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March 5, 2019

Delivered by Email, RESS & Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Application by Enbridge Gas Distribution Inc., Union Gas Limited and EPCOR Natural Gas Limited Partnership for the disposition of Cap and Trade-Related Deferral and Variance accounts for the period 2016-2018
Board File No. EB-2018-0331
Association of Power Producers of Ontario ("APPrO") Submissions on the legal effect of a repeal of legislation

Pursuant to Procedural Order No. 3 in the above referenced proceeding, please find enclosed the written Submissions of APPrO.

Should you have any questions or require further information in this regard, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A. D. Vellone

John A.D. Vellone

cc: All parties to EB-2018-0331

EB-2018-0331

Enbridge Gas Distribution Inc., Union Gas Limited, EPCOR Natural Gas Limited Partnership

Applications for the disposition of Cap and Trade-Related Deferral and Variance, Accounts for the period 2016-2018

Submissions of the Association of Power Producers of Ontario in Response to Procedural Order No. 3

TAB	DOCUMENT
	Association of Power Producers of Ontario Submissions
1.	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014) at para. 6.42-6.53, 24.30-24.43, 25.1-25.11, 25.136-25.164, 25.165-25.175
2.	Piere-André Côté, *The Interpretation of Legislation in Canada* (4th ed.) at p. 105-111 and p. 171-181.
3.	*Spooner Oils Ltd v Turner Valley Gas Conservation Board*, [1933] SCR 629
4.	*Gustavson Drilling 1964 Ltd. v MNR*, [1977] 1 SCR 271 at p. 282-283.
5.	*Canada Employment and Immigration Commission v Dallialian*, [1980] 2 SCR 582
6.	*Summit Golf and Country Club v York (Regional Municipality*, [2008] OJ No 2839 (Div Ct)

SUBMISSIONS

1. The Association of Power Producers of Ontario ("APPrO") files these submissions in response to the Ontario Energy Board's Procedural Order No. 3 on the legal effect of a repeal of legislation.

2. Once the Climate Change Act (as defined below) was repealed it is considered at law to never have existed. The Climate Change Act prohibited the disclosure of certain bidding information as part of the cap and trade regime. That cap and trade regime no longer exists and neither do the prohibitions. The applicants in this proceeding are unable, at law, to rely on sections of the Climate Change Act that prohibited them from disclosing certain information to shield their financial affairs from scrutiny.

3. These submissions are structured in four parts.

   (a) First, APPrO provides background with respect to the OEB's Practice Direction regarding confidential information. This Practice Direction is subordinate to existing laws and regulations;

   (b) Second, APPrO discusses the sections of the Climate Change Act that prohibited disclosure of the bidding information at issue;

   (c) Third, APPrO summarizes the law with respect to the legal effects of repealing legislation; and

   (d) Fourth, APPrO applies that law to the circumstances of this case.

The OEB's Practice Direction Regarding Confidential Information

4. The OEB's *Practice Direction on Confidential Filings* (the "Practice Direction") directs that as a general policy all records should be open for inspection by any person unless disclosure is prohibited by law.

5. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in a given case (section 1).

6. The Practice Direction is subordinate to existing law and regulations (section 2).

The Climate Change Act

7. Section 32(6) and (7) of the now repealed *Climate Change Mitigation and Low-carbon Economy Act*, 2016 ("Climate Change Act") prohibited the disclosure of information by a person participating in an auction (the "Prohibition Sections"). The provisions read as follows:

> (6) No person shall disclose whether or not the person is participating in an auction.
>
> (7) No person shall disclose whether or not the person is taking part in an auction or any other information relating to the person's participation in an auction, including the person's identity, bidding strategy, the amount of the person's bids and the quantity of emission allowances concerned, and the financial information provided to the Director in connection with the auction.

8. The Cap and Trade Regulation (Regulation 144/16) exempted the OEB from the prohibition on disclosure under the Prohibition Sections.

> **65.** (1) For the purposes of subsection 32 (9) of the Act, subsections 32 (6), (7) and (8) of the Act do not apply with respect to,
>
> (a) a disclosure to the Ontario Energy Board; or

9. The Climate Change Act was repealed by the *Cap and Trade Cancellation Act*, 2018 S.O. 2018 c. 13 (the "Repealing Act"). There is nothing in the Repealing Act that purports to continue the effect of the Prohibition Sections.

The legal consequences of repealing legislation

10. The effects of repealing a piece of legislation are found in the Interpretation Acts of the provinces and the common law. In this section, APPrO provides the relevant statutory provisions and case law and commentary with respect to the effect of repealing legislation.

11. The authority on legislative interpretation is a treatise by Ruth Sullivan called *Sullivan on the Construction* of Statutes. Generally speaking, when a provision that repeals legislation comes into force, the repealed legislation ceases to be part of the law and it ceases to have legal effect. This means that everything dependent on the repealed

legislation for its existence or efficacy at the moment ceases to exist or have effect. Regulations lose the force of law; corporate bodies cease to exist; office holders cease to hold office.[1]

12. Similarly, Professor André Coté in his treatise on *The Interpretation of Legislation in Canada* writes that:

> At common law, the effect of repeal of a statute is "to obliterate it as completely from the records of Parliament as if it had never passed".[2]

13. However, there is a common law presumption that the legislature does not intend legislation to be applied so as to interfere with vested rights except if the legislation is explicitly to that effect.[3] As such, the repeal of legislation does not "repeal" vested rights.

14. In Ontario, the common law presumption of vested rights is codified in the ***Legislation Act, 2006***.

15. Section 51(1) of the *Legislation Act* provides:

> 51 (1) The repeal of an Act or the revocation of a regulation does not,
>
> (a) affect the previous operation of the repealed or revoked Act or regulation;
>
> (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

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[1] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014) at para. 6.42, 24.31, 25.166, Tab 1

[2] Piere-André Côté, *The Interpretation of Legislation in Canada* (4th ed.) [Côté] at p. 109, Tab 2

[3] The leading case on this presumption is *Spooner Oils Ltd v Turner Valley Gas Conservation Board*, [1933] SCR 629, Tab 3 where the Supreme Court stated the principle in the following terms: A legislative enactment is not to be read as prejudicially affecting accrued rights, or an "existing status" unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

> (c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;
>
> (d) affect an investigation, proceeding or remedy in respect of,
>
> > (i) a right, privilege, obligation or liability described in clause (b), or
> >
> > (ii) a penalty, forfeiture or punishment described in clause (c).

16. This exception to the continued legal effect of vested rights is narrow. The Supreme Court of Canada has made it clear that no one has a vested right to the continuance of the law:

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and government policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued[4]

17. In other words, the right must be acquired by a specific individual, and not the public in general.[5] The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists.

18. Courts have recognized vested rights in various contexts. For instance, the Supreme Court of Canada held that a new statute cannot affect rights of creditors whose secured or preferred claims were created by an earlier statute.[6] In another example, a person who was in receipt of pension benefits under legislation that was later repealed was held to be enjoying a right or a privilege which had accrued under the repealed enactment.[7]

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[4] *Gustavson Drilling 1964 Ltd. v MNR*, [1977] 1 SCR 271 at p. 282-283; Tab 4.
[5] Côté at p. 172, Tab 2.
[6] Côté at p. 177; See also other examples at p. 178-179, Tab 2.
[7] *Canada Employment and Immigration Commission v Dallialian*, [1980] 2 SCR 582 at p. 594, Tab 5.

19. In contrast, the court held that a party had no vested right to an appeal after the repeal of the statutory provisions that provided for the right to appeal. The right to appeal does not arise unless and until there is an actual event that is capable of being appealed from. In this case, the right did not come into effect until well after the repeal had occurred. It could not therefore be a "right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation." The mere possibility of availing itself of a right of appeal is not sufficient to preserve the right thereafter.[8]

Analysis

20. The issue to be determined by the Ontario Energy Board is whether Enbridge Gas Inc. and EPCOR Natural Gas Limited Partnership had a "right, privilege, obligation or liability that came into existence" under the Prohibition Sections before it was repealed, within the meaning of ss. 51(1)(b).

21. APPrO submits that they did not.

22. Enbridge Gas Inc. and EPCOR Natural Gas Limited Partnership cannot rely on sections from a repealed statute that prohibits them from disclosing certain information such as their bidding strategies and information. The Repealing Act has extinguished the Prohibition Sections. There is no longer a statutory prohibition against sharing information regarding the cap and trade auctions.

23. The Prohibition Sections did not create a vested right that would allow the continuation of the application of the Climate Change Act to the present situation. The Prohibition Sections mandated a certain conduct of the parties in order to ensure that the cap and trade regime operated in a proper manner. In other words, instead of bestowing a right of confidentiality on participants in cap and trade these prohibitions instituted prohibitions to govern their conduct.

[8] *Summit Golf and Country Club v York (Regional Municipality)*, [2008] OJ No 2839 (Div Ct) at paras. 7-9; Tab 6

24. The persons engaging in cap and trade compliance activities do not have a vested right to rely on the Prohibition Sections once that cap and trade regime has been repealed.

25. As such, APPrO submits that the information that was previously held to be Strictly Confidential should instead be processed in the normal course in accordance with the Practice Direction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Original signed by John A. D. Vellone

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John Vellone, counsel for the Association of Power Producers of Ontario

TAB 1

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 6 - ORIGINAL MEANING

Obsolescence

Introduction

§6.42 *Introduction.* Statutes may become obsolete in a number of different ways:

(1) Obsolete application. Although the legislative text remains in force, because of external change there are no longer any facts to which it can apply. Legislation prohibiting the capture or destruction of a species that has become extinct or regulating the treatment of a disease that has been eradicated illustrate this form of obsolescence.

(2) Obsolete purpose or norm. Although the legislative text remains in force, its purpose or the assumptions or values it reflects are no longer accurate or appropriate and its continuing application may produce undesirable consequences. A statute that discriminated against illegitimate children or assumed that nurses are women would be examples.

(3) Spent legislation. When legislation is spent, the legislative text may remain on the books, but because the legal effects of the legislation have all occurred, it has become a dead letter. The most common example of spent legislation is amending legislation. The moment an amendment comes into force, the provisions to be repealed, replaced or added to an enactment are immediately repealed, replaced or added and the amending legislation has nothing further to do. Transitional provisions often operate for many years before they are spent. A provision exempting persons who became Canadian citizens born before 1950 from the application of an amendment would be spent when the last pre-1950 citizen died.

Obsolescence vs. disuse

§6.43 *Obsolescence vs. disuse.* Obsolescence is not the same as disuse. Disuse is well-illustrated by the situation addressed in *R. v. Mercure*.[1] Section 110 of the *Northwest Territories Act*, as consolidated in 1886, required French to be used in legislative debates, in legislation and in judicial proceedings in the Northwest Territories. Those requirements were made applicable to Saskatchewan by s. 16 of the *Saskatchewan Act*, enacted in 1905. In practice, French had ceased to be used in legislative debates and judicial proceedings and in the ordinances of the Territories by 1892. And by the time the appellant received a parking ticket under legislation published in English

only, the requirements in s. 110 had been ignored for almost a 100 years. But the institutions referred to in the original legislation (or their successors) still existed and, as the Supreme Court of Canada held, they were still subject to the requirements of s. 110. In the words of La Forest J., "statutes do not, of course, cease to be law from mere disuse."[2]

Obsolete application

§6.44 ***Obsolete application.*** If no facts exist within the ambit of a legislative provision, obviously it cannot apply. Technically it continues to exist as law, but in practice it has no effect. In some circumstances, obsolescence of this sort is problematic. In *Collins v. British Airways Board*,[3] for example, the Court was asked to apply the articles of the Warsaw Convention establishing limited liability for the loss or damage of "registered baggage". These articles came into force in Britain in 1961, pursuant to the *Carriage By Air Act*. At that time it was customary for airlines to keep registers in which the baggage of passengers was recorded. Some years later this practice was discontinued. Did that mean that the provisions establishing limited liability no longer applied?

§6.45 Although strictly speaking the baggage for which recovery was sought in the *Collins* case was not "registered baggage", the Court was prepared to overlook the obsolete registration requirement in order to give appropriate effect to the obvious intent of the legislation. Lord Denning M.R. wrote:

> What then are we to do? The only solution that I can see is to strike out the words "registered" and "registration" wherever they occur in the articles. By doing this, you will find that all the articles work perfectly ... [4]

The jurisdiction exercised here is reminiscent of the courts' jurisdiction to correct mistakes. The text is effectively rewritten so as to implement the clear intention of the legislature.

Reduced application

§6.46 ***Reduced application.*** On occasion the courts have suggested that a proposed interpretation of legislation should be avoided if it would leave the legislation with little or no practical effect. In *Hills v. Canada (Attorney General)*,[5] for example, the Supreme Court of Canada divided on whether to insist on the original sense or the original interpretation of the word "financing" in s. 44(2)(a) of the *Unemployment Insurance Act*. The section provided that a claimant for unemployment insurance whose loss of work was caused by a work stoppage such as a strike would be ineligible for benefits if he or she were "participating in or financing or directly interested in the labour dispute that caused the stoppage of work". The appellants urged the Court to adopt a narrow reading of the word "financing" in keeping with the interpretation that would have been given when the legislation was first passed.

§6.47 Lamer J., who wrote the dissenting judgment, rejected this approach in part for the following reason:

> ... the interpretation suggested by the appellants would deprive the word "financing" in s. 44(2)(*a*) of its meaning. The word would then have little or no practical effect ... In reading a statute it must be "assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. Parliament ... does not speak gratuitously" ... [6]

The presumption against tautology is well established, but it has no application here. It makes sense to assume that when the legislation *initially* was drafted it was meant to apply to something; the legislature would not engage in a futile exercise. However, there is no guarantee against change and no basis for assuming that legislation enacted at a particular time will always have something to apply to. Although a court might prefer an interpretation that gives current effect to legislation over one that renders it obsolete, it is not obliged by the presumption against tautology to do so.

Obsolete purpose or norm

§6.48 ***Obsolete purpose or norm.*** The courts sometimes conclude that the purpose of an Act or a particular provision has become obsolete. Generally speaking, if legislation is applicable to existing facts, the courts cannot refuse to apply it solely because the purpose served by the legislation is obsolete or it reflects values or assumes facts that are no longer current. This point was made in Charlottetown Area Development Corp. v. Harbourside Tenants, Charlottetown, P.E.I ., where the Court wrote:

> No one contests the fact that the *Rent Review Act* was enacted as an anti-inflationary measure ... The intent was to prevent large increases in rents during the highly volatile inflationary times of the late 1970's ...
>
> Unfortunately for landlords, when inflation stabilized, the *Rent Review Act* was never repealed or amended. However, that is no concern of the Court. It is up to the Legislature to repeal or amend.[7]

The decision to pursue a social goal, eradicate a mischief or promote a policy lies at the heart of the legislative function. It would exceed the constitutional role of the courts to effectively reverse this decision by refusing to apply legislation to existing facts.

§6.49 Although the courts cannot refuse to apply legislation because it is obsolete, they can interpret it in a way that minimizes its undesirable impact.

§6.50 In *Re Vabalis*,[8] for example, the Ontario Court of Appeal relied on the presumption against absurdity. The Court was faced with a provision that required any married person applying for a change of surname to apply to have their spouse's surname changed as well. This provision made sense when women automatically assumed their husband's name upon marrying. However, when a woman has kept her birth name, the provision leads to irrational results. In the *Vabalis* case, the applicant wished to adopt a more anglicized version of her birth name which she had retained upon marrying. If the provision were applied as written, her husband would have been obliged to change his name as well to the anglicized version of his wife's birth name. This clearly was not the sort of result the legislature had in mind. The Court dealt with the problem as follows:

> We are all agreed that the literal interpretation of s. 4(1) as requiring a change of name of the applicant's spouse in the present

> situation would lead to an obvious absurdity. A statute enacted by the Legislature of this province should not be so interpreted ...
>
> We are satisfied that in a society where it is not uncommon for married persons to use a name other than the name of the spouse, it would not be reasonable to require that the spouse whose name is different should adopt the change of surname.[9]

The Court avoided this absurd outcome by effectively reading down s. 4(1) so that it applied to "any married person applying for a change of surname whose surname is the same as his or her spouse".

§6.51 In *Hills v. Canada (Attorney General)*,[10] a majority of the Supreme Court of Canada held that union members were not "financing" a strike by members of another local of the same union simply because some of their union dues, which they were obliged to pay, were deposited into a general union account from which money was drawn to pay striking workers. Although the sense of "financing" was broad enough to apply to such facts, when the provision was first enacted "financing" would have been understood as referring to voluntary, intentional and direct contributions by individual union members to striking workers. L'Heureux-Dubé J. wrote: "While today interpreting the term 'financing' [in this way] may appear to deprive the term of much of its application, this is merely a historical contingency which does not entail a conclusion that such an interpretation is unwarranted."[11]

§6.52 In *Abakhan & Associates Inc. v. Braydon Investments Ltd.*,[12] the British Columbia Court of Appeal struck the words "by collusion, guile, malice or fraud" from s. 1 of British Columbia's *Fraudulent Conveyance Act*, on the grounds that those words "no longer perform a meaningful function in the text."[13] Section 1 provided:

> 1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> (a) a disposition of property, by writing or otherwise,
>
> ...
>
> is void and of no effect against a person ... whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded ...

The Court noted that the British Columbia legislation was modelled on the 1571 *Statute of Elizabeth*, which included a provision making fraudulent dispositions to defeat creditors a crime, resulting in forfeitures and imprisonment. This provision was also included in the original British Columbia *Fraudulent Conveyance Act* and was carried forward through successive amendments and re-

enactments of that Act until it was declared unconstitutional in 1965 and formally repealed in 1987. The Court also noted that the case law applying s. 1 after the repeal of the criminal law provision in 1987 had consistently ignored the words "by collusion, guile, malice or fraud".

§6.53 In the *Abakhan* case, the Court in effect concluded that once the penal provision was removed from the statute, the reference to a criminal intent in s. 1 became obsolete. However, rather than asserting a jurisdiction to cure obsolescence, it apparently relied on its jurisdiction to correct drafting errors: if words in a text perform no meaningful function, if they are the result of a drafting mistake (in this case, the failure to repeal them when they no longer reflected legislative intent), the words may be struck by the Court.

Footnote(s)

1 [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.).

2 *Ibid*., at 256.

3 [1982] 1 All E.R. 302 (C.A.).

4 *Ibid.*, at 306. See also *R. v. Paul*, [1982] S.C.J. No. 32, [1982] 1 S.C.R. 621 (S.C.C.), discussed in Chapter 2, at §2.17; *Province of New Brunswick, as represented by the Department of Natural Resources v. Aiken et al*., [2009] N.B.J. No. 279, 2009 NBCA 54, at paras. 21-22 (N.B.C.A.).

5 [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

6 *Ibid.*, at 562. The quotation is from P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville: Les Éditions Yvon Blais Inc., 1984), p. 210.

7 [1987] P.E.I.J. No. 73, 64 Nfld. & P.E.I.R. and 197 A.P.R. 328, at paras. 11-12 (P.E.I.S.C.). See also *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.), where La Forest J. (quoting E. A. Driedger, *The Composition of Legislation* (2d ed. rev. 1976), at p. 110) wrote at p. 255: "A statute is not effaced by lapse of time, even if it is obsolete or has ceased to have practical application". Compare *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, [2002] F.C.J. No. 1504, 2002 FCA 417, [2003] 2 F.C. 451, at para. 48 (F.C.A.), where the Court refused to deviate from the costs tariff, even though it was obsolete in many instances, to the following cases in which the courts were prepared to deviate from obsolete tariffs: *Bankruptcy of Brian Juce*, [2006] M.J. No. 470, 2006 MBQB 298, at para. 38 (Man. Q.B.); *Biron c. Caisse Populaire Desjardins Buckingham*, [2003] J.Q. no 4179, at paras. 33-37 (Q.C.C.A.); *Re Unified Technologies Inc.*, [1995] O.J. No. 4550, 32 C.B.R. (3d) 182 (Ont. Gen. Div.).

8 [1983] O.J. No. 3200, 2 D.L.R. (4th) 382 (Ont. C.A.).

9 *Ibid.*, at 383-84.

10 [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

11 *Ibid*., at 555.

12 [2009] B.C.J. No. 2315, 2009 BCCA 521 (B.C.C.A.), leave to appeal refused [2010] S.C.C.A. No. 26 (S.C.C.).

13 *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, [2009] B.C.J. No. 2315, 2009 BCCA 521, at para. 70 (B.C.C.A.), leave to appeal refused [2010] S.C.C.A. No. 26 (S.C.C.).

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 24 - TEMPORAL OPERATION

Repeal

Rules governing repeal

§24.30 ***Rules governing repeal.*** When legislation provides that it is to come to an end at a designated time, it is said to "expire".[1] When legislation is ended by an Act of the legislature, it is said to be "repealed". A statute is not repealed, nor does it expire, through the passage of time or by reason of non-use or obsolescence.[2] Unless the legislature has fixed a limit for the duration of legislation, it continues in force until it is repealed.

§24.31 Repeal is the key terminal event in the operation of legislation. At common law, when a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects. This means that conduct that was formerly prohibited is now lawful. It also means that everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce effects. Regulations lose the force of law and become mere pieces of paper; holders of office become ordinary citizens; corporate bodies cease to exist.[3]

§24.32 The basic principle underlying the common law effects of repeal was stated by Lord Tenterden in *Surtees v. Ellison*:

> ... when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) *as if it had never existed*.[4]
>
> [Author's emphasis]

This rule has some startling implications, both for the operation of legislation and for the temporal application of repeal. It implies, for example, that upon the repeal of legislation any previously existing law that was displaced by the repealed legislation is revived. In effect, the displacement that occurred when the repealed legislation first came into force is deemed never to have occurred. It also implies that repeals apply retroactively. Except for transactions already past and closed when the repeal took effect, the repealed law ceases to be applicable not only to facts occurring after the repeal but to pre-repeal facts as well.

§24.33 Neither of these implications has been allowed to stand. Canadian Interpretation Acts provide that repeal does not revive legislation or anything that was not in existence at the time of the repeal.[5] These Acts also provide for the survival or continued application of repealed legislation

to facts arising in whole or in part prior to repeal. The rules governing survival are examined in Chapter 25 dealing with the temporal application of legislation.

Repeal techniques

§24.34 ***Repeal techniques.*** In principle, the legislature has a range of techniques available to effect a repeal. In practice, however, the usual method of repeal in Canadian jurisdictions is highly stylized. Using a standard form of words, the legislature enacts a provision that declares certain legislation to be repealed.[6] If an amendment is contemplated in addition to repeal, the provision declares that the following words or provisions are substituted for the repealed legislation. The repeal does not operate until the repealing or amending provision comes into force.

§24.35 Most Interpretation Acts define "repeal" to include "revoke or cancel".[7] This ensures that regulations are covered by the statutory provisions governing repeal. In addition, the federal *Interpretation Act* provides:

> 2.(2) For the purposes of this Act, an enactment that has been replaced is repealed and an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.[8]

This section makes it clear that provisions replaced in the course of an amendment are effectively repealed and therefore are subject to the survival provisions of the Act. On their face, the words "ceased to have effect" appear to encompass inoperative legislation. However, such an interpretation would undermine the distinction between provisions that are genuinely repealed, that is, have ceased to be part of the law, and those that are merely suspended for a definite or indefinite period. Properly understood, inoperative legislation has not ceased to be part of the law; its operation is only suspended in so far as necessary and for as long as necessary to avoid conflict with paramount legislation. It should therefore not be deemed to have been repealed.

Implied repeal

§24.36 ***Implied repeal.*** In Canadian law, the concept of implied repeal is relied on for two distinct purposes: (1) to resolve a conflict between two provisions, each of which is a valid provision forming part of the existing law of a jurisdiction;[9] (2) to determine that a provision has effectively been repealed despite the absence of an express legislative provision declaring the repeal.

§24.37 When implied repeal is relied on to resolve conflict, it operates as a paramountcy rule: the subordinate legislation is rendered inoperative. Unlike a repealed provision, a provision that is partly or entirely inoperative resumes full operation upon repeal of the paramount law. When implied repeal is relied on to determine that a provision has been effectively repealed, the provision ceases to form part of the law and the rules applicable to a true repeal apply.

§24.38 From a theoretical perspective, there is no reason not to regard implied repeal as a form of true repeal equivalent in effect to an express repeal. As a sovereign power, a legislature is not

obliged to adopt an express or standard method of repeal. So long as it adequately communicates the intended result, no special formula is necessary. By enacting new legislation that leaves no room for the operation of an existing provision, the legislature impliedly expresses an intention to replace the old provision.

§24.39 However, as noted above, under current Canadian practice repeal is usually carried out through the enactment of stylized provisions in which the legislation to be repealed is expressly designated.[10] Governments go to considerable care and expense to ensure that the temporal operation of legislation is clear and explicit and that the body of statute law in force at a given time is easily ascertainable. Millions of dollars have been spent on periodic statute revisions[11] and millions more on the use of computer technology to create ongoing consolidations.[12] Repeal by implication is inconsistent with this approach to statute law.[13] This explains why there are few Canadian cases that rely on implied repeal for this purpose, and it also justifies judicial insistence on a stringent test.

§24.40 In *R. v. Mercure*,[14] La Forest J. wrote:

> ... [S]tringent tests ... have been established to warrant a holding that a statute has been impliedly repealed. As the court put it in *The India* [[15]] ... a prior statute is repealed by implication only 'if the entire subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provisions in the prior statute could not have been intended to subsist' ... [16]

§24.41 An example of implied repeal in which this stringent test was met is found in *Canada v. Schmidt*.[17] It concerned the committal of the appellant for extradition to the United States on a charge of child stealing. The committal was resisted in proceedings on a writ of *habeas corpus*, followed by an appeal, first to the Ontario Court of Appeal and then to the Supreme Court of Canada. A preliminary issue in the second appeal was whether the Court had jurisdiction. Section 40 of the *Supreme Court Act* provided:

> 40. No appeal to the Supreme Court lies ... in proceedings for or upon a writ of *habeas corpus*, *certiorari*, or prohibition arising out of a criminal charge, or in proceedings for or upon a writ of *habeas corpus* arising out of a claim for extradition made under a treaty.

Section 719(5) of the *Criminal Code*, enacted many years later, included a contrary provision:

> 719.(5) Where a judgment is issued on the return of a writ of *habeas corpus ad subjiciendum*, an appeal therefrom lies to the court of appeal, and from a judgment of the court of appeal to the Supreme Court of Canada, with the leave of that court ...

§24.42 The Court considered whether the *Criminal Code* provision should be interpreted narrowly to exclude proceedings relating to extradition. That would have resolved the conflict by treating the provision respecting extradition in s. 40 of the *Supreme Court Act* as an implied exception to s. 719(5) of the Code. However, because the latter section was introduced into the Code by amendment in response to a series of extradition cases, this interpretation was not appropriate. It

seemed clear from its legislative history, and from certain textual clues, that the amendment reflected a change in government policy on the question of appeals and was intended to apply to all *habeas corpus* proceedings, not just those arising under the *Criminal Code*. In these circumstances, the Court concluded that the earlier legislation could not have been intended to survive. La Forest J. wrote:

> In enacting this provision, Parliament obviously overlooked s. 40 of the *Supreme Court Act*. It must, however, be taken to have been superseded by the later provision. To the extent that there is conflict between s. 40 of the *Supreme Court Act* and s. 719 of the *Code*, then, s. 40 has been impliedly repealed.[18]

The later provision here did more than carve exceptions out of the earlier one. It changed the rule governing appeals in a way that was comprehensive and expressed a new policy toward the matter in question. It left no room for the earlier provision to operate. In such circumstances, it is appropriate to find that the later provision has truly repealed the earlier one.

§24.43 In the *Schmidt* case La Forest J. rightly associated implied repeal with oversight or mistake. When a provision is meant to completely displace or subsume existing legislation, as the *Criminal Code* provision did in *Schmidt*, a competent drafter would provide for its express repeal, provided it came to his or her attention. Given the enormity of the statute book, it is not surprising that such oversights occur.

Footnote(s)

1 Expiry is a form of repeal that is rarely used by legislatures. It is governed by the same rules as repeal. See *Moakes v. Blackwell Colliery Co.*, [1925] 2 K.B. 64, at 70 (C.A.).

2 For discussion of judicial responses to obsolete legislation, see Chapter 6, at §6.42*ff*.

3 See *Kay v. Goodwin* (1830), 6 Bing. 576, 130 E.R. 1403, at 1405 (C.P.); *Surtees v. Ellison* (1829), 9 B. & C. 750, 109 E.R. 278, at 279 (K.B.).

4 *Surtees*, *ibid*., at 279. See also *R. v. A.D.*, [2005] S.J. No. 100, at para. 32 (Sask. C.A.); *Kay*, *ibid*., at 1405.

5 R.S.C. 1985, c. I-21, s. 43(a); R.S.A. 2000, c. I-8, s. 35(1)(a); R.S.B.C. 1996, c. 238, s. 35(a); C.C.S.M. c. I80, s. 46(1)(a); R.S.N.B. 1973, c. I-13, s. 8(1)(a); R.S.N.L. 1990, c. I-19, s. 29(1)(a); R.S.N.S. 1989, c. 235, s. 23(1)(a); S.O. 2006, c. 21, Sched. F, s. 51; R.S.P.E.I. 1988, c. I-8, s. 32(a); CQLR, c. I-16, s. 9 [rep. & sub. S.Q. 1982, c. 62, s. 153]; S.S. 1995, c. I-11.2, s. 34(1)(a); R.S.N.W.T. 1988, c. I-8, s. 35(a); R.S.N.W.T. (Nu) 1988, c. I-8, s. 35(a); R.S.Y. 2002, c. 125, s. 23(1)(a).

6 But see *Canfield v. Prince Edward Island*, [1998] P.E.I.J. No. 21, at paras. 52-56 (P.E.I. C.A.), where the Court held that whether an enactment has been repealed is a matter of legislative intent; it is not necessary to use the word "repeal".

7 R.S.C. 1985, c. I-21, s. 2(1); R.S.A. 2000, c. I-8, s. 1(1); R.S.B.C. 1996, c. 238, s. 1; C.C.S.M. c. I80, s. 1; R.S.N.L. 1990, c. I-19, s. 2(1)(c); R.S.N.S. 1989, c. 235, s. 7(1)(y); R.S.P.E.I. 1988, c. I-8, s. 1(f); S.S. 1995, c. I-11.2, s. 2; R.S.N.W.T. 1988, c. I-8, s. 1; R.S.N.W.T. 1988, c. I-8, s. 1; R.S.Y. 2002, c. 125, s. 1(1).

8 R.S.C. 1985, c. I-21, s. 2(2) [rep. and sub. S.C. 1993, c. 34, s. 88; am. S.C. 2003, c. 22, s. 224(z.43) (E)]; see also R.S.A. 2000, c. I-8, s. 1(2); R.S.B.C. 1996, c. 238, s. 4(4); C.C.S.M. c. I80, s. 45; R.S.N.L. 1990, c. I-19, s. 2(2); R.S.P.E.I. 1988, c. I-8, s. 5(3); R.S.Y. 2002, c. 125, s. 1(2).

9 Reliance on implied repeal to resolve conflict is dealt with in Chapter 11.

10 When the *Criminal Code* was first made applicable to Newfoundland after it became a Canadian province, Parliament enacted that "all laws that are in force in Newfoundland at the time of the coming into force of this Act and are inconsistent with or repugnant to the *Criminal Code*, are repealed and abolished": S.C. 1950, c. 12, s. 2. Although repeal in this form is an exception to the statement in the text, it may be understood as a codification of the constitutional doctrine of paramountcy. The idea presumably was to put Newfoundland in the same position as all the other provinces in relation to the *Criminal Code*.

11 Statute revision is discussed below at §24.50*ff*.

12 Consolidation is discussed below at §24.47-24.49.

13 See *Meridian Developments Ltd. v. Nu-West Group Ltd.*, [1984] A.J. No. 983, 6 D.L.R. (4th) 663, at 670 (Alta. C.A.).

14 [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.).

15 (1865), 12 L.T.N.S. 316, at 316.

16 *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234, at para. 40 (S.C.C.). This test was applied by the Supreme Court of Canada in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] S.C.J. No. 42, 2013 SCC 42, at para. 44*ff*. (S.C.C.), in concluding that a received British enactment had not been impliedly repealed by subsequent British Columbia legislation.

17 [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.). See also *Ells v. Ells*, [1979] N.S.J. No. 552, 32 N.S.R. (2d) 51 (N.S.C.A.); *Bell v. British Columbia*, [1992] B.C.J. No. 1543, 71 B.C.L.R. (2d) 8 (B.C.S.C.). For an example of implied repeal in which this stringent test was not applied, although it may have been met, see *LSJPA - 0914*, [2009] J.Q. no 4075, 2009 QCCA 839, at para. 37 (Que. C.A.).

18 *Ibid.*, at 514.

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CHAPTER 25 - TEMPORAL APPLICATION

Introduction

Sources of law

§25.1 ***Sources of law*.** The rules governing the temporal application of legislation[1] come from a variety of sources and take a variety of forms. Some temporal application rules are found in the *Canadian Charter of Rights and Freedoms*.[2] Paragraphs 11(g) and (i) provide:

> Any person charged with an offence has the right
>
> ...
>
> g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> ...
>
> i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.[3]

In addition, any retroactive deprivation of life, liberty or security of the person is likely to violate the principles of fundamental justice protected by s. 7. To date, these rules have not had much impact on transitional law in Canada -- largely because there is little inclination on the part of Canadian legislatures to violate them.[4]

§25.2 The major source of Canadian transitional law is the body of general rules found in federal and provincial statutes like Interpretation Acts, Regulation Acts and Statute Revision Acts. These Acts apply generally to the legislation produced by the jurisdiction, subject only to indications of a contrary legislative intent in particular enactments. While the rules contained in these Acts are helpful, in most jurisdictions they are in need of reform. Typically they are drafted in a style that is dated, and they embody a formalistic, rule-based approach to the subject that is equally dated. In nearly all areas of statutory interpretation, the courts have moved from formalism to functionalism, and from a rule-based approach to a principle-based approach. As reflected in Driedger's modern principle, the courts rely on a mix of textual and purposive analysis and legal norms to reach an outcome in keeping with the legislature's intention. While this approach is equally effective in resolving transitional problems, and is often used in practice, its use is hindered rather than encouraged by the general statutory rules.

§25.3 A third source of transitional law is the common law. The rules found in Interpretation Acts

and elsewhere only partially codify the law governing the temporal application of legislation. Furthermore, these rules draw heavily on common-law concepts like vested rights and the distinction between substantive and procedural law. For this reason, the common law remains an important source of law in this area.

§25.4 The final and most useful source of transitional law is the new legislation whose application is in issue. Whenever the law is changed, the law-maker must address the transitional problems that may arise when the new law comes into force. Once identified, these problems may be dealt with in transitional provisions set out in the new legislation, usually at the very end. Transitional provisions are often straightforward applications of general statutory or common law rules, but they need not be. The legislature can adopt whatever solution seems appropriate for the anticipated transitional situations.[5] In the event of a conflict between a specific transitional provision and a general rule, the specific provision prevails.

Principles underlying transitional law

§25.5 ***Principles underlying transitional law.*** An appreciation of the concerns underlying transitional law provides a sound basis for dealing with transitional issues in a coherent and functional way. It will not make transitional law easy, but it may avoid some of the problems that arise in trying to determine whether a particular application is retroactive as opposed to retrospective or retrospective as opposed to immediate.

§25.6 The most compelling concern underlying transitional law is the rule of law and the values served by rule of law -- certainty, predictability, stability, rationality, and formal equality. One of the great virtues of law is that it provides a stable framework within which people can carry on their activities. Law that changes too frequently or quickly or in an unexpected way undermines the sense of security of citizens and their willingness to participate in the relationships and activities on which a stable society and economy depend. Principles of fairness are also important.[6] Finally, there is the traditional common law commitment to protecting private law rights.

§25.7 Perhaps the most fundamental tenet of the rule of law is that those who are governed by law must have knowledge of its rules before acting; otherwise, any compliance with the law on their part is purely accidental. Citizens must have knowledge of the law before acting so they can adjust their conduct to avoid undesirable consequences and secure desirable ones. To ensure adequate notice, the rules enacted by legislatures must be published and adequately publicized -- ideally before commencement but at the latest on commencement. Furthermore, the content of the rules must be clearly communicated. These requirements ensure that people have the knowledge they need to make intelligent choices. Citizens cannot comply with, rely on or take advantage of the law unless they know what it is before deciding what to do.

§25.8 The retroactive application of legislation is a direct assault on the principle of adequate notice. Although it is not possible for a legislature to really change the past, when it enacts retroactive legislation it fictitiously deems the past to have been different from what it was. In actual

fact, when X made a decision to act or not act in a particular way, the law said one thing. Sometime later, when it is impossible for X to do anything about his or her decision, the law is deemed to have said a different thing. This undermines X's agency. At best retroactive law makes it impossible for people to know whether they are complying with the law; at worst it imposes negative consequences on them for attempting to do so. Consider the following example:

> On January 1, 1999, in an effort to eliminate mosquitoes, legislation comes into force that requires all landowners to spray D.D.T. on their land.
>
> X complies with the law, but Y does not.
>
> On January 1, 2000, legislation comes into force that makes it an offence for a person to spray or have sprayed D.D.T. on any land within the jurisdiction, before or after the coming into force of the legislation.

