough in itself for granting the appellants their **costs**. After all, on this basis, any accused person could claim **costs**. Here, however, the parents rose up against state power because of their religious beliefs. Although I have decided that this cannot stand in the way of medical treatment deemed necessary by a judge on the basis of fact findings based on expert evidence, our *Charter* has proclaimed protection of religious beliefs to be "fundamental" and, in fact, the first of the "fundamental freedoms." Therefore, these circumstances must be a factor coming within r. 57.01(1)(*d*) — "the importance of the issues."

105 It is this ground, again, which justifies considering another important factor referred to by Whealy D.C.J., i.e., "that the Court of Appeal, by a majority, had held that the issue argued on the appeal was of province-wide importance" [at p. 3]. I would merely add that, despite some variations between the provinces as to their child welfare statutes, the issue on this appeal is of national importance — the resort to wardships of children whose parents refuse blood transfusions on religious grounds. In fact, it has international significance as these same issues have arisen in the United States and Australia.

106 The following appears to be a third factor referred to by Whealy D.C.J. in deciding to grant **costs** to the appellants [at p. 4]:

> This case proceeded in a most unusual fashion and laborious manner for all concerned, and I am not aware of any case where a first level appeal from a decision of a trial judge has gone this circuitous route and ended up with the appeal being transformed into what amounts to a retrial on fresh evidence.

107 The Attorney General does not refer to this in his submissions. Instead, his sixth submission, referred to above, suggests that the purpose of allowing this "test case" was to benefit the appellants and their co-religionists. I think that the answer to this arises out of the first factor I dealt with here, i.e., that it is not they who initiated the proceedings giving rise to this appeal.

108 In any event, the case before Whealy D.C.J. was complicated, the hearings were very lengthy and were a form of retrial. The Attorney General submits that a factor that should have been considered was that the learned District Court judge found two of the appellants' witnesses "not too helpful," that he found that one of the other witnesses "did not materially advance either position put before the Court," and that two others were "irrelevant." However, it was Whealy D.C.J. who heard all these witnesses and yet granted **costs** to the appellants. Apparently, although he did not accept their evidence in preference to that of the respondents, he did not consider the evidence on behalf of the appellants to be so "improper, vexatious or unnecessary" (r. 57.01(1)(*f*)(i)) as to override the other considerations. I do not believe that an appellate court should second-guess him on this.

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

109 In view of the above discussions, I do not accept the Attorney General's fifth submission. In view of the factors set out above, I do not think that the **costs** order "will encourage marginal applications for constitutional challenges." Even though the appellants lost at all levels, I do not consider their application to have been marginal, even in the appeal to this court. However, I do not think that **costs** should be granted on the appeal. In the circumstances of having gained party and party **costs**, despite losing before Whealy D.C.J., an indulgence has already been obtained. A further one cannot be justified after having had the full review from him. None of the respondents asked for **costs** and none should be granted.

Disposition

110 I would dismiss the appellants' appeal from the disposition of the case by Whealy D.C.J. on February 10, 1989. I would also dismiss the cross-appeal of the respondent Attorney General from the **costs** order of June 9, 1989. There should be no **costs** granted in this appeal.

***Goodman J.A.*:**

111 I have had the opportunity of reading the reasons for judgment of Tarnopolsky J.A. and those of Houlden J.A., dissenting in part. I agree with the reasons of my brother Tarnopolsky dismissing the appellants' appeal. Although I am of the opinion that **costs** should be awarded against a successful party only in exceptional cases, I am not persuaded that the case at bar is not a proper case for such an award. I am not disposed to interfere with the discretion exercised by the District Court judge in his award of **costs** to the appellants and, for the reasons given by Tarnopolsky J.A., would dismiss the cross-appeal from the **costs** order.

112 Although I am of the view that it is not necessary to deal with the specific relief requested by the appellants, I agree with my brother Houlden that the appellants, even if successful on the merits, would not have been entitled to the declaratory relief in the form asked, having regard to the facts and issues involved in this case.

***Houlden J.A.* (dissenting in part):**

113 I have read the judgment of Tarnopolsky J.A. and, except for the matter of **costs**, I agree with his conclusions. In addition to setting out my view on **costs**, I would like also to discuss briefly the remedies sought by the appellants. Tarnopolsky J.A., quite rightly, takes the position that, because the appeal is being dismissed, there is no need to say anything about the remedies requested by the appellants. However, since a considerable portion of the argument was directed to this subject, and since the case may be appealed to a higher court, I believe that something should be said about it.

Remedies Sought by the Appellants

114 In the event that the appellants succeeded in the appeal, counsel sought three declarations. First, a declaration of principle governing all health care professionals, health care institutions, and the C.A.S. when providing medical treatment to mature minors. The declaration of principle would be as follows:

> A mature minor has the right to personal autonomy and security, including the freedom to make private health-care choices where:
>
> a. the minor has expressed a firm, clear and personal treatment choice;
>
> b. the minor's capacity reflects a personal understanding and appreciation of the nature and impact of the choice made.

Since S.B. is not a mature minor, I am of the opinion that the court would have had no power to make such a declaration.

115 Second, the appellants sought a declaration as to the criteria which should govern when the C.A.S. seeks to impose medical treatment on a child, who is not a mature minor, contrary to the wishes of the child's parents or legal guardians. The proposed criteria were the following:

> a. Every family has the right to family autonomy, including the freedom to make health-care choices for the child, consistent with his or her health;
>
> b. The C.A.S. may only apply for a judicial order authorizing treatment of a child patient, who is not a mature minor, where:
>
> > i. the C.A.S. or attending physician has given the patient's parents or guardians two days' notice, together with early, full and fair disclosure of the basis for the medical opinion;
> >
> > ii. the patient cannot be transferred to another physician or a medical centre acceptable to the patient's parent or guardians;
> >
> > iii. the attending physician and C.A.S. have consulted with another physician selected by the patient's parents or guardians;
> >
> > iv. no alternative medical management acceptable to the patient's parents or guardians can be used in the circumstances;
> >
> > v. the proposed treatment will probably cure or alleviate the patient's illness, disease or injury;
> >
> > vi. the proposed treatment is not medically controversial or will not itself cause substantial harm to the patient.
>
> c. The Family Court may grant the C.A.S. a treatment order limited to the treatment that has been proved to be necessary in the circumstances.

It will, of course, be obvious that the suggested criteria would result in substantial amendments to the *Child Welfare Act*, an Act which has been repealed and replaced by the *Child and Family Services Act, 1984*, S.O. 1984, c. 55 [now R.S.O. 1990, c. C.11].

116 In *Schachter v. Canada*, judgment of the Supreme Court of Canada, released July 9, 1992 [reported at [1992] 2 S.C.R. 679, 92 C.L.L.C. 14,036, 139 N.R. 1, 93 D.L.R. (4th) 1, 10 C.R.R. (2d) 1], the respondent contended that s. 32 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, dealing with the right of parents of adopted children to benefits under the Act, should be extended to natural parents. After the action was commenced, the impugned section was amended to equalize the benefits given to adoptive parents and to natural parents. In the Federal Court it was conceded by the appellants that the provisions of the *Unemployment Insurance Act, 1971*, as they existed when the action was commenced, violated s. 15(1) of the *Charter* so that the only matter in issue was the remedy to be given to the respondent. Strayer J. granted declaratory relief under s. 24(1) of the *Charter*, extending to natural parents the same benefits as were granted to adoptive parents under s. 32. An appeal to the Federal Court of Appeal was dismissed. The Supreme Court of Canada was unanimously of the opinion that the appeal should be allowed and that the court should not grant the remedy awarded by the Federal Court.

117 Lamer C.J.C., who delivered the judgment of five members of the court, said [at p. 723 S.C.R.]:

> Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole.

118 La Forest J., who delivered a concurring judgment, joined in by L'Heureux-Dubé J., said [at pp. 726-727]:

> As the Chief Justice points out, there is a long tradition of reading down legislation, and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation.

And later in his judgment, he said [at p. 728]:

> The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

119 To make the declaration requested by the appellants would, to use the words of Lamer C.J.C., "constitute a substantial intrusion into the legislative domain." Furthermore, the amendments that the appellants would have us make in the legislation do not accord with the amendments that the legislature has seen fit to make in it. I am of the opinion, therefore, that the court would not have the power to make the second declaration claim by the appellants.

120 Third, the appellants sought a declaration regarding the criteria which should govern where a physician and health care institution in a bona fide medical emergency consider it necessary to treat a child, who is not a mature minor, contrary to the wishes of the patient's parents or legal guardians. The proposed criteria were the following:

> a. Every family has the right to family autonomy, including the freedom to make health-care choices for the child, consistent with his or her health;
>
> b. The physician may only treat without judicial order where:
>
> i. the attending physician has tried unsuccessfully to transfer the patient to a physician in the same facility who is capable and willing to provide treatment acceptable to the family; and
>
> ii. the attending physician obtains a consultation and written agreement from another physician; and
>
> iii. any delay in administering the proposed medical treatment will probably result in the patient's death or irreparable harm, and the proposed treatment will likely be beneficial to cure or alleviate the patient's condition; and

1992 CarswellOnt 301, 43 R.F.L. (3d) 36, 10 O.R. (3d) 321, 96 D.L.R. (4th) 45, (sub nom. Sheena, Re) 58 O.A.C. 93

iv. no alternative medical management acceptable to the patient's parent or guardian can be used in the circumstances, and

v. the proposed treatment is not medically controversial or will not cause substantial harm to the patient.

c. The *Child and Family Services Act*, 1984, shall provide that upon the application of the patient's parent or guardian, the Family Court shall, following treatment, determine the appropriateness of the decision to treat made pursuantto subparagraph (b).

Again, the suggested criteria would require extensive amendments to the *Child Welfare Act*, and also to the *Child and Family Services Act, 1984*, a statute that is not before us. For the reasons I have given in dealing with the second declaration, I do not believe that the court could make such a declaration.

121 What the appropriate remedy would have been if we had found that the provisions of the *Child Welfare Act* violated the *Charter* is a difficult question to answer in view of the repeal of the statute. In the circumstances I do not believe that any useful purpose would be served by attempting to answer this question.

Costs

122 After delivering his reasons for dismissing the appeal, Judge Whealy, in May 1989, commenced a hearing concerning the question of **costs**. At the conclusion of argument, he reserved the matter. On June 9, 1989, he delivered written reasons in which he ordered the intervenor, the Attorney General of Ontario, to pay the **costs** of the appellants on a party and party basis. The Attorney General has cross-appealed against that order.

123 Since the appellants were challenging the constitutional validity of the *Child Welfare Act*, s. 122 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11 [now s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43], required notice to be served on the Attorney General of Ontario. By s. 122(4) the Attorney General was entitled to adduce evidence and to make submissions to the court in respect of the constitutional question. Notice was given to the Attorney General of Ontario by the appellants as required by s. 122. The Attorney General intervened to defend the validity of the legislation and was successful before Judge Whealy in upholding its validity. It would, in my opinion, create a dangerous precedent to award **costs** against the Attorney General in these circumstances.

124 Accordingly, I would allow the cross-appeal, set aside the order for **costs** made by Judge Whealy, and, in its place, I would make an order that there be no **costs** of the appeal to the District Court. I agree with Tarnopolsky J.A. that there should be no **costs** of the appeal or the cross-appeal.

Appeals dismissed.

END OF DOCUMENT

Horsefield v. Ontario (Registrar of Motion Vehicles) (1999), 44 O.R. (3d) 73

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

Horsefield v. Ontario (Registrar of Motor Vehicles)

Ronald Horsefield, Respondent and The Registrar of Motor Vehicles, Appellant and Criminal Lawyers' Association, Intervenor and Mothers Against Drunk Driving, Intervenor

Ontario Court of Appeal

Catzman, Charron, Finlayson JJ.A.

Heard: March 11, 1999
Judgment: April 8, 1999[FN*]
Docket: CA C29157

Proceedings: reversing (1997), 34 O.R. (3d) 509 (Ont. Div. Ct.); varied (May 14, 1999), Doc. CA C29157 (Ont. C.A.)

Counsel: *Michel Y. Hélie*, for Appellant.

R.J. Blais MacLean, for Respondent.

Sharon E. Lavine and *Paul K. Burstein*, for the Intervenor Criminal Lawyers' Association.

Sandra Antoniani, for the Intervenor MADD.

Subject: Public; Constitutional

Motor vehicles --- Constitutional issues — Under Constitution Act, 1867 — Provincial offences and penalties — Impaired driving — General

Accused was stopped by R.I.D.E. program and officer detected moderate odour of alcohol on accused's breath — Accused complied with demand to provide breath sample for road-side screening device — Device registered "fail" reading — Accused submitted two breath samples at police station and breathalyzer tests showed blood alcohol concentration of 90 mg of alcohol per 100 ml of blood — Accused was charged with driving with excess alcohol and notice of licence suspension was given to accused on basis of certificate of analysis — Accused brought application for judicial review of registrar's decision to suspend licence — Suspension was served in full and charge of driving with excess alcohol was withdrawn at request of Crown — Applications judge granted application and declared s. 48.3 of Highway Traffic Act to be unconstitutional as it was inconsistent with paramount federal legislation in ss.

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

254, 256 and 258 of Criminal Code — Appeal by Crown allowed — Right to build and operate highways, including right to provide for safety of traffic, is wholly within purview of provinces under s. 92 of Constitution Act — Fact that provincial enactment violates Charter right of citizen is immaterial to its constitutionality under s. 92 of Constitution Act — Program under s. 48.3 of Highway Traffic Act was enacted in accordance with province's jurisdiction under s. 92 of Constitution Act, and was not in conflict with Criminal Code provisions — Administration of licence suspension provisions of program did not offend principles of natural justice — Legislature has right to override common-law administrative law principles relating to natural justice — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92 — Criminal Code, R.S.C. 1985, c. C-46, ss. 254, 256, 258 — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48.3.

Motor vehicles --- Constitutional issues — Under Constitution Act, 1867 — Provincial offences and penalties — Licence suspension

Accused was stopped by R.I.D.E. program and officer detected moderate odour of alcohol on accused's breath — Accused complied with demand to provide breath sample for road-side screening device — Device registered "fail" reading — Accused submitted two breath samples at police station and breathalyzer tests showed blood alcohol concentration of 90 mg of alcohol per 100 ml of blood — Accused was charged with driving with excess alcohol and notice of licence suspension was given to accused on basis of certificate of analysis — Accused brought application for judicial review of registrar's decision to suspend licence — Suspension was served in full and charge of driving with excess alcohol was withdrawn at request of Crown — Applications judge granted application and declared s. 48.3 of Highway Traffic Act to be unconstitutional as it was inconsistent with paramount federal legislation in ss. 254, 256 and 258 of Criminal Code — Appeal by Crown allowed — Right to build and operate highways, including right to provide for safety of traffic, is wholly within purview of provinces under s. 92 of Constitution Act — Fact that provincial enactment violates Charter right of citizen is immaterial to its constitutionality under s. 92 of Constitution Act — Program under s. 48.3 of Highway Traffic Act was enacted in accordance with province's jurisdiction under s. 92 of Constitution Act, and was not in conflict with Criminal Code provisions — Administration of licence suspension provisions of program did not offend principles of natural justice — Legislature has right to override common-law administrative law principles relating to natural justice — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92 — Criminal Code, R.S.C. 1985, c. C-46, ss. 254, 256, 258 — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48.3.

Motor vehicles --- Constitutional issues — Effect of Charter of Rights and Freedoms — Life, liberty and security of person — Licence suspension or cancellation

Accused was stopped by R.I.D.E. program and officer detected moderate odour of alcohol on accused's breath — Accused complied with demand to provide breath sample for road-side screening device — Device registered "fail" reading — Accused submitted two breath samples at police station and breathalyzer tests showed blood alcohol concentration of 90 mg of alcohol per 100 ml of blood — Accused was charged with driving with excess alcohol and notice of licence suspension was given to accused on basis of certificate of analysis — Accused brought application for judicial review of registrar's decision to suspend licence — Suspension was served in full and charge of driving with excess alcohol was withdrawn at request of Crown — Applications judge granted application and declared s. 48.3 of Highway Traffic Act to be unconstitutional as it was inconsistent with paramount federal legislation in ss. 254, 256 and 258 of Criminal Code — Applications judge further declared that s. 48.3 of Act constituted deprivation of liberty within meaning of s. 7 of Charter — Appeal by Crown allowed — Program under s. 48.3 of Highway Traffic Act was enacted in accordance with province's jurisdiction under s. 92 of Constitution Act, and was not in conflict with Criminal Code provisions — Right to drive motor vehicle is not liberty within meaning of s. 7 of Charter — Suspended drivers are able to make alternative arrangements to get to and from work — Driving of motor vehicle is not matter that is fundamental or inherently personal to individual — Program under s. 48.3 of Highway Traffic Act did not interfere with liberty protected by s. 7 of Charter — Administration of licence suspension provisions of program did not offend principles of natural justice — Legislature has right to override common-law administrative law principles relating to natural justice — Canadian Charter of Rights and Freedoms, s. 7 — Constitution

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92 — Criminal Code, R.S.C. 1985, c. C-46, ss. 254, 256, 258 — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48.3.

Constitutional law --- Procedure in constitutional challenges — Costs

Accused was stopped by R.I.D.E. program and officer detected moderate odour of alcohol on accused's breath — Accused was charged with driving with excess alcohol and notice of licence suspension was given to accused on basis of certificate of analysis — Accused brought application for judicial review of registrar's decision to suspend licence — Suspension was served in full and charge of driving with excess alcohol was withdrawn at request of Crown — Applications judge granted application and declared s. 48.3 of Highway Traffic Act to be unconstitutional as it was inconsistent with paramount federal legislation in ss. 254, 256 and 258 of Criminal Code — Applications judge further declared that s. 48.3 of Act constituted deprivation of liberty within meaning of s. 7 of Charter — Applications judge ordered Crown to pay costs of accused on solicitor-client basis — Appeal by Crown allowed and judgment of applications judge set aside — Accused entitled to solicitor-and-client costs throughout — Accused was entitled to challenge program under s. 48.3 of Act — Arguments of accused were not frivolous as they were successful in first instance — Intervenors who presented arguments on appeal also entitled to solicitor-and-client costs for appeal — Administration of justice was well served by arguments of intervenors — Canadian Charter of Rights and Freedoms, s. 7 — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92 — Criminal Code, R.S.C. 1985, c. C-46, ss. 254, 256, 258 — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48.3.

Cases considered by *Finlayson J.A.*:

Buhlers v. British Columbia (Superintendent of Motor Vehicles) (1998), 33 M.V.R. (3d) 164, 50 B.C.L.R. (3d) 369, [1999] 2 W.W.R. 94 (B.C. S.C.) — applied

Buhlers v. British Columbia (Superintendent of Motor Vehicles) (1999), 60 C.R.R. (2d) 74, 170 D.L.R. (4th) 344, 132 C.C.C. (3d) 478, 23 C.R. (5th) 1, 119 B.C.A.C. 207, 194 W.A.C. 207, 41 M.V.R. (3d) 165 (B.C. C.A.) — applied

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643, [1986] 1 W.W.R. 577, 24 D.L.R. (4th) 44, 63 N.R. 353, 69 B.C.L.R. 255, 16 Admin. L.R. 233, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35 (S.C.C.) — applied

Ginther v. Saskatchewan Government Insurance, 6 M.V.R. (2d) 273, [1988] 4 W.W.R. 738, 66 Sask. R. 109, 37 C.R.R. 172, 62 D.L.R. (4th) 698 (Sask. C.A.) — considered

Godbout c. Longueuil (Ville), (sub nom. *Godbout v. Longueuil (City)*) 152 D.L.R. (4th) 577, (sub nom. *Godbout v. Longueuil (Ville)*) 219 N.R. 1, (sub nom. *Godbout v. Longueuil (City)*) 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout*) 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — considered

Inuit Tapirisat of Canada v. Canada (Attorney General), [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 (S.C.C.) — applied

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 106 N.R. 17 (S.C.C.) — applied

Leclair v. R. (1990), 25 M.V.R. (2d) 47, (sub nom. *R. v. Leclair*) 67 Man. R. (2d) 265 (Man. Q.B.) — considered

Prince Edward Island (Provincial Secretary) v. Egan, [1941] S.C.R. 396, [1941] 3 D.L.R. 305, 76 C.C.C. 227

(S.C.C.) — applied

Prince Edward Island (Registrar of Motor Vehicles) v. Rankin (1991), 30 M.V.R. (2d) 122, (sub nom. *R. v. Rankin (No. 1)*) 96 Nfld. & P.E.I.R. 167, (sub nom. *R. v. Rankin (No. 1)*) 305 A.P.R. 167 (P.E.I. C.A.) — considered

R. c. Duguay, (sub nom. *Lepage c. R.*) [1993] R.J.Q. 722, 54 Q.A.C. 232, 46 M.V.R. (2d) 167 (Que. C.A.) — considered

R. c. Duguay (1993), (sub nom. *R. v. Lepage*) 161 N.R. 63 (note) (S.C.C.) — referred to

R. v. Gray (1988), 9 M.V.R. (2d) 152, [1989] 1 W.W.R. 66, 54 Man. R. (2d) 240, 66 C.R. (3d) 378, 44 C.C.C. (3d) 222, 44 C.R.R. 6 (Man. C.A.) — considered

R. v. MacCormack (1998), (sub nom. *R. v. MacCormick*) 163 Nfld. & P.E.I.R. 1, (sub nom. *R. v. MacCormick*) 503 A.P.R. 1, (sub nom. *R. v. MacCormick*) 34 M.V.R. (3d) 266 (P.E.I. T.D. [In Chambers]) — considered

R. v. MacCormack (March 12, 1999), Doc. AD-0789 (P.E.I. C.A.) — considered

R. v. Neale, 43 M.V.R. 194, 71 A.R. 337, 28 C.C.C. (3d) 345, 52 C.R. (3d) 376, 26 C.R.R. 1, [1986] 5 W.W.R. 577, 46 Alta. L.R. (2d) 225 (Alta. C.A.) — applied

R. v. Neale, 54 C.R. (3d) xxvii, 75 N.R. 160 (note), 77 A.R. 239 (note), [1987] 1 W.W.R. lxviii, 4 M.V.R. (2d) xxxviii, [1987] 1 S.C.R. xi (note) (S.C.C.) — applied

R. v. Pontes, 13 M.V.R. (3d) 145, 41 C.R. (4th) 201, 100 C.C.C. (3d) 353, 186 N.R. 81, 12 B.C.L.R. (3d) 201, 62 B.C.A.C. 241, 103 W.A.C. 241, [1995] 3 S.C.R. 44, 32 C.R.R. (2d) 1 (S.C.C.) — considered

R. c. Richard, 23 M.V.R. (3d) 1, 3 C.R. (5th) 1, [1996] 3 S.C.R. 525, 203 N.R. 8, 110 C.C.C. (3d) 385, 140 D.L.R. (4th) 248, 39 C.R.R. (2d) 219, 182 N.B.R. (2d) 161, 463 A.P.R. 161 (S.C.C.) — considered

R. v. Robson (1985), 31 M.V.R. 220, 28 B.C.L.R. (2d) 8, 19 D.L.R. (4th) 112, [1988] 6 W.W.R. 519, 19 C.C.C. (3d) 137, 45 C.R. (3d) 68, 15 C.R.R. 236 (B.C. C.A.) — considered

R. v. Wolff (1979), 9 B.C.L.R. 390, 1 M.V.R. 261, 6 C.R. (3d) 346, 46 C.C.C. (2d) 467 (B.C. C.A.) — applied

Ross v. Prince Edward Island (Registrar of Motor Vehicles) (1973), [1975] 1 S.C.R. 5, 23 C.R.N.S. 319, 14 C.C.C. (2d) 322, 1 N.R. 9, 42 D.L.R. (3d) 68 (S.C.C.) — applied

White v. Nova Scotia (Registrar of Motor Vehicles) (1996), 20 M.V.R. (3d) 192, 147 N.S.R. (2d) 259, 426 A.P.R. 259 (N.S. S.C.) — considered

Yehia v. Alberta (Solicitor General) (1992), 40 M.V.R. (2d) 57, 10 C.R.R. (2d) 191 (Alta. C.A.) — applied

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 5 — referred to

s. 6 — referred to

s. 7 — considered

s. 11(d) — referred to

Charte des droits et libertés de la personne, L.R.Q., c. C-12

art. 5 — referred to

Comprehensive Road Safety Act, 1997, S.O. 1997, c. 12

Generally — referred to

s. 3(1) — considered

s. 3(2) — considered

s. 4(a) — considered

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 — considered

s. 91 ¶ 27 — referred to

s. 92 — considered

s. 92 ¶ 13 — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 254 [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — considered

s. 254(3) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — referred to

s. 256 [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — considered

s. 258 [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — considered

Highway Traffic Act, S.M. 1985-86, c. 3; C.C.S.M., c. H60

Generally — considered

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

s. 48.3 [en. 1996, c. 20, s. 8] — considered

s. 48.3(1) [en. 1996, c. 20, s. 8] — considered

s. 48.3(2) [en. 1996, c. 20, s. 8] — considered

s. 48.3(2.1) [en. 1997, c. 12, s. 3(1)] — considered

s. 48.3(3) [en. 1996, c. 20, s. 8] — considered

s. 48.3(4) [en. 1996, c. 20, s. 8] — considered

s. 48.3(7) [en. 1996, c. 20, s. 8] — considered

s. 48.3(10) [en. 1996, c. 20, s. 8] — considered

s. 49(1) — considered

s. 50.1 [en. 1996, c. 20, s. 10] — considered

s. 50.1(1) [en. 1996, c. 20, s. 10] — considered

s. 50.1(2) [en. 1996, c. 20, s. 10] — considered

s. 50.1(4) [en. 1996, c. 20, s. 10] — considered

s. 50.1(6) [en. 1996, c. 20, s. 10] — considered

s. 50.1(7) [en. 1996, c. 20, s. 10] — considered

s. 50.1(8) [en. 1996, c. 20, s. 10] — considered

s. 50.1(9) [en. 1996, c. 20, s. 10] — considered

s. 50.1(10) [en. 1996, c. 20, s. 10] — considered

s. 53 — considered

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

Highway Traffic Act, R.S.P.E.I. 1988, c. H-5

Generally — considered

Judicial Review Procedure Act, R.S.O. 1990, c. J.1

s. 6(2) — pursuant to

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Generally — considered

s. 92 — referred to

s. 94 — referred to

s. 94(1) — referred to

Motor Vehicle Act, R.S.N.B. 1973, c. M-17

Generally — referred to

Motor Vehicle Act, R.S.N.S. 1989, c. 293

Generally — considered

Offence Act, R.S.B.C. 1979, c. 305

s. 4.1 [en. 1990, c. 34, s. 10] — referred to

s. 72(1) — referred to

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1

s. 16 — referred to

APPEAL by Crown from judgment reported at (1997), 28 M.V.R. (3d) 189, 46 C.R.R. (2d) 149, 34 O.R. (3d) 509 (Ont. Div. Ct.), granting accused's application for judicial review and declaring s. 48.3 of *Highway Traffic Act* to be inoperative.

