Board staff Book of Authorities

APPLICATION BY ELECTRICITY DISTRIBUTORS ASSOCIATION

Board File No.: EB-2012-0414

January 4, 2013

Index

Note: Sections footnoted in Board staff's submission are marked

Tab 1

Indexed as:

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

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

[1994] 1 S.C.R. 311

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

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

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

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

Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

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

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

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

Held: The applications should be dismissed.

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

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

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that

preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

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

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

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

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

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

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

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

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

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

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

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110;
considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594;

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

Statutes and Regulations Cited

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

Authors Cited

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

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

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

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

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

SOPINKA AND CORY JJ.:--

I. Factual Background

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

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

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

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

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

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

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

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

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

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

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

months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

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

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

II. Relevant Statutory Provisions

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

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

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

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

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

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

III. Courts Below

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

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

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

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

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

Court of Appeal (on the application for a stay)

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

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

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

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity

> of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

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

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

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

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

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

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

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

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought

would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

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

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

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

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

Supreme Court Act

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

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or

> other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

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

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

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

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

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the tradi-

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

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

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

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

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

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

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

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

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

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

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

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not,

the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

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

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

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

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

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

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

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

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

B. The Strength of the Plaintiff's Case

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

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

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

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

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

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

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

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal

> and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

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

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

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

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

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

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have

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

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

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

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

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

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

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

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the

location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

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

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

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

C. Irreparable Harm

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

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

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

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application.

One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

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

D. The Balance of Inconvenience and Public Interest Considerations

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

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

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers

from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

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

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

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

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

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

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

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

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

2. The Status Quo

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

E. Summary

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

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

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

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

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These

public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

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

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

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

B. Irreparable Harm

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

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

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief

sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

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

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

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

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

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

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

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

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

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

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

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

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

Tab 2

Case Name:

Consumers Council of Canada (Re)

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B; AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the Ontario Energy Board Act, 1998 and Ontario Regulation 66/10.

2010 LNONOEB 235

No. EB-2010-0184

Ontario Energy Board

Panel: Howard Wetston, Chair

Decision: August 5, 2010.

(48 paras.)

Tribunal Summary:

On April 26, 2010, a Notice of Motion was filed by the Consumers Council of Canada ("CCC") regarding the assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "Act"). On May 11, 2010, the Board issued a Notice of Hearing and PO No. 1, in which the Board decided that it intended to hear arguments on a number of preliminary questions before determining whether or not it would hear the motion. On July 13, 2010, the Board held an oral hearing for arguments on the preliminary questions. At the hearing on July 13, 2010, the Board determined that it would hear arguments on the **stay** issue. After hearing the arguments and reviewing the pre-filed materials, the Board determined that it was not satisfied with the state of the record regarding the **stay** issue. On July 19, 2010, CME filed a notice of motion seeking a **stay** of the assessments issued by the Board on April 9, 2010, until such time as matters pertaining to the constitutional validity of Ontario Regulation 66/10 have been decided on their merits. The CME Motion was opposed by the Attorney General. The Motion was argued before the Board on July 26, 2010.

The constitutional issue before the Board is whether the special purpose charge under sections 26.1 and 26.2 of the Act is an unconstitutional indirect tax or a valid regulatory charge. The Board, before hearing on the question of the merits, satisfied itself that it had the authority to determine the constitutional question. As stated by the Attorney General, the Board noted that when an administrative tribunal has the explicit or implicit jurisdiction to decide questions of law arising under a legislative provision, it is presumed the tribunal also has jurisdiction to decide the constitutional validity of the provision. While there was agreement that the Board has the jurisdiction to hear the constitutional issue, intervenors also acknowledged that the Board has the authority to state a case to the Divisional Court under section 32 of the Act. Most parties argued that the Board should hear the constitutional question rather than state a case to the Divisional Court. The Board agreed that it should hear the matter and not state a case to the Divisional Court.

With respect to staying the assessments, CME argued that the Board has a duty and an obligation to consider the constitutionality of its actions taken in response to the Regulation. By failing to consider the legality of the Regulation prior to issuing the assessments, CME submitted that the Board made an error. CME also argued that the administration of justice is irreparably harmed where a tribunal presumes its own actions are valid prior to assessing their legality. The CME Motion was opposed by the Attorney General.

In considering the test for a **stay,** the Board considered the three part test for a **stay** articulated by the Supreme Court in *RJR-MacDonald.*

a. is there a serious issue to be tried

b. will the moving party suffer irreparable harm

c. what is the balance of convenience.

The Attorney General argued that even if the Board finds that the serious issue branch of the test has been met, it fails the irreparable harm and the balance of convenience branches of the test.

The Board accepted that there is a serious issue to be tried in this case, however, the Board was not satisfied that irreparable harm will result if a **stay** is not granted, nor was it satisfied that the balance of convenience rests in favour of CME or the intervenors seeking the **stay.**

DECISION WITH REASONS

THE PROCEEDING

1 On April 26, 2010, a Notice of Motion was filed by the Consumers Council of Canada ("CCC") regarding the assessments issued by the Ontario Energy Board (the "Board") pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "Act").

2 On May 11, 2010, the Board issued a Notice of Hearing and Procedural Order No. 1 (the "Notice") in which the Board decided that before determining whether or not it would hear the motion, the Board intended to hear argument on a number of preliminary questions that were set out in the Notice. The preliminary questions set out in the Notice included, but were not limited to, the following:

(a) given Rule 42.02 of the Rules, does CCC have standing to bring the Motion;

(b) does the Board have the authority to cancel the assessments issued under section 26.1 of the Act;

(c) does the Board have the authority to determine whether section 26.1 of the Act (and Ontario Regulation 66/10 made under the Act) are constitutionally valid in the absence of another proceeding (i.e., can the constitutionality of the legislation be the only issue in the proceeding); and

(d) would stating a case to the Divisional Court be a better alternative?

3 A number of intervenors provided written argument in response to the questions in the Notice. On July 13, 2010, the Board held an oral hearing to hear further argument on the preliminary questions. In their pre-filed materials relating to the preliminary issues, certain intervenors made arguments in favour of staying the assessments resulting from the application of section 26.1 of the Act until the motion to determine whether the assessments were constitutional was heard on its merits. However, no party had brought a formal motion to **stay** the assessments that was supported by evidence. The Attorney General of Ontario (the "Attorney General") argued in its responding materials that the granting of a **stay** had not been identified by the Board as one of the preliminary issues to be heard on July 13, 2010, and that the issue should therefore not be heard that day. In the alternative, the Attorney General argued that the test for a **stay** had not been met and should therefore be denied.