As a result of the new legislation X will find himself in the absurd position of having violated the law because he in fact complied with it whereas Y, who in fact disregarded the law, will be vindicated instead of punished. Such displays of irrationality necessarily undermine respect for the law.

§25.9 In assessing the temporal application of legislation, another major consideration is fairness. It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences. Change that could, or should, have been anticipated by those affected at the time of reliance is less objectionable than totally unpredictable change. Similarly, change that confers advantages on those affected is less objectionable than change that is purely or mostly detrimental.

§25.10 Judgments about fairness also depend on the nature of the affected interest. Historically, common law courts have been preoccupied with ensuring a stable legal framework for the free exchange and enjoyment of private rights, particularly real property rights and rights arising under contracts. These are taken to be the basis of free enterprise and the market economy and legislative interference with such rights has been strongly resisted by the courts. More recently, the preoccupation with private rights has been tempered by acceptance of the legislature's mandate to pursue initiatives in the public interest. In some circumstances it is not only necessary but also fair to curtail private rights in order to achieve a public good.

The current state of Canadian transitional law

§25.11 ***The current state of Canadian transitional law.*** Currently transitional law in Canada is in a state of confusion. This area of law has always been difficult, in Canada and elsewhere. It is difficult because although legislation starts and stops operating at a precise, readily identifiable moment, the facts to which it applies and their operation in time are often not readily identifiable. This fundamental difficulty is not easy to overcome. In recent years, attempts to do so in Canada have led to such complex classifications and subtle distinctions that transitional law has become something of a morass. To escape from a morass, it is helpful to appreciate how one came to be

there. The next section therefore reviews the evolution of transitional law in Canada, which is distinctive in a number of respects.

Footnote(s)

1 The law governing the temporal application of legislation is often referred to as transitional law. In this text, the terms are used interchangeably.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

3 Section 37 of Quebec's *Charter of Human Rights and Freedoms* has comparable provisions, as do Canadian Interpretation Acts.

4 However, see *Canada (Attorney General) v. Whaling*, [2014] S.C.J. No. 20 (S.C.C.), where the Court held that the retrospective extension of a person's period of incarceration violated s. 11(h) of the *Charter*. The Court did not rule out the possibility that s. 7 might have applied if s. 11(h) had not. The Court appears to use the terms "retrospective" and "retroactive" interchangeably in the judgment.

5 In the case of regulations, however, any transitional provisions must comply with the presumptions examined in this chapter, in the absence of express authorization to depart from them. See below at §25.176-25.177.

6 In *Merck Frosst Canada & Co. v. Apotex Inc.*, [2011] F.C.J. No. 1664, 2011 FCA 329, at para. 53 (F.C.A.), speaking for the Court, Stratas J.A. wrote:

> The concern of courts about unauthorized regulations that cause retrospective or retroactive effects or interfere with vested rights is founded upon aspects of the rule of law. "Citizens choose how to act in the belief that the state will impose the legal consequences determined by the legal text discoverable at that time and not on other texts which were not in existence at the time of the relevant action": Sampford et al., *Retrospectivity and the Rule of Law*, *supra* at page 98. It is unfair to change the rules later and catch those who planned their affairs under the former law: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), 2005 SCC 49 at paragraph 71, 2005 SCC 49 (CanLII), [2005] 2 S.C.R. 473; E. Edinger, "Retrospectivity in Law" (1995) 29 U.B.C. L. Rev. 5, at page 13; Joseph Raz, "The Rule of Law and its Virtue" (1977), 93 L.Q.R. 195 at page 198; Andrew P. LeSueur, et al., *Principles of Public Law*, 2d ed. (London: Cavendish Publishing Limited, 1999) at page 425.

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CHAPTER 25 - TEMPORAL APPLICATION

Interference with Vested Rights

The common law presumption

§25.136 ***The common law presumption.*** It is presumed that the legislature does not intend legislation to be applied in circumstances where its application would interfere with vested rights. In the *Gustavson Drilling* case, Dickson J. wrote:

> The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction ... The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective [retroactive] or prospective ... [1]

If the application of a provision would interfere with vested rights, the courts refuse to apply it unless there is evidence that it was meant to apply despite its prejudicial impact.

§25.137 Reliance on the presumption against interfering with vested rights is illustrated by the judgment of the British Columbia Court of Appeal in *Canada (Attorney General) v. Lavery*.[2] In 1987, the Crown in right of Canada instituted an action *per quod servitium amisit* to recover damages suffered by one of its servants. In 1988, before the action came to trial, the legislature enacted a provision that abolished this cause of action. The Court refused to apply the new legislation to the Crown's pending action because to do so would interfere with the Crown's vested right. There was nothing in the legislation, or the circumstances in which it was passed, to suggest that this effect was intended. Taylor J.A. wrote:

> The simple statement that "the action *per quod servitium amisit* is abolished", without more, is, in my view, clearly inadequate to overcome the presumption [against interference with vested rights].
>
> The purpose of rules of restrictive interpretation of this sort is not to "cut down" the effect of a legislative enactment. It is to guard against the danger of giving to words of the legislature wider effect than the legislators may in fact have intended ... [T]he court must be satisfied that the legislators did indeed intend to take away rights already "vested".[3]

To avoid an unintended curtailment of rights, the Court limited the application of the 1988 provision to causes of action arising after its coming into force.

Reasons for presumption

§25.138 ***Reasons for presumption.*** The primary justification for the presumption against interfering

with vested rights is explained by Duff J. in *Upper Canada College v. Smith*:

> ... speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.[4]

To deprive individuals of interests or expectations that have economic value is akin to expropriation without compensation, which has never been favoured by the common law. If the application of new legislation creates special prejudice for some, or windfalls for others, the burdens and benefits of the new law are not rationally or fairly distributed. This not only affects the individuals involved but tends generally to undermine trust in the fairness and stability of the law. For these reasons, interference with vested rights is avoided in the absence of a clear indication of legislative intent.

§25.139 In *Upper Canada College*, the plaintiff had negotiated a contract that was valid and enforceable at the time it was made. Under the new legislation it became unenforceable. Applying the new legislation to this contract would have produced a windfall for the defendants and unfair loss for the plaintiff. In the absence of evidence to the contrary, the Court concluded that the legislature could not have intended these effects.

Recognizing vested or accrued rights

§25.140 ***Recognizing vested or accrued rights.*** To determine what is a vested or accrued right, the courts focus sometimes on the common law presumption and sometimes on the language of the Interpretation Acts.[5] Regardless of focus, the central problem is the same. The court must decide whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.

§25.141 Some vested rights are easily recognized. Property rights, contractual rights, and rights to damages or other common law remedies are well-established categories. So are defences and immunities from suit.[6] For the most part, these are "private law" rights with a respectable common law pedigree; their importance is taken for granted. Moreover, it usually is possible to identify a specific point at which these rights arise and can be said to "belong" to a claimant. The acquisition of property rights, for example, normally occurs at a particular and well-documented moment, in accordance with statutory or common law rules. Rights under contracts arise on the effective date of the instrument. Rights under wills arise when the testator dies. Rights of action arise the moment the last fact necessary to constitute the cause of action is complete. Rights to plead limitation periods arise the moment the action is statute-barred. A litigant's right to costs arises when the judgment is signed.

§25.142 Outside these traditional categories, it can be difficult to predict when a given interest or expectation will be recognized as a vested or accrued right. There is a vast range of claims that may be made by members of the public for statute-based benefits, authorizations, exemptions, remedies,

orders and the like. The methods of establishing and enforcing those claims follow no fixed pattern. Some entitlements depend on matters within the claimant's control, while others depend on the actions or choices of others. In each case, the court must decide whether at the moment of repeal[7] the individual's statutory claim was sufficiently defined and developed, and sufficiently in his or her possession, to count as a vested right. This is a judgment call that is informed by the legal norms underlying the presumption, as the Supreme Court of Canada in *Outremont (City) v. Outremont (City) Protestant School Board* clearly acknowledged:

> [A] vested or accrued right is a claim or interest that cannot be defeated without causing grave injustice; it is something that should be protected because to take it away would be arbitrary or unfair.[8]

The official test

§25.143 ***The official test.*** The issue of when an interest or expectation achieves the status of a vested or accrued right was addressed by the Supreme Court of Canada in *Dikranian v. Quebec (Attorney General*).[9] The case involved the terms for repaying student loans that were obtained by the appellant between 1990 and 1996. The loans were made by a bank in the context of a program established by Quebec's *Act respecting financial assistance for students*. The contracts between the appellant and the bank provided that the appellant was not obliged to pay interest to the bank until a certain date. The Act provided that the government was obliged to pay the interest during this honeymoon period. However, legislative amendments coming into force in 1997 and 1998 moved the student payment date forward, thereby transferring more of the interest burden from the government to the appellant. The appellant claimed to have a vested right in the repayments terms set out in his original contracts with the bank. The Court agreed and took the occasion to review the law governing the presumption against interference with vested rights. On the question of when a right is vested, Bastarache J. wrote:

> Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61).
>
> I am satisfied from a review of the case law of this Court and the courts of the other provinces that [this] analytical framework ... is the correct one.
>
> ... The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, [[10]] the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued ... [[11]] In other words, the right must be vested in a specific individual.
>
> But there is more. The situation must also have materialized (Côté, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question ... [J]ust as the hopes or expectations of a person's heirs become rights the instant the person dies ... , and just as a tort or delict instantaneously gives rise to the right to compensation ... , rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Côté, at p. 163).[12]

§25.144 As Bastarache J. observes, rights created by contract normally vest when the contract is

concluded. However, in this case the contract was simply a mechanism by which the government delivered a benefit to a class of persons; what the new legislation interfered with was less a contractual right than a statutory benefit. If the appellant's rights had been characterized in this way -- as public law rights -- the outcome would not be so obvious. As Dickson J. wrote in *Gustavson Drilling*, "no one has a vested right to the continuance of the law as it stood in the past."[13] That observation applies in particular to legislation that confers an ongoing benefit on persons. No doubt, the appellant's right to have the government pay a portion of the interest owing on his loan to the bank vested at the time the contracts of loan were concluded. But that does not mean the legislature cannot reduce, or is presumed not to intend to reduce, its obligation.

Specific rules

§25.145 ***Specific rules.*** In addition to the general criteria set out in *Dikranian* for recognizing vested rights, the courts have established a number of specific points. It is said, for example, that a right will not be defeated simply because the procedural steps necessary to claim the right have not all been taken prior to repeal.[14] In the case of a statutory benefit or advantage, if the last thing needed to establish an entitlement occurs before the legislation is repealed, the courts generally will recognize the entitlement as a vested right even though certain formalities must still be completed.[15] But if a substantive condition precedent to the validity of the claim is missing, the entitlement will not be recognized. As Létourneau J.A. wrote in *Hutchins v. Canada (National Parole Board)*:

> There is consensus among the authorities on the need to satisfy statutory conditions precedent to the existence of a right before claiming it.[16]

§25.146 More recently, in *R. v. Puskas*, commenting on s. 43(c) of the federal *Interpretation Act*, Lamer C.J. wrote:

> A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events ... In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.[17]

The issue in *Puskas* was whether the accused had a vested right in an appeal as of right to the Supreme Court of Canada under s. 691(2) of the *Criminal Code*. In February of 1997, Mr. Puskas was acquitted of certain criminal charges. In March, the Attorney General of Canada appealed. In May, an amendment to s. 691(2) of the Code was proclaimed into force. It eliminated the right of appeal as of right that had formerly existed when a Court of Appeal overturned an acquittal and ordered a new trial. Several months later, Mr. Puskas' appeal was heard and the Ontario Court of Appeal overturned his acquittal and ordered a new trial. Mr. Puskas claimed a vested right to an appeal as of right on the grounds that his acquittal had been appealed before the new legislation came into force. This argument did not succeed. As Lamer C.J. explained:

> Under the former s. 691(2) of the *Code*, there were a number of conditions precedent to the acquisition of the right to appeal to this

> Court without leave. The first is that the accused is charged with an indictable offence. The second is that he is acquitted of that offence at trial. The third is that the acquittal must be reversed by the Court of Appeal, and the fourth is that the Court of Appeal order a new trial. Until those events occur, the accused does not acquire the right to appeal to this Court without leave, nor does it accrue, nor is it accruing to him or her. As a result, s. 43 of the *Interpretation Act* does not exclude the cases at bar from the operation of s. 44, which indicates that the old proceeding should be continued under the new enactment.[18]

§25.147 It is also clear that when the entitlement to a benefit depends on the free exercise of policy-based discretion, the courts do not recognize a vested right unless and until the discretion has been exercised in the claimant's favour. As Robertson J.A. observed in *Apotex Inc. v. Canada (Attorney General)*:

> If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. This is the ratio of the Judicial Committee of the Privy Council in *Director of Public Works v. Ho Po Sang* [[19]] ... In that case, the Court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a rebuilding permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force.[20]

However, if the discretion is more in the nature of fact-based determination, the outcome may be different. Thus, in the *Apotex* case, the Court concluded that the claimant's right to a notice of compliance under the regulations vested once it filed materials establishing its compliance with the relevant safety and efficacy requirements. The key finding here was that there was no discretion in the Minister to deny an application that met those requirements. Accordingly, the claimant could be said to have a vested right as opposed to a mere hope.[21]

§25.148 Finally, when a statute provides for periodic benefits, or when an advantage or exemption is stated to be available for a period of time, the courts do not recognize a vested right in the law remaining unchanged. The content of the vested right is a right to the benefit or exemption as it exists from time to time.[22] In *Canada (Attorney General) v. Kowalchuk*, Marceau J.A. wrote:

> ... it is [now] well established that a claimant has no vested right that the rules under which benefits will be paid to him on a weekly basis will remain fixed and immutable after the moment he makes his claim; any change in those rules will be applicable to him.[23]

As Dickson J. explained in *Gustavson Drilling*:

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.[24]

What Dickson J. says of tax legislation applies to all legislation. Once the government undertakes to regulate a matter to protect the interests of particular groups or the public at large, individuals who organize their affairs on the assumption that "promised" advantages will not be withdrawn do so at their own risk.

Accruing rights

§25.149 ***Accruing rights.*** The survival provisions of Canadian Interpretation Acts provide that repeal does not affect rights that were "accrued" or "accruing" under the repealed legislation. For example, s. 43(c) of the federal Act provides:

> 43. Where an enactment is repealed in whole or in part, the repeal does not
>
> ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed ... [25]

The significance of the term "accruing" has been explored in a number of cases.[26] In principle, "accruing" should mean something different from "accrued"; otherwise its inclusion would serve no purpose, contrary to the presumption against tautology. However, the prolix style in which the provision is drafted (typical of the nineteenth and early twentieth centuries) blunts the force of this presumption. The difficulty of assigning a satisfactory meaning to "accruing" was commented on by Cameron J.A. in *Scott v. College of Physicians & Surgeons of Saskatchewan* case:

> A comparison of the two forms of provision would suggest that those which contain the word "accruing" have a broader scope than do those which do not contain the word. How much broader is another matter. Obviously the term cannot be construed so broadly as to render repeal ineffective. Nor can it be interpreted so narrowly as to add nothing to what the provision contains, expressly or by implication, by virtue of the words "acquired" or "accrued".[27]

Having regard to these considerations, and in particular to the need to give real effect to a repeal, Cameron J.A. reached the following conclusion:

> [B]y "accruing right" ... the legislature meant one which *will*, rather than *may*, in time accrue ... I conclude that "accruing" rights ... are those necessarily or inevitably, not possibly or even probably, arising in due course. In other words I am of the opinion that before a right ... may be said to be "accruing", the events giving rise to it or the conditions upon which it depends for its existence, must have been so set in train or engaged as inevitably to give rise in due course to the right ... [28]

In the *Scott* case this test was met. The repealed legislation provided that doctors struck from the medical register were entitled to be reinstated "upon payment ... to the registrar of ... all annual fees due, ... the costs of suit, if any, payable to the college and a penalty in any amount that the council may specify".[29] Acting in reliance on this legislation Dr. Scott filled out an application for reinstatement, ascertained the amount he had to pay and deposited this amount with his lawyer. He did not pay the registrar, as required under the statute, because he rejected the method used by the college to calculate the costs of suit. By the time this dispute was resolved, in Dr. Scott's favour, new legislation had come into force. It stated that all applications for reinstatement had to be made within a year of the applicant being struck. Under this new legislation Dr. Scott was out of time.

§25.150 Cameron J.A. pointed out that when the new legislation came into force the condition on which the right to reinstatement depended, namely payment of the required amount, was in the process of being fulfilled. The only remaining step was procedural and eventual fulfillment was

inevitable. Also, the source of the delay was an error of the college in calculating the costs to be paid by Dr. Scott. In these circumstances Cameron J.A. concluded that the right to reinstatement was an accruing right within the meaning of the *Interpretation Act*; the repealed legislation therefore continued to apply.[30]

§25.151 It is arguable that this result could have been reached without the benefit of the word "accruing" in Saskatchewan's *Interpretation Act*. Applying the new legislation to Dr. Scott obviously would be unfair. The interest at stake is of great importance, namely professional status and livelihood. Yet the new legislation struck without warning, giving those in Dr. Scott's position no chance to adjust their affairs. Dr. Scott's reliance on the former law was reasonable and also special in the sense that the sudden change affected him more harshly than others. Most importantly perhaps, the delay that put him out of time was due to a mistake on the part of the college. In these circumstances, permitting the repealed provision to survive, thus restricting the application of the new legislation so that it did not apply to Dr. Scott, was the only acceptable result.

Weight of the presumption

§25.152 ***Weight of the presumption.*** In *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, Dickson J. wrote:

> This presumption, however, [the presumption that the legislature does not intend to interfere with vested rights] only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception.[31]

The first sentence in this passage could be understood as an endorsement of the plain meaning rule: if the "literal" meaning is clear, other indicators of legislative intent are not to be considered. However, the second sentence suggests that the passage is better understood as a statement about the weight of the presumption: because new legislation is ordinarily enacted to address and cure an existing unsatisfactory state of affairs, the presumption against interfering with existing rights should not be difficult to rebut.

§25.153 This is certainly the assumption in cases like *Acme (Village) School District No. 2296 v. Steele-Smith*[32] and *Bellechasse Hospital Corp. v. Pilotte*,[33] where the Courts conclude that, to fully achieve the benevolent purpose of the new legislation and avoid treating like cases differently, the new legislation should be given an immediate application.[34] This analysis is also supported by the judgment of the Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, where Bastarache J. warned that "care must be taken not to get caught up in the last vestiges of the literal approach to interpreting legislation."[35] The presumptions of legislative intent are part of the context in which legislation is to be interpreted, but they are more or less easily rebutted depending on the circumstances and the importance of the legal norm underlying the presumption.

§25.154 Arguably, the key to weighing the presumption is considering how arbitrary or unfair it

would be to apply the new legislation to the facts in question and whether these unwanted consequences are necessary or warranted by the goals to be achieved. When the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. When the interference is less troubling, the presumption is more easily rebutted.

§25.155 The importance of this factor was emphasized in the judgment of Cameron J.A. in the *Larsen* case.[36] The issue was whether new legislation that abolished the right of mortgagees to seek a personal remedy upon default applied in respect of mortgages made before the commencement of the legislation. While Cameron J.A. acknowledged that applying the new legislation would interfere with a vested right, he did not consider the interference to be particularly unfair. Even under the former legislation, a commercial mortgagee's right to sue on the covenant had been cast into doubt. Over the years commercial lenders in the province had become accustomed to legislation limiting their rights in similar ways. Furthermore, the new legislation had come into force just weeks after the mortgage was signed and long before the respondent defaulted. In these circumstances, it was unlikely that the new legislation occasioned much surprise.[37] Finally, he considered the nature of the right interfered with and the extent of the mortgagee's loss:

> ... assuming for the moment the amendment were to operate indiscriminately [that is, apply generally to all mortgagees], it is not as though a mortgagee would lose all; he would lose his right of action *in personam* but retain his right of action *in rem*. Of the two, the latter most often provides the most effective remedies. The effect, then, would be to dampen but not destroy the ability of a mortgagor [sic] to recover.[38]

Cameron J.A. concluded by noting that although these factors concerning the fairness of the interference and the importance of the right were not decisive, the presumption against interference with vested rights was more readily overcome in light of them.[39]

Transitional provisions

§25.156 ***Transitional provisions.*** The presumption against interference with vested rights is rebutted by statutory language that clearly indicates the legislature's intention to interfere. In *Grand Rapids (Town) v. Graham*,[40] for example, the Manitoba Court of Appeal had to determine the effect of new legislation on the appellants' actions against the Provincial Municipal Assessor for failure to assess taxable property within their territory. The appellants had passed by-laws making certain classes of property liable to assessment and taxation, but because the Assessor did no assessments, the appellants were unable to collect the tax. They filed actions for negligence and misfeasance seeking to recover their lost revenue. A short while later, new legislation was enacted that exempted from taxation the classes of property the appellants had sought to tax. This legislation, enacted in 1999, contained the following transitional provision: "This Act is retroactive and is deemed to have come into force on December 1, 1996." The clear and direct effect of this provision was to exempt the property in question for the years 1996-1999. However, the appellants claimed that the Act could not be applied so as to interfere with their right of action, which vested before the Act came into force.

§25.157 Philp J.A. dismissed the appeal and approved the reasoning of the motions judge who pointed out that by retroactively exempting the property in question from liability to tax, the legislature had destroyed the basis for any duty the Assessor might have owed the appellants.[41] The motion judge also drew attention to the context of the 1999 legislation:

> ... [T]he retroactive date of the legislation is just a little more than two weeks earlier than the earliest of the two by-laws. This justifies the inference this legislation was aimed, at least in part, at the by-laws. If then it can be concluded the legislators were directly aware of the existence of the by-laws and yet chose to pass [the] legislation ... , it is not very difficult to regard this as additional reinforcement of the conclusion the Legislature intended to eliminate whatever rights may have existed before enactment of the amendment.[42]

Philps J.A. also noted that loss of the appellants' right of action did not create the sort of unfairness that would cast doubt on the legislature's apparent intention. In the end, the appellants' actions against the Assessor were dismissed for disclosing no cause of action.

§25.158 Transitional provisions can be important for what they don't say as well as what they do. In *Venne v. Quebec*,[43] the legislation to be applied included a transitional provision that expressly exempted one class of vested rights from the application of the legislation. The Supreme Court of Canada relied on an implied exclusion[44] argument to conclude that the legislature intended to abolish all other classes of vested rights. As Chouinard J. explained:

> ... the presumption that vested rights cannot be affected is only a rule of construction and, by adopting the provisions of Division IX of the Act, the legislator intended to override this rule of construction and replace it with a complete and exhaustive code of the rules applicable to the matter. It is hard to see how the legislator could have more clearly defined the scope of the acquired rights which can be relied on by litigants and the conditions for their exercise.[45]

No transitional provision

§25.159 ***No transitional provision.*** In the absence of a transitional provision, it is left to the courts to determine legislative intent. Evidence of intent is gathered in the usual way, by reading the legislation in context having regard to its purpose and the consequences of applying it to particular facts. Extrinsic materials, such as commission reports or *Hansard* may also be consulted.[46]

§25.160 Again, the judgment of Cameron J.A. in *National Trust Co. v. Larsen* provides a good example. After considering the consequences that the mortgagee would suffer if the new legislation were applied, he turned to the purpose of the legislation:

> The purpose of the amending enactment is to confer upon mortgagors to whom it applies the same "benefit" as that enjoyed by other mortgagors. The "benefit" ... consists in relief for debtors against what the legislature when passing the Act quite obviously regarded as an oppressive set of concurrent remedies available to an unpaid vendor of land ... [47]

He later pointed out:

> ... it is manifestly clear that the change in the law was remedial ... in the beneficial sense of correcting an imperfection in the prior law. Of course, one person's benefit is another's burden. But ... the legislature was setting the interests of the one, the mortgagor, ahead of the other, the mortgagee. And that being so, I think it fair to say the amendment might more readily be construed as having been intended to encroach upon the right in issue than would otherwise be the case.[48]

When a primary purpose of legislation is to abolish a right of which the legislature disapproves, a court may readily conclude that the legislature intended to target existing as well as future examples of that right.

Delayed coming into force

§25.161 ***Delayed coming into force.*** Some courts have suggested that when a legislature postpones the coming into force of legislation, it intimates an intention that the new legislation is to have an immediate and general application when it does come into force. In *R. v. Leeds and Bradford Railway Co.*, Lord Campbell wrote:

> If it had been enacted that the provisions of the statute should come into operation immediately, I should have said that there was a hardship in their being construed retrospectively, and I should not have been willing so to construe them. But, here, the Act receiving the Royal assent on the 14th August, sect. 38 directs that it "shall commence and take effect from the 2d day of October ... " That seems to be an intimation by the Legislature that they mean to give a time, whether long or short, within which bygone matters of complaint may be brought before justices ... [49]

The validity of this analysis has been doubted. In *R. v. Ali*,[50] the Supreme Court of Canada mentioned the absence of any modern authority in its support and concluded that it would be unwise to treat Lord Campbell's suggestion as a canon of construction. Clearly, a delay in commencement cannot be conclusive of legislative intent. However, if such a delay does have the effect of giving timely and useful notice to those who will be affected, it is hard to see why this factor should not be taken into account in assessing the fairness of applying new legislation to on-going facts.

Reliance on ordinary meaning

§25.162 ***Reliance on ordinary meaning.*** Even though the statute itself is the appropriate starting point, there are dangers in considering only the text of legislation to resolve temporal application problems. Generally speaking, it is inappropriate to rebut the presumption against interfering with vested rights by relying simply on the ordinary meaning of the provision. In the *Acme (Village) School District No. 2296 v. Steele Smith*,[51] for example, the issue was whether s. 157 of Alberta's *School Act* regulating the termination of employment agreements between teachers and school boards applied to agreements entered before the commencement of the provision. Lamont J. wrote:

> Giving to the words employed in section 157 their natural and ordinary meaning, we have a section general in its character, and susceptible of application to every agreement of engagement between teacher and trustees. Why then should the section be construed as relating to future agreements only?[52]

The answer to this question, of course, is that if the rights of the parties under existing agreements

are judged to be vested rights, the legislature is presumed to respect them. And because this respect is presumed, it is unnecessary for the legislature to include explicit words of limitation; the limitation is taken for granted.[53] If a presumption against unfair applications is to have any meaning at all, it cannot be rebutted by the absence of express words limiting the scope of the provision.[54]

Verb tense

§25.163 ***Verb tense.*** Another pitfall to avoid is attaching inappropriate significance to the tense of the verbs used in legislation. Generally, legislative drafters use the present tense. This is in keeping with the rule that a statute is always speaking[55] and inferences concerning temporal application should not be drawn from the use of this tense.[56] Similarly, inferences concerning temporal operation should not be drawn from the use of "shall". In the context of legislation, the auxiliary "shall" has nothing to do with tense; its only function is to indicate that a provision is meant to be imperative.[57]

§25.164 On occasion, the present perfect is used to describe a fact situation to which legal consequences are attached. For example: "where damages *have been caused*, ... " or "where a person *has registered*, ... ". Such descriptions do not ordinarily refer to events occurring before commencement of the legislation. This point was explained in *Re Athlumney*,[58] where the issue was whether a provision limiting the interest rate "where a debt *has been proved*" applied to debts proved before the provision was enacted. Wright J. wrote:

> ... [I]s the section so expressed as to be plainly retrospective? No doubt the words "where a debt has been proved under the principal Act" are capable of such a meaning. But this form of words is often used to refer, not to a past time which preceded the enactment, but to a time which is made past by anticipation -- a time which will have become a past time only when the event occurs on which the statute is to operate.[59]

A provision that applies to facts within a single time frame uses the present tense, which is taken to refer to facts as they occur from time to time. A provision that applies to facts within different time frames uses the present tense and other tenses in relation to the present tense. For this purpose, the present does not refer to the time the legislation is enacted, but rather to the time the legislation is applied.

Footnote(s)

1 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue -- M.N.R.)*, [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 282 (S.C.C.).

2 [1991] B.C.J. No. 1, 76 D.L.R. (4th) 97 (B.C.C.A.).

3 *Ibid.*, at 99. This is an example of a case in which an application would be both retroactive and interfere with vested rights.

4 [1920] S.C.J. No. 72, 61 S.C.R. 413, at 417 (S.C.C.).

5 The relevant Interpretation Act provisions are examined below at §25.149.

6 See *Angus v. Sun Alliance Insurance Co.*, [1988] S.C.J. No. 75, [1988] 2 S.C.R. 256, at 266-67 (S.C.C.); *Martin v. Perrie*, [1986] S.C.J. No. 1, [1986] 1 S.C.R. 41 (S.C.C.).

7 Whether the legislation is simply repealed, or repealed and replaced by new law, the issue for the court is whether the repealed law should continue to govern. See the discussion of survival, below at §25.165.

8 *Outremont (City) v. Outremont (Municipality) Protestant School Board*, [1951] Que. K.B. 676 at 692, affd [1952] S.C.J. No. 40, [1952] 2 S.C.R. 506 (S.C.C.). See also *CNG Producing Co. v. Alberta (Provincial Treasurer)*, [2002] A.J. No. 1108, 2002 ABCA 207, at para. 40 (Alta. C.A.); *National Life Assurance Co. of Canada v. Peace River (Town of)*, [1998] A.J. No. 781, 1998 ABCA 233, 64 Alta. L.R. (3d) 360 at para. 19 (Alta. C.A.).

9 [2005] S.C.J. No. 75, [2005] 3 S.C.R. 530 (S.C.C.). For a comprehensive review of this issue, see also *Niagara Escarpment Commission v. Paletta International Corp.*, [2007] O.J. No. 3308 (Ont. S.C.J.).

10 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue -- M.N.R.)*, [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 283 (S.C.C.).

11 See also *Abbott v. Minister for Lands*, [1895] A.C. 425, at 431 (P.C.); *Attorney General of Quebec v. Expropriation Tribunal*, [1986] S.C.J. No. 33, [1986] 1 S.C.R. 732, at 743 (S.C.C.); *Massey-Ferguson Finance Co. of Canada v. Kluz*, [1973] S.C.J. No. 89, [1974] S.C.R. 474 (S.C.C.); *Scott v. College of Physicians & Surgeons of Saskatchewan*, [1992] S.J. No. 432, 95 D.L.R. (4th) 706 at 727-28 (Sask. C.A.).

12 *Dikranian v. Quebec (Attorney General)*, [2005] S.C.J. No. 75, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 37-40 (S.C.C.). See also *Yao v. Li*, [2012] B.C.J. No. 1523, 2012 BCCA 315, at paras. 29-36 (B.C.C.A.); *Skypower CL 1 LP v. Ontario (Minister of Energy)*, [2012] O.J. No. 4458, 2012 ONSC 4979, at paras. 75-77 (Ont. S.C.J.); *1392290 Ontario Ltd. v. Ajax (Town)*, [2010] O.J. No. 215, 2010 ONCA 37, at paras. 29*ff*. (Ont. C.A.); *Engel v. Edmonton (City) Police Service*, [2008] A.J. No. 422, 2008 ABCA 152, at paras. 24-26 (Alta. C.A.); *Summit Golf and Country Club v. York (Regional Municipality)*, [2008] O.J. No. 2839, at para. 9 (Ont. Div. Ct.); *British Columbia v. Bolster*, [2007] B.C.J. No. 192, at paras. 110-13 (B.C.C.A.).

13 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue -- M.N.R.)*, [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 282-83 (S.C.C.).

14 See *Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario*, [1981] O.J. No. 2940, 121 D.L.R. (3d) 403, at 413 (Ont. C.A.); *Abell v. R.C.M.P. Commissioner*, [1979] S.J. No. 288, 3 Sask R. 181, at 191 (Sask. C.A.).

15 See, for example, *Esso Resources Canada Ltd. v. Canada (Minister of National Revenue)*,

[1990] F.C.J. No. 340, 109 N.R. 272 (F.C.A.).

16 [1993] F.C.J. No. 679, 156 N.R. 205, at 209 (F.C.A.).

17 [1998] S.C.J. No. 51, [1998] 1 S.C.R. 1207 (S.C.C.).

18 *Ibid*., at para. 15. See also *Fabrikant c. Canada (Attorney General)*, [2014] Q.J. No. 892, 2014 QCCA 240, at para. 48 (Que. C.A.), where the Quebec Court of Appeal found that the right of a convicted inmate to apply for a reduced period of parole ineligibility after serving 15 years of their sentence neither accrued nor was accruing until the 15 years were served.

19 [1961] A.C. 901 (P.C.). This case is frequently cited by Canadian courts.

20 [1993] F.C.J. No. 1098, [1994] 1 F.C. 742, at 772 (F.C.A.), affd [1994] S.C.J. No. 113, [1994] 3 S.C.R. 1100 (S.C.C.).

21 Compare *Apotex Inc. v. Canada (Attorney General)*, [2000] F.C.J. No. 634, at para. 82*ff*. (F.C.A.). In such a case, the presumption of discretion created by use of the term "may" is rebutted: see Chapter 4, at §4.64.

22 See *Re Apple Meadows Ltd. and Government of Manitoba*, [1985] M.J. No. 132, 18 D.L.R. (4th) 58, at 62-64 (Man. C.A.).

23 [1990] F.C.J. No. 447, 114 N.R. 275, at 279 (F.C.A.); *Côté v. Canada Employment and Immigration Commission*, [1986] A.C.F. no 447, 69 N.R. 126, at 129 (F.C.A.). Compare *Canada (Employment & Immigration Commission) v. Dallialian*, [1980] S.C.J. No. 91, [1980] 2 S.C.R. 582 (S.C.C.).

24 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 282-83 (S.C.C.). See also *Engel v. Edmonton (City) Police Service*, [2008] A.J. No. 422, 2008 ABCA 152, at paras. 24-26 (Alta. C.A.). In *Merck Frosst Canada & Co. v. Apotex Inc.*, [2011] F.C.J. No. 1664, 2011 FCA 329, at para. 39 (F.C.A.), Stratas J.A. observed that the appellant's "submissions seem to suggest that it had a vested right to the continuance of the law as it stood at the time it decided to apply for an order of prohibition. As a general proposition, this is not the law of Canada ... No one has a vested right or an enforceable claim to the continuance of the substantive standards in laws, even in situations where expectations to that effect have been encouraged: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525."

25 R.S.C. 1985, c. I-21, s. 43. See also R.S.A. 2000, c. I-8, s. 35; R.S.B.C. 1996, c. 238, s. 35; C.C.S.M. c. I80, s. 46(1); R.S.N.B. 1973, c. I-13, s. 8 [am. S.N.B. 1982, c. 33; s. 21; R.S.N.L. 1990, c. I-19, s. 29; R.S.N.S. 1989, c. 235, s. 23; S.O. 2006, c. 21, s. 51(1)(b)-(d); R.S.P.E.I. 1988, c. I-8, s. 32; R.S.Q. c. I-16, s. 12; S.S. 1995, c. I-11.2, s. 34; R.S.N.W.T. 1988, c. I-8, s. 35; R.S.N.W.T. (Nu) 1988, c. I-8, s. 35; R.S.Y. 2002, c. 125, s. 23.

26 See, for example, *Hutchins v. Canada (National Parole Board)*, [1993] F.C.J. No. 679, 156 N.R. 205, at 208-09 (F.C.A.); *Re Rai*, [1980] O.J. No. 3513, 106 D.L.R. (3d) 718, at 724

(Ont. C.A.); *Strata Plan VR 29 v. British Columbia (Registrar, Vancouver Land Registration)*, [1978] B.C.J. No. 596, 91 D.L.R. (3d) 528, at 532 (B.C.S.C.). See also the comments of the Supreme Court of Canada in *R. v. Puskas*, [1998] S.C.J. No. 51, [1998] 1 S.C.R. 1207, at paras. 14-15 (S.C.C.).

27 [1992] S.J. No. 432, at 718 (Sask. C.A.).

28 *Ibid.*, at 719. This analysis was approved by the Supreme Court of Canada in *Puskas*, [1998] S.C.J. No. 51, [1998] 1 S.C.R. 1207, at para. 14 (S.C.C.).

29 *Ibid.*, at 709.

30 *Ibid.*, at 720-21.

31 [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271, at 282 (S.C.C.). See also *CNG Producing Co. v. Alberta (Provincial Treasurer)*, [2002] A.J. No. 1108, 2002 ABCA 207, at paras. 35-38 (Alta. C.A.); *National Trust Co. v. Larsen*, [1989] S.J. No. 424, 61 D.L.R. (4th) 270, at 288 (Sask. C.A.).

32 [1932] S.C.J. No. 60, [1933] S.C.R. 47 (S.C.C.).

33 [1974] S.C.J. No. 106, [1975] 2 S.C.R. 454 (S.C.C.).

34 See above at §25.97.

35 *Dikranian v. Quebec (Attorney General)*, [2005] S.C.J. No. 75, [2005] 3 S.C.R. 530, 2005 SCC 73, at para. 36 (S.C.C.).

36 *Ibid*.

37 See *National Trust Co. v. Larsen*, [1989] S.J. No. 424, 61 D.L.R. (4th) 270, at 279 (Sask. C.A.).

38 *Ibid*.

39 *Ibid*.

40 [2004] M.J. No. 342 (Man. C.A.). See also *Mandavia v. Central West Health Care Institutions Board*, [2005] N.J. No. 69 (N.L.C.A.).

41 *Ibid*., at para. 15.

42 *Ibid*., at para. 26. See also *Baker Petrolite Corp. v. Canwell-Enviro-Industries Ltd.*, [2002] F.C.J. No. 614, [2003] 1 F.C. 49, 2002 FCA 158, at para. 17*ff*. (F.C.A.).

