Court File No.
T-381-93

FEDERAL COURT OF CANADA
TRIAL DIVISION

B E T W E E N:

DEBORAH COYNE

Plaintiff

- and -

HER MAJESTY THE QUEEN, THE GOVERNOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE ATTORNEY GENERAL OF NEW BRUNSWICK

Defendants

BOOK OF AUTHORITIES

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6. *Reference re Public Schools Act (Man.)*, unreported, S.C.C., March 4, 1993.

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10. *Draft Legal Text (Charlottetown Accord)*, 2 (3).

11. *R. v. Oakes*, [1986] 1 S.C.R. 103.

12. *Societé des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

13. Roger Tassé, Gordon Robertson, and Donald G. Lenihan, "Collective Rights: Moving the Debate Forward", paper presented at the Department of Justice, Ottawa, June 9, 1993.

14. *Protestant School Board of Greater Montreal et. al. v. Quebec (A.G.)*, [1989] S.C.R. 377.

15. *Hunter v. Southam*, [1984] 2 S.C.R. 145.

16. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

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18. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

19. *Minister of Justice v. Borowski,* [1981] 2 S.C.R. 575.

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21. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

22. *Pennikett et al. v. The Queen et al.*, (1987) 45 D.L.R. (4th) 108 (N.W.T.C.A.).

23. *Re Sibbeston and Attorney General of Canada*, (1988) 48 D.L.R. (4th) 691 (N.W.T.C.A.).

24. *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

25. *Northern Telecom v. Communications Workers,* [1983] 1 S.C.R. 733.

26. *Federal Court Practice, 1991-1992*

27. *Kigowa v. Canada*, [1990] 1 F.C. 804 (F.C.A.).

28. *Quebec North Shore Paper v. C.P Ltd.*, [1977] 2 S.C.R. 1054, at 1064-65.

29. Letters Patent constituting the Office of Governor General, October 1, 1947 [R.S.C. 1985, Appendix II, No. 31]

30. *Retail, Wholesale, and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573.

31. *Finlay v. Minister of Finance of Canada*, [1986] 2 S.C.R. 607.

32. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd. *Appellants*

v.

George Ernest Hunt *Respondent*

and

T & N, P.L.C. and Flintkote Mines Limited *Respondents*

and between

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd. *Appellants*

v.

George Ernest Hunt *Respondent*

and

T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd. *Respondents*

INDEXED AS: HUNT *v.* CAREY CANADA INC.

File Nos.: 21508, 21536.

1990: February 22; 1990: October 4.

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Practice — Motion to strike — Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres — Allegation of conspiracy to withhold information of potential health risks — Allegations of other nominate torts — Circumstances in which a statement of claim (or portions of it) could be struck out — Whether allegations based on the tort of

* Chief Justice at the time of judgment.

Carey Canada Inc., antérieurement Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited et Lac d'amiante du Québec Ltée, antérieurement Lake Asbestos Company Ltd. *Appelantes*

c.

George Ernest Hunt *Intimé*

et

T & N, P.L.C. et Flintkote Mines Limited *Intimées*

et entre

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited et Lac d'amiante du Québec Ltée, antérieurement Lake Asbestos Company Ltd. *Appelantes*

c.

George Ernest Hunt *Intimé*

et

T & N, P.L.C. et Carey Canada Inc., antérieurement Carey-Canadian Mines Ltd. *Intimées*

RÉPERTORIÉ: HUNT *c.* CAREY CANADA INC.

N^os du greffe: 21508, 21536.

1990: 22 février; 1990: 4 octobre.

Présents: Le juge en chef Lamer* et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Cory.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Pratique — Requête en radiation — Action intentée par une personne souffrant d'une maladie qui résulterait de l'exposition aux fibres d'amiante — Allégation de complot en vue de cacher des renseignements quant aux risques possibles pour la santé — Allégations d'autres délits énumérés — Circonstances dans lesquelles une déclaration (ou des parties de celle-ci) peut être

* Juge en chef à la date du jugement.

conspiracy should be struck out — Rules of Court (British Columbia), Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

radiée — Les allégations fondées sur le délit civil de complot devraient-elles être radiées? — Rules of Court (Colombie-Britannique), règle 19(24).

L'intimé Hunt, un électricien à la retraite, a intenté une action dans laquelle il allègue qu'il souffre de mésothéliome parce qu'il a été exposé aux fibres d'amiante au cours de son emploi. Les défenderesses ont exploité des mines d'amiante en vue de produire et de fournir une variété de produits d'amiante entre les années 1940 et 1967. Il est allégué qu'elles savaient depuis 1934 que les fibres d'amiante pouvaient causer des maladies chez ceux qui y étaient exposés. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville et T & N, P.L.C sont non seulement poursuivies pour négligence, mais encore il est allégué qu'elles ont comploté en vue de cacher des renseignements quant aux dangers associés à l'amiante et que, par suite de ce complot, M. Hunt a souffert de mésothéliome. Par ordre de la Cour d'appel de la Colombie-Britannique, Flintkote Mines Limited et T & N, P.L.C. ont été ajoutées comme intimées dans l'appel en Cour d'appel.

Carey Canada Inc. a demandé avec succès que l'action intentée contre elle soit rejetée parce qu'elle ne révélait aucune demande raisonnable. (L'action n'était fondée que sur des allégations de complot.) La Cour d'appel a accueilli l'appel interjeté contre cette décision. En l'espèce, il s'agit de déterminer dans quelles circonstances une déclaration (ou des parties de celle-ci) peut être radiée et si les allégations fondées sur le délit civil de complot doivent être radiées.

Arrêt: Les pourvois sont rejetés.

Le critère à appliquer est de savoir s'il est «évident et manifeste» que la déclaration du demandeur ne révèle aucune demande raisonnable. Ce n'est que si l'action est vouée à l'échec parce qu'elle contient un vice fondamental qui se range parmi les autres énumérés à la règle 19(24) que les parties pertinentes de la déclaration du demandeur devraient être radiées en vertu de la règle 19(24)a).

En l'espèce, il n'est pas «évident et manifeste» que la déclaration du demandeur ne révèle pas une demande raisonnable, compte tenu de la plus récente décision de notre Cour sur les circonstances dans lesquelles le droit de la responsabilité civile reconnaîtra une telle demande fondée sur le complot. Il n'est pas non plus évident et manifeste qu'en permettant à cette action de suivre son cours, il y aurait recours abusif au tribunal. Il appartient au juge de première instance de décider, compte tenu de la preuve, s'il existe de bonnes raisons d'étendre le délit civil au présent contexte.

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's *Business Concerns Records Act* limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: *Dyson v. Attorney-General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094; *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; **distinguished:** *Frame v. Smith*, [1987] 2 S.C.R. 99; **referred to:** *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86; *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.*, [1892] 3 Ch. 274; *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97; *Kemsley v. Foot*, [1951] 1 T.L.R. 197; *Nagle v. Feilden*, [1966] 2 Q.B. 633; *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501; *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289; *Minnes v. Minnes* (1962), 39 W.W.R. 112; *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279; *Metall und*

Il n'appartient pas à notre Cour, suite à une requête en radiation, de rendre une décision quant aux chances de succès du demandeur. Il suffit que le demandeur ait quelque chance de succès. Les questions de savoir si un objet prédominant a été établi et si la *Loi sur les dossiers d'entreprises* du Québec restreint l'éventail des renseignements que les défenderesses peuvent produire à l'audience sont des questions qui n'ont rien à voir avec celle de savoir si la déclaration du demandeur révèle une demande raisonnable. La radiation ne saurait être justifiée parce qu'un acte de procédure révèle «une question de droit contestable, difficile ou importante». Au contraire, il peut fort bien être capital que l'action puisse suivre son cours.

L'allégation d'un délit civil de complot n'est pas interdite parce qu'on a allégué la perpétration d'un autre délit. Bien qu'il puisse être discutable que si une partie a gain de cause contre un défendeur en invoquant un délit civil spécifique distinct, une action fondée sur le complot ne devrait pas alors être recevable contre ce défendeur, il est loin d'être clair que le simple fait qu'un demandeur allègue qu'un défendeur a commis d'autres délits l'empêche d'invoquer le délit civil de complot. On peut déterminer si le demandeur devrait être privé du recours fondé sur le délit civil de complot seulement lorsque l'on a décidé s'il a établi que le défendeur a réellement commis les autres délits allégués.

Jurisprudence

Arrêts examinés: *Dyson v. Attorney-General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094; *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173; *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452; **distinction d'avec l'arrêt:** *Frame c. Smith*, [1987] 2 R.C.S. 99; **arrêts mentionnés:** *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86; *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.*, [1892] 3 Ch. 274; *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97; *Kemsley v. Foot*, [1951] 1 T.L.R. 197; *Nagle v. Feilden*, [1966] 2 Q.B. 633; *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501; *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289; *Minnes v. Minnes* (1962), 39 W.W.R. 112; *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *Dumont c. Canada (Procureur général)*, [1990] 1

Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

Business Concerns Records Act, R.S.Q. 1977, c. D-12.
Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01.
Rules of Court [British Columbia], Rule 19(24).
Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19].
Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66.

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Burns, Peter. "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 *U.B.C. L. Rev.* 229.
Fridman, G. H. L. *The Law of Torts in Canada*, vol. 2. Toronto: Carswells, 1990.
Halsbury's Laws of England, vol. 36, 4th ed. London: Butterworths, 1981.
McLachlin, Beverly M. and James P. Taylor. *British Columbia Practice*, vol. 1, 2nd ed. Vancouver: Butterworths, 1979.
Milsom, S. F. C. *Historical Foundations of the Common Law*, 2nd ed. Toronto: Butterworths, 1981.

APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.

Jack Giles, *Q.C.*, and *Robert McDonell*, for Carey Canada Inc.

D. M. M. Goldie, *Q.C.*, for Lac d'amiante du Québec Ltée.

Marvyn Koenigsberg, for National Gypsum Co.

David Martin and *Michael P. Maryn*, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.

James A. Macaulay, *Q.C.*, and *K. N. Affleck*, for T & N, P.L.C.

R.C.S. 279; *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598.

Lois et règlements cités

Loi sur les dossiers d'entreprises, L.R.Q. 1977, ch. D-12.
Règles de procédure civile, Règl. de l'Ont. 560/84, règle 21.01.
Rules of Court [Colombie-Britannique], règle 19(24).
Rules of the Supreme Court [Angleterre], R.S.C. 1883, ord. 25, règle 4 [abr. & rempl. R.S.C. (Révision) 1962, ord. 18, règle 19].
Supreme Court of Judicature Act, 1873, (Angl.) 36 & 37 Vict., ch. 66.

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Baker, John Hamilton. *An Introduction to English Legal History*, 2nd ed. London: Butterworths, 1979.
Burns, Peter. «Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest» (1982), 16 *U.B.C. L. Rev.* 229.
Fridman, G. H. L. *The Law of Torts in Canada*, vol. 2. Toronto: Carswells, 1990.
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Milsom, S. F. C. *Historical Foundations of the Common Law*, 2nd ed. Toronto: Butterworths, 1981.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique qui a infirmé un jugement du juge Hollinrake qui avait rejeté l'action contre Carey Canada Inc. parce qu'elle ne révélait aucune demande raisonnable. Pourvois rejetés.

Jack Giles, *c.r.*, et *Robert McDonell*, pour Carey Canada Inc.

D. M. M. Goldie, *c.r.*, pour Lac d'amiante du Québec Ltée.

Marvyn Koenigsberg, pour National Gypsum Co.

David Martin et *Michael P. Maryn*, pour Atlas Turner Inc., Asbestos Corporation Limited et Bell Asbestos Mines Limited.

James A. Macaulay, *c.r.*, et *K. N. Affleck*, pour T & N, P.L.C.

Robert Ward and *S. E. Fraser*, for Flintkote Mines Limited.

J. J. Camp, Q.C., and *P. G. Foy*, for George Ernest Hunt.

The judgment of the Court was delivered by

WILSON J.—The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent [Hunt's] statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(a) of the British Columbia *Rules of Court*.

1. The Facts

The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée, National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

Robert Ward et *S. E. Fraser*, pour Flintkote Mines Limited.

J. J. Camp, c.r., et *P. G. Foy*, pour George Ernest Hunt.

Version française du jugement de la Cour rendu par

LE JUGE WILSON—La question que soulèvent ces pourvois est de savoir si l'intimé peut intenter contre les appelantes une action pour délit civil de complot. Les pourvois soulèvent plus particulièrement la question de savoir si les parties de la déclaration de l'intimé [Hunt] dans lesquelles il allègue que les appelantes ont comploté en vue de cacher des renseignements concernant les effets des fibres d'amiante font état d'une demande raisonnable au sens de la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique.

1. Les faits

L'intimé, George Hunt, est un électricien à la retraite qui prétend avoir été exposé aux fibres d'amiante au cours de son emploi. M. Hunt a intenté une action contre Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée, National Asbestos Mines Limited, The Quebec Asbestos Mining Association et T & N, P.L.C. («les défenderesses»).

Monsieur Hunt allègue que les défenderesses exploitaient des mines d'amiante en vue de produire et de fournir une variété de produits d'amiante entre les années 1940 et 1967. Il allègue qu'après 1934 les défenderesses savaient que les fibres d'amiante pouvaient causer des maladies chez ceux qui y étaient exposés. En plus de poursuivre Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville et T & N pour négligence, M. Hunt allègue que toutes les défenderesses ont comploté en vue de cacher des renseignements quant aux dangers associés à l'amiante et que, par suite de ce complot, il a souffert de mésothéliome.

reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

Most recently, in *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) *Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck From his Statement of Claim?*

In the last decade the tort of conspiracy has received a considerable amount of attention. In

d'un débat pour arriver à une conclusion sur ce point préliminaire n'est pas un élément décisif et la nouveauté de la cause d'action ne joue pas contre les demandeurs. [Je souligne.]

Plus récemment, dans l'arrêt *Dumont c. Canada (Procureur général)*, [1990] 1 R.C.S. 279, j'ai expliqué clairement, à la p. 280, que j'estimais que le critère formulé dans l'arrêt *Inuit Tapirisat* était le bon critère. Le critère est toujours de savoir si l'issue de l'affaire est «évidente et manifeste» ou «au-delà de tout doute raisonnable».

Ainsi, au Canada, le critère régissant l'application de dispositions comme la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique est le même que celui régissant une requête présentée en vertu de la règle 19 de l'ordonnance 18 des R.S.C.: dans l'hypothèse où les faits mentionnés dans la déclaration peuvent être prouvés, est-il «évident et manifeste» que la déclaration du demandeur ne révèle aucune cause d'action raisonnable? Comme en Angleterre, s'il y a une chance que le demandeur ait gain de cause, alors il ne devrait pas être «privé d'un jugement». La longueur et la complexité des questions, la nouveauté de la cause d'action ou la possibilité que les défendeurs présentent une défense solide ne devraient pas empêcher le demandeur d'intenter son action. Ce n'est que si l'action est vouée à l'échec parce qu'elle contient un vice fondamental qui se range parmi les autres énumérés à la règle 19(24) des *Rules of Court* de la Colombie-Britannique que les parties pertinentes de la déclaration du demandeur devraient être radiées en application de la règle 19(24)a).

La question qu'il nous faut maintenant trancher en l'espèce est de savoir s'il est «évident et manifeste» que les prétentions du demandeur en ce qui concerne le délit civil de complot ne révèlent aucune cause d'action raisonnable ou si le demandeur a présenté une question «susceptible d'instruction», même si elle peut exiger une application complexe ou nouvelle du délit civil de complot.

(2) *Les allégations de M. Hunt fondées sur le délit civil de complot devraient-elles être radiées de sa déclaration?*

Au cours de la dernière décennie, le délit civil de complot a fait l'objet de plusieurs décisions. Par

Katherine Swinton*

AMENDING THE CANADIAN CONSTITUTION: LESSONS FROM MEECH LAKE†

On 23 June 1990, the proposed Constitution Amendment 1987, better known as the Meech Lake accord, died, having failed to obtain the unanimous consent needed for parts of the proposal and caught by the three-year time limit applicable to others.[1] The death of the accord set in motion a new round of constitutional negotiations in which the demands from Quebec, if accommodated, would lead to a much more decentralized federal system than would have resulted from the accord. As Canada proceeds through this period of difficult and complex discussions concerning its constitutional options, important questions about the process of constitutional reform cannot be ignored in the debate about substance. Many significant lessons about the problems of the constitutional amendment procedure should be learned from the failure of the Meech Lake accord. Unfortunately, there is no agreement, in this country of competing constitutional visions, on what the exact problems are.[2]

This article explores some of the major criticisms of the constitutional amending formulas. From one perspective, the major problem lies in those aspects of the procedure that prevented the Meech Lake accord from passing, with the main source of difficulty ascribed to the three-year time limit in section 39(2).[3] Others, whether or not supporters of the accord (and, indeed, usually its most vociferous critics), focus on the process adopted and, in particular, the lack of public participation. I shall deal with these criticisms from the perspective that one failed constitutional

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† I am grateful to Ken Swan and an anonymous reviewer for comments on an earlier draft of this article.

1 The content of the various parts of the constitutional amending formula relevant to the different sections of the accord will be further described in the text below. While popularly known as the Meech Lake accord, the Constitution Amendment 1987 resulted from two documents: the accord, signed 30 April 1987, and the Langevin agreement, signed 3 June 1987.

2 The debate on the accord illustrates these competing visions well. For an overview of that debate, see K. Swinton and C. Rogerson (eds) Competing Visions of Constitutionalism: The Meech Lake Accord (Toronto: Carswell 1988), and especially R. Simeon 'Meech Lake and Visions of Canada' at 295.

3 The main proponent of this view has been Prime Minister Mulroney, who has argued that the time limit for amendments is too long. See infra at note 30.

In sum, the bilateral formula is not available for the next round, even if it might be attractive to some.[50] Again, we must work with the present mix of general and unanimity formulas, asking how they should be changed in order to meet important concerns about public participation.

Participation

While many opposed the substance of the Meech Lake accord, even greater was the distaste for the process used to formulate and implement it. The widespread public perception, fostered by a series of three closed meetings of first ministers, was of a group of men bargaining about the Constitution as if it were their property and of no special concern to other Canadians. The public was invited to comment, at least outside Quebec, really only after the language of the amendment had been agreed upon by the first ministers, and their input was limited to demonstrating 'egregious errors.' No amendments could be permitted because the amendment was a package, a 'seamless web.'[51]

and might be able to defend their interests, one must remember that they are not necessarily represented in adequate strength in the governing party. The Mulroney Conservative government gains much of its strength from Quebec, the very province that is most likely to seek a devolution of powers. It is hardly in the interests of those members to discuss a reduction in their influence in policy in the future.

50 The discussion here has focused on the use of section 43 to *facilitate* bilateral amendments. There is another way in which section 43 may enter future constitutional debates – as a way to further reduce the flexibility of the general amending formula. The argument has been made that section 43 provides a veto for a province opposed to the change of any provision of the Constitution that affects it differently from other provinces. Thus, it is argued that Quebec has a veto over certain Senate amendments – particularly those affecting the number of senators and the way in which they are selected – because section 22 of the Constitution Act, 1867 specifically provides that the 24 senators allocated to Quebec will represent set electoral divisions and section 23(6) provides that a Quebec senator must own real property in the district he or she represents. (The debate is referred to in Beaudoin-Edwards, supra note 5, 15 n2).

This argument seems flawed from several perspectives. First, it increases the rigidity of the amending formula in ways that seem inconsistent with the overall structure of part v of the Constitution Act, 1982. Section 41 sets out a very limited list of those items requiring unanimity. Otherwise, the Constitution is subject to change by section 38, a section that provides no province with a veto and is, indeed, founded on a principle of provincial equality. To use section 43 to veto amendments with widespread support in the country is to turn a section designed to facilitate amendments into a source for blocking change. Moreover, section 42(1)(c) provides that the general amending formula should be used for changes to the number of members by which a province is to be represented in the Senate and the residence qualifications of senators (which seems inconsistent with a veto for any province). In addition, the Senate is not a provision of the Constitution applying to one province – it is a national institution that should be open to reform if there is widespread support for such a change.

51 A representative criticism of the process is found in A.C. Cairns 'The Limited Constitutional Vision of Meech Lake' in Swinton and Rogerson, supra note 2, 247 at 255–61. Only Quebec held public hearings between the Meech Lake accord and the Langevin agreement.

Alan Cairns is right to suggest that a major flaw of the Meech Lake process was to treat the Constitution as an affair of governments, rather than to recognize that we now have a citizens' Constitution.[52] He attributes this new perception to the 1982 constitutional amendments, especially the entrenchment of the Canadian Charter of Rights and Freedoms. I suggest that he gives too much emphasis to that one event and fails to acknowledge the general mobilization of rights groups and the dissatisfaction with governments across many societies today. In Canada, that mobilization had begun prior to the Charter and, indeed, was a potent force in shaping the content of that document. Nevertheless, Cairns rightly points out that our constitutional tradition has been dominated by governmental interests, federal and provincial, and that it has too often ignored other cleavages in society, such as gender, class, or ethnic identity – all characteristics that lead to alliances that cross regional boundaries. But it is not only the groups he calls 'Charter Canadians' who were dissatisfied with the Meech Lake process. Canadians from various classes and regions raised objections to the way in which they, and their Constitution, were treated.[53]

Ironically, the Meech Lake round was the most democratic constitution-making exercise in Canada's history, if one measures democracy by the level of legislative involvement. This is only the second occasion on which the Constitution has been amended using the general or unanimity formulas, but these amending formulas ensured the involvement of the legislatures in the process – a role that they did not have before 1982. Prior to that year, only the federal houses were involved in the passage of a joint resolution to the United Kingdom Parliament requesting an amendment.[54] And while many argue that the round of negotiations leading up

52 Ibid. See also A.C. Cairns 'Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake' (1988) 14 *Can. Pub. Pol. Supp.* S121.

53 An Environics poll showed that the substance of the accord had differing levels of support, with the distinct society clause the most unpopular outside Quebec. However, there was much support for provisions such as the provincial role in the Senate and Supreme Court appointments and federal-provincial immigration agreements. The greatest point of dissatisfaction was with the process (M. Adams and M.J. Lennon 'The Public's View of the Canadian Federation' in Watts and Brown, supra note 23, 97 at 102–3 and 107).

54 Provincial legislatures in some provinces were asked by their governments to approve certain proposed amendments: Saskatchewan, Manitoba, and Quebec in 1951; Quebec in 1960 and 1964 (Canada, *Amendment*, supra note 14, 14–5). Stefan Dupré has pointed out that a profound change was made in 1982 with the amending formula, which we have only now begun to appreciate (supra note 8, 244). In his view, the 1982 process has been 'degovernmentalized,' since it is no longer under the control of first ministers. The process is now 'parliamentarized,' and this introduces significant checks and balances.

the Supreme Court in the Constitution will inevitably bring in both amending formulas, efforts should be made to avoid linkage wherever possible.

Bilateralism as an alternative

Following the failure of the Meech Lake accord, the suggestion was made in various circles that many of its objectives could be achieved bilaterally – that is, through the use of the amending formula in section 43.[43] Bilateralism would, of course, appeal to the government of Quebec, since it would no longer have to deal with some of the representatives of the other provincial governments, an experience that its leaders found extremely distasteful near the end of the Meech Lake round.

In fact, it is wrong to think that section 43 is available to permit amendments of the kind that will be on the table, such as devolution of federal powers to the provinces in areas such as communications or occupational training. The section permits an amendment to the Constitution of Canada 'in relation to any provision that applies to one or more, but not all, provinces,' including alteration to boundaries between provinces. This is meant to be a narrow section, applying to sections of the Constitution with limited application. The kinds of sections that would be covered would be the special guarantees for denominational schools (which vary from province to province);[44] a provision such as section 94 of the Constitution Act, 1867 allowing for delegation of jurisdiction over private law from Nova Scotia, New Brunswick, and Ontario to the federal government; or the Natural Resources Transfer Agreements of 1930, affecting the Prairie provinces.[45] On its terms, the section is not available to change provisions that affect all the provinces, for example, the division of legislative powers in sections 91 and 92. Indeed, it might well be argued that this section

with the danger that unanimity could be the rule, unless the resolutions of approval are framed so as not to link the various parts of the package together – something Quebec will be unwilling to agree to do – or unless '7 and 50' (the section 38(1) formula) is the governing principle.

43 See, for example, Monahan, supra note 23, 35. Certain parts of the accord can also be implemented by informal arrangements that do not have constitutional status, as evidenced by the signing of the Quebec-Canada immigration agreement on 5 February 1991 (*The Globe and Mail* Toronto, 6 February 1991). These informal arrangements cannot be seen as a first, best solution in Quebec, since there are questions of enforceability. I have discussed this in K. Swinton 'Federalism under Fire: The Role of the Supreme Court of Canada' (1992) 55 *Law & Contemp. Prob.* 501.

44 For example, section 93 of the Constitution Act, 1867 is varied for Manitoba, Alberta, Saskatchewan, and Newfoundland. Indeed, the amending formula in section 43 has been used once to deal with denominational rights in education in Newfoundland (Constitution Amendment 1987 (Newfoundland Act) SI/88-11).

45 Constitution Act, 1930. Meekison mentions others as well (supra note 28, 118).

does not apply to most changes in federal powers, because provisions such as section 91 do not apply to the provinces.[46]

There is an argument from purpose that bolsters the one from the text. Amendments that transfer powers from the federal government to one or more provinces do not affect only the recipient of the power. Indeed, such transfers, especially as they cumulate, increasingly bring into question the legitimacy of the representation structure in the federal Parliament, for members of Parliament from the recipient province will continue to vote on and help shape a policy area for the other provinces that is regulated directly by their recipient province. Inevitably, those from other provinces must question the legitimacy of these representatives to do so.[47]

Elsewhere in the amending formula, there are many clear signals about the concern to protect the structure of national legislative institutions and, especially, efforts to ensure that the voices of some provinces are not reduced without special protection.[48] Similarly, there should be concern about amplification of the voices from some provinces that could result from devolution of federal powers to some provinces and not others. In such cases, the safeguard of the general amending formula is designed to protect the interests of residents of the other provinces.[49]

46 Thus, I disagree with Monahan, supra note 43, who seems to suggest a more generous view of the scope of section 43. To be fair to Monahan, he is ambiguous on the exact range of section 43. He does suggest that the distinct society clause in the Meech Lake accord might have been enacted under that provision. This must be wrong, for the clause was designed to interpret the whole of the Constitution of Canada, not just a provision applying to Quebec. The point is especially evident if one recalls the linguistic duality reference also found in the section.

The fact that the June 1990 first ministers' conference proposed that a clause recognizing New Brunswick's linguistic duality be included under the section 43 formula does not change the status of the distinct society clause. The language of the two clauses was very different, for the New Brunswick proposal related to the equality of status of the two linguistic communities in the province. Section 43 specifically provides that amendments dealing with the use of English or French in the province come under that clause. However, it is debatable whether the clause really dealt with the *use* of the two languages (especially as it would have recognized a role for the provincial government to preserve and promote the two linguistic communities). To the extent that the clause might have affected Charter rights, one could argue that the provision amended (the Charter) does not apply only to one province, and section 43 was not the correct mechanism.

47 This is already a problem with the provision allowing opting out of amendments in section 38(2) and 38(3), as Hogg has noted, supra note 17, 74. At least those provisions contain some safeguards for the other provinces, such as requirements of majority votes from all members of the appropriate legislative bodies and a maximum of three 'opt-outs.' Moreover, if there is a serious concern about opting out, the other provinces can withhold their consent to the amendment or revoke their assent, as they are part of the process under section 38(1).

48 See, for example, section 41(b) (unanimity to change the Senate floor rule in section 51A of the Constitution Act, 1867) and section 42(1)(a) (general amending formula for changes to the principle of proportionate representation in the House of Commons).

49 While some might argue that those interests are represented in the federal Parliament

CONSTITUTIONAL LAW OF CANADA

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of Governor General is nowhere created by the Act and no rules are provided for the appointment or tenure of that officer. The reason for this gap was the assumption that the office would be created and filled in the same way as colonial governorships had always been created and filled, that is, by the Queen acting on the advice of the British Colonial Secretary. The office of Governor General has never been formalized in an amendment to the B.N.A. Act. The office is still constituted by the royal prerogative,[11] and appointments are still made by the Queen, although, needless to say, she now acts on the advice of her Canadian ministers.[12]

The system of responsible (or cabinet) government, which had been achieved before confederation by the uniting colonies,[13] is another gap in the B.N.A. Act. It was intended in 1867 that this system would apply to the new federal government, but it never seems to have occurred to anyone to write the rules of the system into the B.N.A. Act, and so there is no mention of the Prime Minister, or of the cabinet, or of the dependence of the cabinet on the support of a majority in the House of Commons: the composition of the actual executive authority and its relationship to the legislative authority were left in the form of unwritten conventions – as in the United Kingdom. That is still their status today.[14]

Nor did the Canadians write into their B.N.A. Act a new supreme court on the model of the Supreme Court of the United States. The B.N.A. Act, by s. 101, gave authority for such a court to be established, but it did not actually establish it. The reason was simple. The framers were accustomed to look to the Judicial Committee of the Privy Council in England as the final appellate authority for British North America (and other colonies), and they were content to leave the appellate authority in those same safe British hands. This was regarded as so natural and obvious – like responsible government – that the Judicial Committee of the Privy Council is not mentioned anywhere in the B.N.A. Act. When the Supreme Court of Canada was established in 1875, it was established by an ordinary federal statute,[15] and the right of appeal to the Privy Council was retained; the abolition of Privy Council appeals did not occur finally until 1949.[16] It is still the case that the existence, composition and jurisdiction of the Supreme Court of Canada depend upon an ordinary federal statute.[17]

11 Letters Patent constituting the office of Governor General of Canada, 1947, R.S.C. 1985, Appendix II, No. 31.
12 See ch. 9, Responsible Government, below.
13 The history of the development of responsible government is related in ch. 9, Responsible Government, below.
14 Responsible government is the subject of ch. 9, below.
15 The history of the Supreme Court of Canada is related in ch. 8, Supreme Court of Canada, below.
16 See sec. 8.2, "Abolition of Privy Council Appeals", below.
17 Supreme Court Act, R.S.C. 1985, c. S-26.

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contemplated for the future. The new Dominion, although enjoying a considerable degree of self-government, remained a British colony. In fact, of course, after 1867, there was an evolution to full independence, but it was a gradual process continuing well into the twentieth century.[8]

The B.N.A. Act did not follow the model of the Constitution of the United States in codifying all of the new nation's constitutional rules. On the contrary, the B.N.A. Act did no more than was necessary to accomplish confederation. The reason was stated in the preamble to the Act: the new nation was to have "a Constitution similar in principle to that of the United Kingdom". Apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before. After 1867, therefore, much of Canada's constitutional law continued to be found in a variety of sources outside the B.N.A. Act. Indeed, as will be elaborated later in this chapter, some of the most important rules were not matters of law at all, but were simply "conventions" which were unenforceable in the courts.

The best-known example of the colonists' reliance on the old regime is the absence of any general amending clause in the B.N.A. Act. We do not have definite information as to the reasons for this omission, because on this point (as on many others) there is no record of any discussion at the conferences in Charlottetown, Quebec and London which preceded the passage of the Act. But two facts may be assumed with confidence. First, the framers of the B.N.A. Act could not have overlooked such a vital matter: they were far too intelligent and pragmatic to imagine that they had drafted a document which would never require amendment, and they were very familiar with the United States' Constitution which of course contained an amending clause. Secondly, the framers must have known that the absence of an amending clause would mean that amendments would have to be enacted by the imperial Parliament. The conclusion is inescapable that the Canadian framers of the B.N.A. Act were content for the imperial Parliament to play a part in the process of amending the new Constitution.[9] Because of the absence of an amending clause in the B.N.A. Act, the imperial Parliament enacted amendments to the Act until 1982, when the Constitution Act, 1982 (itself an imperial statute) finally supplied amending procedures which could be operated entirely within Canada.[10]

Another gap in the B.N.A. Act concerns the office of Governor General. The Act, by s. 9, vests general executive authority for Canada in "the Queen", and confers several specific powers on a "Governor General". But the office

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8 See sec. 3.1, "Bonds of Empire", below.

9 See also, Livingston, *Federalism and Constitutional Change* (1956), 19-21; Mallory, *The Structure of Canadian Government* (1971), 374; Forsey, *Freedom and Order* (1974), 229.

10 The history of the search for a domestic amending formula is related in sec. 4.1(b) "The search for a domestic amending procedure", below.

The Meech Lake Accord of 1987[83] raised an interesting point of interpretation regarding the three-year time-limit. The Accord was a package of related amendments, some of which were subject to the seven-fifty procedure, and others of which (dealing with the Supreme Court of Canada and the amending procedures) were subject to the unanimity procedure. In order to bring the entire package into force, obviously the unanimity procedure had to be employed. Did this mean that no time-limit applied to the ratification of the Accord? Probably, the answer to that question was no: the existence within the package of seven-fifty amendments required that the time-limit be adhered to. Certainly, that was the view that was generally held, and the Accord was treated as having lapsed when two provincial legislative assemblies were still debating the Accord at the expiry of three years from the date of the initiating resolution.