4 At the hearing on July 13, 2010, the Board determined that it would hear argument on the **stay** issue. After hearing the arguments and reviewing the pre-filed materials, the Board determined that it was not satisfied with the state of the record regarding the **stay** issue. As the request for a **stay** had not been made through a fully supported motion, the Board, through Procedural Order No. 4, afforded parties the opportunity to file additional materials, including evidence to support their request for a **stay.**

5 On July 19, 2010, Canadian Manufacturers & Exporters ("CME") filed a notice of motion seeking a **stay** of the assessments issued by the Board on April 9, 2010 until such time as matters pertaining to the constitutional validity of Ontario Regulation 66/10 (the "Regulation") have been decided on their merits (the "CME Motion"). The CME Motion was opposed by the Attorney General. The CME Motion was argued before the Board on July 26, 2010. Several other intervenors adopted their original submissions from the July 13, 2010 hearing relating to the **stay** and provided some additional comments in support of CME's Motion. The Board issued a decision and order (without reasons) later that day dismissing the CME Motion. The Board's reasons for that decision and order are included below.

THE SPECIAL PURPOSE CHARGE AND THE ROLE OF THE BOARD

6 Sections 26.1 and 26.2 of the Act provide for a special purpose charge ("SPC") to be assessed to certain persons with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs.

7 The Regulation provides the details for the overall amount of the SPC, how the SPC is to be allocated between the persons required to pay the assessments, and how the persons required to pay the SPC assessments may recover the amounts.

8 The Regulation sets out that the total amount of the SPC is $53,695,310. The Regulation clearly states how the Board is to apportion that amount among the Independent Electricity System Operator (the "IESO") and licensed electricity distributors. In the simplest terms, the Regulation contains a formula, with corresponding definitions, that sets out how the Board is to calculate an amount. The Board then uses that amount in other formulas set out in the Regulation to apportion the SPC among the IESO and licensed electricity distributors. The Board's role is to perform the calculation identified in the Regulation and as such, the Board's role is not discretionary or adjudicative.

9 Similarly, the manner in which the IESO and licensed electricity distributors may recover the assessments they are required to pay under the Regulation is also set out in the Regulation. The Board has no discretion in how those amounts are calculated or the mechanism for recovery.

CCC'S STATUS

10 Submissions were made regarding the issue of standing and more particularly whether or not CCC needed leave to bring the motion. The Attorney General was satisfied that Aubrey LeBlanc had standing to bring the motion. The Attorney General argued, however, that CCC itself did not have standing to bring the motion and should be considered an intervenor. For the purposes of this proceeding, the Board finds that CCC should be considered an intervenor.

THE BOARD'S AUTHORITY TO HEAR THE CONSTITUTIONAL ISSUE

11 The constitutional issue before the Board is whether the SPC is an unconstitutional indirect tax or a valid regulatory charge. Before hearing the question on its merits, the Board first had to satisfy itself that it had the authority to determine the constitutional question.

12 Section 19 of the Act provides that the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." There was no disagreement among the intervenors that the Board had the jurisdiction to hear the constitutional issue. As stated by the Attorney General, when an administrative tribunal has the explicit or implicit jurisdiction to deicide questions of law arising under a legislative provision, it is presumed that the tribunal also has jurisdiction to decide the constitutional validity of that provision.

13 The Board agrees that it has the jurisdiction to determine the constitutional issue regarding the SPC.

BOARD HEARING VERSUS A STATED CASE

14 While there was agreement that the Board has the jurisdiction to hear the constitutional issue, intervenors also acknowledged that the Board has the authority to state a case to the Divisional Court under section 32 of the Act. Most parties argued that the Board should hear the constitutional question rather than state a case to the Divisional Court. Intervenors submitted that the Board should develop the evidentiary record necessary to state a case and that it would be more efficient for the Board to hear the matter. However, the Association of Power Producers of Ontario ("APPrO") and Union Gas Limited ("Union") argued that stating a case to the Divisional Court would be the preferred option, once the evidentiary record was developed by the Board, since the matter would likely ultimately be resolved by the Courts in any event.

15 The Attorney General argued that the Board should hear the case and determine the questions of fact and law rather than stating a case to the Divisional Court. The Attorney General contended that it would be more expeditious for the Board to determine the entire matter rather than to have an evidentiary hearing before the Board, an argument on the law before the Divisional Court, have the matter referred back to the Board from the Divisional Court, and then have the Board consequently apply the Court's opinion.

16 The Board agrees with the Attorney General and the other parties that argued that the Board should hear the matter and not state a case to the Divisional Court. The Board finds that it would be more efficient and expeditious for the Board to determine the facts and law with respect to the constitutional question in this matter. The Board will set a date for the filing of the evidence by the Attorney General by procedural order in due course.

STAYING THE ASSESSMENTS

Positions of the Intervenors

17 In its motion materials, CME argued that the Board has a duty and an obligation to consider the constitutionality of its actions taken in response to the Regulation. By failing to consider the legality of the Regulation prior to issuing the assessments, CME submitted that the Board erred and that it should now **stay** the assessments pending this consideration. CME's position was that the presumption of constitutional validity does not apply to actions taken by a quasi-judicial tribunal in response to enactments of questionable validity requiring the tribunal to perform particular actions, and cited *R.* v. *Conway,* [2010] S.C.J. No. 22 ("*Conway*") in support of this argument. In particular, counsel argued that the administration of justice is irreparably harmed where a tribunal presumes its own actions are valid prior to assessing their legality.

18 Although CME argued that the test for a **stay** established in *RJR-MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR-MacDonald*") did not apply to this case, it did submit that irreparable harm would result if the assessments were not stayed. CME argued that any assessments paid by distributors might not be returned by the government if the assessments were ultimately found to be unconstitutional. CME further submitted that even if the assessed amounts were refunded to the distributors, returning the money to individual ratepayers would be problematic, and that distributors might face class action law suits requiring the return of the assessed amounts, including significant legal costs.

19 Union also argued in favour of a **stay,** and relied on the three part test for a **stay** from *RJR-MacDonald,* namely:

(a) is there a serious issue to be tried;

(b) will the moving party suffer irreparable harm prior to the determination of the matter if the **stay** is refused; and

(c) does the balance of convenience, taking into account the public interest, favour the granting of a **stay?**

20 All three branches of the test must be satisfied if a **stay** is to be granted.

21 Union argued that the threshold for a serious issue was low and that it was proven in this case.

22 Union submitted that irreparable harm in the form of class action law suits brought by ratepayers against distributors could result if the assessed amounts are ultimately found to be unconstitutional. Even if the government were to return the assessed amounts to the distributors, such amounts could not be returned on a dollar for dollar basis to the ratepayers from whom the distributors initially recovered the money. A class action law suit could impose serious financial harm on distributors. Union also submitted that distributors may suffer a loss of profits and that the loss of profits would constitute irreparable harm.

23 Union further argued that the balance of convenience in this case favours ratepayers and distributors over the Province, largely on the basis that, once paid, it would be very difficult to return the amounts either to distributors or to ratepayers.

24 The request for a **stay** was also supported by CCC, VECC, and APPrO.

25 The CME Motion was opposed by the Attorney General. The Attorney General relied on the three-part test in *RJR-MacDonald.* The Attorney General agreed that the threshold for establishing a serious issue is not high but submitted that the moving party cannot succeed on this branch of the test.