The judgment of the court was delivered by *Finlayson J.A.*:

1 The Attorney General, acting on behalf of the Registrar of Motor Vehicles ("Registrar"), appeals the judgment of the Honourable Mr. Justice Stong of the Ontario Court (General Division) dated August 5, 1997. Stong J. allowed the application brought by Ronald Horsefield under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*") and declared inoperative s. 48.3 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as am. by S.O. 1996, c. 20, s. 8 ("*HTA*").

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

2 Section 48.3 of the *HTA* establishes the so-called Administrative Driver's Licence Suspension Program ("ADLS Program"). The Program provides for a 90-day licence suspension effective immediately upon the Registrar receiving notice that a peace officer is satisfied that a person driving or having the care, charge or control of a motor vehicle had a blood alcohol concentration exceeding 80 milligrams of alcohol in 100 millilitres of blood as revealed by a breathalyser or blood sample taken pursuant to s. 254 or s. 256 of the *Criminal Code* or has refused to provide a breath or blood sample pursuant to a demand under s. 254.

3 On August 8, 1997, Stong J. further ordered the Registrar to pay Horsefield his costs of the application on a solicitor-client basis. The Attorney General also appeals this order. Stong J.'s judgment is reported at (1997), 34 O.R. (3d) 509 (Ont. Div. Ct.).

Facts

4 On December 29, 1996 at 12:18 a.m., Horsefield was stopped while driving in the City of Oshawa by a R.I.D.E. program operated by the Durham Regional Police. During a brief conversation with Horsefield, the officer detected a moderate odour of alcohol on his breath. Horsefield complied with a demand to provide a breath sample for a road-side screening device, which registered a "fail" reading. The officer then read him his rights to counsel and made a further demand of him to provide a breath sample for an approved breath analysis instrument pursuant to s. 254(3) of the *Criminal Code*.

5 Horsefield accompanied the investigating officer to the police station where, slightly more than two hours after the arrest, he submitted two breath samples. The results of the breathalyzer tests showed a blood alcohol concentration ("BAC") of 90 mg of alcohol per 100 ml of blood for both samples. The breathalyzer technician prepared a certificate of analysis showing these results and the appellant was charged with driving with more than 80 milligrams of alcohol in 100 millilitres of blood.

6 After the certificate was obtained, a notice of licence suspension was given to Horsefield at the station on the basis that an analysis of his breath sample showed that he had a concentration of alcohol in his blood in excess of 80 milligrams in 100 millilitres of blood ("over 80"). This suspension procedure was authorized by the ADLS Program that is here impugned.

Procedural History

7 On February 6, 1997, Horsefield commenced an application for judicial review of the Registrar's decision to suspend his licence. He also sought an interlocutory and permanent injunction to prohibit the Registrar from suspending his licence pending the hearing and/or trial of the charge of over 80 as well as an interim and permanent order staying the suspension of his driver's licence pending the determination of the judicial review application.

8 Stong J. denied the application for an interlocutory injunction and interim order. As a result, Horsefield served the 90-day licence suspension in full. The over 80 charge against him under the *Criminal Code* was withdrawn at the request of the Crown on May 5, 1997.

9 The application for judicial review was disposed of on August 5, 1997. Stong J. declared that s. 48.3 of the *HTA* is unconstitutional because it is inconsistent with paramount federal legislation in ss. 254, 256 and 258 of the *Criminal Code*. In addition, Stong J. declared that s. 48.3 constitutes a deprivation of liberty within the meaning of s.7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and is not saved by s. 1. He concluded that the Registrar acted without legal authority in imposing the 90-day administrative driver's licence suspension on Horsefield and quashed this decision.

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

10 The Attorney General, acting on behalf of the Registrar, brought a motion before a single judge of this court on August 15, 1997 seeking a stay of Stong J.'s decision pending the motion for leave to appeal, and if leave were granted, pending the appeal. The motions judge granted the stay. Leave to appeal from the judgment of Stong J. was granted by a panel of this court on February 5, 1997.

Relevant Statutory Provisions

11 The statutory framework of the ADLS Program consists of the following provisions of the *HTA*, which read as follows at the time of the application before Stong J.:

> **s.48.3** (1) Where a police officer is satisfied that a person driving or having the care, charge or control of a motor vehicle meets one of the criteria set out in subsection (3), the officer shall notify the Registrar of that fact, or cause the Registrar to be so notified, in the form and manner and within the time prescribed by the regulations.
>
> (2) Upon being notified under subsection (1), the Registrar shall suspend a person's driver's licence for a period of ninety days.
>
> (3) The criteria for the purpose of subsection (1) are:
>
> 1. The person had a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 millilitres of blood, as shown by an analysis of the person's breath or blood taken pursuant to a demand made under section 254 of the *Criminal Code* (Canada) or pursuant to section 256 of the *Criminal Code* (Canada).
>
> 2. The person failed or refused to provide a breath or blood sample in response to a demand made under section 254 of the *Criminal Code* (Canada).
>
> (4) The suspension takes effect from the time notice of the suspension is given, in accordance with section 52, to the person whose licence is suspended.
>
> . . . . .
>
> (7) Whether or not the person is unable or fails to surrender his or her driver's licence under subsection (5) or (6), the licence is suspended and invalid for any purpose for a period of ninety days from the time notice is given to the person.
>
> . . . . .
>
> (10) The suspension of a driver's licence under this section is intended to safeguard the public and does not constitute an alternative to any proceeding or penalty arising from the same circumstances or around the same time.
>
> **49(1)** (1) The board known as the Licence Suspension Appeal Board is continued under the name Licence Suspension Appeal Board in English and Commission d'appel des suspensions de permis in French.
>
> . . . . .
>
> **50.1** (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Board.
>
> (2) The only grounds on which a person may appeal under subsection (1) and the only grounds on which the

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

Board may order that the suspension be set aside are,

> (a) that the licence was suspended solely because of a mistake as to the identity of the person who met one of the criteria set out in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

. . . . .

(4) The Board may confirm the suspension or may order that the suspension be set aside.

. . . . .

(6) The decision of the Board under this section is final and binding.

(7) The suspension under section 48.3 continues to apply despite the filing of an appeal under this section unless the Registrar reinstates the licence pursuant to the Board's order that the suspension be set aside, and this subsection prevails over the *Statutory Powers Procedure Act.*

(8) The Board is not required to hold an oral hearing under this section unless the appellant requests an oral hearing at the time of filing the appeal and bases the appeal on one of the grounds set out in subsection (2).

(9) Despite a request by the appellant for an oral hearing, the Board may order that the suspension be set aside on the basis of the material filed with the Board without holding an oral hearing.

(10) One member of the Board is a quorum for the purposes of an appeal under this section.

12 Subsequent to the application before Stong J., ss. 48.3 and 50.1 were amended by the *Comprehensive Road Safety Act*, 1997, S.O. 1997, c. 12 proclaimed in force 1 August 1997. The changes to s. 48.3 do not address the constitutional impediments identified by Stong J. These amendments are as follows:

> 3. (1) Section 48.3 of the Act, as enacted by the Statutes of Ontario, 1996, chapter 20, section 8, is amended by adding the following subsection:
>
> > (2.1) A person has no right to be heard before or after the notification by the officer, or before or after the Registrar suspends the licence, but this subsection does not affect the taking of any proceeding in court.
>
> (2) Paragraph 1 of subsection 48.3(3) of the Act, as enacted by the Statutes of Ontario, 1996, chapter 20, section 8 is repealed and the following substituted:
>
> > 1. The person is shown, by an analysis of breath or blood taken pursuant to a demand made under subsection 254(3) of the *Criminal Code* (Canada) or pursuant to section 256 of the *Criminal Code* (Canada), to have a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 millilitres of blood.
>
> 4. Clause 50.1 (2)(a) of the Act, as enacted by the Statutes of Ontario, 1996, chapter 20, section 10 is repealed and the following substituted:

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or

13 The relevant provisions of the *Charter of Rights and Freedoms* read as follows:

Life, Liberty and Security of Person

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

Issues

(1) Is s.48.3 of the *HTA* constitutionally valid under the division of powers established by ss. 91 and 92 of the *Constitution Act, 1867*?

(2) If the legislation is within the legislative competence of the provincial government under s.92 if the *Constitution Act, 1867*, is there nevertheless a violation of s. 7 of the *Charter*?

(3) Does the administration of the license suspension provisions of the ADLS Program offend the principles of natural justice?

(4) How should the costs of the application and the appeal be awarded?

Analysis

14 The Criminal Lawyers' Association took the lead in presenting the argument on behalf of the respondent, Horsefield. It supported the reasons of the application judge for striking down the impugned legislation on the basis of both the federalism or separation of powers argument and the submission that s. 48.3 of the *HTA* violates s. 7 of the *Charter*. In my opinion, neither constitutional attack on the ADLS Program in the *HTA* can succeed. The Supreme Court of Canada has ruled conclusively that the right to build and operate highways, including the right to provide for the circulation and safety of traffic, is wholly within the purview of the provinces under one or more heads of s.92 of the *Constitution Act, 1867*. As for the *Charter* argument, the weight of judicial authority is against the conclusion that the right to drive a motor vehicle is a liberty within the meaning of s. 7. Accordingly, it is not a constitutionally protected interest. A subsidiary argument that the ADLS Program somehow interferes with mobility rights under s. 6 of the *Charter* has no currency whatsoever.

15 It seems to me that the same argument is being advanced under both arms of the constitutional challenge. It is submitted that the ADLS Program in using the provisions in the *Criminal Code* relating to procedures for conducting breathalyser and blood tests thereby injects itself into a field already occupied by federal legislation. Similarly, the intervenor Criminal Lawyers' Association submits that the Registrar, by making use of the *Code* procedures to initiate license suspensions that in turn can be enforced by criminal sanctions including imprisonment, has engaged a liberty interest protected by the *Charter*. As the intervenor put it in its factum:

(1) As to the separation of powers analysis:

In enacting the ADLS scheme the Government of Ontario has attempted to combine a valid legislative objective with the criminal law and procedure in a manner which gives the provincial proceeding the benefit of the crimi-

nal enactment while, at the same time, bypassing the protection accorded an individual by the same criminal law and procedure. In so far as s. 48.3 of the *Highway Traffic Act* does so, it is *ultra vires* the province and should be declared of no force and effect.

(2) With reference to s. 7 of the Charter:

It is respectfully submitted that the suspension of a driver's license enforced by penalty provisions including the possibility of imprisonment for breach of the license suspension represents an interference with a person's right to liberty within section 7 of the *Charter of Rights* such that a person has the right under that section not to be deprived thereof except in accordance with the principles of fundamental justice.

16 The reference to imprisonment is to s. 53 of the *HTA* providing for the imposition of fines and imprisonment for a term of up to six months for driving while a motorist's license is under suspension. The factum continues:

In other words, if this Honourable Court were not, contrary to the above submissions, persuaded that the license suspension *per se* represents an interference with a liberty interest which can only be carried out in accordance with the principles of fundamental justice, then it is submitted that by penalizing driving in violation of such suspensions with the threat of imprisonment as enforcement, then a liberty interest is created, whose impairment must live up to the rules of fundamental justice. Therefore, the initial element in that impairment, the suspension, must be examined for compliance with the rules of fundamental justice in precisely the same way.

17 Almost the entire argument before us, whether directed to the separation of powers issue or the issue whether the legislation interferes with a protected right under the *Charter*, was focussed on the additional burden this legislation is said to impose on the motorist who is under suspicion for driving while under the influence of alcohol. The first and most obvious argument was that an over 80 reading would bring about an automatic suspension of the motorist's license, a penalty over and above what the motorist is already exposed to under the *Code*. A second argument was that a motorist who complied with a demand and had an over 80 reading would be reluctant to test the validity of the demand or the reading in court because he or she would be subject to the 90-day license suspension while awaiting a trial date, a suspension for which he would receive no credit against the suspension that is called for following a conviction under the *Code*. It was submitted that this affected the motorist's options in that it made more difficult the motorist's choice of complying with the breathalyzer demand or refusing with the intention of contesting the lawfulness of the demand.

18 In my opinion, these arguments are irrelevant to either constitutional challenge. Matters of inconvenience or economic hardship or difficult legal choices have nothing to do with the constitutional authority of the provincial legislature to suspend a driver's license. Similarly, these matters are of no concern under the *Charter* unless a driver's license is a protected interest or some other right is engaged under the *Charter*. The immateriality of the intervenor's concerns becomes apparent when one takes the traditional approach and subjects the legislation to a segregated analysis, the first under the heading of separation of powers and the second under the heading of compliance with the *Charter*.

19 Admittedly, it is possible that a given piece of legislation could be impugned under either approach, but problems arise when the two issues are combined and addressed as one constitutional problem. A good example is the result achieved in this case. The applications judge decided that the legislation is *ultra vires* the province because it makes use of a criminal law enacted by the Government of Canada under s. 91(27) to impose a sanction on a motorist without incorporating the *Criminal Code* safeguards that justify the deprivation of basic rights under the *Charter*. This led him to hold that the provincial legislature had enacted legislation in an area occupied by Parliament that created an actual conflict with federal legislation sufficient to invoke the doctrine of paramountcy.

20 In my opinion, the fact that a provincial enactment has the object or effect of violating *Charter* rights of a

citizen is immaterial to its constitutionality under s. 92 of the *Constitutional Act, 1867*. The separation of powers analysis should proceed without reference to the *Charter*. The enactment of the *Charter* postdates the separation of powers under our constitution and gives a separate and distinct authority to the court to strike down legislation which is otherwise constitutional in the event that it violates the fundamental freedoms enshrined therein. This is an additional constitutional tool. The court always has had the power to declare provincial legislation *ultra vires* as not being supportable under s. 92.

Issue 1 — Is s. 48.3 of the HTA constitutionally valid under the division of powers established by ss. 91 and 92 of the Constitution Act, 1867?

21 The appellant properly relies on the Supreme Court of Canada decision in *Prince Edward Island (Provincial Secretary) v. Egan*, [1941] S.C.R. 396 (S.C.C.) as authority for the constitutionality of s. 48.3 of the *HTA* with respect to the separation of powers issue. At issue in *Egan* was the legislative competence of the province of P.E.I. to enact a provision of the *Highway Traffic Act* of that province which imposed a 12-month licence suspension on a person convicted of driving while impaired. In addition, the provision prohibited the Provincial Secretary from issuing a licence to any person during the suspension period.

22 The appellant in particular cites Rinfret J.'s statement at pp. 415-416:

> *The right of building highways and of operating them within a province ... is wholly within the purview of the province ... and so is the right to provide for the safety of circulation and traffic on such highways.* The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. *...It has nothing to do with the Dominion aspect of the creation of a crime and its punishment. And it cannot be said that the Dominion, while constituting the criminal offence of driving while intoxicated and providing for certain penalties therefor, has invaded the whole field in such a way as to exclude all provincial jurisdiction...*
>
> *Surely the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them, upon the happening of certain conditions. The provision that a person convicted of driving while intoxicated will lose his licence for a time or forever is, in a certain sense, a condition upon which the licence, or permit, is granted by the province.*
>
> [Emphasis added.]

23 The appellant also relies on *Ross v. Prince Edward Island (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.), wherein the court reaffirmed its holding in *Egan* that the provincial legislature has authority to regulate the system of driver's licences to secure the observance of regulations enacted in the public interest. Like *Egan, Ross* was decided in the context of a constitutional challenge to a provincially imposed post-conviction licence suspension.

24 The argument is made that the facts in *Egan* and *Ross* are distinguishable from those in *Horsefield* because the licence suspension in the former cases followed a conviction under the *Criminal Code* for an alcohol-related driving offence whereas the ADLS Program mandates suspension prior to and consequently, irrespective of, a conviction. This attempted distinction ignores the seminal finding by Rinfret J. that the suspension scheme in *Egan* had nothing to with the creation of crime and its punishment; rather, the suspension scheme created a civil disability arising out of a conviction for a criminal offence. The fact that the suspension in the case in appeal is not tied to a conviction for a criminal offence, but is connected to the failure to supply a breath sample with a reading that is not over 80, distances the scheme further from the federal criminal law jurisdiction under s. 91(27).

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

25 This point was made by Melvin J. of the British Columbia Supreme Court in *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1998), 33 M.V.R. (3d) 164 (B.C. S.C.) where he heard a constitutional challenge to the ADLS program enacted by amendments to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The nature of the challenge was identical to that brought by Horsefield. Melvin J. was satisfied that the impugned legislation relates to the entitlement of an individual to hold a valid driver's licence, which is a subject properly and solely within provincial jurisdiction. He found at p. 173 that this conclusion was unaffected by the fact that the behaviour leading to the suspension may also support a conviction under the *Criminal Code*.

26 In reaching this conclusion, Melvin J. relied on the decision of the British Columbia Court of Appeal in *R. v. Wolff* (1979), 9 B.C.L.R. 390 (B.C. C.A.), which considered the constitutionality of a roadside suspension of a driver's licence by a peace officer on suspicion of alcohol consumption by the driver. At p. 172 Melvin J. quoted the following observation of the Court in *Wolff*:

> ...I cannot see why the *Egan* case should be distinguished merely because the provincial legislature provided that the action with regard to the licence would be taken after a conviction under the *Criminal Code*. If the legislation is within the competence of the provincial legislature, it is valid whether the powers be exercisable before or after a conviction under the *Criminal Code*. The legislature is trying to ensure the safety of the users of the highway, and is legislating within its jurisdiction.

27 The judgment of Melvin J. was upheld by the B.C. Court of Appeal in a judgment that was released February 24, 1999. Hinds J.A., speaking for the court, dismissed both constitutional challenges against the B.C. legislation: see *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 60 C.R.R. (2d) 74 (B.C. C.A.). In extensive reasons, he reviewed many of the same authorities that I have considered, including without comment as to its merit, the decision of Stong J. in *Horsefield*.

28 On the division of powers issue, Hinds J.A. concluded at paragraph 61:

> Upon reviewing the provisions of the Legislation and the extrinsic evidence adduced in the court below, I conclude that the purpose and effect of the Legislation, its pith and substance, is the licensing of persons to drive motor vehicles and the enhancement of public safety on the highway. Those are matters within the jurisdiction of the province. The authorities to which I have referred (with the exception of the *Horsefield* decision), establish that the Legislation did not improperly encroach upon the federal jurisdiction under s. 91(27) of the *Constitution Act, 1867*. I therefore conclude that the Legislation, on a division of powers analysis, is not *ultra vires*.

29 Lower courts in Manitoba, Nova Scotia and P.E.I. have also upheld the constitutionality of ADLS programs in their provinces. The Manitoba ADLS program was challenged in *Leclair v. R.* (1990), 67 Man. R. (2d) 265 (Man. Q.B.) on the basis that it was criminal law and thus was outside the province's jurisdiction to enact. However, the court concluded at p. 274 that the purpose and effect of the impugned provisions are to regulate and control traffic on provincial highways and are thus within the legislative competence of the Province under s. 92(13) of the *Constitution Act, 1867*. The ADLS program in Nova Scotia was upheld by MacAdam J. in *White v. Nova Scotia (Registrar of Motor Vehicles)* (1996), 426 A.P.R. 259 (N.S. S.C.). His decision, which did not consider the federalism issue, was affirmed without reasons by the Nova Scotia Court of Appeal on May 27, 1996. In *R. v. MacCormack* (1998), 163 Nfld. & P.E.I.R. 1 (P.E.I. T.D. [In Chambers]), Webber J. rejected a challenge to the scheme of P.E.I., which included the argument that the impugned legislation offended the division of powers. She analysed the reasons of Stong J. on the federalism issue and declined to follow them. Her judgment was recently upheld by the P.E.I. Court of Appeal in very brief reasons dated March 12, 1999 [*R. v. MacCormack* (March 12, 1999), Doc. AD-0789 (P.E.I. C.A.)].

30 To my way of thinking, the conclusion that the legislation is *intra vires* the province is clear. However, Stong

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

J. reached the opposite conclusion. He said at pp. 518-19:

> The Parliament of Canada has from its exclusive jurisdiction over the criminal law given evidentiary vitality and viability to the breath test, but only within the safeguards of s. 258 of the *Criminal Code*....Parliament has legislated the permissible evidentiary effect of breath tests. The province on the other hand has attempted to legislate to utilize those tests while at the same time ignoring the safeguards that Parliament has imposed on the tests to give them not only life, but scientific and factual validity. The province has adopted a scatter-gun approach to the federal legislation upon which it bases s. 48.3 of the *Highway Traffic Act*.
>
> . . . . .
>
> While it is accepted that the province may make a licensing decision contingent upon the happening of an event, when that event is a reference back to an *action which itself is a creation of federal law*, the province acts at its own peril when it alters the *action* so as to destroy its validity. When the reference is back to an *action taken pursuant to federal law*, then that *action* itself must be a legitimate action [Emphasis in original].

31 Stong J. held:

> Insofar as the province has legislated inconsistently with an area occupied by Parliament, s. 48.3 of the *Highway Traffic Act* runs afoul of the "division of powers" in the *Constitution*, and creates an actual conflict sufficient to invoke the doctrine of paramountcy. The provincial scheme cannot stand and so is declared inoperative by virtue of its unconstitutionality.

32 The reasons of Stong J. are not consistent with those of the Supreme Court in Egan and Ross, *supra*. His conclusion on the federalism issue has also been the subject of academic criticism by Professors Solomon, Hovius and Usprich in an article entitled, "*90-Day Administrative Licence Suspensions: Constitutional Challenges on the Road to Traffic Safety*" (1998), 30 M.V.R.(3d) 119. The authors concluded that Stong J.'s decision in *Horsefield* should not be upheld.

33 These authors contend that the ADLS Program is constitutionally valid legislation based on the provincial authority over property and civil rights, citing Egan, *supra*, in support of that conclusion. The authors disagree with Stong J.'s conclusion that the impugned legislative scheme conflicts with the *Criminal Code* procedural safeguards so as to invoke the doctrine of paramountcy. In doing so they comment critically on his objection that the breathalyzer demand in this particular case was not made within the two hours called for by the *Code*. The authors state at pp. 135-136:

> Stong J. concluded that Ontario's 90-day ALS provisions conflicted with the *Criminal Code* because they impose a licence suspension on motorists based on a single Breathalyzer test, even if it was conducted more than two hours after the alleged impaired driving incident.
>
> His conclusion appears to be based on the view that Parliament has occupied the field on the validity of Breathalyzer and blood tests. *As indicated, however, the Canadian courts have repeatedly rejected the "occupied field" or "negative implication" test in recent years* [see *Multiple Access v. McCutcheon*, [1982] S.C.R. 161]. Moreover, the clear language of s. 258(1)(c) and (d) limits the application of that section to the criminal prosecution of drinking and driving offences. Finally, even if Parliament had intended to control the provinces' use of Breathalyzer and blood tests in licensing matters and had used unequivocal language to that effect, its constitutional authority to do so is highly questionable. *Parliament has no constitutional authority to dictate to the provinces the standards and procedures that they must use in regulating the licensing of drivers. In our view, Parliament did not have the intent, nor would it have the constitutional authority, to limit how the provinces use Breathalyzer and blood test results.* [Emphasis added].

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

34 In addition to rejecting the possibility that the federal legislation occupied the field, these authors reject the notion that the *Criminal Code* and *HTA* provisions are in actual conflict. They point out at p. 136 that compliance with one statute does not necessitate violating the other: "Consequently, the doctrine of paramountcy does not apply and both provisions are operable".

35 In conclusion, I am of the view that the ADLS Program was enacted in accordance with the Province's jurisdiction under s. 92 of the *Constitution Act, 1867* and, further, that there is no conflict, either actual or by implication, between the ADLS Program and the *Criminal Code* provisions.

Issue 2 — If the legislation is within the legislative competence of the provincial government under s. 92 if the Constitution Act, 1867, is there nevertheless a deprivation of a liberty protected by the Charter?

36 The applications judge found that the ADLS Program constituted a deprivation of a liberty protected by the *Charter*. He observed at p. 524 that:

> ...once a licence is granted and the citizen is qualified to drive, there attaches to that licence a general liberty to employ one's skill and ability, in this case the ability to drive. *A driver's licence properly obtained and validly held... can be characterized in modern society as a major component of the liberty known as freedom of movement.* When one considers the vastness of Ontario, it is little wonder that the automobile of the 20th century has been compared to the steam locomotive of the 19th century.... In our highly mobile and mechanized society communities are so geographically separated and the people so demographically scattered that entitlement to legally drive a motor vehicle can be more properly characterized as a necessity than a luxury. *The mobility of the citizenry has taken on the quality of an essential "need" in this large province.* [Emphasis added.]

37 However, the weight of judicial authority is firmly against the conclusion that the right to drive is a liberty within the meaning of s. 7 of the *Charter*. While the question has not been directly considered by the Supreme Court of Canada, several provincial appellate courts have ruled on the matter.

38 A leading case is the early *Charter* decision of the Alberta Court of Appeal in *R. v. Neale* (1986), 28 C.C.C. (3d) 345 (Alta. C.A.), from which the Supreme Court denied leave to appeal: [1987] 1 S.C.R. xi (note). This decision was not referred to by Stong J. in *Horsefield*. In *Neale*, the Court held that circulation in a motor vehicle is not a right protected by s. 7 of the *Charter*. In the words of Lieberman J.A. for the Court at p. 352: "On the face of it, a suspension of driving privilege has no effect on the accused's liberty as the suspension does not restrict his right to go where he chooses. There is no physical restraint on him." In *Yehia v. Alberta (Solicitor General)* (1992), 40 M.V.R. (2d) 57 (Alta. C.A.), the Alberta Court of Appeal reaffirmed its decision in *Neale*.

39 *Neale* was referred to by the Manitoba Court of Appeal in *R. v. Gray* (1988), 54 Man. R. (2d) 240 (Man. C.A.) as establishing that the suspension of a driver's licence does not constitute a deprivation of liberty under s. 7 of the *Charter*.