4.5 Some-but-not-all-provinces procedure (s. 43)

Section 43 of the Constitution Act, 1982 provides as follows:

> 43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
>
> (a) any alteration to boundaries between provinces, and
>
> (b) any amendment to any provision that relates to the use of the English or the French language within a province,
>
> may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

There are provisions of the Constitution of Canada[84] which apply to one or more, but not all, provinces. For example, s. 93 of the Constitution Act, 1867 (education) applies to only six of the ten provinces; a similar but separate provision in each of the Manitoba Act, Alberta Act, Saskatchewan Act and Newfoundland Act (all included in the Constitution of Canada) applies to each of the other four provinces. Section 94 of the Constitution Act, 1867 (uniformity of laws) does not apply to Quebec. Section 97 of the Constitution Act, 1867 (qualifications of judges) does not apply to Quebec; s. 98 (on the same topic) applies only to Quebec. A number of language provisions apply only to Quebec or Manitoba or New Brunswick.[85] For the amendment of provisions of this kind, s. 43 requires authorizing resolutions of only those

83 Note 37, above.

84 See sec. 4.2(b), "Constitution of Canada", below.

85 Section 133 of the Constitution Act, 1867 applies only to Quebec (and the federal government), and s. 23 of the Manitoba Act applies only to Manitoba, and ss. 16(2), 17(2), 18(2), 19(2) and 20(2) of the Constitution Act, 1982 apply only to New Brunswick. See also note 79, above.

THE PROCESS FOR AMENDING THE CONSTITUTION OF CANADA

The Report of the Special Joint Committee
of the Senate and the House of Commons

Joint Chairmen:
Hon. Gérald Beaudoin, Senator
Jim Edwards, M.P.

June 20, 1991

amendments have been fully considered and are not the product of passing fads. At the same time, too much resistance to change results in rigidity and the failure of a constitution to evolve in tandem with changing public priorities and needs.

85. The balance between stability and change is particularly sensitive in Canada, because the Constitution is a source of vital protection for Quebec and other provinces, as well as for minorities. When the current amending rules were established in 1982, Quebec's need for safeguards against the imposition of unacceptable change, in combination with the determination of other provinces to have powers equal to those of Quebec, led to the creation of an amending procedure with strong safeguards against undesired change. As has been noted, change in some categories must be approved unanimously in order to be ratified, and in most other categories dissident provinces can opt out of changes.

86. The amending rules clearly enable change in matters requiring unanimity to be resisted unless it is backed by a high level of consensus. At the same time, however, the general procedure permits change to occur even where it is opposed by up to three provinces, containing 49.9 per cent of the population. While provinces may opt out of changes made under this rule, they are likely to incur financial penalties for doing so, except in the areas of education and culture.

87. In our view, the current formula is an awkward compromise which may prevent needed changes from occurring and which also fails to provide the full protection required by individual provinces, in particular by Quebec. Canadians must not allow themselves to forget that Quebec is the institutional shelter for six million of their fellow citizens whose first language is French, who perceive their government and its powers as primary defences against the assimilationist pull of the surrounding 250 million English-speaking North Americans. Our recognition of the distinctiveness of Quebec society is hollow unless we show ourselves willing to do what is necessary to maintain that distinctiveness. It is clear that for most Quebeckers, one necessary improvement would be the broadening of protections against unacceptable constitutional change.

88. A new amending formula must also address the concerns of Canadians in minority regions--in the West and in Atlantic Canada. Many Canadians in these regions are strongly committed to the doctrine of equality of the provinces and have expressed, as well, their desire for greater weight in national decision-making.

89. Our view is that the doctrine of equality of the provinces does not preclude variations in provincial roles or powers. Such variations or asymmetries have occured since 1867 and have, for the most part, contributed positively to the flexibility which is a fundamental advantage of our federal arrangements. Just as the equality of individuals should not be seen as requiring identical treatment, so the equality of the provinces should not be seen as precluding the tailoring of roles and powers to the particular needs of people in any individual province.

90. We also are concerned that a narrow view of equality of the provinces may bring it into conflict with equality of the person. If Canada's smallest province, with .5 per cent of the population, has the same power over constitutional change as its largest province, with 37 per cent of the population, then the constitutional weight of any individual in the smallest province becomes vastly disproportionate to the weight of a citizen of the largest province.

91. Canadians cannot have both equalities of the person and of provinces. They can, however, have a balance between these two equalities if they are willing to recognize that the principle of equality of the provinces allows for variations among the provinces in specific roles and powers, according to their different needs and for the purpose of furthering overall equality.

92. Our view is that a balance between the equalities of province and person can be achieved in a regionally-based amending formula, along the lines of the Victoria formula, which recognizes the Atlantic provinces, Quebec, Ontario, and the West as regions and gives each a veto over constitutional amendments. In addition to balancing the equalities, this formula largely avoids the combination of too much protection (unanimity) and too little protection (two-thirds and 50 per cent) contained in our present formula. It thus strikes a more consistent balance between resistance to change and receptivity to change even while, as we propose, preserving the unanimity requirement for certain essential matters.

93. A regional formula, in tandem with a commitment to carry out Senate reform which would address desires in the minority regions for greater weight in national decision-making, could, we feel, meet the needs of both central and outlying regions in Canada.

3. Our Recommendations

1) **We recommend that the amending formula contained in sections 38 and 42 of the *Constitution Act, 1982* (whereby the approval of the Senate, the House of Commons and at least two-thirds of the provinces representing at least 50 per cent of the population is required) and the amending formula in section 41 (whereby the approval of the Senate and the House of Commons and every province is required) be changed such that constitutional amendments would require the approval of the Senate and the House of Commons and each of the four regions of Canada, as follows:**

   a) **at least two of the following provinces: Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;**

   b) **Quebec;**

   c) **Ontario; and**

   d) **at least two of Manitoba, British Columbia, Saskatchewan and Alberta, representing at least 50% of the population of that region.**

   except that the requirement of unanimity should be retained respecting

      i) **the use of the English or the French language (as contained in section 41(c) of the *Constitution Act, 1982*);**

      ii) **the proprietary rights of provinces;**

      iii) **the offices of the Queen, Governor General and Lieutenant Governor;**

iv) any change to provisions i to iii,

and excepting provisions with respect to the territories and the aboriginal peoples contained in other recommendations.

2) **In making this recommendation, the Committee realizes that, in practice, a new amending formula should be adopted only in the context of a substantial package of constitutional reform including, for instance, the reform of the Senate.**

3) **We recommend that the amending formula contained in sections 43, 44 and 45 of the *Constitution Act, 1982* remain unchanged.**

E. FLEXIBILITY OPTIONS

94. Our attention has been drawn to a number of proposals for constitutional and other protections designed to prevent any single province from using a veto power to block constitutional change in all provinces. A number of these proposals fall outside the amending procedure and thus warrant mention primarily for future reference. Among these are: increased use of the existing federal capacity to delegate administrative authority to the provinces, and provisions allowing certain exclusive federal and provincial powers to become concurrent powers, with a stipulation in each case indicating which order of government would have paramountcy.

95. Other possibilities for introducing greater flexibility into our Constitution involve the amending procedure. They relate to section 43, which sets out the rules for amendments affecting the federal government and some but not all provinces; and the opting out provision (section 38(3) of the *Constitution Act, 1982*), which is an element of the existing general (two-thirds and 50 per cent) formula. We examine, in addition, the delegation of powers.

1. Section 43 (Bilateral Formula)

a. What We Heard

96. A number of witnesses suggested that section 43 might be used to allow delegation of certain federal powers to one or several provinces with particular reasons to exercise those powers, without affecting the other provinces, or without requiring their constitutional assent.

97. Some witnesses noted that this arrangement would allow Quebec to deal directly with the federal government on a carefully limited class of issues, such as linguistic and cultural powers, which bear a different relationship to the government of Quebec than to other provincial governments. They stressed, however, that section 43 was intended to deal only with constitutional provisions which apply in some but not all provinces. They noted that extending section 43 to permit widespread bilateral deal-making could lead to creation of a chequerboard of provincial powers and jurisdictions, and to protracted instability.

98. Other witnesses disagreed with extending the use of section 43 as a means of tailoring the distribution of federal and provincial powers in response to specific needs of Quebec or any other province. Language, education and culture were specifically mentioned as examples of matters which affect all provinces, and therefore fall outside section 43.

b. Our Analysis

99. Section 43 does not permit one province to be given a different legislative status from another. In principle, provinces enjoy equal powers insofar as the division of powers between Parliament and the ten provincial legislatures is concerned.

100. Some marked cases of asymmetry do exist. Section 93 of the *Constitution Act, 1867*, which deals with education is not the same for all provinces, notably for Manitoba and above all for Newfoundland and Labrador.[10] Quebec is exempted from section 94 of the *Constitution Act, 1867*, which provides for the uniformity of laws relative to property and civil rights. Section 98 of the *Constitution Act, 1867*, reflects this asymmetry in its provision concerning the appointment of Quebec's judges.

101. Section 43 of the *Constitution Act, 1982* is restricted to "any provision that applies to one or more, but not all, provinces". Since, in principle, sections 91 (federal powers) and 92 (provincial powers) apply to all provinces, section 43 cannot be used to grant an asymmetric legislative status to any one province.

102. A province can only be granted different legislative powers if the federal government and two-thirds of the provinces, representing at least 50 per cent of the population, consent to the change. In short, what is needed is a constitutional amendment based on section 38 and not on section 43.

2. Opting Out

a. What We Heard:

103. Sections 38(3) and 40 of the *Constitution Act, 1982* enable provinces to opt out of amendments reducing provincial legislative powers, proprietary rights, or any other rights or privileges of the province.[11] The province receives financial compensation when opting out of an amendment which transfers its provincial powers over education and culture. A number of witnesses argued that these provisions are a valuable source of constitutional flexibility. They enable provinces to protect themselves from amendments which do not meet their needs, without blocking constitutional changes elsewhere in Canada.

104. Most who favoured the opting-out rule recommended extending the right to reasonable compensation (as the Meech Lake Accord did) to cover not just education and culture but any amendment transferring jurisdiction from the provincial governments to the federal government.

105. Opinion was by no means unanimous on the opting-out provision, however. Some witnesses viewed opting out with suspicion, as a means for gradually introducing province-to-province variations in powers and status.

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[10] The protection of denominational rights and denominational school systems varies in certain cases.

[11] If a legislative competence is transferred to the Parliament of Canada by a constitutional amendment, a province may choose to opt out and retain its legislative competence. This is the right to opt out. If proprietary rights of the provinces were to be transferred to the federal Parliament by amendment, a province could choose to retain them.

Mahé v. Alberta

See Tab 14, A.G. (Canada) Book of Authorities

Reference re Public Schools Act (Man.)

See Tab 13
A.G. (Canada) Book of Authorities

New Brunswick
Commission on
Canadian
Federalism

Commission du
Nouveau-Brunswick
sur le fédéralisme
canadien

New Nouveau Brunswick

January 14, 1992

The Honorable Frank McKenna
Premier of New Brunswick
Centennial Building
Fredericton, N.B.
E33B 5H1

Dear Premier:

We, the members of the New Brunswick Commission on Canadian Federalism appointed in September 1990, have the honour, in accordance with our mandate, of submitting our report.

We express our appreciation to you for granting us the opportunity to play a role in the renewal of the Canadian Federation. We would also like to express our gratitude to all those who were interviewed, submitted briefs or who met with us during the course of our deliberations. Finally, we would like to thank the Commission staff and the Department of Intergovernmental Affairs for providing outstanding support to the Commission.

The Members,

Erminie Cohen

James Downey

Yvon Fontaine

Ronald LeBreton

Chief Albert Levi, C.M.

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25.1 This Charter shall be interpreted in a manner consistent with

(b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.

This description of Canada's linguistic duality is troubling because it speaks of majorities and minorities rather than of communities located throughout Canada. Bearing in mind that this text is a lens through which the **Charter** is to be seen, it is understandable that minority linguistic communities should fear that their linguistic rights might be seen by the courts as different or of unequal value when compared to the linguistic rights of the majority community.

Further, the reference to French-speaking Canadians "primarily located in Quebec" and "also present throughout Canada" diminishes the historic and continuing role played by French-speaking communities, including New Brunswick's. Similarly, Quebec's anglophone community, with its deep historic roots, is relegated to marginal status.

As outlined in the first chapter of this report, the New Brunswick Commission fully endorses the recognition of Quebec as a distinct society. Noting that the federal proposals would see this distinctness defined in part by reference to Quebec's French speaking majority, the Commission is of the view that the clause affirming Canada's linguistic character is inappropriately located in the proposed section 25.1 and should be located in a Canada clause.

Therefore, the New Brunswick Commission recommends:

17. That the existence of the English and French linguistic communities throughout the country constitutes a fundamental characteristic of Canada and should therefore be expressed in the proposed Canada clause.

The Development of Linguistic Communities

Given the importance this Commission attaches to the development in Canada and in New Brunswick of both our major linguistic communities, we believe this concept should be separately recognized in the body of the Constitution. Our history demonstrates that both English-speaking and French-speaking peoples have played central roles in the development of this country and traditionally have enjoyed access to their own educational, religious, and cultural institutions. The Commission firmly believes that to realize our full potential as a country, governments must support the development of the English and French communities.

Support for the continuing federal role in assisting the development of minority language communities remains very strong among those communities across the country. Francophone New Brunswickers realize that much has improved in their communities because of both Canada's and New Brunswick's official language policies. Indeed, they look forward to making further progress through collaboration with the federal and provincial governments. The New Brunswick Commission, therefore, is concerned that there is an inconsistency in the federal proposals between the responsibility of Quebec to preserve and promote its distinct society and the responsibility of other governments only to preserve "Canada's two linguistic majorities and minorities." There appears to be a legitimizing of "majoritarianism" and no assignment of responsibility to promote linguistic duality. We find this to be inconsistent with the constitutional principle of equality of the two official languages and the goal of development of the official linguistic communities. We believe that less constraining and more positive alternatives must be explored and considered.

The Commission is convinced that New Brunswick is a richer and stronger province because of the recognition of the equality of status of the francophone and anglophone communities and the establishment of distinct educational institutions. We hope that other

provinces will eventually reflect this conviction in their policies and programs. The Commission recognizes, however, that the primary aim of this Canada Round is to find an arrangement to preserve this country in a way that will allow the continuing development of our communities. Throughout this report we have tried to provide a balanced outlook on the issues we have considered. We have been guided by our belief that we have a responsibility to recommend accommodations that appear fair to each partner of the federation.

18. Therefore the New Brunswick Commission recommends

(a) That the Constitution be amended to affirm the responsibility of the Parliament and government of Canada to preserve and promote the English and French linguistic communities throughout the country; and

(b) That the Constitution be amended further to affirm the responsibility of provincial legislatures and governments to preserve the English and French linguistic communities throughout the country.

Partnership in New Brunswick

New Brunswick has a long and colourful history demonstrating what may well be both the best and worst of relations between English- and French-speaking communities. The Acadian population, returning from the deportation of 1755, settled in small communities in the north and east and lived in almost complete isolation from the Loyalist communities in the south. The Acadians had very little input in the political life of the province until the middle of this century. Their struggle for acceptance and place has never been easy and remains a challenge today. Achievements in the past twenty years, including the passage of the **Official Languages of New Brunswick Act** in 1969, legislative authority for the establishment of homogeneous schools and school boards, the unanimous passage of **An Act Recognizing the Equality of Status of the Two Official Linguistic Communities** (Bill 88) in 1981, and the constitutional entrenchment of linguistic rights in 1982, make up a remarkable, if belated, acceptance of the respect for the rights of French- and English-speaking New Brunswickers. Geography and history made us partners.

The same kind of leadership and determination that overcame past adversity and differences can allow that partnership to reach its potential. In order for that to happen, both communities must have access to the means essential to their development. Within the overall Canadian linguistic framework, New Brunswick, like Quebec, requires particular kinds of solutions. The approach that New Brunswick has chosen is to recognize the equality of status of the two linguistic communities. This approach was adopted because it built upon the constitutional recognition of equality of status of the two official languages and because it provides a basis for development of both linguistic communities without reference to geographic concentration.

As we have indicated, the definitions of linguistic duality presented in the current federal proposals present a challenge to this equality concept. New Brunswickers reacted negatively to the Meech Lake definitions of duality in which they were relegated to the status of "French-speaking Canadians elsewhere in Canada" and to the lack of a commitment to promote this "existence." The status of equality which had been recognized in 1981 and 1982 was clearly being threatened. Following a specific recommendation of New Brunswick's Select Committee on the 1987 Constitutional Accord, the New Brunswick government proposed a Companion Resolution to the Meech Lake Accord that would have added to the list of Canada's fundamental characteristics "the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."

Beyond this basic principle of equality, the challenge remains how best to seek constitutional expression of the elements related to achieving equality. The Commission has reviewed the content of Bill 88 and its intended effect. It has also listened to representations from anglophones and francophones who have articulated the importance of the partnership concept for New Brunswick. We believe that the purposes of Bill 88 enhance that concept. We are of the view, however, that not all of the legislative provisions are appropriate subjects for constitutional entrenchment.

The Commission favours an approach which backs up the equality objective with a commitment to ensure that the necessary tools for development are available. Experience in New Brunswick and elsewhere throughout Canada demonstrates that eduction should come at the head of the list of those necessary tools. The Commission understands the fundamental importance to minority language communities of access to educational facilities provided for out of public funds and controlled by those communities. Our understanding is confirmed by the Supreme Court of Canada in the Mahé case in which the crucial role played by education in the maintenance of a culture was underlined. In speaking of the nature and extent of section 23 of **Charter of Rights and Freedoms**, Chief Justice Dickson stated:

> *"The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.*
>
> *My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them."*

There may be other circumstances in which access to distinct institutions is necessary and justified. In the cultural field, New Brunswick's pioneering of the concept of combined schools and community centers, for communities that constitute a numerical minority within a particular region of the Province, has proven to be successful. The model has since been adopted by other provinces.

It should be understood that access to distinct institutions is not intended to apply to the apparatus of government. By virtue of the **Charter of Rights and Freedoms** and the **Official Languages Act**, the government of New Brunswick is committed to provide services to residents of the Province in the official language of their choice. In order to meet this commitment, the apparatus of government operates in both languages. But when it comes to non-governmental and educational institutions, such as the University of New Brunswick and l'Université de Moncton, which are principally intended to serve one community or the other, our experience is that both communities are better served by having access to their own institutions.

Given New Brunswick's experience in promoting its two linguistic communities, and noting that through such policies assimilation rates have been reduced, this Commission is in favour of enshrining the principle of equality of the two linguistic communities in New Brunswick and affirming that the principle of equality includes the right to distinct educational institutions and distinct cultural institutions as are necessary for the development of one or both communities.

The Commission therefore recommends:

19. That the Constitution be amended to include a clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities.

Conclusion

The New Brunswick Commission has looked at the debate over policies that determine how language issues are played out on the national scene. We note that while policies related to official languages are relatively recent, the rights on which they are based have historic foundations that are centuries old. The progress that has been made in the last two decades in recognizing and defining these rights should be retained. We have achieved a base upon which to build. But, much remains to be done in order to make rights truly meaningful and in order to allow Canadi-

DRAFT LEGAL TEXT

The attached draft legal text is based on the Charlottetown Accord of August 28, 1992. It is a best efforts text prepared by officials representing all the First Ministers and Aboriginal and Territorial Leaders.

October 9, 1992

DRAFT

Constitution Act, 1867

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

Canada Clause

"2. (1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;

(c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;

(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;

(g) Canadians are committed to the equality of female and male persons; and

(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

SCHEDULE

CONSTITUTION AMENDMENT, 1987

Constitution Act, 1867

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

Interpretation

"**2.** (1) The Constitution of Canada shall be interpreted in a manner consistent with

(*a*) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and

(*b*) the recognition that Quebec constitutes within Canada a distinct society.

Role of Parliament and legislatures

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(*a*) is affirmed.

Role of legislature and Government of Quebec

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(*b*) is affirmed.

Rights of legislatures and governments preserved

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

2. The said Act is further amended by adding thereto, immediately after section 24 thereof, the following section:

Names to be submitted

"**25.** (1) Where a vacancy occurs in the Senate, the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate.

Choice of Senators from names submitted

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the *Constitution Act, 1982*, the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."

3. The said Act is further amended by adding thereto, immediately after section 95 thereof, the following heading and sections:

"Agreements on Immigration and Aliens

Commitment to negotiate

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the

Agreements

Limitation

Application of Charter

Proclamation re ing to agreemen

Amendment of agreements

Application of s tions 46 to 48 of *Constitution Ac 1982*

Amendments to tions 95A to 95I this section

Role of legislature and Government of Quebec

(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

Powers, rights and privileges preserved

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

Aboriginal and treaty rights

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada."

2. Section 4 of the said Act is repealed and the following substituted therefor:

Construction

"4. Unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under the Constitution of Canada."

3. Section 17 of the said Act is repealed and the following substituted therefor:

Constitution of Parliament of Canada

"17. There shall be one Parliament for Canada, consisting of the Queen, the Senate and the House of Commons."

commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

l'Immigration, précité, à la p. 218: « ... il est important de se rappeler que les tribunaux effectuent cette enquête tout en veillant au respect des droits et libertés énoncés dans les autres articles de la *Charte*.»

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

Toutefois, les droits et libertés garantis par la *Charte* ne sont pas absolus. Il peut être nécessaire de les restreindre lorsque leur exercice empêcherait d'atteindre des objectifs sociaux fondamentalement importants. C'est pourquoi l'article premier prévoit des critères de justification des limites imposées aux droits et libertés garantis par la *Charte*. Ces critères établissent une norme sévère en matière de justification, surtout lorsqu'on les rapproche des deux facteurs contextuels examinés précédemment, savoir la violation d'un droit ou d'une liberté garantis par la Constitution et les principes fondamentaux d'une société libre et démocratique.

La charge de prouver qu'une restriction apportée à un droit ou à une liberté garantis par la *Charte* est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Il ressort nettement du texte de l'article premier que les restrictions apportées aux droits et libertés énoncés dans la *Charte* constituent des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits et libertés sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction. C'est ce que confirme l'emploi de l'expression «puisse se démontrer» qui indique clairement qu'il appartient à la partie qui cherche à apporter la restriction de démontrer qu'elle est justifiée: *Hunter c. Southam Inc.*, précité..

La norme de preuve aux fins de l'article premier est celle qui s'applique en matière civile, savoir la preuve selon la prépondérance des probabilités. L'autre possibilité, la preuve hors de tout doute raisonnable qui s'applique en matière criminelle, imposerait selon moi une charge trop lourde à la partie qui cherche à apporter la restriction. Des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent tout simplement pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement. En fait, l'expression «dont la justification puisse se démontrer», que l'on trouve à l'article premier de la *Charte*, étaye cette conclusion. La norme générale applicable en matière civile comporte différents degrés de probabilité qui varient en fonction de la nature de chaque espèce: voir Sopinka et Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), à la p. 385. Comme l'explique lord Denning dans *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), à la p. 459:

> [TRADUCTION] La preuve peut être faite selon la prépondérance des probabilités, mais cette norme peut comporter des degrés de probabilité. Ce degré dépend de l'objet du litige. Une cour civile, saisie d'une accusation de fraude, exigera naturellement un degré de probabilité plus élevé que celui qu'elle exigerait en examinant si la faute a été établie. Elle n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances.

This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences . . . .

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker, supra*, at p. 384; *Singh v. Minister of Employment and Immigration, supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd., supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Ce passage a été cité et approuvé dans l'arrêt *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, à la p. 161. Un point de vue semblable a été exprimé par le juge Cartwright dans l'arrêt *Smith v. Smith*, [1952] 2 R.C.S. 312, aux pp. 331 et 332:

> [TRADUCTION] Je tiens toutefois à souligner que, dans toute action civile, pour pouvoir conclure sans risque à l'exactitude d'une question de fait qui doit être établie, le tribunal doit être convaincu d'une manière raisonnable qui dépendra de l'ensemble des circonstances à partir desquelles il formera son jugement, y compris la gravité des conséquences . . .

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, «proportionné aux circonstances». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction. Voir: *Law Society of Upper Canada c. Skapinker*, précité, à la p. 384; *Singh c. Ministre de l'Emploi et de l'Immigration*, précité, à la p. 217. La cour devra aussi connaître les autres moyens dont disposait le législateur, au moment de prendre sa décision, pour réaliser l'objectif en question. Je dois cependant ajouter qu'il peut arriver que certains éléments constitutifs d'une analyse en vertu de l'article premier soient manifestes ou évidents en soi.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*, doit être «suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution»: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes qui constituent l'essence même d'une société libre et démocratique ne bénéficient pas de la protection de l'article premier. Il faut à tout le moins qu'un objectif se rapporte à des préoccupations urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd., supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd., supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and demo-

En deuxième lieu, dès qu'il est reconnu qu'un objectif est suffisamment important, la partie qui invoque l'article premier doit alors démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'«une sorte de critère de proportionnalité»: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Même si la nature du critère de proportionnalité pourra varier selon les circonstances, les tribunaux devront, dans chaque cas, soupeser les intérêts de la société et ceux de particuliers et de groupes. À mon avis, un critère de proportionnalité comporte trois éléments importants. Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un tel lien rationnel, le moyen choisi doit être de nature à porter «le moins possible» atteinte au droit ou à la liberté en question: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la *Charte* et l'objectif reconnu comme «suffisamment important».

Quant au troisième élément, il est évident que toute mesure attaquée en vertu de l'article premier aura pour effet général de porter atteinte à un droit ou à une liberté garantis par la *Charte*; d'où la nécessité du recours à l'article premier. L'analyse des effets ne doit toutefois pas s'arrêter là. La *Charte* garantit toute une gamme de droits et de libertés à l'égard desquels un nombre presque infini de situations peuvent se présenter. La gravité des restrictions apportées aux droits et libertés garantis par la *Charte* variera en fonction de la nature du droit ou de la liberté faisant l'objet d'une atteinte, de l'ampleur de l'atteinte et du degré d'incompatibilité des mesures restrictives avec les principes inhérents à une société libre et

cratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the *Narcotic Control Act*. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the *Narcotic Control Act*. According to the Crown, s. 8 of the *Narcotic Control Act* is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. (See *Report of the Special Committee on Traffic in Narcotic Drugs*, Appendix to Debates of the Senate, Canada, Session 1955, pp. 690-700; see also *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973).) Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

At the international level, on June 23, 1953, the *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium*, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The *Single Convention on Narcotic Drugs, 1961*, was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, . . ."

At the national level, statutory provisions have been enacted by numerous countries which, *inter alia*, attempt to deter drug trafficking by imposing criminal sanctions (see, for example, *Misuse of Drugs Act 1975*, 1975 (N.Z.), No. 116; *Misuse of Drugs Act 1971*, 1971 (U.K.), c. 38).

The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous

démocratique. Même si un objectif est suffisamment important et même si on a satisfait aux deux premiers éléments du critère de proportionnalité, il se peut encore qu'en raison de la gravité de ses effets préjudiciables sur des particuliers ou sur des groupes, la mesure ne soit pas justifiée par les objectifs qu'elle est destinée à servir. Plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important pour que la mesure soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Ayant exposé les principes généraux qui régissent une analyse en vertu de l'article premier, nous devons maintenant les appliquer à l'art. 8 de la *Loi sur les stupéfiants*. La disposition portant inversion de la charge de la preuve qui figure à l'art. 8 apporte-t-elle au droit d'être présumé innocent tant que la culpabilité n'est pas prouvée hors de tout doute raisonnable, une restriction raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique?

Comme je l'ai déjà souligné, pour répondre à cette question, il faut commencer par préciser la nature de l'intérêt ou de l'objectif poursuivi par le législateur en adoptant l'art. 8 de la *Loi sur les stupéfiants*. Selon le ministère public, l'art. 8 de la *Loi sur les stupéfiants* vise à refréner le trafic des stupéfiants en facilitant l'obtention d'un verdict de culpabilité contre les trafiquants. À mon avis, le souci du législateur de réduire le trafic des stupéfiants peut être qualifié de réel et urgent. Le problème du trafic des stupéfiants n'a cessé de s'aggraver depuis les années cinquante, et déjà à cette époque ce phénomène suscitait beaucoup d'inquiétude. (Voir *Rapport du Comité spécial chargé d'enquêter sur le trafic des stupéfiants*, appendice aux Débats du Sénat du Canada, session 1955, aux pp. 736 à 747; voir aussi *Rapport final, Commission d'enquête sur l'usage des drogues à des fins non médicales* (Ottawa, 1973).) Pendant toute cette période, des sociétés libres et démocratiques ont adopté de nombreuses mesures tant sur le plan national que sur le plan international.

Sur le plan international, le *Protocole visant à limiter et à réglementer la culture du pavot, ainsi que la production, le commerce international, le commerce de gros et l'emploi de l'opium*, dont le Canada est signataire, a été adopté le 23 juin 1953 dans le cadre de la Conférence des Nations unies sur l'opium tenue à New York. La *Convention unique sur les stupéfiants de 1961* a été conclue à New York le 30 mars 1961. Signé par le Canada le même jour, ce traité est entré en vigueur le 13 décembre 1964. Comme on le dit dans le préambule, «la toxicomanie est un fléau pour l'individu et constitue un danger économique et social pour l'humanité . . .»

Sur le plan national, de nombreux pays ont adopté des dispositions législatives visant notamment, par l'imposition de sanctions pénales, à empêcher le trafic des stupéfiants (voir, par exemple, la *Misuse of Drugs Act 1975*, 1975 (N.Z.), nº 116; la *Misuse of Drugs Act 1971*, 1971 (U.K.), chap. 38).

L'objectif de protection de notre société contre les fléaux liés au trafic des stupéfiants est, selon moi, suffisamment important pour justifier dans certains cas l'atteinte à un droit ou à une liberté garantis par la Constitution. De plus, la gravité du trafic des stupéfiants fait qu'il va presque sans dire que sa répression constitue un objectif suffisamment important aux fins de l'article premier. Le ministère public a donc satisfait au premier critère applicable à une analyse en vertu de l'article premier.

L'étape suivante de l'analyse consiste à examiner le moyen choisi par le législateur pour atteindre son objectif. Ce moyen doit être raisonnable et sa justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Soulignons encore une fois que l'application de ce critère de proportionnalité doit commencer par un examen de la rationalité de la disposition: existe-t-il un lien rationnel entre la disposition de l'art. 8 portant inversion de la charge de la preuve et l'objectif consistant à refréner le trafic des stupéfiants? Cela nécessite tout au moins que l'art. 8 soit lui-même rationnel. Il doit exister un lien rationnel entre le fait établi de la possession et le fait présumé de la possession à des fins de trafic, sinon la disposition portant inversion de la charge de la preuve pourrait avoir pour conséquence que

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See Tab 12

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Collective Rights: Moving the Debate Forward

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Pierre Trudeau's critique of the collective rights in both the Meech Lake and Charlottetown accords raised questions about an issue that, perhaps more than any other, has divided Canadians with respect to their vision of the country.

Trudeau opposes the incorporation of collective rights in the Constitution on 'philosophical' grounds. He argues that 'collective rights' violate Canadians' liberal commitment to the 'primacy of the individual' and hence are unacceptable. Thus, in his view, the collective rights debate comes down to a single, fundamental question: Should a liberal-democratic society recognize the existence of individual *and* collective rights, or just individual ones?

In contrast, our research has convinced us that such attempts to refute or vindicate 'collective rights' in one fell swoop tend to preach to the converted. As a *basis for sound political and legal reasoning* the distinction between individual and collective right is simply too vague and too abstract to yield many useful conclusions.

However, as a *polemical* tool the distinction has become very potent. It allows opponents of 'collective rights' to frame what is really a complex and heterogeneous set of issues in terms of a single, stark opposition.[1] As a result, its current role in public debate is more akin to a political slogan than an objective way of posing a problem. As such, the distinction has become an obstacle to fruitful public debate rather than an aid.

In this essay we will argue that the issues in the collective rights debate are too heterogenous and too complex to be fairly resolved by sweeping 'philosophical' arguments against 'collective rights'. If progress is to be made, what is needed is a lot more emphasis on a sorting and sifting of the various issues and interests at stake; and a lot less emphasis on grand philosophical arguments.

Two Separate Classes of Rights?

Part of the problem with contrasting individual and collective rights is that it falsely suggests that the former constitute a relatively well-defined and homogenous class. 'Collective rights' then appear as a set of interests or claims which stand in opposition to individual ones and which

[1] Thus William Johnson of the Montreal *Gazette* contrasts those who favour individual rights because they "secure freedom and a stable political community" with those who support collective ones because they "give power to the state or to collectivities to enforce conformity, to repress freedom, to impose a collective standard on everyone and to coerce dissidents and minorities." Montreal *Gazette*, April 12, 1993.

compete with them. This is misleading in at least two ways.

First, it assumes that the interests underlying individual rights are unambiguously individual while those underlying collective rights are unambiguously collective. Second, it assumes that the task of balancing individual rights is one of balancing competing aspects of individual liberty; while the task of balancing individual and collective rights is one of deciding 'how far' the interests of the collectivity should be allowed to erode personal freedom, that is, to trump individual rights.