43 [1989] S.C.J. No. 32, [1989] 1 S.C.R. 880 (S.C.C.).

44 Implied exclusion is explained in Chapter 8, at §8.89*ff*.

45 *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] S.C.J. No. 32,

[1989] 1 S.C.R. 880, at 909 (S.C.C.).

46 See, for example, *Re Royal Canadian Mounted Police Act*, [1990] F.C.J. No. 1133, 123 N.R. 120, at 138-39 (F.C.A.) (Commission Report and *Hansard*); *Page Estate v. Sachs*, [1993] O.J. No. 269, 99 D.L.R. (4th) 209, at 214-15 (Ont. C.A.) (Commission Report).

47 [1989] S.J. No. 424, 61 D.L.R. (4th) 270, at 278 (Sask. C.A.).

48 *Ibid.*, at 279.

49 (1852), 18 Ad. & E. (N.S.) 343, at 346.

50 [1979] S.C.J. No. 105, [1980] 1 S.C.R. 221, at 59 (S.C.C.).

51 [1932] S.C.J. No. 60, [1933] S.C.R. 47 (S.C.C.).

52 *Ibid.*, at 50.

53 See *Martin v. Perrie*, [1986] S.C.J. No. 1, [1986], 1 S.C.R. 41 at para. 27 (S.C.C.), where the Supreme Court of Canada makes the point that if anything requires explicit words, it is the intention to destroy rights not the intention to respect them.

54 For judgments in which this point appears to have been overlooked, see *Canadian Assn. of Industrial, Mechanical & Allied Workers (Loc. 4) v. B.C. (Director, Employment Standards Branch)*, [1993] B.C.J. No. 1476, 103 D.L.R. (4th) 146, at 150, *per* McEachern C.J.B.C. (B.C.C.A.); *Hackett v. Ginther*, [1986] S.J. No. 36, 26 D.L.R. (4th) 106, at 111, *per* Tallis J.A. dissenting (Sask. C.A.).

55 See the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10. A comparable rule is found in provincial and territorial Interpretation Acts.

56 See *Bowes v. Edmonton (City)*, [2007] A.J. No. 1500, 2007 ABCA 347, at paras. 153-54 (Alta. C.A.); *Canada (Attorney General) v. Lavery*, [1991] B.C.J. No. 1, 76 D.L.R. (4th) 97, at 101 (B.C.C.A.). Compare *Matejka Estate (Re)*, [1984] B.C.J. No. 1645, at para. 14 (B.C.C.A.) and *Page Estate v. Sachs*, [1993] O.J. No. 269, at para. 9 (Ont. C.A.).

57 See Chapter 4, at §4.79.

58 [1898] 2 Q.B. 547 (Q.B.).

59 *Ibid.*, at 553.

Ruth Sullivan

Sullivan on the Construction of Statutes, 6th Ed.

CHAPTER 25 - TEMPORAL APPLICATION

Survival of Repealed Law

The common law rule

§25.165 ***The common law rule.*** At common law, the presumption against retroactivity did not apply to repeals. The rule governing repeals was stated by Lord Tenterden in *Surtees v. Ellison*:

> ... when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.[1]

The effect of this rule was to preclude the application of repealed legislation to circumstances and events occurring prior to repeal. Anything that had not been dealt with definitively before repeal was effectively abandoned. Persons charged with offences were free to go, and persons entitled to benefits or privileges lost their entitlement. For obvious reasons, this rule proved unacceptable and has been displaced by statute.

Statutory survival

§25.166 ***Statutory survival.*** Under the Interpretation Acts of all Canadian jurisdictions, provision is made for the continued application of repealed legislation to facts occurring prior to repeal. At the federal level, s. 43 provides:

> 43. Where an enactment is repealed in whole or in part, the repeal does not
>
> ...
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,
>
> (*d*) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or
>
> (*e*) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (*c*) or in respect of any punishment, penalty or forfeiture referred to in paragraph (*d*),
>
> and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.[2]

In other words, the repeal of an enactment does not destroy any right, privilege, obligation, or liability arising under the repealed enactment, nor does it obliterate any contravention of the repealed law. Investigations and proceedings relating to pre-repeal events may be begun and continued under the old enactment despite its repeal. And the remedies and punishments provided for under the old enactment still apply as if the repeal had not occurred. In short, the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law.

§25.167 These general statutory rules may be supplemented or displaced by specific transitional rules set out in the repealing legislation. For example, s. 52 of Ontario's *Succession Law Reform Act, 1977* provided for the continued application of the repealed *Wills Act* to the wills of persons dying before a certain date:

> 52. The enactments repealed or amended by sections 50 and 51 continue in force as if unrepealed or unamended in respect of a death occurring before the 31st day of March, 1978.[3]

To the extent repealed legislation continues to apply, the application of any new legislation is restricted. In this case, the new legislation was restricted to the wills of persons dying after the March 31 cut-off date.

§25.168 Unlike the retroactive application of legislation, the survival of legislation is an attempt to achieve coincidence between the time frame in which legislation operates and the time frame to which it is applied. In the case of retroactivity, legislation is applied after it begins to operate to facts that occurred before it was binding law. In the case of survival, legislation is applied after it has ceased to operate to facts that occurred while it was binding law.

Survival of offences

§25.169 ***Survival of offences***. The survival of legislation is strikingly illustrated in the judgment of the House of Lords in *R. v. West London Stipendiary Magistrate*.[4] In that case the accused was charged with loitering, contrary to s. 4 of the *Vagrancy Act 1824*. The loitering complained of occurred in June of 1981. The accused was charged on June 30 and came to trial in November of that year. Meanwhile, in July of 1981 the *Vagrancy Act 1824* was repealed. The accused argued that he should not be convicted under an Act that was no longer good law, especially one so archaic and vague.

§25.170 Although sympathetic, the House of Lords could see no way around the *Interpretation Act*, which contained a section similar to s. 43. It pointed out that in its Act to repeal the *Vagrancy Act* the legislature could have included a transitional provision making the repeal applicable to pending cases. In the absence of such a provision, or some other adequate expression of intent, the repealed legislation survived and continued to govern conduct occurring prior to its repeal.

Survival of benefits

§25.171 ***Survival of benefits***. The survival provisions of the *Interpretation Act* preserve benefits as well as offences. In *Esso Resources Canada Ltd. v. Canada (Minister of National Revenue)*,[5] for example, s. 43 of the federal *Interpretation Act* was relied on to preserve entitlement to a refund under the *Excise Tax Act*. That Act imposed a tax on natural gas on its receipt by a processor but created an exemption for gas that met a certain description and was used for a designated purpose. Paragraph 68(1)(g) provided that processors who paid tax in respect of exempted gas were entitled to a refund. In 1985, the exemption and refund provisions were repealed, after Esso had received gas within the description, paid the tax, and used it for the designated purpose, but before it had applied to the Minister for a refund. Stone J.A. wrote:

> In this case that gas was purchased and was in fact used for an exempt purpose well before the repealing legislation was enacted. Upon such use being made of the gas, in my view, a right arose in favour of the respondent to a refund of the amounts paid in respect of these particular natural gas liquids. That right had "accrued" or was "accruing" at the time the repealing legislation was enacted.
>
> ...
>
> [Section 43(e) of *the Interpretation Act*] appears to preserve from extinguish-ment "any ... remedy in respect of any right ... referred to in paragraph (c)".
>
> The "remedy" here is to be found in the refund provisions of s. 68(1)(g). Accordingly, the repeal of that paragraph did not affect the remedy in respect of the accrued or accruing right to a refund.[6]

Under s. 43(c) of the *Interpretation Act*, the exemption provision continued to apply to facts occurring before repeal, while under s. 43(e) the means of securing the exemption remained available to the claimant.

Repeal and replacement

§25.172 ***Repeal and replacement***. The impact of s. 43 is modified somewhat by s. 44, which deals with the repeal and replacement of existing legislation. Section 44 provides for the continuation of appointments and regulations made under the repealed legislation, and for the continued use of records and forms, for the immediate application of procedures established in the new legislation and for the following:

> Where an enactment ... is repealed and another enactment ... is substituted therefore,
>
> ...
>
> (e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly.

This provision is in keeping with s. 11(g) of the Charter. In *R. v. Dunn*,[7] the Supreme Court of Canada held that an accused was entitled to the benefit of the lesser punishment even though the new enactment had not come into force until after the accused was convicted at trial and while his appeal against sentence was pending. In the view of the majority, the punishment was not "adjudged" until the appeals of the accused were exhausted.

Relation of survival provisions to common law presumptions

§25.173 ***Relation of survival provisions to common law presumptions.*** The survival provisions of the *Interpretation Act* provide for the continued application of repealed legislation to past situations. Depending on how they are interpreted, they may also provide for the continued application of repealed legislation to on-going situations. In the context of amendment, this ensures that there are no gaps between the repealed law and the new law that replaces it. It also means that in certain circumstances the application of the new law is restricted.

§25.174 There is an obvious relationship between the circumstances in which survival is permitted under an Interpretation Act and the common law presumption against interference with vested rights. In the federal Act, s. 43(c) provides that repeal does not affect rights or privileges "acquired, accrued or accruing" under the repealed legislation. Under the common law presumption, vested rights are protected from interference by new legislation. These protections are mirror images of each other and should be interpreted together.[8]

§25.175 However, in attempting to determine what is a vested right or, more generally, when a situation should be sheltered from the immediate application of new law, the courts derive little assistance from either the vague common law presumptions or the archaic language of the Interpretation Acts. What is needed, whether the analysis takes place in the context of the Act or the common law, is an appreciation of the reasons why it is sometimes appropriate to delay the application of new legislation and continue the application of repealed law. In other words, the purpose(s) of the rule must be identified. This entails a balancing of the purposes that the new rule is designed to promote against the principles and values underlying the presumption against interference with vested rights.

Footnote(s)

1 (1829), 9 B. & C. 750, 109 E.R. 278, at 279 (K.B.).

2 R.S.C. 1985, c. I-21, s. 43. See also R.S.A. 2000, c. I-8, s. 35; R.S.B.C. 1996, c. 238, s. 35; C.C.S.M. c. I80, s. 46(1); R.S.N.B. 1973, c. I-13, s. 8 [am. S.N.B. 1982, c. 33; s. 21; R.S.N.L. 1990, c. I-19, s. 29; R.S.N.S. 1989, c. 235, s. 23; S.O. 2006, c. 21, s. 51(1)(b)-(d); R.S.P.E.I. 1988, c. I-8, s. 32; R.S.Q. c. I-16, s. 12; S.S. 1995, c. I-11.2, s. 34; R.S.N.W.T. 1988, c. I-8, s. 35; R.S.N.W.T. (Nu) 1988, c. I-8, s. 35; R.S.Y. 2002, c. 125, s. 23.

3 S.O. 1977, c. 40.

4 [1982] 3 W.L.R. 289 (H.L.).

5 [1990] F.C.J. No. 340, 109 N.R. 272 (F.C.A.).

6 *Esso Resources Canada Ltd. v. Canada (Minister of National Revenue),* [1990] F.C.J. No. 340, 109 N.R. 272, at 275-76 (F.C.A.).

7 *R. v. Dunn*, [1995] S.C.J. No. 5, [1995] 1 S.C.R. 226 (S.C.C.). See also *R. v. R.A.R.*, [2000] S.C.J. No. 9, [2000] 1 S.C.R. 163 (S.C.C.).

8 Of course, the common law presumption is broader in that it applies to rights arising under the common law as well as under legislation.

TAB 2

PIERRE-ANDRÉ CÔTÉ
in collaboration with Stéphane Beaulac and Mathieu Devinat

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ute. An addition to a statute must be interpreted not only in the light of the section to which it is added, but also with reference to the statute as a whole.

Integration of the amendment within the original enactment justifies another rule: repeal of a statute necessarily implies repeal of all its amendments.[22]

Sometimes, however, the interpreter must separate the amending enactment from its immediate legislative environment, and establish its meaning independently of contextual indications. The drafter prepares an enactment as a coherent whole, and it should be presumed that the legislature has maintained this coherence. Nevertheless, Parliament occasionally falls short of such an objective: it happens that a word, an expression or a section is added to a statute without the required adjustments elsewhere. Under such circumstances, the courts do not hesitate to ignore parts of the context in construing an amending enactment.[23]

Generally, amending the legislative text results in a modification of the legal rule which the text expresses. It is rare for the modification to be simply formal, leaving the rule unchanged. When the rule is modified, the amendment is analysed, in transitional law, as having deleted the rule which corresponds to the old text while adding the rule which corresponds to the new. When analysing the temporal application of the amendment, therefore, one must pay heed to the effects of the deletion of the old rule as well as to those of the addition of the new one.[24]

Paragraph 3: Repeal, Substitution and Expiration of a Legislative Text

For each legislated rule, it is necessary to distinguish between the "period of observation", i.e. the period during which it is in effect,

22. *Lancaster Board of Assessors* v. *City of St. John*, [1954] 4 D.L.R. 501 (N.B.C.A.); *R.* v. *Blake* (1978), 39 C.C.C. (2d) 138 (P.E.I.C.A.). *Interpretation Act*, R.S.C. 1985, ch. I-21, s. 40(2).
23. *Gravel* v. *City of St. Léonard*, [1978] 1 S.C.R. 660. A "lapse in drafting cannot, however, nullify the intention of the legislature". *Per* Pigeon J., p. 666. See also *Re MacKenzie and Commissioner of Teachers' Pensions*, (1992) 94 D.L.R. (4th) 532 (B.C.C.A.).
24. On the importance in transitional law of drawing a distinction between the suppression of old rules and the creation of new ones, see *infra* pages 138 ff.

and the "period of application", i.e. the period to which it is applicable. After reviewing this distinction, the major methods of extinction of statutes, namely repeal, substitution and expiration, will be discussed.

Subparagraph 1: Period of observation and period of application of legal rules

The legal rule contained in a text has binding force from the commencement date of the text until either the legislature revokes it by repeal or replacement or until its date of expiration.[25] This period – during which the rules contained in the text must be observed by all who are subject to it – is the rule's "period of observation".

However, a rule contained in a statute can have effect both before and after its normal period of observation: its "period of application" may begin before its period of observation (the phenomenon of retroactivity) or continue after the period of observation (the phenomenon of survival).[26] In some cases, a statute may remain inapplicable throughout the entire period during which it is binding. For example, a legislative enactment might provide that certain provisions, although fully in force, have effect only after the occurrence of certain events.[27] Not infrequently, a statute that has been neither expired nor repealed ceases to have effect. This occurs, for example, when the purpose of the statute's enactment has been fulfilled[28] or when it has been declared unconstitutional by the Supreme Court.[29]

Hence, it is essential to distinguish between the binding force of a legal rule and its applicability. As a general rule, when a statute coming into force conflicts with an earlier statute, the second statute overrides the first, with those parts of the earlier statute that are in

25. Subsection 2(2) of the federal *Interpretation Act*, R.S.C., 1985, ch. I-21 establishes the equivalence of repeal and extinction by expiration or other means.
26. Retroactivity and survival are discussed *infra*, pp. 131 ff.
27. The *Emergencies Act*, R.S.C. 1985, ch. 22 (4th supp.), contains provisions that only have effect by proclamation by the Governor in council that "a public welfare emergency exists and necessitates the taking of special temporary measures for dealing with the emergency" (s. 6).
28. For example, "back to work" legislation: *An Act respecting health services in certain establishments*, S.Q. 1976, c. 29.
29. It would be presumptuous to attempt to deal here with the delicate question of the effect of a judgment declaring a statute unconstitutional or quashing a regulation. For the effect of a decision of unconstitutionality, see especially *Canada (Attorney General)* v. *Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10.

conflict ceasing to have effect. By tradition the earlier statute is considered to be "implicitly repealed", but the use of the term "repealed" is debatable: although evocative, it may be misleading with respect to the phenomenon it is intended to describe.[30]

Repealing a statute not only erases the text, but also expunges the statute altogether. In contrast, legislation that contradicts an earlier statute without repealing it merely renders the rules contained in the first enactment inapplicable, or without effect, to the extent of the conflict. The text of the prior statute itself survives and, theoretically at least, the legal rule contained therein may be revived if the second statute is eliminated.[31]

The concepts of "paramountcy" and "inapplicability" are better suited to describing the effects of a conflict between enactments than that of repeal. Repeal attacks the text of a statute and is *erga omnes* and, necessarily, absolute: either an enactment is repealed or it is not. On the other hand, when a statute becomes inoperative, the text itself remains, and the suspension of its rules may apply to specific persons, events or territories only. In other words, the rule becomes inapplicable only to the extent of its conflict with the rules of the overriding statute.

In light of the preceding, the term "repeal" is best reserved for the explicit elimination of the text of a statute by a legislature. When a legal rule is merely deprived of its effect by the adoption of an overriding rule, it should be characterized as inoperative, not implicitly abrogated. The identification and resolution of conflicting rules will be discussed in the chapter on the systematic method of interpretation.[32]

The distinction between a repealed legislative text and an enactment whose rules have become inoperative is not simply of theoretical interest. The interpretation acts contain several rules concerning the effect of repeal. But are these directives applicable to enactments whose rules have been rendered inoperative?

In federal law, the answer appears straightforward: a statute which has ceased to have effect is deemed, for the purposes of the

30. Hansen J. in *Mirfin* v. *Attwood* (1869), L.R. 4 Q.B. 333, 340.
31. *Re D. Moore Co.*, [1928] 1 D.L.R. 383 (Ont. C.A.), 393-394 (Middleton J.).
32. *Infra*, pp. 374 ff.

Interpretation Act (s. 2(2)), to have been repealed. All provisions of the federal *interpretation act* dealing with repeal ought therefore to apply to statutes which have become inoperative following enactment of conflicting legislation.

Quebec's *interpretation act* has no analogous provision, and this somewhat complicates the question. Can an individual be charged with an offence if the legal rule upon which the charge is based has since become inoperative, although the text itself has not been formally repealed? In this case, and even in the absence of explicit repeal, Section 12 of the *Interpretation Act* could apply, given its object and the custom of qualifying inoperative statutes as implicitly repealed.[33] Yet Section 9 of the same act seems to apply only to cases of explicit repeal: "When a legislative enactment which repeals another is itself repealed, the legislative enactment first repealed does not come again into force, unless the Legislature expresses such intention." Explicit repeal of an overriding statute should in theory reinstate any rules rendered inoperative by it. Once the conflict between statutes has disappeared, earlier legal rules regain their full effect.

A legislative enactment may cease producing effects in a variety of ways. But desuetude alone is insufficient to deprive statutes of their binding force.[34] Maxwell reports that a statute dictating the colour and material of nightcaps to be worn in bed by clergy of the Church of England was still in force in 1966.[35]

In Canada, general revision provides an opportunity to repeal such anachronisms. But an enactment which is excluded from revision and which has not been repealed will continue in force indefinitely.[36]

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33. See, nevertheless: *R.* v. *Stanley*, [1925] 1 W.W.R. 33 (Alta. S.C.).
34. *R.* v. *Ruddick*, [1928] 3 D.L.R. 208 (Ont. S.C.), 213 (Wright J.).
35. Peter St. John Langan, *Maxwell On The Interpretation of Statutes*, 12th ed., London: Sweet & Maxwell, 1969, p. 16.
36. Section 10 of Quebec's first *Interpretation Act*, (1868) 31 Vict., c. 7, is an excellent example of a little-known provision remaining in force over a lengthy period. Passed over in successive consolidations of the Quebec statutes, it remained in force until 1986 when it was repealed by a statute whose purpose was in effect to remove provisions of this type: *An Act to repeal Acts and statutory provisions omitted upon the revision of statutes in 1888, 1909, 1925, 1941 and 1964*, S.Q. 1985, c. 37, s. 1. See however *Robin* v. *Collège de St-Boniface* (1985), 15 D.L.R. (4th) 198 (Man. C.A.).

A statute only ceases to be binding when its text expires or is repealed or replaced.[37]

Subparagraph 2: Repeal of a Legislative Text

The power to adopt a legislative or regulatory provision also includes the power to repeal or revoke it.[38]

While it is normally the case that the repeal of a text entails the deletion of the rule which it expresses, repeal does not necessarily express legislative intent to delete a rule. Such is the case, notably, with the repeal of prior texts during legislative revision: such a repeal does not imply deletion of the rule, which in fact continues to exist and is now expressed in the new text.

The repealed statute ceases to have effect from the moment the repealing statute is commenced and starts producing effects: there is no legislative vacuum between the old and the new enactments.[39]

Rules as to the effect of repeal are formulated by common law, the interpretation acts and special provisions of repealing statutes.

1. Effect of repeal at common law

At common law, the effect of repeal of a statute is "to obliterate it as completely from the records of Parliament as if it had never passed":[40]

> . . . when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.[41]

Specifically, repeal at common law entails the following consequences:

---

37. In fact, sections 5 and 6 of the Quebec *Interpretation Act* do refer to reserve powers and the power of disallowance, but these powers are so obsolete that consideration of their effects is unnecessary.
38. *Interpretation Act*, R.S.Q., c. I-16, s. 11; *Interpretation Act*, R.S.C. 1985, ch. I-21, ss. 31(4) and 42(1); *Re Certain Statutes of the Province of Manitoba Relating to Education* (1894), 22 S.C.R. 577.
39. *Wright and Corson and Canadian Raybestos Co.* v. *Brake Service Ltd.*, [1926] S.C.R. 434; *Marcil* v. *Cité de Montréal* (1893), 3 Que. S.C. 346; *Interpretation Act*, R.S.Q., c. I-16, s. 8.
40. *Kay* v. *Goodwin* (1830), 6 Bing. 576, 582 (Tindal J.), 130 E.R. 1403, 1405.
41. *Surtees* v. *Ellison* (1829), 9 B. & C. 750, 752 (Lord Tenterden), 109 E.R. 278, 279.

i) Because the repealed statute no longer has effect, institutions created within its purview cease to exist. Corporations disappear,[42] appointments are abolished, and regulations adopted under the authority of the statute are likewise repealed;[43]

ii) The repealing of the statute is deemed not to affect vested rights;[44]

iii) Offences committed prior to the repeal cannot give rise to legal proceedings, and proceedings already undertaken must be stayed;[45]

iv) Legal rules previously repealed by the statute are revived, because the repealed statute is deemed to have never existed.

2. Effect of repeal according to the interpretation acts

The interpretation acts confirm or modify some common law rules on repeal, and say nothing about others.[46]

i) They are silent as to the effect of repeal on institutions and regulations. Therefore common law rules continue to apply, because they are compatible with the interpretation acts (Quebec, s. 38, federal, s. 3(3)).

ii) They confirm the common law protection of vested rights (Quebec, s. 12, federal s. 43c)). It has even been suggested that the federal interpretation act broadens the rule to include not only "acquired" rights but also "accruing" rights.[47]

iii) They set aside the common law rule relating to offences, and permit prosecution of offences committed prior to repeal.[48]

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42. *Régie des alcools du Québec* v. *Dandurand*, [1972] Que. C.A. 420.
43. *Dupuy* v. *Déry*, [1981] Que. S.C. 516; *Watson* v. *Winch*, [1916] 1 K.B. 688; *Cité de Montréal* v. *Royal Insurance Co.* (1906), 15 Que. K.B. 574, affirming (1906), 29 Que. S.C. 161; *Motor Car Supply Co. of Canada* v. *A.-G. of Alberta*, [1938] 4 D.L.R. 489 (Alta. S.C.); *Blakey & Co.* v. *The King*, [1935] Ex. C.R. 223.
44. Vested or acquired rights are discussed *infra*, pp. 156 ff.
45. *R.* v. *McKenzie* (1820), Russ & Ry. 429, 168 E.R. 881.
46. *Interpretation Act*, R.S.Q., c. I-16, ss. 5, 9 and 12; *Interpretation Act*, R.S.C. 1985, ch. I-21, s. 43.
47. *Infra*, p. 175.
48. In this way the interpretation acts avoid a retroactive effect being given to repeal by the *a posteriori* suppression of penal liability incurred prior to repeal. See *infra*, pp. 148 ff.

iv) They set aside the rule by which the repeal of a repealing enactment revives the prior law (Quebec, s. 9, federal, s. 43a)). The federal act is somewhat broader than the Quebec one, preventing the revival of both statute and common law.[49] In contrast, the Quebec act only prevents the revival of statute law only,[50] thus allowing a return to common law rules unless the legislature has indicated, either implicitly or explicitly, that this is not to take place.

3. Special provisions for repeal

Although, in the interests of clarity, special provisions relating to repeal have been reserved for last, they are in fact the first element to be looked at in assessing the effect of repeal. Just as the interpretation acts create exceptions to common law, special provisions in repealing legislation can set aside common law, sometimes with extravagant consequences.[51]

Transitional provisions – special provisions defining the effect of repeal – may also clarify the application of the general law in specific circumstances. In particular, because acquired or vested rights are, as we shall see, nebulous concepts, legislatures may take special care to define their scope

Subparagraph 3: Substitution of a Legislative Text

Legislatures may substitute one text for another, by introducing a new enactment, on the same subject, at the same time as it revokes a previous one. From a formal perspective, substitution is viewed as the repeal of the earlier text and the enactment of a new one. From a substantive perspective, substitution is generally viewed as the amendment of the former law, as opposed to pure and simple deletion.

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49. *R.* v. *Camp* (1978), 79 D.L.R. (3d) 462 (Ont. C.A.); *R.* v. *Firkins* (1978), 80 D.L.R. (3d) 63 (B.C.C.A.); *Schiell* v. *Coach House Hotel Ltd.* (1982), 136 D.L.R. (3d) 470 (B.C.C.A.). It was held that this rule also applies when an enactment is declared invalid: the enactment that was repealed by the invalid enactment does not revive: *Montreal General Hospital* v. *Ville de Montréal*, J.E. 82-911 (Que. S.C.). This view is contrary to what was stated by the Supreme Court of Canada, in *obiter*, in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 747.
50. *Montreal Parquetry Floors Ltd.* v. *Comité conjoint des métiers de la construction de Montréal*, [1956] Que. Q.B. 142.
51. The interpretation acts apply only in the absence of contrary provisions (*Interpretation Act*, R.S.Q., c. I-16, s. 1; *Interpretation Act*, R.S.C. 1985, ch. I-21, s. 3(1)).

changes in favour of the citizen, the chances are that the courts will rule in favour of immediate application of the new statute.[280]

iii) Criteria for the recognition of vested rights

Deciding whether a new statute should be immediately applied is, as judges themselves have noted, a difficult task. To help litigants distinguish between genuinely vested rights and simple expectations, the courts have enunciated a number of criteria, two of which are particularly important. Firstly, the courts require litigants to establish that their legal situation is specific and concrete, rather than general and abstract. Secondly, litigants must demonstrate that this situation existed at the time of the new statute's commencement.[281]

- A specific and concrete legal situation

An individual cannot claim vested rights if unable to prove they are placed in a specific and concrete legal situation. The mere availability of a statute does not create a vested right.

Take, for example, the owner of a plot of land who hopes one day to construct a 20-storey building. This plan could be realized if certain administrative steps that would convert this abstract right into a concrete one were undertaken. But if, before any material steps have been taken to exercise this theoretical right, the zoning bylaw is amended to render construction of the building impossible, the owner of the plot cannot plead the existence of vested rights. Mere ownership of the land, for this owner as for all other landowners in the same zone, is not a sufficient basis for vested rights.[282] If this were not true, laws could never be changed.

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280. Maintenance of vested rights is a liberal principle based on the desire to protect subjects of the law against prejudicial changes to it. When legislation is amended in a way favourable to the citizen, it would be inappropriate to deny the benefit of the more favourable enactment. Some decisions are undoubtedly founded on the unwritten principle that the Administration cannot, by invoking the doctrine of vested rights, deprive a person of the benefit of a new statute. See: *Board of Trustees of the Acme Village School District* v. *Steele-Smith*, [1933] S.C.R. 47; *Bellechasse Hospital Corporation* v. *Pilotte*, [1975] 2 S.C.R. 454; *A.-G. of Quebec* v. *Tribunal de l'expropriation*, [1986] 1 S.C.R. 732.

281. The method of analysis suggested here was adopted by the Supreme Court in *Dikranian* v. *Québec (Attorney General)*, [2005] 3 S.C.R. 530, par. 37 ff., and by the Saskatchewan Court of Appeal in *Re Scott and College of Physicians and Surgeons of Saskatchewan*, (1993) 95 D.L.R. (4th) 706 (Sask. C.A.).

282. *Canadian Petrofina Ltd.* v. *Martin and City of St-Lambert*, [1959] S.C.R. 453, 458 (Fauteux J.); *Santilli* v. *City of Montreal*, [1977] 1 S.C.R. 334.

The leading case on the requirement of a specific and concrete legal situation is the Privy Council's decision in *Abbott* v. *Minister for Lands*.[283] When Abbott purchased parcels of Crown land, the law gave him the right to acquire adjacent lots, subject to certain conditions, without any residence requirement. Before he had exercised the option, the statute was repealed. The repealing act provided for the preservation of "rights accrued". Some years later, Abbott attempted to exercise his option to buy the neighbouring lots. Was this option one of the "rights accrued" explicitly provided for in the repealing statute?

The Privy Council answered in the negative. In the Lord High Chancellor's words:

> It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.
>
> It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a 'right.' But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.
>
> Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed.' They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment.[284]

The *Abbott* case was applied by the Supreme Court of Canada in *Minister of National Revenue* v. *Molson*,[285] *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*[286] and *Attorney-General of Quebec* v. *Expropriation Tribunal*.[287]

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283. *Abbott* v. *Minister for Lands*, [1895] A.C. 425.
284. *Ibid.*, 431.
285. *Minister of National Revenue* v. *Molson*, [1938] S.C.R. 213, 230-231.
286. *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, [1977] 1 S.C.R. 271.
287. *A.G. (Que.)* v. *Expropriation Tribunal*, [1986] 1 S.C.R. 732.

In *Gustavson Drilling*, the Court decided that the right to certain tax deductions was not "vested" with respect to subsequent fiscal years. According to Justice Dickson:

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and government policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.[288]

In other words, "the right must be acquired by a specific individual, and not the public in general".[289] Similarly, in *Starey* v. *Graham*, it was held that exercise of the mere possibility of practising an unregulated profession gave no vested right to exercise the profession.[290] Because the "right" to practise a non-prohibited activity belongs to everyone, the judge held that the situation of someone who actually engaged in that activity was not sufficiently specific to justify recognition of a vested right.

But it is not enough to establish the existence of a specific right; it is also necessary that it be acquired, that is, that it has sufficient legal existence.

- A sufficiently constituted legal situation

In determining the existence of vested rights, the courts require not only that they be specific and concrete, but also that they are sufficiently individualized and materialized to justify judicial protection.

At what moment does this take place? This is a delicate question, and often little more than a guess can suggest where the judge

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288. *Ibid.*
289. *Commander Nickel Copper Mines Ltd.* v. *Zulapa Mining Corp.*, [1975] Que. C.A. 390, 392 (Rinfret J.) [translation].
290. *Starey* v. *Graham*, [1899] 1 Q.B.D. 406. Similarly: *University Health Network* v. *Ontario (Minister of Finance)*, (2001) 208 D.L.R. (4th) 459 (Ont. C.A.); *Rhys-Jones* v. *Rhys-Jones*, (2000) 186 D.L.R. (4th) 108 (Ont.C.A.).

will draw the line between vested rights and simple expectations.[291] "The distinction between what is and what is not 'a right' must often be one of great fineness."[292]

Some cases are not particularly complicated, because the legal situation is crystallized instantly. The hopes or expectations of a person's heirs generally become rights the instant they die.[293] Rights and obligations resulting from a contract are created at the same time as the contract itself.[294] A fault or tort instantaneously gives birth to the right to compensation.[295] Any proceedings that ensue serve only to realize the debt, not to create rights, nor confer upon them "vested" status.[296]

Other rights may be created only by administrative or judicial intervention. On several occasions the courts have ruled that the right to file claims against compensation funds for the victims of automobile accidents is acquired at the time of the decision against the wrongdoer and not at the time of the accident.[297] If the law is amended between the date of the accident and that of a judgment of civil liability, the claim against the fund will be governed by the new statute.[298]

Often the statute requires that the individual apply to an administrative body in order to create or exercise their rights. Three steps are involved: application, study by the body, and decision.

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291. "It is not an easy task to determine when sufficient has been done in a particular case to change abstract or potential rights into acquired rights. . .", *Re Owners Strata Plan VR 29* (1979), 91 D.L.R. (3d) 528 (B.C.S.C.), 534 (Trainor J.).
292. *Per* Lord Evershed, *Free Lanka Insurance Co.* v. *Ranasinghe*, [1964] A.C. 541, 552.
293. *Marchand* v. *Duval*, [1973] Que. C.A. 635.
294. *Dikranian* v. *Québec (Attorney General)*, [2005] 3 S.C.R. 530; *Township of Nepean* v. *Leikin* (1971), 16 D.L.R. (3d) 113 (Ont. C.A.). A contractual right is generally considered to be a vested right: see *Location Triathlon Inc.* v. *Boucher-Forget*, [1994] R.J.Q. 1666 (C.S.).
295. *Holomis* v. *Dubuc* (1975), 56 D.L.R. (3d) 351 (B.C.S.C.); *Ishida* v. *Itterman*, [1975] 2 W.W.R. 142 (B.C.S.C.).
296. *McMeekin* v. *Calder* (1978), 84 D.L.R. (3d) 327 (Alta. S.C.).
297. *Nadeau* v. *Cook and Superintendent of Insurance*, [1948] 2 D.L.R. 783 (Alta. S.C.); *Re Mercier and Mercier* v. *McCammon*, [1953] 4 D.L.R. 498 (Ont. H.C.); *Provincial Secretary Treasurer* v. *Hastie*, [1955] 3 D.L.R. 371 (N.B.C.A.).
298. *Cross* v. *Butler & Sawyer*, [1955] 2 D.L.R. 611 (N.S.S.C.); *A.-G. of Canada* v. *Murray* (1968), 70 D.L.R. (2d) 52 (N.S.S.C.); *Canadian Pacific Ltd.* v. *Public Trustee* (1973), 32 D.L.R. (3d) 122 (Alta. S.C.), affirmed (1974) 43 D.L.R. (3d) 318 (Alta. C.A.). For the contrary view, *Curran & Curran* v. *Wood*, [1954] 1 D.L.R. 462 (Ont. H.C.).

Although generalizations are hazardous, it seems that problems will arise only if the statute is amended during the process of study by the body. As long as the application has not been made, the individual has no more than an expectation, and this can be swept away by legislative amendment. On the other hand, if the administrative body has rendered its final decision, the courts will generally hold that the right in question has been fully constituted and is not affected by a new statute.

What happens if the law is amended while an application is being studied? For example does a simple application (for a permit, licence, visa, patent, enquiry, etc.) give the individual a sufficiently concretized right, and thus enable him to proceed according to the legal rules existing at the time of the application?

It appears to be accepted that a distinction should be made between study for the purposes of recognizing a right and study for the purposes of creating a right. This distinction played a crucial role in the Privy Council decision of *Director of Public Works* v. *Ho Po Sang*.[299] Were the steps undertaken by a landlord to obtain an eviction order against tenants of a building scheduled to undergo urban renewal sufficient to constitute a vested right? Because the decision to grant or refuse the order was administrative rather than quasi-judicial, and could therefore be based on policy considerations, the procedure served to create a right, and not simply to recognize one that already existed.

The Privy Council was asked to interpret an enactment similar to section 43 of the federal *Interpretation Act*, which provides that repeal is deemed not to affect an enquiry relating to a right accrued under the repealed act.

Lord Morris distinguished between a procedure serving to declare rights and one creating them:

> It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should

299. *Director of Public Works* v. *Ho Po Sang*, [1961] A.C. 901.

not be given. Upon repeal, the former is preserved by the *Interpretation Act*. The latter is not.[300]

However, it has been held that even if rights are created by procedure, the applicant may have acquired the right to a decision, although not necessarily a favourable one.[301]

There is some doubt about the applicability of *Ho Po Sang* to federal law, because of the wording of section 43(c) of the federal *Interpretation Act*. The text refers to any "right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed". Quebec's *Act* only protects "acquired rights", but the federal statute goes further and covers those that are "accruing" at the time of repeal. This distinction has been made on several occasions,[302] and could justify a relatively more liberal interpretation of vested rights where federal statutes are concerned. However, in *R.* v *Puskas*, the Supreme Court supported the position that regardless of the wording of the federal *Interpretation Act*, a right only becomes vested once all of the preliminary conditions are met, and that it remains subject to legislative change if, at that moment, it was simply accruing.[303]

Ho Po Sang can also be set aside in Quebec law by invoking section 12 of the *Interpretation Act*, which provides that "proceedings instituted" may be continued despite repeal of a statute. As section 12 does not specify the type of proceedings, it can be argued that even proceedings serving to create rather than simply recognize a right ought to be continued even after repeal. On the other hand, the term

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300. *Ibid.*, 922.

301. *Re Falconbridge Nickel Mines Ltd.* (1981), 121 D.L.R. (3d) 403 (Ont. C.A.), reversing (1980), 100 D.L.R. (3d) 570 (Ont. H.C.); *Ford* v. *National Parole Board*, [1977] 1 F.C. 359 (T.D.). A Quebec decision states that a procedure which culminates in the creation of rights (a collective agreement made by decree) must be completed before the repeal of the statute which governs it: *Saumure* v. *Building Materials Joint Committee*, [1943] Que. K.B. 426.