26 The Attorney General argued that even if the Board finds that the serious issue branch of the test has been met, that the CME Motion meets neither the irreparable harm nor the balance of convenience branches of the test.

27 The meaning of "irreparable" was discussed at paragraph 59 in *RJR-MacDonald:*

> "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.

28 The Attorney General argued that any alleged harm that may be suffered if the assessments are ultimately found to be unconstitutional can be quantified in monetary terms because the amount of the assessments is known and that any harm can be remedied. In *Kingstreet Investments Ltd.* v. *New Brunswick (Finance),* [2007] 1 S.C.R. 3 ("*Kingstreet*"), the Supreme Court held that where the government collects a tax that is found to be unconstitutional, those who paid the tax are entitled to restitution. The Attorney General further observed that irreparable harm must relate to the applicant's own interests, and that here the moving party (CME) was not alleging harm to itself, but rather to distributors. Finally, the Attorney General argued that the courts have already decided in *Canada (Attorney General)* v. *Amnesty International Canada,* [2009] F.C.J. 545, and *Canadian National Railways* v. *Leger,* [2000] F.C.J. 243, that potential legal costs incurred by distributors to defend against class proceedings do not constitute irreparable harm.

29 The Attorney General argued that the CME Motion also fails the balance of convenience branch of the test because CME must demonstrate that the balance of convenience operates in favour of granting a **stay.** The Attorney General cited a number of cases which stand for the principle that, in constitutional cases, the balance of convenience is a very low hurdle for governments, and a very high hurdle for applicants. In *RJR-MacDonald,* the Court held:

> 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. (para. 80)

30 The Attorney General argued that CME cannot satisfy the balance of convenience branch of the test.

31 The Attorney General submitted that tribunals perform their duties under the presumption that statutes passed by the legislature are constitutionally valid until determined to be otherwise. The Attorney General argued that CME's submission that a tribunal should not act pursuant to legislation until it has considered the constitutional validity of the legislation is incorrect.

Decision

32 The Board finds that the appropriate test for granting a **stay** in these circumstances is the three part test identified in *RJR-MacDonald.*

33 The Board accepts that there is a serious issue to be tried in this case. However, it is not satisfied that irreparable harm will result if a **stay** is not granted, nor is it satisfied that the balance of convenience rests in favour of CME or the intervenors seeking the **stay.**

34 The potential harm identified in support of the motion is not irreparable. The harm identified is monetary and quantifiable; indeed, the total amount of the assessments is already known. The *Kingstreet* decision determined that, at a minimum, restitution would be available if the assessments are ultimately found to be unconstitutional. In the event that the assessments were returned to distributors, although a dollar for dollar refund to each ratepayer that paid their share of the original assessment would be impractical, the Board would have the ability to return these amounts to ratepayers by requiring the refunded amounts to be placed in a variance account or a deferral account. This amount could then be cleared through rates and act as an offset to each distributor's revenue requirement.

35 The Board also agrees with the Attorney General that the possibility of a class action law suit does not constitute irreparable harm.

36 CME argued that the Board should **stay** the assessment based on *Conway.* CME submitted that the Board had an obligation and a duty to determine the constitutional validity of the legislation and that that obligation and duty constituted a threshold legal requirement that the Board had to take into account when issuing the assessments. CME submitted that the assessments must be set aside until the threshold constitutional question had been answered. The Board is not persuaded by this argument. *Conway* deals with a tribunal's authority to determine constitutional questions; it does not deal with matters of interlocutory relief or **stays.** The Board does not find that the *Conway* case provides authority for the Board to **stay** the assessments.

37 The Board does not agree with CME's argument that the administration of justice would be irreparably harmed if the Board presumes the actions it took pursuant to the Regulation are legal. There is no basis for a finding that the presumption of legislative validity should not apply in this case.

38 The Board also does not accept Union's argument that any alleged loss of profits to the distributors would amount to irreparable harm to distributors. The amounts the electricity distributors pay as assessments will be recovered from consumers within a twelve month period. The variance

account which has been established by the Board to record this recovery will ensure that there is no over or under recovery. In addition, the variance account allows distributors to recover their carrying charges for the assessed amounts.

39 The Board accepts the Attorney General's arguments with respect to the balance of convenience. CME has failed to meet the high threshold of establishing that the balance of convenience weighs in its favour.

40 As previously stated, in order to overcome the assumed benefit to the public interest from the continued application of the legislation, it must be demonstrated that the suspension of the legislation would itself provide a public benefit. The intervenors that argued for a **stay** suggested that the public interest to be gained by staying the legislation and Regulation is that electricity distributors and the IESO, and their consumers, will not have to pay the costs of the SPC.

41 Arguments that suggest that the suspension of the assessments would amount to a public interest which outweighs the public interest in the continued application of the legislation are not supportable. These arguments relate only to an economic and personal interest in not paying the SPC. The Supreme Court addressed similar arguments in *RJR-MacDonald* relating to the increased price of tobacco products. The Supreme Court stated that "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." (*RJR-MacDonald* at para. 93)

42 The Board agrees that there is a high threshold for applicants to overcome in constitutional cases, and the parties seeking the **stay** have not provided clear evidence to meet this threshold.

COSTS

43 The Notice stated that the Board did not intend to grant cost awards in this proceeding. The Board had decided that no costs were warranted as the original Notice limited the extent of participation in the hearing to four parties, namely CCC, the Attorneys General of Ontario and Canada, and the Ministry of Energy and Infrastructure. However, as the hearing progressed, the Board allowed further participation in the hearing and a number of other parties intervened in the proceeding. Given the expanded participation in the proceeding, and the value the Board sees in having the expanded participation, the Board will allow for costs. Costs were requested by a number of intervenors, namely CCC, CME, VECC, and APPrO.

44 Under the circumstances, the Board will not rely on section 30 of the Act for costs. Distributors and the IESO should not be entirely responsible for paying the costs of this proceeding. The electricity distributors and the IESO are required to pay the SPC by virtue of the Regulation; this was not within their control. The Board also notes that the assessments may be extended to the natural gas sector in the future. Section 26.1 of the Act contemplates gas distributors being included in the assessments. Therefore, natural gas utilities and customers will also benefit from having the constitutional issue decided.

45 The Board has therefore determined that it would be more efficient for the Board to provide funding to groups representing the interests of customers that may be affected by this proceeding through section 26 of the Act. The rates for legal counsel's hourly fees will be determined in accordance with the Tariff in the Board's Practice Direction on Cost Awards (the "Practice Direction") and the Board will follow the principles set out in section 3 of the Practice Direction when deter-

mining eligibility for costs and the principles in section 5 of the Practice Direction amount of the costs it will allow the intervenors to recover.

46 Based on section 3 of the Practice Direction, the Board finds that CCC, CME, and VECC are eligible to apply for their costs of participating in this proceeding.