But the claim that individual rights are distinguishable *in kind* from collective ones is far more problematic than it may seem. There are important cases where there is no adequate way of specifying important interests in strictly individual terms, that is, where the existence of a community will be a condition for the exercise of a right aimed at protecting the interest.2 When this happens, it may be unclear whether the right should be classed as an individual or a collective one. Or, to put it slightly differently, the right will have both individual and collective *aspects*. Let us explore this a little further.

Distinguishing Individual from Collective Rights

Most scholars agree that the language rights in the Charter are vested in individual persons. On this point, the wording is quite clear. But is legal wording the sole criterion for determining when a right is individual or collective?

Suppose we ask why it is that French and English are protected by the Charter. Why not, say, Chinese or Italian? Or why not all four languages? How should a defender of the Charter's language rights reply? The stock answer is that the French and the British were 'founding communities' (or perhaps 'founding peoples') while the Chinese and Italians were not.

The point, presumably, is that the historical role of these languages justifies their current status as official ones.[2] The early history and initial founding of Canada is viewed as a collaborative effort that involved a series of important political arrangements between the French and the British. As a result, those living today who are members of these original language communities have a kind of claim on the country regarding the choice of its official languages that the Chinese and Italian communities lack. On this view, the status of the French and British as 'founding communities' gave them a 'right' to make their own languages official ones. But two questions need to be posed here.

First, if there is an historical justification for these language rights, who is the bearer of them? Is it the French- and English-speaking *communities*? Or is it the *members* of these communities? In short, is the right a collective or an individual one? Second, what sort of 'rights' are we actually

[2] We should make clear here that, while we defend the claim that the idea of 'founding communities' is an important one, and while our discussion here focuses on the idea of linguistic duality, we believe that the concept of 'founding communities' must be extended to include First Nations.

talking about? These questions will be addressed over the next two sections, beginning with the former.

The Language Rights in the Charter: A Closer Look

Consider one's right to freedom of conscience. This is a relatively uncontroversial example of an individual human right. Its point is to protect a particular power that belongs essentially to individuals, namely, their capacity to freely choose a religion (or to withhold belief). To say that this power belongs 'essentially' to individuals is to say that *it can be both held and exercised by them, acting alone.*

But note that the appeal to an 'essential power' occurs at a high level of abstraction. The result of employing such an argument to justify a right is that the conclusion, like the premises, will be universal: to show that any one individual deserves the right, is to show that all do. This is precisely the point of calling rights justified in this way *human* rights. The language rights in the Charter differ from individual human rights in at least two ways.

First, a language is not something that can be produced, maintained, exercised or enjoyed by individuals, acting alone. Language is by its very nature a collective enterprise. Its existence presupposes the existence of a community of users. The community provides the context or setting in which the development, use and maintenance of a language takes place. Language, as a quintessentially social activity, is unthinkable without such a context.

In practical terms, this means that the preservation and vitality of the language community is a condition for the exercise of language rights, in a way that, say, the preservation and vitality of a community of believers is not a condition for the exercise of free choice regarding one's religious beliefs. If this is correct, these language rights cannot be 'individual' in the same sense as freedom of conscience. We will return to this point momentarily.

Second, the language rights in the Charter cannot be intended solely to protect an abstract 'human power' (e.g. the 'power of speech'). If they were, everyone with a language would have this power and hence everyone would have an equal right to have her own language legally protected. But the Charter specifically singles out English and French. The language rights in the Charter therefore cannot be adequately modeled on human, i.e. universal, rights.

The lesson we want to draw here is that, the legal wording notwithstanding, the rights contained in the Charter are not genuinely universal or individual. They are *particular* and *collective*. The are particular in the sense that, if they can be justified, it will not be by reference to an abstract 'human power' which merits protection. It will be on *historical* grounds; that is, it will have to be shown that these rights have been *justly acquired* in the course of events. The rights are collective in the sense that they cannot be exercised and enjoyed by individuals, acting alone.

The historical and collectivist character of these rights is most evident in the case of the minority language education rights in s. 23 of the Charter. While the legal wording vests these rights in

individuals, nevertheless, before an individual can claim them he must meet certain criteria. It is noteworthy that these criteria have nothing to do with such usual rights-conferring considerations as need, the protection of human powers, compensation for some disadvantage, or personal merit. On the contrary, the rights are granted on the basis of what, on first blush, appears to be a rather arbitrary characteristic, namely, *the fact that the individual belongs to a particular linguistic community*. Such membership is usually an accident of birth.

If these rights did indeed belong strictly to individuals, the only explanation for their apparently arbitrary distribution would be that they were a kind of 'institutional inheritance', much like an aristocratic title. Some people would be lucky enough to get them, others would not. And, as we will see below, there is, in fact, a grain of truth in this analysis; nevertheless, as it stands, it is a very unsatisfactory -- and even alarming -- defence of the language rights in s. 23. After all, could it really be fair that one's neighbour might get singled out for preferential treatment, simply because his ancestors arrived a little earlier on in the country's history than one's own?

The apparent arbitrariness results from trying to model these rights too exclusively on individual human rights, that is, conceiving of them as essentially a mechanism for the protection of individual choice. This obscures their collective social function and, along with it, their justification.

In our view, these rights are an expression of a collective commitment regarding the terms and conditions of membership in Canadian society, namely, that linguistic duality is a fundamental characteristic of it. This difference in emphasis and language is not insignificant for it affects the logic of the rights in two very important ways.

First, making explicit their suppressed reference to the existence of the linguistic community reveals that the rights are more than a way of protecting individual choice. They are also a kind of 'political institution' for maintaining the integrity and the unique character of some important aspect of Canadian society, namely, linguistic duality. As a result, they no longer look like an arbitrary *individual* inheritance but rather as a means for preserving and transmitting a central feature of Canadians' *collective* identity and history. As such, they belong to the community *as a whole*.

Second, looking at the rights from this point of view helps us understand why singling out French and English for special treatment is not a form of discrimination against those with another first language.

Immigrants usually come to their new country *as individuals* who, on gaining citizenship, enter into a social contract with the new country. Implicit in the act of *joining* the new society is an admission both that they have no historical claim to rights as a 'national minority' flowing from an earlier social contract and that they recognize the legitimacy of the terms and conditions of the existing social contract. In the Canadian case, this includes a respect for the commitment to linguistic dualism and for the measures (legitimately) agreed upon for preserving it.

So on immigrating to Canada, one lays claim to an equal right to participate in community life and to share in its benefits. One such benefit is the existence of two secure and flourishing linguistic communities. Immigrants have an equal right to enjoy the benefits of these communities. Nevertheless, it does *not* follow that they should therefore *benefit equally from it.* The fact that they are sometimes burdened because the society's official languages do not include their mother tongue is not an injustice. Unless otherwise stated, accepting such a burden was an implicit (in Canada, an explicit) condition of joining the new society.[3]

It is hard to imagine what other kind of answer could be given to the question of why French and English should be official languages, if not that historical agreements of various sorts -- 'social contracts' -- often provide a legitimate basis for the maintenance of differences in the political and legal status of subgroups within a larger political community.

If the argument so far is essentially right, then those like Trudeau, whom we will call 'staunch individualists', that oppose *on philosophical grounds* the entrenchment of 'collective rights', yet who defend bilingualism are inconsistent. The support for bilingualism betrays an implicit recognition and acceptance of the importance of some kinds of collective interests as well as of some version of the past theory. If these staunch individualists really want to continue to insist on the validity of their 'philosophical argument', then, in our view, they should bite the bullet and draw the further conclusion that there is no liberal way to justify *any* special language rights. For a staunch individualist, no individual's language should be singled out for special treatment. The interests of *each and every citizen* should be treated equally by the state.

Legal Rights vs. Interests

We now want to make explicit a distinction which weaves its way through the discussion of the last two sections but which remains ambiguous in much of the public debate over collective rights in Canada. On the one hand, there are *legal* rights -- that is, those contained in law -- and, on the other, the (individual or collective) *interests* which someone might point to in order to justify the creations of legal rights. Thus the existence of a legal right is ultimately justified by appeal to some interest that is considered important enough to the subject's well-being that it merits protection under the law.

With respect to the debate over collective rights, this justificatory relationship between interests (or 'moral' rights) and legal rights can take several forms. Consider the following possibilities:

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[3] This does *not* mean governments are absolved of any responsibility for helping immigrants adjust to their new society; nor does it mean that immigrants can make no legitimate claims with respect to their own cultural and linguistic needs. It simply means that the responsibilities of governments, and the legitimacy of claims, are based upon and limited by other considerations and commitments. Hence Canadians' commitment to multiculturalism is different in kind from that to its 'founding peoples'.

1. One may agree that there are collective interests (e.g. a minority linguistic community's 'right' to have its language protected) but insist that, at the legal level, these rights should be framed in individualist terms (i.e. by identifying individuals as the legal bearers of the entitlements). As we have just argued, in our view, this is the best way to understand the language rights in s. 23 of the Charter.

2. One could agree that there are collective interests and then insist that the collective nature of these interests should be reflected in the legal language. This seems to have been the view of the framers of the BNA Act when in s. 93(1) they expressly attributed certain educational rights to a "Class of persons".

3. One might also take the position that all interests strong enough to be called (moral) rights are individual ones, yet agree that the creation of collective legal rights is sometimes appropriate. Positive measures to overcome discrimination, such as affirmative action programs, seem to be of this sort. For example, when someone is denied a job because of their skin colour, the (moral) right that has been violated is an individual one: the right to be treated as an equal with other individuals. But a law aimed at overcoming some form of racial discrimination by establishing a quota takes a collectivist approach to solving the problem.

4. Finally, in theory, one could maintain that all 'moral rights' are individual ones and then go on to conclude that therefore all legal ones should be as well. In fact, no sensible person really maintains this position. Everyone seems to agree that there is nothing intrinsically illiberal or anti-democratic about assigning collectivities such as unions and corporate entities certain legally defined rights.

There are thus four combinations of justificatory relationships that can be generated by mixing and matching collective/individual 'moral rights' with collective/individual legal ones. But this only begins to reveal the complexity of the issues in the collective rights debate. We have not even raised the most contentious question, namely, *which* collective or individual (legal or moral) rights someone is claiming. The possibilities here are quite literally limitless.

Moreover, in deciding for or against the creation of a particular legal collective right, it may also be necessary to distinguish between various legal levels. One may, for example, accept that certain kinds of collective legal rights, say, the creation of affirmative action programs, are acceptable at the statute level, but deny that linguistic or culturally based collective (legal) rights should be entrenched in a constitution. Before closing this chapter, we want to explore just a little further some of the practical implications of the distinctions and arguments advanced so far.

Staunch Individualism and the Oakes Test

Suppose that the Courts decided to adopt the 'staunch individualists' philosophy as the basis for approaching the Charter. What would this involve? In our view, at least two conditions would have to be met. First, it would have to be possible to draw the distinction between individual and

collective interests in a relatively objective and uncontroversial way. Second, any piece of legislation designed solely to promote a collective interest that comes into conflict with an individual right would have to be rejected. Interestingly, in the period immediately following the creation of the Charter, the Court seems to have seriously considered just this approach, only to later find it wanting. We can bring out what we think are the underlying reasons by considering the Oakes test.

The Oakes test was initially supposed to result in the development of a set of objective and relatively uncontroversial criteria for limiting individual rights through s. 1. The Court has since retreated from what, in hindsight, appears to have been an overly ambitious project. Our interest here is with the first branch of the test, which evaluates legislation according to the importance of its objectives. Generally speaking, that branch of the Oakes test should please staunch individualists; in an important way it reflects the logic of their conception of rights and attempts to make it the basis of the first test for a s. 1 exemption from the Charter. Bringing out the underlying assumptions of the first branch of the test is useful in that it helps identify some of the underlying weaknesses in the staunch individualists' approach to rights.

First, let's note that, if our analysis so far is correct, a staunch individualist would probably have to conclude that the Official Languages Act fails branch one of the test. For, as we saw above, its justification rests upon an appeal to a collective linguistic/cultural interest. But for the staunch individualist, such an interest, in and of itself, cannot provide a legitimate reason for limiting basic rights. Indeed, in his view, it is precisely this sort of collectivist infringement on individual liberty that Charter rights are supposed to protect. Hence, insofar as official bilingualism infringes on the right to equal treatment (and perhaps freedom of expression) of those whose first language is not English or French, it should be struck down. Indeed, one might even argue that it infringes the right to equal treatment of unilingual English- or French-speaking Canadians, say, because they would be disadvantaged with respect to hiring practices in the federal bureaucracy.

The fact the Official Languages Act might well fail to pass branch one of the Oakes test, we think is already enough to show that there is something seriously wrong with test and, more importantly, with the philosophical conception of rights underlying it. But there is yet a deeper problem.

Branch one of the test, like the staunch individualist's position, further assumes that it is possible to sort individual from collective interests in an objective and relatively uncontroversial way. For before one can identify the objectives of a piece of legislation, one must know what interests are at stake. But in many cases *this 'sorting' is just what cannot be done.* Language, as we have already argued, is a case in point. Everyone agrees that some questions about language are questions about the scope of our individual right of freedom of expression. Language therefore must have individual aspects. But, as we have already shown, language also has collective aspects. The problem is that there is often no uncontroversial way of deciding which ones are at issue.

In real life, the individual and collective aspects of language overlap and intersect at a myriad of points. The creation of legal minority language rights, for example, is usually a response to a complex historical situation: changing demographics; economic and technological evolution; new social attitudes; political instability; etc. In short, there is often a welter of social forces at work.

These forces affect the interests of both the group and its members in manifold ways. There is often -- usually -- no uncontroversial way of deciding exactly which ones are at stake, or even where one interest begins and another leaves off.

Consider the education laws in Quebec. Are these designed to protect the (linguistic) community or the individual? Opponents will say the community (they are 'collective' rights). But many defenders will say that, while there is a sense in which they are aimed at protecting the community, their ultimate purpose is to *protect individual citizens' need for a secure linguistic community* and that this security is a condition of their individual well-being. Who is right? Of course, eveyone may have his own *opinion* on the matter. But, as far as the test is concerned, that is not what we need. Indeed, the purpose of the test is precisely to rise above 'mere opinion'. For that, however, we need *objective and relatively uncontroversial* criteria. Unfortunaely, that is precisely what the Court has been unable to produce.

Over the last decade the Court has begun to treat branch one of the Oakes test as almost *pro forma*. It is not hard to guess why. The Court, we suspect, has begun to realize that the Oakes test is far too ambitious: it is impossible to develop objective criteria for determining when the object of a piece of legislation is pressing enough to limit individual freedom. But it is crucial to see here that, if this is so, it is not just because Canadians have conflicting views about how to weigh basic values, it is also because they have conflicting views about what interests a given piece of legislation serves. Such, as we just saw, is the case with Quebec's education laws. But if one cannot define the legislation's object without first deciding what interests it serves, one cannot apply branch one of the test.

Some of the more recent decisions, such as *Ford*, suggest that the Court is trying to come to terms with the fact that the interests which legislation promotes are sometimes ambiguous in the sense that they have 'collective aspects' (i.e. they cannot be conceived independently of one's membership in a community). On the staunch individualist's assumptions, such legislation may appear as an unjustified 'collectivist' assault on individual freedom. Hence, in this view, it ought to be struck down under branch one of Oakes. But once one realizes that there are already many cases where we quite legitimately weigh these sorts of interests against the more clearly individual ones (e.g. the creation of special language rights), the same piece of legislation may begin to appear as a reasonable attempt to balance various competing interests in a way that will promote the over-all well-being of the individuals in the community.

It's worth noting that the logic of this approach to some 'collective rights' is similar to that by which many staunch individualists themselves justify the provision of certain services (e.g. public education) as a consequence of our commitment to equality. Most Canadians think governments are justified in taxing individuals (hence limiting their individual property rights) in order to provide a basic education for others who are less fortunate. At one level, the interest which is at stake could be called collective for it aims at improving the individual's ability to function in a social context. But the interest is also individual: most Canadians believe that public education promotes the well-being of individual citizens.

If we are sometimes justified in limiting individual freedom in order to promote the collective level of education, health, or some other general good, why not language? Given its overwhelming importance in the lives of individual citizens, excluding it from consideration seems simply arbitrary.

Conclusion

In conclusion, staunch individualists' attempts to provide a knock down argument against 'collective rights' by contrasting them with individual ones seems to us misguided. It ignores the complexity of the issues and glosses over the distinction between the nature of a legal right and the interest which justifies it.

In our view, legal rights are a *means* to the *end* of protecting some interest. And there are lots of different kinds of interests. Some are individual; some are collective. Some are important enough to merit the creation of legal rights to protect and promote them. Many are not. Moreover, when legal rights are in order, the most effective way of protecting and promoting the interest at stake, whether individual or collective, will vary with time and place. Sometimes the best strategy will be to create some collective legal rights; sometimes some individual legal rights; sometimes a combination of both; and sometimes none. Judgement is called for. All that can be said in advance is that, over the long-term, legislators should aim at 'preserving a balance' between the promotion of those interests which have a collective aspect and those which are more unambiguously individual.

It is time for the collective rights debate in Canada to move forward. Giving due consideration and weight to the *collective aspects* of certain interests at both the legislative and judicial levels would be a major step. A further step would involve a conscious rethinking of the role of s. 1 as a tool for achieving a better balance between these interests and those protected by other parts of the Charter. Such a project would begin with two basic assumptions:

- it is often legitimate to weight collective interests against individual ones;
- determining whether a piece of legislation serves a collective or individual interest often depends on how one chooses to describe a situation.

There is no single, authoritative and permanant way of drawing the line between the individual and the collective; it shifts with time and circumstances. To approach the issue of evaluating rights claims as though this line could be drawn, once for all, is the myth of staunch individualists.

ıld be interpreted in that light. While the 1987 ndments (of which the present s. 45 forms a) did not eliminate all appeals as of right, they further enhance the capacity of this Court to ıage its docket by conferring jurisdiction to de leave applications on the basis of written erial. Had Parliament intended to limit this ortant newly-conferred jurisdiction by except- applications for leave in certain criminal cases, ould have said so explicitly. This Court has ntly affirmed the desirability of "an expansive ling" of the provisions relating to leave to eal "the better to enable this Court to dis- rge its role at the apex of the Canadian judicial em as the court of last resort for all Canadi- ": *Argentina v. Mellino*, [1987] 1 S.C.R. 536). 547, quoting *R. v. Gardiner*, *supra*, at p. 404. : result of the foregoing analysis is entirely sistent with this approach and in keeping with important objective of enhancing this Court's acity to control and manage its docket in a nner consistent with its role at the apex of the nadian judicial hierarchy.

Conclusion

For these reasons, we conclude that the appli- nt's claim to an oral hearing as of right and llenge to the Court's jurisdiction to decide his plication for leave to appeal without according n an oral hearing must fail.

Application dismissed.

Solicitors for the applicant Morrissette: Walsh, icay and Co., Winnipeg.

Solicitors for the applicant Chaulk: Wolch, nx, Tapper, Scurfield, Winnipeg.

Solicitor for the respondent: The Department of e Attorney General, Winnipeg.

Solicitor for the intervener: John C. Tait, 'tawa.

législateur a choisi d'accorder à cette Cour le pouvoir de contrôler son propre rôle et l'art. 45, dans sa forme actuelle, doit être interprété dans ce contexte. Les modifications de 1987 (dont le présent art. 45 fait partie) n'ont pas éliminé tous les appels de plein droit, mais elles ont encore accru la capacité de cette Cour de gérer sa charge de travail en lui accordant la compétence de trancher les demandes d'autorisation sur le fondement de conclusions écrites. S'il avait voulu limiter cette importante compétence nouvelle en en retranchant les demandes d'autorisation dans certaines affaires criminelles, le législateur l'aurait dit explicitement. Cette Cour a récemment affirmé qu'il était souhaitable de donner aux dispositions relatives à l'autorisation de pourvoi «une interprétation plus libérale qui permet à cette Cour de remplir son rôle au sommet du système judiciaire canadien en tant que cour de dernier ressort pour tous les Canadiens»: *Argentine c. Mellino*, [1987] 1 R.C.S. 536, à la p. 547, citant *R. c. Gardiner*, précité, à la p. 404. L'analyse qui précède offre un résultat tout à fait compatible avec cette conception et en accord avec l'objectif important d'accroître la capacité de cette Cour de contrôler et de gérer sa charge de travail d'une manière compatible avec son rôle au sommet de la hiérarchie judiciaire canadienne.

V Conclusion

Pour ces motifs, nous concluons que la prétention du requérant à une audience de plein droit et la contestation de la compétence de la Cour de trancher sa demande d'autorisation de pourvoi sans lui accorder une audience doivent échouer.

Requête rejetée.

Procureurs du requérant Morrissette: Walsh, Micay and Co., Winnipeg.

Procureurs du requérant Chaulk: Wolch, Pinx, Tapper, Scurfield, Winnipeg.

Procureur de l'intimée: Le ministère du Procureur général, Winnipeg.

Procureur de l'intervenant: John C. Tait, Ottawa.

The Protestant School Board of Greater Montreal, the Greater Quebec School Board, the Lakeshore School Board and the Quebec Association of Protestant School Boards *Appellants*

v.

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario and the Attorney General of Newfoundland *Interveners*

INDEXED AS: GREATER MONTREAL PROTESTANT SCHOOL BOARD *v.* QUEBEC (ATTORNEY GENERAL)

File No.: 20415.

1988: June 7; 1989: March 16.

Present: Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain* and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Distribution of legislative powers — Education — Rights and privileges respecting denominational schools — Regulations establishing a uniform curriculum for all schools in Quebec — Special allowance made for moral and religious instruction in schools recognized as Catholic or Protestant — Whether provincial legislation and the regulations adopted thereunder ultra vires the Quebec legislature — Constitution Act, 1867, s. 93(1), (2) — Education Act, R.S.Q., c. I-14, s. 16(7) — Regulation respecting the basis of elementary school and preschool organization, (1981) 115 O.G. II 1213 — Regulation respecting the basis for secondary school organization, (1981) 115 O.G. II 1223.

Constitutional law — Distribution of legislative powers — Education — Powers, privileges or duties conferred by law on the separate schools and school trustees of Upper Canada at the time of Union extended by s. 93(2) of the Constitution Act, 1867 to the dissentient schools of Quebec — Whether all those powers, privileges or duties enjoy the constitutional protection of s. 93(1) — Constitution Act, 1867, s. 93(1), (2).

* Le Dain J. took no part in the judgment.

La Commission des écoles protestantes du Grand Montréal, la Commission scolaire Greater Québec, la Commission scolaire Lakeshore et l'Association des commissions scolaires protestantes du Québec *Appelantes*

c.

Le procureur général du Québec *Intimé*

et

Le procureur général de l'Ontario et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: GRAND MONTRÉAL, COMMISSION DES ÉCOLES PROTESTANTES *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

N° du greffe: 20415.

1988: 7 juin; 1989: 16 mars.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Lamer, Wilson, Le Dain* et La Forest.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences législatives — Éducation — Droits et privilèges relatifs aux écoles confessionnelles — Règlements établissant un programme d'études uniforme pour toutes les écoles du Québec — Dispositions spéciales prévues pour l'enseignement religieux et moral dans les écoles reconnues comme catholiques ou protestantes — La loi provinciale et ses règlements d'application sont-ils ultra vires de la législature du Québec? — Loi constitutionnelle de 1867, art. 93(1), (2) — Loi sur l'instruction publique, L.R.Q., chap. I-14, art. 16(7) — Règlement concernant le régime pédagogique du primaire et l'éducation préscolaire, (1981) 115 G.O. II 1733 — Règlement concernant le régime pédagogique du secondaire, (1981) 115 G.O. II 1743.

Droit constitutionnel — Partage des compétences législatives — Éducation — L'article 93(2) de la Loi constitutionnelle de 1867 étend aux écoles dissidentes du Québec les pouvoirs, privilèges ou devoirs conférés par la loi aux écoles séparées et aux syndics d'écoles du Haut-Canada lors de l'Union — Tous ces pouvoirs, privilèges ou devoirs bénéficient-ils de la protection constitutionnelle de l'art. 93(1)? — Loi constitutionnelle de 1867, art. 93(1), (2).

* Le juge Le Dain n'a pas pris part au jugement.

The Government of Quebec adopted, under s. 16(7) of e *Education Act*, two regulations which purported to tablish a uniform curriculum for all non-denominaonal subjects for all schools in Quebec. The governnt made special allowance in its uniform curriculum r moral and religious instruction in schools recognized Catholic or Protestant. The content of this component a pupil's curriculum was not determined by the inister of Education under the impugned regulations t by the Catholic or Protestant committee of the nseil supérieur de l'éducation in regulations made by se bodies. Furthermore, the school board was not thout input for the curricula other than religious and ral instruction. It was charged with adapting the vince-wide regime to local needs and adding to the scribed curricula when necessary, with approval. The ool board also participated in the evaluation of the rricula.

Before the Superior Court, the appellants sought a claration that s. 16(7) of the *Education Act* and the ulations adopted thereunder were *ultra vires* as being onsistent with s. 93(1) of the *Constitution Act, 1867*. e Court dismissed appellants' motion and the judgnt was upheld by the Court of Appeal. In this Court, appellants argued that s. 16(7) of the *Education Act* d the regulations were *ultra vires* the province cause they violated a right protected under s. 93(1) abling the Protestant minority in Quebec to manage d control its own schools and to regulate, subject to vincial rules of general application, the course of dy to be followed in those schools. As an alternative, y argued that s. 93(2) of the *Constitution Act, 1867* ended the power or privilege to determine the exact ent of curriculum enjoyed by trustees in Upper nada to the Quebec Protestants.

Held: The appeal should be dismissed.

Per Beetz, McIntyre, Lamer and La Forest JJ.: Under tion 93(1) of the *Constitution Act, 1867*, the province exclusive jurisdiction to legislate with respect to cation, but it cannot prejudicially affect a right or vilege affecting denominational schools enjoyed by a rticular class of persons by law in effect at the time of Union. Section 93(1) protects not only the denomiional aspects of denominational schools but also the n-denominational aspects which are necessary to give ect to denominational guarantees. The fact that the

Le gouvernement du Québec a adopté, en vertu du par. 16(7) de la *Loi sur l'instruction publique*, deux règlements ayant pour effet d'établir un programme d'études uniforme pour toutes les matières non confessionnelles dans toutes les écoles du Québec. Le gouvernement a spécialement prévu dans son programme d'études uniforme un enseignement moral et religieux dans les écoles reconnues comme catholiques ou protestantes. Le contenu de cet élément du programme d'études d'un élève n'était pas déterminé par le ministre de l'Éducation en vertu des règlements attaqués, mais par le comité catholique ou le comité protestant du Conseil supérieur de l'éducation dans des règlements faits par ces comités. Par ailleurs, la commission scolaire prend part à l'élaboration des programmes d'études dans d'autres domaines que l'enseignement religieux et moral. Il lui incombe d'adapter aux besoins locaux le régime établi pour l'ensemble de la province et de faire des ajouts, si besoin est et avec l'approbation nécessaire, aux programmes d'études prescrits. De plus, la commission scolaire participe à l'évaluation des programmes d'études.

En Cour supérieure, les appelantes ont cherché à faire déclarer *ultra vires*, pour cause d'incompatibilité avec le par. 93(1) de la *Loi constitutionnelle de 1867*, le par. 16(7) de la *Loi sur l'instruction publique* et ses règlements d'application. La Cour a rejeté la requête des appelantes et la Cour d'appel a maintenu ce jugement. En cette Cour, les appelantes ont soutenu que le par. 16(7) de la *Loi sur l'instruction publique* et ses règlements d'application excèdent la compétence de la province parce qu'ils violent un droit protégé par le par. 93(1), savoir le droit de la minorité protestante au Québec d'administrer et de diriger ses propres écoles et de régler, sous réserve de règles provinciales d'application générale, le programme d'études à suivre dans ces écoles. Elles ont fait valoir subsidiairement que le par. 93(2) de la *Loi constitutionnelle de 1867* étend aux protestants du Québec le droit ou le privilège conféré aux syndics du Haut-Canada d'établir le contenu exact des programmes d'études.

Arrêt: Le pourvoi est rejeté.

Les juges Beetz, McIntyre, Lamer et La Forest: Aux termes du par. 93(1) de la *Loi constitutionnelle de 1867*, la province a compétence exclusive pour légiférer en matière d'éducation, mais elle ne peut préjudicier à un droit ou à un privilège relatif aux écoles confessionnelles, que conférait à une classe particulière de personnes une loi en vigueur lors de l'Union. Le paragraphe 93(1) protège non seulement les aspects confessionnels des écoles confessionnelles mais aussi les aspects non confessionnels qui sont nécessaires pour rendre efficaces les

guarantee is constitutionally entrenched is relevant to its interpretation. As a constitutional text, s. 93(1) may deserve a "purposive" interpretation but, in so doing, courts must not improperly amplify the provision's purpose. While it may be rooted in notions of tolerance and diversity, the exception in s. 93(1) is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory bench-mark should not be construed as a *Charter* human right or freedom.

In this case, the impugned legislation and regulations are *intra vires* the Quebec legislature. The Minister of Education successfully crafted regulations falling within the parameters of the provincial authority in relation to education and respecting the constitutional guarantees in s. 93(1). Under the scheme established by the regulations, the Minister has a broad power to establish a pedagogical regime for the preschools, elementary and secondary schools in the province. However, in schools recognized as Catholic or Protestant, it is the regulations of the Catholic or Protestant Committee of the Conseil supérieur de l'éducation which govern religious and moral instruction. The regulations under attack here do not purport to set the content of moral and religious instruction in Protestant schools. They go no further than to include such instruction among the courses deemed compulsory in all schools. By carving out the denominational content of curriculum and leaving it in the hands of the Protestant Committee of the Conseil, the province has conformed to the law in effect at the time of the Union which gave the "Curé, Priest or officiating Minister" the exclusive right of selecting the books having reference to religion and morals in denominational schools, and thus the authority to set the content of curricula pertaining to "religion and morals". This exception to the province's plenary power in relation to education — constitutionally entrenched by s. 93(1) — has not been violated.

The constitutional protection over non-denominational aspects of denominational schools necessary to give effect to denominational guarantees has not been violated by the regulations. The power which the school commissioners and trustees had in 1867 to "regulate the course of study" to be followed in denominational schools has been entrenched only in so far as this limited

garanties confessionnelles. Le fait qu'il s'agit d'une garantie constitutionnelle est un facteur pertinent pour son interprétation. En tant que texte constitutionnel, le par. 93(1) peut mériter d'être interprété «en fonction de son objet», mais les tribunaux doivent alors se garder de donner une portée indue à cet objet. Quoiqu'elle puisse avoir des racines dans les notions de tolérance et de diversité, l'exception énoncée au par. 93(1) ne constitue pas une affirmation générale de la liberté de religion ou de la liberté de conscience. Le droit constitutionnel reconnu à certaines classes de personnes, dans une province, d'avoir des écoles confessionnelles financées par l'État, selon une norme légale fixe, ne doit pas être interprété comme un droit ou une liberté de la personne garantis par la *Charte*.

En l'espèce la Loi et les règlements attaqués sont *intra vires* de la législature du Québec. Le ministre de l'Éducation a réussi à façonner des règlements qui restent à l'intérieur des limites de la compétence provinciale en matière d'éducation et respectent les garanties constitutionnelles énoncées au par. 93(1). Selon le système établi par les règlements, le ministre a le pouvoir général de créer un régime pédagogique pour l'éducation préscolaire et les écoles primaires et secondaires de la province. Toutefois, dans le cas des écoles reconnues comme catholiques ou protestantes, ce sont les règlements du comité catholique ou du comité protestant du Conseil supérieur de l'éducation qui régissent l'enseignement religieux et moral. Les règlements contestés dans la présente affaire n'ont pas pour effet de fixer le contenu de l'enseignement moral et religieux dans les écoles protestantes. Ils se bornent à inclure cet enseignement parmi les matières considérées comme obligatoires dans toutes les écoles. En ne touchant pas au contenu confessionnel du programme d'études, qui est laissé au comité protestant du Conseil, la province s'est conformée à la loi en vigueur lors de l'Union, qui donnait au «curé, prêtre ou ministre desservant» le droit exclusif de faire le choix des livres ayant rapport à la religion et à la morale pour les écoles confessionnelles et qui leur conférait par le fait même le pouvoir de déterminer le contenu des programmes d'études portant sur la «religion» et la «morale». Cette exception au pouvoir absolu de la province en matière d'éducation, exception à laquelle le par. 93(1) a donné valeur constitutionnelle, a été respectée.

La protection constitutionnelle des aspects non confessionnels des écoles confessionnelles qui sont nécessaires pour rendre efficaces les garanties confessionnelles est également assurée par les règlements. Le pouvoir de «régler le cours d'études» dans les écoles confessionnelles, qu'avaient en 1867 les commissaires et les syndics d'écoles, n'est constitutionnalisé que dans la mesure où

regulatory power is necessary to give effect to denominational guarantees. The impugned legislation and regulations meet the constitutional requirement by granting to the school boards the power to adapt prescribed curricula to local needs and to create additional curricula, subject to approval, where they deem it necessary and to participate in the evaluation of the curricula generally. The regulations therefore allow the school boards to exercise their 1867 power over the non-denominational aspects or denominational schools necessary to give effect to denominational guarantees.