40 *Neale* was also relied on by the P.E.I. Court of Appeal in *Prince Edward Island (Registrar of Motor Vehicles) v. Rankin* (1991), 30 M.V.R. (2d) 122 (P.E.I. C.A.) as authority for the proposition that the right to drive is not protected by the *Charter*. The issue in that case was whether the absence of a provision in the *Highway Traffic Act*, R.S.P.E.I. 1988, c. H-5, for a stay of a licence cancellation pending an appeal of a conviction on a charge of driving over 80 violated s. 7. Mitchell J.A. for the Court held as follows at pp. 123-124:

> The absence of a stay provision only matters if the *Charter* gives some protection to a right to drive in the first place. I have concluded that it does not. Section 7 comes under the heading of "Legal Rights" in the *Charter*. *Considering the historical origins of our notion of liberty in that context, I have concluded that in s. 7 that term*

> *refers to an absence of legal restraints on physical movement. Its purpose is to allow people to freely move about and go where they choose. However, it does not go so far as to guarantee that they can move according to the mode of their choice.* The Supreme Court of Canada in *R. v. Dedman* ... has already characterized the so called "right to drive" a motor vehicle on the highway in a way which puts it beyond the pale of s. 7.... It follows, therefore, that the failure of the *Highway Traffic Act* to provide a stay of licence cancellation pending appeal does not offend s. 7 of the *Charter* because that section does not guarantee any right to drive in the first place.
>
> *The Court recognizes that cancellation of a licence while an appeal is still pending seems unfair. Perhaps the Highway Traffic Act ought to be amended to allow for a stay by adding a provision similar to s. 261 of the Criminal Code. However, that is a matter for the Legislature, not the Courts. The Charter neither provides constitutional protection for all human activities nor a remedy for every grievance.* [Emphasis added.]

41 The Quebec Court of Appeal has also ruled that the right to drive a motor vehicle is not a fundamental right protected by the Charter, but is a right of an economic character: see *R. c. Duguay*, [1993] R.J.Q. 722 (Que. C.A.); leave to appeal to S.C.C. refused (1993), 161 N.R. 63 (note) (S.C.C.). Similarly, the Saskatchen Court of Appeal in *Ginther v. Saskatchewan Government Insurance*, [1988] 4 W.W.R. 738 (Sask. C.A.) ruled at p. 741 that "...the right to life, liberty and security of the person as contemplated by s. 7 of the *Charter* does not include the 'right' to drive an automobile."

42 The only exception to this line of jurisprudence at the appellate level is the British Columbia Court of Appeal decision in *R. v. Robson* (1985), 19 C.C.C. (3d) 137 (B.C. C.A.). The Court in that case held that legislation empowering a peace officer to require a driver to surrender his licence where the officer has reason to suspect that the driver had consumed alcohol violated s. 7 of the *Charter*. The Court expressed the view at p. 140 that once a driver's licence "...is granted there becomes attached to it the general liberty to employ one's skill and ability -- in this case the ability to drive. Accordingly, such liberty constitutes a right under the *Charter* and a person cannot be deprived of it except in accordance with the principles of fundamental justice."

43 However, in the very recent decision in *Buhlers*, *supra*, the British Columbia Court of Appeal expressly refused to follow *Robson*. Hinds J.A. for the Court at paragraph 110 held that "...the right or privilege to drive a motor vehicle on a public highway is not a liberty protected by s. 7".

44 Although the Supreme Court has not directly considered whether the right to drive is a liberty interest protected by s. 7 of the *Charter*, it has considered s.7 in the driving context. Passages from several of the Court's judgments in this area provide support for the conclusion that the right to drive is not protected by s. 7. For example, in *R. c. Richard*, [1996] 3 S.C.R. 525 (S.C.C.) the Court considered whether a New Brunswick provision [*Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, s. 16], which permitted conviction for an offence under the *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17 where a driver fails to appear in court at the time and place indicated in the ticket, infringed s. 11(d) of the *Charter*. La Forest J. for the Court raised the issue whether s. 7 of the *Charter* was engaged. He held at p. 546 that it was not:

> In the case at bar, however, there is absolutely no possibility of imprisonment, since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the *Motor Vehicle Act* can in no case result in imprisonment. Thus, the liberty component of s. 7 of the *Charter* does not come into play.

45 The decision of the Supreme Court in *R. v. Pontes*, [1995] 3 S.C.R. 44 (S.C.C.) is capable of supporting the same conclusion. The facts in *Pontes* were that the accused had been prohibited from driving a motor vehicle under s. 92 of the British Columbia *Motor Vehicle Act*. That section provided that a person convicted of an offence under certain sections of the Act was "automatically and without notice" prohibited from driving a motor vehicle for 12

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

months. The accused was later found driving a motor vehicle during the period of prohibition and was charged under s. 94(1) of the Act, which provided that a person who drives a motor vehicle on a highway while he is prohibited from doing so under s. 92 is liable on conviction to a fine and imprisonment. The issue before the Supreme Court was whether s. 94(1) created a strict or absolute liability offence.

46 Cory J. concluded that ss. 92 and 94 created an absolute liability offence. Nonetheless, he held that the absolute liability offence did not contravene the *Charter*. The reason for this holding was that ss. 4.1 and 72(1) of the *Offence Act*, R.S.B.C. 1979, c. 305, as amended, prohibited imprisonment with respect to an absolute liability offence. Cory J. had earlier noted at p. 50 that:

> Obviously, if the offence is one of absolute liability, but there is no risk of imprisonment, then the provision will not offend s. 7 of the *Canadian Charter of Rights and Freedoms*.

47 Accordingly, because an accused convicted under ss. 92 and 94 faced no risk of imprisonment, the Court concluded that no s. 7 violation was established.

48 Hinds J.A. made the following observation about the majority decision in *Pontes* at paragraph 83, with which I agree:

> The majority concluded that the provisions of s. 7 were not involved because, although the offence was an absolute liability offence, the accused faced no risk of imprisonment and, therefore, the accused's personal liberty was not affected. But if the majority had been of the opinion that, absent the liability to imprisonment, the accused's right to drive was, nevertheless, a liberty protected under s. 7 of the *Charter*, it is anticipated that the majority would have so stated.

49 It would thus run counter to the weight of authority at the appellate level throughout Canada to hold that the right to drive is a liberty within the meaning of s. 7 of the *Charter*. The reluctance to find the right to drive as being a liberty interest protected by s. 7 no doubt stems in part from a fear of trivializing the *Charter*. Along these lines, Webber J. in *MacCormack*, *supra* stated:

> There are good reasons for restricting "liberty" in the *Charter* to fundamental rights in the tradition of our common law. This should ensure that the principles that we as a society hold very dear and believe are fundamental to a democratic system of government are upheld while, at the same time, ensure that the courts don't become the legislators of society.

50 Also as pointed out by Webber J., there was no evidentiary basis before Stong J. to establish that the right to drive is as essential to liberty as Stong J. assumed. On the contrary, the evidence showed that Horsefield was able to make alternate arrangements to get to work and to run his errands. As well, Stong J. cited the study submitted by the appellant in the form of an affidavit of John Hughes, Director of the Safety Policy Branch at the Ministry of Transportation, which concluded that suspended drivers are able to make alternative arrangements to get to and from work. The evidentiary record thus does not provide a firm basis for concluding that the right to drive falls within the s. 7 guarantee.

51 I adopt the latest word on this subject as expressed by Hinds J.A. in *Buhlers*, *supra*. On the *Charter* challenge, he had this to say at paragraph 109:

> In my view, the broadened scope of the liberty interest protected by s. 7, as expressed by some of the members of the Supreme Court in *B. (R.)* [*B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315] and in *Godbout* [*Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844], does not extend to the driving of a motor vehicle on a public highway. It is not a matter that is fundamental or inherently personal to the individual. It is not a matter that

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

> goes to the root of a person's dignity and independence. To hold otherwise would trivialize the liberty sought to be protected by s. 7.

52 The Supreme Court decision of *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.) was referred to this court as well. The case involved a resolution by the City of Longueil requiring all permanent employees of the City to live in Longueil. Ms. Godbout, a permanent employee, moved to a neighbouring municipality and was discharged. She sued for wrongful dismissal maintaining that her right to privacy under s. 5 of the Quebec Charter and her rights under s. 7 of the *Charter* had been violated. In upholding her claim, the Supreme Court was unanimous in agreeing that her right to privacy under the Quebec Charter had been violated and three members of the court agreed that there was also a violation of her s. 7 rights under the *Charter*. The reasoning was that s. 7 was an interference with her right to make an inherently private choice of her residence free from state interference. It was suggested in this court that the decision could also be supported by invoking the mobility rights provision in s. 6 of the *Charter*.

53 I hardly think that losing for 90 days the privilege or license to drive a motor vehicle is in the same category as suffering the state to dictate one's place of residence. The suggestion does trivialize the *Charter*, which is intended to protect fundamental liberties, not to insulate the citizen from inconvenience, no matter how great that inconvenience may be in the individual case. As La Forest J. put it in expressing the minority view with respect to s. 7 in *Godbout*, *supra*, at p. 893:

> Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence...In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

54 For the reasons set out above, I am of the opinion that s. 48.3 of the *HTA* establishing the ADLS Program does not interfere with a liberty protected by s. 7 of the *Charter*.

55 I think the reasoning set out above also disposes of the alternative argument advanced by the intervenor Criminal Lawyers' Association that even if a licence suspension under s. 48.3 of the *HTA* does not *Per se* represent an interference with a liberty interest protected by s. 7 of the *Charter*, by penalizing driving in violation of such suspensions with the threat of imprisonment, the legislature has created a liberty interest whose impairment must live up to the rules of fundamental justice. We are dealing here with the power to suspend a license. The offence of driving without a licence contrary to s. 53 of the *HTA* is not restricted to the 90 day suspension that this appeal is considering. It involves all driving suspensions for whatever reason. To suggest that any person who is operating an automobile without a license or while his or her license is suspended can raise a *Charter* argument that he should not be required to have a license or that the license he did acquire was unconstitutionally suspended is simply arguing in circles. There is, I repeat, no constitutional right to acquire or preserve a license to drive a car.

Issue 3 — Does the administration of the license suspension provisions of the ADLS Program offend the principles of natural justice?

56 This issue was argued by the Registrar but was not seriously contested by the intervenor. It has no application to the constitutional challenges. Having found that the province has plenary powers to enact the impugned legislation, there is no issue that it has the power to proceed to an administrative suspension of a driver's licence without a hearing or a full right of appeal. A brief reference to authority makes that clear.

57 The principles of natural justice were recognised by the Supreme Court of Canada in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at 653:

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

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

58 The common law duty of fairness may be modified or abrogated by statute. As stated by Estey J. in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.) at 755:

> While it is true that a duty to observe procedural fairness, as expressed in the maxim '*audi alteram partem*', need not be express ... it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply.

59 The Supreme Court of Canada has also established that the intent to modify or abrogate the rules of natural justice must be revealed by clear statutory language. As stated by L'Heureux-Dubé J. in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at 677-678:

> However, as was pointed out by Dickson J. *in Kane v. Board of Governors of the University of British Columbia*... "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument."

60 The legislative scheme that the respondent Horsefield challenges does not provide for a pre-suspension hearing. That such a hearing is not contemplated was implicit in the legislation considered by Stong J., but has since been made explicit by the 1997 amendment to s. 48.3 of the *HTA*, which for convenience I will repeat:

> (2.1) A person has no right to be heard before or after the notification by the officer, or before or after the Registrar suspends the licence, but this subsection does not affect the taking of any proceeding in court.

61 Section 50.1 of the *HTA* provides a right to appeal the suspension decision to the Licence Suspension Appeal Board. However, a suspension order will be rescinded only on the grounds of mistaken identity or by showing that a medical reason existed for refusing to provide a breath sample. The Registrar is not required to consider relevant statements or information in deciding whether to affirm or rescind the suspension.

62 In contrast, the review proceedings in the Manitoba, Nova Scotia, P.E.I. and British Columbia ADLS programs require that relevant information be considered by the Registrar. As well, the Manitoba, Nova Scotia and P.E.I. legislation requires the Registrar to consider whether the driver had an over 80 blood-alcohol level or whether the driver in fact failed to comply with a demand for breath or blood samples. The B.C. legislation, in addition to directing the Registrar to consider these issues, adds that a ground for revoking the suspension is if the driver had a reasonable excuse for failing or refusing to comply with a breath demand.

63 Although the legislation of other provinces provides greater review rights than does the Ontario ADLS Program, there is no legal requirement that constitutionally valid legislation provide for any right of appeal from an administrative act. Accordingly, the sufficiency of the right of review in the ADLS Program is a matter for the legislature.

64 It is also noted that the British Columbia, Manitoba, Nova Scotia and Prince Edward Island programs, unlike the Ontario program, provide for the issuance of a temporary licence after the brief roadside suspension expires. This temporary licence allows the motorist to make alternative transportation arrangements and to seek review by the Registrar of the suspension. In Manitoba, Nova Scotia. and P.E.I., the temporary licence is valid for seven days; in B.C. it is valid for 21 days.

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

65 I mention these distinctions only to indicate that I am aware of them. The absence of a more elaborate procedural safeguards does not impact on the fundamental principle that the legislature has the right to override common law administrative law principles relating to natural justice. Accordingly, the ADLS Program is immune from attack on this ground as well.

Issue 4 — How should the costs of the application and the appeal be awarded?

66 The applications judge awarded solicitor and client costs to Horsefield following his success in challenging the ADLS Program. The Registrar appeals this award as to costs and suggests that party and party costs would have sufficed. The Registrar also submits that if it is successful on this appeal, all of the parties to the appeal should bear their own costs.

67 Horsefield was never convicted of an offence under the *Criminal Code*. Since his license suspension has long expired, he has no personal interest in these proceedings except to preserve his award of costs. The two intervenors were thus of great assistance in ensuring that all the issues relating to the constitutionality of the ADLS Program were fully explored.

68 I am well aware that the Registrar had no choice but to appeal the judgment of Stong J., but he had to be aware that an attack on the constitutionality of the legislative scheme was inevitable. Horsefield, a private citizen of modest means who found himself caught up in the ADLS Program, was entitled to challenge the scheme. His arguments were obviously not frivolous because they were successful in the first instance. Horsefield, through his counsel, appeared before me on the stay application. His simple request was that the Registrar exclude the cost order from the stay application but the Registrar declined to do so. No intervenors appeared at that time and accordingly the only effective opposition to the motion came from Horsefield's counsel, Mr. MacLean. His submissions were most helpful and the fact that the matter was fully argued made me more comfortable in making my decision to grant the stay.

69 I think that Horsefield should receive his costs on a solicitor and client basis throughout.

70 Similarly, I think the court and the administration of justice were well served by the two intervenors who presented arguments on both sides of this important constitutional case. I think that both should receive costs on a solicitor and client basis for this appeal and for any participation in the preparation of or cross-examination upon any affidavits that were prepared for the purposes of this appeal.

Fresh evidence

71 I note in passing that there was a motion by the appellant to admit fresh evidence that made current the experience of law enforcement agencies in dealing with the new legislation. It was not necessary for my determination of this case and consequently I have not relied upon it.

Disposition

72 Accordingly, the appeal is allowed, the judgment of Stong J. is set aside, except for the order as to the costs awarded to Horsefield. In its place an order is to go declaring that s. 48.3 of the *HTA* is *intra vires* the province under s. 92 of the *Constitution Act, 1867* and that it is not in violation of s. 7 of the *Charter*. Notwithstanding the outcome, Horsefield and the two intervenors are entitled to their costs of the appeal on a solicitor and client basis.

Appeal allowed.

1999 CarswellOnt 919, 118 O.A.C. 291, 134 C.C.C. (3d) 161, 172 D.L.R. (4th) 43, 62 C.R.R. (2d) 161, 42 M.V.R. (3d) 1, 44 O.R. (3d) 73, [1999] O.J. No. 967

FN* Varied on May 14, 1999.

END OF DOCUMENT

Ontario Legislature, Debates February 2, 1960, pp. 120-201

Feb. 2, 1960

ONTARIO ENERGY BOARD ACT

Hon. R. Macaulay moves first reading of bill intituled, "An Act to establish the Ontario energy board."

Motion agreed to; first reading of the bill.

He said: This is a bill to establish what is called the Ontario energy board, which will replace the Ontario fuel board. It will possess, in effect, many of the same powers of the Ontario fuel board except only those powers which are of a quasi-judicial nature, dealing with the issuing of franchises and the granting of rates.

ACT RESPECTING ENERGY

Hon. Mr. Macaulay moves first reading of bill intituled, "An Act respecting energy."

Motion agreed to; first reading of the bill.

HOURS OF WORK AND VACATIONS WITH PAY ACT

Mr. R. Gisborn moves first reading of bill intituled, "An Act to amend the Hours of Work and Vacations with Pay Act."

Motion agreed to; first reading of the bill.

Hon. M. Phillips (Provincial Secretary): Mr. Speaker, before the orders of the day, I beg leave to present to the House the fifty-first annual report of the hydro-electric power commission of Ontario for the year ended December 31, 1958.

Mr. E. Sopha (Sudbury): Mr. Speaker, before the orders of the day, I should like to ask a question of the hon. Minister of Energy Resources, notice of which has been given It is this.

In reference to reports in the press and on television that the hon. Minister of Energy Resources made representations to the federal government concerning the location of a nuclear research centre at Elliot Lake instead of in the province of Manitoba, would the hon. Minister inform the House of the results of this discussion?

Hon. Mr. Macaulay: In reply to the question of the hon. member—and I appreciate receiving notice of his question—I would say firstly that I made no statement with respect to which my hon. friend has made an inquiry.

However, I would like to say to my hon. friend, for his information, that this government is pressing the federal government for a joint study of its municipal problems arising from the curtailment of Canada's uranium contracts.

The Ontario government is anxious that studies be implemented by the two governments to consider the future of the Elliot Lake, Blind River and Bancroft uranium mining communities, and find means of alleviating a threatening decline in their economies. We have made representation to the federal government that it join the Ontario government in such studies, because these communities were organized with the encouragement of the federal government so Canada could supply the free world with uranium when it was critically needed. Both governments spent large sums of money in setting up Elliot Lake and the Bancroft area.

We feel that the federal government has a tremendous moral responsibility as well in maintaining the healthy economy of these communities because they were established as a direct result of Canada's agreement to provide uranium to its allies. A joint study should investigate every means of aiding these communities.

Elliot Lake mines produced 74 per cent. of all uranium mined in Canada, and the area contains 94 per cent. of the country's proven uranium ore reserve, the largest high-grade ore body in the world.

The stretch-out delivery programme of supplying uranium to the United States and Great Britain will leave Canada's uranium mining industry in a difficult position by 1966, and there is an emergent need for alternate means to maintain the economy of both Elliot Lake and the Bancroft area.

Mr. Sopha: I had no idea that my question would trigger such a copious memorandum. I should like to ask the hon. Minister a supplementary question. Has he made representations to the federal government to locate the nuclear research centre in Elliot Lake, rather than in the province of Manitoba? If he did not, I should like to ask him why not.

Hon. Mr. Macaulay: I would be happy to take my hon. friend's question as notice.

Mr. Speaker: Orders of the day.

SPEECH FROM THE THRONE

Mr. J. J. Wintermeyer (Leader of the Opposition): Mr. Speaker, it is my pleasure to join in this debate and my first words are congratulations to yourself on the appointment to your high office. It was my opportunity to speak in your absence a few days

ago to the motion for you
that time I tried to stress
your position and the sign
toric Legislature. I wis
Speaker, and I hope that
impartial and wise way t
the position.

Mr. Speaker, I would ta
to add my congratulations
that have been extended
members of this Legislatu
hon. member for Duff
Downer), who has gone o
tion—his geniality and frien
an impression on all of
member for Ottawa South
is not with us during this
wit stimulated many inte
in this Legislature over
time, to the hon. Minister f
Dunlop) in his retirement f
portfolio, a portfolio that
these particular times is a
We commend him for his cc
cation in Ontario and expr
he will have a very pleasa

I would, Mr. Speaker, ad
tions to the hon. Minister fr
(Mr. Robarts) on his recen
the important portfolio of
particularly impressed
Minister's observation that w
a serious teacher shortage
teacher qualification. I thin
important things in any p
strative operation is to
problem. At least then we
work from and we have so
of what the objective must
him in that observation.

Now, Mr. Speaker, I
opportunity to extend my c
the government and in parti
of the government (Mr.
victory last June. We did c
it otherwise, but the decision
and I unhesitatingly offer m
to the head of this gover
Prime Minister of this provin

I feel, Mr. Speaker, that i
the people of Ontario just pre
have grown accustomed to h
wanted him around for a

But, Mr. Speaker, I sug
the passage of a few years, a
will come to our minds, an
will be "You have been
House and played around thi
long."

investigation into the whole matter of fluoridation.

The committee was composed of the hon. Mr. Justice Kenneth G. Morden, Dr. G. E. Hall, and Mrs. Frankel who has suffered a long and serious illness which makes it impossible for her to continue her work with the committee. On the advice of her doctors, Mrs. Frankel has resigned.

Mrs. Frankel performed very valuable duties in the early stages of the committee's work, and it is with great regret that the government accepts her resignation.

To replace Mrs. Frankel, the government has appointed Mrs. Cameron MacKenzie of Beaverton.

Mrs. MacKenzie brings a very great amount of service and municipal experience to this task. She is a registered nurse and worked for many years as a volunteer for the Red Cross and for the Children's Aid Society. She was vice-president of the Ontario division of the Canadian Red Cross and for many years was a director of the Children's Aid Society for Ontario county. She has also served as extension chairman for Ontario county for the Ontario Cancer Society and, for some years, was chairman of the building committee for Fairview Lodge, home for the aged at Whitby.

Her municipal experience has also been noteworthy. Between 1946 and 1952, she served on the town council of the town of Beaverton, and for the last two years of this period she held the position as the head of the municipality. She is, at present, a member of the reform institutions advisory committee or council for the treatment of its members.

Mrs. MacKenzie's wide experience and integrity, as well as her knowledge of municipal and service activities, thoroughly fits her, I think, for her new and important post.

Mr. Speaker, I got in touch with her in Florida and she will be back here tomorrow I think, or the next day, and she advises me that she assumes her task with no predetermined opinion which would prevent her from giving a most impartial inquiry into this matter.

Before the orders of the day, I might also announce to the House the intention to have a night session tomorrow night. I think, in view of the fact that we are not sitting on Wednesdays, that it would make it desirable that we should have night sessions perhaps on Tuesdays and on Thursdays. In any event, I would like to give that notice at this time.

ONTARIO ENERGY BOARD

Hon. R. Macaulay moves second reading of Bill No. 38, "An Act to establish the Ontario energy board."

Hon. R. Macaulay (Minister of Energy Resources): Mr. Speaker, if I may, I would like to have an opportunity of indicating, to the House, some of the principles which promote Bill No. 38, "An Act to establish the Ontario energy board."

I am sure that the hon. members accept the understanding of the rules of the House that it is not possible to deal with specific provisions of the Act. On the other hand, this is the occasion upon which the mover makes reference to the general provisions of the Act which is being proposed.

Mr. Speaker, The Ontario Energy Board Act, which I present to the Legislature for second reading, comes about as a result of the creation of The Department of Energy Resources and it follows very generally, and in some specific details, a number of the provisions recommended by the Gordon committee on organization of government in Ontario.

If I may I would like to refer the hon. members to page 72 of that document wherein the Gordon committee set forth the 5 general functions of the Ontario fuel board. It states the 5 specific obligations of the fuel board in this way, that:

First, the board has general powers to control and regulate the location, drilling and abandonment of oil and gas wells and, in the words of The Fuel Board Act, "the production, storage, transmission, distribution, sales, disposal, supply and use of natural gas" in the province. In the exercise of these powers, the board carries out a wide range of inspection and licencing functions.

The second responsibility of the fuel board, the Gordon committee points out, is that the board is responsible for the fixing of rates, meter rentals, and other charges "to be paid by ultimate consumers of natural gas."

The third responsibility is that, under the provisions of The Municipal Franchises Act, the board may issue certificates of public convenience and necessity to gas companies seeking to establish distribution facilities to serve a given market area.

Fourthly, also under this Act the board must approve municipal by-laws granting or renewing gas franchises.

Fifthly, under The Pipe Lines Act, 1958, leave to construct oil or gas transmission lines must be obtained from the board. Where

leave has been granted, the recipient corporation may apply to the board for authority to expropriate land for the purposes of the pipe line.

The Gordon committee then went on to state that the various functions of the board are of two types: administrative and quasi-judicial.

Its administrative functions stem from the provisions of The Fuel Board Act. In delegating the broad powers of control and regulation, the Legislature has indicated that the board should have certain responsibilities, namely, to insure the orderly development of the natural gas industry and to safeguard public safety in regard to the production, transmission, distribution, or consumption of natural gas—and in some instances—coal and oil.

Now, these were the recommendations of the Gordon committee. The Gordon committee recommended that these supervisory inspection and licencing functions be transferred to the new Department of Energy Resources. Thus the department would take over the present powers of the board to regulate and control the construction, installation, removal or acquisition of works, pipe lines or machinery for the production, storage, transmission, distribution or measurement of natural gas.

It would also take over the sale, installation or use of coal-burning equipment and gas or fuel oil appliances—that is, the regulation and control of the same. Also, it would take over the installation or use of high-pressure vessels for liquefied petroleum gases which are connected with gas appliances, the designation of natural gas storage areas, and the conservation of natural gas and oil—particularly with reference to drilling or production practices or the abandonment or plugging of wells.

In addition, the committee recommended that the department should become responsible for the issuance of licences or permits to or for contractors and dealers in oil and gas appliances, persons acquiring oil and gas leases, space heating appliances, industrial use of gas and drilling rigs.

Now, I would say to hon. members of this House, through you, Mr. Speaker, that is the effect of the eighteenth and nineteenth orders on the order paper, namely Bill No. 38 and Bill No. 39. The Gordon committee, on page 75, also made in concluding, in relation to the fuel board, this statement:

> In summary, our recommendations are that the administrative functions of the board—those that involve supervision, inspection and licencing—should be transferred to the new Department of Energy Resources. The board would retain its quasi-judicial functions, reporting to a designated Minister, logically the Minister of the new Department. The board would thus be accountable to the Minister, to the government and the Legislature.
>
> We further recommend, with particular reference to the determination of retail rates for natural gas, that the basic standards of policy, to be applied by the board, be established either by statute or by order-in-council.

Now those, Mr. Speaker, are the general observations of the Gordon committee in relation to the Ontario fuel board and the control and regulation of gas and its distribution—frankly of hydro-carbons more accurately—in the province of Ontario, and the two Acts which I am presenting to this House this afternoon are designed to accomplish that.

It can be said that the basic purpose of the two Acts is to separate the quasi-judicial functions of the fuel board from the purely administrative functions, so that the fuel board will retain control over matters dealing with quasi- or semi-judicial functions, and The Department of Energy Resources will assume the responsiblities dealing with purely administrative functions.

One would ask, as a matter of principle perhaps, why this is so.

The simplest answer, I think, can be found in the fact that at the moment the fuel board has been both judge and prosecutor. It has established the terms of reference, the codes, the offences, the penalties, and has then supervised these codes and has sat in judgment of any offence. At the same time, it has determined what franchises should be granted to what municipalities and what companies, as well as what rates should prevail. Consequently, one day it has been setting standards, and the next day it has been hearing infractions and dealing with licences.