302. *In Re Kleifges*, [1978] 1 F.C. 734, 738 (Walsh J.); *Re Owners Strata Plan VR 29* (1979), 91 D.L.R. (3d) 528 (B.C.S.C.), 532 (Trainor J.); *Ford* v. *National Parole Board*, [1977] 1 C.F., p. 359, 364 (Walsh J.); *Re Rai* (1980), 106 D.L.R. (3d) 718 (Ont. C.A.), 724 (Weatherston J.).

303. *R.* v. *Puskas*, [1998] 1 S.C.R. 1207, p. 1216, *per* Lamer C.J.: "something can only be said to be 'accruing' if its eventual accrual is certain, and not conditional on future events. . . In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled." To the same effect, see *Hutchins* v. *National Parole Board*, (1994) 156 N.R. 205 (F.C.A.).

"instituted" refers to civil or penal proceedings undertaken against another party, but does not refer to an administrative procedure serving to create a right, as strictly speaking, the latter is considered to be exercised against the administrative agency.

Setting aside the problem of administrative proceedings that create rights, does the simple filling out of an application (for a permit, a licence, etc.) suffice to crystallize an individual's rights? There is no general answer to this question. In some cases, applications have been held to be sufficient, in others they have not; it is difficult to find a logical basis for the distinctions made in the case law.

In municipal law, a request for a demolition permit[304] and proceedings to join two apartments in co-ownership[305] were held sufficient to concretize the judicial situation and confer vested rights, thereby justifying survival of the earlier statute. In the matter of construction permits, the Supreme Court has exhibited a nuanced approach that strikes a balance between the rights of landowners and those of the municipality: the request for a permit does not make a right "vested"[306] but it does create a *prima facie* right that can only be set aside by the municipality under certain conditions.[307]

In labour law, the referral of a dispute to an arbitrator[308] and the laying of a complaint regarding discrimination in employment[309] have justified survival of the earlier statute. While the courts have been generous in recognizing vested rights in matters relating to citizenship,[310] they have been less so when dealing with immigration.[311] In patent law, it was held that a right was acquired with the filing of the patent application.[312] This is also true for the approval of new medication: the Supreme Court held, in *Apotex*, that a request for the

304. *Re Teperman & Sons Ltd.* (1975), 55 D.L.R. (3d) 653 (Ont. C.A.).
305. *Re Owners Strata Plan VR 29* (1979), 91 D.L.R. (3d) 528 (B.C.S.C.).
306. *Canadian Petrofina Ltd.* v. *Martin and the City of St-Lambert,* [1959] S.C.R. 453.
307. *City of Ottawa* v. *Boyd Builders Ltd.*, [1965] S.C.R. 408.
308. *Picard* v. *Public Service Staff Relations Board,* [1978] 2 F.C. 296 (C.A.).
309. *Bell Canada* v. *Palmer,* [1974] 1 F.C. 186 (C.A.).
310. *In Re Kleifges,* [1978] 1 F.C. 734 (T.D.).
311. Compare *McDoom* v. *Minister of Manpower and Immigration,* [1978] 1 F.C. 323 (T.D.) with *Cortez* v. *Canada (Secretary of State)* (1994), 74 F.T.R. 9 (T.D.) and *Kazi* v. *Canada (Minister of Citizenship and Immigration),* [2004] 1 R.C.F. 161 (C.A.F.).
312. *Canadian Westinghouse Co.* v. *Grant,* [1927] S.C.R. 625.

issuance of a notice of compliance for a pharmaceutical product gives rise to a vested right.[313]

However, in matters of refugee status recognition, the courts have ruled that the law applicable is the law in force at the moment the file is under review and not that in force when the status is claimed.[314]

The Federal Court, on two separate occasions, has held that an application for a permit did not create the right to have it processed according to the law in force at the time of application. In *Martinoff* v. *Gossen*,[315] Walsh J. decided that filing for permission to operate a firearms business did not create a vested right to have the request studied in the light of a statute that had since been repealed. In *Lemyre* v. *Trudel*,[316] Marceau J. ruled that a request to register a restricted weapon did not create a vested right to have the request considered in accordance with the law in effect at the time of the request. These cases are hard to reconcile with *Abell* v. *Commissioner of Royal Canadian Mounted Police*[317] and *Haines* v. *Attorney-General of Canada*,[318] which held that an application for a firearms permit generated vested rights.

2. *Application of the principle of non-interference with vested rights*

The principle of non-interference with vested rights has been applied in both public and private law. In private law, for example, it has been held on several occasions that a new statute cannot affect rights of creditors whose secured or preferred claims were created by an earlier statute.[319]

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313. *Apotex Inc.* v. *Canada (Attorney General)*, [1994] 3 S.C.R. 1100, affirming Federal Court of Appeal ([1994] 1 F.C. 742).
314. *McAllister* v. *Canada (Minister of Citizenship and Immigration)* (1996), 108 F.T.R. 1 (T.D.).
315. *Martinoff* v. *Gossen*, [1979] 1 F.C. 327 (T.D.).
316. *Lemyre* v. *Trudel*, [1978] 2 F.C. 453 (T.D.).
317. *Abell* v. *Commissioner of Royal Canadian Mounted Police* (1980), 49 C.C.C. (2d) 193 (Sask. C.A.).
318. *Haines* v. *A.G. of Canada* (1979), 32 N.S.R. (2d) 271 (N.S.C.A.).
319. *Trust and Loan Co. of Canada* v. *Picquet* (1922), 60 Que. S.C. 291; *Manufacturers' Life Insurance Co.* v. *Hanson*, [1924] 2 D.L.R. 692 (Alta. C.A.); *Minister of Railways and Canals* v. *Hereford Railway Co.*, [1928] Ex. C.R. 223; *Gilmore* v. *Le Roi* (1932), 52 Que. K.B. 346; *Mortgage Corporation of Nova Scotia* v. *Muir*, [1937] 4 D.L.R. 231 (N.S.S.C.); *Re Director of Employment Standards and Montreal Trust Co.* (1981), 123 D.L.R. (3d) 58 (Man. C.A.); *Orca Investments Ltd.* v.

In contract law, it has been held that a new statute will not govern the ongoing effects of a loan,[320] sale,[321] insurance contract[322] or lease.[323] The Supreme Court has held that rights accrued by the registration of a patent should not be affected by the repeal of the statute in force at the time the patent was granted.[324]

Municipal law, and specifically zoning, is the field of public law most concerned with vested rights. A new zoning bylaw cannot interfere with validly constituted non-conforming uses unless the enabling statute provides for the power to encroach upon vested rights.

The principle of non-interference with vested rights has been invoked in the face of new statutes or regulations, to justify a hospital's claim to be paid for services, [325]and to affirm the rights of an airline pilot subject to reclassification,[326] a prisoner's right to periodic reconsideration of parole,[327] the right to unemployment insurance

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Vaugier (1983), 142 D.L.R. (3d) 327 (B.C.C.A.). *Contra: Ross* v. *Beaudry*, [1905] A.C. 570, reversing (1903), 12 Que. K.B. 334, and restoring (1902) 22 Que. S.C. 46. The decision in *Ross* v. *Beaudry* was no doubt motivated by the unusual character of the guarantee in question, the lessor's privilege in the case of transfer of rights to the lessee. The property on which the privilege will operate remains undetermined, and is not "crystallized" unless there is a writ of execution, a garnishee order or a transfer or conveyance of rights); *Allard et Robitaille Ltée* v. *La Reine*, [1956] Que. Q.B. 51.

320. *Dikranian* v. *Quebec (Attorney General)*, [2005] 3 S.C.R. 530.

321. *Location Triathlon Inc.* v. *Boucher-Forget*, [1994] R.J.Q. 1666 (C.S.); *Benson* v. *International Harvester Co.* (1914), 16 D.L.R. 350 (Alta. S.C.); *Pitcher* v. *Shoebottom* (1971), 14 D.L.R. (3d) 522 (Ont. H.C.); *Re Cadillac Fairview Corporation and Allin* (1980), 100 D.L.R. (3d) 344 (Ont. H.C.). See, however, *Massey-Ferguson Finance Company of Canada Limited* v. *Kluz*, [1974] S.C.R. 474, which held that amendment of procedures for recovering items that had been sold applied to a contractual situation created before the commencement of the amended provisions. As Forget J. observed at page 1674 of the *Location Triathlon* case ([1994] R.J.Q. 1666 (C.S.)), *Kluz* can be understood by reference to the purely procedural character of the modifications to creditors' rights provided by the new statute.

322. *Toronto General Trusts Corp.* v. *Gooderham*, [1936] S.C.R. 149; *Wawanesa Mutual Insurance Co.* v. *Buchanan* (1977), 74 D.L.R. (3d) 330 (Ont. Co. Ct.); *Burke* v. *North British Mercantile Insurance Co.* (1977), 76 D.L.R. (3d) 737 (P.E.I.S.C.).

323. *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *R.* v. *Walker*, [1970] S.C.R. 649; *Phillips* v. *Conger Lumber Co.* (1912), 5 D.L.R. 188 (Ont. H.C.).

324. *Kaufman* v. *Belding-Corticelli Ltd.*, [1940] S.C.R. 388.

325. *Parklane Private Hospital Ltd.* v. *City of Vancouver*, [1975] 2 S.C.R. 47.

326. *Jones et Maheux* v. *Gamache*, [1969] S.C.R. 119.

327. *Ford* v. *National Parole Board*, [1977] 1 C.F. 359.

benefits despite a reduction of the age limit[328] and rights of the owner of real property rights.[329]

3. *Non-application of the principle of non-interference with vested rights*

As with other principles of statutory interpretation, the principle of non-interference with vested rights is only a presumption of parliamentary intent, and can therefore be set aside either explicitly or implicitly.[330] The interpretation acts enshrine the power of legislatures to withdraw benefits which may have been granted by an earlier statute.[331]

It has already been pointed out that the principle of non-interference with vested rights appears to be less imperative than the rule against retroactive operation of statutes: because it is thought to carry less weight and less authority than the latter, it can be dismissed more easily. This is hardly surprising, because retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule. "It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights. . ."[332]

It was Driedger who underlined the differing weight of the two principles.[333] The case law is replete with endorsements of his thesis, the most noteworthy decision being *Board of Commissioners of Public Utilities* v. *Nova Scotia Power Corp.*[334]

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328. *Employment and Immigration Commission* v. *Dallialian*, [1980] 2 S.C.R. 582. The extent of the vested rights of the beneficiary of unemployment insurance is however limited: *Côté* v. *Canada Employment and Immigration Commission* (1986), 69 N.R. 126 (F.C.A.), and *Bourdeau* v. *Canada* (1988), 86 N.R. 394 (F.C.A.); *Canada (Attorney General)* v. *Kowalchuk* (1990), 114 N.R. 275 (T.D.).
329. *Abell* v. *County of York* (1921), 61 S.C.R. 345; *Re Alfrey Investments Ltd. and Shefsky Developments Ltd.* (1975), 52 D.L.R. (3d) 641 (Ont. H.C.).
330. *Board of Trustees of the Acme Village School District* v. *Steele-Smith*, [1933] S.C.R. 47, 51.
331. *Interpretation Act*, R.S.Q., c. I-16, s. 11; *Interpretation Act*, R.S.C. 1985, ch. I-23, s. 42(1). For an application of this principle: *Re Apple Meadows Ltd.* (1985), 18 D.L.R. (4th) 58 (Man. C.A.).
332. *Per* Dickson J., *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, [1977] 1 S.C.R. 271.
333. Elmer A. Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, p. 189.
334. *Board of Commissioners of Public Utilities* v. *Nova Scotia Power Corp.* (1977), 75 D.L.R. (3d) 72 (N.S.C.A.).

When does a statute encroach upon vested rights? Legislative intention to affect vested rights may be either explicit or implicit.

i) Explicit interference with vested rights

Because Parliament has the power to pass retroactive laws, it can *a fortiori* legislate to affect vested rights. The presumption of non-interference with vested rights ". . . only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions".[335] The law at present provides no constitutional or quasi-constitutional rule that could limit the power of the legislature to determine if and to what extent a new statute will have an immediate effect.[336]

What for Parliament is only a presumption becomes for the Administration a formal jurisdictional constraint, however. Vested rights cannot be encroached upon by regulation unless the enabling act authorizes such power, either implicitly or explicitly.[337]

The courts are not particularly demanding with regard to expression of intent to affect vested rights. On numerous occasions, they have simply noted that the wording of the statute seems to apply indiscriminately to all legal situations, whether constituted before or after the commencement of the statute. The literal method tends to assign to the legislature the intention to affect vested rights whenever the statute fails to distinguish between legal situations constituted before or after commencement of the new statute: since the legislature has failed to draw a distinction, judges do not feel authorized to do so either.

Such reasoning has justified applying a new statute to contracts concluded,[338] debts incurred,[339] and children born[340] before the date of the statute's commencement.

335. *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, [1977] 1 S.C.R. 271, 282 (*per* Dickson J.).
336. For requirements of the principle of equality before the law where transitional provisions aimed at defining and preserving vested rights are concerned, see: *R.* v. *Beauregard*, [1986] 2 S.C.R. 56.
337. *Parklane Private Hospital Ltd.* v. *City of Vancouver*, [1975] 2 S.C.R. 47. An example of express authorisation can be found in *Magog (Ville de)* v. *Restaurants McDonald du Canada Ltée*, [1996] R.J.Q. 570 (C.A.Q.).
338. *Board of Trustees of the Acme Village School District* v. *Steele-Smith*, [1933] S.C.R. 47; *Chapin* v. *Matthews* (1915), 24 D.L.R. 457 (Alta. S.C.); *Re Attorney General for Alberta and Gares* (1976), 67 D.L.R. (3d) 635 (Alta. S.C.).
339. *Allard et Robitaille Ltée* v. *La Reine*, [1956] Que. Q.B. 51.
340. *Karst* v. *Berlinski*, [1930] 4 D.L.R. 884 (Sask. C.A.).

In *Venne* v. *Québec (Commission de protection du territoire agricole)*,[341] the Court concluded that the statute had immediate application, following an *a contrario* reasoning based on its provisions, which expressly provided for the respect of certain vested rights.

Vested rights may also be affected by the adoption of a statute that is retroactive to a date prior to the vesting of the rights. This law requires proceeding as if the rights in question had never been vested.[342]

ii) Implicit interference with vested rights

Statutes can affect vested rights even if such intention can only be inferred from the legislation.

On this subject, the leading case is *Board of Trustees of the Acme Village School District* v. *Steele-Smith*.[343]

A contract of employment between a teacher and a school board provided that either party could terminate it at any time by giving 30 days' notice. It also gave the teacher the right to be heard, before the school board could give such a notice of termination. The contract between the parties was renewed for one year on June 28, 1931. One week later, on July 4, the board announced its intention to terminate the contract. The teacher was heard by the board on July 14, and on July 18 received a notice of dismissal.

However, on July 1 (after renewal of the contract but before the notice of dismissal) a new statute, enacted March 28, 1931, limiting the right of parties to terminate contracts came into effect. According to the *School Act* (S.A. 1931, ch. 32, s. 157), a school board could not dismiss a teacher without permission of the school inspector, unless the dismissal notice were given during the month of June. Similarly, the teacher required permission to resign, unless notice was given during the months of June or July. The purpose of the new provision was apparently to minimize movement of personnel during the school year, and thus improve the quality of teaching.

341. *Venne* v. *Quebec (Commission de la protection du territoire agricole)*, [1989] 1 S.C.R. 880.
342. *Grand Rapids (Town)* v. *Graham*, [2005] 1 W.W.R. 464 (Man. C.A.).
343. *Board of Trustees of the Acme Village School District* v. *Steele-Smith*, [1933] S.C.R. 47.

TAB 3

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SPOONER OILS LIMITED, AND ARTHUR GILLESPIE SPOONER (PLAINTIFFS) ..... APPELLANTS;

*April 26, 27.
*Oct. 3.

AND

THE TURNER VALLEY GAS CONSERVATION BOARD AND THE ATTORNEY GENERAL OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional law—Statutes (construction, validity)—Turner Valley Gas Conservation Act, Alta., 1932, c. 6—Competency, in so far as it affects leases from Dominion Government under Regulations of 1910 and 1911 (made under authority of Dominion Lands Act, 1908, c. 20)—Agreement between the Dominion and the Province of Alberta respecting transfer to Province of public lands, etc. (confirmed by B.N.A. Act, 1930)—B.N.A. Act, 1867, ss. 91, 92.

Appellant was holder of a lease from the Dominion Government, granted under the regulations of March, 1910 and 1911 (made under authority of the *Dominion Lands Act,* 1908, c. 20), of a tract of land in the Turner Valley gas field, in the province of Alberta, for the purpose of mining and operating for petroleum and natural gas. Sec. 2 of the agreement between the Dominion and the Province, dated December 14, 1929 (respecting transfer to the Province of public lands, etc.; and which agreement was confirmed and given "the force of law" by the *B.N.A. Act, 1930,* c. 26) provides that "the Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise" except with consent or "in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province * * *." In 1932 (c. 6) the Province passed the *Turner Valley Gas Conservation Act,* the broad purpose of which was to reduce the loss of gas in the said field by burning as waste, and which subjected a lessee's operations to the control of a Board whose duty it was to limit the production of natural gas, in the said field, and from any particular well by reference to the amount of naphtha the well ought, in the Board's opinion, to be permitted to produce.

Held: The said Act of the Province "affected" the "terms" of the lease and of similar leases made under said regulations, within the meaning of s. 2 of said agreement (and did not come within the exceptions in said s. 2), and was, in so far as it affected such leases, incompetent.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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(Judgment of the Appellate Division, Alta., [1932] 3 W.W.R. 477, [1932] 4 D.L.R. 750, reversed in this respect).

The Act "affected" the lease, notwithstanding that the lease required the lessee to work the mines "in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands.". Conforming to such standard of working did not require following methods dictated by considerations of public policy, as contradistinguished from the interests of proprietors as proprietors.

Sec. 29 of the Dominion regulations of 1928 (published in 1930), which (among other provisions) required a lessee to take precautions against "waste" of natural gas, did not apply to the lease in question. The rule that a legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark*, 15 App. Cas. 384, at 388), unless the language in which it is expressed requires such a construction, operated against such application; the Order in Council bringing s. 29 into force contained nothing in its language to indicate that s. 29 was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the regulations of 1910 and 1911. Neither the terms of the lease itself, nor the regulations of 1910 and 1911, justified a construction by which s. 29 was made to constitute a part of the contract. But even assuming that s. 29 applied, it afforded no escape from the conclusion that the terms of the lease were disadvantageously "affected" by the provincial Act; whatever might be the exact effect of such a requirement against "waste" (if it applied to the lease), the provincial Act, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" (s. 13 of the Act) of an administrative Board, in this respect radically altered the status of the lessee under the terms of his lease.

Sec. 2 of said agreement between the Dominion and the Province precluded the Province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character as to fall under powers of legislation possessed by the Province prior to the agreement. But, further, had the provincial Act in question been passed prior to the agreement, and while the public lands were still held by the Dominion, it would have been inoperative, as regards such leases as that in question, on the grounds (1) that it was repugnant, in so far as it affected tracts leased under the regulations of 1910 and 1911, to those regulations, and the Dominion statute under which they were promulgated; and (2) that, in so far as it authorized the Board to make regulations (taking effect by orders of the Board which were given statutory force) concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it was legislation strictly concerning the public property of the Dominion (reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1) of the *B.N.A. Act, 1867*).

Held also (agreeing in this respect with the judgment of the Appellate Division, *supra*): The Act of the province could not be said to be invalid on the ground that, as a whole, it dealt with matters falling strictly under s. 91 (2) (regulation of trade and commerce), or, at all

events, with matters outside the scope of s. 92, of the *B.N.A. Act, 1867*. *(Union Colliery Co. of British Columbia Ltd.* v. *Bryden,* [1899] A.C. 580, at 587, cited). The Act was, in substance, legislation providing for the regulation of the working of natural gas mines in the Turner Valley area from a provincial point of view and for a provincial purpose; nothing had been shown to indicate that the working of the mines (excepting the wells upon lands leased from the Dominion) was a matter which, by reason of exceptional circumstances, had ceased to be, or had ever been, anything but a matter "provincial" in the relevant sense.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The plaintiff Spooner was the holder of a lease of land dated August 31, 1912, from His Majesty the King, represented therein by the Minister of the Interior of Canada, for the "sole and only purpose" of mining and operating for petroleum and natural gas, and of laying pipe lines, etc. The lease was granted under the Regulations of March, 1910 and 1911, made under the authority of the *Dominion Lands Act,* 1908, c. 20, s. 37. The appellant company was the owner in fee simple of certain lands, and held a sub-lease of sixty acres of the tract leased to the plaintiff Spooner. All the lands were in the Turner Valley gas field in the province of Alberta. The plaintiffs brought an action, attacking an order made by The Turner Valley Gas Conservation Board as being illegal and unauthorized (The plaintiffs' contention below that the Board's order was not authorized by the provincial Act in question was not argued in the present appeal); attacking the *Turner Valley Gas Conservation Act,* Statutes of Alberta, 1932, c. 6, as being contrary to the terms of s. 2 of the agreement dated December 14, 1929, made between the Government of the Dominion of Canada and the Government of the Province of Alberta (respecting transfer to the Province of public lands, etc.), and set out as a schedule to c. 26 of the Imperial Statutes of 1930 (the *British North America Act, 1930,* which confirmed said agreement and gave it "the force of law"); and attacking the said Act of the Province as being legislation in regard to the "regulation of trade and commerce" (*B.N.A. Act, 1867,* s. 91 (2)), and therefore *ultra vires;* and attacking s. 20 of the said Act of the Province as imposing indirect taxation and being, therefore, *ultra vires.*

(1) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

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Ewing J. dismissed the action (1). The Appellate Division (2) varied his judgment so as to declare that ss. 20, 21 and 22 of the said Act of the Province were *ultra vires* (as imposing indirect taxation. Ewing J., for reasons stated in his judgment, did not make a declaration on this point), and in all other respects affirmed his judgment. The plaintiffs appealed (by leave of the Appellate Division) to the Supreme Court of Canada. (There was no cross-appeal against the declaration that ss. 20, 21 and 22 were *ultra vires,* and this matter was not in issue in the present appeal).

The material facts, and the questions in issue on the present appeal, are more fully set out in the judgment now reported.

The appeal was allowed with costs, and judgment was directed declaring that the impeached legislation was invalid as respects the leasehold properties of the appellants.

H. S. Patterson, K.C., for the appellants.

W. S. Gray, K.C., for the respondents.

The judgment of the court was delivered by

DUFF C.J.—The appellant Spooner is the holder of a "lease" of a tract of land in the Turner Valley gas field, which gives him the right to work the tract for petroleum and natural gas. The term of the lease is twenty-one years and is renewable at its expiration. The lease was granted under the Regulations of March, 1910 and 1911, and it will be necessary to consider the provisions of it with some particularity.

The Turner Valley gas field is what is known as a "wet field"; one, that is to say, where the natural gas coming to the surface holds crude naphtha in suspension. The practice of the operators in that field was, up to the time the impugned legislation was enacted, to extract the naphtha from the natural gas by passing the gas through separators, and thereby effecting a liquefaction of the naphtha.

For the natural gas produced in this field there is no sufficient market, and, since, to allow it to escape into the atmosphere (after the extraction of the naphtha) might

(1) [1932] 2 W.W.R. 454; [1932] 4 D.L.R. 729.
(2) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

endanger the health of people living in the vicinity, it is for the most part burned as refuse. Some of it is transported to Calgary and Lethbridge for consumption there in the production of light and heat; and some is used in refineries; but, while the ratio of the volume of gas consumed as waste to that which is usefully consumed varies from month to month, it may be stated, without substantial inaccuracy, that very little more than ten per cent. of what passes out of the wells is, except for the recovery of naphtha, applied to any useful purpose.

In 1932 the Legislature of Alberta passed a statute, *The Turner Valley Gas Conservation Act* (1932, c. 6); the broad purpose of which is to reduce the loss of gas in this field by burning as waste. A Board is constituted, The Turner Valley Gas Conservation Board, the general function of which, the statute declares, is to take measures for the conservation of gas in the Turner Valley field.

The appellant company are the owners, in fee simple, of several tracts in the field, and hold a sub-lease of sixty acres of the tract leased to the appellant Spooner. The appellants, who are plaintiffs in the action, seek a declaration that the legislation of 1932 is *ultra vires,* as a whole, on the ground that it deals with matters falling within the ambit of s. 91 (2) of the *British North America Act,* or, at all events, with matters outside the scope of s. 92. They contend, in the alternative, for a declaration that, in so far as the legislation affects the rights of the appellants under the lease mentioned (as well as of other holders of similar leases), it is an invasion of the legislative sphere reserved to the Dominion by s. 91 (1) of the *B.N.A. Act* in respect of "The Public * * * Property", and consequently, to that extent (if not in its entirety), *ultra vires,* and further that the legislation "affects" the provisions of such leases within the meaning of s. 2 of the compact between the Province and the Dominion, to which the *B.N.A., 1930,* gives "the force of law", and is, therefore, incompetent. Article 2 of the compact is in these words:

> The province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may

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apply generally to all similar agreements relating to lands, mines or minerals in the province or to interests therein, irrespective of who may be the parties thereto.

We have come to the conclusion that the first of these contentions fails, and we shall postpone the discussion of that for the present. We are unable, however, to agree with the decision of the courts below with regard to the second contention.

We think that the legislation of 1932 does "affect" the "terms" of the appellant's lease, and of similar leases, within the meaning of the article quoted, and that it is, therefore, incompetent in so far as it does so "affect" such leases.

Contrasting the rights of the appellant Spooner and of any lessee, as lessee, under the provisions of a lease, granted under the Regulations of 1910 and 1911, and under the Regulations, a copy of which is annexed to Spooner's lease, with the position of a lessee under a lease of identical terms, but brought under the dominion of the provincial statute, there can, we think, be no dispute that the terms of leases governed by the regulations alone and the rights of the lessee under such terms are "affected" in a substantial degree by the legislation; if the legislation can take effect upon such leases.

We quote textually two clauses of Spooner's lease which are the only provisions immediately pertinent:

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the rents and royalties hereinafter reserved and subject to the provisos, conditions, restrictions and stipulations hereinafter expressed and contained, His Majesty doth grant and demise unto the lessee, for the sole and only purpose of mining and operating for petroleum and natural gas, and of laying pipe lines and of building tanks, stations and structures thereon necessary and convenient to take care of the said products,

the tract demised for the term defined, and renewable as stipulated.

By article 8 it is agreed,

That the lessee shall and will during the said term, open, use and work any mines and works opened and carried on by him upon the said lands in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands, and when working the same shall keep and preserve the said mines and works from all avoidable injury and damage, and also the roads, ways, works, erections and fixtures therein and thereon in good repair and condition, except such of the matters and things last aforesaid as shall from time to time be considered by any inspector or other person authorized by the Minister to inspect and report

upon such matters and things to be unnecessary for the proper working of any such mine, but so that no casing placed in any mine shall be removed or impaired, and in such state and condition shall and will at the end or sooner determination of the said term deliver peaceable possession thereof and of the said lands to His Majesty.

The lessee has, under the terms of the lease, the right, during the currency of the term, of "mining and operating for petroleum and natural gas" subject only to the conditions and restrictions prescribed by the provisions of article 8. Under that article, the standard by which the lessee is to govern himself in opening, using and working "any mines and works opened and carried on by him" is the standard set by the manner of doing so "in skilful and proper mining operations", which is "usual and customary" among proprietors working their own lands. This involves two things: the lessee's manner of working the demised property is to conform to that which is "usual and customary" with proprietors working their own lands; but that again is qualified by the condition that the manner of working must conform to what is "usual and customary" in "skilful and proper mining operations" carried on by such persons in such lands.

There is no suggestion here that, in working his property conformably to the standard of "skilful and proper mining operations", the proprietor is supposed to be aiming at any object other than exploiting his own property in a profitable way. Any method of working lands for gas and petroleum which is "usual and customary" among proprietors exploiting their own property, for their own profit, and which, from that point of view, is "skilful and proper", could not be condemned, as in contravention of article 8, merely because considerations of public policy, as contradistinguished from the interests of proprietors as proprietors, might dictate a different course.

Turning now to the enactments of the statute of 1932. The Act (s. 13) requires the Board to

proceed to reduce the production of gas from all the wells in the area to an aggregate amount of not more than two hundred million cubic feet of gas per day, and to prescribe the daily rate of permitted production for each of every such well, * * *

It is also enacted that, for this purpose, the Board

may by order prescribe the periods during which any specified well or wells may be permitted to produce, and the total amount of the production which may be permitted during any such period from any such well or wells, and the working pressure at which all wells or any specified well

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shall be operated, and may by subsequent order and from time to time increase or reduce the amount of the permitted production of any well as the Board in its uncontrolled discretion deems proper.

The Board is further directed, (after certain tests provided for have been made) to determine the total amount of daily production which ought to be permitted for the time being from all wells and from each well in the area.

The operations of the lessee are subjected, by the statute, to the control of a Board whose duty it is to limit the production of natural gas in the whole of the Turner Valley field; and to limit the production of natural gas, from any particular well, by reference to the amount of naphtha the well ought, in the opinion of the Board, to be permitted to produce. The effect of the Order of the Board, of which the appellants complain (and this we mention by way of illustration only), upon the operations of the appellant company has been to reduce its production of naphtha by something like 95%.

On the 4th of May, 1932, the Board issued an order known as Order No. 1 in which, *inter alia*,

* * * the Board does order and prescribe that on and after the ninth day of May, 1932, the amount of gas permitted to be produced daily from the respective wells set out in (the schedule to the Order) shall not be greater than is required to produce the amount of naphtha set out opposite the description of each such well in said schedule following * * *

The Order further requires that every person operating a well set out in the schedule to the Order

shall so operate it so as not to permit such well to produce a greater daily flow of gas than will produce the number of barrels of naphtha set in said schedule opposite the description of such well.

It may be observed, although our conclusion is in no way dependent upon it, that it seems to be conceded that, as a rule, proprietors in the Turner Valley field carried on their operations in the manner above described; and that there really is no evidence to show, nor indeed is there any suggestion, that such a method of working a well of the type found in that field, which prevailed prior to the coming into force of the Order of the Board, was a method not permitted by article 8 of the appellant's lease. There is nothing pointing to the conclusion that such a manner of working is not a manner

usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands.

By the terms of the lease, the lessee undertook certain obligations therein defined. What the legislation professes to do is to substitute for these obligations a discretionary

control by an administrative body which is governed, in the exercise of its discretion, by general principles and rules laid down in the statute, pursuant to a policy of conserving natural gas in the entire field in the general public interest; with no regard (or at all events only in a very subordinate degree) to the standards, or the rules governing proprietors acting in the usual and customary manner in skilfully and properly working their own land for their own profit.

The respondents advance the argument that this reasoning is met by reference to s. 29 of the Regulations of 1928 which were published in 1930. That section contains this provision:

> In case natural gas is discovered through boring operations on a location, the lessee shall take all reasonable and proper precautions to prevent the waste of such natural gas, and his operations shall be so conducted as to enable him, immediately upon discovery, to control and prevent the escape of such gas.

The respondents rely upon that part of the provision which relates to "waste". Several points are involved in the examination of this contention.

First (assuming s. 29 to apply to leases granted under the regulations of 1910 and 1911) the provision quoted does not afford to the respondents a way of escape from the conclusion that the terms of the lease are disadvantageously "affected" by the legislation of 1932. The obligation under s. 29, upon which the argument is founded, is to "take all reasonable and proper precautions to prevent the waste" of natural gas. Whether the use of the natural gas for the purpose of recovering the naphtha held in suspension is "waste" within the meaning of this provision would, in a controversy between the Crown and the lessee, be a question to be determined by the courts.

The application of gas to the useful purposes of creating light and heat necessarily involves the destruction of it. The production of gas for the purpose of recovering from it the naphtha in suspension necessarily (necessarily, that is to say, in a practical business sense) involves the loss of the gas for which there is no market as gas. From the point of view of the proprietor there is no evidence that this loss of gas is not more than compensated for by the value of the naphtha recovered; and, as already observed, there are no facts before us justifying the conclusion that the obligation to "take all reasonable and proper precautions to prevent waste" imports a prohibition upon

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production for such a purpose. The legislation of 1932 limits, but does not prohibit, such production and neither the enactments of the statute nor the orders of the Board go to the length of declaring, that such production necessarily involves waste, which, from any point of view, ought to be prohibited.

Whatever be the exact effect of this provision of s. 29, it is quite clear that, while if, in the opinion of the Minister, the lessee infringes it, the Minister may call upon him to answer for his delinquency in the courts, yet, under the provision, such appeal to the courts is, apart from the cancellation of the lease, his only remedy. The enactments of the provincial statute, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" of an administrative Board, in this respect radically alter the status of the lessee under the terms of his lease. This appears to have been, in substance, the view of the Apellate Division.

The next point for consideration is whether s. 29 applies to leases granted under the Regulations of 1910 and 1911. It must be examined from two aspects. The first aspect is that under which it was envisaged by the learned trial judge (who held that the rights of the lessee are governed by the section), in which s. 29 is regarded simply as a regulation made under the regulative authority conferred upon the Governor in Council by s. 35 of the *Dominion Lands Act* (c. 113, R.S.C. 1927) (which does not in any pertinent sense differ from s. 37 of the Act of 1908). The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* (1)), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

(1) (1890) 15 App. Cas. 384, at 388.

On the construction of this paragraph of s. 29 for which the respondents contend, the paragraph, if applicable, imposes *ab extra* by the force of law new terms, as broad, in scope, as the statute of 1932, which, as already observed, radically alter, to his prejudice, the rights and duties of the lessee under the stipulations of the existing contract of lease. The same thing could properly be stated of any construction which would leave it to the Crown to determine in its "uncontrolled discretion" what is and what is not "waste" within the meaning of the section. Moreover, the argument seems to involve the proposition that the whole of s. 29, and not alone the particular paragraph relating to "waste", applies to the leases in question; and there are still other provisions of s. 29, which, if operative, would, apart altogether from that provision, most materially affect his contractual rights and obligations.

First, there is the provision reserving to the Minister the right to make additional regulations, as it may appear necessary or expedient to him, governing the manner in which the boring operations shall be conducted, and the manner in which the wells shall be operated.

Then, there is the further provision vesting in the discretion of the Minister the power of cancellation in the event of non-compliance with the requirements set out in the section in relation to boring operations, or with any requirement which the Minister may consider it necessary to impose with respect to boring or operating.

We think there is nothing in the language of the Order in Council bringing into force this section 29 which requires us to hold that it was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the Regulations of 1910 and 1911.

The other aspect, from which this point must be considered, presents for examination the question whether s. 29 constitutes a part of the contract, between the Crown and the lessee, by force of the contract itself. We think this question must be answered in the negative.

The lease declares, in express terms, that it is granted by the Minister of the Interior, pursuant to regulations made for the disposal of petroleum and natural gas rights, by Orders in Council dated respectively the 11th days of

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March, 1910 and 1911, "a copy of which regulations is hereto appended".

The term is twenty-one years and the lease is renewable for a further term of twenty-one years provided the lessee furnishes evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the regulations under which it was granted.

Among the "provisos, conditions, restrictions and stipulations" of the lease there is this:

2. That the lessee shall and will well, truly and faithfully observe, perform and abide by all the obligations, conditions, provisos and restrictions in or under the said regulations imposed upon lessees or upon the said lessee.

The Regulations "appended" to the lease contain the following:

21. The lease shall be in such form as may be determined by the Minister of the Interior, in accordance with the provisions of these Regulations.

It appears that the lease is framed upon the view that the rights of the parties *inter se* are to be ascertained from the provisions of the lease, from the Regulations, a copy of which is appended thereto, and such further orders and regulations and directions as may be made from time to time during the currency of the lease under article 9 of the lease or sections 23 and 24 of the Regulations. The last mentioned sections are in these words:

23. No royalty shall be charged upon the sales of the petroleum acquired from the Crown under the provisions of the Regulations up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever Regulations in respect of the payment of royalty may then or thereafter be made.

24. A royalty at such rate as may from time to time be specified by Order in Council may be levied and collected on the natural gas products of the leasehold.

But, it is argued that, notwithstanding the form of the lease itself, the concluding words of s. 1 of the Regulations of 1910 and 1911 have the effect of incorporating, as conditions of the lease, all subsequent regulations made during the currency of the term. The sentence in which these words occur is this:

The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the Regulations in force from time to time during the currency of the lease.

"The Regulations in force from time to time during the currency of the lease" should be read, it is argued, as embracing all subsequent regulations whether incorporated in the terms of the lease, by force of some provision of the lease or of the existing Regulations, or not.

We cannot agree with this view of the effect of these words.

We think the better view is that they extend only to regulations made in exercise of a right reserved by the regulations of 1910 and 1911 or of the lease itself. Sections 23 and 24 contemplate such regulations, while by stipulations in the lease itself, the terms of which are left to his discretion, the Minister may, of course, consistently with the existing regulations, reserve the right to make further regulations. Article 9 of the lease in question contains such a reservation.

The view suggested involves the result that the terms of the contract may in every respect be altered (as regards rental, as regards royalties, as regards the obligations of the lessee in respect to the working of the mine); and by one party to the lease acting alone, without consultation with the other; and with the result (a result which, as we have seen, actually follows in this case from the acceptance of the respondent's contention) that a contract radically new, in its essential terms, may be substituted for that explicitly set forth in the document executed by the parties and the specific regulations that it incorporates.