Appellants' position that Protestant educational philosophy extends constitutional protection beyond what is necessary to give effect to denominational guarantees is unacceptable. The appellants are attacking non-denominational aspects of the curriculum which are not necessary to give effect to denominational guarantees. By associating the content of the constitutional guarantee with a Protestant educational philosophy founded upon pluralism, the appellants would give to the Protestant community a right or privilege to determine the curriculum used in denominational schools which is completely incompatible with the exercise of the general regulatory power of the province over matters of curriculum falling outside religious and moral education.

Finally, appellants' alternative contention based on s. 93(2) of the *Constitution Act, 1867* must be rejected. Section 93(2) extends all powers, privileges and duties (but not constitutional powers and privileges) conferred and imposed on the separate schools in Upper Canada at the time of Union to the dissentient schools in Quebec. But section 93(2) does not itself entrench rights or privileges which existed in either province by law in 1867. It is section 93(1), and not s. 93(2) on its own, which raises "Right[s] or Privilege[s] with respect to Denominational Schools" to the status of constitutional norms. Therefore, where, by the operation of s. 93(2), a power or privilege which existed at the time of Union in Upper Canada is "extended" to dissentient Quebec Protestants or Catholics, the inquiry as to what greater constitutional powers and privileges dissentient Quebec Protestants and Catholics may enjoy in their own province does not end there. The Court is still required, not by s. 93(2) but by s. 93(1), to apply s. 93(1) to determine whether the power or privilege extended from

ce pouvoir de réglementation limité est nécessaire pour rendre efficaces les garanties confessionnelles. La Loi et les règlements attaqués répondent à l'exigence constitutionnelle en donnant aux commissions scolaires le pouvoir d'adapter aux besoins locaux les programmes d'études prescrits, de créer, sous réserve qu'ils soient approuvés, d'autres programmes d'études lorsqu'elles le jugent nécessaire et de participer à l'évaluation des programmes d'études en général. Les règlements permettent donc aux commissions scolaires d'exercer le pouvoir qu'elles détenaient en 1867 sur les aspects non confessionnels des écoles confessionnelles qui sont nécessaires pour rendre efficaces les garanties confessionnelles.

On ne peut retenir la proposition des appelantes suivant laquelle la philosophie protestante en matière d'éducation implique une protection constitutionnelle dépassant ce qui est nécessaire pour rendre efficaces les garanties confessionnelles. Les appelantes attaquent des aspects non confessionnels du programme d'études qui ne sont pas nécessaires pour rendre efficaces les garanties confessionnelles. En associant le contenu de la garantie constitutionnelle à une philosophie protestante en matière d'éducation qui est fondée sur le pluralisme, les appelantes accorderaient à la collectivité protestante un droit ou un privilège de régler le programme d'études à suivre dans les écoles confessionnelles qui est tout à fait incompatible avec l'exercice par la province de son pouvoir général de réglementation à l'égard des questions touchant le programme d'études qui n'appartiennent pas au domaine de l'enseignement religieux et moral.

Finalement, l'argument subsidiaire des appelantes fondé sur le par. 93(2) de la *Loi constitutionnelle de 1867* doit être rejeté. Le paragraphe 93(2) étend aux écoles dissidentes du Québec tous les pouvoirs, privilèges et devoirs (mais non des pouvoirs et privilèges garantis par la Constitution) conférés ou imposés aux écoles séparées du Haut-Canada au moment de l'Union. Mais le par. 93(2) lui-même ne donne pas valeur constitutionnelle à des droits ou des privilèges conférés par la loi qui existaient dans l'une ou l'autre province en 1867. C'est le par. 93(1), et non le par. 93(2) pris isolément, qui érige en normes constitutionnelles les «droit[s] ou privilège[s] [...] relativement aux écoles confessionnelles». Par conséquent si, en application du par. 93(2), un pouvoir ou un privilège existant au moment de l'Union dans le Haut-Canada est «étendu» aux protestants ou aux catholiques dissidents du Québec, cela ne permet pas de déterminer complètement quels sont les droits et privilèges constitutionnels additionnels dont disposent les protestants et catholiques dissidents du Québec dans

Upper Canada to Quebec is "with respect to Denominational Schools" and whether that power or privilege is prejudicially affected by the legislation attacked in any given case. Accepting in this case that in 1867 in Upper Canada the exact content of a particular school's curriculum was, in the absence of specific regulation by the Council for Public Instruction of that province, to be by law left to the discretion of the separate school trustees, this extended power or privilege did not result in a wider constitutional protection for the appellants. The power to set curriculum extended to Quebec Protestants has, by the application of s. 93(1), only been entrenched in so far as it is necessary to give effect to the denominational guarantee in Quebec.

Per Dickson C.J. and Wilson J.: The Court is required under s. 93(2) of the *Constitution Act, 1867* to measure the protection afforded by law to separate schools in Ontario in 1867 against the protection afforded by law to dissentient schools in Quebec in 1867 and if, as a result of that comparison, it is found that the powers, privileges and duties of separate schools in Ontario in 1867 were greater, those additional powers, privileges or duties are extended by s. 93(2) to the dissentient schools in Quebec. Such additional powers, privileges or duties enjoy in general the constitutional protection of s. 93(1). Section 93(1) protection is not limited to powers, privileges or duties which relate specifically to the denominational aspects of such schools.

In the present case, however, the powers of the trustees of the separate schools in Ontario over the curriculum in their schools, which were extended by s. 93(2) to the dissentient schools in Quebec, were not constitutionally protected by s. 93(1) because they were subject in Ontario to the overriding regulatory authority of the Council of Public Instruction representing the province. It follows that, as far as curriculum is concerned, those powers, privileges and duties must be subject to that same regulatory authority on the part of the province of Quebec. The overriding regulatory authority of the province of Ontario, while it existed in law, could not be used to defeat the very purpose for which the separate schools in Ontario were established, namely the protection of Roman Catholic minority educational rights. Similarly, the province of Quebec cannot regulate the curriculum in the denominational schools in

leur propre province. La Cour est encore obligée, non par le par. 93(2) mais par le par. 93(1), d'appliquer le par. 93(1) afin de déterminer si le pouvoir ou privilège qui existait dans le Haut-Canada et que l'on a étendu au Québec est relatif aux écoles confessionnelles et si la loi attaquée dans une cause donnée préjudicie à ce pouvoir ou à ce privilège. Si l'on tient pour acquis en l'espèce qu'en 1867 dans le Haut-Canada, en l'absence d'un règlement exprès du Conseil d'instruction publique de cette province, la loi laissait aux syndics d'écoles séparées le soin de fixer le contenu précis du programme d'études d'une école particulière, le pouvoir ou le privilège ainsi étendu n'a pas eu pour effet de faire bénéficier les appelantes d'une plus grande protection constitutionnelle. Le pouvoir d'établir le programme d'études qui a été étendu aux protestants du Québec n'est constitutionnalisé par l'application du par. 93(1) qu'autant que cela est nécessaire pour rendre efficace la garantie confessionnelle au Québec.

Le juge en chef Dickson et le juge Wilson: Le paragraphe 93(2) de la *Loi constitutionnelle de 1867* oblige la Cour à comparer la protection accordée par la loi aux écoles séparées de l'Ontario en 1867 et celle accordée par la loi aux écoles dissidentes du Québec en la même année. Si cette comparaison révèle que les pouvoirs, privilèges et devoirs des écoles séparées de l'Ontario en 1867 étaient plus grands, les pouvoirs, privilèges ou devoirs supplémentaires sont étendus aux écoles dissidentes du Québec par l'effet du par. 93(2). Ces pouvoirs, privilèges ou devoirs supplémentaires bénéficient en général de la protection constitutionnelle du par. 93(1). La protection du par. 93(1) ne se limite pas aux pouvoirs, aux privilèges ou aux devoirs qui se rapportent particulièrement aux aspects confessionnels de ces écoles.

En l'espèce toutefois, les pouvoirs des syndics des écoles séparées de l'Ontario sur le programme d'études dans leurs écoles, que le par. 93(2) a étendus aux écoles dissidentes du Québec, ne bénéficiaient pas de la protection du par. 93(1) de la Constitution parce qu'ils étaient soumis au pouvoir de réglementation prépondérant du Conseil d'instruction publique, qui représentait la province. Il s'ensuit que, en ce qui concerne le programme d'études, ces pouvoirs, privilèges et devoirs doivent être assujettis au même pouvoir de réglementation, détenu cette fois-ci par la province de Québec. Bien que la loi conférât à la province de l'Ontario un pouvoir de réglementation prépondérant, on ne pouvait s'en servir pour contrecarrer le dessein même dans lequel les écoles séparées avaient été établies, savoir la protection des droits de la minorité catholique en matière d'éducation. De même, la province de Québec ne saurait réglementer

Quebec so as to undermine their distinctively denominational character. Therefore, even if the purpose of s. 93(2) was to enhance the constitutional protection afforded to dissentient schools in Quebec in order to equate their position with that of separate schools in Ontario, it would still be open to the legislature of Quebec to regulate the powers of dissentient school boards over curriculum, provided such regulation did not prejudicially affect the denominational character of such schools. Here, the impugned legislation and regulations did not prejudicially affect the denominational character of the denominational schools in Quebec. It was accordingly *intra vires* the Quebec legislature.

Cases Cited

By Beetz J.

Referred to: *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Hirsch v. Protestant Board of School Commissioners of Montreal*, [1928] A.C. 200; *Attorney General of Quebec v. Greater Hull School Board*, [1984] 2 S.C.R. 575; *Quebec Association of Protestant School Boards v. Attorney General of Quebec*, [1985] C.S. 872; *City of Winnipeg v. Barrett*, [1892] A.C. 445.

By Wilson J.

Referred to: *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

Statutes and Regulations Cited

Act for the further improvement of Grammar Schools in Upper Canada, S. Prov. C. 1865, 29 Vict., c. 23.
Act respecting Common Schools in Upper Canada, C.S.U.C. 1859, c. 64.
Act respecting Provincial Aid for Superior Education, — and Normal and Common Schools, C.S.L.C. 1861, c. 15, ss. 21(3), (4), 65(2).
Act respecting Separate Schools, C.S.U.C. 1859, c. 65.
Act respecting the Conseil supérieur de l'éducation, R.S.Q., c. C-60, ss. 2, 9(*a*), 17, 22, 30 [am. 1979, c. 23, s. 27].
Act to again amend the Education Act, S.Q. 1979, c. 80, s. 3.
Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools, S. Prov. C. 1863, 26 Vict., c. 5.
Canadian Charter of Rights and Freedoms, s. 23.
Code of Civil Procedure, R.S.Q., c. C-25, s. 453.
Constitution Act, 1867, s. 93.
Education Act, R.S.Q., c. I-14, s. 16(7) [ad. 1979, c. 80, s. 3].
Regulation respecting the basis for secondary school organization, (1981) 115 *O.G.* II 1223.
Regulation respecting the basis of elementary school and preschool organization, (1981) 115 *O.G.* II 1213.

le programme d'études des écoles confessionnelles du Québec d'une manière qui nuirait à leur caractère confessionnel distinctif. Donc, même si le par. 93(2) avait pour objet d'augmenter la protection constitutionnelle des écoles dissidentes du Québec afin de les mettre sur un pied d'égalité avec les écoles séparées de l'Ontario, le législateur québécois aurait encore compétence pour réglementer les pouvoirs des commissions d'écoles dissidentes sur le programme d'études, pourvu que cette réglementation ne préjudiciât pas au caractère confessionnel de ces écoles. En l'espèce, la Loi et les règlements attaqués ne préjudicient pas au caractère confessionnel des écoles confessionnelles du Québec. Ils sont donc *intra vires* de la législature du Québec.

Jurisprudence

Citée par le juge Beetz

Arrêts mentionnés: *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148; *Hirsch v. Protestant Board of School Commissioners of Montreal*, [1928] A.C. 200; *Procureur général du Québec c. Greater Hull School Board*, [1984] 2 R.C.S. 575; *Quebec Association of Protestant School Boards c. Attorney General of Quebec*, [1985] C.S. 872; *City of Winnipeg v. Barrett*, [1892] A.C. 445.

Citée par le juge Wilson

Arrêt mentionné: *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148.

Lois et règlements cités

Acte concernant l'allocation provinciale en faveur de l'éducation supérieure, — et les écoles normales et communes, S.R.B.C. 1861, chap. 15, art. 21(3), (4), 65(2).
Acte pour perfectionner davantage les écoles de grammaire dans le Haut-Canada, S. Prov. C. 1865, 29 Vict., chap. 23.
Acte pour réintégrer les catholiques romains du Haut-Canada dans l'exercice de certains droits concernant les écoles séparées, S. Prov. C. 1863, 26 Vict., chap. 5.
Act respecting Common Schools in Upper Canada, C.S.U.C. 1859, chap. 64.
Act respecting Separate Schools, C.S.U.C. 1859, chap. 65.
Charte canadienne des droits et libertés, art. 23.
Code de procédure civile, L.R.Q., chap. C-25, art. 453.
Loi constitutionnelle de 1867, art. 93.
Loi modifiant de nouveau la Loi sur l'instruction publique, L.Q. 1979, chap. 80, art. 3.
Loi sur le Conseil supérieur de l'éducation, L.R.Q., chap. C-60, art. 2, 9*a*), 17, 22, 30 [mod. 1979, chap. 23, art. 27].
Loi sur l'instruction publique, L.R.Q., chap. I-14, art. 16(7) [aj. 1979, chap. 80, art. 3].
Règlement concernant le régime pédagogique du primaire et de l'éducation préscolaire, (1981) 115 *G.O.* II 1733.
Règlement concernant le régime pédagogique du secondaire, (1981) 115 *G.O.* II 1743.

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Carignan, Pierre. "La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d'éducation" (1986), 20 *R.J.T.* 375.
Chevrette, François et Herbert Marx et André Tremblay. *Les problèmes constitutionnels posés par la restructuration scolaire de l'île de Montréal*. Québec: Ministère de l'Éducation, 1972.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

APPEAL from a judgment of the Quebec Court of Appeal, [1987] R.J.Q. 1028, 6 Q.A.C. 237, 41 D.L.R. (4th) 229, affirming a judgment of the Superior Court, [1986] R.J.Q. 48. Appeal dismissed.

Colin K. Irving and *Allan R. Hilton*, for the appellants.

Jean-Yves Bernard and *Luc Leblanc*, for the respondent.

John Cavarzan, Q.C., for the intervener the Attorney General for Ontario.

Alphonsus E. Faour, for the intervener the Attorney General of Newfoundland.

The reasons of Dickson C.J. and Wilson J. were delivered by

WILSON J.—I have had the benefit of reading the judgment of my colleague, Justice Beetz, in this appeal and I am in complete agreement with him that the denominational content of education in denominational schools in Quebec is constitutionally protected by s. 93(1) of the *Constitution Act, 1867*. I agree with him also that the non-denominational content of education in denominational schools in Quebec is constitutionally protected by s. 93(1) to the extent the protection of such content is necessary to maintain the denominational character of those schools.

Doctrine citée

Carignan, Pierre. «La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d'éducation» (1986), 20 *R.J.T.* 375.
Chevrette, François et Herbert Marx et André Tremblay. *Les problèmes constitutionnels posés par la restructuration scolaire de l'île de Montréal*. Québec: Ministère de l'Éducation, 1972.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

POURVOI contre un arrêt de la Cour d'appel du Québec, [1987] R.J.Q. 1028, 6 Q.A.C. 237, 41 D.L.R. (4th) 229, qui a confirmé un jugement de la Cour supérieure, [1986] R.J.Q. 48. Pourvoi rejeté.

Colin K. Irving et *Allan R. Hilton*, pour les appelantes.

Jean-Yves Bernard et *Luc Leblanc*, pour l'intimé.

John Cavarzan, c.r., pour l'intervenant le procureur général de l'Ontario.

Alphonsus E. Faour, pour l'intervenant le procureur général de Terre-Neuve.

Version française des motifs du juge en chef Dickson et du juge Wilson rendus par

LE JUGE WILSON—J'ai eu l'avantage de lire les motifs rédigés par mon collègue le juge Beetz dans le présent pourvoi et je suis entièrement d'accord avec lui que le contenu confessionnel de l'éducation dans les écoles confessionnelles du Québec bénéficie de la protection constitutionnelle du par. 93(1) de la *Loi constitutionnelle de 1867*. Je partage également son avis que le contenu non confessionnel de l'éducation dans les écoles confessionnelles du Québec est protégé par le par. 93(1) de la Constitution dans la mesure où cette protection est nécessaire pour maintenir le caractère confessionnel de ces écoles.

laws in regard of education subject only to the provisions of the section; and it is difficult to see how the Legislature can effectively exercise the power entrusted to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise.

As Viscount Cave notes, this basic provincial power is subject to limitations. Section 93(1) provides that nothing in any provincial law adopted pursuant to the basic legislative power over education "shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union". The outcome of this appeal depends on the content which is to be given to this limitation.

Much was made in argument as to the method of interpretation which is appropriate to s. 93(1) of the *Constitution Act, 1867*. Indeed although all three judges in the Court of Appeal agreed that the imposition by the province of the pedagogical regimes set forth in the Regulations did not prejudicially affect any right or privilege with respect to denominational schools guaranteed by s. 93(1), they disagreed as to the appropriate rule of interpretation which gives content to these protected rights and privileges. Nichols J.A., speaking in this regard on behalf of himself and L'Heureux-Dubé J.A., as she then was, said that a restrictive interpretation should be given to the rights or privileges in s. 93(1). The exclusive provincial power set forth in the opening words of the section is deserving of a liberal interpretation, but the limitation on that power, as an exception to a general rule, in their view, is not. The rights or privileges are frozen in time, determined by reference to the laws in force "in the Province at the Union". Consequently, Nichols J.A. decided that the exception should be interpreted restrictively (at p. 1045):

[TRANSLATION] Section 93(1) does not in itself have any substantive constitutionalized content, as is the case for example with the fundamental rights recognized by the *Canadian Charter of Rights and Freedoms*. Constitutionalization by reference does not call for a wide and

législature de la province à légiférer en matière d'éducation sous réserve seulement des dispositions de l'article; et je peux difficilement voir comment la législature peut exercer d'une manière efficace le pouvoir qui lui a été conféré si elle n'a pas une grande marge de manœuvre pour s'adapter aux circonstances et aux besoins nouveaux lorsqu'ils se présentent.

Comme le souligne le vicomte Cave, cette compétence provinciale de base connaît certaines restrictions. Suivant le par. 93(1), rien dans une loi provinciale adoptée dans l'exercice de la compétence législative de base en matière d'éducation «ne devra préjudicier à un droit ou privilège conféré par la loi, lors de l'Union, à quelque classe particulière de personnes dans la province relativement aux écoles confessionnelles». Le sort du pourvoi dépend du sens donné à cette restriction.

Au cours des plaidoiries, la méthode d'interprétation à employer dans le cas du par. 93(1) de la *Loi constitutionnelle de 1867* a fait l'objet d'une longue discussion. En fait, quoique les trois juges en Cour d'appel soient unanimes à dire que la province, en imposant les régimes pédagogiques prévus dans les règlements, ne préjudicie à aucun droit ou privilège relatif aux écoles confessionnelles garanti par le par. 93(1), leurs opinions divergent quant à la règle d'interprétation qu'il faut appliquer pour déterminer la teneur des droits et libertés protégés. Le juge Nichols, exprimant également l'avis du juge L'Heureux-Dubé (maintenant juge de cette Cour) sur ce point, dit qu'il faut donner une interprétation restrictive aux droits ou privilèges visés au par. 93(1). Selon ces derniers, le pouvoir provincial exclusif conféré par la disposition liminaire de l'article doit recevoir une interprétation libérale, mais la restriction apportée à ce pouvoir, à titre d'exception à la règle générale, ne doit pas recevoir une telle interprétation. Ces droits et privilèges sont figés et doivent être déterminés par référence aux lois en vigueur dans la province «lors de l'Union». Le juge Nichols décide en conséquence que l'exception doit s'interpréter restrictivement (à la p. 1045):

L'article 93 paragraphe 1 n'a en lui-même aucun contenu substantif constitutionnalisé comme s'il s'agissait par exemple des droits fondamentaux reconnus par la *Charte canadienne des droits et libertés*. La constitutionnalisation par renvoi n'invite pas à interpréter large-

liberal interpretation, in an evolutionary and creative manner, of the rights so crystallized. It only requires that they be interpreted in their legislative context, applying the rules of statutory interpretation.

McCarthy J.A. disagreed (at p. 1033):

In my view, if the "large and liberal" interpretation referred to in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, must be given to the exclusive powers of the province to make laws "in relation to Education", it must also be given to the rights and privileges which certain classes of persons held by law at confederation "with respect to Denominational Schools". The choice of a particular drafting technique ought not to affect the rights and privileges guaranteed under a constitution.

I am of the view that in this case, the resolution to the problem is not to be found in one rule of interpretation as opposed to another. I note that McCarthy J.A. decided that even with a large and liberal interpretation of s. 93(1) rights and privileges, the adoption by the province of the pedagogical regime in the impugned Regulations did not prejudicially affect the rights or privileges guaranteed by s. 93(1). It is true, of course, that the fact that the guarantee is constitutionally entrenched is relevant to its interpretation. As a constitutional text, s. 93(1) may deserve a "purposive" interpretation but, in so doing, courts must not improperly amplify the provision's purpose. While it may be rooted in notions of tolerance and diversity, the exception in s. 93 is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory benchmark should not be construed as a *Charter* human right or freedom or, to use the expression of Professor Peter Hogg, a "small bill of rights for the protection of minority religious groups" (see Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 824). As Professor Pierre Carignan explains in "La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d'éducation" (1986), 20 *R.J.T.* 375, at p. 451:

ment et libéralement, de façon évolutive et créative, les droits ainsi cristallisés. Elle invite seulement à les interpréter dans leur contexte d'énonciation, en appliquant les règles propres à l'interprétation législative.

Le juge McCarthy ne souscrit pas à cette opinion (à la p. 1033):

[TRADUCTION] À mon avis, s'il faut donner à la compétence législative exclusive de la province «sur l'éducation» l'interprétation «large et libérale» dont parle l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, il faut aussi donner la même interprétation aux droits et privilèges que la loi conférait à certaines classes de personnes «relativement aux écoles confessionnelles» au moment de la Confédération. La méthode de rédaction employée ne devrait pas avoir d'effet sur les droits et privilèges garantis par une constitution.

J'estime qu'en l'espèce, la solution du problème ne se trouve pas dans le recours à une règle d'interprétation plutôt qu'à une autre. Je remarque que, d'après le juge McCarthy, même selon une interprétation large et libérale des droits et privilèges que garantit le par. 93(1), l'adoption par la province du régime pédagogique établi dans les règlements attaqués ne préjudicie pas à ces droits ou privilèges. Il est évident que le fait qu'il s'agit d'une garantie constitutionnelle est un facteur pertinent pour son interprétation. En tant que texte constitutionnel, le par. 93(1) peut mériter d'être interprété «en fonction de son objet», mais les tribunaux doivent alors se garder de donner une portée indue à cet objet. Quoiqu'elle puisse avoir des racines dans les notions de tolérance et de diversité, l'exception énoncée à l'art. 93 ne constitue pas une affirmation générale de la liberté de religion ou de la liberté de conscience. Le droit constitutionnel reconnu à certaines classes de personnes, dans une province, d'avoir des écoles confessionnelles financées par l'État, selon une norme légale fixe, ne doit pas être interprété comme un droit ou une liberté de la personne garantis par la *Charte* ou, pour reprendre l'expression du professeur Peter Hogg, comme [TRADUCTION] «une petite déclaration des droits pour la protection des minorités religieuses» (voir Hogg, *Constitutional Law of Canada* (2nd ed. 1985), à la p. 824). Ainsi que l'explique le professeur Pierre Carignan dans «La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d'éducation» (1986), 20 *R.J.T.* 375, à la p. 451:

offences require specialized techniques for their detection and suppression. They say that for such offences, as compared to most other criminal offences, there is inherently less basis for certainty and specificity, both as to the commission of an offence and as to the existence of specific physical evidence in relation to such offence. In this context, they contend, s. 10 does not authorize "unreasonable" search or seizure. Further, the appellants argue, the wording of s. 10 does not prevent the R.T.P.C. member in appropriate cases from requiring, for instance, evidence under oath before he approves the Director's authorization. In any event, they maintain, it cannot be said that s. 10 is incapable of being applied in a manner which does not offend the Constitution, and it ought not, therefore, to be struck down. At most it ought to be read down so as to include any necessary procedural safeguards. In support, they cite the decision of Van Camp J. in *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983).

III "Unreasonable" Search or Seizure

At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.

As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history

les fouilles, les perquisitions et les saisies effect
par les autorités relativement à ce dernier
d'infractions sont raisonnables. Selon eux, il
avoir recours à des techniques spécialisées
déceler et supprimer les infractions en matière
coalitions. Ils affirment que, contrairement
plupart des autres infractions criminelles,
infractions comportent en soi moins de certitud
de spécificité pour ce qui est de leur perpétra
et de l'existence de preuves matérielles précise
concernant. Dans ce contexte, ils prétendent
l'art. 10 ne permet pas d'effectuer des fouille
perquisitions ou des saisies «abusives». Les a
lants soutiennent en outre que la formulation
l'art. 10 n'empêche pas le membre de la CP
d'exiger dans les cas appropriés, par exemple,
déposition sous serment avant d'approuver l'aut
sation du directeur. Quoi qu'il en soit selon eux,
ne peut pas dire que l'art. 10 n'est pas susceptib
d'être appliqué d'une manière compatible avec
Constitution et cet article ne devrait donc pas
radié. Tout au plus il devrait recevoir une interp
tation atténuée de manière à inclure toutes
garanties nécessaires en matière de procédure
l'appui de cet argument, ils citent la décision
juge Van Camp dans l'affaire *The Queen*
Metropolitan Toronto Pharmacists' Associati
(inédite, H. C. Ont., le 4 mai 1983).

III Fouilles, perquisitions ou saisies «abusives»

Il importe d'abord de souligner que la quest
en litige dans ce pourvoi concerne la constitu
nalité d'une loi autorisant des fouilles, des per
sitions et des saisies. Elle ne concerne pas le ca
tère raisonnable ou autre de la façon dont
appelants ont exercé les pouvoirs qui leur
conférés par la loi. Il faut se pencher non pas su
conduite des appelants mais plutôt sur les text
loi en vertu desquels ils ont agi.

Il ressort clairement des arguments des par
et du jugement du juge Prowse que le point cap
en l'espèce est le sens qu'il faut donner au te
«abusives» que l'on trouve dans la formulatio
la protection que garantit l'art. 8 contre les fo
les, les perquisitions ou les saisies abusives
garantie offerte est vague et générale. Les tri
naux américains ont bénéficié d'un certain nom
de conditions préalables précises énoncées da

Quatrième amendement de la Constitution des États-Unis, ainsi que de l'opposition des colonies à certaines pratiques de la Couronne en matière d'enquête, ce qui leur a permis d'identifier la nature des droits protégés par cet amendement et le genre de conduite qu'il proscrit. On ne retrouve rien de cela à l'art. 8. Cet article n'offre rien de plus qu'une simple garantie de protection contre les fouilles, les perquisitions et les saisies «abusives»; il n'y a non plus aucun contexte historique, politique ou philosophique susceptible de préciser le sens de cette garantie.

Il est clair qu'on ne peut pas déterminer le sens du mot «abusives» au moyen d'un dictionnaire ou des règles d'interprétation des lois. L'interprétation d'une constitution est tout à fait différente de l'interprétation d'une loi. Une loi définit des droits et des obligations actuels. Elle peut être facilement adoptée et aussi facilement abrogée. Par contre, une constitution est rédigée en prévision de l'avenir. Elle vise à fournir un cadre permanent à l'exercice légitime de l'autorité gouvernementale et, lorsqu'on y joint une *Déclaration* ou une *Charte des droits*, à la protection constante des droits et libertés individuels. Une fois adoptées, ses dispositions ne peuvent pas être facilement abrogées ou modifiées. Elle doit par conséquent être susceptible d'évoluer avec le temps de manière à répondre à de nouvelles réalités sociales, politiques et historiques que souvent ses auteurs n'ont pas envisagées. Les tribunaux sont les gardiens de la constitution et ils doivent tenir compte de ces facteurs lorsqu'ils interprètent ses dispositions. Le professeur Paul Freund a bien exprimé cette idée lorsqu'il a averti les tribunaux américains [TRADUCTION] «de ne pas interpréter les dispositions de la Constitution comme un testament de peur qu'elle ne le devienne».

La nécessité d'aborder dans une perspective d'ensemble les documents constitutionnels est un thème bien connu en droit constitutionnel canadien. Ce point de vue se retrouve dans la formulation classique du vicomte Sankey dans l'arrêt *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, à la p. 136, laquelle a été citée et appliquée dans d'innombrables décisions canadiennes:

trial, absent unconstitutional conduct.

The appeal is accordingly dismissed.

Appeal dismissed.

Solicitor for the appellant: John A. Howlett, Toronto.

Solicitor for the respondent: R. Tassé, Ottawa.

nelle, il n'y aura pas de perte de compétence si une cour de première instance, agissant par suite d'un acte d'accusation, n'instruit pas le procès au moment fixé.

Le pourvoi est donc rejeté.

Pourvoi rejeté.

Procureur de l'appelant: John A. Howlett, Toronto.

Procureur de l'intimée: R. Tassé, Ottawa.

Her Majesty The Queen *Appellant*;

and

Big M Drug Mart Ltd. *Respondent*;

and

The Attorney General of Canada, the Attorney General of New Brunswick and the Attorney General of Saskatchewan *Interveners.*

File No.: 18125.

1984: March 6, 7; 1985: April 24.

Present: Ritchie*, Dickson, Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Canadian Charter of Rights and Freedoms — Freedom of conscience and religion — Lord's Day Act and Sunday observance — Whether or not Lord's Day Act in violation of Charter guarantee of freedom of conscience and religion — Whether or not Act a reasonable limit demonstrably justifiable in a free and democratic society — Whether or not Act enacted pursuant to criminal law power — Canadian Charter of Rights and Freedoms, ss. 1, 2(a), 24(1), 27, 32(1) — Constitution Act, 1867, ss. 91, 92, 93 — Constitution Act, 1982, s. 52(1) — Lord's Day Act, R.S.C. 1970, c. L-13, s. 4.

The respondent, Big M Drug Mart Ltd., was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*. Respondent was acquitted at trial. The Court of Appeal dismissed the appeal. The constitutional questions before this Court were whether the *Lord's Day Act*, and especially s. 4, (i) infringed the right to freedom of conscience and religion guaranteed in the *Charter*; (ii) were justified by s. 1 of the *Charter*; and (iii) were enacted pursuant to the criminal law power (s. 91(27)) of the *Constitution Act, 1867*.

Held: The appeal should be dismissed.

Per Dickson, Beetz, McIntyre, Chouinard and Lamer JJ.: Respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the *Charter* guarantee of freedom of conscience and religion. Recourse to s. 24 is unnecessary where the chal-

* Ritchie J. took no part in the judgment.

Sa Majesté La Reine *Appelante*;

et

Big M Drug Mart Ltd. *Intimée*;

et

Le procureur général du Canada, le procureur général du Nouveau-Brunswick et le procureur général de la Saskatchewan *Intervenants.*

N° du greffe: 18125.

1984: 6, 7 mars; 1985: 24 avril.

Présents: Les juges Ritchie*, Dickson, Beetz, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte canadienne des droits et libertés — Liberté de conscience et de religion — Loi sur le dimanche et observance du dimanche — La Loi sur le dimanche viole-t-elle la liberté de conscience et de religion garantie par la Charte? — La Loi constitue-t-elle une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique? — La Loi a-t-elle été adoptée conformément à la compétence en matière de droit criminel? — Charte canadienne des droits et libertés, art. 1, 2a), 24(1), 27, 32(1) — Loi constitutionnelle de 1867, art. 91, 92, 93 — Loi constitutionnelle de 1982, art. 52(1) — Loi sur le dimanche, S.R.C. 1970, chap. L-13, art. 4.

Big M Drug Mart Ltd. a été accusée de s'être livrée illégalement à la vente de marchandises le dimanche contrairement à la *Loi sur le dimanche*. L'intimée a été acquittée en première instance. La Cour d'appel a rejeté l'appel. Les questions constitutionnelles dont est saisie la Cour consistent à déterminer si la *Loi sur le dimanche*, et en particulier son art. 4, (i) empiète sur la liberté de conscience et de religion garantie par la *Charte*, (ii) si elle est justifiée compte tenu de l'art. 1 de la *Charte* et (iii) si elle relève du pouvoir en matière de droit criminel que confère le par. 91(27) de la *Loi constitutionnelle de 1867*?

Arrêt: Le pourvoi est rejeté.