47 APPrO has also requested costs in this proceeding. APPrO represents the interests of power producers who are not eligible under the Practice Direction unless they are a customer of the applicant or there are special circumstances. APPrO is not a customer of the "applicant" in this proceeding because the "applicant" in this proceeding is Aubrey LeBlanc/CCC (or for the motion for the **stay,** CME) and APPrO is not a customer of those parties. Therefore, the Board must consider whether there are special circumstances to warrant granting cost eligibility to APPrO.

48 APPrO has been granted intervenor status and of course may participate in this proceeding. While it is true that generators will pay the SPC assessments as load customers, is that sufficient to amount to special circumstances in this proceeding? The Board is of the opinion that it is not. APPrO's position as a consumer (as load) in this proceeding is not unique compared to the other consumer groups. APPrO would also not appear to have any greater expertise with respect to the constitutional issue being determined by the Board in this proceeding than any other consumer group. The Board therefore finds there are no special circumstances to warrant granting APPrO costs in this proceeding. This is in no way a comment on the contributions made by APPrO, to date, in this matter.

DATED at Toronto, August 5, 2010

ONTARIO ENERGY BOARD

Original signed by

Howard Wetston
Chair

qp/e/qlspi

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Time Of Request: Wednesday, December 05, 2012 09:50:58

Tab 3

Indexed as:

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.

Attorney General of Manitoba, appellant;
v.
Metropolitan Stores (MTS) Ltd., respondent;
and
Manitoba Food and Commercial Workers, Local 832, respondent;
and
The Manitoba Labour Board, respondent.

[1987] 1 S.C.R. 110

[1987] S.C.J. No. 6

File No: 19609.

Supreme Court of Canada

1986: June 20 / 1987: March 5.

Present: Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts -- Procedure -- Stay of proceedings and interlocutory injunctions -- Constitutional validity of legislation challenged -- Board proposing to act pursuant to challenged legislation -- Motion to stay Board's proceedings until determination of constitutional validity of legislation-- Decision to deny motion overturned by Court of Appeal -- Principle governing judge's discretionary power to grant stay -- Appropriateness of Court of Appeal's intervention in motion judge's discretion -- Labour Relations Act, C.C.S.M., c. L10, s. 75.1.

Constitutional law -- Charter of Rights -- Currency of impugned legislation -- Whether or not presumption of constitutionality when legislation challenged under Charter.

The Manitoba Labour Board was empowered by The Labour Relations Act to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the Canadian Charter of Rights and Freedoms. Within the framework of this ac-

tion, the employer applied by way of motion in the Court of Queen's Bench for an order to stay The Manitoba Labour Board until the issue of the legislation's validity had been heard. The motion was denied. The Board, unfettered by a stay order, indicated that a [page111] collective agreement would be imposed if the parties failed to reach an agreement. The Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay order and granted a stay. At issue here are: (1) whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the Charter; (2) what principles govern the exercise of a Superior Court Judge's discretionary power to order a stay of proceedings until the constitutionality of impugned legislation has been determined; and (3) whether the Court of Appeal's intervention in the motion judge's discretion was appropriate.

Held: The appeal should be allowed.

The innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the presumption of constitutional validity in its literal meaning -- that a legislative provision challenged on the basis of the Charter can be presumed to be consistent with the Charter and of full force and effect.

A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. In order to better delineate the situations in which it is just and equitable to grant an interlocutory injunction, the courts currently apply three main tests.

The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience. The second test addresses the question of irreparable harm. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

When one contrasts the uncertainty in which a court finds itself with respect to the merits of the constitutional [page112] challenge of a law at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an interlocutory injunction, not only for the parties to the litigation but also for the public at large, it becomes evident that the courts ought not to be restricted to the traditional application of the balance of convenience.

It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties, and in cases involving interlocutory injunctions directed at statutory authorities, it is erroneous to deal with these authorities as if they had any interest distinct from that of the public to which they owe the duties imposed upon them by statute. Such is the rule even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Charter. The granting of an interlocutory injunction generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant who requests the granting of a stay. In the first branch of the alternative, the operation of the impugned

provisions is temporarily suspended for all practical purposes. Instances of this type can be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. The rule of the public interest should not be interpreted as meaning that interlocutory injunctive relief will only be granted in exceptional or rare circumstances, at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons.

Finally, in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar.

Here, the motion judge applied the correct principles in taking into consideration the public interest and the [page113] inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the parties. The Court of Appeal was not justified in substituting its discretion for that of the motion judge: the emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion.

Cases Cited

Disapproved: Home Oil Distributors Ltd. v. Attorney-General for British Columbia, [1939] 1 D.L.R. 573; considered: American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504; Morgentaler v. Ackroyd (1983), 42 O.R. 659; Société de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166; Procureur général du Québec c. Lavigne, [1980] C.A. 25, reversing [1980] C.S. 318; Campbell Motors Ltd. v. Gordon, [1946] 4 D.L.R. 36; Law Society of Alberta v. Black (1984), 8 D.L.R. (4th) 346, dismissing (1983), 144 D.L.R. (3d) 439; referred to: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Therens, [1985] 1 S.C.R. 613; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; McKay v. The Queen, [1965] S.C.R. 798; Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638; Black v. Law Society of Alberta, [1986] 3 W.W.R. 590, leave to appeal granted [1986] 1 S.C.R. x; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Boeckh v. Gowganda-Queen Mines, Ltd. (1912), 6 D.L.R. 292; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127; Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association, [1979] O.J. No. 682, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ.; Daciuk v. Manitoba Labour Board, Man. Q.B., June 25, 1985, Dureault J. (unreported); Metropolitan Toronto School Board v. Minister of Education (1985), 6 C.P.C. (2d) 281; Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843; Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2; Weisfeld v. R. (1985), 16 C.R.R. 24; Turmel v. Canadian Radio-Television and Telecommunications Commission (1985), 16 C.R.R. 9; Marchand v. Simcoe County Board of Education (1984), 10 C.R.R. 169; Gould v. Attorney General of Canada, [1984] 2 S.C.R. 124, aff. [1984] 1 F.C. 1133, setting aside [1984] 1 F.C. 1119; Cayne v. Global Natural Resources plc., [1984] 1 All E.R. 225; R. v. Jones, [1986] 2 S.C.R. 284; Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66; Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575; [page114] Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846; Attorney

General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Smith v. Inner London Education Authority, [1978] 1 All E.R. 411; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; Bregzis v. University of Toronto (1986), 9 C.C.E.L. 282; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Liquor Licensing Board [1986] 2 S.C.R. ix; Home Oil Distributors Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444; Société Asbestos Ltée c. Société nationale de l'amiante, [1979] C.A. 342; Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042; Garden Cottage Foods v. Milk Marketing Board, [1983] 2 All E.R. 770.

Statutes and Regulations Cited

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Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8.
Code of Civil Procedure, art. 751, 752.
Constitution Act, 1867, ss. 91, 92, 93, 133.
Criminal Code, R.S.C. 1970, c. C-34, s. 251.