It will be observed that the proviso, in express terms, affects only the right of renewal. On the supposition that the proviso relates to this right of renewal, and to that right alone, we arrive (on the construction advocated by the respondents) at the truly extraordinary result, that, even under the renewed lease, the lessee is not bound by s. 29; although his right of renewal is dependent upon compliance with that section prior to the completion of the original term. It is difficult, no doubt, to think it could have been intended that the lessee's right of renewal should be conditioned upon the performance, during the term antecedent to its renewal, of obligations which the lessee was not required to observe as contractual terms of the lease. But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease, a stipulation

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that all future regulations touching the working of the property should become part of the lease as contractual stipulations, that intention would have been expressed, not inferentially, but in plain language.

Reverting to the form of the lease itself, as distinguished from the Regulations, and to the evidence it affords as to the view of the Minister, that the existing Regulations alone, and not Regulations subsequently enacted, are embodied in the lease, as forming part of the contract between the lessor and the lessee; it is not immaterial to recall what has already been stated, that, admittedly, this lease was in the usual form. The practice of the Department based upon this view of the effect of the Regulations of 1910 and 1911 is not without weight in a controversy as to its proper construction (*Webb* v. *Outrim* (1)). It may further be observed that, on this point, neither the Appellate Division nor the trial judge expressed an opinion in the respondent's favour. On the contrary, the Appellate Division appears to have entertained the view we have now expressed.

We turn now to the question which the Appellate Division regarded as the question of substance on the appeal. That court has taken the view that article 2 of the Compact has not the effect of depriving the provinces of any power of legislation which they possessed anterior thereto. This view is challenged by the appellants.

The question which thus arises is strictly a narrow one. The legislation of 1932 provides for the regulation of mining operations, for the production of natural gas, having naphtha in suspension, with the object of conserving the natural gas in the Turner Valley field. By its terms, it extends to operations in lands which (but for the *B.N.A. Act, 1930*) would have been public lands of the Dominion, as well as lands owned in fee simple by private individuals. The question may be put thus: Would it have been competent to the provincial legislature, if these public lands had not been transferred to the province, to regulate or to authorize an Administrative Board to regulate such operations, in private lands as well as Dominion public lands (held under lease to private individuals), by orders having the force of statute in the manner directed or contemplated by this legislation. The lessees, in virtue of leases under

(1) [1907] A.C. 81, at 89.

the Regulations of 1910 and 1911, became, by force of Dominion statute, entitled to exercise the rights vested in them by the leases. Indeed, the public lands of the Dominion are vested in Parliament, in the sense that only by virtue of Parliamentary authority can such lands be disposed of or dealt with. The right of the lessee, in each case, is to take from a specified tract of land, which is leased to him for that purpose alone, certain substances and to convert them to his own use. Until so taken, they remain, subject to his right to take them during the specified term, the property of the Dominion—part of the public lands of the Dominion. To take away this right, or to prohibit the exercise of it, would be to nullify *pro tanto* the statutory enactment creating the right. It is obvious, of course, that the provincial legislature could not validly have passed the enactments of the *Dominion Lands Act,* or the Regulations of 1910 and 1911, under which the lessee became entitled to exercise his rights. The appropriate principle seems to be that expressed by Lord Haldane in *Great West Saddlery Co. Ltd.* v. *The King* (1) in the words:

> Neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact.

The principle applies to such a measure of regulation as that which is attempted by the legislation of 1932. It is nothing to the purpose that the legislation is expressed in general terms, applying to all wells in the Turner Valley area. The regulation takes effect by orders of the Board constituted under it, having the force of statute, which may apply, not only to the field generally, but to each well *eo nomine.* Every such order constitutes in effect a statutory edict, governing the operations in, and connected with, each several well against which it is directed.

Nor is it material that, by the lease, an interest in the tract has passed to the lessee. The *Dominion Lands Act,* and the Regulations enacted pursuant to it, give statutory effect to plans for dealing with Dominion public lands, including lands containing petroleum and natural gas, which, it must be assumed, were conceived by Parliament, and the authorities nominated by Parliament, as calculated to serve the general interest in the development and exploitation of such lands and the minerals in them. It is

(1) [1921] 2 A.C. 91, at 116-117.

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not competent to a provincial legislature *pro tanto* to nullify the regulations, to which Parliament has given the force of law in execution of such plans, by limiting and restricting the exercise of the rights in the public lands, created by such regulations in carrying the purpose of Parliament into effect. Indeed, an administrative order, which the legislature has professed to endow with the force of statute, directed against a tract of public land, the property of the Dominion, held by a lessee under the Regulations of 1910 and 1911, and which professed to regulate the exercise, by the lessee, of his right to take gas and petroleum from the demised lands, would truly be an attempt to legislate in relation to a subject reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1), "The Public * * * Property" of the Dominion.

On these two grounds, therefore, first, that the legislation of 1932 is repugnant, in so far as it affects tracts leased under the Regulations of 1910 and 1911, to those Regulations, and the statute under which they were promulgated; and, second, on the ground that, in so far as it authorizes the Board to make regulations concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it is legislation strictly concerning the public property of the Dominion; on both of these grounds, the legislation of 1932 would, if these public lands were still held by the Dominion, be inoperative, as regards the leases with which we are concerned.

As respects tracts of land held in fee simple, totally different considerations apply. Such tracts have ceased to be the public property of the Dominion, and in the absence of some Dominion enactment relating to matters comprised within the subject of the public property, that would have the effect of limiting the jurisdiction of the provinces (under s. 92 (10), (13) and (16)), there is no ground on which such legislation could, as affecting such lands, be held to be *ultra vires*. (*McGregor* v. *Esquimalt & Nanaimo Ry.* Co. (1)).

(1) [1907] A.C. 462, at 468.

We have not considered it necessary to attempt the formulation of any general rule by which (apart from the enactments of the *B.N.A. Act, 1930*) the validity of provincial legislation affecting the holders of leases and other particular and limited interests in the public lands of the Dominion may be tested. Speaking broadly, it may be stated without inaccuracy that such legislation cannot lawfully take effect if it is repugnant to some statutory enactment by the Dominion passed in exercise of its powers to legislate in relation to its public lands. This is involved in the judgment of the Judicial Committee in the *Great West Saddlery Co.* case (1) already cited. The occupant of Dominion lands under a legal right may be taxed in respect of his occupancy. But it is necessary to be cautious in inferring from this that such taxation can in every case be enforced by remedies involving the sale or appropriation of the occupant's right, without regard to the nature of that right. Where the right is equivalent to an equitable title in fee simple, probably no difficulty would arise (*Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (2)); but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legislation under which the right is constituted, then it is, to say the least, doubtful, whether such provisions could take effect.

The judgment in the *Great West Saddlery Co.* case (1) discussed the matter of the enforcement of a provincial tax levied upon a Dominion company incorporated under the residuary clause of s. 91. Lord Haldane there adverts to some of the difficulties attendant upon holding that it is competent to a provincial legislature to enforce the payment of a tax upon a Dominion company by a penalty involving the abrogation of some capacity or power competently bestowed upon it by the Parliament of Canada. Similar questions may be suggested as arising in other connections; for example, the question whether it is competent to a legislature to sanction measures for the enforcement of a tax imposed upon a Dominion railway which would involve the dismemberment of the railway.

In *Smith* v. *Vermilion Hills* (3), the proceeding was an action against Smith, who was assessed as tenant. The

(1) [1921] 2 A.C. 91. (2) (1911) 45 Can. S.C.R. 170.
(3) [1916] 2 A.C. 569.

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sole question in the action was that of Smith's personal liability to pay the tax. He

> was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. (P. 573.)
>
> The real question is whether this restriction (the restriction in virtue of s. 125 of the *B.N.A. Act*) prevents (the legislature of Saskatchewan) from imposing the tax in controversy upon a tenant of Crown lands. (P. 572.)

No question arose as to any remedy by proceedings affecting the title to the lands or the lease. This point was adverted to in this Court in *Smith* v. *Vermilion Hills* (1).

In *City of Montreal* v. *Attorney-General for Canada* (2), Lord Parmoor points out that the remedy of the municipality was necessarily limited in such a way as to exclude the operation of the provisions of the Charter of Montreal giving recourse against the immoveable occupied by the tenant.

Once again, as regards the amenability of occupants of Crown property to provincial laws in respect of nuisances (such as, for example, legislative provisions for the suppression of noxious weeds, mentioned in the judgment) which, as a rule, impose upon occupiers generally duties enforceable against the occupier personally by penalty, it is not out of place to observe that the validity of legislation empowering an administrative board to prescribe rules in relation to such matters, having the force of statute, with respect to any individual tract of land, including tracts which are the public property of the Dominion, might possibly, as affecting such tracts, be subject to different considerations. Where the regulations, under which Dominion lands are leased, or the stipulations of such leases, contain provisions dealing with the very subject matter of the provincial legislation, then it is quite obvious that such regulations and stipulations must prevail in case of conflict. (*Madden* v. *Nelson & Fort Sheppard Railway Co.* (3); *Can. Pac. Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (4); *Can. Pac. Ry. Co.* v. *The King* (5); *Great West Saddlery Co. Ltd.* v. *The King* (6).

(1) (1914) 49 Can. S.C.R. 563, at 573-4.
(2) [1923] A.C. 136.
(3) [1899] A.C. 626.
(4) [1899] A.C. 367, at 372-3.
(5) (1907) 39 Can. S.C.R. 476, at 482-3.
(6) [1921] 2 A.C. 91, at 116-7.

We think it desirable to say this much, in order to indicate the difficulty of drawing an abstract line, assigning boundaries to the provincial fields of the general powers vested in the provinces by s. 92, and marking them off from the sphere of the essential powers of the Dominion, under one of the enumerated heads of s. 91, and s. 91 (1) in particular, or from the larger sphere which includes the Dominion's ancillary powers as well.

It may be observed, in view of some observations made by the Appellate Division, that land held under an estate in fee simple in a province is not necessarily subjected to an unlimited control by the province in the field of "property and civil rights." Such is not the case, for example, where land so held is part of a Dominion railway. (*Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (1)).

It may be proper also to utter a word of caution with regard to the authority of the provinces in relation to the "confiscation" of property.

The term "confiscation," of course, connotes, according to ordinary usage, something in the nature of *privilegium,* of a special law dealing with a particular case. Now, it might be difficult, in most cases, to hold that a statute specifically appropriating to the Crown in the right of the province the interest of a lessee in Dominion lands, was not legislation dealing with the subject of the public property of the Dominion; and apart from that, it would probably also be difficult, in most cases, to escape the conclusion that an attempt to substitute the Crown as lessee, in place of a lessee, for example, who has acquired his lease under the Regulations of 1910 and 1911, was repugnant to such regulations and to the statute by which they were authorized.

We are, therefore, unable to concur with the Appellate Division in the reasons which led them to dismiss the appellant's appeal from the learned trial judge. We agree with them that the legislation of 1932 does not come within the exception set out in s. 2 of the compact. The exception is in these words:

except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

(1) [1922] 1 A.C. 202, at 207-8.

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Admittedly there was no consent, and it is hardly disputed that the legislation does not apply "to all similar agreements relating to lands, mines or minerals in the Province or to interests therein."

We cannot, however, agree with the Appellate Division that the governing consideration, in applying s. 2 of the agreement, is that upon which they base their judgment. That section deals in specific terms with specific things. The Province is not to "alter," nor is it to "affect," except under conditions which, as we have said, do not exist here, ("by legislation or otherwise") "any term of any such * * * lease" of "Crown lands, mines or minerals."

We think the natural reading of these words is that which precludes the province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character that it would fall under the powers of the provincial legislature, even if the public lands of the Dominion had not been transferred to the province.

We have said something to indicate some of the difficulties in the process of ascertaining the precise limits of the powers of the province to enact legislation affecting the public property of the Dominion. We think that the limits of these powers, as exercisable after the transfer of the land, were intended to be fixed by the stipulations of the agreement, as regards the matters therein dealt with; and must now, in any particular case, be determined by reference to the true construction of those stipulations.

It follows from all this that the impugned legislation is invalid in so far as it affects leases under the Regulations of 1910 and 1911.

It was not contended before us that the effect of this is to invalidate the impugned enactments in their entirety. It was not argued that, on the grounds we have been considering, the legislation ought to be held invalid in so far as it provides for the regulation of wells held under a title in fee simple. On this point we express no opinion and our judgment will be limited accordingly.

We have still to consider the question whether the statute is invalid on the ground that, as a whole, it deals with matters falling strictly under s. 91 (2), or, at all events, with matters outside the scope of s. 92. The subject has been

discussed fully, and very ably, in the judgment of the Appellate Division, and we think it right to say that, in this respect, we are in complete agreement with that judgment.

In *Union Colliery Company of British Columbia Ltd.* v. *Bryden* (1), Lord Watson, speaking for the Judicial Committee, said, at p. 587, that the Coal Mining Regulations there in question might "be regarded as merely establishing a regulation applicable to the working of underground coal mines," and he added that if that had been "an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, subs. 10, or s. 92, subs. 13." We think that is what this legislation now before us in substance is: legislation providing for the regulation of the working of natural gas mines in the Turner Valley area. It rests upon those who impeach the statute as *ultra vires* on the ground that it deals with matters outside the scope of s. 92, to adduce some reason for ascribing to it another character. In this we think the appellants have failed.

The statute provides for the regulation of the wells in that area from a point of view which is provincial and for a purpose which is provincial,—the prevention of what the legislature conceives to be a waste of natural gas in the working of them. In its substance it deals neither with "trade in general" nor with trade in any "matter of interprovincial concern"; nor is there anything before us to indicate that the working of these mines (excepting, of course, the wells situate upon lands leased from the Dominion) is a matter which, by reason of exceptional circumstances, has ceased to be, or has ever been, anything but a matter "provincial" in the relevant sense.

The appeal must be allowed with costs and judgment given for the plaintiffs in accordance with the views herein expressed.

Appeal allowed with costs. Judgment declaring that the impeached legislation is invalid as respects the leasehold properties of the appellants.

Solicitors for the appellants: *Patterson & Hobbs.*

Solicitors for the respondents: *W. S. Gray* and *J. J. Frawley.*

(1) [1899] A.C. 580.

TAB 4

Gustavson Drilling (1964) Limited
Appellant;

and

The Minister of National Revenue
Respondent.

1974: November 1, 5; 1975: December 4.

Present: Martland, Judson, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation—Income tax—Oil companies—Deductions—Drilling and exploration expenses—Transferability of right to deduct to successor corporation—Income Tax Act, R.S.C. 1952, c. 148, as amended, s. 83A(8a), now 1970-71-72, (Can.) c. 63, s. 66(6).

Since 1949 the exploration for petroleum and natural gas has been encouraged by the provision in the *Income Tax Act*, R.S.C. 1952, c. 148 as amended 1970-71-72, c. 63, that oil companies could deduct drilling and exploration expenses from income earned in subsequent years. In 1956 the right was extended to successor corporations by legislation which provided that an oil company which acquired all or substantially all of the property of another oil company could deduct drilling and exploration expenses incurred by the predecessor corporation. The acquisition had however to be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor on the winding up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960 when its parent company acquired substantially all of its property in consideration of the cancellation of a debt due. Entitlement to claim the undeducted drilling and exploration expenses did not accrue to the parent company as the transaction was not carried out as required by the 1956 Act. The appellant remained inactive until 1964 when its shares were acquired by another corporation following the liquidation of its previous parent company. After a change of name it recommenced business with newly acquired assets, none of which had been used or owned by it prior to June 1964. It sought to deduct the accumulated drilling and exploration expenses for the ensuing taxation years. The Minister re-assessed and disallowed the deductions. The appellant successfully appealed to the

Gustavson Drilling (1964) Limited
Appelante;

et

Le ministre du Revenu national *Intimé.*

1974: le 1er et 5 novembre; 1975: le 4 décembre.

Présents: Les juges Martland, Judson, Pigeon, Dickson et de Grandpré.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Revenu—Impôt sur le revenu—Compagnies pétrolières—Déductions—Dépenses d'exploration et de forage—Transmissibilité du droit de déduire ces dépenses à la compagnie remplaçante—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, avec modifications, art. 83A(8a), maintenant 1970-71-72 (Can.), c. 63, art. 66(6).

Depuis 1949, la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifié par 1970-71-72, c. 63, encourage la recherche du pétrole et du gaz naturel en autorisant les compagnies pétrolières à déduire les dépenses de forage et d'exploration du revenu des années subséquentes. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi prévoyant qu'une compagnie pétrolière qui acquérait tous ou presque tous les biens d'une autre compagnie pétrolière pouvait déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Cependant, il fallait que l'acquisition résulte a) d'un échange d'actions du capital social de la remplaçante, ou b) de la distribution des biens à la compagnie remplaçante lors de la liquidation de la compagnie remplacée, postérieurement à l'achat des actions de la compagnie remplacée, par la compagnie remplaçante, moyennant les actions de cette dernière. En 1962, on a retiré ces conditions. La compagnie pétrolière appelante a engagé des dépenses de forage et d'exploration d'un montant supérieur à son revenu avant 1960, année durant laquelle la compagnie-mère a acquis presque tous ses biens en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. La compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que l'opération ne s'est pas faite selon les conditions énoncées dans la Loi de 1956. L'appelante est restée inactive jusqu'en 1964, date à laquelle une autre compagnie a acheté, à la suite de la liquidation de la compagnie-mère, l'ensemble de ses actions. Après un changement de nom, l'appelante a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été pos-

Tax Appeal Board but on a Special Case stated by consent, the Minister was successful in the Federal Court before Cattanach J. and on appeal.

Held (Pigeon and de Grandpré JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. On a literal construction of the legislation the appellant was in the category of a predecessor company and had thereby lost the right to deduct. As the language of the statute was unambiguous and clear, there was no need to have recourse to rules of construction to establish legislative intent. It could not be said that the 1962 legislation was retrospective or that any vested right acquired by the appellant by the repealed paragraphs was affected by their repeal.

Per Pigeon and de Grandpré JJ. *dissenting*: The legislative change effected in 1962 was not an alteration in the scheme of deductions for drilling and exploration expenses. It was a modification in the transferability of the entitlement to those deductions. While the rule against retrospective operation of statutes is no more than a rule of construction which operates more or less strongly according to the nature of the enactment, it operates nowhere more strongly than when any other construction would result in altering the effect of contracts previously entered into. The effect of the 1962 change was to facilitate the transfer of the right to deductions not to alter the result of past contracts so as to effect a forfeiture of the rights of oil companies that had previously transferred their properties under conditions that did not involve the transfer of the valuable right of entitlement to deduct to the transferee.

[*Assessment Commissioner of The Corporation of the Village of Stouffville v. Mennonite Home Association*, [1973] S.C.R. 189; *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] S.C.R. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of*

sédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu des années subséquentes, l'appelante a cherché à déduire les dépenses accumulées de forage et d'exploration. Le Ministre a établi une nouvelle cotisation et rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante mais, par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé en appel.

Arrêt (les juges Pigeon et de Grandpré étant dissidents): Le pourvoi doit être rejeté.

Les juges Martland, Judson et Dickson: Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Interprétée littéralement, la Loi attribue nettement à l'appelante la qualité de compagnie remplacée; cette dernière perd donc le droit aux déductions. En présence d'un texte de loi clair et précis il n'est pas nécessaire de recourir aux règles d'interprétation pour déterminer quelle était l'intention du législateur. On ne peut soutenir que la Loi de 1962 avait un effet rétroactif ou que l'abrogation des paragraphes en question a eu un effet sur quelque droit acquis par l'appelante sous leur régime.

Les juges Pigeon et de Grandpré, *dissidents*: La modification législative de 1962 n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration. Elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation et sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. L'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire.

[Arrêts mentionnés: *Assessment Commissioner of The Corporation of the Village of Stouffville c. Mennonite Home Association*, [1973] R.C.S. 189; *Acme Village School District c. Steele-Smith*, [1933] R.C.S. 47; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] R.C.S. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961]

Public Works v. Ho Po Sang, [1961] 2 All E.R. 721 (P.C.); *Hargal Oils Ltd. v. Minister of National Revenue*, [1965] S.C.R. 291 referred to].

APPEAL from a judgment of the Federal Court of Appeal[1] affirming the judgment of Cattanach J. allowing an appeal by way of special case stated from a decision of the Tax Appeal Board allowing an appeal by the appellant from an income tax assessment. Appeal dismissed, Pigeon and de Grandpré JJ. dissenting.

John McDonald, Q.C., F. R. Matthews, Q.C., and *D. C. Nathanson*, for the appellant.

G. W. Ainslie, Q.C., and *L. P. Chambers*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.

Parliament since 1949 has encouraged the exploration for petroleum and natural gas by permitting corporations "whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas" (hereafter referred to as "oil companies") to deduct their drilling and exploration expenses in computing income for the purpose of the *Income Tax Act*. In 1956 the right was extended to successor corporations by legislation which provided that a corporation whose principal business was exploring and drilling for petroleum or natural gas and which acquired all or substantially all of the property of another corporation in the same type of business could deduct drilling and exploration expenses incurred by the predecessor corporation. In the absence of this legislation neither the successor corporation nor the predecessor corporation could have availed itself of such drilling and exploration

[1] [1972] F.C. 1193.

C.T.C. 490 (Ech.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (C.P.); *Hargal Oils Ltd. c. Le ministre du Revenu national*, [1965] R.C.S. 291].

POURVOI interjeté d'un arrêt de la Cour d'appel fédérale[1] confirmant le jugement du juge Cattanach accueillant un appel exposé dans un mémoire spécial à l'encontre d'une décision de la Commission d'appel de l'impôt qui avait accueilli un appel interjeté par l'appelante d'une cotisation à l'impôt sur le revenu. Pourvoi rejeté, le juge Pigeon et de Grandpré étant dissidents.

John McDonald, c.r., F. R. Matthews, c.r., et *D. C. Nathanson*, pour l'appelante.

G. W. Ainslie, c.r., et *L. P. Chambers*, pour l'intimé.

Le jugement des juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Il s'agit d'une question d'impôt sur le revenu portant sur le droit de l'appelante Gustavson Drilling (1964) Limited de déduire dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, les dépenses de forage et d'exploration qu'elle a faites de 1949 à 1960.

Depuis 1949, le Parlement encourage la recherche du pétrole et de gaz naturel en autorisant les compagnies dont «l'entreprise principale est la production, le raffinage ou la mise en vente du pétrole, des produits du pétrole ou du gaz naturel, ou l'exploration ou le forage en vue de découvrir du pétrole ou du gaz naturel» (ci-après appelées «compagnies pétrolières») à déduire leurs dépenses de forage et d'exploration, dans le calcul de leur revenu aux fins de la *Loi de l'impôt sur le revenu*. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi qui prévoyait qu'une corporation dont l'entreprise principale est l'exploration et le forage en vue de découvrir du pétrole ou du gaz naturel et qui acquiert tous les biens ou sensiblement tous les biens d'une autre corporation dont l'entreprise principale est la même, peut déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. En l'absence de cette loi, ni la

[1] [1972] C.F. 1193.

expenses for tax purposes. The 1956 legislation contained qualifications, however. In order to entitle the successor corporation to the deduction it was imperative that the acquisition of the property of the predecessor by the successor be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor upon the winding-up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed; thereafter the legislation simply provided that every oil company which at any time after 1954 acquired all or substantially all of the property of another oil company could claim a deduction in respect of drilling and exploration expenses incurred by the predecessor company and the predecessor company was denied the right to make any such claim. Within this context the present case arises.

The appellant was incorporated in 1949 under the name of Sharples Oil (Canada) Ltd., as a wholly owned subsidiary of Sharples Oil Corporation, an American corporation, and until 1960 it carried on the business of an oil company in Canada, incurring during that period drilling and exploration expenses of $1,987,547.19 in excess of its income from the production of petroleum and natural gas. On November 30, 1960, the parent company, Sharples Oil Corporation, acquired substantially all of the property of the appellant in consideration for the cancellation of a debt owing to it by the appellant. The parties agree that at this time entitlement to claim the theretofore undeducted drilling and exploration expenses did not accrue to the parent company because the transaction was not carried out in either manner prescribed by the Act.

After disposal of its property the appellant discontinued business and remained inactive until 1964. In June 1964, however, Mikas Oil Co. Ltd. purchased all of the issued and outstanding shares in the capital stock of the appellant from the shareholders of Sharples Oil Corporation following the liquidation of that corporation. The appellant's

corporation remplaçante ni la corporation remplacée n'aurait pu se prévaloir pour des fins fiscales des dépenses de forage et d'exploration. Toutefois, cette loi de 1956 comporte certaines réserves. La corporation remplaçante n'a droit à cette déduction que si elle acquiert les biens de la corporation remplacée (a) en échange d'actions de son propre capital social, ou (b) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat des actions de la corporation remplacée, par la corporation remplaçante, moyennant des actions de cette dernière. En 1962, on a retiré ces conditions; dans la suite, la loi prévoyait simplement que toute compagnie pétrolière qui, en tout temps après 1954, avait acquis tous les biens ou sensiblement tous les biens d'une autre compagnie pétrolière, pouvait réclamer une déduction à titre de dépenses de forage et d'exploration faites par la corporation remplacée alors que cette dernière ne pouvait, elle, se prévaloir de ce droit. Le présent litige tire son origine de ce contexte.

En 1949, l'appelante a été constituée en corporation sous le nom de Sharples Oil (Canada) Ltd., en tant que filiale exclusive de la corporation américaine Sharples Oil Corporation, et jusqu'en 1960, elle était une compagnie pétrolière au Canada qui a engagé, durant cette période, des dépenses de forage et d'exploration d'un montant de $1,987,-547.19 supérieur au revenu que lui a procuré la production de pétrole et de gaz naturel. Le 30 novembre 1960, la compagnie-mère Sharples Oil Corporation, a acquis presque tous les biens de l'appelante en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. Les parties conviennent qu'à cette époque-là la compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que la transaction ne s'est pas opérée aux termes de l'une ou l'autre des conditions énoncées dans la Loi.

A la suite du transfert de ses biens, l'appelante a interrompu ses opérations et est restée inactive jusqu'en 1964. Cependant, en juin 1964, Mikas Oil Co. Ltd. a acheté des actionnaires de Sharples Oil Corporation, à la suite de la liquidation de cette dernière, l'ensemble des actions émises du capital social de l'appelante. En octobre 1964, l'appelante

name was changed to Gustavson Drilling (1964) Limited, in October 1964; thereafter the appellant recommenced business as an oil company with newly acquired assets, none of which had been used or owned by the appellant prior to June 1964. In computing its income for the 1965, 1966, 1967 and 1968 taxation years the appellant claimed deductions of $119,290.49; $447,369.99; $888,-084.10; and $31,179.00 respectively as part of the accumulated drilling and exploration expenses of $1,987,547.19. The Minister re-assessed and disallowed the claimed deductions. The appellant successfully appealed to the Tax Appeal Board but a Special Case was stated by consent, pursuant to Rule 475 of the Federal Court, and the appeal of the Minister was successful before Cattanach J. whose judgment in the Federal Court was upheld by the Federal Court of Appeal. The question on which the opinion of the Court was sought in the Special Case reads:

a adopté le nom de Gustavson Drilling (1964) Limited; par la suite, elle a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été possédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, l'appelante a déduit des sommes de $119,290.49, $447,369.99, $888,084.10 et $31,179.00 respectivement, qu'elle a réclamées comme partie des dépenses accumulées de forage et d'exploration chiffrées à $1,987,547.19. Le Ministre lui a imposé une nouvelle cotisation et a rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante; par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial, conformément à la règle 475 de la Cour fédérale, et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé par la Cour d'appel fédérale. Voici le libellé de la question litigieuse exposée dans le mémoire spécial:

> The question for the opinion of the Court is whether subsection (8a) of section 83A of the *Income Tax Act* as amended by the repeal of paragraphs (c) and (d) thereof by Statutes of Canada, 1962-63, c. 8, section 19, subsections (11) and (15), precludes the Respondent from deducting in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years amounts on account of the drilling and exploration expenses mentioned in paragraph 4 hereof, which but for the repeal would have been deductible by the Respondent under subsections (1) and (3) of section 83A of the Act.

> [TRADUCTION] La question soumise à la Cour est celle de savoir si le paragraphe (8a) de l'article 83A de la *Loi de l'impôt sur le revenu* tel que modifié par l'abrogation des alinéas *c*) et *d*) dudit article par les statuts du Canada, 1962-63, c. 8, article 19, paragraphes (11) et (15), interdit à l'intimée de déduire, dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968 les sommes représentant les dépenses de forage et d'exploration mentionnées au paragraphe 4 des présentes que, n'eût été l'abrogation, l'intimée aurait pu déduire en vertu des paragraphes (1) et (3) de l'article 83A de la Loi.

Subsections (1) and (3) of s. 83A of the *Income Tax Act*, under which the appellant claims the right to deductions, read as follows as applied to the 1965 to 1968 taxation years:

Les paragraphes (1) et (3) de l'art. 83A de la *Loi de l'impôt sur le revenu*, en vertu desquels l'appelante prétend avoir droit aux déductions, se lisent comme suit, tels qu'ils s'appliquaient aux années d'imposition 1965 à 1968:

> **83A.** (1) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*a*) the aggregate of such of the drilling and exploration expenses . . . as were incurred during the calendar years 1949 to 1952, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*b*) of that aggregate, an amount equal to its income for the taxation year

> **83A.** (1) Une corporation . . . peut déduire, dans le calcul de son revenu, aux fins de la présente Partie, pour une année d'imposition, le moindre de
>
> *a*) l'ensemble des dépenses de forage et d'exploration . . . qui ont été faites au cours des années civiles 1949 à 1952, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou
>
> *b*) de cet ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

minus the deductions allowed for the year by subsections (8a) and (8d) of this section . . .

. . .

(3) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses . . .

. . .

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

. . .

minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section . . .

There can be no doubt that in the absence of subs. (8a) of s. 83A the drilling and exploration expenses claimed by the appellant would have been deductible by it. One must, then, turn to subs. (8a) upon the construction of which this case falls to be decided. In 1960, when the property of the appellant was acquired by Sharples Oil Corporation, the pertinent parts of subs. (8a) read:

83A. (8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor corporation") . . .

. . .

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") . . . all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

(*c*) pursuant to the purchase of such property by the successor corporation in consideration of shares of the capital stock of the successor corporation, or

(*d*) as a result of the distribution of such property to the successor corporation upon the winding-up of the predecessor corporation subsequently to the purchase of all or substantially all of the shares of the capital stock of the predecessor corporation by the successor corporation in consideration of shares of the capital stock of the successor corporation,

. . .

moins les déductions allouées pour l'année par les paragraphes (8a) et (8d) du présent article . . .

. . .

(3) Une corporation . . . peut déduire, dans le calcul de son revenu aux fins de la présente Partie, pour une année d'imposition, le moindre de

c) l'ensemble

(i) des dépenses de forage et d'exploration . . .

. . .

qui ont été faites après l'année civile 1952 et avant le 11 avril 1962, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou

d) dudit ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

moins les déductions allouées pour l'année par les paragraphes (1), (2), (8a) et (8d) du présent article . . .

Il n'y a aucun doute qu'en l'absence du par. (8a) de l'art. 83A, l'appelante aurait pu déduire les dépenses de forage et d'exploration qu'elle réclame. Il faut donc examiner ce par. (8a) dont l'interprétation sera déterminante du sort de cette affaire. En 1960, lorsque Sharples Oil Corporation a acquis les biens de l'appelante, les dispositions pertinentes du par. (8a) se lisaient comme suit:

83A. (8a) Nonobstant le paragraphe (8), lorsqu'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplaçante»). . .

. . .

a, en tout temps après 1954, acquis d'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplacée»). . .tous les biens ou sensiblement tous les biens de la corporation remplacée, utilisés par elle dans l'exercice de ladite entreprise au Canada,

c) en vertu de l'achat desdits biens par la corporation remplaçante moyennant des actions du capital social de la corporation remplaçante, ou

d) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat de toutes les actions ou sensiblement toutes les actions du capital social de la corporation remplacée, par la corporation remplaçante, moyennant des actions du capital social de la corporation remplaçante,

there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

(*e*) the aggregate of

(i) the drilling and exploration expenses ... incurred by the predecessor corporation ...

. . .

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

Paragraphs (*c*) and (*d*) of subs. (8a) were repealed by c. 8, 1962-63 (Can.), s. 19, subs. (11), and the repeal was made applicable to the 1962 and subsequent taxation years.

In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a).

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*[2], at p. 194.

[2] [1973] S.C.R. 189.

cette dernière peut déduire, dans le calcul de son revenu selon la présente Partie pour une année d'imposition, le moindre

e) de l'ensemble

(i) des dépenses de forage et d'exploitation. . .faites par la corporation remplacée. . .

. . .

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Le paragraphe (11) de l'art. 19 du c. 8 des Statuts du Canada 1962-63 a abrogé les al. *c*) et *d*) du par. (8a), et cette abrogation est entrée en vigueur à compter de l'année d'imposition 1962 et suivantes.

En résumé: la compagnie A a fait des dépenses de forage et d'exploration; la compagnie B a acquis les biens de la compagnie A en 1960, mais à cause de la façon dont s'est opérée la transaction, la compagnie B ne pouvait pas être considérée à cette époque-là comme une compagnie remplaçante de sorte qu'elle n'a pu acquérir le droit de déduire de son revenu les dépenses non déduites de forage et d'exploration engagées par la compagnie A; en 1962 et par la suite, si l'on s'en tient aux prétentions du Ministre, la compagnie B a acquis la qualité de compagnie remplaçante et à ce titre, elle était dorénavant autorisé à déduire les dépenses en question; la fin du par. (8a) empêchait la compagnie A de se prévaloir de ce droit.

Avant d'examiner les prétentions rivales, il convient de formuler quelques remarques. La première porte sur le fardeau incombant au contribuable qui se prévaut d'une exemption. Il doit établir clairement que son cas s'insère dans l'exemption réclamée: *The Assessment Commissioner of the Corporation of the Village of Stouffville c. The Mennonite Home Association of York County et The Corporation of the Village of Stouffville*[2], à la p. 194.

[2] [1973] R.C.S. 189.

Secondly, the concept of a deduction being made by a taxpayer other than the one who incurred the expenditure is not unknown to the *Income Tax Act*. Section 85I(3) of the Act permits a new corporation formed on the amalgamation of two or more corporations after 1957 to deduct drilling and exploration expenses incurred by the predecessor corporation. Section 83A(3c) permits a joint exploration corporation to elect to renounce in favour of another corporation an agreed portion of the aggregate of the drilling and exploration expenses incurred by the joint exploration corporation.

Thirdly, by deleting paras. (*c*) and (*d*) of subs. (8a), Parliament liberalized the provision by making available to an expanded number of successor corporations a right to deduct. I do not think Parliament ever contemplated that a company which had sold or otherwise disposed of its assets could later have recourse to s. 83A. Parliament chose to grant a successor company the right to deduct drilling and exploration expenses incurred by a predecessor and the only problem in implementing its policy was with respect to the company which would have the right to deduct in the year of acquisition. The successor was accorded that right by the statute. The result of the amendment to the legislation in 1962 was to confer a right to claim deductions upon certain successor companies. This was a new right, coming from Parliament, not one acquired from a company's predecessor. At no time during the currency of the legislation has a predecessor company been able to transfer to a successor company entitlement to claim deductions in respect of drilling and exploration expenses.

It will be convenient now to consider in more detail the submissions of the appellant and of the Minister. Those of the Minister may be shortly put, resting on the language of the Act which, the Minister submits, is precise and unambiguous when read in the context of the whole statute and the general intendment of the Act. It is argued that there is no need to have recourse to presumptions of legislative intent, for such rules of construction are only useful in ascertaining the true

Deuxièmement, le principe selon lequel une déduction peut être effectuée par un contribuable autre que celui qui a encouru la dépense n'est pas étranger à la *Loi de l'impôt sur le revenu*. Le paragraphe (3) de l'art. 85I de la Loi autorise la nouvelle corporation, issue de la fusion de deux ou plusieurs corporations après 1957, à déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Le paragraphe (3c) de l'art. 83A permet à une corporation d'exploration en commun de renoncer en faveur d'une autre corporation à une partie convenue de ses dépenses de forage et d'exploration.

Troisièmement, en abrogeant les al. *c*) et *d*) du par. (8a), le Parlement a élargi les cadres de la disposition en permettant à un plus grand nombre de corporations remplaçantes de s'en prévaloir. Je crois que le Parlement n'a jamais envisagé la possibilité qu'une compagnie qui a vendu ses biens ou en a autrement disposé puisse plus tard se prévaloir de l'art. 83A. Le Parlement a choisi d'accorder à la compagnie remplaçante le droit de déduire les dépenses de forage et d'exploration engagées par la compagnie remplacée et, la seule difficulté dans la mise en œuvre de cette politique consistait à déterminer quelle compagnie serait autorisée à se prévaloir de la déduction pour l'année de l'acquisition. La loi a accordé ce droit au remplaçant. Les dispositions modificatrices de 1962 ont conféré à certaines compagnies remplaçantes le droit de se prévaloir des déductions en question. C'était donc un droit nouveau accordé par le Parlement et non par la compagnie remplacée. Jamais la loi n'a permis à une compagnie remplacée de céder à une compagnie remplaçante le droit de se prévaloir des déductions relatives aux dépenses de forage et d'exploration.