So the fuel board, in fact, has been policeman, prosecutor, and judge and jury.

This is an unfortunate mixture of responsibilities. But it is my respectful submission that until this time it has not been either to the detriment of the industry or to the consumer of the goods supplied by the industry. We have now reached the stage where gas has become an extremely important energy resource. A number of years ago, as I recall—and I will speak more specifically on this

licencing—should be trans-
new Department of Energy
The board would retain its
functions, reporting to a
inister, logically the Minister
epartment. The board would
mtable to the Minister, to the
nd the Legislature.

: recommend, with particular
the determination of retail
ural gas, that the basic stand-
r, to be applied by the board,
l either by statute or by order-

Mr. Speaker, are the general
the Gordon committee in
Ontario fuel board and the
ılation of gas and its distribu-
: hydro-carbons more accur-
rovince of Ontario, and the
I am presenting to this House
are designed to accomplish

l that the basic purpose of the
ɔ separate the quasi-judicial
e fuel board from the purely
functions, so that the fuel
n control over matters dealing
semi-judicial functions, and
ıt of Energy Resources will
onsiblities dealing with purely
unctions.

ısk, as a matter of principle,
his is so.

answer, I think, can be found
at the moment the fuel board
judge and prosecutor. It has
terms of reference, the codes,
:he penalties, and has then
e codes and has sat in judg-
ffence. At the same time, it
l what franchises should be
ıat municipalities and what
well as what rates should
quently, one day it has been
ls, and the next day it has
infractions and dealing with

l board, in fact, has been
ıecutor, and judge and jury.

nfortunate mixture of respon-
it is my respectful submission
time it has not been either to
ɔf the industry or to the con-
oods supplied by the industry,
reached the stage where gas
ı extremely important energy
ımber of years ago, as I recall-
eak more specifically on this

when the estimates of the department are presented—the gas consumed in this province, I think in 1954, was in the neighbourhood of 14 billion cubic feet. Last year it was in the neighbourhood of 85 billion cubic feet.

We estimate in The Department of Energy Resources that we will need, in the next 25 years, approximately 12 to 15 trillion cubic feet, and that by 1980 we will be consuming about 600 or 700 billion cubic feet a year.

This is a tremendous development, when one thinks of it increasing from 14 billion cubic feet in 1954 to 600 or 700 billion cubic feet in 1980. That is a fabulous increase, and it gives some indication of the important place of gas in the energy market in this country.

I want, if I may, Mr. Speaker, to give some indication to my fellow hon. members of this Legislature, the general outline of the two pieces of legislation which I respectfully submit to this House as very important legislation for the days ahead.

First, in relation to the Act to which I am now addressing hon. members' attention, the Ontario energy board will replace the Ontario fuel board, and it will consist of 5 members to whom I will make reference in a moment. Its basic purposes will be these:

1. To grant and extend new and existing franchises to the municipalities.

2. To hear complaints in relation to service and delivery.

3. To hear applications for the withdrawal of service to a community or part of a community.

4. To fix rates which shall prevail in the various areas from time to time.

5. To hear applications which are referred to it with reference to the cancellation of various licences which may be issued by The Department of Energy Resources.

My hon. friend, the hon. leader of the Opposition (Mr. Wintermeyer) being, as I am, a lawyer, is extremely sensitive to the withdrawal, as well as the granting, of licences to persons whose livelihood depends on the existence of the licence. Like myself, he is very anxious that, if a licence is to be withdrawn from someone to whom it has been issued, there should be ample opportunity to be heard by persons other than the Minister of Energy Resources. So that is the method by which this matter will be dealt.

6. The board will hear expropriation applications for new transmission lines.

I would want to say to the House that there are other obligations imposed by the Act upon the new Ontario energy board. But, generally speaking, those are the basic functions of the board.

It will be composed of the chairman, Mr. Crozier, who has had a great many years of experience in the field of manufactured and natural gas in this country. In fact, as I travelled to the western provinces I found that Mr. Crozier is accepted—certainly in the west, and I should think also by much of the industry in the east—as an outstanding authority in these matters.

The second member of the fuel board is Mr. Wingfelder who has been with the board as vice-chairman for some time.

The third member is Professor Allcut, an engineer who has many high qualifications in respect to the combustion, the transmission of gas, and other associated engineering problems. Professor Allcut was recently appointed to the Ontario energy board.

The search for an engineer was begun by my hon. predecessor (Mr. Spooner), but I would say to the House that it is a difficult thing to find a man who suits and fits all the qualifications that one would desire in this position.

An actively practicing engineer is usually associated in one way or another with the gas distribution system in this country. He has a number of retainers and clients whom he is loath to give up in return for a position on a board of this nature.

However, Professor Allcut, who had a very senior position in the University of Toronto and who is now professor emeritus, has been prepared to give up a number of connections, which he might otherwise have made to his advantage, to enter the board. He is already fully occupied with his duties, and I think will make a very worthy contribution to this board in Ontario.

The fourth member is Mr. Treadgold, who is a lawyer of considerable experience in municipal matters. It is highly desirable to have someone on the fuel board with experience in relation to the distribution of energy resources through the legislation which deals with the municipalities.

The fifth member is also a lawyer, Mr. L. R. MacTavish, who is the registrar of regulations for the province of Ontario. I am greatly indebted to him for his assistance in drafting these two Acts which I am presenting to the House this afternoon, and which have gone through something like 19 drafts.

The Ontario energy board also has, on retainer as advisers in relation to accounting and rate matters, the firm of Ormsby and

Ormsby, who have been of great assistance in preparing this legislation, and whose basic responsibility in the future will be to help sort out, and to equate and collate, much of the evidence which will be presented for rate hearings.

I might say to the hon. members of the House, Mr. Speaker, at this time, that I would think that there will be, within the next few months, a large number of rate hearings, some of which are extremely complex and involved.

I would also say to the House that the board itself will be responsible to this Legislature through the Minister of Energy Resources.

I would like, if I might, to speak very generally on a number of principles which are affected by this bill, including rates, rate basis, rate hearings, and some matters which I think are of great concern to this House, and particularly to a number of the hon. members who have made frequent reference to them in the last few years.

Indeed, I am indebted to a number of the hon. members of this House who have been kind enough to assist me in preparing this legislation—hon. members of the Opposition of both parties and of the government side. I wrote a letter to all of the hon. members of this House, and asked them if they would assist me in its preparation on any point which they felt should be dealt with. A number responded, and very generously so, and I am indebted to them.

I am particularly indebted to the hon. member for Lambton East (Mr. Janes) who has been very helpful to me in a number of matters, as well as to a number of other hon. members.

Mr. Speaker, so far there are very few permanent rate decisions in this province. It is necessary to obtain a number of permanent rate hearings.

I have not been anxious to discuss permanent rate hearings until the present legislation was presented to this House. The reason for that, I think, will be more evident when the bill is read in committee. The committee of the whole House will see that the Ontario energy board, as well as the department itself, is given much wider powers in relation to the calling of evidence and material to be presented in relation to these matters.

I felt that the Acts, which these Acts supersede, have served the purposes which existed, and were in mind of this House, when the bills were presented to this House. But conditions in 1959 and 1960 have sufficiently changed to warrant new Acts. In 1958 there was distributed in this province about 51 billion cubic feet of gas. In 1959, that figure rose to 85 billion cubic feet—nearly double in one year.

It became apparent to the government that it was necessary to augment the legislation in relation to the distribution of natural gas, and I felt that, as the Minister responsible to the hon. members of this House, Mr. Speaker, it would be unwise to bring on applications for permanent fixing of rates until the legislation —which is somewhat different in this case to the legislation earlier prevailing—was passed, or in any event submitted to this House for its consideration.

I want to say also, in connection with this particular bill, that this is no take-it or leave-it bill, and I would like to refer it to the committee on energy. I will be happy indeed, as will the government, to have the committee's recommendations, and any changes that the committee feels are desirable will, of course, be implemented. I would say the same in relation to the committee of the whole House.

I do not for a moment pretend that this bill is perfection. We have done our best, with about 19 drafts, to present the best bill we could to this Legislature. So if this Legislature feels, in its wisdom, that there are a number of improvements which can be made, they will be accepted and implemented, I assure hon. members.

Now, Mr. Speaker, one of the—I think one could say—salient characteristics of The Ontario Energy Board Act is the creation of something which, to date, does not exist in this field of legislation in Canada. That is the creation of what we call in the Act an energy returns officer.

One of the problems in relation to rates, before I come to them, Mr. Speaker, is this: That when a company comes before a fuel board or the national energy board, or what will be the Ontario energy board, to fix a rate, it is, of course, well and fully familiar with its own facts, with its own statistics. But the municipalities which either contest the rate, or oppose it in some way, have very little knowledge as to the details upon which the battle, if one can call it that, should be fought.

We do not desire that the government should take sides in these issues. After all, in an economy which is based upon freedom of movement and enterprise, it is desirable that one has as little regulation consistent with reasonable and just security for the consumer as possible. At the same time, it

was apparent that, if the companies had to supply specific details as to their earnings and their rate base and other facts with the board, the board could logically be argued to be seized of facts which it was using prior to a hearing and thus prejudging a case.

This is something which is strongly argued against in the concepts of the Gordon committee report, as well as by the legal profession itself. Therefore, we tried to find a means by which it could be said that all of the evidence, regardless of how insignificant or important, was made available to the board.

We concluded that the best way of doing it was to create what we have called an energy returns officer in The Department of Energy Resources. This officer will be a party to every application for a rate hearing. His duty will be to bring before the board all the pertinent facts of that application without either fear or favour, without desiring to assist one side or another, but simply with a sense of responsibility that all of the facts—both favourable and unfavourable—to the applicant as well as the defendant, should be made available.

We felt that this would aid both sides in a dispute as well as the board.

It is to be noted that this energy returns officer is not a member of the board nor is he associated with it, but is a member of The Department of Energy Resources.

This is an adaptation of what is called, under the federal power commission, a "special examiner." I am hopeful that it will work to the advantage of orderly development in these matters.

Mr. Speaker, in relation to the orders of the board itself, I would like to say that, in response both to the dictates of my own heart as well as the recommendations of the Gordon committee, all the hearings of the Ontario energy board will be public hearings. Notice will be given of the hearing, all of their orders will be written decisions, and these decisions will be available to the public, upon request.

Mr. Speaker, I would like to make some reference to the philosophy of this government in connection with rates for the distribution of natural gas.

First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly, because people become tied to a system and have a very great investment in their own equipment, and it is only fair that whatever rate is charged should be one designed, not only in the interests of the consumer, but also in the interests of the distributor.

Therefore, when one fixes a rate in relation to the distribution of natural gas, one really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate.

Second, the rate should be adequate to pay for good service and replacement and retirement of the used portions of the assets.

Third, it should be high enough to attract a sufficient return on capital, and to attract capital for the orderly expansion and development of the industry.

I respectfully submit to this House that that is the basic purpose of any rate control in relation to the distribution of any energy resource—such as gas.

It is one thing to describe what one's purposes are in life; it is quite another thing, however, to discuss ways and means of obtaining it. There are a number of standards which are used in this country and in the United States in relation to rates. I would like to make, if I might, some mention of them to this House, because last year there was considerable discussion as to rate base and rate of return, and I would be surprised if that did not form a part of the discussions of the present sittings of this House.

One of the basic conceptions of rate base is this: That the rate base should be the historical cost of the assets in use, less depreciation. There are in effect 4 or 5 means, or methods, by which one can determine a rate base. There are 4 or 5 different architectural concepts, let us say, of a rate base.

One of these is, what did it cost, how much depreciation has there been, and the difference between the two is the amount upon which earnings should be allowed, or what is called in terms of gas distribution the rate base. This is called historical cost less depreciation.

Now, the difficulty with this method of a rate base is pointed out by the Borden commission, which I respectfully submit the hon. member for York South (Mr. MacDonald) has completely misunderstood.

In the Borden commission report it pointed out that one of the objections that the Borden commission had, to the historical cost less depreciation concept, was that it amounted almost to an expropriation of capital during periods of inflation or depreciation of the dollar. It is explained in this way, that if we have—let us say—a fixed number of dollars

in our assets, each year the difference between your original value and your depreciation gets to be less and less and less, and so your rate base becomes smaller and smaller each year. So the return to the company becomes smaller and smaller each year, simply by the mere fact of inflation, and as the assets are depreciated the difference between the original cost—in short, the depreciated value—becomes much smaller, therefore, the rate base obviously has to be reduced.

And so the Borden commission pointed out, in effect, that it was opposed to such a type of a rate base, and it substituted one quite different from that which is suggested by the historical system less depreciation.

I would like, if I might, to make reference to the Borden commission's report, which I am respectfully submitting to the hon. member for York South that he misunderstood.

The Borden commission said that, normally, the allowed rate of return on assets employed exceeds the interest rate on borrowed money, and in such event the greater the proportion of the total investment represented by borrowed money, the greater is the advantage to the equity owner in terms of the rate of return on his investment. Such an advantage is commonly referred to as leverage.

Incidentally there was an interesting article on leverage in the morning paper in Toronto this morning, on the mining and financial page, which I would commend to the hon. members of this House.

But the commission went on to say:

> We are of the view that a method of regulation which permits such leverage will, in the case of oil and gas pipe lines, tend to produce an undesirable disparity between the several companies in the rate of return upon equity.
>
> It may also make possible realization of inordinate profits which, in the last analysis, will be paid by the consuming public.
>
> In this respect we have in mind, particularly, situations where shares in the equity have been issued to shareholders at prices varying from a few cents to substantially higher amounts.
>
> The commission is, therefore, of the view that the best basis of regulation to be followed, with respect to pipe line companies—subject to the jurisdiction of the Parliament of Canada—is that method of regulation which insures a fair rate of return on the shareholders' equity—

not paid-up capital, my hon. friend—on the shareholders' equity. Hon. members are under the impression they are the same thing, but they are not—

> —and does not permit the leverage to which we have above referred.
>
> We have concluded that it is preferable to allow the board to exercise its discretion in this regard—that is, as to the rates—recognizing that, in so doing, it will strive to exercise its powers in a fair manner and authorize rates and thus a level of earnings, having regard to the circumstances in each case sufficient to attract the necessary capital. The flexibility which will obtain under such a plan, in our view, is particularly desirable.

Then they go on to say this—and this is the essence of the formula which was endowed with the approval of the hon. member for York South last year.

> In order to insure the fair treatment of equity capital—

not paid-out capital, but equity capital—

> —on a long-term basis, we consider that, from the outset of regulation, there should be a candid recognition by the board of transport commissioners of the principle of evaluating the assets at their fair value, in arriving at the value of the equity to be remunerated, the valuation of the assets, and hence of the equity on the principle that historical costs in dollars will inevitably result in the confiscation of capital so long as the purchasing power of the dollar continues to decline.

I want to point out to my hon. friend that he spoke of leverage in an interesting aspect, but he looked at only one side of it.

This is an interesting point, I say to my hon. friend, because this is a fact that I do not think has been introduced in the House before, and I would respectfully submit it for hon. members' consideration.

While leverage, on the one hand, gives the shareholder a little more income—or even a great deal more income—than he would have if there were no leverage, factually it can be shown that the higher the leverage, the lower the rate to the consumer.

Now, let me give hon. members an example. Where there is 80 per cent. of the company in debt and 20 per cent. in equity, there will be a higher leverage to the shareholder, but there will be a lower rate to the consumer.

The reason for that is this: The interest on borrowed money is deducted before taxation, and need not be doubled again in taxation, as it is when it is interest or revenue on the shares.

Turn that the other way around. Where we have 20 per cent. of debt and 80 per. cent. of equity, there will be far less leverage, but there will be a much higher rate of return required to satisfy that condition.

I worked this out, and I would ask if the hon. member for York South would care to take his pencil and a piece of paper, and I will give him these figures.

Assuming that the rate base is $700,000 and assuming that the equity and debt ratio are 70-30, the interest costs at 6 per cent. on the $700,000 debt is approximately $420,000. If he deducts that from the return allowed on the rate base of $700,000—

Interjections by hon. members.

Mr. D. C. MacDonald (York South): How many is he talking about, $7 million?

Hon. Mr. Macaulay: No, we will start again. If we have—

Hon. L. M. Frost (Prime Minister): I know the hon. member for York South is all mixed up.

Hon. Mr. Macaulay: If we have a debt equity ratio of 70-30 on a $1 million company, we have $300,000 in equity and $700,000 in debt.

Now then, assuming that the rate of return allowed on the rate basis is $700,000—7 per cent. on the historical cost effect—if we have, let me go back, $1 million of assets, and we are allowed to have 7 per cent. return on a $1 million asset, we will have $700,000 allowable rate base.

From that, we deduct the percentage of the debt, say 6 per cent. on $700,000 at $420,000. The difference is $280,000 available for the equity people.

Mr. MacDonald: The hon Prime Minister will forgive us for being confused.

Hon. Mr. Macaulay: Well, I am no mathematician. Let me put it this way, if I can.

Mr. K. Bryden (Woodbine): It might change the conclusion.

Hon. Mr. Macaulay: No, it does not affect the conclusion because this is a recognized fact, that when we have a higher percentage of equity and a lower percentage of debt, we will have to have a higher rate. I say this because we have to permit, in the rate return, enough to pay the income tax, the corporation income taxes. That is why, if we have 20 per cent. equity and 80 per cent. debt, we will have a higher proportion of leverage. But the company will have to earn less in order to give the return necessary to the equity, and thus the rate of that company will be lower than a company that has 80 per cent. of equity and 20 per cent. of debt.

The only reason I raise this for the benefit of the hon. member for York South is that he looked at this question of leverage, as has the Borden commission, as something that is quite undesirable. But I want to point out that the higher the leverage, the lower the rate of the company.

Mr. MacDonald: That leaves the corporation with 100 per cent. of borrowed money. They should have no equity at all.

Hon. Mr. Macaulay: On that basis, my hon. friend, the rate could be lower under our present corporation tax system.

Mr. MacDonald: The hon. Minister is robbing Peter to pay Paul.

Hon. Mr. Macaulay: So the higher the debt, the greater the leverage there may be for the equity shareholders, but at the same time the lower the amount that the company has to take in on its return in order to finance itself.

Now my hon. friend has said, in relation to the Borden commission last year, that the Borden commission decided that there should be a rate base based on equity of the shareholders. But then he did not take the equity of the shareholders, he took the paid-up capital of the shareholders. Let me give my hon. friend an example of the difference.

If a person buys a $10,000 house—and on these simple mathematics I hope not to stray too far—and he assumes a first mortgage of $7,000 and pays $3,000 cash, his $3,000 cash is coincidentally his paid-up capital. It is also his equity.

Next year, somebody comes along and offers to buy the house for $12,000. In the meantime the person has paid $1,000 off the mortgage. Let us say, for argument's sake, that the person put up $3,000, and has paid $1,000 off the mortgage, so his paid-up capital in that house is $4,000. But his equity is the difference between what it will sell for and and the debt, which is $6,000.

Now, what the Boarden commission was referring to, when they talked about a return on equity, was the difference between what they say is fair value for the asset less the debt.

John Willis, Report of the Government Committee on the Organization of Government in Canada (1961), 14 U. of T. L.J. 103

NOTES

REPORT OF THE COMMITTEE ON THE ORGANIZATION OF GOVERNMENT IN ONTARIO

JOHN WILLIS*

THE purpose of this note is to draw the attention of all persons interested in administrative law to the Report of the Committee on the Organization of Government in Ontario (hereinafter called the Gordon Report) and to the Interim Report of the Select Committee of the Ontario House of Assembly on the Administrative and Executive Problems of the Government of Ontario (hereinafter called the Interim Report) which is now considering the recommendations of the Gordon Report. The United Kingdom has had its Donoughmore Committee on Ministers' Powers and its Franks Committee on Administrative Tribunals and Enquiries, and the United States its Acheson Committee and its Hoover Commission—and, naturally enough, the Gordon Report borrows freely from all four of them. But these two Ontario committees are the first official bodies in Canada to investigate the field variously called "administrative law," "boards and commissions," "delegated powers of legislation and decision," "bureaucracy," and, no doubt, many other names as well. Their reports would, for this reason alone, be landmarks in the history of administrative law in Canada and this JOURNAL cannot allow them to pass without mention.

No "public outcry" (such as gave rise to both of the United States investigations and to the United Kingdom Committee on Ministers' Powers) or "bureaucratic scandal" (such as the Crichel Down affair which ultimately produced the Franks Committee) preceded the appointment of the Gordon Committee. In a manner quite characteristic of the easy-going Canadian way of life, what gave rise to it was nothing more dramatic than a suggestion of the Provincial Auditor in his 1956–7 report that "a survey to assess the strength and weakness of the present machinery of government is needed." Its formal terms of reference were to "examine into the administrative and executive problems of the Government of Ontario in all divisions of the Provincial Service and to examine into the relationship of boards and commissions to the Government and the Legislature"; but, again characteristically, its effective terms of reference were contained in a letter from the Premier to Mr. Gordon that states "the problem is to preserve Democratic Government while not depriving it of the benefits and efficiencies which go with good business methods." The persons appointed to resolve in connection with the details of the machinery of government in Ontario this ever present modern conflict between "constitutional theology" and the real needs of real men were: Mr. Walter Gordon, a Toronto economic and business consultant, who had previously headed a federal royal commission on Canada's economic prospects; Principal Mackintosh of Queen's University, a former professor of economics who had been one of the "brains trust" in Ottawa during the war; and Mr. C. R. Magone, the former Deputy Attorney-General of Ontario. At the beginning of January, 1960, their 88-page report—a surprisingly practical document when the theological nature of the subject and of the learned writings thereon is considered—was released to the public. Incorporated

*Professor in the Faculty of Law, University of Toronto.

with it were about 350 pages of appendices describing in a summary way the functions of the various Ontario government departments, boards, and commissions; this pioneer job of research was done, not well but adequately, by firms of business consultants and chartered accountants. Embedded in the rather discursive discussions in the report were a number of specific recommendations that required legislative action. A Select Committee of the House, consisting of eleven members drawn from all three parties and chaired by the Attorney-General, was therefore appointed to report and recommend upon their implementation. This essentially practical job of dealing in detail with specific trouble spots revealed by the Gordon Report they handled by hearing ministers, senior civil servants, and some outsiders, and on November 17, 1960, they issued their terse (19 pages) and lucid Interim Report on the matters on which they had made up their minds.

The Gordon Report is divided into four chapters. Chapter I briefly examines the organization of twentieth-century government in the wide context of the social and economic changes to which it has responded and then outlines four broad standards that the process of delegation should meet. Two of them, ministerial responsibility and provision for appeals, are constitutionally important. "There is no effective substitute for ministerial responsibility," says the Report—a view not shared by those who think that in this day and age ministerial responsibility is and must remain a mere myth—and accordingly warns against the indiscriminate creation of new "independent administrative agencies" and suggests methods of tightening parliamentary control over existing ones. "Generally speaking, the right of appeal from the decisions of ministers, officials, boards and commissions should be facilitated"; "as between two of the objectives of good administration which were enumerated earlier—one, the provision of safeguards to individuals and the other, the attainment of operational efficiency—the first objective must not be subordinated to the second"; but, the Report recognizes, "the question . . . must, in the final analysis be settled empirically." Chapter II, headed "Supervision and Control of Delegated Powers," examines the "safeguards" now employed, and suggests additional "safeguards" that might be employed, in Ontario to "minimize the risks" of delegating the power to legislate and to make decisions in individual cases—parliamentary "safeguards," judicial "safeguards," and internal "safeguards." The existing "safeguards" are pretty well common form throughout Canada and need no special mention here; the additional ones suggested by the Report will be considered in a moment. Chapter III deals with the government departments and contains nothing of interest to people outside Ontario, except possibly town planners. Chapter IV, "Boards and Commissions," is the longest in the Report and also contains much that is of purely Ontario interest. Of wider interest is its classification of "the 85 boards and commissions attached to the provincial government" so often paraded by the anti-bureaucratic journalist; the number of regulatory boards, or "quasi-judicial agencies," turns out to be only nine. This does not, however, include the host of regulatory agencies at the municipal level—police commissions, boards of health, and school boards, for example—for they were outside the terms of reference. And the Report does not deal at all with "civil service discretions" ("ministers' powers" in U.K. terms); for, although there are many of them, for instance in the fields of marriage licences, driver's licences, and club incorporations, they do not usually involve important people or big money and so do not attract much attention.

The Interim Report of the Select Committee agrees with most, but not all, of the recommendations in the Gordon Report. It too sounds as its dominant theme "adherence to the well established principles of responsible government,

including ministerial and executive responsibility" and regards these as being "the key to the question under consideration." It too pronounces itself "conscious . . . of the importance to the subject of a right of appeal from administrative decisions" and feels that the matter "can be satisfactorily dealt with only in relation to concrete situations." Those who are more interested in removing real injustices than in the "theology" which pervades both reports should note that (as the Select Committee plaintively records), despite some areas where no appeal as to law or fact exists at all, very few representations were made by the persons most likely to be hurt, viz, the members of the public, and even the comments of the legal profession were of a most general nature. The conclusion would seem to be: "well, if no one is squealing about appeals, things must be going along alright, so why bother." The Select Committee, however, has recommended a thorough examination of the whole subject with particular emphasis on licensing.

In pursuance of the principles of responsible government which both emphasize, the two reports concur in the following recommendations designed to tighten the control of the legislature over boards and commissions. First, the duties of all agencies should be more precisely spelled out and a periodic review made of them in order to tighten up and "codify" their powers. Second, each agency should make an annual report to the minister responsible for it and there should be an opportunity for debate on that report. Third, those who like to speak of agencies independent of the Government (for example, the Workmen's Compensation Board, the Labour Relations Board, and so on) must remember that "the principle of independence in this context is properly confined to the area of detail and of application of policy to fact and should not extend to policy making itself"; although the government should avoid involvement with particular fact situations coming before the agency, it is and should remain fully responsible for the policy or principles to be applied.

As to the "internal safeguards" to be observed by "quasi-judicial agencies," both reports agree that where the subject-matter is of more than routine importance they should, in all cases when requested to do so, give written reasons for their decisions. On the vexed question of codes of procedure, both reports in effect recommend a modified version of the system adopted by the United Kingdom in the Tribunals and Inquiries Act, 1958, and reject the United States solution of a General Administrative Procedure Act. Each agency should be left to work out the rules specially adapted to its own needs, subject however to scrutiny by a senior official of the Attorney-General's Office in order to ensure that the fundamental matters, such as notice, hearing, and recording of evidence, are properly covered; "there is no virtue in uniformity for its own sake."