Fisheries Act, R.S.C. 1970, c. F-14.
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National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, s. 2(1)(c).
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APPEAL from a judgment of the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, ordering a stay of proceedings pending disposition of a constitutional challenge and allowing an appeal from a decision of Krindle J. (1985), 36 Man. R. (2d) 152, denying an application for a stay of proceedings before The Manitoba Labour Board. Appeal allowed.

Stuart Whitley and Valerie J. Matthews-Lemieux, for the appellant.
Walter L. Ritchie, Q.C., and Robin Kersey, for the respondent Metropolitan Stores (MTS) Limited.
A.R. McGregor, Q.C., and D.M. Shrom, for the respondent the Manitoba Food and Commercial Workers, Local 832.
David Gisser, for the respondent The Manitoba Labour Board.

Solicitor for the appellant: Tanner Elton, Winnipeg.
Solicitors for the respondent Metropolitan Stores (MTS) Limited: Thompson, Dorfman, Sweatman, Winnipeg.
Solicitors for the respondent Manitoba Food and Commercial Workers, Local 832: Simkin, Gallagher, Winnipeg.
Solicitor for the respondent Manitoba Labour Board: David Gisser, Winnipeg.

The judgment of the Court was delivered by

BEETZ J. --

I The Facts, the Proceedings and the Judgments of the Courts Below

1 The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, described them at p. 181:

> Under the terms of the Labour Relations Act, C.C.S.M., c. L-10, there is provision allowing the [page116] Manitoba Labour Board to impose a first collective circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.
>
> The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the Labour Relations Act under which a first collective agreement might be imposed, declared invalid, as contravening the Charter of Rights and Freedoms.

> Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle, J. (see 36 Man. R. (2d) 152). The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

2 The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

3 The reasons of Krindle J. (1985), 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

> The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to Court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of the 22. Nine employees wrote in letters opposing the certification of the union. [page117] We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compell [sic] decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.
>
> The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation ....
>
> Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and

> the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms.
>
> . . .
>
> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year [page118] period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.
>
> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

4 In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal at pp. 181-83, exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge:

> The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date ....
>
> It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J.,

was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.
[page119] Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.

Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.

At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation; it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the Labour Relations Act are under attack as violating the Charter, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board "... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the Labour Relations Act".

. . .

By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.

There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations af-

> fecting the [page120] exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

5 In allowing the appeal, the Manitoba Court of Appeal ordered that:

> all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of The Labour Relations Act (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

6 It is from this interlocutory order that the Attorney General is appealing by leave of this Court. He is supported by the Manitoba Food and Commercial Workers, Local 832, (the"Union") and by The Manitoba Labour Board, (the "Board").

II The Issues

7 The points in issue, according to appellant's factum, are as follows:

1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms?
2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of The Labour Relations Act, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?
3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings? [page121]
4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

8 The first issue stated by the appellant is related to the existence of a so-called presumption of constitutional validity of a law when challenged under the Canadian Charter of Rights and Freedoms and will be dealt with first.

9 The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a Superior Court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in Charter cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the vires of delegated legislation: as I read those cases, there is no essential difference between this type of cases and the Charter cases in so far as the principles governing the grant of interlocutory injunctive relief are concerned.

10 Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The Canadian Charter of Rights and Freedoms and the So-called Presumption of Constitutional Validity

11 According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recognize that a presumption of constitutional validity continues to exist [page122] where legislation is being challenged on the basis of the Canadian Charter of Rights and Freedoms".

12 I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

13 We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force and effect.

14 Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

15 A reason of principle related to the character of the Charter also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.

16 As was said by Lamer J., speaking for himself and five other members of the Court in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 496:

> The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

[page123]

17 The Charter extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed by three years pursuant to s. 32(2) of the Charter, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

18 Furthermore, the innovative character of the Charter affects even traditional rights already recognized before the coming into force of the Charter and which must now be viewed in a new light. In R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, this Court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the Charter to such interpretation of this freedom as had prevailed before the Charter. At pages 343-44 of the Big M case, Dickson J., as he then was, speaking for himself and four other members of the Court, wrote as follows:

> ... it is certain that the Canadian Charter of Rights and Freedoms does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

19 Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the Charter than it has received prior to the Charter: R. v. Oakes, [1986] 1 S.C.R. 103.

20 Thus, the setting out of certain rights and freedoms in the Charter has not frozen their content. [page124] The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the Charter, must remain susceptible to evolve in the future:

> In my opinion the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was

> enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.
>
> (Per Le Dain J., dissenting, although not on this point, in R. v. Therens, [1985] 1 S.C.R. 613, at p. 638.)

21 The views of Le Dain J. reflect those of Dickson J., as he then was, in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

22 In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of this constitutional instrument.

23 This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

24 One such meaning refers to the elementary rule of legal procedure according to which "the one [page125] who asserts must prove" and "the onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": D. Gibson, The Law of the Charter: General Principles (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

25 Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: McKay v. The Queen, [1965] S.C.R. 798. In the Southam case, supra, a Charter case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional". But that was a question of "reading in", not "reading down". The extent to which this rule of construction otherwise applies, if at all, in the field of the Charter is a matter of controversy: Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638, at p. 658 (Ont. C.A.); Black v. Law Society of Alberta, [1986] 3 W.W.R. 590, at p. 628 (Alta. C.A.), leave to appeal has been granted, [1986] 1 S.C.R. x; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés," La Charte canadienne des droits et libertés: Concepts et impacts (1984), pp. 124-26; R.M. McLeod, et al., eds., The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences (1983), vol. 1, pp. 2-198 to 2-209; P.W. Hogg,

Constitutional Law of Canada (2nd ed. 1985), p. 327; D. Gibson, The Law of the Charter: General Principles (1986), pp. 57, 58 and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

[page126]

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceedings Pending the Constitutional Challenge of a Legislative Provision

26 The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

27 It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at p. 330.

(1) The Usual Conditions for the Granting of a Stay

28 Prior to the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law (Halsbury's Laws of England, vol. 24, 4th ed., p. 577). The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec where the distinction between equity and law is unknown. The distinction the English Judicature Act created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to [page127] the Court to be "just and convenient" that such order should be made. See also Boeckh v. Gowganda-Queen Mines, Ltd. (1912), 6 D.L.R. 292.

29 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: Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127, at p. 132; Hal-

dimand-Norfolk Regional Health Unit and Ontario Nurses' Association, [1979] O.J. No. 682, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ.; Daciuk v. Manitoba Labour Board, Man. Q.B., June 25, 1985, Dureault J. (unreported); Metropolitan Toronto School Board v. Minister of Education (1985), 6 C.P.C. (2d) 281 (Ont. Div. Ct.), at p. 292, leave to appeal to the Court of Appeal refused.

30 The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

31 The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843, per McRuer C.J.H.C., at pp. 854-55. The House of Lords has somewhat relaxed this first test in American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court [page128] that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J. speaking for himself and five other members of the Court in a unanimous judgment referred to but did not comment upon this difference in Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, at pp. 9-10.