Il convient maintenant d'examiner de plus près les allégations de l'appelante et du Ministre. Les allégations de ce dernier se résument en quelques mots et reposent sur le texte de la Loi qui, selon lui, est clair et précis lorsque son lecteur tient compte de l'ensemble et de l'esprit général de la Loi. On allègue qu'il n'est pas nécessaire d'avoir recours aux présomptions portant sur l'intention du législateur puisque ces règles d'interprétation ne sont utiles dans la détermination du sens vérita-

meaning where the language of the statute is not clear and plain: per Lamont J. in *Acme Village School District v. Steele-Smith*[3], at p. 51. There is much to this submission. I do not think that the appellant can sustain its position on a literal reading of subs. (8a), the language of which places appellant fairly and squarely in the category of a predecessor company. The appellant, however, seeks to avoid a literal construction of the subsection with a three-pronged argument, which must fairly be considered, based upon (a) the presumption against retrospective operation of statutes; (b) the presumption against interference with vested rights; (c) the meaning to be given to the word "aggregate" in subs. (8a). With regard to points (a) and (b) it would not be sufficient for the appellant to establish that the legislation had retrospective effect; it must also show it had an accrued right which was adversely affected by the legislation.

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of

[3] [1933] S.C.R. 47.

ble que lorsque le texte est obscur et ambigu: voir les propos du juge Lamont dans *Acme Village School District c. Steele-Smith*[3], à la p. 51. Cette allégation est fort pertinente. Je ne crois pas que l'appelante puisse obtenir gain de cause en s'en tenant au sens littéral du par. (8a) puisque sa rédaction attribue nettement à l'appelante la qualité de compagnie remplacée. Toutefois, elle cherche à éviter une interprétation littérale de ce paragraphe et soumet à cet effet une triple argumentation qu'il convient d'examiner équitablement et qui se fonde sur a) la présomption à l'encontre de la rétroactivité des lois; b) la présomption voulant qu'on ne puisse porter atteinte aux droits acquis; c) la signification à donner au mot «ensemble» du par. (8a). Concernant les points a) et b), l'appelante doit faire plus que démontrer la portée rétroactive de la loi; elle doit également établir qu'elle possédait un droit acquis auquel la loi a porté atteinte.

Premièrement, la rétroactivité. Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif. A première vue, la présente affaire peut s'apparenter au deuxième cas, mais je suis d'avis que l'analyse de la disposition abrogative démontre qu'elle n'a aucune portée rétroactive dans le sens qu'elle modifie des droits acquis, bien qu'elle porte incontestablement atteinte aux transactions passées. L'article, tel que modifié par la disposition abrogative, ne vise pas les années d'imposition antérieures à la date de la modification; il ne cherche pas à s'immiscer dans le passé et ne prétend pas signifier qu'à une date antérieure, il faille considérer que le droit ou les droits des parties étaient ce qu'ils n'étaient pas alors. Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était aupara-

[3] [1933] R.C.S. 47.

the amending statute.

The appellant maintains that in 1960, at the time of the relevant transaction, it had the status of a non-predecessor company under s. 83A(8a), as it then read, and the right to carry over deductions to subsequent tax years; that the 1962 amendment could not operate retrospectively to change its status from non-predecessor company under s. 83A(8a) with the consequence that the drilling and exploration expenses became thereafter deductible only by Sharples Oil Corporation, the successor company. The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.

The contention of appellant that the repeal has application only in respect of acquisitions carried out subsequent to the passage of the repealing enactment would introduce a limitation upon the amplitude of subs. (8a), as amended, which is not supported by the language of the subsection. It would also deny successor corporations rights which s. 83A would seem to accord them. The interpretation pressed by appellant tends also to ignore the words "at any time after 1954". Appellant submits that these words may, and should, have application to the extent of preserving the rights of a successor corporation which, prior to the repealing enactment, carried out an acquisition in one or other of the manners set out in subs. (*c*) and (*d*) and therefore prior to repeal enjoyed the benefit of subs. (8a) but they should not have further force or effect. The difficulty with this submission is that one can find nothing in the legislation as it read in respect of the 1965 and subsequent taxation years which would support a distinction between those corporations which

vant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

L'appelante prétend qu'elle avait en 1960, à l'époque de la transaction en question, la qualité d'une compagnie non remplacée aux termes du par. (8a) de l'art. 83A, tel qu'alors libellé, ainsi que le droit de reporter des déductions au cours des années d'imposition subséquentes; elle soutient également que la modification de 1962 ne peut avoir d'effet rétroactif de façon à lui conférer maintenant la qualité de compagnie remplacée aux termes du par. (8a) de l'art. 83A, de sorte que les dépenses de forage et d'exploration pouvaient être déduites, par la suite, uniquement par Sharples Oil Corporation, la compagnie remplaçante. Finalement, l'appelante conclut qu'elle conserve à perpétuité le droit de déduire les dépenses en question. Je ne peux partager cette prétention. Il importe peu que la compagnie appelante ait eu une qualité particulière sous l'ancienne loi. Sans outrepasser sa compétence, le Parlement a statué qu'à compter des années d'imposition 1962 et suivantes, pour les fins du calcul du revenu imposable, l'appelante aurait une qualité différente.

La prétention de l'appelante selon laquelle l'abrogation agit seulement sur les acquisitions faites ultérieurement à l'adoption de la loi abrogative, a pour effet de restreindre la portée du par. (8a) dans sa forme modifiée, ce que le texte du paragraphe en question ne démontre aucunement. Cette prétention a également pour effet d'empêcher les corporations remplaçantes de se prévaloir des droits que leur accorde semble-t-il, l'art. 83A. L'interprétation mise de l'avant par l'appelante tend également à ignorer les mots «en tout temps après 1954». Cette dernière prétend que ces mots peuvent et doivent agir uniquement dans la mesure où ils permettent de garantir les droits d'une corporation remplaçante qui, antérieurement à la loi abrogative, a fait une acquisition suivant l'une ou l'autre des méthodes décrites aux al. *c*) et *d*) et qui, par conséquent, tirait avantage du par. (8a) avant l'abrogation. Ce qui fait obstacle à cette prétention est l'impossibilité de trouver dans cette partie de la loi portant sur les années d'imposition 1965 et suivantes, un indice qui étayerait une

acquired the property of other corporations prior to the 1962 amendment, in accordance with subs. (*c*) and (*d*), and those which acquired the property of other corporations following the amendment.

The *Income Tax Act* contains a series of very complicated rules which change frequently, for the annual computation of world income. The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect. In each of the years 1949 to 1960 the appellant had a right to deduct. The Act in each of those years conferred the right. In 1960 the appellant transferred its assets. The contract of sale, if any, forms no part of the record. So far as the record discloses, no mention was made of drilling and exploration espenses at the time. After disposing of its property, it was no longer a corporation whose principal business was that of exploring or drilling for petroleum or natural gas nor did it have income. It, therefore, no longer had a right to deduct. No claim was made by it in the 1961, 1962, 1963 or 1964 taxation years. By the time the appellant resumed business it had no right under the then legislative scheme to claim for drilling and exploration expenses incurred in earlier years. Any claim which it might make for exploration and drilling expenses could only be in respect of expenses incurred following resumption of business. It may seem unfortunate that an amendment which was intended to liberalize the legislation by removing a barrier to the inheritance of drilling and exploration expenses should have the effect of denying a predecessor company such as the appellant from enjoying a right which it would have enjoyed in the absence of the repeal but the legis-

distinction entre les corporations qui ont fait l'acquisition des biens d'autres corporations avant la modification de 1962, en conformité avec les al. *c*) et *d*), et celles qui ont fait l'acquisition des biens d'autres corporations postérieurement à la modification.

La *Loi de l'impôt sur le revenu* contient une série de règles très complexes modifiées fréquemment qui servent au calcul annuel du revenu global. Pour déterminer le revenu imposable d'un contribuable pour une année particulière, il faut appliquer la loi qui était alors en vigueur. La disposition abrogative de 1962 a simplement pour effet d'introduire pour les années subséquentes de nouvelles règles touchant la déductibilité des dépenses d'exploration et de mise en valeur. Bien que la disposition abrogative puisse paraître avoir pour effet de dépouiller l'appelante du droit dont elle jouissait auparavant de faire certaines déductions et d'une certaine façon causé la transmutation d'une transaction antérieure, je suis d'avis qu'un examen attentif de la question démontre qu'il n'en est pas ainsi. De 1949 à 1960, la Loi en vigueur au cours de chacune de ces années autorisait l'appelante à se prévaloir de la déduction. En 1960, l'appelante a transféré son actif. Le contrat de vente, s'il en existe un, n'apparaît pas au dossier et dans la mesure des révélations qui y sont contenues, il n'a pas été question à l'époque des dépenses de forage et d'exploration. Après avoir disposé de ses biens, l'appelante n'était plus une corporation s'occupant principalement de faire de l'exploration ou forage pour la découverte de pétrole ou de gaz naturel, et elle n'avait plus de revenu. Elle ne pouvait donc plus se prévaloir de la déduction en question. Au cours des années d'imposition 1961, 1962, 1963 et 1964, elle n'a fait aucune réclamation. A l'époque où l'appelante a repris ses activités, elle n'avait plus le droit, en vertu de la loi alors en vigueur, de réclamer les dépenses de forage et d'exploration engagées antérieurement. Il lui était possible de réclamer uniquement les dépenses de forage et d'exploration engagées après qu'elle eut repris ses activités. Il est peut-être malheureux qu'une modification dont le but est de libéraliser la loi en facilitant la transmission des dépenses de forage et d'exploration, ait pour effet de priver une compagnie remplacée comme l'appe-

lation as amended is unambiguous and clear. After the repeal of paras. (*c*) and (*d*) of subs. (8a) in 1962 and for the purpose of paying income tax in the years following 1962, the appellant company is a predecessor company within the meaning of subs. (8a) and precluded from deducting the drilling and exploration expenses incurred by it prior to November 10, 1960.

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[4], at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmen-

[4] [1933] S.C.R. 629.

lante d'un droit dont elle aurait pu se prévaloir en l'absence de l'abrogation, mais il n'en demeure pas moins que la loi dans sa forme modifiée est claire et précise. Après l'abrogation des al. *c*) et *d*) du par. (8a) en 1962 et aux fins du calcul de l'impôt à payer pour les années postérieures à 1962, la compagnie appelante est une compagnie remplacée au sens du par. (8a) et de ce fait, il lui est impossible de déduire les dépenses de forage et d'exploration engagées par elle avant le 10 novembre 1960.

Deuxièmement, l'interférence avec des droits acquis. Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*[4], à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir. Ce dernier type de loi peut être mauvais s'il porte atteinte à des droits acquis sans l'exprimer clairement. Toutefois, cette présomption s'applique seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations. Il est évident que la plupart des lois modifient des droits existants ou y portent atteinte d'une façon ou d'une autre, et les lois fiscales ne font pas exception. Les seuls droits dont un contribuable peut se prévaloir au cours d'une année d'imposition au regard de réclamations d'exemptions sont ceux que lui accordent la *Loi de l'impôt sur le revenu* alors en vigueur. L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes. C'est une erreur que de considérer les dépenses de forage et d'exploration comme un compte en banque duquel il est possible d'effectuer des retraits indéfiniment ou, du moins,

[4] [1933] R.C.S. 629.

tal policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*[5], at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6]; *Director of Public Works v. Ho Po Sang*[7].

Section 35 of the *Interpretation Act*, R.S.C. 1970, c. I-23 is cited in support of the appellant. It reads:

35. Where an enactment is repealed in whole or in part, the repeal does not

. . .

(*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

I agree with Mr. Justice Thurlow of the Federal Court of Appeal that it cannot be said that the repeal of paras. (*c*) and (*d*) affected their previous operation or anything done or suffered by appellant thereunder since paras. (*c*) and (*d*) never had any operation upon or application to anything done or suffered by appellant. I am also in agreement with Mr. Justice Thurlow that it cannot be said that any right acquired by appellant under paras. (*c*) or (*d*) was affected by their repeal, since no right was ever acquired by appellant under either of them. This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the sec-

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All E.R. 721 (P.C.).

jusqu'à l'épuisement du solde. Personne n'a le droit acquis de se prévaloir de la loi telle qu'elle existait par le passé; en droit fiscal, il est impérieux que la législation reflète l'évolution des besoins sociaux et de l'attitude du gouvernement. Un contribuable est libre de planifier sa vie financière en se fondant sur l'espoir que le droit fiscal demeure statique; il prend alors le risque d'une modification à la législation.

Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*[5], à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6], *Director of Public Works v. Ho Po Sang*[7].

L'article 35 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23 est cité en appui de la thèse de l'appelante. En voici le texte:

35. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation

. . .

b) n'atteint ni l'application antérieure du texte législatif ainsi abrogé ni une chose dûment faite ou subie sous son régime;

c) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé.

Je partage l'avis du juge Thurlow de la Cour d'appel fédérale selon lequel il ne peut être dit que l'abrogation des al. *c*) et *d*) atteint leur application antérieure ni une chose dûment faite ou subie sous leur régime par l'appelante, puisque les al. *c*) et *d*) ne se sont jamais appliqués à l'appelante ni à une chose dûment faite ou subie par elle. Je souscris encore une fois à l'avis du juge Thurlow lorsqu'il affirme que l'on ne peut pas dire que l'abrogation des al. *c*) et *d*) a eu un effet sur quelque droit acquis par l'appelante sous leur régime, puisque cette dernière n'a jamais acquis de droits sous le régime de l'un quelconque d'entre eux. Cet article représente simplement la consécration législative de la présomption de droit commun relative aux

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All. E.R. 721 (P.C.).

tion does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Third, "aggregate". The somewhat tortuous argument on this point is largely a mere embellishment of the retrospectivity argument. It runs as follows. Even if the appellant is regarded as a predecessor corporation, the accumulated drilling and exploration expenses may nevertheless be deducted by the appellant because (1) the prohibition expressed in the concluding paragraph of subs. (8a) extends only to "the aggregate determined under paragraph (*e*)"; (2) such aggregate in each of the years 1965 to 1968 is *nil* by reason of the necessity under subparas. (iii) and (iv) thereof of determining such aggregate in the first instance "for the taxation year in which the property so acquired was acquired by the successor corporation", *i.e.*, 1960; (3) subparas. (iii) and (iv) of subs. (8a)(*e*) have been construed by this Court in *Hargal Oils Ltd. v. Minister of National Revenue*[8], at pp. 295-6, where it was held that the "aggregate" is to:

> . . . consist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of . . . this subsection."

(4) this passage presupposes the existence of the qualified predecessor and a qualified successor corporation in the taxation year in which the transfer of property took place and the amount to be included in the aggregate can only be determined in the taxation year in which the transaction occurred; (5) in the 1960 taxation year subs. (8a) was not applicable to appellant and there cannot be in that taxation year either a successor corporation or a predecessor corporation nor any "aggregate" to which the concluding paragraph of

[8] [1965] S.C.R. 291.

droits acquis telle qu'elle existe à l'égard de l'abrogation des dispositions législatives et, selon moi, cet article n'ajoute rien à l'argumentation de l'appelante. Cette dernière doit toujours démontrer qu'elle possède un droit ou un privilège né ou acquis sous le régime du texte législatif avant son abrogation, ce qu'elle ne peut faire.

Troisièmement, le mot «ensemble». Cet argument quelque peu tortueux reprend en grande partie, sous un jour plus favorable, l'argument de la rétroactivité. En voici l'essentiel: même si l'appelante est considérée comme une corporation remplacée, elle peut néanmoins déduire les dépenses accumulées de forage et d'exploration parce que (1) l'interdiction spécifiée dans le dernier alinéa du par. (8a) porte uniquement sur «l'ensemble déterminé selon l'al. *e*)»; (2) cet ensemble pour chacune des années d'imposition 1965 à 1968 est nul, vu la nécessité, aux termes des sous-al. (iii) et (iv) de l'al. *e*), de déterminer d'abord cet ensemble «pour l'année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante», c.-à-d. 1960; (3) les sous-al. (iii) et (iv) de l'al. *e*) du par. (8a) ont été interprétés par cette Cour dans *Hargal Oils Ltd. c. Le ministre du Revenu national*[8], aux pp. 295 et 296, où cette dernière a statué que le mot «ensemble»:

> [TRADUCTION] . . . comprend les dépenses qui n'étaient pas déductibles par la compagnie remplacée dans le calcul de son revenu pour l'année d'imposition où ses biens ont été acquis par la compagnie remplaçante, mais qui auraient été déductibles par la compagnie remplacée dans le calcul de son revenu pour cette année d'imposition-là «en l'absence des dispositions ... du présent paragraphe».

(4) cet extrait présuppose l'existence de corporations remplacées et remplaçantes autorisées à l'époque du transfert des biens, et il est possible de déterminer le montant à inclure dans l'ensemble uniquement au cours de l'année d'imposition où s'est effectuée la transaction; (5) au cours de l'année d'imposition 1960, le par. (8a) n'était pas applicable à l'appelante, et il ne pouvait y avoir à cette époque soit une corporation remplacée ou une corporation remplaçante, ni aucun «ensemble» auquel pourrait se rattacher dans les années d'im-

[8] [1965] R.C.S. 291.

subs. (8a) can be related in subsequent taxation years; (6) the repealing enactment is made applicable to the 1962 and subsequent taxation years and cannot be given earlier effect in determining what is to be included in the "aggregate".

I do not think that the language of subs. (8a) or the gloss which it is suggested was put upon that language in the quoted passage from *Hargal's* case leads to the conclusion for which appellant contends. The quoted passage from *Hargal's* case merely compresses the words of subs. (8a). As applied to the facts of the case now before us, subs. (8a) provides that there may be deducted by the successor corporation the "aggregate" of the drilling and exploration expenses incurred by the appellant (*i.e.* approximately $2,000,000) to the extent that such expenses (a) were not deductible by the appellant in 1960 or earlier; and (b) would but for subs. (8a) have been deductible by the appellant in 1960. The subsection does not postulate the existence of a successor corporation and a predecessor corporation in the year of acquisition. The amount of the aggregate must be determined each year in which the deduction is sought, not for the taxation year of acquisition. The starting point in computing the aggregate is to total the expenditures on drilling and exploration; this amount must then be reduced to the extent that the expenses were deductible by the predecessor corporation in the year of acquisition or in earlier years; the amount which the successor corporation may deduct must not exceed the amount which would have been deductible by the predecessor in the year of acquisition in the absence of subs. (8a). It will be observed that the appellant is claiming to be entitled to a deduction under s. 83A(1) and (3), both of which subsections speak of the "aggregate" of drilling and exploration expenses to the extent that they were not deductible in computing income for a previous taxation year. It would be strange if the "aggregate" computed in accordance with the wording of s. 83A(1) and (3) would amount to $2,000,000 but computed in accordance with the analogous wording of s. 83A(8a) would be nil. In my opinion the "aggregate" is the same whether computed under s. 83A(1) and (3) or under s. 83A(8a). There is no difficulty in applying the words of s. 83A(8a) in this case. The

position subséquentes, le dernier alinéa du par. (8a); (6) le texte législatif abrogatif est applicable aux années d'imposition 1962 et suivantes et ne peut rétroagir de façon à déterminer ce qu'il faut inclure dans l'«ensemble».

Je ne suis pas d'avis que le texte du par. (8a) et l'interprétation spécieuse qui, prétend-on, en a été donnée dans l'extrait cité de l'arrêt *Hargal* mènent à la conclusion recherchée par l'appelante. L'extrait cité de l'arrêt *Hargal* ne fait que condenser le texte du par. (8a). Tel qu'appliqué aux faits de la présente affaire, le par. (8a) dispose que la corporation remplaçante peut déduire l'«ensemble» des dépenses de forage et d'exploration engagées par l'appelante (c.-à-d. approximativement $2,000,000) dans la mesure où lesdites dépenses a) n'étaient pas déductibles par l'appelante en 1960 ou avant cette date; et b) auraient été déductibles par l'appelante en 1960 en l'absence des dispositions du par. (8a). Ce paragraphe ne présuppose pas l'existence, au cours de l'année d'acquisition, de corporations remplaçantes et remplacées. Le montant de l'ensemble doit être déterminé chaque année où l'on se prévaut de la déduction, et non pour l'année d'imposition où s'est fait l'acquisition. Pour déterminer le montant de l'ensemble, il faut d'abord établir le total des dépenses de forage et d'exploration; ce montant doit ensuite être réduit dans la mesure où les dépenses étaient déductibles par la corporation remplacée dans le calcul de son revenu pour l'année d'acquisition ou pour toute l'année antérieure; le montant déductible par la corporation remplaçante ne doit pas dépasser celui que la compagnie remplacée aurait pu déduire du calcul de son revenu pour l'année de l'acquisition en absence du par. (8a). Il convient de souligner que l'appelante prétend avoir droit à une déduction en vertu des par. (1) et (3) de l'art. 83A, qui traitent de l'«ensemble» des dépenses de forage et d'exploration, dans le mesure où elles n'étaient pas déductibles du revenu d'une année d'imposition antérieure. Il serait plutôt étrange que l'«ensemble» calculé en conformité du texte des par. (1) et (3) de l'art. 83A totalise un montant de $2,000,000, tandis qu'il serait nul lorsque calculé en conformité du texte analogue du par. (8a) de l'art. 83A. A mon avis, l'«ensemble» est le même, qu'il soit calculé selon les par. (1) et (3) de l'art. 83A ou selon

aggregate of the drilling and exploration expenses deductible by the appellant prior to the repealing enactment and since that time deductible by the successor corporation is readily identifiable and has been quantified.

I would dismiss the appeal with costs.

The judgment of Pigeon and de Grandpré JJ. was delivered by

PIGEON J. (*dissenting*)—The appellant is an oil producing company. It was incorporated under the laws of Canada on May 26, 1949, under the name of Sharples Oil (Canada) Ltd. It was a wholly owned subsidiary of Sharples Oil Corporation, a U.S. company. It did incur drilling and exploration expenses for which it would, in later years, be entitled to claim a deduction from income for taxation purposes. As of November 30, 1960, the amount of such expenditures that could be carried forward was nearly $2,000,000 (the exact amount was agreed to be $1,987,547.19). Preliminary to the winding-up of the parent company, the appellant transferred to it on that date substantially all its assets. Under subs. (8a) of s. 83A of the *Income Tax Act* as it then read (that is as enacted by 1956 c. 39, s. 23 with some immaterial amendments), this conveyance did not transfer to the parent company appellant's entitlement to future deductions because it did not meet the requirements of subparas, (*c*) and (*d*). Therefore, the conveyance did not have the effect of depriving the appellant from its entitlement to deductions in the future on that account by virtue of the concluding paragraph of subs. (8a):

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

In the winding-up of the parent company, the appellant's shares were distributed to the parent's

le par (8a) de l'art. 83A. L'application des termes du par. (8a) de l'art. 83A ne soulève aucune difficulté en l'espèce. L'ensemble des dépenses de forage et d'exploration déductibles par l'appelante avant le texte législatif abrogatif, et depuis lors déductible par la corporation remplaçante, est facilement identifiable et a été déterminé.

Je suis d'avis de rejeter le pourvoi avec dépens.

Le jugement des juges Pigeon et de Grandpré a été rendu par

LE JUGE PIGEON (*dissident*)—L'appelante est une compagnie pétrolière. Elle a été constituée par charte fédérale le 26 mai 1949 sous le nom de Sharples Oil (Canada) Ltd. Elle était une filiale exclusive de Sharples Oil Corporation, une compagnie américaine. Elle a engagé des dépenses de forage et d'exploration pour lesquelles il lui était possible, dans les années à venir, de réclamer une déduction dans le calcul de son revenu imposable. Le 30 novembre 1960, le montant de ces dépenses susceptibles d'être reportées totalisait presque $2,000,000 (les parties ayant convenu d'un montant exact de $1,987,547.19). Antérieurement à la liquidation de la compagnie-mère, l'appelante lui a transféré, à cette date-là, presque tout son actif. En vertu du par. (8a) de l'art. 83A de la *Loi de l'impôt sur le revenu*, tel qu'alors libellé (c'est-à-dire, tel que mis en vigueur par 1956 c. 39, art. 23 avec quelques modifications non pertinentes), ce transfert de l'actif n'a pas entraîné le transfert à la compagnie-mère du droit de l'appelante à des déductions futures parce que l'actif n'a pas été acquis conformément aux dispositions des al. *c*) et *d*). Par conséquent, en vertu du dernier alinéa du par. (8a) que voici, ce transfert n'a pas eu pour effet de retirer à l'appelante le droit de réclamer, pour les années d'imposition à venir, des déductions relatives aux dépenses engagées:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Au cours des procédures de liquidation de la compagnie-mère, ses actionnaires ont acquis les

shareholders who, as of June 18, 1964, sold all those shares to Mikas Oil Co. Ltd. for $280,000. The appellant's name was then changed to Gustavson Drilling (1964) Limited and it resumed operations as an oil producing company. Having made profits, it claimed deductions from income on account of the previously incurred drilling and exploration expenses above mentioned. These deductions totalling over $1,500,000 for 1965-68 were disallowed by reassessments. They were restored by the Tax Appeal Board but, on appeal, they were denied by the Federal Court at trial and on appeal.

The reason for which the deductions were denied was that in 1962, some two years after the transfer of appellant's assets to its parent, subparas. (*c*) and (*d*) of ss. (8a) had been repealed by statute applicable to 1962 and following taxation years. It was said in effect that by virtue of this amendment, the entitlement to the future deductions had gone with the assets to the parent company as a "successor corporation". Of course, as the latter had been wound-up, it could not take advantage of the provision but it was said that this had destroyed, as of 1962, any right which the appellant had to claim deductions on account of drilling and exploration expenditures incurred before November 30, 1960, by virtue of the concluding paragraph of ss. (8a) amended by the 1962 statute to read:

> and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for a taxation year subsequent to its taxation year in which the property so acquired was acquired by the successor corporation.

In my view, the legislative change effected in 1962 by the repeal of paras. (*c*) and (*d*) of subs. (8a) was not an alteration in the scheme of deductions for drilling and exploration expenses, but a modification in the transferability of the entitlement to those deductions. In essence, the Minister's contention which prevailed in the court below against the Tax Appeal Board's conclusion was that, although the transfer of appellant's property

actions de l'appelante et, le 18 juin 1964, ils les ont vendues à Mikas Oil Co. Ltd. pour la somme de $280,000. L'appelante a alors adopté le nom de Gustavson Drilling (1964) Limited et elle a repris ses activités comme compagnie pétrolière. Ayant réalisé des profits, l'appelante a réclamé, dans le calcul de son revenu, la déduction de certaines sommes au regard de ses dépenses de forage et d'exploration engagées antérieurement. Ces déductions, qui totalisaient plus de $1,500,000 pour les années 1965 à 1968, ont été refusées à l'occasion de nouvelles cotisations. La Commission d'appel de l'impôt les a rétablies mais elles ont ensuite été refusées par la Cour fédérale en première instance et en appel.

Les déductions ont été refusées en raison de l'abrogation, en 1962, soit deux ans après le transfert de l'actif de l'appelante à la compagnie-mère, des sous-alinéas *c*) et *d*) du par. (8a) par une loi applicable aux années d'imposition 1962 et suivantes. En fait, on a statué qu'en vertu de cette modification, la compagnie-mère en tant que «corporation remplaçante» avait acquis, en même temps que l'actif, le droit aux déductions futures. Naturellement, vu la liquidation de cette dernière, elle n'a pu tirer profit de cette disposition, mais on a statué, en vertu du dernier alinéa du par. (8a), tel que modifié en 1962 et reproduit ci-après, que cela avait retiré à l'appelante, à compter de 1962, le droit de se prévaloir d'une déduction à titre de dépenses de forage et d'exploration engagées avant le 30 novembre 1960:

> et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

A mon avis, la modification législative apportée en 1962 par l'abrogation des al. *c*) et *d*) du par. (8a) n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration; elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Selon le Ministre, bien que le transfert des biens de l'appelante à Sharples Oil Corporation effectué le 13 novembre 1960 ne s'étendait pas au droit à ces

to Sharples Oil Corporation made on November 13, 1960, did not include the entitlement to the deductions in question, this right became included in this transfer when, in 1962, an amendment to the *Income Tax Act* repealed the provisions that had prevented it from going to the transferee with the property transferred.

The rule against retrospective operation of statutes is, of course, no more than a rule of construction. It operates more or less strongly according to the nature of the enactment. However, nowhere does it operate more strongly than when any other construction would result in altering the effect of contracts previously entered into. In *Reid v. Reid*[9], Bowen L.J. said (at pp. 408-9):

> Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis,* that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a large retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.
>
> Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. *Barber* puts forward, ... this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. *Barber* contends for, the principle of construction with which I set out forbids us to adopt that construction.

Here, the effect of the contract was to leave the entitlement to the deductions intact in the hands of the transferor but, if the legislative change is read as applicable to that contract, the result is an outright forfeiture or confiscation of this valuable

[9] (1886), 31 Ch.D. 402.

déductions, ce droit a été incorporé au transfert en question lorsqu'en 1962 une modification à la *Loi de l'impôt sur le revenu* a abrogé les dispositions qui consacraient l'intransmissibilité de ce droit à la personne à qui les biens avaient été transférés. Cette prétention du Ministre a prévalu devant le tribunal d'instance inférieure à l'encontre de la conclusion de la Commission d'appel de l'impôt.

Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation. Sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. Dans *Reid v. Reid*[9], le lord juge Bowen tient les propos suivants (aux pp. 408 et 409):

> [TRADUCTION] Or, la règle particulière d'interprétation dont on a fait mention, mais qui est utile uniquement lorsque le texte d'une loi du Parlement est obscur, se rattache à la célèbre maxime *omnis nova constitutio futuris formam imponere debet non praeteritis,* c'est-à-dire que sauf exception, la nouvelle loi doit être interprétée de façon à minimiser au possible l'interférence avec des droits acquis. Selon moi, même lorsque nous interprétons une loi ou un article qui ont une portée rétroactive, nous devons toujours avoir à l'esprit que cette maxime entre en jeu dès que le texte cesse d'être clair. Il s'agit là d'un corollaire nécessaire et naturel de la règle générale selon laquelle il ne faut pas donner à un article une portée rétroactive plus considérable que celle que la législature a manifestement voulu lui donner, même si cette loi a, dans une certaine mesure, un effet rétroactif.
>
> Or, quant à l'art. 5, il s'applique expressément aux mariages contractés avant l'entrée en vigueur de la Loi. Allons-nous donc adopter l'opinion émise par M. *Barber*, ... cette interprétation peut toucher ou porter atteinte à des actes antérieurs, elle est donc inadmissible selon le principe énoncé au début de mes motifs, à moins qu'il nous apparaisse clairement que la prétention de M. *Barber* est conforme à l'intention du législateur.

En l'espèce, le contrat avait pour effet de laisser intact entre les mains du cédant le droit aux déductions, mais, si la modification législative est jugée applicable, il y a alors déchéance complète de ce droit précieux à cause de la liquidation du

[9] (1886), 31 Ch.D. 402.

right, the transferee having been wound-up. On that construction, if the transferee was a subsisting oil company it would, without any consideration therefor, obtain this valuable right in addition to the properties conveyed. In the instant case, the appellant's shares were sold after the 1962 amendment but, on the Minister's submission, it would make no difference if they had been bought before the amendment, the purchasers would have lost what they paid for. Bearing in mind the presumption against retrospective operation, can the statute be read so as to avoid this unjust result?

The application provision of the 1962 amending act enacts that the relevant subsection is applicable to the 1962 and subsequent taxation years. The Minister says this means that assessments for those years are to be made in accordance with the law as changed by the new statute. I do not deny that such is ordinarily the effect of an enactment in those terms. However, I cannot see why, in view of the nature of the substantive enactment, it would not be read differently with respect to the provisions with which we are concerned, namely, provisions which concern the legal effect of contracts in relation to a scheme of entitlement to deductions intended to be available for many years in the future. Because of the special risk involved in exploring and drilling for oil Parliament has departed from the principle of yearly deductions of expenses, deductions for drilling and exploration expenses are available to oil companies in subsequent years.

While after the sale of its assets the appellant was no longer in a situation in which it could claim deductions for drilling and exploration expenses, it had a perfect right to resume active operations and claim in later years. It had not lost its entitlement to such deductions in appropriate circumstances, such entitlement was a valuable asset of enduring value involving substantial potential benefits just as some other kinds of tax losses. While the realization of actual benefits from such assets is subject to restrictions and conditions, they are commonly bought and sold through the acquisition of the shares of the company holding them. This is some-

cessionnaire. Selon cette interprétation, si le cessionnaire était une compagnie pétrolière existante il obtiendrait, sans contre-partie, ce droit précieux en plus des biens cédés. Dans la présente affaire, on a vendu les actions de l'appelante après l'entrée en vigueur de la modification de 1962 mais, de l'aveu même du Ministre, les acheteurs auraient perdu l'objet de leur achat même s'ils avaient acheté les actions avant l'entrée en vigueur de la modification. En ayant à l'esprit la présomption contre la rétroactivité, peut-on interpréter la loi présentement en cause de façon à éviter ce résultat injuste?

La disposition visant l'application de la loi modificatrice de 1962 prévoit que le paragraphe en question s'appliquera aux années d'imposition 1962 et suivantes. Selon le Ministre, cela signifie que les cotisations pour ces années-là doivent s'effectuer en conformité du droit modifié par la nouvelle loi. Je ne nie pas que ce soit ordinairement l'effet d'un texte législatif ainsi libellé. Toutefois, en raison de la nature du système de déductions dont il s'agit, je ne vois pas pourquoi on ne pourrait pas l'interpréter différemment à l'égard des dispositions en cause, c'est-à-dire celles qui portent sur l'effet juridique des contrats conclus en relation avec ce système de déductions à faire pendant plusieurs années à venir. A cause du risque particulier propre à l'exploration et au forage visant à découvrir du pétrole, le Parlement s'est écarté du principe de la déduction annuelle des dépenses en autorisant les compagnies pétrolières à déduire au cours des années subséquentes leurs dépenses de forage et d'exploration.

Bien qu'après la vente de son actif l'appelante ne fût plus en mesure de se prévaloir du droit de déduire ses dépenses de forage et d'exploration, elle conservait néanmoins le droit légitime de reprendre plus tard ses activités et de réclamer alors les déductions. Elle n'avait pas perdu le droit de faire ces déductions dans des circonstances appropriées, et ce droit était un bien précieux de valeur permanente qui comporte d'importants avantages éventuels à l'instar d'autres types de pertes admissibles pour fins fiscales. Bien que la réalisation profitable de semblables actifs soit soumise à des restrictions et conditions, ils sont régu-

thing which appears from the facts of the case and of which we should anyway take judicial notice. It is not something of which Parliament may be deemed to have been unaware in passing the legislation. Due to the nature of the entitlement to future deductions for drilling and exploration expenses, it should not be presumed that a company holding such an asset will not seek to realize its value in later years just because, at one point, it has sold or otherwise disposed of its properties. The 1962 amendment should not be looked upon purely as conferring the right to claim deductions upon the purchaser of the properties. There is a correlative withdrawing of this right from the vendor which Parliament's so-called liberality effected at the same time. Thus the true nature of the operation is a transfer of the entitlement to the deductions.

I cannot agree that our present income tax legislation should be construed on the basis of the special rules that were developed in the days when the taxation statutes were yearly drawn up in the Ways and Means Committee. Our *Income Tax Act* is permanent legislation and we are here dealing with incentive provisions, that is a system of deductions designed to encourage investment. It is true that it is within Parliament's power to breach the promises of special treatment on the faith of which investments have been made. There is however a strong presumption against any intention to do this. In the present case, there was clearly no such intention. The scheme of deductions was not repealed. Appellant would admittedly be entitled to the deductions were it not for the fact that, some years previously, it transferred its property to another corporation, as it could lawfully do without prejudicing its entitlement to the deductions. At that time, this transfer did not carry the right to the deductions although it would now do so. Under such circumstances, it does not appear to me that the application provision may properly be read as making the new law applicable to a contract previously executed so as to change its effect especially when such change is nothing but an entirely unjustified forfeiture or confiscation of valuable rights.

lièrement achetés et vendus par l'acquisition des actions de la compagnie qui les possède. Les faits de l'espèce le démontrent et, de toute façon, j'estime que nous devons en prendre connaissance d'office. Il ne s'agit pas d'une situation dont le Parlement pouvait ignorer l'existence lors de l'adoption du texte législatif. Vu le caractère du droit aux déductions futures pour dépenses de forage et d'exploration, on ne doit pas présumer qu'une compagnie qui possède un tel actif ne cherchera pas plus tard à le réaliser, uniquement parce qu'à une certaine époque, elle a vendu ses biens ou en a autrement disposé. On ne doit pas interpréter la modification de 1962 comme ayant pour seul effet de donner à l'acquéreur le droit aux déductions. La prétendue générosité du Parlement comporte également le retrait corrélatif de ce droit au vendeur. La disposition a donc pour but véritable d'effectuer le transfert du droit aux déductions.

Je ne peux partager l'avis selon lequel nos présentes lois fiscales doivent être interprétées suivant les règles spéciales établies à l'époque où le Comité des voies et moyens rédigeait annuellement les lois fiscales. Notre *Loi de l'impôt sur le revenu* est une loi permanente, et nous sommes aux prises ici en présence de dispositions visant à encourager les investissements par l'instauration d'un régime de déductions. Il est vrai que le Parlement a le pouvoir de briser les promesses de traitement privilégié sur la foi desquelles des investissements ont été faits. Toutefois, une forte présomption existe à l'encontre d'une intention semblable. En l'espèce, il n'y a trace d'aucune telle intention. Le régime de déduction n'a pas été abrogé. De toute évidence, l'appelante aurait droit aux déductions si elle n'avait, quelques années auparavant, transféré ses biens à une autre corporation comme elle pouvait légitimement le faire sans porter atteinte à son droit de se prévaloir des déductions. A cette époque-là, ce transfert n'emportait pas celui du droit aux déductions, bien qu'aujourd'hui il en soit autrement. Dans de telles circonstances, j'estime qu'on ne peut, à bon droit, interpréter la disposition visant l'application de la nouvelle loi comme signifiant qu'elle est applicable à un contrat déjà exécuté, de façon à en modifier l'effet, surtout lorsqu'une telle modification ne constitue rien de moins qu'une confiscation entièrement injustifiée de droits précieux.