As to judicial control of "quasi-judicial agencies," the two reports differ on "privative clauses," that is, statutory sections purporting to oust judicial review entirely. As is well known, Canadian courts have more or less nullified these clauses by a process of spurious interpretation; the Gordon Report accepted the situation and thought they should be rescinded as useless. The Select Committee has reserved the question for further study. In the Western world where judicial review is one of the sacred cows, their comments are so unusual that they deserve quotation in full. "We are by no means satisfied that there is anything inherently undesirable in seeking to make a particular quasi-judicial agency supreme in a special field assigned to it and in ousting judicial review. Responsibility for the proper functioning of such an agency and for the correcting of its wrong decisions would then reside in the Legislature rather than in the Court. We are therefore not inclined to accept without further study the premise that judicial review is invariably desirable." The

Gordon Report's position on appeals to the courts on law, fact, and/or merits is not clear, and this question too has been reserved by the Select Committee for further consideration. Because the livelihood of a large section of the population depends upon the holding of a licence, both reports do however agree that all decisions affecting forfeiture or cancellation of a licence should be appealable to the courts. They also agree that there shall be no appeals on fact from the two agencies of chief concern to the labour unions, the Workmen's Compensation Board and the Labour Relations Board—in which connection it is worth recording that when the Gordon Report first came out the labour unions thought, mistakenly, that it was recommending an extension of judicial control over these agencies and they protested loudly and vigorously. Again, the Select Committee are refreshingly non-doctrinaire in their approach to judicial review; for they say with respect to appeals, "we feel that the question can be satisfactorily dealt with only in relation to concrete situations."

The field of regulations, or "delegated legislation," has never excited much adverse comment in Canada. There were at one time complaints that regulations were hard to find but for some years now the Dominion and most of the provinces have had Regulations Acts which provide for their central filing and for their publication in both a periodic and a consolidated form. There has been no complaint that the power of the courts to declare them ultra vires the issuing authority has been excluded; in sharp contrast with the many "privative clauses" purporting to protect the decisions of "quasi-judicial agencies," it is very hard indeed to find similar clauses purporting to protect regulations; the "have effect as if enacted in the Act" and "conclusive evidence" clauses, formerly so familiar in England, never got a foothold in Canada. The Interim Report does, however, following the Gordon Report, meet two complaints that have sometimes been made. The first is that Canadian legislatures ought, like the Mother of Parliaments, to have a Scrutiny Committee to act as watchdog over delegated legislation; at present none of them do. As one would expect from its devotion to the slogan of "return to the Legislature," the Interim Report recommends the institution of one in Ontario; more specifically it recommends that the Registrar of Regulations annually report to the Legal Bills Committee any regulations appearing to require special consideration and that that Committee annually review these and other regulations at sittings where persons interested would be encouraged to attend and make representations. The other complaint is that there is not enough opportunity for public discussion of regulations before enactment. The Interim Report thought that in practice most administrators did discuss proposed regulations with any trade associations involved but asked the highly pertinent question, "How does the *public* enter the discussion?" and suggested that at least "an attempt be made to feel the *public* pulse." This is a welcome suggestion in these days when a good deal of government regulation comes to look to the innocent bystander, for example the consumer of goods and services, remarkably like a conspiracy against him by the regulating authority and the industry regulated.

As the reader will have noticed, I am a little irritated by the theological tone of both reports—but I was equally irritated by the theological tone of the Donoughmore, Franks, Acheson, and Hoover reports. Is somebody being actually hurt by some actual defect in the operation of the machinery of government, if so what is that defect and how can it be remedied—those are the questions I should like to see asked. The questions that all reports of this kind do ask are, does the machinery of government fail to square with "fundamental constitutional principles" and are there circumstances

under which a lively imagination might predict the *possibility* of injustice being done. Long experience has, however, taught me that the theology of law and government has an irresistible attraction for those otherwise hard-headed and practical people, the politicians and the lawyers, and I must, I suppose, put up with it. I should, I suppose, be grateful that the Select Committee wants, at least on the issue of appeals to the courts, to get down to concrete cases and that both the Gordon Report and the Interim Report are singularly free from the anti-bureaucratic hysteria that still afflicts some of the older generation of Canadian lawyers.

THE NEW FACULTY OF LAW IN THE UNIVERSITY OF WESTERN ONTARIO

I. C. RAND*

IN recent years legal education in Ontario has received renewed impetus from the addition of several law schools to supplement the older institutions of legal training, Osgoode Hall Law School and the Faculty of Law at the University of Toronto. Following the adoption in 1957 of new policies toward legal education by the Law Society of Upper Canada, faculties of law were established at the University of Ottawa, Queen's University, and, most recently, at The University of Western Ontario.

The idea of a law school at London was first conceived by the Middlesex Law Association in 1885. The promptings of this body resulted in the institution in that year of a law curriculum leading to the degree of LL.B. by Western University. Initial enthusiasm for the project was high and on its opening thirty-eight students enrolled in the course; but the subsequent refusal of the Law Society to accept the examinations of the new school as equivalent to their own caused an understandable depletion of students which culminated in the cancellation of classes in February, 1887.

The dormancy of the school ended, however, when, in 1958, the Senate of the University decided to re-establish the faculty. As Dean, the Senate appointed the Honourable Ivan C. Rand, formerly a Puisne Judge of the Supreme Court of Canada. Other staff appointments followed quickly. Ronald St. John Macdonald, formerly of Osgoode Hall, and Robert S. Mackay, formerly of the Faculty of Law at the University of Toronto, both able and widely respected law teachers, joined the staff as professors. A third member, Douglas M. Johnston, with a distinguished academic record in law at Yale, was added and the permanent staff was ready for the first year. The school was fortunate in obtaining Mr. A. B. Siskind, Q.C., president of the Middlesex Bar Association, to undertake the courses in civil practice. Classes commenced in September, 1959, with an enrolment of 35 students. The second year has seen the addition of two more full-time members of the staff, Mr. E. E. Palmer and Mr. A. A. Fatouros, with high academic records at the Faculty of Law of Toronto University and of Columbia University respectively, and the registration of 51 first-year students.

Due largely to the generosity of Mrs. Josephine Spencer Niblett, funds were raised for the construction of a new building to house the Faculty of Law which will be ready in May of this year. In the meantime quarters have been provided in the Engineering Science Building. The new building will provide the most modern facilities and is planned to admit of such enlargement

*Dean of the Faculty of Law, The University of Western Ontario.

OEB, RP-002-0120, Notice of Proceeding

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2002-0120

RP-1999-0057
EB-2002-0242
RP-2002-0110

NOTICE OF PROCEEDING

Review of the Ontario Energy Board's Transmission System Code and Related Matters

The Transmission System Code (the "Code") outlines the rules regarding ownership and operation of electricity transmission systems. The Code includes a standard form of Connection Agreement (Appendix 1) to be used by transmitters and transmission customers. All licensed transmitters in the province must comply with the provisions of this Code as a condition of licence. The Code requires transmitters to submit to the Board for review their connection process which outlines procedures for processing connection requests and may include standard forms of Connection Cost Recovery Agreements associated with the connection.

The Board is initiating, on its own motion, a proceeding to determine if changes to the Code are required, including changes that may alter the effect of existing Connection Cost Recovery Agreements and Connection Agreements.

The Board designates Hydro One Networks Inc. ("Hydro One") for the purpose of cost awards, to be administered in accordance with the Board's guidelines on costs.

Particulars of the Proceeding

The Board has become aware of concerns about certain provisions in the Transmission System Code and their interpretation and application. These concerns have come to the attention of the Board as a result of submissions to the Board from generators, large users, distributors, industry associations and transmitters. The Board has decided that there is a need to proceed with a broad-based review of the Code.

The scope of the proceeding with respect to the Code will include, but is not limited to transmission bypass, capital cost responsibility, rules for determining capital contributions and requirements for a transmitter's connection process, including appropriate time lines.

Potential participants should be aware of the following documents and material that are relevant to this review of the Code.

- Hydro One proposed amendments to the Code submitted in its letters to the Board Secretary dated September 27, 2001 and October 17, 2001. This has been given file number RP-1999-0057
- Hydro One's Customer Connections Process, particularly Appendices 5, 6,and 7, filed with the Board on January 30, 2002. This filing has been given file number EB-2002-0242 (RP-2002-0101).
- Ontario Power Generation Inc.'s ("OPG") application dated March 4, 2002 for an order of the Board amending Hydro One's Transitional Transmission Licence number ET-1999-0332. This filing has been given number RP-2002-0110.

As part of this Proceeding, the Board will make a decision regarding Hydro One's proposed amendments, Hydro One's Customer Connection Process and OPG's application to amend Hydro One's licence.

How to Participate

If you wish to participate in this Proceeding you must write a letter to the Board Secretary at the address listed below. Your letter **must** quote file number **RP-2002-0120** and be received by the Board Secretary by 4:45 PM on June 28, 2002. Your letter **must**:

- clearly state your name, address, e-mail address, telephone and fax number;
- include a brief description of issues, comments or proposed amendments you intend to address in the Proceeding.
- indicate whether you intend to seek an award of costs. The Board will only consider cost awards to eligible intervenors representing the public interest.

The Board will prepare a list of issues after which parties may have the opportunity to submit detailed submissions on these issues.

All filings with the Board **must** include 9 hard copies and will become part of the public record in the Proceeding. The Board requests that all parties make every effort to include a copy of their filings on disk in WordPerfect format, along with the hard copies that are filed.

Ontario Energy Board
2300 Yonge Street
26th Floor
Toronto, Ontario
M4P 1E4

Attn: Paul B. Pudge
Board Secretary

Toll free: 1-888-632-6273
Fax: 416-440-7656

OEB, RP-2002-0120, Phase 1 Policy Decision with Reasons, section entitled: The Proceeding

1 THE PROCEEDING

1.1 Hydro One Application for Amendments to the Transmission System Code

On September 27, 2001 and October 17, 2001 Hydro One Networks Inc.("Hydro One") submitted proposed amendments to the Transmission System Code (the "Code"). This submission was given file number RP-1999-0057, which is the general file number for this Code.

1.2 Hydro One Request for Approval of its Connection Process

On January 30, 2002, Hydro One submitted, in accordance with section 4.1.5 of the Code, its proposed Customer Connections Process. This filing was given file number RP-2002-0101 / EB-2002-0242.

1.3 Ontario Power Generation Application for Amendment of Hydro One Licence

On March 4, 2002, Ontario Power Generation Inc. ("OPG") applied for an order of the Board to amend Hydro One's Transitional Transmission Licence number ET-1999-0332. This filing was given number RP-2002-0110. On December 3, 2003, Hydro One's Transitional Transmission Licence was subsequently renewed and replaced with an end-state Transmission Licence number ET-2003-0035.

1.4 The Board, on its Own Motion

In addition to these applications, the Board had also received expressions of concern from various stakeholders, regarding the interpretation and application of the Code. As a result, the Board was of the view that it would be appropriate to review the entire Code, and as part of that process, deal with the applications that had been filed.

1.5 Notice of Proceeding

On June 14, 2002, the Board published its Notice of Proceeding, indicating its intent to review the Code, and to consolidate that review with the applications that had been received. The Notice was mailed directly to potential participants and it was posted on the Board's website. The Board assigned the consolidated Proceeding file no. RP-2002-0120.

25 The Notice of Proceeding invited interested persons to write to the Board, requesting intervenor status and providing a description of issues, comments or proposed amendments they intended to address in the Proceeding. Throughout this Proceeding, the Board received in excess of 130 submissions. A list of the parties and their associated acronyms, is set out in Appendix A to this Decision.

26 The Board reviewed the submissions and determined that it would be best to divide the Proceeding into two phases: Phase 1, which would address policy issues, and provide the principled framework for detailed Code revisions, and Phase 2, which would present specific Code amendments based on the principles developed in Phase 1 and deal with the implementation issues as well as issues arising out of the applications filed by Hydro One and OPG.

27 This Decision is the culminating element in Phase 1. Attached, as Appendix C, is a brief synopsis summarizing the more significant aspects of the Decision and the Board's associated rationale.

28 In Phase 2, which will follow this Decision forthwith, the Board will produce a revised Code incorporating the policy decisions reflected in this Decision. In accordance with the statutory provisions governing this process, Parties will have an opportunity to make submissions on the draft Code before it is adopted by the Board.

29 In a separate joint application filed by OPG, Bruce Power, and Hydro One (Board File No. EB-2002-0501), the Board is considering proposed amendments to the form of the connection agreement which is Appendix 1 of the Code. These amendments include proposals to address specific operational requirements for the safety of nuclear generating sites, and certain legacy issues related to generating site requirements for both conventional and nuclear sites. Parties will have an opportunity to make submissions regarding the proposed changes contained in the joint application. Board findings related to this Proceeding will be incorporated into the revised Code, and will be circulated to all parties for further comments before issuing the revised Code.

1.6 Procedural Orders

30

31 On August 30, 2002, the Board issued Procedural Order No. 1, requesting submissions on Phase 1 issues by September 30, 2002 and reply submissions by October 21, 2002.

32 On September 20, 2002, the Board issued Procedural Order No. 2, extending the filing dates for submissions to October 31, 2002 and reply submissions to November 22, 2002, at the request of parties.

33 On April 14, 2003, the Board issued Procedural Order No. 3. The Board provided a set of Principles and a list of preliminary propositions for Phase 1 issues and requested submissions and reply submissions on these propositions. This was done to achieve a more focused discussion of the issues.

34 On July 30, 2003, the Board issued Procedural Order No. 4 establishing a Settlement Conference to be held beginning September 9, 2003.

1.7 Settlement Conference

35

36 A Settlement Conference was held on September 9 - 16, 2003 to review issues, seek consensus where possible, and develop workable alternatives for the Board's consideration on the following issues:

37 • Determination of the remaining value of an asset

38 • What constitutes "fully allocated costs"

39 • Determination of and allocation of O&M costs

40 • Definition of Capacity Allocated to a Customer (CATC)

41 • Definition of Line Connection and Network assets

42 • Definition of Embedded Generation

43 • Proposals for true-up requirements

44 A copy of the facilitator's report from this Settlement Conference is found in Appendix B to this Decision.

45 The results of the Settlement Conference were of assistance to the Board in deciding on a number of specific issues. How the results of the Settlement Conference were incorporated with respect to specific issues is discussed in appropriate sections of the Decision.

Extract from General Counsel's Book, National Energy Board

[*Later:*]

DISTRIBUTION OF STATEMENT ON DAIRY SUPPORT PRICES

On the orders of the day:

Mr. Gabriel Roberge (Megantic): Mr. Speaker, I would like to ask a question of the Minister of Agriculture. In view of the statement he just made to the house with regard to support prices, does the minister think it proper, or is it possible, for him to have copies of this statement distributed to all members of this house before his estimates come up this afternoon for study?

Hon. D. S. Harkness (Minister of Agriculture): I made the statement, Mr. Speaker, and I should have thought hon. members would be able to take down any figures they wanted in connection with it. I certainly have not taken steps to have this reproduced so I could give a statement to every member of the house, particularly as the statement will appear in *Hansard*. I do not think there is any necessity for this.

Hon. Paul Martin (Essex East): A supplementary question. Does the minister not think, in view of the fact that he will be dealing with his estimates today, and as this is a matter of great importance, that he ought to furnish the members of this house with as many copies as he has available? If not, we will have them run off by the national Liberal federation.

[*Later:*]

Mr. Roberge: Mr. Speaker, I wish to direct a question to the Minister of Agriculture arising out of previous questions put to him. Do we understand from what the minister said that his estimates are not going through this afternoon?

Mr. Speaker: Order. I think the hon. member is rather seeking to enter into a controversy over this subject instead of seeking information.

Mr. Martin (Essex East): No, Mr. Speaker. Hon. gentlemen opposite, I know, wish to accommodate the opposition just as the previous administration accommodated them. The question raised by the hon. member for Megantic is a legitimate one. I ask the Minister of Agriculture if he will not—

Some hon. Members: Order.

Mr. Speaker: If the hon. member for Essex East is dealing with the question of the hon. member for Megantic as a point of order I will hear him on that, but if he wants to ask a question himself it is a different matter.

Mr. Martin (Essex East): I submit with great respect, Mr. Speaker, that the hon. member was not looking for an argument when he asked an important question as an hon. member of this house. We are about to have the agricultural estimates before us. The announcement made by the Minister of Agriculture today deals with an important aspect of agricultural policy. Hon. members who did not have any notice of this statement cannot be expected to appreciate all of its implications. We are simply asking the minister if he will not accommodate us by letting us have available copies so that today when these estimates are before us, and not tomorrow, we might be prepared to examine very carefully his statements on price supports as they affect dairy products.

Mr. Speaker: If that is the question I have no objection to it being asked. We have been over the ground before.

Mr. Harkness: Mr. Speaker, I might say that immediately upon the request being made I sent a note to my private secretary asking him to send two copies to the Liberal party and one to the C.C.F. party, if available, or more copies if they could be obtained.

Mr. Martin (Essex East): Thank you very much.

[*Later:*]

Mr. Harkness: Mr. Speaker, with reference to the request a few minutes ago for copies of the statement on dairy products, may I say that I think members of the opposition have six or seven copies now, and here are about 20 more which I will put on the clerk's table.

Mr. Martin (Essex East): I want to thank the minister but the national Liberal federation has already reproduced it.

NATIONAL ENERGY BOARD

PROVISION FOR ESTABLISHMENT AND OPERATION, APPOINTMENT OF MEMBERS, ETC.

Hon. Gordon Churchill (Minister of Trade and Commerce) moved that the house go into committee at the next sitting to consider the following resolution, which has been recommended to the house by His Excellency:

That it is expedient to introduce a measure to provide for the establishment and operation of a national energy board and the appointment of its members and staff, to define its duties, to authorize it to exercise certain powers and to provide for other related and incidental matters.

Motion agreed to.

National Energy Board

Mr. Carter: The railways were given permission to increase rates up to 17 per cent, but that did not necessarily mean that every commodity would bear this increase. Some might be raised 10 per cent, others 12 per cent and others 15 per cent. In the case of a commodity in central Canada where the railways have decided that a 12 per cent increase should be in effect, they could apply a 17 per cent increase to that commodity and take advantage of this subsidy and bring it down to 10 per cent.

An hon. Member: No.

Mr. Carter: In other words, they could juggle the commodities in order to compete with trucking services.

Mr. Hees: The hon. member is a member of the committee on railways, canals and telegraph lines. This whole matter was discussed at considerable length with Commissioner Knowles at the time and it was explained exactly how the whole thing would work. This would apply to any commodity which bears a 17 per cent increase at the time the bill becomes law.

Clause agreed to.

Clauses 4 to 7 inclusive agreed to.

Title agreed to.

Bill reported, read the third time and passed.

NATIONAL ENERGY BOARD

PROVISION FOR ESTABLISHMENT AND OPERATION, APPOINTMENT OF MEMBERS, ETC.

Hon. Gordon Churchill (Minister of Trade and Commerce) moved that the house go into committee to consider the following resolution:

That it is expedient to introduce a measure to provide for the establishment and operation of a national energy board and the appointment of its members and staff, to define its duties, to authorize it to exercise certain powers and to provide for other related and incidental matters.

Motion agreed to and the house went into committee, Mr. Rea in the chair.

Mr. Churchill: Mr. Chairman, this proposal to establish a national energy board which we have before us for consideration is the fulfilment of an objective held by the Conservative party over the years. That objective was clearly stated on February 25, 1955, at page 1530 of *Hansard* by the hon. member for Vancouver Quadra, now Minister of Public Works, in the following words:

We believe there is a great need for an over-all nergy policy. Let us get away from dealing with he problem piecemeal with different departments concerned. It is not an efficient way to deal with these important matters. For example, we suggest that consideration be given to setting up what might be called a national energy board under which could be gathered a professional staff to deal with those questions which would have the necessary information and the necessary training and which could recommend policy to the government. Then, once policy had been decided by the government, the board could implement that policy.

We believe the energy resources are among Canada's greatest assets, and that they can go far to make her one of the leading nations of the world. But if this is to be done we must get away from the present hit and miss method of dealing with those resources. We must have in Canada a national energy policy for the use of those resources, and the administrative machinery to carry it out.

When the opportunity arrived for the present government to take steps toward developing the policy outlined above an order in council was passed on October 15, 1957 setting up a royal commission on energy. The preamble of that order reads in part as follows:

That inasmuch as Canada has within its boundaries large sources of energy in the form of gas, oil, coal, water and uranium, the increasing need of energy for the growing industrial requirements of Canada renders it of the greatest importance to assure the most effective use of those resources in the public interest;

That it is desirable that an investigation be made now into a number of questions relating to sources of energy in order to assist in determining the principles and procedures to be applied in the administration of certain aspects of energy policy which fall within the jurisdiction of the parliament of Canada;

The royal commission was instructed to inquire into and make recommendations concerning, among other matters:

(a) the policies which will best serve the national interest in relation to the export of energy and sources of energy from Canada;

(b) the problems involved in, and the policies which ought to be applied to, the regulation of the transmission of oil and natural gas between provinces or from Canada to another country including, but without limiting the generality of the foregoing, the regulation of prices or rates to be charged or paid, the financial structure and control of pipe-line corporations in relation to the setting of proper prices or charges, and all such other matters as it is necessary to inquire into and report upon, in order to ensure the efficient and economical operation of pipe lines in the national interest;

(c) the extent of authority that might best be conferred on a national energy board to administer, subject to the control and authority of parliament, such aspects of energy policy coming within the jurisdiction of parliament as it may be desirable to entrust to such a board, together with the character of administration and procedure that might best be established for such a board;

The members of the royal commission were Henry Borden, Esq., C.M.G., Q.C. of the city of Toronto, Chairman; J. Louis Levesque, Esq., of the city of Montreal; George Edwin Britnell, Esq., of the city of Saskatoon; Gordon G. Cushing, Esq., of the city of Ottawa; Robert D. Howland, Esq., of the [illegible]; Leon J. Ladner, Esq., [illegible] Vancouver.

Subsequently, Dr. [illegible] versity of Alberta was [illegible] mission, and Mr. Cushing [illegible] assistant deputy minister [illegible] of Labour.

The commission held [illegible] Victoria, Calgary, Regina, [illegible] and Montreal, in the course [illegible] taken some 8,500 pages of [illegible] ceived about ninety [illegible]

In October, 1958 the [illegible] a first report dealing with [illegible] its inquiry and will submit [illegible] soon concerning some [illegible] lating to crude oil.

Since receiving the report [illegible] has studied it very carefully [illegible] constructive comment [illegible] been supplied by provincial [illegible] by various segments of the [illegible] cerned and by investment [illegible]

The commission deserves [illegible] and thanks for the extensive [illegible] made of the matters before it [illegible] scientious discharge of its [illegible] bilities. Many of its recommendations [illegible] be implemented as well as [illegible] bill is before the house.

The measure, as the [illegible] has as its principal purpose the [illegible] of a national energy board [illegible] that this board have most of the [illegible] held by the board of transport [illegible] under the Pipe Lines Act [illegible] of the Railway Act incorporated [illegible] Lines Act by reference.

Whereas under the Pipe [illegible] board of transport commissioners [illegible] to grant or withhold leave to [illegible] lines under the jurisdiction [illegible] of Canada, the new board [illegible] plications for the construction [illegible] would have the power to grant [illegible] subject to the approval of the [illegible] council, certificates of public [illegible] necessity. It is proposed that [illegible] supersede the Pipe Lines Act, [illegible] Exportation of Power and [illegible] portation of Gas Act.

The new board would, as [illegible] lic hearings, and subject to [illegible] the governor in council, grant [illegible] cences to export electric power [illegible] import gas.

The board would continue [illegible] advisory functions relating [illegible] field of energy and sources of [illegible] far as the parliament of Canada [illegible] tion over such matters. The

D. Howland, Esq., of the city of Halifax, and Leon J. Ladner, Esq., Q.C., of the city of Vancouver.

Subsequently, Dr. R. M. Hardy of the University of Alberta was appointed to the commission, and Mr. Cushing resigned to become assistant deputy minister of the Department of Labour.

The commission held public hearings in Victoria, Calgary, Regina, Winnipeg, Toronto and Montreal, in the course of which it has taken some 8,500 pages of evidence and received about ninety submissions.

In October, 1958 the commission submitted a first report dealing with some aspects of its inquiry and will submit a second report soon concerning some specific problems relating to crude oil.

Since receiving the report the government has studied it very carefully. Detailed and constructive comment upon the report has been supplied by provincial governments, and by various segments of the industries concerned and by investment firms.

The commission deserves congratulations and thanks for the exhaustive study it has made of the matters before it and for the conscientious discharge of its heavy responsibilities. Many of its recommendations are to be implemented as will be clear when the bill is before the house.

The measure, as the resolution indicates, has as its principal purpose the establishment of a national energy board. It is proposed that this board have most of the powers now held by the board of transport commissioners under the Pipe Lines Act, and those parts of the Railway Act incorporated in the Pipe Lines Act by reference.

Whereas under the Pipe Lines Act the board of transport commissioners has power to grant or withhold leave to construct pipe lines under the jurisdiction of the parliament of Canada, the new board in respect of applications for the construction of pipe lines would have the power to grant or withhold, subject to the approval of the governor in council, certificates of public convenience and necessity. It is proposed that the new measure supersede the Pipe Lines Act, and also the Exportation of Power and Fluids and Importation of Gas Act.

The new board would, on the basis of public hearings, and subject to the approval of the governor in council, grant or deny licences to export electric power or gas or to import gas.

The board would exercise certain broad advisory functions ranging over the whole field of energy and sources of energy in so far as the parliament of Canada has jurisdiction over such matters. The board would have jurisdiction over tolls charged by all pipe-line companies subject to the act, and over prices at which gas and power might be exported.

The bill will set out, in much the same way as the present Pipe Lines Act, the general powers of pipe line companies subject to the jurisdiction of the parliament of Canada. The bill will contain provisions for transition from arrangements under the existing statutes to corresponding new arrangements.

These are the main elements of the proposed bill. I come now to certain points of policy which underlie the bill and which will guide the administration of the measure if approved by parliament.

We recognize the need for and welcome capital whether domestic or foreign for investment in the energy and associated industries, and we believe such capital, wisely invested, should enjoy a fair and reasonable rate of return. As to what is a fair return, it is not our intention to incorporate any fixed formula in the statute. Rather, our first premise is that returns on successful investment must be sufficient to attract capital for replacement and expansion, and our second premise is that the public interest requires that no pipe line company should exploit its monopoly or quasi-monopoly position to secure returns higher than are fair and reasonable. Certain general criteria will be set forth in the bill, and their application will be left to the fair and impartial judgment of the well-qualified men whose services on the board we hope to obtain.

We recognize that gas pipe lines are different from oil pipe lines, and that both are different from public utilities such as electric light and water service. Both oil and gas are subject to competition from other fuels and sources of energy, and an oil pipe line may be subject to competition in its markets by oil from other sources. There are elements of risk for both kinds of pipe line, and perhaps more risk for oil pipe lines than for gas pipe lines.