32 American Cyanamid has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance (Toronto 1983), at pp. 66-77.

33 In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the American Cyanamid description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, Modern Equity (12th ed. 1960), pp. 736-43). In my view, however, 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. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

34 The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves [page129] whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

35 The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suf-

fer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

36 I now propose to consider the particular application of the test of the balance of convenience in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in American Cyanamid, supra, at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

37 It will be seen in what follows that the consequences for the public as well as for the parties, of granting a stay in a constitutional case, do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

38 A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

39 The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to [page130] the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage

40 The limited role of a court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, supra, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

41 The American Cyanamid case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.

42 First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law; see Home Oil Distributors Ltd. v. Attorney-General for British Columbia, [1939] 1

D.L.R. 573, at p. 577; Weisfeld v. R. (1985), 16 C.R.R. 24, and, for an extreme example, Turmel v. Canadian Radio-Television and Telecommunications Commission (1985), 16 C.R.R. 9.

43 Still, in Charter cases such as those which may arise under s. 23 relating to Minority Language Educational Rights, the factual situation as well as [page131] the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff; Marchand v. Simcoe County Board of Education (1984), 10 C.R.R. 169, at p. 174.

44 Furthermore, in many Charter cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case.

45 This latter rule was clearly stated in Gould v. Attorney General of Canada [1984] 2 S.C.R. 124 aff. [1984] 1 F.C. 1133, which set aside [1984] 1 F.C. 1119. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J., dissenting, held at pp. 1137-38 that a court is sometimes entitled to examine the merits of the case and anticipate the result of the action:

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(e) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court to show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.
>
> In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears [page132] to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

46 Mahoney J., whose opinion was generally approved by this Court, took the opposite view (at p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(e) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

47 Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in Cayne v. Global Natural Resources plc., [1984] 1 All E.R. 225, at p. 238. Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the Charter after all and thus will not need to be saved under s. 1; see R. v. Jones, [1986] 2 S.C.R. 284.

48 In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet:

> Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.
> [page133]
> (J.E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 Man. L.J. 21 , at p. 29.)

49 However, the principle I am discussing is not absolute. 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.

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

(ii) The Consequences of Granting a Stay in Constitutional Cases

51 Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to Charter instances. I also propose [page134] to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the Code of Civil Procedure:

> 751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing,

> or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.
>
> 752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.
>
> An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

52 While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

53 Although constitutional cases are often the result of a lis between private litigants, they sometimes involve some public authority interposed between the litigants, such as the Board in the case at bar. In other constitutional cases, the controversy or the lis, if it can be called a lis, will arise directly between a private litigants and the State represented by some public authority; Morgentaler v. Ackroyd (1983), 42 O.R. 659.

54 In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined [page135] from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.

55 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 providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. 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.

56 While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and

advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, [page136] in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

57 The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

58 Société de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the James Bay Region Development Act, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

> [TRANSLATION] ... I am not persuaded that the inconvenience suffered or apprehended by the respondents was of the same order of magnitude as the growing energy needs of Quebec as a whole.

59 Turgeon J.A. reached the same conclusions at p. 177:

> [TRANSLATION] It is important to note at the outset that hydroelectricity is the only primary energy resource the province of Quebec has. With the present acute world oil crisis, this resource has assumed a critical importance in guaranteeing the economic future and well-being of Quebec citizens. The interests of the people of Quebec are represented in the case at bar by the principal appellant companies.
>
> The evidence established that is imperative for Hydro-Quebec to complete its program if it is to meet the growing demand for electricity up to 1985 .... A suspension of work would have disastrous consequences, as it would mean an alternative program would have to be [page137] created to produce electricity by thermal or nuclear plants. [Emphasis added.]
>
> (Leave to appeal was granted by this Court on February 13, 1975, but a declaration of settlement out of court was filed on January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

60 In Procureur général du Québec c. Lavigne, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the Act respecting municipal taxa-

tion and providing amendments to certain legislation, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the Constitution Act, 1867, an allegation which was later sustained by this Court in Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575.

61 The Superior Court had granted an interlocutory injunction for the following reasons, inter alia, at p. 323:

> [TRANSLATION] At the outset it must be said that the case at bar is not an ordinary constitutional question: we are not concerned here with the usual conflict between the jurisdiction of the federal government and one of the provinces, the jurisdictional conflict between two provinces or a province which is alleged to be legislating beyond the limits of powers conferred by s. 92 of the B.N.A. Act.
>
> Rather, this is a very special case (like that of s. 133 of the B.N.A. Act), in which the legislation being challenged is said to be contrary to a constitutional guarantee.
>
> Accordingly, the question is not simply a constitutional one, it involves a guaranteed right, like the language right (133).
> [page138] In the case of a constitutional guarantee, such as language or religion, it will suffice that a person appears prima facie to have been deprived of a right for him to be absolutely entitled to the remedy of an injunction. This follows from the very nature of the constitutional guarantee. When a right is constitutionally guaranteed, it is indefeasible, however extreme the consequences ... [Emphasis added.]

62 The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

> [TRANSLATION] The Superior Court judge, indicating the reasons for issuing the injunctions, held that the disputed provisions prima facie infringed the constitutional guarantee contained in s. 93 of the British North America Act, and that in that case it will suffice that a person is deprived of a right for him to be absolutely entitled to the remedy of an injunction, without the need of presenting evidence on damage or the balance of convenience.
>
> On reviewing the record and considering the arguments submitted to us by counsel for the parties in connection with the Superior Court judgments, the Court is of the view that the right relied on by the plaintiffs, the applicants for an interlocutory injunction, is not clear, that the questions involved are highly complex ones. There is some doubt as to the scope of the constitutional guarantees relied on and the effect of the injunctions is to suspend the operation of a considerable portion of the law throughout the Province of Quebec. In the circumstanc-

> es, the presumption that legislation is valid must prevail over the prima facie uncertain right at this stage of the proceedings. [Emphasis added.]

63 It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the Province.

64 A somewhat similar situation arose in Metropolitan Toronto School Board v. Minister of Education, supra. Interim measure regulations which provided for the funding of separate schools were challenged as being ultra vires by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the [page139] main application. The following words reflect the interest shown by the Court in the preservation of the educational system (at pp. 294-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other, the balance of convenience overwhelmingly is in the latter's favour. The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs. [Emphasis added.]

65 Reference can also be made to Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain Fisheries Officers from enforcing amendments made to the Pacific Commercial Salmon Fishery Regulations, the validity of which had been attacked. And see Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining Fisheries Officers from implementing the fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, and the Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the Fisheries Act. The Court noted at p. 795:

> ... 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; ...

66 These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by [page140] Browne L.J. in Smith v. Inner London Education Authority, [1978] 1 All E.R. 411, at p. 422:

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of conven-

> ience which are referred to by Lord Diplock in American Cyanamid Co v Ethicon Ltd.

67 Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

68 Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373, is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and ultra vires of the Province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into Court from time to time, the amount payable in respect of the taxes claimed.