Les juges Dickson, Beetz, McIntyre, Chouinard et Lamer: L'intimée a le droit de contester la validité de la *Loi sur le dimanche* pour le motif qu'elle porte atteinte à la liberté de conscience et de religion garantie par la *Charte*. Lorsque la contestation est fondée sur l'inconsti-

* Le juge Ritchie n'a pas pris part au jugement.

lenge is based on the unconstitutionality of the legislation. The supremacy of the Constitution declared in s. 52 dictates that no one can be convicted under an unconstitutional law. Any accused, whether corporate or individual, may defend a criminal charge by arguing the constitutional invalidity of the law under which the charge is brought.

The initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effects need only be considered when the law under review has passed the purpose test. The effects test can never be relied on to save legislation with an invalid purpose.

The *Lord's Day Act* cannot be found to have a secular purpose on the basis of changed social conditions. Legislative purpose is the function of the intent of those who draft and then enact the legislation at the time and not of any shifting variable.

Since the acknowledged purpose of the *Lord's Day Act*, on long-standing and consistently maintained authority, is the compulsion of religious observance, that Act offends freedom of religion and it is unnecessary to consider the actual impact of Sunday closing upon religious freedom. Legislation whose purpose is found to violate the *Charter* cannot be saved even if its effects were found to be inoffensive. *Robertson and Rosetanni*, which considered freedom of religion under s. 1 of the *Canadian Bill of Rights*, is of no assistance since the application and not the constitutionality of the legislation was in issue.

The *Lord's Day Act* to the extent that it binds all to a sectarian Christian ideal, works a form of coercion inimical to the spirit of the *Charter*. The Act gives the appearance of discrimination against non-Christian Canadians. Religious values rooted in Christian morality are translated into a positive law binding on believers and non-believers alike. Non-Christians are prohibited for religious reasons from carrying out otherwise lawful, moral and normal activities. Any law, purely religious in purpose, which denies non-Christians the right to work on Sunday denies them the right to practise their religion and infringes their religious freedom. The protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society.

tutionnalité d'une loi, il n'est pas nécessaire de recourir à l'art. 24. La suprématie de la Constitution énoncée à l'art. 52 prescrit que nul ne peut être déclaré coupable d'une infraction à une loi inconstitutionnelle. Tout accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu de laquelle l'accusation est portée est inconstitutionnelle.

Le premier critère à appliquer dans la détermination de la constitutionnalité doit consister à se demander si l'objet de la loi est valable; les effets de la loi ne doivent être pris en considération que lorsque la loi examinée satisfait au critère de l'objet. Le critère des effets ne peut jamais être invoqué pour sauver une loi dont l'objet n'est pas valable.

Il n'est pas possible de conclure que la *Loi sur le dimanche* a un objet laïque en raison d'un changement des conditions sociales. L'objet d'une loi est fonction de l'intention de ceux qui l'ont rédigée et adoptée à l'époque, et non pas d'un facteur variable quelconque.

Puisque, d'après une jurisprudence établie depuis longtemps et constamment confirmée, la *Loi sur le dimanche* a pour objet reconnu de rendre obligatoire l'observance religieuse, cette loi porte atteinte à la liberté de religion et il n'est pas nécessaire d'examiner les répercussions réelles de la fermeture le dimanche sur la liberté de religion. Une loi dont on a conclu que l'objet viole la *Charte* ne peut être sauvée même si ses effets sont jugés inoffensifs. L'arrêt *Robertson and Rosetanni*, où l'on a examiné la liberté de religion au sens de l'art. 1 de la *Déclaration canadienne des droits*, n'est d'aucune utilité étant donné que ce qui y était en cause était non pas la constitutionnalité de la loi mais son application.

Dans la mesure où elle astreint l'ensemble de la population à un idéal sectaire chrétien, la *Loi sur le dimanche* exerce une forme de coercition contraire à l'esprit de la *Charte*. La Loi paraît discriminatoire à l'égard des Canadiens non chrétiens. Des valeurs religieuses enracinées dans la moralité chrétienne sont transformées en droit positif applicable aux croyants comme aux incroyants. Pour des motifs religieux, on interdit aux non-chrétiens d'exercer des activités par ailleurs légales, morales et normales. Toute loi ayant un objet purement religieux qui prive les non-chrétiens du droit de travailler le dimanche les prive du droit de pratiquer leur religion et porte atteinte à leur liberté de religion. Protéger une religion sans accorder la même protection aux autres religions a pour effet de créer une inégalité destructrice de la liberté de religion dans la société.

The power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians recognized in s. 27 of the *Charter*.

The appellant did not establish that the *Lord's Day Act* constituted a reasonable limit, demonstrably justifiable in a free and democratic society and therefore it cannot be saved pursuant to s. 1 of the *Charter*.

The *Lord's Day Act* is enacted pursuant to the criminal law power under s. 91(27) of the *Constitution Act, 1867*. It compels the observance of a religious duty by means of prohibitions and penalties, and is therefore directed towards the maintenance of public order and the safeguarding of public morality.

Per Wilson J.: The approach of the courts to the constitutional validity of legislation in alleged violation of the *Charter* is different from the approach to the constitutional validity of legislation impugned under the division of powers. Since the *Charter* is first and foremost an effects-oriented document, the first stage of any analysis must be to inquire whether the legislation has the effect of violating an entrenched right. If it has, then it is not necessary to consider the purpose behind the enactment at this stage.

Section 1, however, will entail an analysis and evaluation of the purpose underlying the impugned legislation if the government seeks to justify a limitation on the citizen's right under that section. The government policy objective must then be assessed and a determination made as to whether this interest is sufficiently important to override a *Charter* right and whether the means chosen to achieve that objective were reasonable. The objective asserted as a reasonable limit under s. 1 will necessarily reflect the purpose of the enactment in the 'division of powers' analysis.

Cases Cited

Attorney-General for Ontario v. Hamilton Street Railway Co., [1903] A.C. 524; *Ouimet v. Bazin* (1912), 46 S.C.R. 502; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799; *Hamilton (City of) v. Canadian Transport Commission*, [1978] 1 S.C.R. 640; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, considered; *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651; *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld*

Le pouvoir d'imposer, pour des motifs religieux, l'observance universelle du jour de repos préféré par une religion ne concorde guère avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens, reconnu à l'art. 27 de la *Charte*.

L'appelante n'a pas établi que la *Loi sur le dimanche* impose une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique et, par conséquent, cette loi ne peut être sauvée en vertu de l'art. 1 de la *Charte*.

La *Loi sur le dimanche* a été adoptée conformément au pouvoir en matière de droit criminel que confère le par. 91(27) de la *Loi constitutionnelle de 1867*. Elle rend obligatoire l'observance d'une prescription religieuse au moyen d'interdictions et de peines et vise donc à préserver l'ordre et la moralité publics.

Le juge Wilson: La façon dont les tribunaux doivent aborder la constitutionnalité d'une loi dans le cas d'une prétendue violation de la *Charte* est différente de la façon dont ils doivent aborder la constitutionnalité d'une loi attaquée en vertu du partage des compétences. Étant donné que la *Charte* est d'abord et avant tout un document axé sur les effets, la première étape de toute analyse doit consister à se demander si une loi a pour effet de violer un droit enchâssé dans la Constitution. Si tel est son effet, il n'est pas nécessaire, à cette étape, d'examiner l'objet qui sous-tend son adoption.

Toutefois, l'art. 1 exige une analyse et une évaluation de l'objet fondamental de la loi attaquée si le gouvernement cherche à justifier une limitation d'un droit individuel en vertu de cet article. L'objectif de la politique du gouvernement doit alors être évalué et il doit être déterminé si cet intérêt gouvernemental est suffisamment important pour l'emporter sur un droit garanti par la *Charte* et si les moyens choisis pour atteindre cet objectif sont raisonnables. L'objectif dont on dit qu'il constitue une limite raisonnable au sens de l'art. 1 reflète nécessairement l'objet de la loi dans une analyse fondée sur le partage des compétences.

Jurisprudence

Arrêts examinés: *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524; *Ouimet v. Bazin* (1912), 46 R.C.S. 502; *Saumur v. City of Quebec*, [1953] 2 R.C.S. 299; *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] R.C.S. 799; *Hamilton (Ville de) c. Commission canadienne des transports*, [1978] 1 R.C.S. 640; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66; distinction faite avec les arrêts: *Robertson and Rosetanni v. The Queen*, [1963] R.C.S.

v. Brown, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), distinguished; *Boardwalk Merchandise Mart Ltd. v. The Queen*, [1973] 1 W.W.R. 190, reversing [1972] 6 W.W.R. 1, leave to appeal denied [1972] S.C.R. ix; *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *In re Legislation Respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *St. Prosper (La Corporation de la Paroisse de) v. Rodrigue* (1917), 56 S.C.R. 157; *Chaput v. Romain*, [1955] S.C.R. 834; *Lieberman v. The Queen*, [1963] S.C.R. 643; *Attorney General for Ontario v. Canada Temperance Foundation*, [1946] A.C. 193; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Taxada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383; *Quong-Wing v. The King* (1914), 49 S.C.R. 440; *Co-operative Committee on Japanese Canadians v. Attorney-General of Canada*, [1947] A.C. 87; *Morgan v. Attorney General of Prince Edward Island*, [1976] 2 S.C.R. 349; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970); *In the Matter of Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, referred to.

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Act for punishing divers Abuses committed on the Lord's Day, called Sunday, 1 Car. 1, c. 1.
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Act for the further Reformation of sundry Abuses committed on the Lord's Day, commonly called Sunday, 3 Car. 1, c. 2.

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Act for the further Reformation of sundry Abuses committed on the Lord's Day, commonly called Sunday, 3 Car. 1, chap. 2.

Act for the Keeping of Holy Days and Fasting-Days, 5 & 6 Edw. 6, c. 3.
Act of Uniformity, 5 & 6 Edw. 6, c. 1.
Act of Uniformity, 1 Eliz. 1, c. 2.
Act to prevent the Profanation of the Lord's Day, commonly called Sunday, in Upper Canada, 1845 (Can.), c. 45.
Act to Repeal an Act as related to Rectories, (Imp.), 14 & 15 Vict., c. 175.
Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.
Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), 24(1), 27, 32(1).
Charter of the French Language, R.S.Q. 1977, c. C-11.
Colonial Laws Validity Act (Imp.), 28 & 29 Vict., c. 63, s. 2.
Constitution Act, 1867, ss. 91, 92, 93.
Constitution Act, 1982, s. 52(1).
Criminal Code, R.S.C. 1970, c. C-24, s. 762.
Lord's Day Act, 1906 (Can.), c. 27.
Lord's Day Act, R.S.C. 1970, c. L-13, s. 4.
Lord's Day (Ontario) Act, R.S.O. 1980, c. 253.
Lord's Day (Saskatchewan) Act, R.S.S. 1978, c. L-34.
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conscience and religion guaranteed in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*?

2. Is the *Lord's Day Act*, R.S.C. 1970, c. L-13 and especially s. 4 thereof justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Is the *Lord's Day Act*, R.S.C. 1970, c. L-13 and especially s. 4 thereof enacted pursuant to the criminal law power under s. 91(27) of the *Constitution Act, 1867*?

The Attorney General of Canada and the Attorneys General of New Brunswick and of Saskatchewan have intervened in support of the appellant Attorney General of Alberta.

IV

Standing and Jurisdiction

As a preliminary issue the Attorney General for Alberta challenges the standing of Big M to raise the question of a possible infringement of the guarantee of freedom of conscience and religion and the jurisdiction of the Provincial Court to declare the *Lord's Day Act* inoperative.

As best I understand the first submission, the assertion is that Big M is not entitled to any relief pursuant to s. 24(1) of the *Charter*. It is urged that freedom of religion is a personal freedom and that a corporation, being a statutory creation, cannot be said to have a conscience or hold a religious belief. It cannot, therefore, be protected by s. 2(*a*) of the *Charter*, nor can its rights and freedoms have been infringed or denied under s. 24(1); Big M's application under that section must consequently fail.

The second preliminary submission of the Attorney General for Alberta is that the provincial court judge lacked jurisdiction to make any form of declaration under s. 52 of the *Constitution Act, 1982*. In oral argument the Attorney General did not press this point. In his factum, however, it was his submission that prior to the enactment of the *Constitution Act, 1982*, any tribunal was competent to find a statute *ultra vires* under s. 2 of the *Colonial Laws Validity Act*, 28 & 29 Vict., c. 63, and s. 7(1) of the *Statute of Westminster, 1931*, R.S.C. 1970, App. II, No. 26. These provisions have, however, been repealed and they have been replaced by s. 52(1) of the *Constitution Act, 1982*. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the *Constitution Act, 1867* or with respect to the limits imposed on the legislatures by the *Constitution Act, 1982*.

Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitu-

conscience et de religion garantie par l'al. 2*a*) de la *Charte canadienne des droits et libertés*?

2. La *Loi sur le dimanche*, S.R.C. 1970, chap. L-13, et en particulier son art. 4, est-elle justifiée compte tenu de l'art. 1 de la *Charte canadienne des droits et libertés*?

3. La *Loi sur le dimanche*, S.R.C. 1970, chap. L-13, et en particulier son art. 4, relève-t-elle du pouvoir en matière de droit criminel que confère le par. 91(27) de la *Loi constitutionnelle de 1867*?

Les procureurs généraux du Canada, du Nouveau-Brunswick et de la Saskatchewan sont intervenus en faveur du procureur général de l'Alberta.

IV

Qualité pour agir et compétence

Comme moyen préliminaire, le procureur général de l'Alberta conteste, d'une part, la qualité de Big M pour soulever la question de la possibilité d'un empiétement sur la liberté de conscience et de religion garantie par la *Charte* et, d'autre part, la compétence de la Cour provinciale pour déclarer inopérante la *Loi sur le dimanche*.

Si je comprends bien, on allègue dans ce premier moyen que Big M n'a droit à aucun redressement en vertu du par. 24(1) de la *Charte*. On fait valoir que la liberté de religion est une liberté individuelle et qu'on ne peut pas dire qu'une personne morale, en tant qu'entité créée par la loi, a une conscience ou des croyances religieuses. Elle ne peut donc pas jouir de la protection de l'al. 2*a*) de la *Charte* et il ne peut y avoir eu violation ou négation de ses droits et libertés au sens du par. 24(1). Par conséquent, la demande de Big M fondée sur ce paragraphe doit être rejetée.

Le second moyen préliminaire du procureur général de l'Alberta porte que le juge de la Cour provinciale n'avait pas compétence pour faire une déclaration en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Au cours des plaidoiries, le procureur général n'a pas insisté sur ce point. Dans son mémoire toutefois, il soutient qu'avant l'adoption de la *Loi constitutionnelle de 1982*, n'importe quel tribunal avait compétence pour déclarer une loi inconstitutionnelle en vertu de l'art. 2 de la *Colonial Laws Validity Act*, 28 & 29 Vict., chap. 63, et du par. 7(1) du *Statut de Westminster de 1931*, S.R.C. 1970, app. II, nº 26. Cependant, ces dispositions ont été abrogées et remplacées par le par. 52(1) de la *Loi constitutionnelle de 1982*. Selon le procureur général, seule une cour de juridiction supérieure a le pouvoir de rendre une ordonnance déclaratoire en vertu de l'art. 52.

Lorsqu'il s'agit de contester la validité d'une loi en vertu de laquelle on fait l'objet de poursuites, il est sans importance, en ce qui concerne la qualité pour agir et la compétence du tribunal, que la contestation soit fondée sur les art. 91 et 92 de la *Loi constitutionnelle de 1867* ou sur les restrictions imposées aux corps législatifs par la *Loi constitutionnelle de 1982*.

Le paragraphe 24(1) prévoit un redressement pour les personnes, aussi bien physiques que morales, qui ont été victimes d'une atteinte aux droits qui leurs sont garantis par la *Charte*. Toutefois, il ne s'agit pas là du seul recours qui s'offre face à une loi inconstitutionnelle. Lorsque, comme c'est le cas en l'espèce, la contestation est fondée sur l'inconstitutionnalité d'une loi, il n'est pas nécessaire de recourir à l'art. 24 et l'effet particulier qu'elle a sur l'auteur de la contestation est sans importance.

L'article 52 énonce le principe fondamental du droit constitutionnel, savoir la suprématie de la Constitution. De ce principe il découle indubitablement que nul ne peut être déclaré coupable d'une infraction à une loi inconstitutionnelle. Ce n'est pas volontairement, à titre de citoyen intéressé qui demande qu'une loi soit déclarée inconstitutionnelle, que l'intimée se trouve devant les tribunaux. S'il s'était agi de ce genre de «litige d'intérêt public», elle aurait eu à satisfaire aux exigences relatives à la qualité pour agir que cette Cour a établies dans les trois arrêts suivants: *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265 et *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575. Toutefois, ce n'est pas la raison pour laquelle elle s'est présentée en Cour.

Tout accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu

was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni*, *supra*, cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

(iii) The Purpose of Protecting Freedom of Conscience and Religion

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the *Charter*, the origins of the demand

jouissaient de ce droit avant la proclamation de la *Charte*. Pour cette raison, l'arrêt *Robertson and Rosetanni*, précité, ne peut être déterminant quant au sens qui doit être donné à la «liberté de conscience et de religion» garantie par la *Charte*. Il nous faut plutôt recourir aux principes distinctifs d'interprétation constitutionnelle applicables à la loi suprême du Canada.

(iii) L'objectif de protection de la liberté de conscience et de religion

Cette Cour a déjà, dans une certaine mesure, énoncé la façon fondamentale d'aborder l'interprétation de la *Charte*. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, la Cour a exprimé l'avis que la façon d'aborder la définition des droits et des libertés garantis par la *Charte* consiste à examiner l'objet visé. Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.

À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. En même temps, il importe de ne pas aller au delà de l'objet véritable du droit ou de la liberté en question et de se rappeler que la *Charte* n'a pas été adoptée en l'absence de tout contexte et que, par conséquent, comme l'illustre l'arrêt de Cour *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, elle doit être située dans ses contextes linguistique, philosophique et historique appropriés.

Quant à la liberté de conscience et de religion, le contexte historique est clair. Pour autant que cela puisse concerner la *Charte*, la revendication de

for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people—sometimes even the majority in a given territory—found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.

English examples of such laws, passed during the Tudor and Stuart periods have been alluded to in the discussion above of the criminal law character of Sunday observance legislation. Opposition to such laws was confined at first to those who upheld the prohibited faiths and practices, and was designed primarily to avoid the disabilities and penalties to which these specific adherents were subject. As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression the persecuted all too often became the persecutors.

Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our *Charter*, the single

cette liberté a son origine dans les conflits religieux qui ont sévi en Europe après la Réforme. La propagation de croyances nouvelles, la conversion de rois et de princes à d'autres religions, les victoires et les revers de leurs armées ainsi que l'instabilité constante des frontières qui en a résulté ont engendré des situations où beaucoup de personnes, parfois même la majorité dans un territoire donné, se sont retrouvées sous la domination de gouvernants qui professaient une foi différente de la leur et souvent hostile à celle-ci, et assujetties à des lois visant à imposer l'observance de croyances et de pratiques religieuses qui leur étaient étrangères.

Dans le cadre de notre étude du caractère de loi en matière criminelle de la législation relative à l'observance du dimanche, nous avons déjà mentionné des exemples de lois de ce genre adoptées en Angleterre à l'époque des Tudor et des Stuart. Au début, seuls s'opposaient à ces lois les adeptes des confessions proscrites et leur opposition avait principalement pour but d'obtenir la suppression des incapacités et des peines dont ils étaient frappés. Par conséquent, lorsque la tournure des événements leur permettait d'accéder au pouvoir, de persécutés, ces anciennes victimes d'oppression religieuse devenaient hélas trop souvent persécuteurs.

Toutefois, suivant le mouvement amorcé à l'époque du Commonwealth ou de l'Interrègne par la faction dite «indépendante» au sein du parti parlementaire, bien des gens, même parmi les adeptes des croyances fondamentales de la religion dominante, ont fini par s'opposer à ce que le pouvoir coercitif de l'État soit utilisé pour assurer l'obéissance à des préceptes religieux et pour extirper les croyances non conformistes. Il s'agissait, à ce moment-là, non plus d'une opposition fondée simplement sur la conviction que l'État imposait l'observance des mauvaises croyances et pratiques, mais d'une opposition fondée sur le sentiment que la croyance elle-même n'était pas quelque chose qui pouvait être imposé. Toute tentative d'imposer l'observance de croyances et de pratiques constituait un déni de la réalité de la conscience individuelle et déshonorait le Dieu qui en avait doté Ses

integrated concept of "freedom of conscience and religion".

What unites enunciated freedoms in the American First Amendment, s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc.*, *supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democractic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit.

créatures. Voilà donc comment les concepts de la liberté de religion et de la liberté de conscience se sont rattachés pour former, comme c'est le cas à l'al. 2*a*) de notre Charte, une seule et unique notion qui est la «liberté de conscience et de religion».

Les libertés énoncées dans le Premier amendement de la Constitution des États-Unis, à l'al. 2*a*) de la *Charte* et dans les dispositions d'autres documents relatifs aux droits de la personne ont en commun la prééminence de la conscience individuelle et l'inopportunité de toute intervention gouvernementale visant à forcer ou à empêcher sa manifestation. L'arrêt *Hunter c. Southam Inc.*, précité, précise à la p. 155, que la *Charte* a pour objet «la protection constante des droits et libertés individuels». On voit facilement le rapport entre le respect de la conscience individuelle et la valorisation de la dignité humaine qui motive cette protection constante.

Toutefois, il faut aussi remarquer que l'insistance sur la conscience et le jugement individuels est également au cœur de notre tradition politique démocratique. La possibilité qu'a chaque citoyen de prendre des décisions libres et éclairées constitue la condition sine qua non de la légitimité, de l'acceptabilité et de l'efficacité de notre système d'auto-détermination. C'est précisément parce que les droits qui se rattachent à la liberté de conscience individuelle se situent au cœur non seulement des convictions fondamentales quant à la valeur et à la dignité de l'être humain, mais aussi de tout système politique libre et démocratique, que la jurisprudence américaine a insisté sur la primauté ou la prééminence du Premier amendement. À mon avis, c'est pour cette même raison que la *Charte canadienne des droits et libertés* parle de libertés «fondamentales». Celles-ci constituent le fondement même de la tradition politique dans laquelle s'insère la *Charte*.

Vu sous cet angle, l'objet de la liberté de conscience et de religion devient évident. Les valeurs qui sous-tendent nos traditions politiques et philosophiques exigent que chacun soit libre d'avoir et de manifester les croyances et les opinions que lui dicte sa conscience, à la condition notamment que ces manifestations ne lèsent pas ses semblables ou leur propre droit d'avoir et de manifester leurs croyances et opinions personnelles. Historiquement, la foi et la pratique religieuses sont, à bien des égards, des archétypes des croyances et manifestations dictées par la conscience et elles sont donc protégées par la *Charte*. La même protection s'applique, pour les mêmes motifs, aux expressions et manifestations d'incroyance et au refus d'observer les pratiques religieuses. Il se peut que la liberté de conscience et de religion outrepasse ces principes et qu'elle ait pour effet d'interdire d'autres sortes d'ingérences gouvernementales dans les affaires religieuses. Aux fins de la présente espèce, il me paraît suffisant d'affirmer que, quels que soient les autres sens que peut avoir la liberté de conscience et de religion, elle doit à tout le moins signifier ceci: le gouvernement ne peut, dans un but sectaire, contraindre des personnes à professer une foi religieuse ou à pratiquer une religion en particulier. Je ne me prononce pas ici sur la question de savoir dans quelle mesure, s'il y a lieu, le gouvernement peut, en vue de réaliser un intérêt ou un objectif essentiel, exercer une coercition qui pourrait par ailleurs être interdite par l'al. 2*a*).

It is the contention of the respondent that the *Lord's Day Act* violates freedom of conscience and religion by coercing the observance of the religious institution of the Christian Sabbath. It is, therefore, important in the appellant's argument that freedom from such coercion forms no part of "freedom of religion" as it has been articulated in the Canadian jurisprudence. The definition of freedom of conscience and religion proposed above, including freedom from compulsory religious observance, corresponds precisely to the description of religious freedom in Canada offered by Taschereau J. in the passage in *Chaput v. Romain*, *supra*, when he noted that all adherents of various religious faiths are entirely free to think as they wish. This is not to endorse that part of the passage from the judgment of Taschereau J. where he states that religions are on a footing of equality. The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

L'intimée fait valoir que la *Loi sur le dimanche* viole la liberté de conscience et de religion en rendant obligatoire l'observance du sabbat chrétien. Selon l'argument de l'appelante, il importe donc que la protection contre cette coercition ne fasse pas partie de la «liberté de religion» énoncée dans la jurisprudence canadienne. La définition de la liberté de conscience et de religion, dont le droit de ne pas être astreint à l'observance religieuse, que nous avons proposée plus haut correspond exactement à la description de la liberté de religion au Canada que donne le juge Taschereau dans le passage tiré de l'arrêt *Chaput v. Romain*, précité, lorsqu'il souligne que tous les adhérents des diverses confessions religieuses ont la plus entière liberté de penser comme ils le souhaitent. Toutefois, cela ne revient pas à approuver la partie du passage des motifs du juge Taschereau où il affirme que toutes les religions sont sur un pied d'égalité. L'égalité nécessaire pour soutenir la liberté de religion n'exige pas que toutes les religions reçoivent un traitement identique. En fait, la véritable égalité peut fort bien exiger qu'elles soient traitées différemment.

In appeal, *de novo*, the conviction was quashed and an acquittal entered. The Superior Court judge merely stated that there was no evidence that she had said anything fraudulent.

The Court of Appeal restored the conviction.

The issue involves the meaning to be given to the word "fraudulently" and its effect in the section, and in particular whether an accused should be convicted of fraudulently undertaking for a consideration to tell fortunes if he honestly believed that he had the power to tell fortunes. However, given the finding of fact by the trial judge that [TRANSLATION] "The accused knows full well that she has no basis for her claim to be able to predict what will happen in people's futures", we are agreed that the defence of honest belief is not open on the facts of this case.

The appeal is dismissed.

The following are the reasons delivered by

BEETZ J.—I agree with the conclusion of McIntyre, Lamer and La Forest JJ. that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: Ivan Lerner, Montréal.

Solicitors for the respondent: Germain Tremblay and Jean-Pierre Bessette, Montréal.

En appel *de novo*, la déclaration de culpabilité a été annulée et un acquittement a été inscrit. Le juge de la Cour supérieure a simplement déclaré que la preuve ne soulevait aucun propos frauduleux.

La Cour d'appel a rétabli la déclaration de culpabilité.

Ce litige soulève la question du sens à donner au terme «frauduleusement» et de son effet dans l'article, en particulier la question de savoir si un accusé doit être déclaré coupable d'avoir entrepris, moyennant contrepartie, de dire la bonne aventure s'il croit honnêtement avoir le pouvoir de le faire. Toutefois, vu la conclusion de fait du juge du procès que «L'accusée sait pertinemment qu'elle n'a aucun fondement à ses prétentions de pouvoir dire ce qui va survenir dans l'avenir des gens», nous sommes d'avis qu'elle ne peut se prévaloir de la défense de croyance honnête étant donné les faits de l'espèce.

Le pourvoi est rejeté.

Version française des motifs rendus par

LE JUGE BEETZ—Je suis d'accord avec la conclusion des juges McIntyre, Lamer et La Forest que le pourvoi doit être rejeté.

Pourvoi rejeté.

Procureur de l'appelante: Ivan Lerner, Montréal.

Procureurs de l'intimée: Germain Tremblay et Jean-Pierre Bessette, Montréal.

IN THE MATTER OF A REFERENCE under section 27(1) of the *Judicature Act*, being chapter J-1 of the Revised Statutes of Alberta, 1980;

AND IN THE MATTER OF the validity of compulsory arbitration provisions found in the *Public Service Employee Relations Act*, the *Labour Relations Act*, and the *Police Officers Collective Bargaining Act*, being chapters P-33, L-1.1 and P-12.05 of the Revised Statutes of Alberta, 1980 respectively;

AND IN THE MATTER OF the exclusion of certain employees from units for collective bargaining

between

Alberta Union of Provincial Employees, Canadian Union of Public Employees and Alberta International Fire Fighters Association *Appellants*

and

Attorney General of Manitoba *Intervener for the appellants*

v.

Attorney General for Alberta *Respondent*

and

Attorney General of Canada, Attorney General for Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Saskatchewan and Attorney General of Newfoundland *Interveners for the respondent*

INDEXED AS: REFERENCE RE *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALTA.)

File No.: 19234.

1985: June 27, 28; 1987: April 9.

DANS L'AFFAIRE D'UN RENVOI fondé sur le paragraphe 27(1) de la *Judicature Act*, R.S.A. 1980, chap. J-1;

ET DANS L'AFFAIRE DE la validité des dispositions sur l'arbitrage obligatoire contenues dans la *Public Service Employee Relations Act*, la *Labour Relations Act* et la *Police Officers Collective Bargaining Act*, R.S.A. 1980, chap. P-33, L-1.1 et P-12.05, respectivement;

ET DANS L'AFFAIRE DE l'exclusion de certains salariés des unités de négociation collective

entre

Alberta Union of Provincial Employees, Syndicat canadien de la fonction publique et Alberta International Fire Fighters Association *Appelants*

et

Le procureur général du Manitoba *Intervenant pour les appelants*

c.

Le procureur général de l'Alberta *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général de la Colombie-Britannique, le procureur général de l'Île-du-Prince-Édouard, le procureur général de la Saskatchewan et le procureur général de Terre-Neuve *Intervenants pour l'intimé*

RÉPERTORIÉ: RENVOI RELATIF À LA *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALB.)

N° du greffe: 19234.

1985: 27, 28 juin; 1987: 9 avril.

Dickson C.J. and Beetz, McIntyre,
rd*, Wilson, Le Dain and La Forest JJ.

EAL FROM THE COURT OF APPEAL FOR
'A

itutional law — Charter of Rights — Freedom
iation — Scope of protection in labour relations
— Provincial legislation prohibiting strikes and
— Legislation providing for arbitration —
provincial legislation violated s. 2(d) of the
— If so, whether such violation justifiable
1 of the Charter — Public Service Employee
is Act, R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55,
- Labour Relations Act, R.S.A. 1980 (Supp.), c.
s. 117.1, 117.2, 117.3, 117.8 — Police Officers
ve Bargaining Act, S.A. 1983, c. P-12.05, ss.
), 10, 15.

ieutenant Governor in Council of Alberta, in
ice with s. 27(1) of the *Judicature Act* of that
, referred to the Alberta Court of Appeal sever-
tutional questions which raised two main issues:
ether the provisions of the *Public Service*
ee Relations Act, the *Labour Relations Act* and
ce Officers Collective Bargaining Act of Alber-
h prohibit strikes and impose compulsory arbi-
o resolve impasses in collective bargaining, were
ent with the *Canadian Charter of Rights and*
is; and (2) whether the provisions of the Acts
to the conduct of the arbitration and which
e arbitrability of certain items and require the
on board to consider certain factors in making
tration award were inconsistent with the *Char-*
first Act applied to public service employees,
nd to firefighters and hospital employees and the
police officers. The majority of the Court of
of Alberta answered the first issue in the nega-
declined to answer the second issue. This appeal
ermine whether the Alberta legislation violates
antee of freedom of association in s. 2(*d*) of the
and, if so, whether such violation can be justi-
er s. 1.

(Dickson C.J. and Wilson J. dissenting): The
hould be dismissed.

eetz, Le Dain and La Forest JJ.: The challenged
ns of the *Public Service Employee Relations*
Labour Relations Act and the *Police Officers*
ve Bargaining Act were not inconsistent with the
. The constitutional guarantee of freedom of
ion in s. 2(*d*) of the *Charter* does not include, in

inard J. took no part in the judgment.

Présents: Le juge en chef Dickson et les juges Beetz,
McIntyre, Chouinard*, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Liberté d'association — Portée de la protection dans le domaine des relations de travail — Législation provinciale interdisant les grèves et les lock-out — Recours à l'arbitrage prescrit par la législation — La législation provinciale viole-t-elle l'art. 2d) de la Charte? — Dans l'affirmative, cette violation est-elle justifiable en vertu de l'article premier de la Charte? — Public Service Employee Relations Act, R.S.A. 1980, chap. P-33, art. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), chap. L-1.1, art. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act, S.A. 1983, chap. P-12.05, art. 2(2), 3, 9, 10, 15.

Le lieutenant-gouverneur en conseil de l'Alberta, conformément au par. 27(1) de la *Judicature Act* de cette province, a soumis à la Cour d'appel de l'Alberta plusieurs questions constitutionnelles qui soulèvent deux points principaux: (1) Les dispositions de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* de l'Alberta, qui interdisent le recours aux grèves et imposent l'arbitrage obligatoire pour résoudre les impasses dans la négociation collective, sont-elles incompatibles avec la *Charte canadienne des droits et libertés*; et (2) les dispositions de ces lois se rapportant à l'arbitrage, qui limitent les points qui peuvent y être soumis et qui obligent le tribunal d'arbitrage à tenir compte de certains facteurs quand il rend sa sentence, sont-elles incompatibles avec la *Charte*. La première de ces lois s'applique aux employés de la fonction publique, la seconde aux pompiers et aux employés d'hôpitaux et la troisième aux agents de police. La Cour d'appel de l'Alberta à la majorité a répondu à la première question par la négative et a refusé de répondre à la seconde. Le présent pourvoi a pour objet de décider si la législation albertaine viole la liberté d'association garantie à l'al. 2*d*) de la *Charte* et, dans l'affirmative, si cette violation peut être justifiée en vertu de l'article premier.