The customer of the gas pipe line is more nearly captive in that he cannot readily turn to another source of gas. The consumer of the gas in order to use an alternative fuel must convert his equipment or replace it if his gas supply becomes uneconomic or otherwise unsatisfactory. There is therefore a clear case for regulating the returns of gas pipe line companies.

The oil pipe line may not have the same sort of captive market. However, for some refineries one oil pipe line may be the only practical source of supply, and for many oil producers one oil pipe line is the only practical outlet to market. Therefore for practical

purposes an oil pipe line is a carrier in a monopoly or quasi-monopoly position, and should be regulated as such. For somewhat different reasons, therefore, we have come to the conclusion that the returns of both oil pipe lines and gas pipe lines should be regulated, though not necessarily on the same terms or at the same level.

While we have reached the conclusion that in the public interest there should be appropriate regulation of the returns of gas and oil pipe line companies, it is not the intention of the government in so doing to discourage in any way the healthy and beneficial development of such companies.

As regards the exportation of electric power and gas, the key principle will be that quantities proposed to be exported must be surplus to present and reasonably foreseeable Canadian requirements.

In the case of electricity, it has been the policy in the past to grant only annual licences for export, so as to prevent permanent alienation of power. This remains our general policy, although some exceptions may be made in very special circumstances where the national interest would not be prejudiced by a longer term of export.

With regard to gas, we accept the recommendation of the Borden commission, which reads as follows:

> Having regard to the proven reserves of natural gas in Canada and to trends in the discovery and growth of reserves, the export from Canada of natural gas, which may from time to time be surplus to the reasonably foreseeable requirements of Canada, be permitted under licence.

It appears necessary in granting licences for the export of gas to do so for periods up to 25 years in order to make possible the financing of the pipe line facilities.

Two governments must of course be agreed upon any such export. The first is the government of the province of origin. Until it declares gas available for removal from the province, this government can entertain no application for an export permit. After the province has declared gas surplus to its own requirements, the government of Canada, with the recommendation of the proposed national energy board, must decide whether it is also surplus to the requirements of Canada and, if so, upon what terms it may be exported, including the vital and complex question of price.

The government of the United States, as represented by the federal power commission, must also decide whether it will approve the importation of the gas, and upon what terms. This raises the difficult problem of whether we should grant an export licence before or after the federal power commission grants the corresponding import permit. We are willing to work out an efficient arrangement with the United States which will satisfy our respective national requirements without hampering the mutually advantageous development of our gas industry. Our officials have already had discussions with appropriate officials of the United States state department and the federal power commission and we know from these talks that our willingness to co-operate and our desire to reach a flexible and mutually satisfactory working arrangement is reciprocated.

With regard to oil, it is not the intention at the present time to give authority in the bill for the issuing of export or import permits. However, a section of the bill will deal with this important matter and, if approved by parliament, will give authority to the governor in council to extend the application of the relevant portion of the bill to oil.

It will be evident, when the bill is distributed, that the experience of the past has been drawn upon extensively. Hon. members may wish to refer to *Hansard* of 1955, page 1523, for the debate on the Exportation of Power and Fluids and Importation of Gas Act. At that time the act of 1907 dealing with electricity was revised with particular reference to gas.

Hon. members may also read with profit the debate on the Pipe Lines Act of 1949, which is to be found at page 2509 of *Hansard*. The bill which is about to be introduced reproduces the substance of those two acts. Building on that foundation, we propose the setting up of a national energy board with appropriate powers to deal, so far as is within the jurisdiction of the parliament of Canada, with the whole problem of the utilization of the abundant sources of electrical and petroleum energy in our country in the national interest.

I am about half way through, Mr. Chairman. This is an appropriate time to call it six o'clock.

At six o'clock the committee took recess.

AFTER RECESS

The committee resumed at 8 p.m.

Mr. Churchill: Mr. Chairman, prior to six o'clock, I was speaking to the resolution. I dealt with the main principles which will be incorporated in the bill and indicated, in general terms, the important matters that will be shown in the bill. In the remarks which follow I should like to discuss the

importance of this new ir
developed in Canada large
few years.

Everyone is aware that
into a new era in the devel
of energy. The constantl
mands for electrical powe
the use of most of the
sources of hydroelectric
power units, based on the
are being constructed in in
Rapid advance is being ma
leading to the harnessing
for the economic producti
Side by side with these d
has been a spectacular ris
tion and use of oil and g
products, and an equally sp
in the installation of pi
gathering, long distance tra
tribution of oil and gas an

Ten years ago when the
Laurier, then minister of
speaking on this subject h
the production of crude oi
about 100,000 barrels per
allowing for the prairie pr
ments of 60,000 barrels per
be a surplus of 40,000 barr
where. He estimated total
sumption at 290,000 barrels

In 1959, ten years later,
Canadian crude oil product
rate of about 500,000 barrel
alent to roughly two-thirds
dian oil requirements. For th
row, oil was Canada's lea
1959, its value of productio
million. And though our oil
a setback in 1957-58, crude
$73 million to Canadian e
the year 1958. This is an i
when one considers that the
oil to the United States be
as 1951, via the Interprovinci
did not become substantial
first full year of operation
Mountain pipe line.

Parallel developments hav
the natural gas industry.
of natural gas in western C
creased from less than 5 trill
1949 to more than 25 trillio
the end of 1958. Net produ
gas was 60 billion cubic fe
billion in 1958. Further shar
be expected to follow the rec
of major pipe lines. Gas
Alberta and British Columbia
to the Vancouver area and th
western states through the
line in 1957, and the con
Trans-Canada pipe line in

importance of this new industry which has developed in Canada largely within the last few years.

Everyone is aware that we have moved into a new era in the development of sources of energy. The constantly increasing demands for electrical power have stimulated the use of most of the readily available sources of hydroelectric power. Thermal power units, based on the utilization of coal, are being constructed in increasing numbers. Rapid advance is being made in experiments leading to the harnessing of atomic power for the economic production of electricity. Side by side with these developments there has been a spectacular rise in the production and use of oil and gas and their by-products, and an equally spectacular increase in the installation of pipe lines for the gathering, long distance transmission and distribution of oil and gas and their products.

Ten years ago when the hon. member for Laurier, then minister of transport, was speaking on this subject he estimated that the production of crude oil in Alberta was about 100,000 barrels per day; that after allowing for the prairie provinces' requirements of 60,000 barrels per day, there would be a surplus of 40,000 barrels for use elsewhere. He estimated total Canadian consumption at 290,000 barrels per day.

In 1959, ten years later, we find western Canadian crude oil production running at a rate of about 500,000 barrels per day, equivalent to roughly two-thirds of the total Canadian oil requirements. For the sixth year in a row, oil was Canada's leading mineral in 1959, its value of production exceeding $400 million. And though our oil exports suffered a setback in 1957-58, crude oil contributed $73 million to Canadian export income in the year 1958. This is an impressive figure when one considers that the export of crude oil to the United States began as recently as 1951, via the Interprovincial pipe line, and did not become substantial until 1955, the first full year of operation for the Trans-Mountain pipe line.

Parallel developments have taken place in the natural gas industry. Proven reserves of natural gas in western Canada have increased from less than 5 trillion cubic feet in 1949 to more than 25 trillion cubic feet at the end of 1958. Net production of natural gas was 60 billion cubic feet in 1949; 336 billion in 1958. Further sharp increases can be expected to follow the recent construction of major pipe lines. Gas from northern Alberta and British Columbia started to flow to the Vancouver area and the Pacific northwestern states through the Westcoast pipe line in 1957, and the completion of the Trans-Canada pipe line in November, 1958 opened the markets of Ontario and the Montreal area to western Canadian gas.

Applications to export large quantities of gas to the western United States have now been approved by the government of Alberta, and related applications have been filed with this government and with the United States federal power commission. Other projects looking to exports to the United States middle west and to New York state are in preparation. One urgent reason why this government is anxious to press ahead with the measure referred to in the resolution before us is, of course, that we desire to establish with all proper speed administrative machinery for making appropriate disposition of such applications for gas export licences, in the light of government policy and in full consideration of all the interests involved.

The great and increasing growth in gas production and transmission industries has necessarily been accomplished by a remarkable development of the gas by-product industries. Some of the by-products, in particular sulphur, natural gasoline, propane and butane, are themselves valuable. Complicated and costly plants are required to remove them. There are now in Canada 22 such plants for the processing of natural gas and recovery of by-products.

Some export markets for propane and butane have already been developed. These markets were cut off in March when the United States oil import controls were made mandatory and extended to unfinished oil and products, but the exemption from new United States oil import controls announced on April 30 will restore access to such markets. There is good reason to hope that these natural gas liquids and sulphur will become increasingly important in our export trade.

All this growth in production, processing and transportation to market for oil and gas and related products has required an enormous quantity of capital. In 1949 about $90 million were invested in oil and gas exploration, production, processing, transportation and marketing facilities. For 1959 the comparable investment is estimated at $627 million, nearly 7 times as much, and some 13½ per cent of total business capital expenditures planned for 1959 in Canada. In the decade ending in 1958 the cumulative totals were $4.4 billion, excluding land acquisition costs.

These figures cover only direct investment in petroleum expansion and do not take into account the secondary effects of investment in new industries based on petroleum, such

as petrochemicals, or new industries supplying the oil industry, such as pipe mills. Similarly, petroleum development has created jobs for thousands of Canadians, not only those directly employed by the industry but also those working in the ancillary industries I have mentioned.

If the development of the petroleum and related industries is to continue, still larger sums of capital must be attracted for future investment. It is our desire and intention that the climate for investment in these industries in Canada will, so far as it lies within control of this government, be such that this needed capital will be attracted by the prospect of fair and reasonable returns within a framework of stable and realistic government policy.

The past decade of development in the petroleum industries, remarkable as it has been, is only a beginning. We can look forward with confidence to continuing growth in reserves, in production, in employment, in export and in the necessary investment. These prospects, of course, involve the sound utilization of energy resources, perhaps the most important material resources a nation can possess. It is to protect the national interest in the wise use of these resources, and to apply to these complicated, sensitive and vital matters the careful and consistent scrutiny they require, that we have prepared the measure contemplated in this resolution, which I now commend to the house.

Mr. Dumas: Mr. Chairman, we have before us for consideration a resolution to the effect that it is expedient to introduce a measure to provide for the establishment and operation of a national energy board and the appointment of its members and staff, to define its duties, to authorize it to exercise certain powers and to provide for other related and incidental matters.

Today the Minister of Trade and Commerce made a fairly comprehensive and interesting statement. No specific statement of the matters with which this proposed national energy board should deal is contained in the resolution. The minister has said that, for the time being, the board will have authority to deal with matters pertaining to electricity, oil and natural gas.

How closely the legislation will adhere to the recommendations of the Borden commission is not yet clear, although the minister has stated that many of these recommendations will form part of the proposed legislation. Certain of these recommendations have aroused the concern of many Canadians and more particularly that of both the petroleum industry and of some of the provincial governments having direct interests in oil and gas.

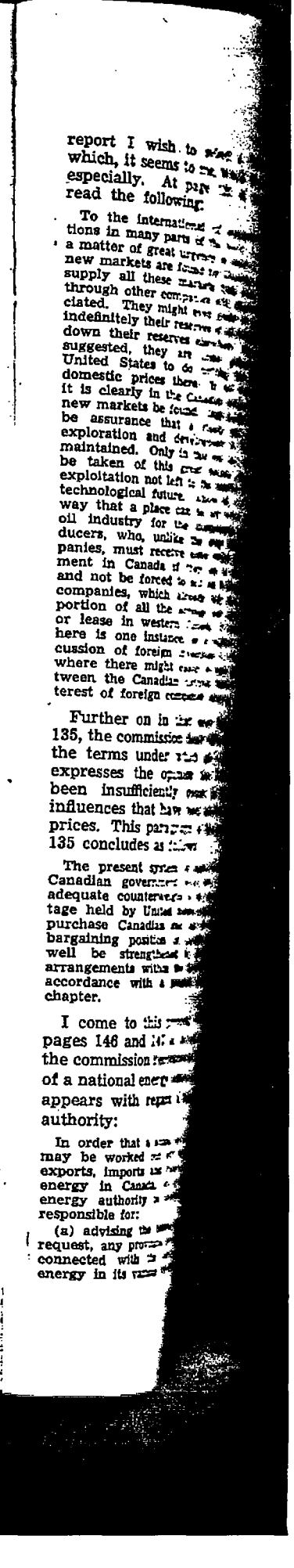
It is beyond any question that this legislation outlining the constitution and the powers of this new board will have an extremely important bearing on the future development of energy resources in this country. As I have said, we have too little information with regard to the intentions of the government in this matter. Until we have the bill before us, we do not know how far the government will go in delegating powers to this proposed new national energy board.

Does the government intend to implement fully the recommendations of the Borden commission as outlined in its first report of October, 1958, or does the government intend to compromise by incorporating in its legislation some of the recommendations made to the Prime Minister and the cabinet by the Canadian petroleum association, the investment dealers' association of Canada and others; or does the government intend to include all forms of energy under the authority of this national energy board? For instance, is it the intention of the government to include coal and atomic energy? Will the government eventually bring under one authority all the agencies we have at present, including the dominion coal board, the atomic energy control board, Atomic Energy of Canada Limited and the international joint commission?

From the minister's statement we conclude that the government does not intend that the authority of this new proposed agency should be limited only to fact finding and advisory responsibilities. Or again, does the government intend to have so much restriction and so many regulations that private industry will be shackled in exercising its proper function in the Canadian economy?

Those are extremely important questions. For this reason we feel that when the bill is before the house for second reading we should have ample latitude to discuss all aspects of this extremely important subject. We sincerely hope that we shall be given this opportunity of reasonable latitude in debating this subject so that we can fulfil the duties which are those of the official opposition and others in this chamber.

During the last four years two royal commissions have made recommendations as to how the energy resources of this country might best be developed, namely the Gordon royal commission on Canada's economic prospects and the Borden royal commission on energy. The Gordon commission of 1955, in its final report on Canada's economic prospects, commented at length upon the extent and importance of our energy resources and, after reviewing the export prospects of same, recommended the establishment of a single national energy authority. From the


report I wish to
which, it seems to
especially. At pa
read the following:

To the internationa
tions in many parts
a matter of great
new markets are
supply all these
through other
ciated. They might
indefinitely their
down their reserves
suggested, they
United States to
domestic prices
it is clearly in the
new markets be
be assurance that
exploration and
maintained. Only
be taken of this
exploitation not
technological future.
way that a place
oil industry for
ducers, who, unlike
panies, must receive
ment in Canada
and not be forced
companies, which
portion of all the
or lease in weste
here is one instance
cussion of foreign
where there might
tween the Canadian
terest of foreign

Further on in
135, the commissio
the terms under
expresses the
been insufficiently
influences that
prices. This pa
135 concludes as

The present
Canadian gover
adequate counterv
tage held by Unit
purchase Canadia
bargaining posit
well be strengthe
arrangements with
accordance with
chapter.

I come to this
pages 146 and
the commission
of a national ener
appears with re
authority:

In order that
may be worked
exports, imports
energy in Canad
energy authority
responsible for:

(a) advising the
request, any pro
connected with
energy in its

report I wish to select a few paragraphs which, it seems to me, would be worth noting especially. At page 130 of the report we read the following:

To the international oil companies with operations in many parts of the world, it may not seem a matter of great urgency or concern whether large new markets are found for Canadian oil. They can supply all these markets from other sources and through other companies with which they are associated. They might even prefer to increase almost indefinitely their reserves of oil in Canada and draw down their reserves elsewhere. Also, as we have suggested, they are under pressure within the United States to do nothing that might disturb domestic prices there. In our opinion, however, it is clearly in the Canadian national interest that new markets be found. Only in this way can there be assurance that a steady and rapid pace of exploration and development in Canada will be maintained. Only in this way can early advantage be taken of this great natural resource and its exploitation not left to the hazards of an uncertain technological future. Above all, it is only in this way that a place can be left within the Canadian oil industry for the independent Canadian producers, who, unlike the large international companies, must receive some return on their investment in Canada if they are to stay in business and not be forced to sell out to the foreign-owned companies, which already hold such a high proportion of all the acreage now under reservation or lease in western Canada. It would seem that here is one instance, as is suggested in the discussion of foreign investment in a later chapter, where there might easily be some divergence between the Canadian national interest and the interest of foreign companies operating in Canada.

Further on in that same chapter, at page 135, the commission deals with the question of the terms under which gas is exported and expresses the opinion that Canadians have been insufficiently aware of some of the influences that have been operative in setting prices. This paragraph of the report on page 135 concludes as follows:

The present system of export licensing by the Canadian government would seem to be an inadequate counterweight to this bargaining advantage held by United States companies wanting to purchase Canadian gas; and in our opinion, the bargaining position of Canadian suppliers might well be strengthened by stronger institutional arrangements within the Canadian government in accordance with a proposal made later in this chapter.

I come to this proposal which we find at pages 146 and 147 of the same report. There the commission recommends the establishment of a national energy authority and this is what appears with regard to this national energy authority:

In order that a sound and comprehensive policy may be worked out with regard to development, exports, imports and consumption of all forms of energy in Canada, we propose that a national energy authority be established which would be responsible for:

(a) advising the federal government and, upon request, any provincial government on all matters connected with the long-term requirements for energy in its various forms and in different parts of Canada; methods of promoting the best uses of energy sources from a long-term point of view; export policy, including such questions as the further refining of oil and gas in Canada and the disposal of by-products; coal subsidies, etc.

(b) approving, or recommending for approval, all contracts or proposals respecting the export of oil, gas and electric power by pipeline or transmission wire, including, where necessary or desirable, the holding of public hearings in connection therewith.

If this proposal is accepted, the organization of the dominion coal board should be merged with that of the proposed national energy authority. It is perhaps unnecessary to add that the proposed new body would not interfere with the rights of the provinces respecting control over natural resources.

Mr. Chairman, the Borden commission of 1957, officially known as the royal commission on energy, was asked by the present government to make recommendations, first, on the policies which will best serve the national interest in relation to the export of energy and sources of energy from Canada; second, on the policies which ought to be applied to long distance transmission of oil and natural gas; and, third, on the nature and authority of a new national energy board.

The Borden commission submitted its first report during the latter part of 1958. The said report is divided into four parts. Chapter 1 deals with the export of natural gas and crude oil. Chapter 2 deals with the regulation of pipe line companies, while chapter 3 of the report is devoted entirely to the new national energy board. In this regard the Borden commission makes specific recommendations under 20 separate headings. Finally, chapter 4 of the report is dedicated entirely to a favourite subject of the Tory party, the Trans-Canada Pipe Lines Company. This is the chapter where the commission in no uncertain terms is recommending that the government repudiate the commitment of a former minister of the crown.

In a brief submitted to the Prime Minister by the investment dealers' association of Canada, Mr. Ely, the president, makes the following comments on this particular subject and I quote from pages 3 and 4 of this letter where Mr. Ely is commenting on the reactions abroad following the publication of the Borden commission report. This is what he had to say:

Even apart from the recurrent adverse comment in the financial press in New York and overseas, conversations of our members with foreign investors make clear the gravity with which the Borden report is viewed abroad. This concern is based in part on the recommended repudiation by the Canadian government of an undertaking given by a former senior minister of the crown. It is also based on the view that the report reflects an attitude on the part of the new Canadian government adverse to business and the investment of private capital.

There is no doubt that the impression created by the recommended repudiation of the gas export undertaking will adversely affect Canada's ability

to raise capital in foreign markets. In Great Britain and Europe this repudiation is being compared in some quarters with unilateral repudiaton of government contracts in Iran and Egypt, to the great detriment of Canada's standing as a field for capital investment. In the United States, comment is no less adverse. As one specific example, you will recall that over $100 million of first mortgage bonds of Trans-Canada Pipe Lines Limited were placed with a group of the largest American investing institutions during the initial financing of the line. The undertaking of a senior minister of the then Canadian government regarding gas export played a necessary part in the sale of these bonds, and there is no question that the purchasing institutions take a very serious view of its subsequent repudiation. Members of our association are not looking forward to approaching them to finance development projects in Canada again.

Mr. Chairman, from what we can make out of the Borden commission's report in respect to this subject a change of government seemingly would justify the repudiation of a former minister's commitment, such as that given by Mr. Howe in his letter of September 28, 1955 to Trans-Canada Pipe Lines Company Limited. I do not think it has ever been the practice to repudiate letters of this kind. It is bad enough for an important body such as the royal commission on energy to have made such a recommendation, but it would be even more awful if the government was to give force de loi to such a repudiation.

Although the Borden commission has reported on only two of the principal energy esources, that is oil and gas, it makes extensive recommendations as regard to the organization of a national energy board. The commission recommends the enactment of legislation enabling the government of Canada to control the export from and the import into Canada and the movement across provincial boundaries of all energy and sources of energy. The present legislation controls the export of any power or fluids, which include gas, oil, water or any other fluids, whether liquid or gaseous, and the import of gas. The commission recommends much more elaborate control, which involves including the control of (a) imports of power and fluids; and (b) interprovincial movements of power, gas, oil, etc. This is indeed a far-reaching recommendation, as it would appear also to include uranium. In resuming, the commission recommends that the board be given extensive authority, much too extensive for the good of the economy.

There are many silly and dangerous recommendations in the first report of the Borden commission. I have mentioned a few and I would like to bring one or two others to the attention of this house. Several references in the commission's report are made or implied that private contracts should be renegotiated after financial commitments have been made and pipe lines constructed. The recommendation to impose the renegotiation of existing contracts seems to me to give rise to enormous dangers for the financing of new enterprises. When the financing of such a project is undertaken, those putting up the requisite capital, either in the form of bonds or stock, do so on the basis of the contracts entered into with the consumers, and if these contracts are to be subject to being changed and the revenues therefrom scaled down, investors would naturally be fearful as to the consequences that such a process would have on the ability of the gas pipe line company to meet its obligations and to provide a return on the investment. Compulsory renegotiation of existing contracts, Mr. Chairman, would simply mean confiscation, and in such circumstances no lending institution could afford to take the risk involved in financing a pipe line project.

The Borden commission also recommends that the prices, tolls, rates or tariffs be just and reasonable, non-discriminatory and calculated to yield a fair rate of return on the shareholders' equity. This recommendation has attracted the widest criticism. No one will disagree with the recommendation that tolls be just and reasonable, and indeed section 43 of the Pipe Lines Act requires that tolls be just and reasonable and likewise non-discriminatory.

The commission's recommendation that the tolls be calculated to yield a fair rate of return on the shareholders' equity is an entirely new concept in rate-making, and would lead to the establishment of different tolls for the same services rendered by two different companies having radically different corporate structures. Thus, in the case of a company which had no funded debt, the shareholders' equity would be substantially higher than would be the case of another company whose capital was represented to the extent of say 60 per cent by bonds and debentures. The same amount of capital might have been invested in each case, but the difference in distribution could easily lead to discriminatory situations. But, apart from this, shareholders' equity is not a logical basis for rate-making. The practice varies enormously in Canada and the United States. In Quebec, legislation calls for rates based on "capital usefully invested", but there are many variants of this theme, and rate-making is in itself an extensive science.

If it is the intention of the government to follow the recommendation of the Borden commission in this respect, that is, establishing a base rate in this way, it will merely tie the hands of any board which will have to enforce the law, and at the same time it will discourage investment in Canada at a time when investment ought to be encouraged and not scared away by restrictive provisions.

The Borden commission's first report is a scarecrow. Commenting on the report in a letter dated January 7, 1959, and addressed to the Prime Minister, Mr. Ely, the president of the investment dealers' association of Canada has this to say, and I quote from page two of the letter:

> There is no doubt that the report has been a great blow to the confidence of foreign investors in Canada. Its recommendations, if implemented, will certainly impair our ability to import from abroad the large amounts of capital we require.

And further on in the same letter, at pages 4 and 5, the president has this to say:

> Canada's investment standing abroad has been no less seriously affected by the evident concern of foreign investors at the basic attitude to private enterprise and the rights of investors revealed in the Borden report. It is suggested that this attitude provides a clue to the attitude of the new Canadian government, and that on this basis Canada is no longer as attractive a field for the investment of private capital as it formerly was. The experience of our members active in foreign capital markets shows clearly that this prevailing impression is injurious to our ability to raise our full capital requirements from these sources.

Let us see now what the Canadian petroleum association has to say in regard to the Borden commission's first report. The Canadian petroleum association is an important organization in its own field. It is made up of some 240 exploration and producing companies which together produce 97 per cent of the oil and gas production in Canada. Here are a few of the most important paragraphs which I should like to quote from a special and lengthy report to the Prime Minister and the cabinet. At page 2 of the report, under the sub-section headed "Excessive regulation will be damaging to Canada", appears the following:

> In terms of government regulation of industry, "too much" can be worse than "too little"—and, unfortunately, certain sections of the interim report —the Borden Commission's first report—have given rise to fears that excessive regulation and control over Canada's oil and gas industry is suggested by the commission. Such fears now exist, not only in this industry, but by many other Canadian industrial and financial leaders and by many outside of Canada whose views have an important bearing on the rate of flow of investment capital to our nation. Since Canada cannot generate sufficient capital within itself for its current pace of development, the withdrawal of foreign capital could have serious repercussions on the whole Canadian economy.

Even some members of the Conservative party were appalled to learn of the recommendations of the Borden commission's first report. The hon. gentleman who represents Calgary South was, I am sure, very much annoyed by the contents of that report. In a Canadian Press dispatch from Hamilton, Bermuda, which appeared in the Ottawa *Journal* of February 28, 1959 we read this:

> Speaking before the Canadian pipe line contractors' association, the Calgary oil expert said—

I am not disputing this title, because I think the hon. member for Calgary South really is a man who knows something about oil and gas. He is a man who has devoted much of his time to a study of these Canadian resources, and I think he knows his business. The report continues:

> —1959 will be a year of decision in which these points likely will be clarified:
>
> Extent of Canadian government control over the industry; changes in oil and gas tax policies; a possible Canadian policy to increase domestic oil sales by Canadian producers; easing of federal regulations on the development of Arctic oil; tariff policies on oil; question of whether a satisfactory solution can be found to separate oil in the Athabaska tar sands.
>
> Touching on the government's plans to set up a national energy board to regulate the oil and gas industries, Mr. Smith predicted the government will not adopt repressive action to restrict oil and gas profits as recommended by the Borden energy commission.

This shows that the hon. member for Calgary South did not too much like the recommendations of the report, but he says the government will not take action to curtail profits as recommended. The report goes on:

> He was convinced, he said, that the administration will ignore this recommendation for the government was vitally concerned, "with the importance of maintaining investment confidence in the petroleum and natural gas industry."
>
> He said he also believed the government would not follow another commission recommendation—to require licensing of exports of oil to the U.S.—since this might hamper Canadian opportunities of finding long-term U.S. markets.