69 In Campbell Motors Ltd. v. Gordon, [1946] 4 D.L.R. 36, the appellant company sought a declaration that The National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(c)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were ultra vires on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together [page141] with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the Board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an ex parte interim injunction restraining members of the Board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

70 Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (c) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

71 A more recent example can be found in Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.), and Law Society of Alberta v. Black (1984), 8 D.L.R. (4th) 346 (Alta. C.A.). The Law Society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the Charter. The Alberta Court of Queen's Bench granted an interlocutory in-

junction restraining the Law Society from enforcing the two rules against the plaintiff solicitors pending the trial of the action. The Law Society only appealed the order granting the interlocutory injunction with respect to the first rule. In [page142] allowing the appeal, Kerans J.A., who delivered the reasons of the Court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the Cyanamid test simply disappears in such a case.

72 The Morgentaler case, supra, is an exemption case involving the Charter which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the Canadian Charter of Rights and Freedoms and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction, from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the Criminal Code. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed -- that is, what may law enforcement agencies [page143] do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?
>
> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.
>
> For example, let us assume that someone challenged the constitutional validity of the Narcotic Control Act, R.S.C. 1970, c. N-1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing

> and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid.
>
> . . .
>
> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

73 The principles followed in the above-quoted cases have been summarized and confirmed for the greater part by this Court in Gould, supra. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(e) of the Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the Canadian Charter [page144] of Rights and Freedoms which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this Court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(e) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

74 That the respondent inmate had thus a prima facie case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, inter alia, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

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

76 The same principles have been followed recently in Bregzis v. University of Toronto (1986), 9 C.C.E.L. 282, where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of sixty-five, in accordance with the university's mandatory retirement policy. He challenged [page145] the legality of the retirement policy as well as s. 9(a) of the Human Rights Code, 1981, S.O. 1981, c. 53, on the ground that they offended s. 15 of the Canadian Charter of Rights and Freedoms. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both Morgentaler, supra, and Gould, supra, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

77 Another case involving facts somewhat similar to Bregzis is Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146, where the plaintiffs, fifteen doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the Hospital Act, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of sixty-five. The regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the fifteen respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

78 Finally, in Rio Hotel Ltd. v. Liquor Licensing Board, [1986] 2 S.C.R. ix, Rio Hotel Ltd., which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the Charter as well as of ss. 91 and 92 of the Constitution Act, 1867. It had [page146] lost in the New Brunswick Court of Appeal and was threatened with the cancellation of its permit when, in an unreported judgment dated July 31, 1986, this Court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and for hearing the appeal. No reasons were given by this Court but those who were present at the oral argument of the application for leave to appeal and for a stay could easily infer from exchanges between members of the Court and counsel that the Court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) Conclusion

79 It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

80 The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an ex-

emption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

81 The problem had already been raised in the Campbell Motors case, supra, where Robertson J.A. wrote at p. 47 in the above-quoted passage:

[page147]

> If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish ....

82 In a case like the Morgentaler case, supra, for instance, to grant a temporary exemption from the provisions of the Criminal Code to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences ... Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

83 This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, supra, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, supra, and Vancouver General Hospital v. Stoffman, supra, can be considered as exceptional or rare. Even the Rio Hotel case, supra, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.

84 On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, supra, is closer to the [page148] mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

85 One of these instances is Home Oil Distributors Ltd. v. Attorney-General for British Columbia, supra, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the enforcement of the Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was intra vires on its face. The sole ground invoked against it was that it constituted a colourable attempt

to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In Home Oil Distributors Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444, this Court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the Campbell Motors case, supra, at p. 48, in a passage that may amount to a veiled criticism. In my view, the Home Oil Distributors decision of the British Columbia Court of Appeal constitutes a weak precedent.

86 The other instance is Société Asbestos Ltée c. Société nationale de l'amiante, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other [page149] person, physical or corporate, from enforcing any right conferred upon them by Bill No. 70, Loi constituant la Société nationale de l'amiante and by Bill No. 121, Loi modifiant la Loi constituant la Société nationale de l'amiante, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

87 In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Canadian Charter of Rights and Freedoms.

88 I should point out that I would have reached the same conclusion had s. 24 of the Charter been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the Charter clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

[page150]

89 On the whole, I thus find myself in agreement with the following excerpt from Sharpe, op. cit., at pp. 176-77:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part. See in this respect Black v. Law Society of Alberta, supra, p. 453, and the Rio Hotel case, supra.

V Review of the Judgments of the Courts Below

91 Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

92 The main legislative provision under attack is s. 75.1 of The Labour Relations Act of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the Board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(b), (d) and 7 of the Canadian Charter of Rights and Freedoms relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

[page151]

93 The "irreparable harm" test also clearly appears to have been satisfied.

94 As I read her reasons, Krindle J., at p. 153 implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

95 It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

96 The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

97 Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this Court to review these findings.

98 Krindle J. then considered the balance of convenience and I refer in this respect to the above-quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained. [page152] In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

99 While this is an exemption case, not a suspension case, and each case, including a fortiori an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the Board. I have not been persuaded that she committed reversible error in concluding that "the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

100 I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

101 Thus, the Court of Appeal observed that it was open to the Board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" and it noted that the Board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

102 According to the reasons of the Court of Appeal, at p. 182, the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> ... wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit

> "prescribed [page153] by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the Charter of Rights and Freedoms.

103 The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the Board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the Board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the Board's authority and upon the public in general. To repeat what was said by Browne L.J. in Smith v. Inner London Education Authority, supra, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

104 The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above-quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the Labour Relations Act. As previously noted, other provisions in the Act are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the Act, based upon the Charter in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.
>
> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned [page154] motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the Charter.
>
> A stay is therefore granted, with costs in cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

105 With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

106 In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

107 The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a court of appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above-quoted reasons, had been considered and taken into account by Krindle J.

108 The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence [page155] adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock:

> Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's

> exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.
> [page156] In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence 'so virtually we have to consider it all afresh'.
>
> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, it any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only it they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions. [p. 1046.]
>
> (See, also to the same effect, Garden Cottage Foods Ltd. v. Milk Marketing Board, [1983] 2 All E.R. 770 (H.L.))

109 I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

110 But there is more.

111 The Court of Appeal did not exercise its fresh discretion in accordance with the above-stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply [page157] attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

112 The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a prima facie case of violation of the Canadian Charter of Rights and Freedoms will normally trigger a recourse to the saving effect of s. 1 of the Charter. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with Gould, supra, and is inconsistent with the principles set out herein.

VI Conclusions

113 I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

114 There should be no order as to costs.

qp/qlcvd/qlhbb

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Tab 4

Indexed as:

International Corona Resources Ltd. v. Lac Minerals Ltd. (Ont. C.A.)

Between
International Corona Resources Ltd., Plaintiff, (Respondent),
and
Lac Minerals Ltd., Defendant, (Appellant)

[1986] O.J. No. 2128

21 C.P.C. (2d) 252

Supreme Court of Ontario - Court of Appeal
(In Chambers) - Toronto, Ontario

Goodman J.A.

Heard: March 17 and 18, 1986
Judgment: March 19, 1986

(7 pp.)