Arrêt (le juge en chef Dickson et le juge Wilson sont dissidents): Le pourvoi est rejeté.

Les juges Beetz, Le Dain et La Forest: Les dispositions contestées de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* ne sont pas incompatibles avec la *Charte*. La garantie constitutionnelle de la liberté d'association que l'on trouve à l'al. 2*d*) de la

* Le juge Chouinard n'a pas pris part au jugement.

the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter*, it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the *Charter*, the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

What is in issue here is not the importance of freedom of association in this sense but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection are sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that, in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action, this Court should be considering the substitution of its judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature

Charte ne comprend pas, dans le cas d'un syndicat, la garantie du droit de négocier collectivement et du droit de faire la grève. En examinant le sens qu'il faut donner à l'expression liberté d'association que l'on trouve à l'al. 2*d*) de la *Charte*, il est essentiel de garder à l'esprit que cette notion doit viser toute une gamme d'associations ou d'organisations de nature politique, religieuse, sociale ou économique, ayant des objectifs très variés, de même que les activités qui permettent de poursuivre ces objectifs. C'est dans cette perspective plus large et non simplement en fonction des prétendues exigences d'un syndicat, si importantes soient-elles, que l'on doit examiner l'incidence de l'extension d'une garantie constitutionnelle, qui se présente sous la forme du concept de la liberté d'association, au droit d'exercer une certaine activité pour le motif qu'elle est essentielle si l'on veut qu'une association ait une existence significative.

En se demandant s'il est raisonnable de prêter une intention aussi générale à la *Charte*, on doit rejeter la prémisse selon laquelle, sans cette protection constitutionnelle supplémentaire, la liberté d'association garantie serait vide de sens. La liberté d'association est particulièrement importante pour l'exercice d'autres libertés fondamentales comme la liberté d'expression et la liberté de conscience et de religion. Celles-ci présentent un large champ de protection d'activités collectives. De plus, la liberté de travailler à la constitution d'une association, d'appartenir à une association, de la maintenir et de participer à ses activités licites sans faire l'objet d'une peine ou de représailles ne doit pas être tenue pour acquise. Cela ressort de sa reconnaissance et de sa protection expresses dans la législation en matière de relations de travail. C'est une liberté qui a été plus ou moins supprimée à l'occasion par des régimes totalitaires.

Ce qui est en cause en l'espèce est non pas l'importance de la liberté d'association en ce sens, mais la question de savoir si une activité particulière qu'exerce une association en poursuivant ses objectifs, doit être protégée par la Constitution ou faire l'objet d'une réglementation par voie de politiques législatives. Les droits au sujet desquels on réclame la protection de la Constitution, savoir les droits contemporains de négocier collectivement et de faire la grève, qui comportent pour l'employeur des responsabilités et obligations corrélatives, ne sont pas des droits ou libertés fondamentaux. Ce sont des créations de la loi qui mettent en jeu un équilibre entre des intérêts opposés dans un domaine qui, les tribunaux l'ont reconnu, exige une compétence spéciale. Il est étonnant que, dans un domaine où cette Cour a affirmé un principe de retenue judiciaire pour ce qui est de contrôler des mesures administratives, celle-ci

ound it necessary to define and qualify in various according to the particular field of labour relations ed. The resulting necessity of applying s. 1 of the er to a review of particular legislation in this field nstrates the extent to which the Court becomes ed in a review of legislative policy for which it is not fitted.

McIntyre J.: The freedom of association in s. 2(*d*) *Charter* did not give constitutional protection to ght of a trade union to strike as an incident to tive bargaining. Freedom of association under the er means the freedom to engage collectively in activities which are constitutionally protected for ndividual. It means also the freedom to associate e purposes of activities which are lawful when med alone. Freedom of association, however, does st independent rights in the group. People cannot, rely combining together, create an entity which eater constitutional rights and freedoms than they, ividuals, possess. The group can exercise only the tutional rights of its members on behalf of those ers. It follows as well that the rights of the lual members of the group cannot be enlarged by the fact of association. Therefore, the associa- oes not acquire a constitutionally guaranteed free- o do what is unlawful for the individual. This ion fully realizes the purpose of freedom of asso- which is to ensure that various goals may be d in common as well as individually. When this ion of freedom of association is applied, it is clear eedom of association does not guarantee the right ke. Since the right to strike is not independently ted under the *Charter*, it can receive protection freedom of association only if it is an activity is permitted by law to an individual.

ther, read in the context of the whole *Charter*, s. annot support an interpretation of freedom of tion which could include a right to strike. gh strikes are commonplace in Canada and have r many years, the framers of the Constitution did clude a specific reference to the right to strike in *arter*. This omission, taken with the fact that the elming preoccupation of the *Charter* is with lual, political, and democratic rights with conspic- attention to economic and property rights, speaks ly against any implication of a right to strike.

doive examiner la possibilité de substituer son opinion à celle du législateur en constitutionnalisant, en termes généraux et abstraits, des droits que le législateur a jugé nécessaire de définir et d'édulcorer de diverses façons selon le domaine particulier des relations de travail en cause. La nécessité qui résulte d'appliquer l'article premier de la *Charte* à l'examen d'une mesure législative particulière dans ce domaine démontre jusqu'à quel point la Cour devient appelée à assumer une fonction de contrôle de politiques législatives qu'elle n'est vraiment pas faite pour assumer.

Le juge McIntyre: La liberté d'association à l'al. 2*d*) de la *Charte* ne confère pas une protection constitutionnelle au droit d'un syndicat de faire la grève à titre d'accessoire de la négociation collective. La liberté d'association au sens de la *Charte* signifie la liberté d'exercer collectivement des activités que la Constitution garantit à chaque individu. Elle s'entend aussi de la liberté de s'associer pour exercer les activités qui sont licites lorsqu'elles sont exercées par un seul individu. La liberté d'association ne saurait toutefois conférer des droits indépendants au groupe. Les gens ne peuvent pas, simplement en se joignant à d'autres, créer une entité qui a des droits et des libertés constitutionnels plus grands que ceux que possèdent les individus. Le groupe ne peut exercer, au nom de ses membres, que les droits constitutionnels dont ils jouissent individuellement. Il s'ensuit aussi que les droits dont jouissent individuellement les membres du groupe ne sauraient être élargis du simple fait de l'association. Donc, l'association n'acquiert aucune liberté garantie par la Constitution de faire ce qui est illicite pour l'individu de faire. Cette définition donne tout son sens à l'objet de l'association, qui est d'assurer que diverses fins puissent être poursuivies collectivement aussi bien qu'individuellement. Lorsqu'on applique cette définition de la liberté d'association, il devient manifeste qu'elle ne garantit pas le droit de faire la grève. Comme le droit de grève ne jouit d'aucune garantie indépendante en vertu de la *Charte*, la liberté d'association ne le protège que s'il s'agit d'une activité que la loi permet à l'individu d'exercer.

En outre, si l'al. 2*d*) est interprété en fonction de l'ensemble de la *Charte*, il ne saurait justifier une interprétation de la liberté d'association qui pourrait inclure le droit de grève. Même si les grèves sont fréquentes au Canada, et ce, depuis plusieurs années, les rédacteurs de la Constitution n'ont inclus aucune mention expresse du droit de grève dans la *Charte*. Cette omission, en plus du fait que la *Charte* se préoccupe d'abord et avant tout des droits individuels, politiques et démocratiques et qu'elle se désintéresse manifestement des droits économiques et des droits de propriété, joue fortement contre tout droit de grève implicite.

Finally, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the *Charter*.

Consequently, the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* which prohibited the use of strikes and lockouts were not inconsistent with the provisions of the *Charter* since the *Charter* does not guarantee a right to strike. The provisions of the Acts which related to the conduct of arbitration were also not inconsistent with the *Charter*, since the *Charter* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

Per Dickson C.J. and Wilson J. (dissenting): The purpose of the constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. While s. 2(*d*), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed. What freedom of association seeks to protect, however, is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licence for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

In the context of labour relations, the guarantee of freedom of association in s. 2(*d*) of the *Charter* includes not only the freedom to form and join associations but also the freedom to bargain collectively and to strike.

Enfin, il faut reconnaître que le droit de grève conféré par la loi partout au Canada est une chose relativement récente. On ne peut dire actuellement qu'il a atteint le statut d'un droit fondamental qui doit être considéré comme implicite en l'absence de mention expresse dans la *Charte*.

Par conséquent, les dispositions de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* qui interdisent le recours aux lock-out et aux grèves ne sont pas incompatibles avec les dispositions de la *Charte* puisque la *Charte* ne garantit pas le droit de grève. Les dispositions de ces lois qui se rapportent à l'arbitrage ne sont pas incompatibles avec les dispositions de la *Charte*, puisque la *Charte* ne garantit aucune forme particulière de règlement des différends comme substitut au droit de grève.

Le juge en chef Dickson et le juge Wilson (dissidents): La garantie constitutionnelle de la liberté d'association, que l'on trouve à l'al. 2*d*) de la *Charte*, vise à reconnaître la nature sociale profonde des entreprises humaines et à protéger l'individu contre tout isolement imposé par l'État dans la poursuite de ses fins. L'alinéa 2*d*), à tout le moins, garantit aux personnes la liberté d'être associées ou d'appartenir à une organisation, néanmoins il doit, en plus de s'intéresser au statut d'associé, accorder une protection efficace aux intérêts que vise la garantie constitutionnelle et protéger l'exercice des activités mêmes pour lesquelles l'association a été formée. Ce que la liberté d'association vise à protéger, cependant, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer. Mais ce n'est pas là une autorisation constitutionnelle illimitée pour toute action collective. Le simple fait qu'une activité puisse être exercée par plusieurs personnes ensemble, aussi bien qu'individuellement, ne signifie pas que l'activité se voit conférer une protection constitutionnelle contre toute interdiction ou réglementation législative. Le facteur primordial demeure la question de savoir si un texte législatif ou un acte administratif porte atteinte à la liberté des personnes de se joindre à d'autres et de poursuivre avec elles des objectifs communs. L'objectif d'une loi qui a pour effet de la rendre invalide est la tentative d'interdire un comportement collectif en raison de sa nature concertée ou collective.

Dans le domaine des relations de travail, la liberté d'association garantie à l'al. 2*d*) de la *Charte* comprend non seulement la liberté de former des associations et d'y adhérer, mais aussi celle de négocier collectivement

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et de faire la grève. L'association a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs. Au cours de l'histoire, les travailleurs se sont associés pour surmonter leur vulnérabilité individuelle face à l'employeur et la capacité de négocier collectivement a depuis longtemps été reconnue comme l'une des fonctions intégrantes et premières des associations de travailleurs. Elle demeure essentielle à la capacité de chaque salarié, à titre individuel, de participer au processus qui leur assurera des conditions de travail humaines et équitables. Dans notre régime actuel de relations de travail, la protection constitutionnelle efficace des intérêts des associations de travailleurs dans le processus de négociation collective requiert aussi la protection concomittante de leur liberté de cesser collectivement de fournir leurs services, sous réserve de l'article premier de la *Charte*. En fait, le droit des travailleurs de faire la grève constitue un élément essentiel du principe de la négociation collective. Cela ne revient pas à dire que l'al. 2*d*) de la *Charte* consacre pour toujours le régime existant des relations de travail. Le domaine des relations de travail est assujetti à une réglementation législative substantielle. Le fait est que cette réglementation ne peut pas définir la portée de la liberté sous-jacente.

En l'espèce, les trois lois interdisent la grève, qu'elles définissent comme un arrêt de travail ou un refus de travailler par deux ou plusieurs personnes qui agissent de concert ou d'un commun accord. Il ne fait aucun doute que la législation albertaine vise à interdire une activité collective particulière, à cause de sa nature collective. La nature même d'une grève est d'influencer l'employeur par une action commune qui serait inefficace si elle était exercée par une seule personne. Il s'ensuit que l'art. 93 de la *Public Service Employee Relations Act*, le par. 117.1(2) de la *Labour Relations Act* et le par. 3(1) de la *Police Officers Collective Bargaining Act*, qui portent directement atteinte à la liberté des salariés de faire la grève, enfreignent la liberté d'association garantie à l'al. 2*d*) de la *Charte*.

Les restrictions à la liberté d'association imposées par ces dispositions ne peuvent être justifiées en vertu de l'article premier de la *Charte*. La protection du gouvernement contre les pressions politiques que ses employés peuvent exercer sur lui par leurs grèves ne constitue pas un objectif suffisamment important, pour les fins de l'article premier, pour limiter la liberté d'association par une interdiction législative de la liberté de faire la grève. Il n'a pas été démontré que tous les employés de la fonction publique jouissent d'un avantage important sur le plan de la négociation en raison du statut gouvernemental de leur employeur. Il n'a pas été non plus démontré que toute pression politique exercée sur le gouvernement au cours des grèves est d'une nature inhabituelle ou particulièrement préjudiciable.

strikes was of an unusual or peculiarly detrimental nature.

The protection of essential services is a government objective of sufficient importance for the purpose of s. 1, but the government did not demonstrate that this objective justified the limit on freedom of association imposed by the abrogation of the right to strike. The essential quality of police officers and firefighters was obvious and self-evident, and did not have to be proven by evidence. Thus, the Legislature's decision to prevent interruption in police protection and firefighting was rationally connected to the objective of protecting essential services. But the prohibition of the right to strike of all hospital workers and public service employees was too drastic a measure for achieving the object of protecting essential services. Indeed, without some evidentiary basis, it was neither obvious nor self-evident that all those employees performed services "whose interruption would endanger the life, personal safety or health of the whole or part of the population". Section 93 of the *Public Service Employee Relations Act* and s. 117.1(2) of the *Labour Relations Act*, in so far as it pertains to the hospital employees under s. 117.1(1)(b), were too wide to be justified by relating to essential services for the purpose of s. 1.

Further, to impair as little as possible the freedom of association of those affected by a legislative prohibition to strike, such prohibition must also be accompanied by a mechanism for dispute resolution by a third party which would adequately safeguard workers' interest. In the present reference, the arbitration system provided by the Acts was not an adequate replacement for the employees' freedom to strike. While the provisions which required the arbitrator to consider the fiscal policies of the government and the wages and benefits of private and public unionized and non-unionized employees did not compromise the adequacy of the arbitration procedure, the exclusion of certain subjects from the arbitration process in the *Police Officers Collective Bargaining Act* and the *Public Service Employee Relations Act* did compromise the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. It may be necessary in some circumstances for a government employer

La garantie des services essentiels est un objectif gouvernemental d'importance suffisante pour les fins de l'article premier, mais le gouvernement n'a pas démontré que cet objectif justifiait la limite apportée à la liberté d'association par l'abrogation du droit de grève. Le caractère essentiel des agents de police et des pompiers est manifeste et évident en soi, et n'a pas à être démontré au moyen d'une preuve. Ainsi, la décision du législateur d'empêcher l'interruption de la protection assurée par les policiers et les pompiers est rationnellement liée à son objectif de protéger les services essentiels. Mais l'interdiction du droit de grève faite à tous les employés d'hôpitaux et à tous les employés de la fonction publique est une mesure trop draconienne par rapport à l'objectif de protection des services essentiels. D'ailleurs, sans quelque fondement probatoire, il n'est ni manifeste ni évident en soi que tous ces employés fournissent des services «dont l'interruption pourrait mettre en péril la vie, la sécurité ou la santé de la personne dans une partie ou dans la totalité de la population». L'article 93 de la *Public Service Employee Relations Act* et le par. 117.1(2) de la *Labour Relations Act*, dans la mesure où il vise les employés d'hôpitaux en vertu de l'al. 117.1(1)b), sont trop larges pour être justifiés pour le motif qu'ils seraient liés aux services essentiels pour les fins de l'article premier.

En outre, pour être de nature à porter atteinte le moins possible à la liberté d'association de ceux touchés par l'interdiction législative de faire la grève, cette interdiction doit également s'accompagner d'un mécanisme de règlement des différends par un tiers, qui permette de sauvegarder adéquatement les intérêts des travailleurs. Dans le présent renvoi, le système d'arbitrage prescrit par les lois ne constitue pas un substitut adéquat au droit de grève des employés. Certes les dispositions qui obligent l'arbitre à tenir compte des politiques financières du gouvernement et des salaires et avantages offerts aux salariés syndiqués et non syndiqués des secteurs public et privé ne compromettent pas le caractère adéquat du système d'arbitrage, mais l'exclusion de certains sujets du processus d'arbitrage dans la *Police Officers Collective Bargaining Act* et la *Public Service Employee Relations Act*, compromet l'efficacité du processus comme moyen d'assurer un pouvoir égal de négociation en l'absence du droit de grève. L'équité et l'efficacité du régime d'arbitrage se trouvent sérieusement compromises lorsque des questions, qui normalement pourraient être négociées, sont exclues de l'arbitrage. Il

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nally, none of the arbitration schemes in the Acts
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deemed appropriate. Such a discretionary power
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sum, the provisions relating to the arbitration
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1(2) of the *Labour Relations Act* and s. 3(1) of the
e Officers Collective Bargaining Act to be justified
r s. 1.

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368; *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1
S.C.R. 718.

peut être nécessaire, dans certaines circonstances, pour l'État-patron, de conserver un contrôle absolu sur certains aspects des conditions de travail par l'exclusion de certaines questions de l'arbitrage, cependant la présomption doit jouer contre de telles exclusions si l'on veut que l'efficacité du régime d'arbitrage substitué à la liberté de grève ne soit pas compromise. En l'espèce, le gouvernement ne s'est pas acquitté de la charge qui lui incombait de faire la preuve de cette nécessité.

Enfin, aucun des régimes d'arbitrage établis dans les lois ne prévoit le droit de soumettre un différend à l'arbitrage. Au contraire, un ministre ou un organisme administratif se voit conférer le pouvoir discrétionnaire de constituer un tribunal d'arbitrage s'il le juge approprié. Un tel pouvoir discrétionnaire est une atteinte injustifiée à l'équité de la procédure d'arbitrage destinée à promouvoir l'égalité du pouvoir de négociation entre les parties.

En somme, les dispositions relatives aux régimes d'arbitrage ne restreignent pas en soi la liberté d'association. Ces dispositions toutefois, à l'exception de celles qui obligent l'arbitre à tenir compte de certains facteurs dans sa sentence arbitrale, ont pour effet de rendre le régime d'arbitrage inadéquat comme substitut à la liberté de grève et, par conséquent, contribuent à rendre l'art. 93 de la *Public Service Employee Relations Act*, le par. 117.1(2) de la *Labour Relations Act* et le par. 3(1) de la *Police Officers Collective Bargaining Act* injustifiés selon l'article premier.

Jurisprudence

Citée par le juge McIntyre

Arrêts mentionnés: *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Collymore v. Attorney-General*, [1970] A.C. 538; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198, confirmé pour d'autres motifs, [1986] 2 R.C.S. 573; *Alliance de la Fonction publique du Canada c. La Reine*, [1984] 2 C.F. 562, confirmé [1984] 2 C.F. 889; *Re Prime and Manitoba Labour Board* (1983), 3 D.L.R. (4th) 74 (B.R. Man.), infirmé pour d'autres motifs (1984), 8 D.L.R. (4th) 641 (C.A. Man.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392; *Canadian Pacific Railway Co. v. Zambri*, [1962] R.C.S. 609; *Canadian Air Line Pilots' Ass'n and Eastern Provincial Airways Ltd.* (1983), 5 CLRBR (NS) 368; *McGavin Toastmaster Ltd. c. Ainscough*, [1976] 1 R.C.S. 718.

By Dickson C.J. (dissenting)

Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983), 44 O.R. (2d) 392; *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609; *Collymore v. Attorney-General*, [1970] A.C. 538, aff'g (1967), 12 W.I.R. 5; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198, aff'd on other grounds, [1986] 2 S.C.R. 573; *Public Service Alliance of Canada v. The Queen*, [1984] 2 F.C. 889; *Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland* (1985), 14 C.R.R. 193; *Re Prime and Manitoba Labour Board* (1983), 3 D.L.R. (4th) 74 (Man. Q.B.), rev'd on other grounds (1984), 8 D.L.R. (4th) 641 (Man. C.A.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358; *Re Chung and Amalgamated Clothing and Textile Workers' Union* (1986), 54 O.R. (2d) 650; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; *Healy v. James*, 408 U.S. 169 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (1971), aff'd 404 U.S. 802 (1971); *Thomas v. Collins*, 323 U.S. 516 (1945); *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *School Committee of the Town of Westerly v. Westerly Teachers Ass'n*, 299 A.2d 441 (1973); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590; *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142; *Perrault v. Gauthier* (1898), 28 S.C.R. 241; *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Oakes*, [1986] 1 S.C.R. 103; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*, P.S.E.R.B. (Alta.), Nos. 140-005-502, 140-013-502,

Citée par le juge en chef Dickson (dissident)

Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983), 44 O.R. (2d) 392; *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609; *Collymore v. Attorney-General*, [1970] A.C. 538, confirmant (1967), 12 W.I.R. 5; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198, confirmé pour d'autres motifs, [1986] 2 R.C.S. 573; *Alliance de la Fonction publique du Canada c. La Reine*, [1984] 2 C.F. 889; *Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland* (1985), 14 C.R.R. 193; *Re Prime and Manitoba Labour Board* (1983), 3 D.L.R. (4th) 74 (B.R. Man.), infirmé pour d'autres motifs (1984), 8 D.L.R. (4th) 641 (C.A. Man.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358; *Re Chung and Amalgamated Clothing and Textile Workers' Union* (1986), 54 O.R. (2d) 650; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; *Healy v. James*, 408 U.S. 169 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (1971), confirmé 404 U.S. 802 (1971); *Thomas v. Collins*, 323 U.S. 516 (1945); *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *School Committee of the Town of Westerly v. Westerly Teachers Ass'n*, 299 A.2d 441 (1973); *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590; *Robertson and Rosetanni v. The Queen*, [1963] R.C.S. 651; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142; *Perrault v. Gauthier* (1898), 28 R.C.S. 241; *Canadian Pacific Railway Co. v. Zambri*, [1962] R.C.S. 609; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *R. c. Oakes*, [1986] 1 R.C.S. 103; *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*,

In an age of interdependence and large-scale organisation, in which the individual counts for so little unless he acts in co-operation with his fellows, freedom of association has become the cornerstone of civil liberties and social and economic rights alike. It has long been the bulwark of religious freedom and political liberty; it has increasingly become a necessary condition of economic and social freedom for the ordinary citizen.

Our society supports a multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational, and charitable. This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals. Of particular importance is the indispensable role played by freedom of association in the functioning of democracy. Paul Cavalluzzo said in "Freedom of Association and the Right to Bargain Collectively" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at pp. 199-200:

Secondly, [freedom of association] is an effective check on state action and power. In many ways freedom of association is the most important fundamental freedom because it is the one human right which clearly distinguishes a totalitarian state from a democratic one. In a totalitarian system, the state cannot tolerate group activity because of the powerful check it might have on state power.

Associations serve to educate their members in the operation of democratic institutions. As de Tocqueville noted, *supra*, vol. II, at p. 116:

... [individuals] cannot belong to these associations for any length of time without finding out how order is maintained among a large number of men and by what contrivance they are made to advance, harmoniously and methodically, to the same object. Thus they learn to surrender their own will to that of all the rest and to make their own exertions subordinate to the common impulse, things which it is not less necessary to know in civil than in political associations. Political associations may therefore be considered as large free schools, where

[TRADUCTION] À une époque d'interdépendance et d'organisations à grande échelle, où l'individu compte pour si peu, à moins qu'il ne coopère avec ses semblables, la liberté d'association est devenue la pierre angulaire des libertés civiles et des droits tant sociaux qu'économiques. Ce fut longtemps le rempart de la liberté religieuse et politique; elle est devenue de plus en plus une condition nécessaire de la liberté économique et sociale du citoyen ordinaire.

Notre société reconnaît l'existence d'une multitude de groupes organisés, de clubs et d'associations qui poursuivent des objectifs fort variés d'ordre religieux, politique, éducatif, scientifique, récréatif et charitable. Cet exercice de la liberté d'association ne fait pas que servir les intérêts ou la cause de l'individu, il favorise la réalisation d'objectifs sociaux généraux. Le rôle que la liberté d'association joue dans le fonctionnement de la démocratie revêt une importance particulière. Paul Cavalluzzo affirme, dans un article intitulé «Freedom of Association and the Right to Bargain Collectively» que l'on trouve dans *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), aux pp. 199 et 200:

[TRADUCTION] En second lieu, [la liberté d'association] constitue un frein efficace contre l'action et la puissance de l'État. À plusieurs égards, la liberté d'association est la liberté fondamentale la plus importante du fait qu'elle constitue le droit de la personne qui distingue nettement l'État démocratique de l'État totalitaire. Dans un régime totalitaire, l'État ne peut tolérer l'activité collective à cause du contrôle puissant qu'elle peut exercer sur la puissance de l'État.

Les associations servent à éduquer leurs membres sur le fonctionnement des institutions démocratiques. Comme le souligne de Tocqueville, précité, tome II, à la p. 158:

... [des individus] ne sauraient faire longtemps partie de ces associations-là sans découvrir comment on maintient l'ordre parmi un grand nombre d'hommes, et par quel procédé on parvient à les faire marcher, d'accord et méthodiquement, vers le même but. Ils y apprennent à soumettre leur volonté à celle de tous les autres, et à subordonner leurs efforts particuliers à l'action commune, toutes choses qu'il n'est pas moins nécessaire de savoir dans les associations civiles que dans les associations politiques.

all the members of the community go to learn the general theory of association.

Associations also make possible the effective expression of political views and thus influence the formation of governmental and social policy. As Professor G. Abernathy observed in *The Right of Assembly and Association* (1961), at p. 242:

... probably the most obvious service rendered by the institution of association is influencing governmental policy. Concerted action or pressure on governmental agencies has a far greater chance of success than does the sporadic pressure of numerous individuals acting separately.

Freedom of association then serves the interest of the individual, strengthens the general social order, and supports the healthy functioning of democratic government.

In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. While some provisions in the Constitution involve groups, such as s. 93 of the *Constitution Act, 1867* protecting denominational schools, and s. 25 of the *Charter* referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

Many of the scholarly writers on this subject have recognized and stated this proposition. Clyde W. Summers in "Freedom of Association and

Les associations politiques peuvent donc être considérées comme de grandes écoles gratuites, où tous les citoyens viennent apprendre la théorie générale des associations.

Les associations permettent aussi d'exprimer efficacement des opinions politiques et influencent ainsi l'élaboration des politiques gouvernementales et sociales. Comme le professeur G. Abernathy le fait observer dans son ouvrage intitulé *The Right of Assembly and Association* (1961), à la p. 242:

[TRADUCTION] ... il est probable que le service le plus manifeste que rend cette institution qu'est l'association, c'est l'influence qu'elle a sur les politiques gouvernementales. L'action concertée ou la pression exercée sur les organismes gouvernementaux a bien plus de chances d'être couronnée de succès que la pression sporadique d'un grand nombre d'individus agissant séparément.

La liberté d'association sert donc les intérêts de l'individu, renforce l'ordre social général et assure le bon fonctionnement du gouvernement démocratique.

En considérant la situation constitutionnelle de la liberté d'association, il faut reconnaître que, bien qu'elle assure la promotion de nombreux intérêts collectifs et, naturellement, qu'elle ne puisse être exercée seule, il s'agit néanmoins d'une liberté qui appartient à l'individu et non aux groupes formés grâce à son exercice. Bien que certaines dispositions de la Constitution s'intéressent à des groupes, tels l'art. 93 de la *Loi constitutionnelle de 1867*, qui assure la protection des écoles confessionnelles, et l'art. 25 de la *Charte*, qui traite des droits existants des autochtones, les droits et libertés qui restent sont des droits individuels; ils ne concernent pas le groupe par rapport à ses membres. Le groupe ou l'organisation n'est qu'un moyen adopté par des individus pour mieux réaliser leurs droits et aspirations individuels. Les gens ne peuvent pas, simplement en se joignant à d'autres, créer une entité qui a des droits et des libertés constitutionnels plus grands que ceux que possèdent les individus. La liberté d'association ne saurait donc conférer des droits indépendants au groupe.

Plusieurs des auteurs qui ont écrit sur ce sujet ont reconnu et énoncé ce principe. Clyde W. Summers affirme, dans «Freedom of Association and

. in the case of other licences issued under the such licences may, by s. 12 of the Regula-, be subjected to restrictions regarding the es and quantity of fish that may be taken, the s and times when they may be taken, the ıer in which they are to be marked and, most rtant here, the type of gear and equipment may be used. Section 12 reads as follows:

(1) Subject to these Regulations and any regula- made under the Act in respect of the fisheries to ı these Regulations apply and for the proper man- ent and control of such fisheries, there may be ied in a licence issued under these Regulations

the species of fish and quantity thereof that is mitted to be taken;

the period during which and the waters in which ıing is permitted to be carried out;

the type and quantity of fishing gear and equip- nt that is permitted to be used and the manner in ich it is to be used;

the manner in which fish caught and retained for ıcational or scientific purposes is to be held or played;

the manner in which fish caught and retained is to marked and transported; and

the manner in which scientific or catch data is to reported.

No person fishing under the authority of a licence ed to in subsection (1) shall contravene or fail to ly with the terms of the licence.

rsuant to these powers, the Musqueam Indian l, on March 31, 1984, was issued an Indian fishing licence as it had since 1978 "to fish almon for food for themselves and their fami- n areas which included the place where the ce charged occurred, the waters of Ladner h and Canoe Passage therein described. The ce contained time restrictions as well as the of gear to be used, notably "One Drift net ty-five (25) fathoms in length".

ıe appellant was found fishing in the waters ibed using a drift net in excess of 25 fathoms.

Comme dans le cas des autres permis délivrés en vertu de la Loi, l'art. 12 du Règlement prévoit que ces permis peuvent faire l'objet de restrictions concernant les espèces et les quantités de poisson qui peuvent être prises, les lieux où le poisson peut être pris et les périodes pendant lesquelles il peut l'être, la façon dont le poisson doit être marqué et, qui plus est en l'espèce, le type d'engins et d'équipement qui peuvent être utilisés. L'article 12 se lit ainsi:

12. (1) Sous réserve du présent règlement et des autres règlements établis en vertu de la Loi relativement aux pêches visées par le présent règlement, un permis délivré en vertu du présent règlement peut indiquer, aux fins de la gestion et de la surveillance judicieuses de ces pêches,

a) quelles espèces et quelles quantités de poisson peuvent être prises;

b) dans quelles eaux et pendant quelle période la pêche peut être pratiquée;

c) quel type et quelle quantité d'engins et d'équipement de pêche peuvent être utilisés et de quelle façon ils doivent l'être;

d) de quelle façon le poisson pris et gardé à des fins éducatives ou scientifiques doit être gardé en captivité ou exposé;

e) de quelle façon le poisson pris et gardé doit être marqué et transporté; et

f) de quelle façon les données à caractère scientifique ou concernant les prises doivent être soumises.

(2) Il est interdit à quiconque pêche en vertu d'un permis visé au paragraphe (1) de déroger aux conditions de ce permis.

Conformément à ces pouvoirs, le 31 mars 1984, on a délivré à la bande indienne des Musqueams un permis de pêche de subsistance comme on le faisait depuis 1978 [TRADUCTION] «pour pêcher le saumon aux fins de leur alimentation et de celle de leurs familles» dans des secteurs dont celui où l'infraction reprochée a été commise, les eaux de Ladner Reach et du passage Canoe décrites dans le permis. Le permis comportait des restrictions quant à la période de pêche et quant au type d'engins à utiliser, notamment [TRADUCTION] «Un filet dérivant de vingt-cinq (25) brasses de longueur».

L'appelant a été surpris en train de pêcher dans les eaux décrites précédemment au moyen d'un

He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing" means "being in actuality in 1982": *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.), at p. 446, aff'd (1984), 12 C.C.C. (3d) 365 (Sask. C.A.) See also *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201.

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa, supra*, had this to say about the matter, at p. 214:

Some academic commentators have raised a further problem which cannot be ignored. The **Ontario Fishery Regulations** contained detailed rules which vary for different regions in the province. Among other things, the **Regulations** specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable

filet dérivant de plus de 25 brasses. Il ne conteste pas ce fait, mais soutient plutôt qu'il n'a commis aucune infraction parce qu'il exerçait alors un droit ancestral existant qui a été reconnu et confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Analyse

Nous aborderons en premier lieu le sens de l'expression droits ancestraux «existants» ainsi que le contenu et la portée du droit de pêche des Musqueams. Nous examinerons ensuite le sens des mots «reconnus et confirmés» et l'effet du par. 35(1) sur le pouvoir réglementaire du Parlement.