Concerning the decision of this Court in *Acme Village School District v. Steele-Smith*[10], I would point out that the situation was quite different. The dispute was between a school teacher and a school board which was his employer. The agreement between them provided for termination by either party giving thirty days notice in writing to the other. Subsequent to the making of the agreement, the Legislature amended the section of the *School Act* contemplating the termination of teachers' engagements by such notice. The amendment provided that except in the month of June, no such notice shall be given by a Board without the approval of an inspector previously obtained. This Court held that the teacher was entitled to the benefit of the amendment. Lamont J. said, speaking for the majority (at p. 52):

> Considering the nature and scope of the Act and the control over the agreement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation.

With deference for those who hold a different view, it seems to me that if a similar reasoning is applied to the contract and legislation in question herein, the result ought to be that the intention of Parliament in effecting the legislative change in 1962 was to facilitate the transfer of the right to deductions, not to alter the result of past contracts so as to effect a forfeiture of the rights of those oil companies that had previously transferred their properties under conditions that did not involve a transfer of their entitlement to the transferee. In my view, the words used by Parliament do not compel us to reach the result contended for by the Minister. That this is a matter of taxation in which it is said no resort to equity can be had, makes in my view no difference.

I would allow the appeal with costs throughout to the appellant, reverse the judgments of the

[10] [1933] S.C.R. 47.

Quant à l'arrêt rendu par cette Cour dans *Acme Village School District c. Steele-Smith*[10], je tiens à souligner que la situation était très différente. Le litige était entre un enseignant et son employeur, une commission scolaire. La convention qui les liait stipulait que l'une ou l'autre des parties pouvait y mettre fin par préavis de trente jours. Après la conclusion de la convention, la législature a modifié l'article du *School Act* relatif à la cessation d'emploi d'un enseignant suite à un tel préavis. Selon la modification, le préavis ne pouvait plus être donné, sauf au mois de juin, sans l'accord préalable d'un inspecteur. Cette Cour a statué que l'enseignant était autorisé à se prévaloir de la modification. Le juge Lamont, au nom de la majorité, s'est exprimé ainsi (à la p. 52):

> [TRADUCTION] Compte tenu du caractère et de la portée de la Loi et du contrôle que le Ministre a conservé sur la convention liant l'enseignant et la Commission, et compte tenu également du fait que le redressement apporté par la Législature s'adresse à un problème actuel que cette dernière se propose de régler en subordonnant au consentement d'un inspecteur le droit de chacune des parties de mettre fin à la convention, j'estime qu'il y en a assez pour réfuter la présomption que l'article ne doit produire son effet que dans l'avenir.

Avec respect pour l'opinion contraire, je suis d'avis que l'application de ce raisonnement au contrat et à la Loi en question incite plutôt à conclure que l'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire. A mon avis, les mots employés par le Parlement ne nous obligent pas à conclure dans le sens que le voudrait le Ministre. Selon moi, il importe peu qu'il s'agisse en l'espèce d'une question de fiscalité à l'égard de laquelle aucun recours en *equity* ne peut être exercé.

J'accueillerais le pourvoi avec dépens dans toutes les cours en faveur de l'appelante, j'infirme-

[10] [1933] R.C.S. 47.

Federal Court at trial and on appeal, and restore the judgment of the Tax Appeal Board.

Appeal dismissed with costs, PIGEON *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: McDonald & Hayden, Toronto.

Solicitors for the respondent: D. S. Maxwell, Ottawa.

rais les jugements rendus par la Cour fédérale en première instance et en appel, et je rétablirais le jugement de la Commission d'appel de l'impôt.

Pourvoi rejeté avec dépens, les juges PIGEON *et* DE GRANDPRÉ *étant dissidents.*

Procureurs de l'appelante: McDonald & Hayden, Toronto.

Procureur de l'intimé: D. S. Maxwell, Ottawa.

TAB 5

Canada Employment and Immigration Commission *Appellant*;

and

Isaac Dallialian *Respondent.*

1980: January 30 and 31; 1980: June 3.

Present: Pigeon, Dickson, Beetz, Estey and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Interpretation — Accrual of right — Retroactivity excluded — Unemployment insurance — Age of entitlement reduced — Unemployment Insurance Act, 1971, 1970-71-72 (Can.) c. 48, ss. 31 (amended by 1974-75-76 (Can.) c. 80, s. 10) and 38 — Unemployment Insurance Entitlements Adjustment Act, 1976-1977 (Can.) c. 11, s. 2 — Interpretation Act, R.S.C. 1970, c. I-23, s. 35(c).

The issue arises by reason of an amendment to the *Unemployment Insurance Act*, which reduced the age of entitlement to benefits from 70 to 65 years and which took effect on January 1, 1976, at which time the respondent had attained the age of 65 but had not reached the age of 70 years. He had established a benefit period commencing July 13, 1975, at a time, therefore, when the Act provided for the payment of benefits until the attainment of the age of 70. The respondent received benefits during the period from July to December 1975. The Unemployment Insurance Commission considered that the amendment to the Act of January 1, 1976, terminated the right to benefits after the attainment of the age of 65 years and invited claimants in this situation to claim a pension under the Pension Plan. On February 1, 1976, the respondent received a pension under the Quebec Pension Plan which, by the statute as it existed prior to January 1, 1976, disentitled the respondent to receive further benefits. The respondent's maximum benefit period of fifty-one weeks expired on July 6, 1976. The respondent attained the age of 70 years on December 18, 1976. The appellant paid the respondent benefits from July 13, 1975, to February 1, 1976. The Board of Referees and the Umpire confirmed this decision. The Federal Court of Appeal set aside the decision and directed that the matter be returned to the Commission for determination in accordance with the law as it existed from and after January 1, 1976, in accordance with its interpretation holding that the entitlement age and receipt of the pension were not causes for refusal of benefits to a claimant who was over 65 years of age on January 1, 1976.

La Commission de l'emploi et de l'immigration du Canada *Appelante*;

et

Isaac Dallialian *Intimé.*

1980: 30 et 31 janvier; 1980: 3 juin.

Présents: Les juges Pigeon, Dickson, Beetz, Estey et Chouinard.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Interprétation — Droit acquis — Rétroactivité exclue — Assurance-chômage — Limite d'âge d'admissibilité abaissée — Loi de 1971 sur l'assurance-chômage, 1970-71-72 (Can.) chap. 48, art. 31 (modifiée par 1974-75-76 (Can.) chap. 80, art. 10), et 38 — Loi sur l'examen de certains cas d'admissibilité aux prestations d'assurance-chômage, 1976-77 (Can.) chap. 11, art. 2 — Loi d'interprétation, S.R.C. 1970, chap. 1-23, art. 35c).

Le litige provient d'une modification de la *Loi sur l'assurance-chômage*, entrée en vigueur le 1er janvier 1976, qui a abaissé de 70 à 65 ans la limite d'âge de l'admissibilité aux prestations. A cette date, l'intimé avait déjà plus de 65 ans mais n'avait pas encore 70 ans. Il avait établi une période de prestations qui a commencé le 13 juillet 1975, à un moment, donc, où la Loi prévoyait le versement de prestations jusqu'à l'âge de 70 ans. L'intimé a reçu des prestations de juillet à décembre 1975. La Commission d'assurance-chômage a considéré que la modification de la Loi, le 1er janvier 1976 avait mis fin au droit d'une personne de recevoir des prestations dès qu'elle avait atteint l'âge de 65 ans et invité les prestataires dans cette situation à réclamer une rente en vertu du Régime de rentes. Le 1er février 1976, l'intimé a acquis le droit de recevoir une rente en vertu du Régime de rentes du Québec, ce qui, aux termes de la Loi antérieure au 1er janvier 1976, rendait l'intimé inadmissible à d'autres prestations. Le 6 juillet 1976, la période maximum de 51 semaines pendant laquelle les prestations pouvaient être versées à l'intimé, prenait fin. Le 18 décembre 1976, l'intimé atteignait l'âge de 70 ans. L'appelante a versé à l'intimé des prestations du 13 juillet 1975 au 1er février 1976. Le conseil arbitral et le juge-arbitre ont confirmé cette décision. La Cour d'appel fédérale a infirmé la décision et ordonné que l'affaire soit renvoyée à la Commission pour qu'elle statue conformément au texte législatif comme il se lit depuis le 1er janvier 1976 selon son interprétation d'après laquelle la limite d'âge et la réception de la rente n'étaient pas des causes de refus des prestations dans le cas d'un prestataire qui avait plus de 65 ans le 1er janvier 1976.

Held: The appeal should be allowed.

Per Dickson, Estey and Chouinard JJ.: There are four possible terminal dates for the payment of benefits to the respondent under the Act: (a) January 1, 1976, because the respondent then being over 65 was ineligible to receive payments under the Act as it was in force from and after that date; (b) February 1, 1976, when a retirement pension became payable to the respondent under the Quebec Pension Plan which was a disqualifying event under the statute prior to the amendment; (c) July 6, 1976, with the expiry of the benefit period; (d) December 18, 1976, the respondent's seventieth birthday, as prescribed by the Act prior to the amendment. Date (a) cannot be retained, for the amendment clearly refers to those who will attain the age of sixty-five in the future. Date (d) cannot be retained, for the statute before and after the 1976 amendment limits benefits to a fifty-one week period. The issue therefore narrows down to whether or not the entitlement to receipt of a Quebec pension terminates benefits effective February 1, 1976, even though this disqualification was removed from the Act with effect January 1, 1976. To construe the statute as entitling the respondent to benefits beyond February 1, 1976, would be to attribute to the amending Act a greater entitlement to a person over 65 years of age than such a person had under the Act prior to the amendment notwithstanding that the clear purpose of the amendment was to terminate entitlement of the earlier age of 65. It is reasonable to read the new s. 31 of the Act as having been adopted by Parliament in the light of s. 35(*c*) of the *Interpretation Act*: when read together, the amending Act and the *Interpretation Act* continue the benefit assured to the respondent under the pre-1976 Act for the month of January 1976 but leave him subject to the disqualification of s. 31(3)(*b*) of the Act as it stood prior to the amendment. Therefore, the respondent's right to benefits came to an end on January 31, 1976, when a retirement pension became payable to him under the Quebec Pension Plan. On the other hand, the 1977 *Unemployment Insurance Entitlements Adjustment Act* does not apply to the present proceedings, as the respondent did not have his "entitlement to benefit terminated" by reason of the new statute but by reason of the pre-existing law.

Arrêt: Le pourvoi doit être accueilli.

Les juges Dickson, Estey et Chouinard: Il y a quatre dates possibles auxquelles, en vertu de la Loi, les prestations d'assurance-chômage devaient cesser d'être versées à l'intimé, savoir: a) le 1er janvier 1976, parce que, à cette date, l'intimé, ayant déjà plus de 65 ans, devenait inadmissible aux prestations conformément aux dispositions de la Loi entrées en vigueur à cette date; b) le 1er février 1976, soit la date à laquelle l'intimé a acquis le droit de recevoir une pension de retraite en vertu du Régime de rentes du Québec, ce qui le rendait inadmissible à des prestations en vertu de la Loi telle qu'elle existait avant l'adoption de la modification; c) le 6 juillet 1976, soit à la fin de la période de prestations; d) le 18 décembre 1976, soit le soixante-dixième anniversaire de naissance de l'intimé, comme le prescrivait la Loi comme elle se lisait avant la modification. La date (a) ne peut être retenue, parce que la modification ne s'applique qu'aux personnes qui atteindront l'âge de 65 ans dans le futur. La date (d) ne peut être retenue parce que le texte législatif, après la modification de 1976 comme auparavant, restreint la période de prestations à une durée de 51 semaines. Par conséquent, la question se résume à savoir si le droit de recevoir une rente en vertu du Régime de rentes du Québec met fin au versement de prestations à compter du 1er février 1976, même si cette cause de déchéance a été retranchée de la Loi à partir du 1er janvier 1976. Interpréter le texte législatif de façon à rendre l'intimé admissible à des prestations au-delà du 1er février 1976 aurait pour effet de conférer aux personnes âgées de plus de 65 ans une admissibilité plus étendue en vertu de la loi modificatrice que celle dont elles disposaient en vertu de la Loi comme elle existait avant la modification. Il est juste de considérer que le Parlement a adopté le nouvel art. 31 de la Loi en tenant compte de l'al. 35*c*) de la *Loi d'interprétation*. Lues de concert, la loi modificatrice et la *Loi d'interprétation* permettent à l'intimé de continuer à recevoir pour le mois de janvier 1976 les prestations auxquelles il avait droit en vertu de la Loi comme elle existait avant 1976 tout en l'assujettissant à la cause de déchéance prévue à l'al. 31(3)*b*) de la Loi comme elle existait avant la modification et ce, nonobstant le but manifeste et la portée évidente de la modification qui sont de mettre fin au droit des prestataires à un âge moins avancé soit à 65 ans. Par conséquent, le droit de l'intimé aux prestations a pris fin le 31 janvier 1976 lorsqu'il a acquis le droit de recevoir une rente en vertu du Régime de rentes du Québec. Par contre, la *Loi sur l'examen de certains cas d'admissibilité aux prestations d'assurance-chômage* de 1977 ne s'applique pas aux présentes procédures, puisque l'inadmissibilité de l'intimé aux prestations ne découle pas de cette nouvelle loi mais de la loi antérieure.

Per Pigeon and Beetz JJ.: The conclusion of Estey J. on the interpretation of the legislative provisions is unassailable. Moreover, the Umpire in the case at bar correctly concluded that the claimant had no remedy for the injury caused to him by the appellant's actions. While it must be admitted that the courts are strictly required to apply the law as written, it is regrettable that the claimants were left without remedy for an obvious injustice. It is illogical to relieve the claimants, by means of a special statute, from their failure to appeal in time because the Commission misled them as to the effect of the statute, and not to relieve them also from the forfeiture due to the pension application which it urged them to make for the same reason. These claimants were unfairly deprived of the difference between the pension and the benefit, but only Parliament could still remedy their situation.

Bell Canada v. Earl Palmer, [1974] 1 F.C. 186; *In re Kleifges*, [1978] 1 F.C. 734; *McDoom v. Minister of Manpower and Immigration*, [1978] 1 F.C. 323; *Martinoff v. Gossen*, [1979] 1 F.C. 327, [1979] 1 F.C. iv; *Danias Gervais*, (Nov. 12, 1976) CUB 4417; *Minister of National Revenue v. Gustavson Drilling (1964) Ltd.*, [1972] F.C. 92 and 1193, [1977] 1 S.C.R. 271; *M.N.R. v. Inland Industries Limited*, [1974] S.C.R. 514, referred to.

APPEAL from a judgment of the Federal Court of Appeal[1], setting aside the decision of the Umpire[2]. Appeal allowed.

Paul M. Ollivier, Q.C., and *Jean-Marc Aubry*, for the appellant.

Jean Barrière, for the respondent.

English version of the reasons of Pigeon and Beetz JJ. delivered by

PIGEON J.—I have had the advantage of reading the opinion of Estey J. His conclusion on the interpretation of the legislative provisions in question I find unassailable. I also note that it agrees with the view expressed by Addy J., sitting as Umpire in *Danias Gervais*[3], relying on the judgment of Cattanach J. in *Minister of National*

[1] [1979] 1 F.C. 686.
[2] CUB 5007, June 14, 1978.
[3] CUB 4417, (Nov. 12, 1976).

Les juges Pigeon et Beetz: La conclusion du juge Estey sur l'interprétation des dispositions législatives est inattaquable. Le juge-arbitre en la présente affaire a par ailleurs correctement conclu que le prestataire était sans recours pour le préjudice que lui a causé le comportement de l'appelante. Mais tout en reconnaissant que les juges sont rigoureusement tenus d'appliquer la loi comme elle est écrite, il y a lieu de regretter que l'on se soit ainsi trouvé à laisser sans remède une injustice manifeste. Il est illogique de relever, par une loi spéciale, les prestataires de leur défaut d'avoir soulevé leur grief en temps utile parce que la Commission les a induits en erreur sur l'effet de la loi et ne pas les relever également de la déchéance résultant de la demande de rente qu'elle les a incités à faire pour la même raison. Ces prestataires ont été injustement privés de la différence entre la rente et la prestation, mais seul le Parlement pourrait encore remédier à leur situation.

Jurisprudence: *Bell Canada c. Earl Palmer*, [1974] 1 C.F. 186; *In re Kleifges*, [1978] 1 C.F. 734; *McDoom c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 1 C.F. 323; *Martinoff c. Gossen*, [1979] 1 C.F. 327, [1979] 1 C.F. iv; *Danias Gervais*, (12 nov. 1976) CUB 4417; *Ministre du Revenu national c. Gustavson Drilling (1964) Ltd.*, [1972] C.F. 92 et 1193, [1977] 1 R.C.S. 271; *M.R.N. c. Inland Industries Limited*, [1974] R.C.S. 514.

POURVOI contre un arrêt de la Cour d'appel fédérale[1], infirmant la décision du juge-arbitre[2]. Pourvoi accueilli.

Paul M. Ollivier, c.r., et *Jean-Marc Aubry*, pour l'appelante.

Jean Barrière, pour l'intimé.

Les motifs des juges Pigeon et Beetz ont été rendus par

LE JUGE PIGEON—J'ai eu le privilège de prendre connaissance de l'opinion du juge Estey. Sa conclusion sur l'interprétation des dispositions législatives en question me paraît inattaquable. Je note d'ailleurs qu'elle rejoint celle qu'a donnée le juge Addy siégeant comme arbitre dans l'affaire de *Danias Gervais*[3] en se fondant sur le jugement

[1] [1979] 1 C.F. 686.
[2] CUB 5007, 14 juin 1978.
[3] CUB 4417, (12 nov. 1976).

Revenue v. Gustavson Drilling (1964) Ltd.[4]

I must also agree that Marceau J., sitting as Umpire in the case at bar[5], correctly concluded that the claimant had no remedy for the injury caused to him by the actions of the Commission. He described this injury and excluded it from consideration as follows:

First, it is criticized for having given the claimants only the bare information that it had decided to stop payments when the amendment came into force, omitting to give any reason, or to notify the persons concerned of their right to contest the decision. Next, it is pointed out that the Commission itself urged the claimants to claim their due from the Quebec Pension Board, and was therefore directly responsible for creating the situation that was held against them. Lastly, surprise is expressed that beginning in 1977, the Commission had rendered decisions imposing retroactive disentitlement on grounds which they had long known existed.

It is clear that the conduct of the Commission and the actions of its officers have some extremely regrettable aspects which could well be invoked to cause the flood of sympathy for the claimants that I have already mentioned. But I fail to see how they can be the basis for arguments with any legal weight. The Commission is a body whose role is strictly to administer the Act, and the rights of individuals under the Act cannot result solely from the Commission's conduct, however deserving of criticism or however regrettable such conduct may be. Certainly it is true that the Commission, like any other government body, could be held responsible for making good damage caused by its mistakes and those of its officers, but such an obligation would follow from the application of the principles of administrative responsibility: it could not be invoked in order to contravene the provisions of the very Act the Commission had been created to administer. No one disputes that the Commission committed an error of interpretation, but it was a pardonable error and one made in good faith. The notices it sent to the claimants were brief, but were amplified later, and the officers gave advice unstintingly and with the best intentions to those who consulted

[4] [1972] F.C. 92, affirmed [1972] F.C. 1193, affirmed [1977] 1 S.C.R. 271.

[5] CUB 5007, (June 14, 1978),

du juge Cattanach dans *Ministre du revenu national c. Gustavson Drilling (1964) Ltd.*[4]

Je dois également reconnaître que le juge Marceau, siégeant comme juge-arbitre en la présente affaire[5], a correctement conclu que le prestataire était sans recours pour le préjudice que lui a causé le comportement de la Commission. Ce préjudice il le décrit et l'écarte comme suit:

On lui reproche d'abord de n'avoir informé que très laconiquement les prestataires de sa décision d'arrêter les paiements au moment de la mise en vigueur de l'amendement, omettant, ce faisant, de motiver sa façon de voir et d'informer les intéressés de leur droit de contester. On souligne ensuite qu'elle a, elle-même, incité les prestataires à réclamer leur dû auprès de la Régie des rentes du Québec, se rendant ainsi directement responsable de la création de cette situation invoquée contre eux. On s'étonne enfin qu'elle ait pu, à partir de janvier 1977, se fondant sur un motif dont elle connaissait fort bien l'existence depuis longtemps déjà, prononcer des décisions d'inadmissibilité auxquelles elle donnait effet rétroactif.

Il est clair que le comportement de la Commission et les gestes posés par ses officiers ont des aspects éminemment regrettables qu'on peut facilement évoquer pour éveiller en faveur des prestataires cette sympathie dont j'ai parlé. Mais je ne vois pas comment on en pourrait tirer ici des arguments à portée juridique. La Commission est un organisme dont le rôle est strictement d'administrer la loi et les droits des individus en vertu de cette loi ne sauraient résulter de son seul comportement aussi critiquable et regrettable qu'il soit. Sans doute est-il vrai que la Commission, comme tout organisme public, pourrait être tenue de répondre des dommages causés par ses gestes fautifs et ceux de ses officiers, mais son obligation résulterait alors de l'application des principes de responsabilité administrative: on ne pourrait s'en réclamer pour transgresser les dispositions de la Loi pour l'administration de laquelle elle a été créée. Personne ne conteste que la Commission ici a commis une erreur d'interprétation, mais son erreur était fort excusable et elle l'a commise de bonne foi; ses avis aux prestataires étaient laconiques, mais ils furent par la suite complétés et les conseils donnés par ses officiers à ceux qui s'adressaient à elle furent prodigués avec la

[4] [1972] C.F. 92, confirmé [1972] C.F. 1193, confirmé [1977] 1 R.S.C. 271.

[5] CUB 5007, (14 juin 1978).

them; it invoked, after the event, a reason for disentitlement which it had long known to exist, but it had no choice, seeing that it was then responsible for determining, with the help of new light thrown on the matter by the decision of Addy J., what rights—both retroactively and in the future—the claimants could exercise; it held against these claimants a situation which it had created itself—but one that was none the less real and could not be disregarded. At all events, whether the conduct of the Commission is excusable or not, whether the way it proceeded is understandable or not, it is certain that, however regrettable its actions may have been, they may not be invoked as the source of rights under the *Unemployment Insurance Act*.

As Marceau J. noted, following upon the decision of Addy J., Parliament adopted a special statute to remedy the injustice caused to claimants who had lost their rights by submitting to the erroneous decision of the Commission to treat those rights as extinguished by s. 31 of the *Unemployment Insurance Act* which came into force on January 1, 1976. Here again, I have to approve the reasoning of Marceau J. on this point:

The Act of May 9, 1977 is very brief; its entire substance is contained in one section, the significant parts of which read as follows:

2. Notwithstanding section 102 of the *Unemployment Insurance Act, 1971*, the Unemployment Insurance Commission shall consider the entitlement to benefit of any person, whether or not he has appealed any decision relating thereto, who . . .

(*a*)

(*b*)

(*c*)

and shall calculate the amount of money, if any, to which that person is entitled under the provisions of the *Unemployment Insurance Act, 1971*, as that Act read prior to January 1, 1976, and pay that amount to him.

In the claimant's view, Parliament's intention in passing this unusual Act was to restore to them a right of which they had been unjustly deprived. In the eyes of the Commission, Parliament was confirming that the entitlement to benefit in the cases referred to was to be considered according to the provisions of the Act as they read before January 1, 1976. In my opinion, neither the claimants nor the Commission can find in the May 9,

meilleure intention; elle a invoqué après coup un motif d'inadmissibilité qu'elle connaissait depuis longtemps, mais elle n'avait pas le choix, tenue qu'elle était à ce moment de déterminer, à l'aide de l'éclairage nouveau apporté par la décision du juge Addy, les droits dont pouvaient se prévaloir les prestataires, et ce tant pour le passé que pour l'avenir; elle a opposé à ces derniers une situation qu'elle avait elle-même suscitée, mais cette situation n'en était pas moins réelle et ne pouvait être ignorée. De toute façon, que l'on excuse ou non le comportement de la Commission, que l'on comprenne ou non sa façon de procéder, il est certain que les gestes qu'elle a posés, aussi regrettables qu'ils aient été, ne peuvent être invoqués comme ayant été source de droits en vertu de la *Loi sur l'assurance-chômage* elle-même.

Comme l'a rappelé le juge Marceau, le Parlement, à la suite de la décision du juge Addy, a voté une loi spéciale destinée à remédier à l'injustice causée aux prestataires qui se trouvaient à avoir perdu leurs droits en s'inclinant devant la décision erronée de la Commission de les tenir pour éteints par l'art. 31 de la *Loi sur l'assurance-chômage* entrée en vigueur le 1er janvier 1976. Là encore je ne puis qu'endosser sur ce point le raisonnement du juge Marceau:

Cette loi du 9 mai 1977 est très succincte; elle contient en somme un seul article de substance dont les propositions importantes se lisent comme suit:

2. Par dérogation à l'article 102 de la *Loi de 1971 sur l'assurance-chômage*, la Commission d'assurance-chômage doit examiner l'admissibilité aux prestations de toute personne qui a ou non interjeté appel d'une décision à ce sujet, et . . .

a)

b)

c)

et elle doit calculer la somme éventuellement due à cette personne aux termes de la *Loi de 1971 sur l'assurance-chômage* telle qu'elle était rédigée avant le 1er janvier 1976 et la lui verser.

Pour les prestataires, le Parlement entendait par son intervention exceptionnelle leur redonner un droit qui leur avait été dénié injustement. Pour la Commission, le Parlement confirmait que le droit aux prestations dans les cas visés devait être considéré selon les dispositions de la Loi telles qu'elles existaient avant le 1er janvier 1976. A mon avis, ni les prestataires ni la Commission ne peuvent trouver dans cette loi du 9 mai 1977 l'appui

1977 Act the conclusive support they are looking for. If Parliament had wanted to give a definite decision in the claimants' favour it would not have merely restored to them a right of appeal which allowed them to have their entitlement reconsidered. On the other hand, if Parliament had wanted to confirm definitively that the said entitlement was required to be considered according to section 31(1) as it used to read, it is difficult to understand why its sole mention of the old version of the Act was in reference to calculating the "amount of money, if any, to which that person is entitled". Perhaps it is simply a question of wording—perhaps the reference to the old version of the Act covered at one and the same time the determination of entitlement and the calculation of the amount of benefit, but this is a case where doubt ought to militate against an automatic, unquestioning decision. Moreover, it is quite understandable that, while wanting to restore the right of appeal and put an end to all discussion about the benefit rate, Parliament had no wish to act as substitute, in the matter of entitlement determination, for the general principles that apply when current legislation conflicts with previous legislation.

While admitting that the courts are strictly required to apply the law as written and may not depart from the clear meaning of the provisions enacted by Parliament in order to give effect to a presumed intention which is not expressed I cannot but express regret that the claimants were thus left without remedy for an obvious injustice. I cannot believe that the special statute was adopted merely to the end that claimants in Dallialian's situation, instead of being prevented from appealing the Commission's decision, be allowed to do so only to have the umpire tell them that they are without a remedy, because the Commission acted in good faith in advising them that they were no longer entitled to benefits and urging them to apply for the retirement pension which they would lose if they did not claim it. It is illogical to relieve the claimants from their failure to appeal in time because the Commission misled them as to the effect of the statute, and not to relieve them also from the forfeiture due to the pension application which it urged them to make for the same reason. However, this is how these claimants were unfairly deprived of the difference between the pension and the benefit. Their situation is obviously quite different from that of the industrialist who failed to obtain the anticipated tax benefits in issue in

décisif qu'ils y recherchent. Si le Parlement avait voulu donner définitivement raison aux prestataires, il ne se serait pas limité à leur redonner un droit d'appel leur permettant de faire réexaminer leur éligibilité. En revanche, si le Parlement avait voulu confirmer d'autorité que cette éligibilité devant être examinée selon l'article 31(1) tel qu'il existait auparavant, on voit mal pourquoi il aurait parlé de l'ancienne loi uniquement à propos du «calcul de la somme éventuellement due». Il s'agit peut-être uniquement d'une question de forme, la référence à l'ancienne loi visant tout à la fois la détermination de l'éligibilité et le calcul des prestations, mais c'est un cas où le doute devrait jouer à l'encontre d'une décision aveugle automatique. On pourrait d'ailleurs très bien comprendre que tout en voulant réouvrir le droit d'appel et mettre fin à toute discussion relativement au taux des prestations, le Parlement n'ait pas voulu se substituer, pour la détermination de l'éligibilité, aux principes généraux applicables en matière de conflit de loi dans le temps.

Tout en reconnaissant que les juges sont rigoureusement tenus d'appliquer la loi comme elle est écrite et ne peuvent s'écarter du sens clair des dispositions décrétées par le Parlement en donnant effet à une intention présumée qui n'y est pas exprimée, je ne puis m'abstenir d'exprimer le regret que l'on se soit ainsi trouvé à laisser sans remède une injustice manifeste. Je me refuse à croire que l'on a voté la loi spéciale à seule fin que les prestataires dans la situation de *Dallialian*, au lieu d'être empêchés de soumettre leur grief, aient la possibilité de le faire seulement pour entendre l'arbitre leur dire qu'ils sont sans recours parce que c'est de bonne foi que la Commission leur a dit qu'ils n'avaient plus droit aux prestations et les a incités à demander la rente de retraite qu'ils perdaient s'ils ne la réclamaient pas. En effet, il est illogique de relever les prestataires de leur défaut d'avoir soulevé leur grief en temps utile parce que la Commission les a induits en erreur sur l'effet de la loi et ne pas les relever également de la déchéance résultant de la demande de rente qu'elle les a incités à faire pour la même raison. C'est cependant ainsi que ces prestataires ont été privés injustement de la différence entre la rente et la prestation. Leur situation est évidemment bien différente de celle de l'industriel déçu dans son

M.N.R. v. Inland Industries Limited[6]. These claimants are employees who were entitled to rely on the information which a government agency properly considered it had a duty to provide them. Parliament considered that their situation ought to be remedied, and it is for Parliament to decide whether it is now too late to do so effectively.

I therefore conclude as Estey J. that the appeal should be allowed, the judgment of the Federal Court of Appeal should be reversed and the decision of the Umpire should be restored. In accordance with the terms of the order granting leave, the appellant will pay respondent's costs as between solicitor and client.

The judgment of Dickson, Estey and Chouinard JJ. was delivered by

ESTEY J.—This is an appeal from a judgment of the Federal Court of Appeal which sets aside under s. 28 of the *Federal Court Act* a decision of an Umpire sitting on an appeal from a decision of the Unemployment Insurance Commission on an application for benefits under the *Unemployment Insurance Act*, hereinafter referred to as the Act. The issue arises by reason of an amendment to the Act enacted in 1976 which reduced the age of entitlement to benefits from 70 to 65 years and which took effect on January 1, 1976, at which time the respondent had attained the age of 65 but had not reached the age of 70 years. It will be helpful to set out the relevant parts of the statute before and after the amendment in question.

UNEMPLOYMENT INSURANCE ACT

S.C. 1970-71-72, c. 48, s. 31

31. (1) Notwithstanding section 19, an initial benefit period shall not be established for a claimant if at the time he makes an initial claim for benefit

(*a*) He is seventy years of age or over, or

(*b*) a retirement pension has at any time become payable to him under the *Canada Pension Plan* or *Quebec Pension Plan*.

AMENDMENT being S.C. 1974-75-76, c. 80, s. 10

10. Section 31 of the said Act is repealed and the following substituted therefor:

"31. (1) Notwithstanding section 19, an initial benefit period shall not be established for a claimant if at the time he makes an initial claim for benefit he is sixty-five years of age or over.

(2) An insured person who makes a claim for benefit and proves that he

(*a*) is sixty-five years of age or over,

[6] [1974] S.C.R. 514.

attente d'obtenir les avantages fiscaux dont il est question dans l'arrêt *M.N.R. c. Inland Industries Limited*[6]. Il s'agit ici de simples employés qui étaient en droit de se fier aux renseignements que l'administration publique se considère à bon droit tenue de leur fournir. Le Parlement a jugé qu'il y avait lieu de remédier à leur situation et il lui appartient de décider s'il est trop tard pour le faire effectivement.

Je conclus donc comme le juge Estey qu'il y a lieu d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir la décision du juge-arbitre. Suivant la condition de l'autorisation, l'appelante devra payer les dépens de l'intimé sur la base avocat-client.

Version française du jugement des juges Dickson, Estey et Chouinard.

LE JUGE ESTEY—Le présent pourvoi attaque un arrêt de la Cour d'appel fédérale qui, sous l'autorité de l'art. 28 de la *Loi sur la Cour fédérale*, a infirmé une décision d'un juge-arbitre qui siégeait en appel d'une décision rendue par la Commission d'assurance-chômage sur une demande de prestations présentée conformément à la *Loi sur l'assurance-chômage*, ci-après appelée la Loi. Le litige provient d'une modification de la Loi édictée en 1976 qui fait passer l'âge de l'admissibilité aux prestations de 70 à 65 ans. Cette modification est entrée en vigueur le 1er janvier 1976. A cette date, l'intimé avait déjà plus de 65 ans mais n'avait pas encore atteint 70 ans. J'estime utile d'énoncer les dispositions pertinentes du texte de loi en cause, soit l'article antérieur à la modification et l'article de remplacement.

LOI SUR L'ASSURANCE-CHÔMAGE

S.C. 1970-71-72, chap. 48, art. 31

31. (1) Nonobstant l'article 19, une période initiale de prestations n'est pas établie au profit d'un prestataire si, au moment où il formule une demande initiale de prestations,

a) il est âgé de soixante-dix ans ou plus, ou

b) il a déjà acquis le droit de percevoir une pension ou rente de retraite en vertu du *Régime de pensions du Canada* ou du *Régime de rentes du Québec*.

MODIFICATION, S.C. 1974-75-76, chap. 80, art. 10

10. L'article 31 de ladite loi est abrogé et remplacé par ce qui suit:

«31. (1) Nonobstant l'article 19, une période initiale de prestations n'est pas établie au profit d'un prestataire si, au moment où il formule une demande initiale de prestations, il est âgé de soixante-cinq ans ou plus.

(2) Un assuré qui présente une demande de prestations et qui prouve

a) qu'il est âgé d'au moins soixante-cinq ans,

[6] [1974] R.C.S. 514.

(2) When a major attachment claimant who is seventy years of age or over or to whom a retirement pension has at any time become payable under the *Canada Pension Plan* or *Quebec Pension Plan* makes an initial claim for benefit and an initial benefit period would otherwise be established for him, an amount equal to three times the weekly rate of benefit at the rate applicable to him under section 24 shall forthwith be paid to him and section 23 does not apply in respect of the claimant.

(3) Any benefit period established for a claimant under this Part if not earlier terminated under this Part, terminates at the end of the week in which

(*a*) he attains the age of seventy years, or

(*b*) a retirement pension at any time becomes payable to him under the *Canada Pension Plan* or *Quebec Pension Plan*,

whichever first occurs.

(*b*) has had twenty or more weeks of insurable employment

(i) in the fifty-two week period immediately preceding the week in which he makes the claim, or

(ii) in the period between the commencement date of his last initial benefit period and the week in which he makes the claim,

whichever period is the shorter, and

(*c*) has not previously been paid an amount under this subsection as it now reads or as it read before January 1, 1976,

shall, subject to sections 48 and 49, be paid an amount equal to three times the weekly rate of benefit provided under section 24.

(3) Subsections (2) to (5) of section 18 apply to the period mentioned in subparagraph (i) of paragraph (*b*) of subsection (2) with such modifications as the circumstances require.

(4) Any benefit period established for a claimant under this Part, if not earlier terminated under this Part, terminates at the end of the week in which he attains the age of sixty-five years.

(5) If the total benefit paid to a major attachment claimant in a benefit period terminated under subsection (4) is less than an amount that is equal to three times the weekly rate of benefit payable to him in that benefit period, that claimant shall, subject to sections 48 and 49 but notwithstanding any other provision of Part II, be paid benefit at the weekly rate of benefit payable to him in that benefit period for the number of weeks that is required to ensure that the total benefit paid to him in respect of that benefit period is not less than the aforementioned amount."

(2) Lorsqu'un prestataire de la première catégorie qui est âgé de soixante-dix ans ou plus ou qui a déjà acquis le droit de percevoir une pension ou rente de retraite en vertu du *Régime de pensions du Canada* ou du *Régime de rentes du Québec* formule une demande initiale de prestations qui, sans cela, ferait établir à son profit une période initiale de prestations, une somme égale à trois fois le taux des prestations hebdomadaires qui lui est applicable en vertu de l'article 24 doit immédiatement lui être versée et l'article 23 ne s'applique pas au prestataire.