We of the Liberal party advocate the integrated development in co-operation with the provinces of petroleum, natural gas, hydro-electric power, coal and all other energy sources across the whole of Canada to meet the needs of industrial and population growth. We advocate the establishment of a national energy authority to advise the government as to the long term requirements of energy in Canada, including the best methods of providing efficient long term uses in Canada and for export. We feel that the government should not relegate policy making to any board. And, as was mentioned by the Canadian petroleum association, I feel myself that there should be a division of energy authority as between policy making, advisory and regulatory functions. For the time being, we feel that the organization of the dominion coal board should not be merged with that of any proposed national energy authority.

The Liberal position with regard to the export of electrical energy, oil and natural gas has remained basically the same since

it was enunciated in the house at different times in the past and more particularly in 1953 and 1955 by the then minister of trade and commerce, the Right Hon. C. D. Howe.

The Deputy Chairman: I am sorry to have to advise the hon. member that his time has expired. Will the committee give the hon. member unanimous consent to continue?

Some hon. Members: Agreed.

Mr. Dumas: In 1955 while introducing the Exportation of Power and Fluids and Importation of Gas Act, as reported at page 1524 of *Hansard*, Mr. Howe with respect to electrical energy had this to say:

> While there have been differences of opinion as to how the policy on exports should be implemented, there is no doubt that such policy has crystallized in one of no firm commitment for power, that licences should be on a surplus interruptible basis only, and that they should be reviewed annually.

I think the minister said this afternoon that as far as hydroelectric power is concerned it is the intention of this government to impose a similar restriction except in special cases where we are assured there is a considerable amount of surplus in which case contracts would be negotiated.

In the same debate Mr. Howe reminded the house that he had enunciated the policy of the government with respect to oil on March 13, 1953, and with respect to natural gas on the same occasion. He summed up the position in 1955, as reported at page 1526 of *Hansard* in these words:

> In brief, therefore, the policy with respect to these items (oil, electricity and natural gas) is that the export of oil should be based on the movement from the source of production to refineries in the cheapest possible way, and to arrange for that portion of the Canadian output that cannot be economically used in Canadian refineries the market that offers the highest return to the producer; that with respect to electricity there should be no firm export commitments and authorizations given only for interruptible surpluses; and that natural gas should leave Canada only when it is demonstrated to be surplus to determined Canadian needs.

Both the Gordon and Borden commissions appear to have been convinced that Canada has an exportable surplus of energy. At page 9, paragraph 6 of part 1 of chapter 1 of the Borden commission's first report we read the following statement:

> It is our judgment that the entry of Canadian natural gas into available United States markets, on a moderate scale, is a highly desirable step. In recent years very large investments have been made by the natural gas industry in Canada covering, not only exploration and development, but also processing plants, pipe lines and distribution facilities. With reasonable access to United States markets, expectations of earnings in the industry would be raised to a level which would encourage further sound development.

At this point I should like to limit my observations in this respect to only one item, that of natural gas, for the simple reason that even the Borden commission reported very briefly on exports of oil. We are given to understand that another report will be filed by the same commission on this subject. There seems to be an urgency with regard to issuing permits for the exportation of natural gas to the United States. We feel that the government should not delay action in this respect. We think that the industry is right when it states that if the government were to wait until a new national energy board is organized to grant such permits this unnecessary delay could be detrimental to the economy.

In the early part of April last the Alberta government approved the granting of permits for the export of natural gas to two companies, Alberta Southern and Westcoast Transmission. Both companies have filed applications at Ottawa and Washington for Canadian federal government and United States federal government permits. I think it is reasonable to take the position that the federal government of Canada should grant a permit only if it is assured that the United States government will issue import permits.

In the *Daily Oil Bulletin* of April 8, 1959, Mr. Proctor, president of Canadian petroleum association, is reported to have commented as follows:

> By granting the two companies permission to export natural gas for the next 25 years, the government of Alberta has taken a firm step toward linking Alberta natural gas with logical and necessary markets. From this point on, the federal government has the responsibility of processing export permits to allow the gas to reach those markets.
>
> There is an important time element about all this, for Alberta is not alone in her efforts to market surplus natural gas. There are gas suppliers in the United States and Mexico just as anxious as Canada to win available markets which represent, to whoever captures them, a long-term source of income not only for producers, but for the public.
>
> Natural gas is being discovered in Alberta at an annual rate of growth three times that of known market demand. There are proven natural gas reserves in Alberta at the present time of 27 trillion cubic feet, and the annual gas discovery rate is between 2 and 3 trillion cubic feet. This surplus of reserves over market demand is a constant one which will be maintained by the Alberta Oil and Gas Conservation Board. It is an assurance that the needs of the province and of Canada will continue to be met first before markets for surplus natural gas are sought outside the boundaries of Canada.

We feel that this calls for prompt action, that it is vital to the national interests that greater utilization of western Canada's surplus of gas reserves should not be delayed. Again I say that the government should not

necessarily wait for this new national energy board to be organized before processing these permits.

I wish to conclude by saying that we hope the government will not shackle the development of Canada's energy resources by imposing too many regulations and restrictions. When we have the bill we will be in a better position to judge the intentions of the government in this respect.

Mr. Churchill: Mr. Chairman, I rise on a question of privilege which refers not to the speech just delivered by my hon. friend to which I listened with interest but rather to a phrase I used before the supper hour which apparently has lent itself to misinterpretation. I used the phrase "regulating the returns of gas pipe-line companies" and apparently to some hon. members this connotes profits. I want to assure the committee that there is no provision in the proposed bill to regulate the profits of pipe lines but rather the tolls charged for the transmission or transportation of oil or gas. The word "returns" was used with that meaning.

Mr. Herridge: Mr. Chairman, we are very glad to see this important subject brought before the committee by the minister. I listened with a great deal of interest to the introductory statement made by the minister. I was most interested to note that he referred the committee to a statement of policy on the question made during the 1955 session by the then private hon. member for Vancouver Quadra who is now the Minister of Public Works. I want to say before I proceed that I am very happy to know that the present Minister of Public Works says exactly the same things as the Minister of Public Works on the questions of conservation, the development of the Columbia and of the establishment of a national energy board as he said when he was the hon. member for Vancouver Quadra and a distinguished member of Her Majesty's loyal opposition. When the minister was referring us to the statement of the hon. member for Vancouver Quadra of 1955, I could not help but think, is it not strange that the Minister of Finance has never referred us to any of the statements he made when in opposition on any particular question. I thought that was a most interesting parallel and I look upon it as one up for British Columbia.

The minister told us that the cabinet had carefully studied the report of the royal commission. As a result, if I heard him correctly, he introduced this measure which would make some provision for the regulation of free enterprise. That is a very interesting statement compared with things that were said a number of years ago. A few years ago the regulation of free enterprise was considered completely unorthodox and improper for some members of the minister's party when they were in opposition. I must say that I fairly glowed at one point in his remarks when he talked about regulating the returns of oil and gas companies. I thought to myself, well, the government is coming in our direction quite quickly. I was somewhat disappointed when the minister rose in his place just before I rose to speak and more or less modified his previous statement to bring it more in line with the principles of free enterprise that the government supports and wishes to give effect to.

Anyway, we were interested to know that this legislation will supersede the Pipe Lines Act and the Exportation of Power and Fluids and Importation of Gas Act. The bill will provide a transition stage and I think this is very sensible. This is a very important matter, and I think experience will have to be gained more or less slowly as a result of the operation of the bringing together of the various elements that are concerned in the successful operation of the national energy board, namely the federal authority, the provincial governments and the industries.

I was very pleased to hear the minister say that it is the intention of the legislation and its operation to protect Canadian interests with respect to the export of gas and of electricity and of other commodities of that type.

Mr. Benidickson: The same as last year.

Mr. Herridge: I notice that the minister said that there had been discussions with the United States department of state and with the United States federal power commission. I do hope the result of those discussions will mean that this, shall I say, will bring on a better understanding of the Canadian position and will result in the advance of this country.

It is very difficult to say much in reply to the minister's general statement. We will have to wait for the bill for the details and for the answers to our questions to find out exactly what is intended by the government with respect to this resolution.

I want first of all to say that I shall deal more or less with a broad outline so far as our approach to this problem is concerned. The details and all the rest of it will be filled in by my colleagues later on in this debate. I want to bring to the minister's attention the fact that, if I recollect correctly, the word "energy" means force, power, efficiency, potency, efficacy, activity, go, mettle, impetus, verve, drive, vim. We in this group sincerely hope that the government, the national energy board and the personnel, when it is appointed,

will exercise all those attributes in the operation of this legislation. They have an immediate, a very important and I think everyone will recognize a very heavy task.

The C.C.F. policy for many years has urged the need for the establishment of what I think we were generally pleased to call a national fuel and energy board. To inform the committee in that respect and to show how consistent our policies are and how continuing they have been throughout the years because they are based on sound foundations, I want to quote our program in this respect:

> The C.C.F. proposes that it be reinforced by the following specific measures:
> Establishment of a national fuel and energy authority to ensure that the use of all fuels—coal, oil, natural gas, electricity and atomic energy—will be planned to make the maximum contribution to the Canadian economy and the welfare of the Canadian people.

Well, sir, while we have not the details of this legislation at this time, we are very pleased indeed once again to note the influence on the government of this small group in this corner of the house in this parliament and during previous parliaments.

And now, Mr. Chairman, owing to his experience in the coal mining industry and knowledge of its disabilities, trials and tribulations, Clarie Gillis, a former member for Cape Breton South, was the most frequent exponent of the need for this policy on behalf of this group. He spoke from experience in the mines as a coal miner and from a knowledge of the industry in general and the marketing disabilities it suffered. He spoke with practical common sense and I am sure all members will agree with that. He had a practical approach to this problem and a wide knowledge of the coal industry because it had been his lifetime occupation prior to coming to this parliament.

I want to say, Mr. Chairman, that when a member's voice ceases to echo or reverberate or, in some cases, boom around this chamber, he is soon forgotten by some people. However, I wish to take this opportunity to pay a tribute to the former member for Cape Breton South, Clarie Gillis, for the contributions he made to the debates of this house and for the work of the committees while he was a member.

No doubt some members in this house will recall his interesting speeches, dotted with colourful and at times earthy language, and his metaphors drawn from a well of experience. I can still see the famous siphon that Clarie Gillis used to picture on occasions, with one end in the maritimes and the other end in central Canada, and that siphon operating so that the provinces of central Canada were over the years sucking the wealth and the lifeblood of the maritime provinces. I always thought that was a good metaphor, and I never think of the former member for Cape Breton South without seeing that siphon, as it were, in front of me, I want to say this before going on to my further remarks with respect to the measure. In my opinion Clarie Gillis would be a most suitable person to represent the employees in the mining industry in Canada on any international or national board. He is a veteran with active service, a veteran with experience in the coal mining industry. He was a veteran C.C.F. member in this house and prior to coming to this house, and he would be I think a most appropriate person to be considered when appointments are being made to international or national bodies representing the employees in the mining industry.

I come back to fuel and energy. I want to tell you, Mr. Chairman, that an old man finds his energy waning a bit at this time of night. I want to deal briefly with our approach generally to this situation. The history of man's utilization of the more exhaustible forms of energy appears to be divided into several great periods or ages. First of all, there was the long period of time in which man depended upon wood fuels and, to some minor extent, upon agricultural wastes. Then, in the 19th century coal dominated the scene until after the first world war, when it was supplemented by water power. Later, petroleum and natural gas products entered the scene. Now nuclear power development is commencing and solar energy is a possibility.

These amazing developments in Canada in recent years, and particularly since the second world war, clearly indicate to me the necessity for public control and regulations, and in the circumstances where it is clearly indicated in the public interest, public ownership of pipe lines, as we in this group consider was indicated in the case of Trans-Canada Pipe Lines. We think Canada today would be in a much better position if Trans-Canada Pipe Lines was owned by the Canadian people.

Few aspects of the Canadian economy are as vital to the nation as the adequate development and efficient use of energy resources. To a very great extent, the nation's standard of living, and certainly its industrial progress, are dependent on the availability of large quantities of heat, power and fuel at prices and in locations which permit their maximum utilization. The supply of many sources of energy is, of course, limited. Furthermore, the principal supplies are not uniformly distributed in Canada. This is one of our

problems in connection
utilization of the natural

The distribution and
various forms of energy
increasing public control
ment, conservation and us
of energy supply. Public
established in every pro
various aspects of the pr
sion, sale and use of fu
at the national level sever
agencies of government ar
various responsibilities i
fuels and energy.

I want to make a few
present federal regulatio
government regulation of
up in a somewhat haphaz
you find that if you read
formation of the various
undertaken by various de
work changed from one
other. The several federa
with energy resources hav
developed to meet parti
relation to specific situati
there has been very litt
correlation of these bodies,
We hope that this measu
effect in that direction. N
dozen government departm
with some aspect of ene
the development of fuel.

Now, Mr. Chairman, c
government is already act
many facets of energy proc
is true that intraprovinci
matters are exclusively w
tion of the provinces. This
and under present circum
group would not want to
iota. Nevertheless, the pre
energy regulation and fede
of certain energy policies i
terest is already well estab

I want to say at this po
this party realized the va
public ownership, and
aspects of energy develo
utilities. They should be br
ownership, either by feder
governments of a combi
governments at other
stances indicate it
interest.

I want to stress the
tion from our point of
have witnessed a
interdependence of
importance of co
policies with respect

problems in connection with the efficient utilization of the natural resources we have.

The distribution and administration of various forms of energy have necessitated increasing public control over the development, conservation and use of various sources of energy supply. Public bodies have been established in every province to deal with various aspects of the production, transmission, sale and use of fuel and power, and at the national level several departments and agencies of government are also charged with various responsibilities in connection with fuels and energy.

I want to make a few comments on the present federal regulation of energy. The government regulation of energy has grown up in a somewhat haphazard manner. I think you find that if you read the history of the formation of the various boards, the work undertaken by various departments, and the work changed from one department to another. The several federal bodies concerned with energy resources have, in the main, been developed to meet particular problems in relation to specific situations. Until recently there has been very little co-ordination or correlation of these bodies, one with the other. We hope that this measure will have some effect in that direction. No less than half a dozen government departments are concerned with some aspect of energy production or the development of fuel.

Now, Mr. Chairman, clearly the federal government is already active with respect to many facets of energy production and use. It is true that intraprovincial fuel and power matters are exclusively within the jurisdiction of the provinces. This is as it should be, and under present circumstances we in this group would not want to change that one iota. Nevertheless, the precedent for federal energy regulation and federal administration of certain energy policies in the national interest is already well established.

I want to say at this point that years ago this party realized the value and necessity of public ownership, and considered certain aspects of energy development as public utilities. They should be brought under public ownership, either by federal or provincial governments of a combination of both or governments at other levels, where circumstances indicate it would be in the public interest.

I want to stress the importance of co-ordination from our point of view. Recent years have witnessed a growing recognition of the interdependence of energy sources and the importance of co-ordinating governmental policies with respect to them. Thus, there has been established a federal interdepartmental committee on energy, I understand, composed of representatives from the various departments, bodies and agencies of government concerned, to centralize information and to investigate the relationship of sources of energy to the national economy. We in this group trust that this national energy board will carry forward that same work at a greater tempo and to much more efficient advantage.

I see you looking at me with a rather worried appearance, Mr. Chairman, but I did not know my time was quite exhausted yet. It has been increasingly apparent, however, that this limited degree of co-ordination is inadequate and that federal energy policies and programs must be more closely related. No longer can individual policies be considered in isolation. Both the supply of energy resources and their uses have been changing rapidly and substantially. In recent years the tempo of these changes has been increasing from month to month. Neither the supply nor the use of any of these sources of energy can be considered in isolation, as I said before. It is increasingly apparent that governmental policies with respect to these sources of energy must be correlated.

Then there is another matter that concerns this group; the importance of reducing costs. When compared to the United States, unit costs of industrial production in Canada are high. This is true despite the fact that hourly earnings—this is a matter of interest—of Canadian workers are as much as 25 per cent below those of United States workers on the average. These higher costs are caused by a limited market and Canada's geography which necessitates long hauls and consequently much higher transportation costs. In our opinion, the government can help to alleviate this condition through this national energy board, if it functions as we hope it will function in the days to come, as a board giving full time to all aspects of this problem.

What should they be, the objectives of a national energy board? We in this group think the first objective should be to increase the use of fuel and power production as part of a national development plan, a related national development plan through co-operation between the national energy board and suitable agencies in the provinces. Second, it should aim to conserve and direct the use of energy resources to the advantage of present and future generations. Third, it should ensure that, so far as is practicable, fuel and power resources are equitably distributed to all sections of the populated areas of Canada, to develop what we in this group have frequently spoken about, and what the former

member for Cape Breton South spoke about, a national standard of living in Canada. This would avoid the situation we have in Newfoundland and in sections of the maritimes, as well as some other sections of Canada, resulting from the failure of these people to enjoy the national energy resources of this country.

Then, Mr. Chairman, I suggest some means by which these objectives may be reached. First of all, what about the question of taxation? This is an important one and the committee on mines, forests and waters in recent days has been listening to representations from the forest industry of British Columbia on this very question of the need for some reconsideration of taxation to provide incentive. We think one extremely important facet or instrument of federal policy is taxation. It could have a big influence on the development of any industry and its expansion. In our opinion, federal taxation policies can and should be devised which will encourage the search for and production of various forms of fuel. Furthermore, these taxation policies, concerning various forms of energy supply, should be correlated one with the other.

As I said before, this problem cannot be considered in isolation. There is, too, the uestion of subventions. Transportation subentions have been available for the past 30 years to assist the movement of coal into specific areas, principally central Canada from the maritimes. When a national energy board is established, this problem will have to be considered and studied in relation to the policies of a national energy board as a whole.

What about research? To me that is an extremely important question indeed. While considerable work is being undertaken by the national research council, the defence research board, the dominion coal board and the fuels division of the Department of Mines and Technical Surveys, and other departments, there is great need for an expansion of research by federal and provincial governments. We think that a major contribution could be made by an appropriate federal government agency undertaking some co-ordination of these research programs and facilitating the exchange of information, not only by federal agencies but by the other research programs carried on by the provincial governments. If this board does the things we hope it will do, it should be the agency to correlate and to develop the research required in this connection. We think the co-ordination of the federal government agencies is a first essential in the successful administration of the policy that we hope to see developed as a result of the appointment of a national energy board.

[Mr. Herridge.]

Because of the important role which energy plays in the economy and the tremendous changes that have taken place in both the supply of and demand for energy, and in view of the many regulatory and administrative bodies with some jurisdiction and responsibility in the field of energy, it becomes increasingly important, from the point of view of the members of this group, that national policies be integrated and that actions be directed toward common goals in this field. Co-ordination, it appears to us, would be best achieved by formal action along three related lines:

1. The consolidation of policy and administration at the federal level, as I have mentioned previously, with respect to energy resources and use, in an appropriate departmental structure.

2. We have advocated the constitution of a national energy board to deal with matters of regulation falling within federal jurisdiction. That is why we are glad to see this resolution come before the house. We trust that its final result and its administration will be along the lines that we have suggested throughout the years.

3. We believe that, in order for this board to function satisfactorily, it is necessary to establish a continuing federal-provincial advisory body to protect provincial jurisdiction, and to promote in the best spirit co-operation and consultation in the administration of this extremely important sector of the Canadian economy.

I now wish to say a word or two about the national energy board. The national energy board personnel, in our opinion, should be composed of members who will represent various national interests and regional interests and be governed by the broad objectives of national policy. They must be men of capacity, intellect, industry and vision. As I said before, if this resolution proves to be the type of legislation we hope it will be, with a national energy board of the type I have mentioned we can hope to go somewhere in the development of natural resources.

Further, for successful administration under the national energy board we believe there should be a dominion-provincial advisory council. Because jurisdiction over natural resources, including sources of energy, as well as the production and intraprovincial movement or transmission of energy comes within the purview of provincial governments, as I have said before, and because the federal government has jurisdiction over other aspects relating to interprovincial transmission and export of energy, it is most important that co-operation be maintained between the

federal and provincial g
with that consideration ir
the minister to give con
form of federal-provinci
on the development of e
that the work of the nat
can proceed in the best
standing, without any viol
tutional jurisdictions of t
ernments concerned.

In conclusion, Mr. Cha
this. It is our opinion t
energy board is establishe
tive foundations and if
the provinces is developed
ion-provincial advisory c
suggested, it should soo
positive factor in the m
stable development of th
country which we all love
party we support.

Mr. Smith (Calgary Sou
I propose at this point, lil
preceded me in speaking,
with the general outline
which is now before the c
nizing, of course, that the
the legislation which will
a bill but, equally imports
which undoubtedly the n
empowered to make, will h
effect on the development
I suggest that they must b
close scrutiny of this Hc
While it might be a bit ea
the minister on the introduc
tion, I know that I speak
people both inside and out
in congratulating him on h
ernment on the fact that
made a start in establishi
and gas policy, something v
have required for some y
When the bill is introduced,
have an opportunity to ass
and the requirement for any
thus to come up with a k
working piece of legislation

I can appreciate, as can m
the difficulty of the governn
to reconcile the two extre
have been expressed in rela
royal commission, namely
hand who have stated thei
industry should not be in a
by regulation, and those o
who believe that a tight for
required in the interests c
sumers. It is my contenti
inconsistent to believe that
troduced into and be passed
bill which, to a substantial d

federal and provincial governments. It is with that consideration in mind that we ask the minister to give consideration to some form of federal-provincial advisory council on the development of energy resources so that the work of the national energy board can proceed in the best spirit and understanding, without any violation of the constitutional jurisdictions of the provincial governments concerned.

In conclusion, Mr. Chairman, may I say this. It is our opinion that if the national energy board is established on sound legislative foundations and if co-operation with the provinces is developed through a dominion-provincial advisory council, as I have suggested, it should soon prove to be a positive factor in the more equitable and stable development of the economy of this country which we all love, regardless of the party we support.

Mr. Smith (Calgary South): Mr. Chairman, I propose at this point, like those who have preceded me in speaking, to deal only briefly with the general outline of the resolution which is now before the committee. Recognizing, of course, that the details of not only the legislation which will come before us in a bill but, equally important, the regulations which undoubtedly the new board will be empowered to make, will have a far-reaching effect on the development of these resources, I suggest that they must be subjected to the close scrutiny of this House of Commons. While it might be a bit early to congratulate the minister on the introduction of the resolution, I know that I speak for a great many people both inside and outside this chamber in congratulating him on behalf of the government on the fact that we have at least made a start in establishing a national oil and gas policy, something which I believe we have required for some years in the past. When the bill is introduced, I believe we shall have an opportunity to assess its limitations and the requirement for any amendments and thus to come up with a highly satisfactory working piece of legislation.

I can appreciate, as can most hon. members, the difficulty of the government in attempting to reconcile the two extreme views which have been expressed in relation to the Borden royal commission, namely those on the one hand who have stated their belief that the industry should not be in any way restricted by regulation, and those on the other hand who believe that a tight form of regulation is required in the interests of Canadian consumers. It is my contention that it is not inconsistent to believe that there can be introduced into and be passed by parliament a bill which, to a substantial degree, will satisfy both of these two extremes. I agree, however, that in introducing any resolution whatsoever it is essential that we remember that if at any time we restrict the ordinary progress or development of an industry, where there is no intention to remove the ordinary rights of the citizen, we not only hinder the industry itself but, of course, we present a serious reduction in the development of our resources and thus the advantages which can be obtained to the consumers as a whole. Unlike the hon. member for Villeneuve who spoke a short time ago, I can see, even in the resolution form, several extremely important changes from the expressions of opinion by Mr. Borden and his colleagues; I refer to the resolution which was introduced and which will form the basis of a bill.

I think perhaps it might be well to point out some of the important ones which I think are going to be, as I said at the outset, of advantage to both consumer and industry alike. First of all, we will apparently be asked to transfer a very substantial measure of authority from the board of transport commissioners to the energy board. Thus we will eliminate what has in the past been the discretionary power of the minister under the power to export act to grant a permit for export without any public hearing. If I understand the minister's remarks correctly we will apparently have in the energy board the right, first of all, to grant a public convenience certificate for the construction of the line, and in addition to that an order may be issued after a public hearing to grant the export licence. This I suggest is a major difference in that it will streamline the operation in which an applicant may apply to the government of Canada for an export permit. I would assume, Mr. Chairman, that the policy of the government will still be the final authority to determine if such a recommendation will be acceded to.

We also see other major changes indicated in the resolution. Up to this point we have only regulations with regard to tolls or tariffs on the pipe lines which carry oil. It would appear from the resolution that this will cover all pipe lines including gas, again a major change. But there is one singular and important difference indicated by the resolution from the recommendations contained in the Borden report. Mr. Borden and his colleagues indicated that they would like to see a fixed rate of return based on shareholder equity, and this has apparently been replaced by granting the authority to the board itself to determine what is fair and reasonable.

The one point which, of course, immediately comes to mind is, how is this rate to be determined? This, of course, we will only

learn when we see the bill. It is apparent from the resolution—I think this is important—that the first premise is that the return must be sufficient to attract capital, and with this I heartily concur. The second premise is that no company should exploit its monopoly or position to secure returns which are higher than fair and reasonable. The important point, and this is a point which apparently escaped the Borden commission, is that you cannot lump oil and gas pipe lines together because the rate of risk is exceedingly different. The basic criticism which I have of the Borden commission is that it failed to recognize the nature of the petroleum industry as a risk undertaking.

Those who question that statement and suggest there is no risk involved in the undertaking of a pipe line need only look at the operation of the Trans Mountain Oil Pipe Line Company which was built with a capacity of 275,000 barrels a day. Today it is taking deliveries of something less than 78,000. You can imagine then, gentlemen, the risk undertaking involved in a pipe line of that nature. If you set certain standards or formulas as recommended by Mr. Borden which do not take into consideration the varieties of risk involved in either a gas or oil pipe line, it is my contention that you would not see the underwriting or construction of any future pipe lines with private capital.

Mr. Benidickson: Mr. Chairman, may I ask my hon. friend a question. I have great regard for him, as he knows, but he said it was apparent in the resolution that there was some distinction between oil and gas, and so on. Does he speak from knowledge of the bill which is not given to other members of the house?

Mr. Smith (Calgary South): Of course, Mr. Chairman, my words were misinterpreted. I am making the assumption that that is accepted and that there is that difference, from the very nature of the fact that the powers which apparently are to be granted, as stated by the resolution, are to consider what would be fair and reasonable. Therefore this is an assumption that there is going to be that flexibility which there had hitherto not been. I think—

Mr. Benidickson: Mr. Chairman, my point of order is that there is nothing in the wording of the resolution to indicate what my hon. friend called an apparent distinction between oil and gas.