«Existants»

Il ressort clairement du mot «existants» que les droits auxquels s'applique le par. 35(1) sont ceux qui existaient au moment de l'entrée en vigueur de la *Loi constitutionnelle de 1982*. D'où il s'ensuit que cette loi ne vient pas rétablir des droits éteints. Un certain nombre de tribunaux ont adopté le point de vue que le terme «existants» signifie «qui étaient exercés en 1982»: *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (B.R. Sask.), à la p. 446, conf. (1984), 12 C.C.C. (3d) 365 (C.A. Sask.) Voir également les arrêts *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (C.A. Ont.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (B.R. Alb.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (B.R.N.-B.); *R. v. Agawa* (1988), 28 O.A.C. 201.

De plus, un droit ancestral existant ne saurait être interprété de façon à englober la manière précise dont il était réglementé avant 1982. L'idée que le droit a été figé de cette façon aurait pour effet d'introduire dans la Constitution un ensemble de règlements disparates. Voici ce que le juge Blair de la Cour d'appel affirme à ce sujet dans l'arrêt *Agawa*, précité, à la p. 214:

[TRADUCTION] Certains auteurs ont soulevé un autre problème qui ne peut être ignoré. Le **Règlement de pêche de l'Ontario** comporte des règles détaillées qui varient d'une région à l'autre dans la province. Le règlement précise notamment les saisons et les méthodes de pêche, les espèces de poisson qui peuvent être prises et le nombre de prises. Des dispositions détaillées du

Minister of Justice v. Borowski

See Tab 7

A.G. (Canada) Book of Authorities.

No Deal!

Why Canadians Should Reject the Mulroney Constitution

By

Deborah Coyne and Robert Howse

Voyageur Publishing
82 Frontenac Street, Hull, Quebec J8X 1Z5 (819) 778-2946
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III. The Division of Legislative Powers

As the Spicer Commission found and as was evident from the Halifax Conference on the Division of Powers, most Canadians are strongly opposed to further decentralization of our already very decentralized federation. Canadians are thoroughly fed up with our politicians talking incessantly about trading legislative powers without articulating precisely what they want to do with these powers and whether this will advance the public interest and social justice.

Moreover, as Quebec political scientist Stéphane Dion persuasively argues, most Quebeckers have never been really concerned about a transfer of powers between Ottawa and Quebec as an end in itself. Dion criticizes the current debate for failing to consider the issue of the division of powers from the point of view of improving the quality of services offered to Quebeckers, something which would bring into question the need for a massive transfer of powers from Ottawa to Quebec.

In many cases, Quebeckers are more critical of their provincial services than other Canadians. For instance, at the very time that Quebec's constitutional negotiators were insisting on federal withdrawal from the worker training and manpower fields, Quebec business leaders were denouncing the Quebec government's own, recently revealed strategy in this area ("Des gens d'affaires dénoncent le projet de loi sur la main-d'oeuvre," *Le Devoir*, June 17, 1992, page 7). With respect to culture and language, Montreal novelist Pierre Billon asks:

> If our language is in danger, how is it possible to explain the poverty of (Quebec) government action to protect it? ... Our politicians declare that our cultural identity is threatened, but this threat doesn't seem to them all that serious, if one is to judge by the modest spending and weak programs for arts and culture. ... It is claimed that the powers that Quebec has under the existing constitution are insufficient to protect its cultural specificity. *The politicians who make these arguments would be more convincing, if they were to exercise fully the powers they already have before asking for new ones*"(*L'Actualité*, December 1991; emphasis added).

The sell-out of powers to the provinces in the latest constitutional package illustrates well the lack of any coherent vision of the future. First, unlike in the earlier federal proposals or the Beaudoin-Dobbie Report, the distinct society provisions of the Canada clause are explicitly the basis for interpreting the whole constitution, including the division of powers. It is thus predictable that Quebec will eventually emerge with special powers in many of the so-called grey areas of policy which are not explicitly set out in the constitution.

In addition, the package includes a proposal providing for a confusing mix of bilateral and multilateral federal-provincial agreements in a wide range of areas and their entrenchment, however complex, in the constitution. This will result in not only a patchwork quilt of legislative powers among provinces in many areas, but also confusing lines of accountability and little sense of common national purpose. It will generate an uncontrolled and incoherent asymmetry in powers, wreaking havoc on our economic union. Regulatory chaos could be created with respect to interprovincial trade and economic activity. This is something about which businesses certainly should be particularly concerned,

not to mention average Canadians. Nothing should automatically be a part of the constitution without adequate second thought.

The fact that these agreements may automatically expire at the end of five years but be renewable by a vote of the legislatures does not change this assessment. Once a significant alteration in policy responsibility takes place, in some fields it will most likely be politically impossible for the federal government to recover the power after five years of building up entrenched provincial bureaucracies and vested interests.

In addition, the entrenchment of complex agreements including detailed funding formulae will quickly turn a constitutional document which ought to reflect general principles and objectives, into a version of the incomprehensible Income Tax Act! Finally, the role of federal MPs from provinces which have complete jurisdiction over a certain policy area will certainly be called into question. Eventually, Parliament could become unworkable with different classes of MPs, different voting privileges and so on.

The explicit devolution of powers proposed in the latest package involves the following areas: culture, immigration, labour market development and training, regional development, telecommunications, tourism, forestry, mining, recreation, housing, and municipal and urban affairs. In some cases, this devolution will be accomplished by complex bilateral agreements and only on the initiative of the provincial government. In all cases, the federal government will be weakened in a fundamentally unaccountable and undemocratic way that involves behind-the-scenes horse-trading and brokering between governments. For example, in the case of telecommunications, secret federal-provincial negotiations to devolve powers to several provinces are already well advanced.

There are few clear indications, from any of the parties to the negotiations, of which actual policies and laws would shift from the federal to the provincial level under these agreements and the implications for the ordinary citizen. For example, in the case of the exclusion of federal jurisdiction over housing and urban affairs, is it intended that the provinces have the legal right to dismantle the Canada Mortgage and Housing Corporation or insist that the federal government withdraw from the provision of low-cost housing to Canadians?

Admittedly, many of these fields are already within provincial jurisdiction. The issue is whether to exclude all the concurrent federal involvement in areas where it has obviously been considered legitimate and necessary over the years.

Environmentally-sensitive industries

For example, as mentioned earlier, excluding federal jurisdiction over environmentally sensitive industries including forestry and mining will impair the important federal role with respect to environmental protection. Also, since these industries represent a considerable percentage of Canada's exports, what are the implications for the federal power over international trade and related industrial policy?

In the case of the environment, supporters of the Charlottetown Accord will undoubtedly argue that the federal government can use other heads of power to protect the environment with respect to forestry and mining. However, an all-party House of Commons Committee that examined many of these proposals for devolution when they first appeared (in the document *Shaping Canada's Future Together)* expressed serious concerns. The concerns were in part based on the intention to eliminate the federal declaratory

Canadian Council of Churches

See Tab 8

A.G. (Canada) Book of Authorities

Kelly then typed the written statement on a statement form. The form contained the following three questions:

1. Do you understand the charge?
2. Do you understand the caution?
3. I have to inform you that you have the right to retain and instruct counsel without delay. Do you understand that?

The form was read to the accused and the accused answered "yes" to each of the three questions. The accused then read and signed the statement.

We are in substantial agreement with the Court of Appeal. As there was and is no need to determine whether, under the circumstances of this case, the accused's conduct amounted to a waiver of his right to counsel, we prefer not to pronounce upon that matter. We agree with Tarnopolsky J.A. in *R. v. Anderson* (1984), 10 C.C.C. (3d) 417, 7 D.L.R. (4th) 306, 45 O.R. (2d) 225 (Ont. C.A.), wherein he said, at p. 431 C.C.C., p. 320 D.L.R.:

> . . . I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forth in this case.

In the present case, the accused did not put forward, nor does the record reveal, any evidence suggesting that he was denied an opportunity to ask for counsel. Absent such circumstances, as that referred to by Tarnopolsky J.A., once the police have complied with s. 10(*b*), by advising the accused without delay of his right to counsel without delay, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel.

This appeal is dismissed.

Appeal dismissed.

Penikett et al. v. The Queen et al.

[Indexed as: Penikett v. Canada]

Yukon Territory Court of Appeal, Nemetz C.J.Y.T., Hinkson and Macdonald JJ.A. December 23, 1987.

Constitutional law — Charter of Rights — Application — Leader of Yukon Government seeking declaration that federal-provincial agreement on constitutional amendment proposal violates Charter rights of Yukon residents — Charter not applicable to constitutional amendments — Canadian Charter of Rights and Freedoms, s. 32(1).

Administrative law — Duty to act fairly — Applicability — Leader of Yukon Government bringing application for declaration that Prime Minister violated duty of fairness in agreeing with Premiers to constitutional amendment proposal without consulting or inviting participation of representatives of Yukon Territory — Duty of fairness not applicable in process of legislation — Federal government not under fiduciary obligation to residents of Yukon Territory — Constitution Act, 1982, s. 41.

The leader of the Government of the Yukon Territory brought a petition against the federal government seeking declarations that the proposed constitutional amendment reached at Meech Lake in 1987 violated rights of Yukon residents under ss. 3, 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The trial judge, on an application for an order pursuant to Rule 34 of the Yukon Rules of Court held that the Charter applies to Part V of the *Constitution Act, 1982* (the amending formula) and that some, although not all, of the claims were justiciable.

On appeal, **held**, the appeal should be allowed.

The Charter of Rights does not apply to the procedure for amending the Constitution found in Part V of the *Constitution Act, 1982*. The reference to "all matters" in s. 32 of the Charter cannot apply to the procedures under the amending formulas. The word "matters" in s. 32(1) parallels its use in ss. 91 and 92 of the *Constitution Act, 1867*. A constitutional amendment is not a matter within the authority of Parliament or the provinces. The amending power is vested in a joint decision of both federal and provincial authorities. The Charter cannot be used to prevent constitutional amendments.

The claim that the Prime Minister of Canada breached a duty of fairness and the principle of fundamental justice under s. 7 of the Charter by failing to invite representatives of the Yukon Territory to conferences leading to the proposed amendment and by failing to consult with them before agreeing to it, is not justiciable. The *Constitution Act, 1982*, in Part V, sets forth the procedure for constitutional amendment. The Prime Minister, in convening the Meech Lake conference of first ministers, was initiating a process of legislation which could lead to an amendment to the Constitution. In so doing, he acted within the terms of the mandate implicitly contained in Part V of the *Constitution Act, 1982*. Therefore, the claims raised are not justiciable because they seek to challenge the process of legislation. The Government of Canada does not have a fiduciary obligation with respect to the residents of the Yukon Territory. Therefore, a claim that the government breached a fiduciary obligation is not justiciable.

Cases referred to

Reference re an Act to Amend the Education Act (1986), 25 D.L.R. (4th) 1, 53 O.R. (2d) 513, 23 C.R.R. 193; affd 40 D.L.R. (4th) 18, [1987] 1 S.C.R. 1148; *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145, [1984] 6 W.W.R. 577, 41 C.R. (3d) 97, *sub nom. Director of Investigation & Research of Combines Investigation Branch v. Southam Inc.*, 33 Alta. L.R. (2d) 193, 9 C.R.R. 355, 27 B.L.R. 297, 55 A.R. 291, 84 D.T.C. 6467, 55 N.R. 241; *Reference re s. 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, 63 N.R. 266; *A.-G. Can. v. Inuit Tapirisat of Canada* (1980), 115 D.L.R. (3d) 1, [1980] 2 S.C.R. 735, 33 N.R. 304; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385, 50 C.C.C. (3d) 353, 13 C.R. (3d) 1, 30 N.R. 119; *Council of Civil Service*

v. Minister for Civil Service, [1985] 1 A.C. 374; *Operation Dismantle Inc. Queen* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287, 59 ; *A.-G. Hong Kong v. Ng Yuen Shui*, [1983] 2 All E.R. 346; *Schmidt v. ry of State for Home Affairs*, [1969] 1 All E.R. 518; *R. v. Secretary of State me Department, Ex p. Ruddock*, [1987] 2 All E.R. 518; *Mensigner v.* ., [1987] 1 F.C. 59, 24 C.R.R. 360; *Bates v. Lord Hailsham of St. ebone*, [1972] 3 All E.R. 1010; *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 1984] 2 S.C.R. 335, 59 B.C.L.R. 301, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 . 6, 55 N.R. 161; revg 143 D.L.R. (3d) 416, [1983] 2 F.C. 656, [1983] 2 R. 686, 13 E.T.R. 245, 45 N.R. 181; *Kinloch v. Secretary of State for India uncil* (1882), 7 App. Cas. 619; *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129; *ian War Claimants Ass'n Ltd. v. The King*, [1932] A.C. 14

ites referred to

ida Act, 1982 (U.K.), c. 11
idian Charter of Rights and Freedoms, ss. 3, 7, 15, 32
stitution Act, 1867, ss. 91, 92, 146
stitution Act, 1982, ss. 38-43, 52

s and regulations referred to

eme Court Rules (Y.T.), Rules 19(24), 34

clamations and Imperial Orders in Council referred to

stitution Amendment Proclamation, 1983, SI/84-102
ert's Land and North-western Territory Order, 1870, R.S.C. 1970, App. II, No. 9, Sch. (A)

APPEAL from a judgment of McDonald J., 43 D.L.R. (4th) 324, 87] 5 W.W.R. 691, determining certain questions of law suant to Rule 34 of the Yukon Territory Supreme Court Rules.

D.M.M. Goldie, Q.C., *W.S. Berardino*, Q.C., and *D.G. Cowper*, appellants.

John Sopinka, Q.C., and *Murray L. Smith*, for respondents.

BY THE COURT:— Five years ago, after years of national debate, amending procedure to our Constitution was enacted *nstitution Act, 1982*, Part V). However, the victory was a rrhic one. Quebec did not agree. Accordingly, this year, the vernment of Canada initiated a meeting of the provinces, luding Quebec, with the objective of arriving at an accord that uld have the unanimous approval of the provinces. On April 30, 87, at Meech Lake, a resolution acceptable to all was adopted. ice the opening of this appeal Parliament, Quebec and Saskatchewan have endorsed the resolution.

Neither the Yukon Territory nor the Northwest Territories re invited to Meech Lake. As a consequence, on May 27, 1987, e Yukon government, in the name of Mr. Penikett, the leader of e local government, filed a petition attacking the accord by eking a number of declarations. (The Northwest Territories was

granted intervenor status and has, since this hearing, brought its own proceedings.) Generally, the petition covered a number of complaints. Among these were:

(1) That the Accord was inconsistent with the rights of Yukoners to equal protection and benefit of the law (s. 15 of the *Charter*) because of the restriction of Supreme Court appointments from the provincial bars; the appointment of senators on the recommendations of provincial governments; the requirement that unanimous consent of all eleven governments would be required to establish any new provinces; the failure to include the consent of the Yukon in the proposed amending process; and not including an elected representative of the Yukon at the annual First Ministers' Conference;

(2) That all of the above areas were also inconsistent with the right of Yukoners under s. 7 of the *Charter* to life, liberty and security of the person;

(3) That it was inconsistent with conventional democratic principles in that the determination of the eligibility of the Yukon for provincehood was in the authority of provincial legislatures in which the Yukon has no representation and lacks any franchise to respond to the provincial exercise of power;

(4) That denying the Yukon Territorial Government a voice in constitutional matters was inconsistent with the right of every citizen to vote (s. 3 of the *Charter*) and rendered votes to elect the Yukon Territorial Government ineffective;

(5) That the agreement surrendered the residual discretion of the federal government to establish new provinces and was inconsistent with their continuing constitutional duties and obligations and violated established constitutional principles;

(6) The agreement limited the eligibility of the territories to admission as provinces and was a violation of a constitutional guarantee to territories' residents to protect their legal rights by courts of competent jurisdiction;

(7) That the effect of the Accord was inconsistent with a constitutional convention that the Yukon will have an increasing right of self-determination culminating in provincehood;

(8) Provisions in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights were violated by the restriction of eligibility of the Yukon to admission as a province without any or adequate defining principle or criteria for a veto;

(9) This restricted eligibility for admission was inconsistent with a constitutional right of the Yukon to be admitted as a province on the same basis as the other provinces were admitted;

(10) The Yukon has a unique status in Canada with greater rights and privileges than non-members of the union which might seek admission as provinces and provisions of the Accord which would restrict that status were contrary to prevailing constitutional values and principles.

The judge at the outset considered an application brought by the Government of Canada for an order pursuant to Rule 34 of the Yukon Rules of Court that the following questions of law be first answered:

(1) Does the *Charter of Rights and Freedoms* apply to Part V of the *Constitution Act, 1982*?

(2) Are the Declarations sought in the Petition otherwise justiciable or maintainable having regard to the terms of the *Canada Act, 1982*?

(3) Do the Petitioners have the legal capacity or standing to advance the claims set out in the Petition?

The judge answered Q. (1) in the affirmative. He answered Q. (2) by striking out most of the paragraphs in the petition but refused to strike out paras. 12, 12(a) and 16, holding these three paragraphs to be justiciable. They will be dealt with later. Question (3) is no longer in issue. It is from these conclusions that the Government of Canada has appealed to this court.

The appeal divides itself into three parts:

I. Do the provisions of the *Canadian Charter of Rights and Freedoms* apply to Part V of the *Constitution Act, 1982*?

II. Do paras. 12, 12(a) give rise to justiciable or maintainable claims?

III. Is the Government of Canada in breach of a fiduciary obligation (para. 16) with respect to the residents of the Yukon Territory in agreeing to the Meech Lake Accord?

There was a preliminary objection taken in this court by Mr. Sopinka, counsel for the respondents. It was to the effect that there could be no appeal from reasons for judgment alone. We see no merit in this objection, a formal order having been filed at this hearing. We, therefore, proceed to consider the substantive points raised.

I. *Do the provisions of the Canadian Charter of Rights and Freedoms apply to Part V of the Constitution Act, 1982?*

The judge said they did. Did he err? We conclude that he did for the following reasons:

The Constitution of Canada is not contained in one omnibus document. Unlike the United States of America, the other British North American colonies did not sunder their ties with the mother country by armed insurrection. Rather, in 1867, a constitution was granted the North American colonies by the British Parliament under the name of the *British North America Act, 1867*. When, therefore, Canada requested patriation of that Constitution, separate legislation was required by the Parliament of the United Kingdom. Perhaps another mechanism might have been found to establish a fully Canadian Constitution but, in the heat of the political debate in the early 1980's, the method of patriation was for the United Kingdom to enact the *Canada Act*, 1982 (U.K.), c.

11. Accordingly, what we now have are basically several tional Acts from 1867 to 1982 which must be read tog arrive at the constitutional framework of Canada. First the old British Act, the *British North America Act, 1* called the *Constitution Act, 1867* as amended over the y to that we add the *Constitution Act, 1982* as amende Constitution Amendment Proclamation, 1983, SI/84-102. *Constitution Act, 1982* that contains not only Part *Canadian Charter of Rights and Freedoms*, but also Pa existing amending formula to the Constitution of Canada.

Part V of the *Constitution Act* explicitly provide procedure for amending the Constitution of Canada. Se sets out that the Constitution of Canada includes:

> 52(1) The Constitution of Canada is the supreme law of Canad law that is inconsistent with the provisions of the Constitution extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (*a*) the *Canada Act, 1982*, including this Act;
>
> (*b*) the Acts and orders referred to in the schedule; and
>
> (*c*) any amendment to any Act or order referred to in parag (*b*).
>
> (3) Amendments to the Constitution of Canada shall be made onl dance with the authority contained in the Constitution of Canada.

Part V contains a number of amendment procedures various enactments that together form our Constitutio range from amendment by Parliament and two-third provinces having in aggregate 50% of the total popul Canada (s. 38) to those matters which require unanimit House of Commons, Senate of Canada and all the provinc latures (s. 41). The question that follows is: can s. 3 Charter be interpreted to include an amendment properly under Part V? We do not think so.

Section 32 provides:

> 32(1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in res matters within the authority of Parliament including a relating to the Yukon Territory and Northwest Territorie
>
> (*b*) to the legislature and government of each province in re matters within the authority of the legislature of each pro

In our view "all matters" cannot apply to procedures u amending formulas. The word "matters" in s. 32(1) of the parallels its use in ss. 91 and 92 of the *Constitution A* Constitutional powers in Canada have always been

between Parliament and the provincial legislative assemblies by these sections. The Parliament of the United Kingdom possessed the power to amend the Constitution of Canada until 1982. This power, as embodied in Part V of the *Constitution Act, 1982*, is now possessed jointly by Parliament and the provincial legislative assemblies. A constitutional amendment is not a "matter" within the authority of either Parliament or the provinces. The amending power is vested in a joint decision of both federal and provincial authority.

We agree with the view adopted by the majority of the Court of Appeal of Ontario where, in another context, they observed that no part of the Constitution is made by virtue of s. 52, paramount over another. Each provision, they noted, must be read in light of the other provisions, unless otherwise specified: *Reference re an Act to Amend the Education Act* (1986), 25 D.L.R. (4th) 1 at p. 54, 53 O.R. (2d) 513, 23 C.R.R. 193; appeal dismissed by the Supreme Court of Canada, unreported, June 25, 1987 [now reported 40 D.L.R. (4th) 18, [1987] 1 S.C.R. 1148].

Subsections (1) and (2) of s. 52 when read together make it clear that it is the Constitution of Canada as a whole which constitutes the supreme law of the land. Subsection (2)(c) of s. 52 includes amendments, and s-s. (3), in our opinion, must refer to the method of amending the Constitution contained in Part V. We find no limitations in the 1982 Act upon the scope of the power to amend the Constitution conferred by ss. 38 to 43. To decide otherwise would be to deny to the elected representatives of Parliament and the several legislatures the ultimate power of amending the Constitution.

The purpose of the Charter is clear. It was stated by Dickson J. (as he then was) in *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641 at p. 650, [1984] 2 S.C.R. 145 at p. 156, 14 C.C.C. (3d) 97:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not itself an authorization for governmental action.

Constitutional amendments, once proclaimed, may affect the relationship between citizen and state. Yet the rights and freedoms in the Charter are not absolute. Nor are they permanent in the sense that they cannot be changed by amending the Constitution of Canada. In a democracy such as Canada, the elected representatives must be able to make such amendments as are

required. Indeed, the Charter exists because it was created by the elected representatives of Canada, as Lamer J. commented in *Reference re s. 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 at p. 545, [1985] 2 S.C.R. 486 at p. 497, 23 C.C.C. (3d) 289:

> It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada.

The Charter cannot be used to prevent constitutional amendments.

For these reasons we answer the first question in the negative.

II. *Do paras. 12 and 12(a) give rise to justiciable or maintainable claims?*

The second issue raised by the appellants was with respect to the decision of the judge that para. 12 as modified by para. 12(a) raised a justiciable issue which should not be struck out pursuant to Rule 19(24) but should be permitted to proceed to trial. Before the judge the respondents, who had made the motion, also relied on Rule 34 which required the court to consider whether or not para. 12 raised a question of law, the resolution of which would substantially dispose of the whole of the case or of an issue therein. In dealing with the motion, it would appear that the judge approached this issue upon the basis of the provisions of Rule 19(24).

Paragraph 12 of the petition asks the court to make a declaration as follows:

> 12. That the agreement of the federal government to the terms of the Québec Accord without consulting the elected representatives of the Yukon Territory before sacrificing rights, liberties and privileges held by citizens of the Yukon Territory is inconsistent with conventional democratic principles and principles of fundamental justice by which Canadian society has traditionally been ruled.

Before the judge difficulties arose as to the meaning of that paragraph and therefore para. 12(a) was added by amendment with leave of the court during the course of argument. It reads as follows:

> 12(a). That the Prime Minister of Canada breached a duty of fairness and the principles of fundamental justice under section 7 of the Charter of Rights in failing to invite representatives of the Yukon Territory to attend the conferences leading to the Constitution Amendment, 1987 and in failing to consult representatives of the Yukon Territory before committing the Government of Canada to the terms of the Constitution Amendment, 1987. This duty of fairness arises by law and by virtue of section 7 of the Charter of Rights and as a result of conventions, practice and the history of the relationship of the parties.

after full argument. However, it seems to me that almost all obstacles are overcome on the strength of the decision of the Supreme Court of Canada in *Carey v. The Queen in right of Ontario* (1986), 35 D.L.R. (4th) 161, 30 C.C.C. (3d) 498, [1986] 2 S.C.R. 637. In that case the reasons for judgment of a unanimous court were handed down by La Forest J. The reasons contain a comprehensive review of decisions in Canada, England, Australia, New Zealand, and the United States. There is no need for me to attempt a reconsideration of the same authorities. La Forest J. has outlined how judicial thinking in virtually every jurisdiction has altered considerably from the expression of opinion of the House of Lords in *Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587, [1942] A.C. 624. In that case, decided under wartime conditions, a ministerial objection to the production of information was taken to be conclusive. That is no longer so.

The judgment of La Forest J. in *Carey v. The Queen* makes it clear that the law in Canada has evolved to the point where a subpoena will not be set aside on the basis of a ministerial opinion that the revelation of evidence would be contrary to public interest. At p. 174 he states:

> The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.
>
> In the end, it is for the court and not the Crown to determine the issue.

And how is the court to determine the issue? Save in instances touching upon national security or international diplomacy, the answer seems to be that the party seeking to have the documents produced must establish that ". . . a reasonably probable case has been made out that the documents contained material relevant to issues in the action". If that be done, then the court must balance the competing interests of preventing harm to the public service as against the public interest in the administration of justice, and to make that determination the documents might be privately inspected to determine where the balance of interest lies.

In the present case, I think the Society and the Association have established the likelihood that the documents contain material which is relevant to the task of the Board, namely, to make a recommendation as to appropriate hydro rates. I think it would be desirable that the subpoena be answered, and the documents made available. The Board may find that the information contained in the documents is not relevant to the task of the Board in which case they will be inadmissible. In any event,

only the particular portions of the documents which are relevant are to be revealed. And this would be so only after the Board has weighed the desirabilitiy of having that evidence openly revealed as against the possible harm flowing from disclosure.

In short, I think it is desirable that the documents be privately considered by the Board to determine whether the documents contain admissible evidence which is in the public interest to be revealed.

That would appear to be the growing trend. In the *Carey* case itself the Supreme Court allowed the documentation to be produced and inspected by the trial judge "to determine whether on balancing the competing interests already described, they should be produced". In his comprehensive reasons for judgment La Forest J. delineates a growing inclination on the part of the courts to satisfy themselves by way of inspection to determine whether a ministerial claim to immunity has validity.

In the instant case, I think that course is the preferred one. I would set aside the order of the Board, and allow the subpoena to be issued and served.

I think it is desirable that the Board itself, after private inspection, determine whether and to what extent the documents will be admitted as evidence. That decision should be made in the context of the responsibility of the Board to make a recommendation as to hydro rates. The Board rather than this court is in a better position to determine relevancy and to weigh the competing interests.

This is not a case for costs.

Appeal dismissed.

Re Sibbeston and Attorney-General of Canada

[Indexed as: Sibbeston v. Canada (Attorney-General)]

Northwest Territories Court of Appeal, McClung, Foisy and J.A. Irving JJ.A.
February 3, 1988.

Constitutional law — Charter of Rights — Application — Petitioner challenging proposed 1987 constitutional amendment as violating Charter of Rights — Charter not applicable to constitutional amendments — Canadian Charter of Rights and Freedoms, ss. 3, 7, 15, 32 — Constitution Act, 1982, Part V.

Constitutional law — Amendment of Constitution — Petitioner challenging proposed 1987 constitutional amendment as violating Charter of Rights — Charter not applicable to constitutional amendments — Canadian Charter of Rights and Freedoms, ss. 3, 7, 15, 32 — Constitution Act, 1982, Part V.

Constitutional law — Amendment of Constitution — Rights of territories — Petitioner challenging amendment procedures established in Constitution Act, 1982, as violating rights of citizens of Northwest Territories — Constitution Act, 1982 not challengeable — Constitution Act, 1982, ss. 42(1)(e), 42(1)(f), 46.

The petitioner sought a series of declarations regarding the constitutionality of the proposed amendments contained in the 1987 Constitutional Accord (the Meech Lake Accord). The requested declarations were to the effect that: (1) the Accord violated the rights of citizens of the Northwest Territories guaranteed by ss. 3, 7, and 15 of the *Canadian Charter of Rights and Freedoms*; (2) that the conference of First Ministers which produced the Accord was held in violation of s. 37.1 of the *Constitution Act, 1982*, because representatives of the territorial governments were not invited; (3) that the Accord violated constitutional conventions regarding the creation of new provinces and the admission of the Northwest Territories to Confederation, and (4) that the Accord is inconsistent with various other constitutional principles relating to the rights, liberties and privileges of the citizens of the Northwest Territories. In addition, the petitioners also requested a declaration that those portions of the *Constitution Act, 1982* respecting amendments in relation to the creation of new provinces (*i.e.*, ss. 42(1)(*e*), (*f*) and 46) were unconstitutional in that they violated the rights of the citizens of the Northwest Territories. The respondent moved for an order that the petition be struck out under Rule 124(*a*) of the Supreme Court Rules (N.W.T.) and also applied to have preliminary questions of law fixed for summary determination. At trial, both requests were dismissed.

Held, on appeal, the appeal should be allowed and the petition struck out under Rule 124(*a*) as disclosing no cause of action.

The *Canadian Charter of Rights and Freedoms* has no application to the constitutional amendment process established under Part V of the *Constitution Act, 1982*. The people of Canada, expressing their political will through the joint constitutional authority of the Parliament of Canada and the elected legislative assemblies of the provinces, are sovereign in the delineation of power-sharing under the Constitution of Canada. The amending process is not caught by s. 32 of the Charter because a constitutional amendment is not the sole exercise of any of the legislative or governmental bodies named in s. 32, but rather a joint or common exercise by those entities.

Part V of the *Constitution Act, 1982* is a complete code, immune to extraneous challenge.

Any obligation to invite representatives of the territorial governments to constitutional conferences dealing with the repeal of s. 42(1)(*e*) and (*f*) of the *Constitution Act, 1982*, was created by s. 37.1 of the *Constitution Act, 1982*. All of the obligations created by s. 37.1 had been satisfied and s. 37.1 repealed prior to the meeting which produced the Constitutional Accord.

There was no merit to the submission that the Accord was in breach of any convention relating to the establishment of new provinces. Such a convention, assuming it existed, has been abrogated by the passage of the *Constitution Act, 1982*, as it relates to constitutional amendments.

The remaining challenges to the Accord which are not based on the Charter and which attacked the legislative process which produced the Accord were non-justiciable.

Penikett v. Canada (1987), 45 D.L.R. (4th) 108, [1988] 2 W.W.R. 481, [1988] N.W.T.R. 18, 21 B.C.L.R. (2d) 1; leave to appeal to S.C.C. refused 46 D.L.R. (4th) vi, **folld**

Otis v. Parker, 187 U.S. 606 (1903), **consd**

Other cases referred to

Reference re an Act to Amend the Education Act (Ontario) (1987), 40 D.L.R. (4th) 18, [1987] 1 S.C.R. 1148, 77 N.R. 241; *Re A.-G. Que. and A.-G. Can.* (1982), 140 D.L.R. (3d) 385, [1982] 2 S.C.R. 793, 45 N.R. 317 *sub nom. Quebec Constitutional Amendment Reference (No. 2)*

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 3, 7, 15, 32
Constitution Act, 1867
Constitution Act, 1982, ss. 37.1 (Part IV.1, enacted SI/84-102, s. 4 — later repealed April 18, 1987, s. 5 *idem*), 38, 42(1)(*e*), (*f*), 46, 52, Part V

Rules and regulations referred to

Supreme Court Rules (N.W.T.), Rule 124(*a*)

Proclamations and Imperial Orders in Council referred to

Constitution Amendment Proclamation, 1983 SI/84-102,ss. 4, 5

APPEAL from a decision dismissing a motion that the petition be struck out under Rule 124(*a*) of the Supreme Court Rules (N.W.T.) and an application to have preliminary questions of law fixed for summary determination.

D. M. M. Goldie, Q.C., and *D. G. Cowper*, for appellant.
J. Sopinka, Q.C., and *J. Z. Vertes*, Q.C., for respondent.

BY THE COURT:—Before us is the Attorney-General's appeal from the dismissal of the appellant's motion for an order that the amended petition herein disclosed no cause of action and that Rule 124(*a*) of the Rules of the Supreme Court of the Northwest Territories be invoked in its striking out. The matter is before us as well by way of a kindred appeal from the learned chamber judge's refusal of the Attorney-General's application to have preliminary questions of law fixed for summary determination.

By reason of the urgency of the petitioner's concerns, expressed in terms of his anxiety over the ongoing political implementation of the Quebec Accord by the legislatures of the existing Canadian provinces, we will deal with this appeal by way of this memorandum as opposed to letting the matter stand for judgment.