(3) Toute période de prestations établie au profit d'un prestataire aux termes de la présente Partie expire, si elle ne s'est pas terminée plus tôt en vertu de la présente Partie, à la fin de la semaine

a) au cours de laquelle il atteint soixante-dix ans, ou

b) au cours de laquelle il acquiert le droit de percevoir une pension ou rente de retraite en vertu du *Régime de pensions du Canada* ou du *Régime de rentes du Québec*, si cette semaine est antérieure à la semaine visée à l'alinéa *a*).

b) qu'il a exercé un emploi assurable pendant au moins vingt semaines

(i) pendant la période de cinquante-deux semaines qui précède la semaine où il présente sa demande, ou

(ii) pendant la période comprise entre le début de sa dernière période initiale de prestations et la semaine où il présente sa demande, si cette dernière est plus courte, et

c) qu'il n'a pas déjà perçu une somme en vertu du présent paragraphe (version actuelle ou antérieure au 1er janvier 1976),

doit recevoir, sous réserve des articles 48 et 49, un montant égal à trois fois le taux des prestations hebdomadaires applicable en vertu de l'article 24.

(3) Les paragraphes (2) à (5) de l'article 18 s'appliquent, *mutatis mutandis*, à la période mentionnée au sous-alinéa (i) de l'alinéa *b*) du paragraphe (2).

(4) Une période de prestations établie au profit d'un prestataire en vertu de la présente Partie se termine à la fin de la semaine où il atteint l'âge de soixante-cinq ans, ou à une date antérieure si la présente Partie le prévoit.

(5) Si le total des prestations versées à un prestataire de la première catégorie au cours d'une période de prestations prenant fin en vertu du paragraphe (4) est inférieur au produit obtenu en multipliant par trois le taux des prestations hebdomadaires qui lui est applicable pendant cette période de prestations, le prestataire a droit, sous réserve des articles 48 et 49 mais nonobstant toute autre disposition de la Partie II, à des prestations calculées au taux hebdomadaire qui lui est applicable pendant cette période de prestations pendant le nombre de semaines nécessaire pour que le total des prestations qui lui sont versées pendant cette période de prestations soit au moins égal à ce produit.»

The sequence of events giving rise to this appeal can be summarized as follows:

1. The respondent was born on December 18, 1906, and accordingly attained the age of 65 on December 18, 1971, and the age of 70 on December 18, 1976.

La série d'événements à l'origine du présent pourvoi peut se résumer comme suit:

1. L'intimé est né le 18 décembre 1906. Il a donc eu 65 ans le 18 décembre 1971 et 70 ans le 18 décembre 1976.

2. The respondent established via the procedure prescribed by the Act a benefit period commencing July 13, 1975.

3. At the time when the respondent's benefit period was established, the Act provided for the payment of benefits until the attainment of the age of 70.

4. The respondent received benefits during the period from July to December 1975.

5. With effect January 1, 1976, the above-noted amendment to the *Unemployment Insurance Act* terminated the right to benefits after the attainment of the age of 65 years.

6. On February 1, 1976, the respondent received a pension under the Quebec Pension Plan which, by the statute as it existed prior to January 1, 1976, disentitled the respondent to receive further benefits under the Act.

7. The respondent's maximum benefit period under the statute expired on July 6, 1976, being a fifty-one week period (s. 38 of the Act).

8. The respondent attained the age of 70 years on December 18, 1976.

There are four possible terminal dates for the payment of benefits to the respondent under the Act:

(*a*) Benefits end January 1, 1976, because the respondent then being over 65 was ineligible to receive payments under the Act as it was in force from and after that date.

(*b*) benefits end on February 1, 1976, when a retirement pension became payable to the respondent under the Quebec Pension Plan which was a disqualifying event under the statute as it existed prior to the amendment.

(*c*) Benefits end on July 6, 1976, with the expiry of the benefit period.

(*d*) Benefits expire on December 18, 1976, the respondent's seventieth birthday, as pre-

2. L'intimé a établi, au moyen de la procédure prévue par la Loi, une période de prestations qui a commencé le 13 juillet 1975.

3. A l'époque où la période de prestations a été établie au profit de l'intimé, la Loi prévoyait le versement de prestations jusqu'à l'âge de 70 ans.

4. L'intimé a reçu des prestations de juillet à décembre 1975.

5. La modification précitée de la *Loi sur l'assurance-chômage* qui a pris effet le 1er janvier 1976 met fin au droit d'une personne de recevoir des prestations dès qu'elle atteint l'âge de 65 ans.

6. Le 1er février 1976, l'intimé a acquis le droit de recevoir une rente en vertu du Régime de rentes du Québec ce qui, aux termes de la Loi comme elle existait avant le 1er janvier 1976, rendait l'intimé inadmissible à d'autres prestations conformément à la Loi.

7. La période maximum pour laquelle les prestations pouvaient être versées à l'intimé conformément à la Loi a pris fin le 6 juillet 1976, à la fin, donc, d'une période de 51 semaines (art. 38 de la Loi).

8. L'intimé a eu 70 ans le 18 décembre 1976.

Il y a quatre dates possibles auxquelles, en vertu de la Loi, les prestations d'assurance-chômage devaient cesser d'être versées à l'intimé, savoir,

a) le 1er janvier 1976: parce que, à cette date, l'intimé, ayant déjà plus de 65 ans, devenait inadmissible aux prestations conformément aux dispositions de la Loi entrées en vigueur à cette date;

b) le 1er février 1976, soit la date à laquelle l'intimé a acquis le droit de recevoir une pension de retraite en vertu du Régime de rentes du Québec, ce qui le rendait inadmissible à des prestations en vertu de la Loi telle qu'elle existait avant l'adoption de la modification;

c) le 6 juillet 1976, soit à la fin de la période de prestations;

d) le 18 décembre 1976, soit le soixante-dixième anniversaire de naissance de l'intimé, comme

scribed by the Act prior to the amendment.

The Commission paid the respondent the benefits to which he was entitled under the Act from the commencement of the benefit period in July 1975 until receipt of the Quebec Pension February 1, 1976. The Board of Referees and the Umpire have confirmed this decision. The Federal Court of Appeal has set aside the decision of the Umpire and directed that the matter be returned to the Commission for determination in accordance with the law as it existed from and after January 1, 1976, and in particular directed that the accrual of the right to receipt of a Quebec pension was, after the effective date of the amendment, no longer a disqualifying event. It should be noted that the Chief Justice of the Court of Appeal has indicated that the Umpire's decision confirmed a decision of the Commission that the respondent was not entitled to benefits after January 1976 and this, while somewhat ambiguous, must be read as agreeing with Pratte J. who wrote the reasons for the court below and who stated that the decision of the Commission, confirmed on appeals to the Board of Referees and the Umpire, continued the benefits payable to the respondent until accrual of the right to receive the Quebec pension on January 31, 1976. Pratte J. in reaching his conclusion that benefits did not terminate at the end of January 1976 stated:

However, careful reading of this provision, which was enacted on January 1, 1976, shows that it applies exclusively to persons who reach the age of sixty-five years after that date, and not to those who, like the applicant, reached it long before.

The reason for the Umpire's decision is that, like other Umpires before him, he felt that when the Commission established a benefit period for an insured person that person thereby acquired a right to the period thus established, the length and conditions of which should therefore normally be governed by the Act as it existed at the time the period was established. In my view, this is incorrect. The establishment of a benefit period does not give rise to any right. It is only a

le prescrivait la Loi comme elle se lisait avant la modification.

La Commission a versé à l'intimé les prestations auxquelles il avait droit en vertu de la Loi depuis le début de la période de prestations, soit juillet 1975, jusqu'au moment où il a commencé à recevoir une rente en vertu du Régime de rentes du Québec, soit le 1er février 1976. Le conseil arbitral et le juge-arbitre ont confirmé cette décision. La Cour d'appel fédérale a infirmé la décision du juge-arbitre et ordonné que l'affaire soit renvoyée à la Commission pour qu'elle statue conformément au texte législatif comme il se lit depuis le 1er janvier 1976. Elle a conclu en particulier que le droit acquis de recevoir une rente du Régime de rentes du Québec ne rendait plus l'intimé inadmissible aux prestations après la date d'entrée en vigueur de la modification. Il convient de noter que le Juge en chef de la Cour d'appel a indiqué que la décision du juge-arbitre confirmait une décision de la Commission selon laquelle l'intimé n'était pas admissible au bénéfice des prestations après janvier 1976. Cette décision se veut, même si cela paraît quelque peu ambigu, en accord avec la conclusion du juge Pratte qui a rédigé les motifs de la Cour d'appel et qui dit qu'aux termes de la décision de la Commission confirmée en appel par le conseil arbitral et le juge-arbitre, l'intimé avait le droit de continuer à recevoir des prestations jusqu'à ce qu'il acquière le droit de recevoir une rente en vertu du Régime de rentes du Québec, soit le 31 janvier 1976. Le juge Pratte en concluant que le versement des prestations ne se terminait pas à la fin de janvier 1976, s'exprime en ces termes:

Cependant, il suffit de lire attentivement ce texte, édicté le 1er janvier 1976, pour voir qu'il s'applique exclusivement aux personnes qui atteignent l'âge de 65 ans après cette date et non à celles qui, comme le requérant, ont atteint cet âge longtemps auparavant.

Si le juge-arbitre a décidé comme il l'a fait c'est que, comme d'autres juges-arbitres avant lui, il a considéré que lorsque la Commission établissait une période de prestations au profit d'un assuré, celui-ci acquérait, par le fait même, un droit à la période ainsi établie dont la durée et les modalités devaient, en conséquence, être normalement régies par la loi telle qu'elle existait au moment de l'établissement de la période. Cela, à mon avis, est inexact. L'établissement d'une période de pres-

formality that must necessarily be carried out so that an insured person can subsequently acquire the right to receive benefits.

Jackett C.J. concurred in the result and went on to add that s. 35(*c*) of the *Interpretation Act*, dealing with the effect of the repeal of an enactment by Parliament, had no application in these circumstances. The learned Chief Justice referred to:

> ... [the] rule of interpretation to be found in the *Interpretation Act* (section 3(1) and section 35(*c*)), that, unless a contrary intention appears, the repeal of an enactment does not "affect any right ... acquired ... (or) accruing ... under the enactment repealed". In my view [he continued], notwithstanding my great respect for the contrary view of the Umpires, this rule of interpretation has no application. The only substantive "right" conferred on an insured person, as I read the statute, is that right which has accrued when those things have happened that entitle him to be paid benefit, and the provision that a person for whom a benefit period is established is "entitled to benefit in accordance with this Part" merely creates an expectancy that is no different in kind from the expectancy of an insured person who is still employed.

Reverting to the four alternatives set out above, there is no difficulty in disposing of the first possibility, namely that the benefit period ends January 1, 1976, for the reason that on that date (the effective date of the amendment) the respondent was already over 65 years of age. Subsection (4) of the new s. 31 provides for termination only at the end of the week in which an applicant "attains the age of sixty-five years" and the statute clearly assumes this event will be in the future. This birthday did not occur in the week of January 1, 1976, or thereafter, the respondent having attained the age of 65 in December 1971. As he had not yet attained the age of 70 years the pre-existing statute did not disentitle him on the grounds of age. A retirement pension had not at that date become payable to him under either the Canada or Quebec Pension Plans. Accordingly, the respondent suffered no disentitlement on January 1, 1976, which would terminate his benefits at that date.

tations ne donne naissance à aucun droit. Ce n'est qu'une formalité qui doit nécessairement être accomplie pour qu'un assuré puisse subséquemment acquérir le droit de recevoir les prestations.

Le juge en chef Jackett souscrivant à cette conclusion ajoute que l'al. 35*c*) de la *Loi d'interprétation* qui traite de l'effet de l'abrogation d'un texte de loi par le Parlement, ne s'applique pas en l'espèce. Le savant Juge en chef renvoie à:

> ... [la] règle d'interprétation figurant à l'article 3(1) et à l'article 35*c*) de la *Loi d'interprétation*, savoir qu'à moins qu'une intention contraire n'apparaisse, l'abrogation d'un texte de loi n'a pas «d'effet sur quelque droit ... acquis ... [ou] naissant ... sous le régime du texte législatif ... abrogé». Nonobstant mon respect pour les opinions contraires des juges-arbitres, [poursuit-il], j'estime que cette règle d'interprétation ne peut s'appliquer. A la lecture du texte législatif, il ressort que le seul «droit» positif conféré à un assuré est le droit né à la suite de situations qui l'ont rendu admissible à des prestations, et la disposition voulant qu'une personne au profit de laquelle une période de prestations est établie soit «admissible au bénéfice des prestations en conformité de la présente Partie» ne fait que créer une attente de nature semblable à celle d'un assuré qui détient toujours un emploi.

Revenons aux quatre dates possibles pour la fin du versement des prestations. On peut sans difficulté rejeter la première, à savoir le 1er janvier 1976, car à cette date (soit celle de l'entrée en vigueur de la modification), l'intimé avait déjà atteint l'âge de 65 ans. Le nouveau par. 31(4) prévoit qu'une période de prestations se termine seulement à la fin de la semaine où un prestataire «atteint l'âge de soixante-cinq ans» et le texte législatif tient clairement pour acquis qu'il s'agit d'un événement futur. Or, cet anniversaire ne s'est pas produit durant la semaine du 1er janvier 1976 ou par après, car l'intimé avait déjà atteint l'âge de 65 ans en décembre 1971. Puisqu'il n'avait pas encore 70 ans, le texte législatif antérieur ne le rendait pas inadmissible au bénéfice des prestations pour raison d'âge. A cette date, il n'avait pas encore acquis le droit de recevoir une pension ou rente en vertu du Régime de pensions du Canada ou du Régime de rentes du Québec. Par conséquent, l'intimé était toujours admissible au bénéfice des prestations le 1er janvier 1976.

Two of the other four alternative interpretations relate to a continuation of the benefits until July or December 1976. The statute before and after the 1976 amendment limits benefits to the fifty-one week period ending in July 1976 and accordingly, the issue really narrows down to whether or not the entitlement to receipt of a Quebec pension terminates benefits effective February 1, 1976, even though this disqualification was removed from the Act with effect January 1, 1976.

It is difficult to construe the statute as entitling the respondent to benefits beyond February 1, 1976, on the accrual of the pension entitlement because to do so would be to attribute to the amending Act a greater entitlement to a person over 65 years of age than such a person had under the Act prior to the amendment. The Act before amendment stipulated disentitlement either on the attainment of 70 years of age or the entitlement to a pension under the Quebec Pension Plan. By disregarding the second disentitlement in the period after the amendment, persons in the position of the respondent would receive, by reason of the amending statute, benefits greater than under the prior statute, notwithstanding that the clear purpose and effect of the amendment was to terminate entitlements at the earlier age of 65.

Crucial to the disposition of this appeal, therefore, is the proper classification in law of the nature of the respondent's rights under the Act on December 31, 1975, which is the last date prior to the commencement of the amended s. 31. This is so because unless s. 35 of the *Interpretation Act* alters the position of the applicant in law in this regard, the Act as amended is the only applicable law during 1976 under which the respondent's rights remain to be determined, and he would clearly be entitled to receive benefits without regard to the commencement of his right to a pension under the Quebec Pension Plan since that

Deux des quatre autres interprétations impliquent des prestations versées jusqu'en juillet ou décembre 1976. Le texte législatif, après la modification de 1976 comme auparavant, restreint la période de prestations à une durée de 51 semaines qui devait en l'espèce prendre fin en juillet 1976. Par conséquent, la question se résume à savoir si le droit de recevoir une rente en vertu du Régime de rentes du Québec met fin au versement de prestations à compter du 1er février 1976, même si cette cause de déchéance a été retranchée de la Loi à partir du 1er janvier 1976.

Il est difficile d'interpréter le texte législatif de façon à rendre l'intimé admissible à des prestations au-delà du 1er février 1976 malgré la naissance de son droit de recevoir une rente, car une telle interprétation aurait pour effet de conférer aux personnes âgées de plus de 65 ans une admissibilité plus étendue en vertu de la Loi modificatrice que celle dont elles disposaient en vertu de la Loi comme elle existait avant la modification. Aux termes de cette dernière, un prestataire devenait inadmissible à recevoir des prestations lorsqu'il atteignait l'âge de 70 ans ou qu'il acquérait le droit de recevoir une rente en vertu du Régime de rentes du Québec. Si l'on exclut le second élément d'inadmissibilité, on constate, pour ce qui est de la période consécutive à la modification, que des personnes dans la même situation que l'intimé recevraient, en raison du texte législatif modificateur, des prestations plus étendues qu'en vertu du texte antérieur et ce, nonobstant le but manifeste et la portée évidente de la modification qui sont de mettre fin au droit des prestataires à un âge moins avancé, soit à 65 ans.

Il est donc d'importance primordiale aux fins du présent pourvoi de déterminer la nature juridique des droits de l'intimé prévus par la Loi comme elle existait au 31 décembre 1975, soit la veille de l'entrée en vigueur du nouvel art. 31. Il en est ainsi parce que, à moins que l'art. 35 de la *Loi d'interprétation* ne change la situation juridique du requérant à cet égard, la Loi, dans sa forme modifiée, constitue le seul texte législatif auquel on peut se référer pour déterminer les droits de l'intimé en 1976 et l'intimé serait nettement admissible aux prestations sans égard à la naissance de son droit de recevoir une rente en vertu du Régime de rentes

disqualification had been removed from the law. Section 35(*c*) of the *Interpretation Act*, R.S.C. 1970, c. I-23 provides as follows:

> 35. Where an enactment is repealed in whole or in part, the repeal does not . . .
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

If the entitlement of the respondent under the Act on December 31, 1975, amounts to a "right [or] privilege ... acquired, accruing ... under the enactment ... repealed", then the repeal would not affect the respondent's position in law. I cannot, with the greatest of respect, reach the same conclusion as that reached by the Chief Justice of the Federal Court as quoted above, namely that the respondent's position under the Act prior to amendment was the same as an employee still working for an employer and who continues contributing under the Act. Here the respondent had, in such an analogy, already ceased working prior to the amendment. His rights to benefits had already arisen during a benefit period which commenced prior to the effective date of the amendment. He was in receipt of benefit payments at the effective date of the amendment. He therefore, on December 31, 1975, was enjoying a right or a privilege which had accrued under the repealed enactment and, for what it is worth, had accrued by reason of his contributions which made him eligible to apply and to have a benefit period prescribed for him.

This, in my view, is precisely the condition contemplated by Parliament when it adopted s. 35(*c*). The amending Act includes no transitional provision in s. 31 for the class of persons which includes the respondent, namely those who had, prior to the effective date of the amendment, attained the age of 65 years but had not reached 70 years of age. There is nothing in the new version of s. 31 which clearly strips the respondent and persons in this class of their right to continue to enjoy benefits immediately upon the introduction of the amendment. On the other hand, there is certainly no language to be found in the amendment which increases the rights of the respondent by authorizing the payment to him of benefits

du Québec puisque cette cause de déchéance a été abrogée. L'alinéa 35*c*) de la *Loi d'interprétation*, S.R.C. 1970, chap. I-23 prévoit que:

> 35. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation
>
> *c*) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé;

Si le droit de l'intimé en vertu de la Loi constituait le 31 décembre 1975 un «droit [ou] privilège ... né, naissant ou encouru sous le régime du texte législatif ... abrogé», alors l'abrogation ne portait pas atteinte à la situation juridique de l'intimé. Avec égards, je ne peux conclure dans le même sens que le Juge en chef de la Cour fédérale, savoir que la situation de l'intimé aux termes de la Loi comme elle existait avant la modification, est la même que celle d'un employé qui est toujours au service d'un employeur et qui continue à verser ses cotisations conformément à la Loi. En l'espèce, aux fins de l'analogie, l'intimé avait déjà cessé de travailler avant l'entrée en vigueur de la modification. Il avait déjà acquis le droit de recevoir des prestations durant la période de prestations qui a débuté avant la date d'entrée en vigueur de la modification. Il recevait des prestations à la date d'entrée en vigueur de la modification. Par conséquent, il jouissait au 31 décembre 1975 d'un droit ou d'un privilège né sous le régime du texte législatif abrogé et j'ajoute, sans attribuer trop de valeur à ce point, né en raison de ses cotisations qui l'ont autorisé à présenter une demande et à faire établir une période de prestations à son profit.

A mon avis, c'est exactement la situation qu'envisageait le Parlement lorsqu'il a adopté l'al. 35*c*). La loi modificatrice ne renferme dans son art. 31 aucune disposition transitoire visant la catégorie de personnes à laquelle appartient l'intimé, savoir les personnes qui, avant la date d'entrée en vigueur de la modification, étaient âgées de 65 ans mais n'avaient pas encore atteint 70 ans. Rien dans la nouvelle version de l'art. 31 n'enlève de façon évidente à l'intimé et aux personnes de cette catégorie leur droit de continuer à recevoir des prestations immédiatement après l'introduction de la modification. De plus, on ne peut certes trouver dans la modification un texte qui accroisse les droits de l'intimé, c'est-à-dire un texte qui autorise

after he has become entitled to a Quebec pension. It is reasonable, in my view, to read the new s. 31 as having been adopted by Parliament in the light of s. 35(*c*) of the *Interpretation Act*. When read together, the amending Act and the *Interpretation Act* continue the benefit assured to the respondent under the pre-1976 Act for the month of January 1976 but leave him subject to the disqualification of s. 31(3)(*b*) of the Act as it stood prior to amendment. Therefore, with the greatest of respect to the court below which adopted a contrary view, the respondent's right to benefits came to an end on January 31, 1976, when a retirement pension became payable to him under the Quebec Pension Plan.

Section 35 has been the subject of consideration by the courts in recent years: *Bell Canada v. Earl Palmer*[7]; *In re Kleifges*[8]; *McDoom v. Minister of Manpower and Immigration*[9] and *Martinoff v. Gossen*[10]. In the first three cases cited, the courts have applied s. 35(*c*) to preserve both substantive and procedural rights which had existed prior to the repeal of a statutory provision in an amending act. In each of those cases the accrued right was given effect subsequent to the repeal of the provision establishing the right. Only in the fourth decision would there appear to be any doubt as to the purpose of s. 35(*c*) in these circumstances. The court was there concerned with the right of a certain class of persons to receive a licence for the possession of a weapon. The effect of the repeal in question was to remove the right of the licensing authority to grant a licence to a person in the prescribed class. The court found that an applicant who made application prior to the repeal of the provision had no right to receive a licence after the repeal, notwithstanding s. 35 of the *Interpretation Act*. This, of course, is a different circumstance than existed in the other three cases or in the appeal now before this Court. In the *Martinoff* case, *supra*, the licence-issuing official had been

[7] [1974] 1 F.C. 186 (C.A.).
[8] [1978] 1 F.C. 734 (T.D.).
[9] [1978] 1 F.C. 323 (T.D.).
[10] [1979] 1 F.C. 327, appeal dismissed [1979] 1 F.C. iv.

le versement à l'intimé de prestations après que ce dernier a acquis le droit de recevoir une rente du Régime de rentes du Québec. Il est juste, à mon avis, de considérer que le Parlement a adopté le nouvel art. 31 en tenant compte de l'al. 35*c*) de la *Loi d'interprétation*. Lues de concert, la loi modificatrice et la *Loi d'interprétation* permettent à l'intimé de continuer à recevoir pour le mois de janvier 1976 les prestations auxquelles il avait droit en vertu de la Loi comme elle existait avant 1976 tout en l'assujettissant à la cause de déchéance prévue à l'al. 31(3)*b*) de la Loi comme elle existait avant la modification. Par conséquent, avec égards envers la Cour d'appel qui a adopté une opinion contraire, j'estime que le droit de l'intimé aux prestations a pris fin le 31 janvier 1976 lorsqu'il a acquis le droit de recevoir une rente en vertu du Régime de rentes du Québec.

L'article 35 a été étudié par les tribunaux aux cours des dernières années: *Bell Canada c. Earl Palmer*[7]; *In re Kleifges*[8]; *McDoom c. Ministre de la Main-d'œuvre et de l'immigration*[9] et *Martinoff c. Gossen*[10]. Dans les trois premières décisions, la Cour fédérale s'est servi de l'al. 35*c*) afin de conserver intacts le droit positif et la procédure qui existaient avant l'abrogation d'une disposition par une loi modificatrice. Dans chacune de ces décisions, la Cour fédérale a maintenu, après l'abrogation de la disposition créatrice, l'effet du droit déjà né. Seule la quatrième décision paraît mettre en doute l'objet visé par l'al. 35*c*) dans ces circonstances. La Division de première instance devait se prononcer dans cette dernière affaire sur le droit d'une certaine catégorie de personnes de recevoir un permis de possession d'armes. L'abrogation en cause avait pour effet d'enlever aux autorités chargées de délivrer des permis le droit d'en délivrer à une personne de la catégorie prescrite. La cour a conclu qu'une personne qui présentait une demande semblable avant l'abrogation de la disposition n'avait pas le droit de recevoir un permis après l'abrogation, nonobstant l'art. 35 de la *Loi d'interprétation*. Il va sans dire que les circonstances de cette dernière affaire se distin-

[7] [1974] 1 C.F. 186 (C.A.).
[8] [1978] 1 C.F. 734 (D.P.I.).
[9] [1978] 1 C.F. 323 (D.P.I.).
[10] [1979] 1 C.F. 327, appel rejeté [1979] 1 C.F. iv.

deprived of his authority to issue the licence in question by a specific statutory provision adopted by Parliament after the applicant had filed his application for a licence. The court was powerless to command the issuance of a licence because Parliament had ordained in precise language that no authority existed for the issuance thereafter of such licences. Here Parliament has not, in the 1976 amendment, specified that the respondent shall receive no benefits after the effective date of the repeal. Parliament has not specified that the respondent shall be deprived of any accumulated entitlement existing on the effective date of the amendment. Parliament has not removed the authority or obligation in the administrators of the Act to make payment of these benefits up to February 1, 1976. All of these observations apply equally to the continuation of the disqualifying element of the old s. 31(3)(*b*).

There remains to be considered the impact, if any, of S.C. 1976-77, c. 11, which came into force on May 12, 1977. This statute, entitled the *Unemployment Insurance Entitlements Adjustment Act*, directs the Unemployment Insurance Commission to take under consideration certain entitlement to benefits under the Act whether or not the person in question has previously appealed his entitlements. Subsection (2) of the 1977 Act directs the Commission to grant benefits after January 1, 1976, as if the amendments to the Act which took effect January 1, 1976, had not been enacted, if:

(*a*) the initial benefit period had been established prior to January 4, 1976;

(*b*) the applicant had his entitlement to benefit terminated as a result of s. 10 which introduced the new s. 31 providing for the termination of benefits at the age of 65; and,

(*c*) the applicant has asked that his entitlement to benefit be 'considered' either before or within 12 months after May 12, 1977.

guent de celles des trois autres ou de celles du présent pourvoi. Dans l'affaire *Martinoff*, précitée, le fonctionnaire chargé de délivrer des permis avait été privé de ce pouvoir par une disposition législative spécifique adoptée par le Parlement après que le requérant eut déposé sa demande de permis. La cour n'avait aucun pouvoir d'ordonner qu'un permis soit délivré car le parlement avait prévu par un texte précis que personne n'était plus habilité à délivrer des permis semblables après cette date. En l'espèce, le Parlement n'a pas décrété par la modification de 1976 que l'intimé ne recevrait pas de prestations après la date d'entrée en vigueur de l'abrogation. Le Parlement n'a pas précisé que l'intimé serait privé des prestations qu'il avait acquis le droit de recevoir lors de l'entrée en vigueur de la modification. Le Parlement n'a pas enlevé aux personnes chargées de l'administration de la Loi le pouvoir ou l'obligation de verser ces prestations à l'intimé jusqu'au 1er février 1976. L'ensemble de ces commentaires s'applique tout aussi bien à la continuation de l'élément de déchéance prévu à l'ancien al. 31(3)*b*).

Il reste à étudier les répercussions possibles de la *Loi sur l'examen de certains cas d'admissibilité aux prestations d'assurance-chômage*, S.C. 1976-77, chap. 11, entrée en vigueur le 12 mai 1977. Cette loi ordonne à la Commission d'assurance-chômage d'examiner l'admissibilité aux prestations prévues par la Loi de certaines personnes qui ont ou non interjeté appel d'une décision sur leur admissibilité. L'article 2 de la Loi de 1977 ordonne à la Commission de verser des prestations à un assuré après le 1er janvier 1976 comme si les modifications de la Loi qui sont entrées en vigueur le 1er janvier 1976 n'avaient pas été édictées, à la condition que:

a) la période initiale de prestations ait été établie avant le 4 janvier 1976;

b) le prestataire ne soit plus admissible à recevoir des prestations par l'application de l'art. 10 qui a introduit le nouvel art. 31 prévoyant la fin du versement des prestations à l'âge de 65 ans; et que

c) le requérant ait demandé, avant le 12 mai 1977 ou dans les douze mois qui suivent cette date, que son admissibilité aux prestations soit «examinée».

Here the respondent lost his entitlement to benefit on January 31, 1976, because on that date a pension had become payable to him under the Quebec Pension Plan, and by the pre-existing s. 31 this terminated his benefit period. Thus the respondent did not have his "entitlement to benefit terminated" by reason of s. 10 of the 1977 statute but by reason of the pre-existing law. Consequently, c. 11 has no application to the respondent in these proceedings.

Chief Justice Jackett reached the same result by concluding that s. 2 of c. 11 applies only to persons under the age of 65 on January 1, 1976, because they alone may attain the age of 65 years of age after January 4, 1976, (the actual date specified in c. 11) and before the automatic expiry of c. 11 in May 1979. Expressed either way, c. 11 has no bearing on this proceeding.

In the result I conclude that s. 35(*c*) of the *Interpretation Act* must be applied in the construction of the Act as amended in the determination of the rights of the respondent, and on such application the two statutory provisions when read together entitle the respondent to payment of benefits up to and including January 31, 1976, but not thereafter.

I would therefore allow the appeal, set aside the order of the Federal Court of Appeal and restore the order of the Umpire. In accordance with the terms of the order granting leave, the appellant will pay respondent's costs as between solicitor and client.

Appeal allowed.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitors for the respondent: Barrière, Neuer & Lamarche, Lachine, Quebec.

En l'espèce, l'intimé a perdu, le 31 janvier 1976, son admissibilité à recevoir des prestations car il avait acquis, à cette date, le droit de recevoir une rente en vertu du Régime de rentes du Québec; aux termes de l'ancien art. 31, cela mettait fin à sa période de prestations. Ainsi l'inadmissibilité de l'intimé aux prestations ne découle pas de l'art. 10 de la Loi de 1977 mais de la loi antérieure. Par conséquent, le chap. 11 ne s'applique pas ici.

Le juge en chef Jackett est parvenu au même résultat lorsqu'il a conclu que l'art. 2 du chap. 11 s'applique uniquement aux personnes âgées de moins de 65 ans le 1er janvier 1976 puisque seules ces personnes peuvent atteindre l'âge de 65 ans après le 4 janvier 1976 (soit la date énoncée au chap. 11) et avant que n'expire automatiquement, en mai 1979, le chap. 11. Son raisonnement et le mien aboutissent au même résultat: le chap. 11 n'est d'aucune utilité en l'instance.

Je conclus, en définitive, que l'on doit s'appuyer sur l'al. 35*c*) de la *Loi d'interprétation* pour interpréter la Loi dans sa forme modifiée afin de déterminer les droits de l'intimé et que les deux dispositions législatives lues de concert rendent l'intimé admissible à recevoir des prestations jusqu'au 31 janvier 1976 compris, mais non après cette date.

Par conséquent, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir la décision du juge-arbitre. Suivant la condition de l'autorisation, l'appelante devra payer les dépens de l'intimé sur la base avocat-client.

Pouvoi accueilli.

Procureur de l'appelante: Roger Tassé, Ottawa.

Procureurs de l'intimé: Barrière, Neuer & Lamarche, Lachine, Québec.

TAB 6

COURT FILE NO.: 142/08 [Toronto]
DATE: 20080717

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT

RE: THE SUMMIT GOLF & COUNTRY CLUB, Appellant (Moving Party)

- and -

THE CORPORATION OF THE REGION OF YORK and THE ONTARIO MUNICIPAL BOARD, Responding Parties

BEFORE: Justice Lax

COUNSEL: *N. Jane Pepino, C.M., Q.C., LL.D.* and *Patrick J. Harrington*, for the Moving Party, The Summit Golf & Country Club

Barnet Kussner, for the Responding Party, The Corporation of the Region of York

HEARD: July 15, 2008

E N D O R S E M E N T

LAX J.

[1] This motion for leave to appeal arises out of an application made by Summit Golf & Country Club in November 2005 to the Region of York for a tree removal permit to facilitate a redesign of parts of a private golf course. The redesign was intended to avoid future incompatibilities with planned road widening in proximity to the golf course and potential liability concerns relating to errant golf balls.

[2] In 2006 and into the late spring of 2007, Summit engaged in consultations with the Region, the Town of Richmond Hill, and others in order to arrive at a mutually acceptable tree removal and replacement plan. The Region ultimately refused Summit's permit application on June 21, 2007. Summit then appealed the refusal to the Ontario Municipal Board pursuant to s. 136(1) of the *Municipal Act, 2001*, but effective January 1, 2007, the right of appeal which had been conferred by the *Municipal Act* was repealed by legislative amendment to that statute.

[3] The Board determined that as the statutory right of appeal did not survive the repeal of s. 136(1) of the *Municipal Act*, it did not have the jurisdiction to entertain the appeal. In particular, it found that Summit's appeal rights under former s. 136(1) had not vested prior to the repeal of this section and that neither section 51 of the *Legislation Act* nor the common law presumption against interference with vested rights was of assistance to Summit in the circumstances of this case.

[4] Summit seeks leave to appeal this decision. It submits that the Board erred in law in failing to recognize that a tree permit applicant was vested with a right of appeal upon filing a complete application and that this issue is of sufficient importance to warrant the attention of the Divisional Court.

[5] Leave to appeal may be granted on a question of law. The appropriate standard of review is correctness. I find no good reason to doubt the correctness of the Board's decision on a point of law. The Board's decision is consistent with the recent decision of this Court in *Niagara Escarpment Commission v. Paletta International Corporation* (2007), 229 O.A.C. (Div. Ct.) (leave to appeal refused, April 25, 2008 (C.A.)) and with established Supreme Court of Canada jurisprudence dealing with vested rights: *R. v. Puskas; R. v. Chatwell*, [1998] S.C.J. No. 51; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.); affirmed, [1994] 3 S.C.R. 1100.

[6] The Board's decision is also consistent with other appellate authority to which the Board made reference in its decision, including *Erin Dancer Holdings Corp. v. Richmond Hill* (1996), O.J. No. 5118 (Div. Ct.), reversed (1998) O.J. No. 2079 (C.A.); *Gustavson Drilling (1964) Ltd. v. Canada (Minister of Revenue)*, [1977] 1 S.C.R. 271 and *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (P.C.).

[7] The Board correctly found that Summit had no vested right to an appeal as of the effective date of the repeal of section 136. The mere possibility of availing itself of a right of appeal is not sufficient to preserve the right thereafter: *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530. It accepted the Region's position that the appeal hearing to which Summit asserted a vested right is not an end in itself – rather, it is a means by which it hoped to achieve its ultimate goal of obtaining the tree removal permit, thereby creating merely a hope or expectation, as in *Ho Po Sang* and *Paletta*.

[8] Prior to its repeal, section 136(1) of the *Municipal Act* conferred three separate rights of appeal. The two that are relevant include an appeal from a non-decision under subsection 136(1)(b) and an appeal from a refusal under subsection 136(1)(a). An appeal from a non-decision could have been exercised any time after 45 days had elapsed from the filing of the application. Summit did not file a so-called "friendly appeal" to preserve this right, although it was represented by experienced counsel and was aware of this practice. Once a decision had in fact been rendered, it nullified any right to appeal from a non-decision.

[9] Summit contends that from the time it first filed its application, it had a vested right to an appeal from a refusal even before an actual decision to refuse had been rendered. The Board correctly determined that there is nothing within section 136(1) to support that contention as the right to appeal does not arise unless and until there is an actual refusal that is capable of being appealed from. Neither section 51 of the *Legislation Act* nor the common law presumption against interference with vested rights which the *Legislation Act* codifies is of assistance to Summit in the circumstances of this case. The right of appeal that Summit purported to exercise was an appeal from Regional Council's refusal to approve a permit. That right did not come into existence until after the actual refusal had taken place on June 21, 2007, well after the repeal of section 136. It could not therefore be a "right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation" as provided in subsection 51(1)(b) of the *Legislation Act*. The Board correctly determined this.

[10] The Legislature enacted no transitional provisions with respect to the repeal of section 136, although it did enact transitional provisions in respect of rights that existed under other sections of the *Municipal Act* which were amended or repealed concurrently with the repeal of section 136. The reasonable inference is that the Legislature turned its mind to this and intended the new legislation to have immediate effect and apply to all appeal rights that had not crystallized or had not yet been exercised. The Board was entitled to draw this inference.

[11] The practical result of the Board's decision is that the legislative repeal of section 136 applies to tree removal applications filed after January 1, 2007 and applications filed before that date where no decision had yet been made and no appeal had yet been filed. Summit asserted at the Board hearing that the pool of potential future appellants is quite small. Counsel for the Region advised the Court that he was aware of only one other situation where this may arise. Therefore, even if Summit had been able to satisfy me that there is reason to doubt the correctness of the Board's decision, it has no broad implications for the development of the law or the administration of justice so as to warrant the attention of the Divisional Court.

[12] The motion for leave to appeal is dismissed with costs. If the parties are unable to agree on costs, they may make brief written submissions within 30 days of the release of these reasons.

LAX J.

DATE: July 17, 2008