Mr. Smith (Calgary South): With all due respect to my hon. friend, I suggest that is contained in the minister's statement and by the restoration of the flexibility which I have suggested they intend to place in the energy board. However—

[Mr. Smith (Calgary South).]

Mr. Benidickson: Mr. Chairman, I am not—

Mr. Smith (Calgary South): If the hon. gentleman will let me answer, I have not of course prior knowledge. I think that should be clear from the nature of my remarks.

Mr. Benidickson: Mr. Chairman, on a point of order, the hon. member made the assertion that there was apparent in the resolution which we are discussing now a difference between oil and gas. I think my hon. friend is straying a little bit from the resolution.

Mr. Smith (Calgary South): Mr. Chairman, I suggest this is contained in the minister's statement to us. However, I will be happy to discuss this at the appropriate time.

I left off at the point, Mr. Chairman, where I was suggesting that there is an important difference between the two and perhaps I might be permitted to continue on exactly that theme. To date, I have dealt with three changes which I suggest differ considerably from the Borden commission report and the outline of the bill as contained in the minister's statement on the resolution. I think perhaps at this point I might make some specific comments. The hon. member for Villeneuve, when he decided to go back into history, might better have made his speech after the bill had been seen—as my hon. friend suggested might be the case in my speech—because he dealt extensively, first of all, with the Gordon report. Then he went into some detail on the Borden royal commission report. Then he was kind enough to make certain references to a speech which I made a short time ago in Bermuda.

Mr. Benidickson: Mr. Chairman, I have served under the hon. member, who is chairman of a committee that has, I think, done a good job, and he himself deserves a great deal of credit.

Some hon. Members: Order.

Mr. Benidickson: But he is now saying certain things—

The Deputy Chairman: Order. I do not understand what point the hon. member is raising.

Mr. Benidickson: My point is, if we see the bill then we can debate at this stage. Has the hon. member seen the bill?

Mr. Smith (Calgary South): Mr. Chairman, I made it clear to the hon. member that I had not at that point, and I do not know that I can add anything more to that.

I would now like, if I might without interruption, Mr. Chairman, to continue. The hon. member for Villeneuve expressed some concern that the Borden commission had decided to recommend to the government against the

: Mr. Chairman, I am not—

gary South): If the hon. me answer, I have not of ledge. I think that should e nature of my remarks.

: Mr. Chairman, on a point . member made the asser- s apparent in the resolution scussing now a difference is. I think my hon. friend is oit from the resolution.

gary South): Mr. Chairman, contained in the minister's However, I will be happy to appropriate time.

point, Mr. Chairman, where that there is an important en the two and perhaps I d to continue on exactly that ; I have dealt with three suggest differ considerably commission report and the ll as contained in the min- on the resolution. I think point I might make some s. The hon. member for Ville- . decided to go back into et[illegible]e made his speech a[illegible] seen—as my hon. might be the case in my he dealt extensively, first of rdon report. Then he went on the Borden royal com- Then he was kind enough to ferences to a speech which I ae ago in Bermuda.

on: Mr. Chairman, I have e hon. member, who is chair- ittee that has, I think, done he himself deserves a great

embers: Order.

son: But he is now saying

Chairman: Order. I do not it point the hon. member is

son: My point is, if we see the debate at this stage. Has the een the bill?

Calgary South): Mr. Chairman, r to the hon. member that I it point, and I do not know anything more to that.

like, if I might without inter- airman, to continue. The hon. Ille[illegible]e expressed some con- ior[illegible]mmission had decided t[illegible]overnment against the

acceptance of a letter as a firm commitment written to Trans-Canada Pipe Lines Company by the then acting minister of trade and commerce in the former administration. The hon. member read at length from what had been said by the president of the investment dealers' association. I suggest to him there were a number of individuals who did not express concern with regard to the report issued by Mr. Borden and his colleagues of the royal commission in relation to the character of the letter. As an example, I think it is significant to note that the federal power commission of the United States said they did not consider his letter as a binding contract between the two governments. I suggest, further, especially to those who have had any legal training in this house, that when Mr. Howe offered a firm contract without any limitation as to time, certainly this was the intention, and this was contained in his letter to Trans-Canada Pipe Lines. There is no basis in fact by which it should be considered as a firm contract. The fact of the matter is that the terms which Mr. Howe offered to this company changed completely during the course of the time the offer was made. It therefore follows that the conditions under which the initial contract were made were not enforceable because the time altered so materially. I do not intend to pursue this matter any further except to say that a senior official of Trans-Canada Pipe Lines Company Limited under examination before the Borden commission himself said he did not consider this letter was binding.

I should like to make a personal observation on two other aspects of the question. The hon. member for Villeneuve stated I said I was convinced that this government would not take any action which would place the oil and gas industry in a regulatory strait-jacket. I certainly made that statement, and I still see no suggestion of this happening in the resolution before us. Then the hon. member went on to say that I was emphatic in my plea that we should not place licences on the export of oil because of our desire to maintain our export markets abroad. Here again, while there is power within this bill to introduce licensing for the export and import of oil, there can be no doubt that this power will not be extended without just cause. Again this is clearly an indication that this is a situation which could develop, and such action could be taken.

There are two major economic problems upon which the minister commented. The first was whether to process future applications for gas export through the energy board or some other alternative. While he does not state this, the only other alternative is to process them through the present legislative facilities, otherwise the board of transport commissioners. It seems to me that if we are going to debate this legislation at any length—and it will require considerable scrutiny—we should recognize that time has the unfortunate habit of changing the circumstances of the markets to which we hope to export, and in addition the day may well come when the area to which we wish to export that gas may be captured by other sources of supply competitive with Canadian gas.

I can only hope, as in the past, to impress on the government the need for urgent action at the earliest date to process the applications currently before the board of transport commissioners so that any delay does not become unfortunate in that we may lose valuable markets to which we hope to export.

Second, I would point out the economic problem involved in the marketing of our oil. It is true that the removal of restrictions by the United States on the importation of Canadian oil is an excellent step, and the government is to be congratulated for convincing the United States of the need for freedom of trade between our two countries. We must also be realistic in recognizing that unless the United States refineries are prepared to give up their commercial preference, then indeed we may have to call upon the licensing aspect suggested in the resolution to be absolutely certain that we do not close down our petroleum industry through lack of protective action.

I suggest in addition that when Mr. Borden makes his second report—his report on the marketing of oil—that will be the time to determine what further course of action we should take. I agree it is not necessary to introduce licensing as such until a full review has been presented, and this in turn will come, we assume, in the second report.

My final comment on Borden and his work will be this: I agree with the congratulatory remarks made by the minister. I think that basically the report did produce a valuable array of information to be used for the establishment of the oil and gas policy to which I have referred. As I have said many times, my principal criticism of the commission was that it did not recognize the nature of the risk involved in the petroleum industry. I would hope that when Mr. Borden makes his second report he will not so much comment on what action the government may have taken in the past but will rather state his views on what future action he thinks desirable. In other words,

I would hope his report can be introduced in the near future in order to help the government to decide with regard to the various alternatives open to it with relation to the marketing of our oil.

I believe it is important that we should also assess the entire problem in relation to the marketing of our by-products, the development of new and changing taxation practices, and the development of our resources in general. I believe, also, in the importance of maintaining research. Again, the resolution itself indicates this. Perhaps most important of all is the need for public understanding that when we talk about the requirement for Canadian citizens in both these resources we should not only equate the requirements for consumption, but also the rate of discovery that we anticipate over same period. It is shortsighted if we do not recognize that we will continue to explore and develop these resources at an even faster rate once we have established the markets for them. Here, I agree, this energy board can provide a useful instrument or vehicle in assessing the relation between market and demand.

So I close on the same note as I began, by saying that this is a first and most useful step forward in a real and honest attempt to provide a policy for the development of our resources, and this is something which the former administration neglected for so many years.

An hon. Member: What about the Borden report?

Mr. Smith (Calgary South): I congratulate this government for making the first progressive step. It is up to parliament to make certain that we develop regulations from this point on that are in the interests of both the petroleum industry and the Canadian consumers.

Mr. McIlraith: Mr. Chairman, my remarks on this resolution will be rather brief. The subject matter of the resolution is very narrow. I wish to draw the attention of the committee to the fact that the resolution merely asks for a decision on the expediency of introducing a measure for the establishment and operation of a national energy board and the appointment of its members and staff. By accepting the resolution that is all we are doing.

The usual resolution in these cases, as I understand it, is much broader. I have taken the trouble to look up the resolution used when the dominion coal board was set up. I find that on that occasion the purposes of the proposed coal board were indicated in the resolution. The coal board was to administer subventions and subsidies and there was also reference to the provision for the advisory functions of the board. For some reason or other that was not done in this case so we are somewhat limited in debating the subject at this stage. However, in his opening remarks on the resolution the minister dealt with it in a somewhat extended way and I think sought to remedy the omission as best he could. I hope he will take the opportunity at other stages of completing the remedying of the defect.

The importance of this subject is well illustrated by statistics on Canada's energy supply; that is, the relative importance of petroleum, natural gas and water power which I take it are the only three sources of energy being dealt with by this legislation. It is interesting to note that in 1926, 69 per cent of our energy was supplied from coal and 15 per cent was supplied from natural gas, petroleum and water power combined. In 1953 the comparable figures were 39 per cent from coal and 54 per cent from the other three combined. For 1980 the projected figure is 16 per cent from coal and 81 per cent from the other three sources being dealt with by this board. This illustrates more graphically than anything I could say the vast importance of this subject.

We are somewhat handicapped in discussing this question because of two factors arising out of the setting up of the Borden royal commission on energy. The first factor is the initial report of the commission published last October that is now available to the committee and the contents of that report to which I shall make further reference a little later on. The second factor is that we are still awaiting the second report of this commission. It is regrettable that the committee could not have had the second report before dealing with this matter. However, I am not going to criticize the government on that score concerning the delay of the commission in producing the second report. I think a great deal of damage has been done to some parts of the development in the petroleum and gas industry by the government not stating its policy since it assumed office in 1957. That is to say the government has not taken advantage of any opportunity to outline its policy in this whole field of development of our energy sources. While I regret very much the fact that the second report of the Borden commission is not available to the committee I am not particularly criticizing the government for proceeding without it.

The first report was rather commended to the house by both the minister in introducing the resolution and by the hon. member for Calgary South in his remarks. I must say that while they were very laudatory of that report I cannot share their views. I consider that the report has done a good deal of damage to the development of the industry in this country. While it is quite true that it has not impeded the exploration work in the oil and gas industry it undoubtedly has impeded development work. That is due to the nature of some of the recommendations contained in that report.

I also hold the view that this report has had a damaging effect on private enterprise outside this field altogether. That, of course, is a matter of debate and I suppose there could be sharply different opinions on it. However, that is the view I hold. I would wish that the minister at some point would undertake to indicate more clearly to the committee the parts of the report and those recommendations contained in it that are being adopted and the recommendations which he is prepared to reject.

If I may say so, his rising on a second occasion in this debate in committee to correct an impression taken from some words he used in introducing the resolution shows the necessity for great clarity on this question and illustrates the need for clarity as to what the government's attitude is with regard to certain recommendations in the first report of the Borden commission. The minister's action in being so quick to correct the wrong impression he inadvertently created in his opening remarks shows just how sensitive the industry is on this point.

There are two matters with which I wish to deal specifically. I was interested to notice that the minister at least on three occasions in his introductory remarks dealt with the necessity of there being capital investment in this industry. I was glad to see him stress the importance of that particularly in view of the somewhat adverse factors in the Borden commission report. I hope that when we see the bill it will indicate that his appreciation of the necessity of capital investment will find expression in the legislation and that there will be nothing in it of such a nature as to impede the proper flow of capital investment into the development of enterprise in this field.

I turn now to the second point arising out of the minister's remarks that concerned me specifically. Incidentally, I could not help but notice that the hon. member for Calgary South in his remarks kept referring to matters none of which were in the resolution and several of which were not dealt with in the minister's remarks but perhaps I can allow that to pass without further comment.

Mr. Smith (Calgary South): Mr. Chairman, I rise on a question of privilege. The hon. member has stated, as I understood him, that I made reference to several matters which were not in the resolution. That was purely an error in description. I was referring, of course, to the speech made by the minister. I wonder whether he will be kind enough to indicate to me, though, the number of matters which were not in the statement of the minister.

The Deputy Chairman: Order. I am of the opinion that this is a matter of argument. When the hon. member is through, if the hon. member for Calgary South wishes to say something, if there is time, it will be in order.

Mr. Benidickson: On this point, Mr. Chairman—

The Deputy Chairman: Order.

Mr. Benidickson: —I think the hon. member for Calgary South had—

The Deputy Chairman: Order. The hon. member for Ottawa West.

Mr. McIlraith: Mr. Chairman, I understood from the minister's remarks he indicated that the legislation would provide for the board having jurisdiction over the export and import of oil. I think I understood him correctly on that point. Then, I understood him to go on to say that while the board would have this jurisdiction, that provision would not become operative until the governor in council made it operative.

What I want to say on that is that it seems to me there are two objections. Perhaps we can see better when we get the legislation. The first objection is that this is a matter of such importance and of such a nature that it should be dealt with by parliament and not be taken to the governor in council by way of arbitrary authority. That is one criticism. The other is that so long as that power is contained in the legislation, then we are going to have a situation where a threat is going to be hanging over the heads of the industry at large that the board will interfere by way of regulation, and that is damaging because of recommendation 19 of the Borden commission report. It is particularly damaging for that reason. For these two reasons I would hope that the minister would take a further look at that point before introducing his legislation.

In his speech the minister covered a very wide range of matters, and made it perfectly clear that the bill will be an extensive one. It is clear, for instance, that the pipe line legislation is to be replaced by this bill as

well as many other things here indicated. Perhaps the best way to proceed is to let us have a look at the bill.

I would hope that when we come to the second reading stage the minister will not be as eager as some of his colleagues have been in recent days to restrict the discussion on second reading. We can then have a full discussion when we see the bill. Bearing that in mind, I am quite prepared to curtail my remarks now so that the resolution may be dealt with and the bill introduced.

Mr. Fisher: At this late point in the evening, I should like to make a few remarks on the national energy board that this government is promising to set up. There are still perhaps a few remarks which may be made about it. The thing that interests me in connection with this bill is that it goes right back to what has been a most exciting thing in recent parliamentary history, namely the pipe line legislation. This is the logical outcome of the stand that the Conservatives took in the pipe line debate, and this is their reaction to the bad way in which the Liberals handled things back in 1955 and 1956. This means that we shall be looking with an especially critical eye for this particular bit of legislation, and no less because, since the Borden commission first report came out, the vociferous nature of the protests of the oil industry seemed to indicate that they feared very much the legislation that is forthcoming. They seemed to be very apprehensive as to just how far this energy control bill would go, and they are especially worried in connection with the export of gas.

The views of this particular party have been so expressed by the hon. member for Kootenay West that I think they covered the general nature of the kind of board that we would like. As a matter of fact, I think the hon. member mentioned that for many years the C.C.F. has been talking about the planning boards that they would like for the regulation of public resources. If the speech in 1955 by the Minister of Public Works was merging toward our point of view we are very pleased to note that conversion and to give him all the credit in the world.

Mr. Green: You are in agreement with me.

Mr. Fisher: I remember that in the past he expressed very strong views about that salt water fleet that he wanted. We have not seen any indication that as a member of the government he has been converted to that point of view.

[Mr. McIlraith.]

In a minor way this is a contribution on the part of the government to taking over another part of the program that the C.C.F. has put forward if, as we have been given to understand, the legislation is to be spelled out as indicated.

I for one will be watching very closely the speech that the hon. member for Calgary South will make at the next stage of the proceedings when the bill is before us. Then we shall get an indicator as to how generally the oil industry and the gas industry in the west will view this particular legislation. If we find the hon. member for Calgary South speaking with a certain amount of criticism, or making some suggestions, we will begin perhaps to get the suspicion that this is a pretty good bit of legislation. It will be an indication that this adoption of general C.C.F. ideas has been a little bit deeper than we had felt.

Will you call it ten o'clock, Mr. Chairman?

Some hon. Members: Carried.

Progress reported.

INCOME TAX ACT

Hon. Donald M. Fleming (Minister of Finance): May I ask leave to revert to motions for the purpose of giving the house notice of an amendment which I propose to introduce to Bill No. C-48 when it is reached. I thought it might be reached this evening. I had given copies of the amendment to hon. gentlemen opposite, Mr. Speaker, but if I might have leave I would put this proposed amendment on *Votes and Proceedings* for today for the use of hon. members when the bill is reached, presumably tomorrow.

Some hon. Members: Agreed.

BUSINESS OF THE HOUSE

Mr. Chevrier: May I ask what is the business for tomorrow and what the business will be on Thursday and Friday?

Mr. Green: Mr. Speaker, tomorrow we shall continue with this debate and then take the resolution concerning the Veterans' Land Act which appears under government notices of motion on today's order paper. The intention is to refer this measure to the standing committee on veterans affairs. If possible, we would like to have it referred to that committee this week. Then, we shall take item No. 13, concerning the convention for the abolition of forced labour; then, item No. 7, the amendments to the Excise Tax Act; item No. 8, the amendments to the Income Tax Act; item No. 16, a resolution

practice of the house to accept
f a member as to what he did
pose of making the correction.
er, as I understand it—and I
o have the views of the house
-to change what was said for
larifying the ideas the member
press. I think the correction
e hon. member for Bonavista-
1 both classes. In the first one
. to clarify the meaning; in the
: corrected *Hansard*, and the
ld be permissible.

:. Speaker, this is very impor-
.e *Hansard* reporter will not
e where there is a cross-play
f the house. The record stands
takes it down. On this occa-
a cross-play and my hon.
ot be able to change it in
: comes here and asks for a
or of the house. I suggest that
allowed.

l: Mr. Speaker, that is pre-
ed for this second correction.
, though I think I did say
's" and it was inadvertently
porter, I am not making any
nce the minister has raised
ev[illegible]he second instance,
Hansard and it was
on of what I had said. It was
rent from my recollection
would be quite improper to
orrection anywhere except in
the house. That is what I
ıd that is certainly what I

Before leaving this matter,
ı. members that when they
hat the *Hansard* reporters
reported them, they do so
ponsibility. They should do
y are sure that is the situa-
hat the house should then
tion. It is not a change in
as reported, because that
record. It is an explanation
the hon. member feels the
has made.

IL DEFENCE

ATEMENT OF POLICY ON VACUATION

f the day:

n (Essex East): In view of
e weeks now have passed
: were communicated with,
ing on civil defence, may
r p[illegible]ional Health and Welfare whether the government is in a position to state its policy on evacuation?

Hon. J. W. Monteith (Minister of National Health and Welfare): Following the conference at which the provincial ministers and several federal ministers were present, the hon. member asked me a similar question and the answer which I gave on that occasion still holds. The matter is getting prior consideration.

Mr. Martin (Essex East): Am I correct in saying to the Minister of National Health and Welfare that from now on all questions on civil defence should be addressed to him, or should they be addressed to two others of his colleagues as well?

Mr. Monteith (Perth): I think, Mr. Speaker, if the hon. member continues to address questions on civil defence to myself as Minister of National Health and Welfare, for the time being that will be satisfactory.

NATIONAL ENERGY BOARD

PROVISION FOR ESTABLISHMENT AND OPERATION, APPOINTMENT OF MEMBERS, ETC.

The house resumed, from Monday, May 18, consideration in committee of the following resolution—Mr. Churchill—Mr. Rea in the chair:

That it is expedient to introduce a measure to provide for the establishment and operation of a national energy board and the appointment of its members and staff, to define its duties, to authorize it to exercise certain powers and to provide for other related and incidental matters.

Mr. Argue: Mr. Chairman, in his statement last night the minister outlined in some detail the powers that would be exercised by the national energy board and to some extent the type of policy that the government would wish it to follow. The minister stated, as found on page 3767 of *Hansard*:

We recognize the need for and welcome capital whether domestic or foreign for investment in the energy and associated industries, and we believe such capital, wisely invested, should enjoy a fair and reasonable rate of return. As to what is a fair return, it is not our intention to incorporate any fixed formula in the statute. Rather, our first premise is that returns on successful investment must be sufficient to attract capital for replacement and expansion, and our second premise is that the public interest requires that no pipe line company should exploit its monopoly or quasi-monopoly position to secure returns higher than are fair and reasonable.

I suggest, Mr. Chairman, that the stated policy of the government is far removed from what was once the policy of the Conservative party when it formed the opposition. We in the C.C.F. believe that natural monopolies such as gas pipe lines or oil pipe lines crossing interprovincial boundaries should in the national interest be publicly owned. We support that position not because of any theoretical belief that public ownership in every field is the right way to proceed but because we believe this is a particular example of the kind of utility, the kind of industrial facility, that should be publicly owned. If our natural gas pipe lines were publicly owned, if the trans-Canada gas pipe line were publicly owned, we feel that this would assist in providing energy sources for Canadian industry at the lowest possible price. At a time when the house is giving serious consideration to the whole question of inflation, to the whole question of our high cost economy—

The Deputy Chairman: Would hon. members please talk a little more quietly. It is rather difficult for the Chair to hear the member who has the floor.

Mr. Argue: Thank you, Mr. Chairman. I was saying that at a time when inflation is very much in the minds of members of the House of Commons, when the government has said that its policy is to prevent a further increase in price levels in this country, with all the warnings that Canada is becoming a high cost economy which is endangering our export trade, I feel the government should consider public ownership of interprovincial pipe lines as a means of securing for Canadian industry energy sources at the lowest possible prices. If energy is brought to Canadian industries at an inflated cost or at an unnecessarily high, cost, then this in turn means that the high cost of energy is passed on in higher and higher prices for finished products. This has a detrimental effect upon the development of the Canadian economy, both from the standpoint of Canadians and also from the standpoint of the development of a healthy export trade.

The government's announced policy is not only a great departure, a complete departure, from the position it has taken in the past, but is in fact very far removed from some of the recommendations made by the royal commission on energy. The report of the commission on energy contains the following recommendation on page 28. This concerns the prices, tolls and rates which should be set by the board of transport commissioners. The recommendation reads as follows:

That the prices, tolls, rates or tariffs of a company owning or operating an oil or gas pipe line as regulated by the board of transport commissioners for Canada, should be just and reasonable, non-discriminatory and calculated to yield a fair rate of return on the shareholders' equity, after making due allowance for reasonable and proper operating expenses, depreciation, interest, income and other taxes.

The important part of this recommendation, I submit, is that in the opinion of the royal commission tolls, rates and prices than can be charged should be set at levels to yield a fair rate of return on the shareholders' equity. Instead of that the government has said they will have the board follow a general policy of setting rates that will provide a fair and reasonable rate of return. These two things are far removed, because the assets of a company very often are so much larger than the shareholders' equity. A company which finances largely by bonds or by debentures is very often able to show a very high rate of return on shareholders' equity; and the announced policy of the government means the continuation, in all probability, of fabulous returns, fabulous profits that have been made from the oil and gas pipe lines of this country.

On page 33 of the energy commission report we find a table showing the percentage return on shareholders' equity in the Trans Mountain pipe-line company. In 1955 the percentage return on shareholders' equity was 27 per cent; in 1956, 43.5 per cent; in 1957, 38 per cent. There were tremendous profits and tremendous returns on the shareholders' equity. The profit of Interprovincial Pipe-line Company, based on a percentage return on shareholders' equity, was in 1953, 18.3 per cent; in 1954, 11.3 per cent; in 1955, 11.5 per cent; in 1956, 18.1 per cent; in 1957, 15 per cent. The percentage return on shareholders' equity in the Montreal Pipe-line Company, and of the Portland Pipe-line Corporation was as follows: 1953, 15.6 per cent; 1954, 9.94 per cent; 1955, 20.45 per cent; 1956, 19.51 per cent; 1957, 14.76 per cent.

These fabulous returns and fabulous profits on pipe lines have made millionaires almost overnight. These profits have accrued not only to Canadians but to United States citizens. These profits have accrued to the Texas buccaneers about whom we heard so much from hon. members opposite when they were in opposition. How they complained about the government's policy with regard to Trans-Canada pipe line company. How they complained that the government was allowing foreign capital to come into this country and make fabulous profits in the development of Canadian natural resources, fabulous profits which were made in a way that was endangering the very sovereignty of this nation, the very control of Canadian industry.

The Prime Minister himself, when he spoke on this subject in the past, has waxed very eloquent. The Prime Minister made many statements on this subject, and on page 4032 of *Hansard* for May 17, 1956 he had this to say:

[Mr. Argue.]

The perquisites here are that the Prime Minister (Mr. St. Laurent) should abdicate his belief in democratic principles and deny those in opposition the right to advance their arguments and to educate public opinion or to find out why there is such solicitude on the part of the members of this government. For five long years this pampered pet, Trans-Canada Pipe-lines, by deviation, by change of direction, by protestation, by alteration in course, has postponed that estimable end of securing a market for Alberta gas and the making available to other parts of Canada of that necessary form of energy. I ask the Prime Minister today to tell this house why he is so fearful of the facts; why he was afraid to allow the true facts of this nefarious scheme to be elucidated? I ask why he found it necessary, and the members of his government found it necessary, to muzzle the representatives of the people in advance of anything in the nature of a filibuster or an interference on the part of the opposition with the policy and program of the government. I ask him to explain that today, for certainly the day of silence is past. Are they afraid of the truth over there? Is that why they hide behind the caricature of parliament which they have substituted by the adoption of the parliamentary form of closure in a way that it has never been adopted before?

A few years ago, Mr. Chairman, the Trans-Canada pipe line scheme was a nefarious scheme in the words of the Prime Minister. The present Minister of Public Works, speaking in the same debate on May 15, 1956, as reported at page 3955 of *Hansard* said:

I conclude my remarks by this statement, and I make it after careful consideration. I believe that this measure now proposed by the government is the greatest betrayal of the Canadian people since confederation.

This resolution before us assures the continuation of this greatest betrayal of the Canadian people since confederation. The government, instead of going as far as the recommendation of the royal commission on energy to hold down profits to a fair return on shareholders' equity, has left the door wide open for the continuation of these fat and fabulous rates of profit that are accruing from the pipe lines of this country.

This is a complete reversal of the position the government has taken in days gone by. Not only is it a reversal of the position which was taken as far as the Trans-Canada pipe line is concerned; it would appear from the statement of the Minister of Trade and Commerce last night to be even much more than that, because the government has shifted its ground from the position it took in parliament in 1956. In those days it was to be Canadian capital developing these resources, but last night the Minister of Trade and Commerce had this to say, as reported at page 3767 of *Hansard*:

We recognize the need for and welcome capital whether domestic or foreign for investment in the energy and associated industries, and we believe such capital, wisely invested, should enjoy a fair and a reasonable rate of return.