Practice -- Stay -- Order to transfer land conditional on payment -- Stay pending appeal granted where status quo in parties' best interests and not prejudicing respondent -- Courts of Justice Act, S.O. 1984, c. 11, s. 144(2) -- Ontario Rules of Civil Procedure, RR. 63.01(1), 63.01(2)(b), 63.02(1)(b) -- Ontario Rules of Practice, R. 506.

This was a motion for a stay of proceedings pending an appeal. A judgment required the transfer of certain land upon payment of $153,978,000 or an amount determined on a reference. The defendant sought a declaration that the judgment was automatically stayed under R. 63.01(1), or should be stayed under R. 63.02(1)(b), or by an order under s. 144(2) of the Courts of Justice Act. The parties agreed on terms and conditions of the operation of the lands by the party given interim possession.

HELD: The motion was granted for a stay until the earlier of six months or disposition of the appeal. The appeal was bona fide. It was in the interests of justice to maintain the status quo since this could be done without prejudice to the successful party. Relief was granted under R. 63.02(b) and s. 144(2).

P.S.A. Lamek, Q.C. and I.V.B. Nordheimer, for the Applicant.

A.J. Lenczner, Q.C. and R.G. Slaght, Q.C., for the Respondent.

GOODMAN J.A.:-- The appellant makes a motion for an Order declaring that the judgment herein of the Honourable Mr. Justice R.E. Holland pronounced the 7th day of March, 1986, is, in all respects, automatically stayed pending the disposition of the appeal therefrom, pursuant to Rule 63.01(1) of the Rules of Civil Procedure.

In the alternative the appellant moves for an order, pursuant to Rule 63.02(1)(b) of the Rules of Civil Procedure, staying the said judgment in all respects pending the disposition of the appeal therefrom.

In the further alternative the appellant moves for an Order Pursuant to s. 144(2) of the Courts of Justice Act, 1984, 50 1984, c. 11, permitting the defendant (if permission be necessary) to continue the operation of the property and gold mine in issue in the proceedings pending the final determination of the appeal herein and giving directions to the appellant as to the manner in which and as to the conditions subject to which the appellant shall operate the said property and gold mine pending the disposition of the appeal herein.

It was common ground in the argument before me that it was in the best interests of all parties that the gold mine continue to be operated in a normal manner pending the disposition of this motion no matter who might be successful on the motion.

Counsel for the parties, by commendable cooperation between them, were able to agree on the "t"s and conditions of operating the mine pending disposition of the appeal, which would govern the conduct of the parties to whom interim possession of the property and mine is awarded as a result of this motion.

The operative part of the judgment of Holland J. with which this motion is concerned as set forth in his reasons states "... judgment will go for a declaration that upon payment by Corona to Lac of $153,978,000.00, subject to the right of either party to undertake a reference to the Master at Toronto concerning this amount, together with all sums paid to Mrs. Williams, with the exception of royalties, the Williams' property will be transferred to Corona by Lac."

The parties made lengthy submission with respect to the question whether the order of Holland J. was a mandatory order within the meaning of Rule 63.01(2)(b). The respondent took the position that it was a mandatory order and accordingly the provisions of Subrule (1) which provide that a notice of appeal from an order stays such order until the disposition of the appeal are inapplicable because Subrule 2 provides that Subrule (1) does not apply to a mandatory order. It is to be noted that in Subrule 2 the words "mandatory order" have been Substituted for the word "mandamus" which appeared in former Rule 506.

The appellant took the position that the words "mandatory order" were synonymous with "mandamus" and they were used in the new rules simply to carry out the announced intention of the Special Sub-Committee on the Rules of Court Procedure to dispense with the use of Latin words and phrases in the new rules. The respondent took the position that the words "mandatory order" were wider in scope than the word "mandamus" and that although they included a "mandamus",

they also included an order which, although not covered by the word "mandamus", is mandatory in nature.

The order of Holland J. is undoubtedly mandatory in nature but it is not an conditional order. The obligation to transfer the property is conditional upon the payment by the respondent to the appellant of $153,978,000.00 or such other sum as might be found to be payable on a reference requested by either party. Although the respondent stated it was prepared to pay the $153,978,000.00 forthwith, the appellant does not agree that that is the proper amount. Accordingly it is doubtful whether the mandatory order, if such it be, would be effective to require the appellant to transfer the property forthwith even if no notice of appeal had been served.

In the view I take of this matter, I need not decide whether the order is a mandatory order within the meaning of Rule 63.01(2)(b). Assuming, without deciding, that it is such an order and that accordingly Rule 63.01(1) does not operate as a stay, an order may be made by a judge of the court to whom an appeal has been taken, pursuant to Rule 63.02(1)(b), to stay such order on such terms as are just.

In considering a motion for such an order, it is my view that the presiding judge should consider inter alia, the bona fides of the appeal, which in most cases involves a consideration of the substance of the grounds of appeal, and the hardship to or the prejudice to be suffered by the respective parties if a stay be granted or refused. In more general terms, it must be determined whether it is in the interests of justice that the stay be granted and the burden of proof rests upon the party seeking the stay.

The present case involves a claim for ownership of property of enormous value and/or damages of staggering amount. The trial proceedings took place over a period of five months. There can be no doubt that the appeal is a bona fide appeal. Without in any way expressing any opinion as to the likelihood of the success of the appeal, it can be said that there is some substance to the grounds of appeal. I am of the view that as a general rule it is in the interest of justice that the "status quo" be maintained pending an appeal where such can be done without prejudicing the interest of the successful party. In the present case the appellant has been involved in the development of the gold mine from its inception until it has been brought into production. It has a work force trained to operate the mine including experienced supervisory personnel. Although the respondent has indicated that it is prepared to keep the same employees if it takes over the operation of the mine pending the disposition of the appeal, I have no doubt that such a change in management would have an adverse affect in the operation of the mine for some period of time. In the event that the appellant is successful in its appeal another change in management and control will take place.

It seems clear that the rights of the party who does not take possession of the mine can be adequately protected by the terms and conditions agreed upon by the parties in their memorandum of terms of mine operation filed. In my opinion I would seriously prejudice the appellant if I refused a stay of proceedings pending the disposition of the appeal and the appellant was successful in its appeal. On the other hand I am satisfied that the respondent's interests will not be seriously prejudiced if I grant a stay of proceedings even if the appellant does not succeed in its appeal.

Accordingly, pursuant to the provisions of Rule 63.02(1)(b) and s. 144(2) of the Courts of Justice Act, 1984 an order will go staying the judgment of Holland J. in all respects pending the disposition of this appeal or for a period of 6 months from the date hereof or until further order of this Court, whichever event shall happen the earliest. The order shall permit the defendant to con-

tinue the operation of the property and gold mine in issue herein in accordance with the terms and conditions of the memorandum dated March 17, 1986, agreed upon between the parties and filed with me on March 18, 1986 which shall be incorporated in the order.

The costs of the application shall be reserved to the Court hearing the appeal.

GOODMAN J.A.