This is a challenge to the constitutionality of the Quebec or Meech Lake Accord as set forth, in 1987, in proposed constitution amendments. We will refer to the proposed constitutional amendments by their popular designations — the Meech Lake Accord or the Accord. The petitioner commenced proceedings by petition in

the Supreme Court of the Northwest Territories seeking declarations impugning the constitutional amendments proposed by the Meech Lake Accord to the *Constitution Acts, 1867* and *1982*. By amendments made on September 28, 1987, the petition sought further declarations impugning provisions of the *Constitution Act, 1982*. In summary the amended petition sought declaratory relief from the court against the provisions of the Accord in the following areas, *inter alia*:

(1) Section 6 of the Accord which prescribes the source of future Supreme Court of Canada appointments on the ground that it is inconsistent with Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*);

(2) Section 2 of the Accord restricting future Senate appointments to persons recommended by the government of a Province which is said to be in violation of Sections 7 and 15 of the *Charter*;

(3) Section 9 of the Accord requiring unanimous consent of the Senate, House of Commons and provincial legislative assemblies for the establishment of new Provinces which is said to be inconsistent with Sections 7 and 15 of the *Charter*;

(4) The provisions of the Accord assigning participation to Provincial legislative assemblies in the matter of the determination of whether the Northwest Territories shall be a Province which are said to be inconsistent with constitutional convention and democratic principles;

(5) The requirement for unanimous consent of the Senate, House of Commons and provincial legislative bodies which is said to be inconsistent with continuing constitutional duties and obligations of Parliament and the Federal Government and which violates established constitutional principles;

(6) The agreement of the Federal Government to the terms of the Accord in respect to the admission of Territories is said to be a violation of a constitutional guarantee to individuals resident in the Northwest Territories to protection of their legal rights by courts of competent jurisdiction;

(7) A constitutional convention of the right of the Northwest Territories to be admitted to Confederation on the same basis as other provinces since 1867.

(8) One paragraph of the petition alleges that the position of the Northwest Territories in respect of its provincial aspirations is no better than that of a foreign state and is therefore inconsistent with its present status;

(9) One paragraph of the petition seeks declarations that Sections 46 and 42(1)(e) and (f) of the *Constitution Act, 1982* are inconsistent with Sections 3, 7 and 15 of the *Charter* (if the former provisions have replaced Section 2 of the *Constitution Act, 1871*);

(10) The Amended Petition alleges that provisions of the Accord requiring annual constitutional conferences do not include representatives of the Government of the Northwest Territories and are therefore inconsistent with the rights of individuals in the Northwest Territories as guaranteed by the common law, constitutional convention and by Sections 7 and 15 of the *Charter*.

(11) One paragraph of the Amended Petition alleges that the procedure for implementing a constitutional amendment was not followed under the Accord;

(12) The Amended Petition alleges that the Accord is inconsistent with a number of constitutional principles which relate to:

(i) The lack of representatives of the Northwest Territories at the meetings;

(ii) Failure to observe the agenda of a previous constitutional conference said to be inconsistent with Section 37.1(3) of the *1982 Act*;

(iii) The agreement reached by the Prime Minister and the other First Ministers under the Accord is alleged to deprive citizens of the Northwest Territories of rights, liberties and privileges in a manner inconsistent with democratic principles, constitutional conventions and the principles of fundamental justice and procedural fairness;

(iv) The Accord is said to deny participation of elected representatives of the Northwest Territorial Government in matters of constitutional importance and therefore to be inconsistent with inherent rights guaranteed by Section 3 of the *Charter*;

(v) The Accord is said to violate the constitutional obligation of the Parliament of Canada, its political trust and fiduciary responsibility to citizens of the Northwest Territories;

(vi) The Accord is said by the amended petition to deprive "citizens" of the Northwest Territories of rights, liberties and privileges by creating two classes of Canadian citizenship.

(vii) The Accord is said to violate principles of international law;

(viii) The agreement of an earlier Prime Minister of Canada and other First Ministers to Section 46 and paragraphs 42(1)(e) and (f) of the *Constitution Act, 1982* is said to have resulted in the "citizens" of the Northwest Territories being deprived of rights, liberties and privileges.

The amended petition is presented by Mr. Sibbeston, a private citizen. The government of the Northwest Territories has not chosen to intervene or seek status in the proceedings.

The fundamental issue in the case is whether the *Canadian Charter of Rights and Freedoms* and, therefore, judicial scrutiny, has any role to play in the evolvement of the Canadian constitutional amendment process, under Part V of the *Constitution Act, 1982*. The question and others ancillary to it were answered adversely to the respondent, Mr. Sibbeston, by the Yukon Court of Appeal in *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108, [1988] 2 W.W.R. 481, [1988] N.W.T.R. 18, in its treatment of a similar pleading pursuing similar relief. We endorse, and adopt as our own, the reasoning followed in that case in allowing this appeal.

The respondent's amended petition cannot be pursued under

principles of Canadian constitutional practice that must now be regarded as established. They include the political reality that it is the people of Canada, expressing their political will through the joint constitutional authority of the Parliament of Canada and the elected legislative assemblies of the provinces, who are sovereign in the delineation of federal-provincial power-sharing under the Constitution of Canada. Beyond that no segment of the Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, is paramount to other segments, or indeed the balance, of the Constitution. The Constitution "as a whole" is Canada's supreme law.

Section 52 of the *Constitution Act, 1982*, provides:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act, 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Section 52 espouses the equality of its components including amendments. Charter scrutiny could not have been reserved by its drafters: *Reference re an Act to Amend the Education Act (Ontario)* (1987), 40 D.L.R. (4th) 18, [1987] 1 S.C.R. 1148, 77 N.R. 241.

The *Constitution Act, 1982*, also provides:

> *Application of Charter*
>
> 32(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

No case can be made that the Charter applies specifically to the amending process here because the reach of s. 32 does not extend beyond the vitality of executive and legislative action by the entities named in it. Under Meech Lake, constitutional amendment is not the sole exercise of either representative or governmental body named in s. 32, but a proclamation of the Governor-General, where its content has been authorized by Senate and Commons resolution coupled to the resolutions of the

requisite provincial legislative assemblies. It is, patently, a joint or common exercise by those entities as required by the amending formula: ss. 38, 41 of the *Constitution Act, 1982*.

The *Constitution Act, 1982* is not assailable. *A fortiori* neither is the amending process it provides. Part V of the *Constitution Act, 1982* is a code, not only complete, but immune to extraneous challenge: *Re A.-G. Que. and A.-G. Can.* (1982), 140 D.L.R. (3d) 385, [1982] 2 S.C.R. 793, 45 N.R. 317 *sub nom. Quebec Constitutional Amendment Reference (No. 2) (Quebec Reference)*, s. 52(3).

In principle, the question of whether Canada and the provinces repatriated the Constitution from the Imperial Parliament only to concurrently shackle its timely and necessary modification to endless judicial review must be answered in the negative.

We address Mr. Sopinka's submission that the Prime Minister was in breach of a constitutional obligation to invite representatives of the territories to the Meech Lake concord. The petition alleges that the Prime Minister and the Premiers breached s. 37.1 of Part IV.I of the *Constitution Act, 1982* by failing to hold a constitutional conference at which the repeal of s. 42(1)(*e*) and (*f*) of Part V was discussed and agreeing to amend s. 42(1)(*e*) and (*f*) at a subsequent First Minister's Conference at Meech Lake at which representatives of the territorial governments were not invited.

Section 37 as originally enacted read as follows:

> 37(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.
>
> (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

This section was replaced on April 17, 1983, and Part IV.I containing s. 37.1 was added by the Constitution Amendment Proclamation, 1983, SI84/102. Section 37.1 now reads as follows:

> 37.1(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

At the 1983 conference the repeal of s. 42(1)(*e*) and (*f*) was on the agenda but was not discussed. Two additional constitutional conferences were held as provided for by s. 37.1(1). The repeal of s. 42(1)(*e*) and (*f*) was on the agenda for both conferences but was not discussed. The territorial governments were invited to and attended all three conferences. The last of these was held on March 26 and 27, 1987. On April 18, 1987, Part IV.I including s. 37.1 was automatically repealed.

On April 30, 1987, the Prime Minister and the Premiers held a conference which resulted in an agreement to amend certain sections of the *Constitution Act, 1982*, including s. 42(1)(*e*) and (*f*) without inviting the participation of the representatives of the Northwest Territories government.

We are of the view that there was no obligation to invite the representatives from the Northwest Territories government to the April 30, 1987 meeting. Section 37.1(3) creates an obligation to invite such participation only if the conference is convened under s-s. (1). After April 18, 1987, s. 37.1 no longer existed. No further conferences could be called under s-s. (1) and there could be no further obligation to invite participation from the Territorial governments under s-s. (3). In any event that the April 30th meeting related to the inclusion of Quebec under the *Constitution Act, 1982*, and the amendments that might be required to the Constitution relate to Part V of the *Constitution Act, 1982*. Nowhere in Part V is the participation of the government of the Northwest Territories required.

Nor are we persuaded that there is any merit to the submission that the Accord is in breach of any convention. Any such convention, as it may relate to the establishment of new provinces, has been abrogated by s.42(1)(*f*). Furthermore, the passage of the *Constitution Act, 1982*, as it relates to constitutional amendments, has done away with the force of any such convention, assuming that one existed: see the *Quebec Reference*.

Remaining is the justiciability of the remaining challenges to the Accord which do not invoke the *Canadian Charter of Rights and*

Freedoms. In so far as the declarations sought in the amended petition seek to attack the legislative process, they must fail. The political exchange which became the Meech Lake Accord was a matter preparatory to amending constitutional legislation. It may find its final expression in a proclamation authorized jointly by resolution of the Senate, the House of Commons and the legislative assemblies of the existing provinces. However they may be couched, the non-Charter declarations sought by the amended petition fall under this objection. The complaints in the amended petition are directed against an agreement of purely and quintessentially political consequence. It has no immediate legal impact nor is it self-executing. The complaints are, in our view, and beyond doubt, not justiciable.

The injunction of Holmes J. in *Otis v. Parker*, 187 U.S. 606 (1903), seems timely when we say that we have no hesitancy in confirming the integrity of the amending process found wholly within Part V of the *Constitution Act, 1982*;

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus*.

The appeal must be allowed. An order will issue under Rule 124(*a*) striking out the amended petition. The companion relief sought by the appellant becomes academic.

Costs, if sought, may be spoken to.

Appeal allowed.

Re Katnich and Workers' Compensation Board of British Columbia

[Indexed as: Katnich v. British Columbia (Workers' Compensation Board)]

British Columbia Supreme Court, Spencer J. in Chambers.
February 4, 1988.

Workers' compensation — Procedure — Statute requiring commissioners of Workers' Compensation Board to reconsider decision where board of review does not confirm original decision — Commissioners holding reconsideration only after original adjudicator determined board of review decision violated criteria established by commissioners — Board hearing new medical evidence

ITO - International Terminal Operators Ltd.

See Tab 2

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it would seem to matter little that the same question with the same ancillary steps attached is raised *in futuro* rather than in retrospect. It is not, therefore, in my view, a violation of the parliamentary limits under s. 101 of the *Constitution Act* to include subs. (4) in s. 28.

It follows from *Canard*, *supra*, and more recently from the decision of this Court in *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 that the same constitutional question might be brought before a provincial court by its appropriate process. A question of administrative review by the Federal Court under the Federal Board's parent statute, which raises no constitutional question, could not be so referred to the provincial superior court. The nexus between the Federal Court and the constitutional issue here arising is the proceeding under the *Federal Court Act* which in turn arises from the patently valid proceedings of the Board conducted under the admittedly valid provisions of the *Canada Labour Code*. In these surrounding circumstances the Federal Court is in the same position as any statutory court, provincial or federal, and therefore can determine the constitutional issue arising as a threshold question in the review of the administrative action in issue.

To conclude otherwise would, in paraphrase of the *Jabour* decision, *supra*, leave a federal court established "for the better administration of the laws of Canada" in the position of having to participate in the execution and administration of such laws without the authority, let alone the duty, of first assuring itself that the statute before the Court is a valid part of the "laws of Canada". Anglin C.J.C., in *Consolidated Distilleries Ltd. v. Consolidated Exporters Corporation Ltd.*, [1930] S.C.R. 531, at p. 534, said that the expression "laws of Canada" must mean " ... laws enacted by the Dominion Parliament and within its competence". I read the reasons of the Chief Justice of this Court in *McNamara*, *supra*, and *Quebec North Shore*, *supra*, as being to the same effect.

One final note should be added to this jurisdictional discussion. The *Constitution Act, 1867*, as amended, is not of course a "law of Canada" in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101, *supra*, on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act*. That may be so, as was discussed in the *Jabour* judgment, *supra*, but we are here concerned with a proceeding that originates in the *Canada Labour Code* and in which is raised a question as to the reach and applicability of that federal statute under the Constitution, in the circumstances disclosed in the record of the C.L.R.B. This aspect of the appeal is dealt with by the Attorney General of Quebec as an intervener in his factum as follows:

[TRANSLATION] ... the Federal Court of Appeal is competent to decide a question of law, even of a constitutional nature, when that question is raised, as it is in the case at bar, in connection with a proceeding or principal action based on the application of federal law.

and with which I respectfully agree.

In my view, therefore, subs. (4) is validly incorporated in s. 28 by Parliament in the enactment, the *Federal Court Act*, and the Federal Court accordingly was acting within its proper constitutional jurisdiction when it answered the question below.

History of this Labour Litigation

Because it will shorten the review required of the evidence taken by the Board to outline some aspects of the origins of this litigation, I now turn to the earlier proceedings undertaken by some or all of these parties in connection with the appropriate labour relations jurisdiction.

Il découle de l'arrêt *Canard*, précité, et de l'arrêt plus récent de cette Cour dans l'affaire *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147, qu'on pourrait porter la même question constitutionnelle devant une cour provinciale par les voies appropriées. On ne pourrait soumettre par renvoi, à une cour supérieure provinciale, une question relative au contrôle administratif exercé par la Cour fédérale en application de la loi constitutive du Conseil fédéral, qui ne soulèverait pas de question constitutionnelle. Le lien entre la Cour fédérale et la question constitutionnelle qui se pose en l'espèce est la procédure introduite en vertu de la *Loi sur la Cour fédérale* qui, à son tour, découle de procédures manifestement valides du Conseil menées en application de dispositions du *Code canadien du travail* reconnues comme valides. Dans ces circonstances, la Cour fédérale est exactement dans la même situation que toute autre cour créée par la loi, qu'elle soit provinciale ou fédérale; elle peut donc se prononcer sur la question constitutionnelle qui surgit à titre de question préliminaire dans le processus de contrôle de l'acte administratif en cause.

Conclure le contraire aurait comme conséquence, pour paraphraser l'arrêt *Jabour*, précité, de placer une cour fédérale établie «pour la meilleure administration des lois du Canada» dans la situation de devoir administrer et appliquer de telles lois sans le pouvoir, et encore moins l'obligation, de vérifier par elle-même si la loi soumise à la Cour appartient validement aux «lois du Canada». Le juge en chef Anglin, dans l'arrêt *Consolidated Distilleries Ltd. v. Consolidated Exporters Corporation Ltd.*, [1930] R.C.S. 531, à la p. 534, dit que l'expression «lois du Canada» signifie [TRADUCTION] « ... les lois adoptées par le Parlement fédéral et qui sont de son ressort.» J'interprète dans le même sens les motifs du Juge en chef de cette Cour dans les arrêts *McNamara* et *Quebec North Shore*, précités.

Il y a lieu d'ajouter un dernier point à cette discussion de la compétence. La *Loi constitutionnelle de 1867*, et modifications, n'est pas, cela va de soi, une «loi du Canada» dans le sens des exemples qui précèdent parce qu'elle n'a pas été adoptée par le Parlement du Canada. La limite inhérente que l'art. 101 précité impose à la compétence que le Parlement peut accorder à la Cour fédérale pourrait donc exclure une procédure fondée sur la *Loi constitutionnelle*. C'est une possibilité qui a été discutée dans l'arrêt *Jabour*, précité, mais en l'espèce il s'agit d'une procédure qui découle du *Code canadien du travail* et qui soulève une question sur la portée et l'application de cette loi fédérale, en vertu de la Constitution, dans les circonstances révélées dans le dossier du Conseil canadien des relations du travail. En tant qu'intervenant le procureur général du Québec a abordé cet aspect de l'appel dans son mémoire de la façon suivante:

... la Cour d'appel fédérale est compétente pour se prononcer sur une question de droit, fût-elle de nature constitutionnelle, lorsque, comme c'est le cas en l'espèce, cette question est soulevée à l'occasion d'un litige ou d'une demande principale fondée sur l'application du droit fédéral.

Je suis tout à fait d'accord.

À mon avis, le Parlement a donc validement édicté le par. (4) de l'art. 28 de la *Loi sur la Cour fédérale*, et en conséquence la Cour fédérale a agi dans les limites de sa compétence constitutionnelle propre en répondant à la question.

Historique du litige

Parce que l'étude requise des éléments de preuve soumis au Conseil se trouvera abrégée par le résumé ou l'exposé de certains aspects des origines du litige, je vais faire maintenant état des procédures antérieures engagées par les parties ou par quelques-unes d'entre elles quant à la compétence en matière de relations de travail.

> of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or *common law*, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised. [emphasis added]

This language is repeated in the *McNamara* case, at p. 659; *Can. L.R.B. v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 at 156-157 (S.C.C.); *Northern Telecom Can. Ltd. v. Communication Workers of Can.*, [1983] 1 S.C.R. 733 at 740 (S.C.C.). In the *Quebec North Shore* case, the Court offered the following example of federal common law, at p. 1063:

> It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature.

Beyond the law respecting the Crown's position as litigant, what does federal common law embrace? It cannot embrace all the common law that could be amended by the federal Parliament: that is the very point of the *Quebec North Shore* decision. There has been some suggestion in the Federal Court of Appeal that the common law that is within the exclusive legislative competence of Parliament and that is beyond alteration by the provinces is federal common law: *Associated Metals & Minerals Corp. v. "Evie W" (The)*, above, at pp. 713-716; *R. v. Prytula*, [1979] 2 F.C. 516 at 523-525 (C.A.); and see Scott, "Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction" (1982), 27 McGill L.J. 137 at 164-170. The Court of Appeal's reasoning seems consistent with the *Quebec North Shore* approach; however, it was not discussed when those cases reached the Supreme Court of Canada, at [1980] 2 S.C.R. 322 and 442 (S.C.C.) respectively. The Supreme Court of Canada has in other contexts acknowledged the existence of common law that is "federal" in the sense that it cannot be altered by provincial legislation: see *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 104-109 (S.C.C.), where there was found to be a body of criminal law that was paramount to and not subject to alteration by provincial legislation; and consider also *Interprovincial Co-operatives Ltd. v. The Queen in right of Manitoba*, [1976] 1 S.C.R. 477 at 511-515 (S.C.C.).

The concept of federal common law as a source of Federal Court jurisdiction continues to develop. In *Roberts v. Canada*, above, at pp. 336-340, the Supreme Court of Canada held that the law of aboriginal title is federal common law and formed, along with certain provisions of the Indian Act, a sufficient basis to support Federal Court jurisdiction. The *Roberts* decision puts to rest any doubt that the laws of Canada extend beyond legislation and embrace some common law. What *Roberts* does not resolve is the method by which federal common law is to be identified. The concept of a federal common law attaching to areas of exclusive federal legislative competence was neither approved nor disapproved.

Indeed, *Roberts* might well be interpreted as a case of incorporation or adoption of the law of aboriginal title as federal law by operation of the Indian Act: see *Kigowa v. Canada*, [1990] 1 F.C. 804, at 813-814 (C.A.).

The Constitution. The Constitution Acts are not "laws of Canada" within the meaning of section 101 of the Constitution Act, 1867, because they were not enacted by the Parliament of Canada: *Northern Telecom Can. Ltd. v. Communication Workers of Can.*, [1983] 1 S.C.R. 733 at 745. That raises the question of whether the Federal Court can determine the constitutional validity or applicability of a federal statute. In the *Northern Telecom* case, it was held that the Federal Court does possess that jurisdiction, at least insofar as the question of constitutionality arises in the context of the execution and administration of federal laws. Thus, the Supreme Court of Canada concluded that the Federal Court of Appeal could determine a threshold question of the constitutional applicability of the Canada Labour Code referred to it by the Canada Labour Relations Board pursuant to section 28(4) [which becomes section 18.3(1)] of the Federal Court Act.

Whether the Federal Court can determine the constitutional validity of legislation, not as a threshold question in substantive proceedings, but in proceedings for a bare declaration of validity remains open. There is no doubt that the provincial superior courts possess this jurisdiction and that it cannot be excluded by federal legislation: *Canada (A.G.) v. Law Soc. of B.C.*, above, at pp. 326-329; *Can. L.R.B. v. Paul L'Anglais Inc.*, above, at pp. 154-162. The reasoning in those decisions is that the provincial superior courts cannot be deprived of the jurisdiction to determine the constitutional validity of federal laws by the purported conferral of exclusive jurisdiction on the Federal Court. That reasoning in itself does not preclude the Federal Court possessing a concurrent jurisdiction. However, those decisions, and the *Northern Telecom* decision, seem to suggest that a proceeding for a bare declaration of constitutional validity would be one founded on the Constitution Act and, impliedly, not on the federal law under attack. That reasoning would take such a proceeding outside section 101 and beyond Federal Court jurisdiction.

There are other sorts of proceedings that might be said to be founded on the Constitution Acts. *Canada v. Prince Edward Island*, [1978] 1 F.C. 533 (C.A.) involved an action by the province against Canada for damages for failure to fulfil a duty imposed by the Terms of Union, a constitutional document. While the issue of jurisdiction was not pursued by the parties to that case, the two judges in the majority were of the view that nothing in the *Quebec North Shore* and *McNamara* decisions brought jurisdiction under section 19 of the Federal Court Act into doubt: per Jackett C.J., at pp. 561-562; per LeDain J., at p. 584. Arguably, the *Northern Telecom* decision now brings that jurisdiction into doubt, and it may be necessary, as suggested by Chief Justice Jackett in the *P.E.I.* case, to find the validity of section 19 outside section 101, possibly in the opening words of section 91 of the Constitution Act, 1867.

Kigawa v. Canada

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diction. The subject-matter of the actions directly arose from legislation of Parliament in respect of excise.

The Chief Justice thought that the cases fell clearly within s. 30(*d*), and probably also within s. 30(*a*). Duff J., while suggesting a possible doubt as to the application of sub-s. (*a*), held that the cases were plainly within sub-s. (*d*).

Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances. In regard to the present case their Lordships appreciate that a difficulty may exist in regard to sub-s. (*a*). While these actions are no doubt "cases relating to the revenue," it might perhaps be said that no law of Canada is sought to be enforced in them. Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (*d*). It was suggested that if read literally, and without any limitation, that sub-section would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be *ultra vires* the Parliament of Canada as one not covered by the power conferred by s. 101 of the *British North America Act*. Their Lordships, however, do not think that sub-s. (*d*), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding sub-sections the actions and suits in sub-s. (*d*) must be confined to actions and suits in relation to some subject-matter legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be *ultra vires*, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions.

Both Anglin C.J.C. in the first *Consolidated Distilleries* case and Duff J. in the second case spoke of "laws of Canada" in s. 101 as referring respectively to "laws *enacted* by Parliament" and to "enforcement of an obligation contracted pursuant to a statute of ... Parliament". So too, the Privy Council in the second *Consolidated Distilleries* case spoke of the power given by s. 101 to confer jurisdiction on the Exchequer Court in actions on bonds executed in favour of the Crown "in pursuance of a revenue law enacted by the Parliament of Canada". Again, the Judicial Committee in dealing with the case before it indicated that it might be difficult to bring it within s. 30(*a*) of the *Exchequer Court Act* because although the actions were "cases related to the revenue" it might perhaps be said that no law of Canada is sought to be enforced in them: This is consistent with the observations of both Anglin C.J.C. and of Duff J., already quoted.

Stress is laid, however, on what the Privy Council said in discussing the application of s. 30(*d*) of the *Exchequer Court Act*, the provision giving jurisdiction to the Exchequer Court in civil actions where the Crown is plaintiff or petitioner. I do not take its statement that "sub-s. (*d*) must be confined to actions ... in relation to some subject matter legislation in regard to which is within the legislative competence of the Dominion" as doing anything more than expressing a limitation on the range of matters in respect of which the Crown in right of Canada may, as plaintiff, bring persons into the Exchequer Court as defendants. It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation. It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.

Addy J. did not deal with the effect of s. 101 of the *British North America Act* upon s. 23 of the *Federal Court Act*, and appeared to assume that he had jurisdiction if the enterprise contemplated by the agreement as a whole fell within federal legislative power. As I have already indicated, the question upon which he proceeded is not reached

Le juge en chef était d'avis que les affaires tombaient clairement sous le coup de l'art. 30*d*) et probablement aussi de l'art. 30*a*). Le juge Duff, tout en exprimant ses doutes quant à l'application de l'al. *a*), était convaincu que les affaires relevaient de l'al. *d*).

Leurs Seigneuries voudraient éviter d'exprimer des opinions générales sur l'étendue de la compétence conférée par l'art. 30, préférant s'en tenir à ce qui est nécessaire au règlement du litige. Il faut juger chaque cas en fonction des faits et des circonstances qui lui sont particuliers. En l'espèce leurs Seigneuries se rendent compte qu'il peut exister une difficulté en ce qui concerne l'al. *a*). Bien que ces actions soient assurément des «cas se rattachant au revenu» on pourrait peut-être dire qu'il ne s'agit pas d'appliquer une loi du Canada. Cependant leurs Seigneuries ont conclu que ces actions relèvent de l'al. *d*). On a avancé qu'interprété de façon littérale, sans aucune restriction, cet alinéa autoriserait la Couronne à poursuivre devant la Cour de l'Échiquier et à soumettre à la compétence de la Cour les défendeurs dans toute cause d'action, et qu'une telle disposition serait *ultra vires* du Parlement du Canada parce qu'elle ne relèverait pas des pouvoirs conférés par l'art. 101 de l'*Acte de l'Amérique du Nord britannique*. Toutefois, leurs Seigneuries estiment que, vu son contexte, on ne peut considérer l'al. *d*) comme exempt de toutes restrictions. Elles pensent qu'étant donné les dispositions des trois alinéas précédents, les actions et poursuites envisagées à l'al. *d*) se limitent à des actions portant sur des matières ressortissant au pouvoir législatif du Dominion. Interprété de cette façon, l'alinéa en question ne serait pas *ultra vires*, et il semble à leurs Seigneuries que les présentes actions entrent dans son domaine d'application. En conséquence, la Cour de l'Échiquier avait compétence en l'espèce.

Le juge en chef Anglin, dans la première affaire *Consolidated Distilleries*, puis le juge Duff dans la seconde, ont tous deux considéré que l'expression «lois du Canada», à l'art. 101, visait, pour l'un, les [TRADUCTION] «lois *adoptées* par le Parlement» et l'autre, [TRADUCTION] «l'exécution d'une obligation contractée conformément aux dispositions d'une loi (du) ... Parlement». De même, dans la seconde affaire *Consolidated Distilleries*, le Conseil privé parlait du pouvoir découlant de l'art. 101, de donner compétence à la Cour de l'Échiquier relativement à des actions portant sur les

cautionnements faits en faveur de la Couronne [TRADUCTION] «en vertu d'une loi fiscale adoptée par le Parlement du Canada». En outre, dans cet arrêt, le Comité judiciaire a indiqué qu'il pouvait être difficile d'assujettir l'affaire à l'art. 30*a*) de la *Loi sur la Cour de l'Échiquier* car, bien que les actions aient été des «cas se rattachant au revenu», on pouvait dire qu'il ne s'agissait pas d'appliquer une loi du Canada. Cela est conforme aux remarques précitées du juge en chef Anglin et du juge Duff.

Toutefois, on insiste sur ce qu'a dit le Conseil privé sur l'application de l'art. 30*d*) de la *Loi sur la Cour de l'Échiquier*, qui donne compétence à la Cour de l'Échiquier en matière d'actions d'ordre civil dans lesquelles la Couronne est demanderesse ou requérante. Je ne considère pas que sa déclaration selon laquelle [TRADUCTION] «les actions ... envisagées à l'al. *d*) se limitent à des actions portant sur des matières ressortissant au pouvoir législatif du Dominion» fasse plus qu'exprimer une restriction quant à l'étendue des domaines à l'égard desquels la Couronne du chef du Canada peut intenter une action comme demanderesse devant la Cour de l'Échiquier. La Couronne devrait de toute façon fonder son action sur une loi qui serait fédérale aux termes de cette restriction. Il est bon de rappeler que le droit relatif à la Couronne a été introduit au Canada comme partie du droit constitutionnel ou du droit public de la Grande-Bretagne; on ne peut donc prétendre que ce droit est du droit provincial. Dans la mesure où la Couronne, en tant que partie à une action, est régie par la *common law*, il s'agit de droit fédéral pour la Couronne du chef du Canada, au même titre qu'il s'agit de droit provincial pour la Couronne du chef d'une province, qui, dans chaque cas, peut être modifié par le Parlement ou la législature compétente. Il n'est pas question en l'espèce de droit de la Couronne.

Le juge Addy n'a pas étudié l'effet de l'art. 101 de l'*Acte de l'Amérique du Nord britannique* sur l'art. 23 de la *Loi sur la Cour fédérale*. Il semble avoir présumé qu'il avait compétence si l'entreprise prévue dans l'accord relevait du pouvoir législatif fédéral. Comme je l'ai déjà souligné, il lui fallait d'abord conclure que la demande de redressement

unless the claim for relief is found to be one made "under an Act of the Parliament of Canada or otherwise". In the Federal Court of Appeal, the majority judgment of LeDain J., which he delivered for himself and Ryan J. and which was concurred in with additional reasons by Thurlow J. (as he then was), poses the issue in terms which also overlook the words just quoted. Thus, he says:

> The question to be determined, therefore, is whether the claim for relief in this case relates to a matter coming within the class of subjects "works and undertakings connecting a province with any other province or extending beyond the limits of a province."

However, LeDain J. does consider the import of the words "or otherwise" and goes on to say that he understands them to refer "to any other law that can be considered to form part of the 'laws of Canada' within the meaning of s. 101 of the *B.N.A. Act*". Then follows another passage upon which counsel for the respondents relies, and it is in these terms:

> ... The expression "laws of Canada", within the meaning of s. 101 of the *B.N.A. Act*, includes not only existing federal statutes but also any law that Parliament can validly enact, amend or repeal. *Consolidated Distilleries Limited v. The King*, [1933] A.C. 508. In this case the respondents' claim for relief is based not on federal statute law but on the Quebec civil law of contract. The contracts in issue all contain a provision that they and any disputes arising thereunder are to be interpreted and construed in accordance with the laws of the Province of Quebec. In so far as the civil law of Quebec applies to a matter within federal legislative jurisdiction with respect to an extra-provincial undertaking contemplated by s. 92(10)(a) of the *B.N.A. Act*, it forms part of the laws of Canada within the meaning of s. 101 of the *B.N.A. Act* since it could be enacted, amended or repealed by the Parliament of Canada. In other words, Parliament could validly enact contract law to apply to matters falling within its jurisdiction with respect to such undertakings.

I do not agree with the statement in the foregoing passage that "in so far as the civil law of Quebec applies to a matter within federal legislative jurisdiction ... it forms part of the laws of Canada within the meaning of s. 101 of the *B.N.A. Act* since it could be enacted, amended or repealed by the Parliament of Canada". I do not understand how provincial laws can be amended or repealed by Parliament, albeit in relation to a matter within federal competence, unless they first have been made laws of Canada by adoption or enactment. I think it begs the question raised by the words "or otherwise" to say that merely because Quebec law applies to the claim for relief in this case, as it clearly would if the action were brought in the Quebec Superior Court, that law forms part of the laws of Canada, although there is no federal re-enactment or referential incorporation.

était faite «en vertu d'une loi du Parlement du Canada ou autrement». En Cour d'appel fédérale, le jugement rendu par le juge LeDain, rédigé en son nom et au nom du juge Ryan, le juge Thurlow (tel était alors son titre) ayant rendu des motifs concomitants, formule également la question en litige sans tenir compte de l'expression susmentionnée:

> Il s'agit donc de trancher la question de savoir si la demande de redressement en l'espèce se rattache à une matière tombant dans la catégorie des «ouvrages et entreprises reliant une province à une autre ou s'étendant au-delà des limites d'une province».

Cependant, le juge LeDain examine alors le sens des termes «ou autrement» qui signifient à son avis «toute autre loi faisant partie des «lois du Canada» au sens de l'art. 101 de l'*Acte de l'A.N.B.*». Puis vient un passage sur lequel se fonde l'avocat des intimées:

> ... L'expression «lois du Canada», au sens de l'art. 101 de l'*Acte de l'A.N.B.*, comprend non seulement les lois fédérales existantes mais aussi toutes lois que le Parlement peut validement édicter, modifier ou abroger. *Consolidated Distilleries Limited c. Le Roi*, [1933] A.C. 508. Dans cet arrêt, les intimées ne fondaient pas leur demande de redressement sur une loi fédérale mais sur le droit civil des obligations du Québec. Les contrats litigieux prévoyaient tous qu'on devait les interpréter et les analyser, de même que toute controverse soulevée à leur égard, conformément aux lois de la province du Québec. Dans la mesure où le droit civil du Québec s'applique à une matière tombant sous la compétence législative fédérale à l'égard d'une entreprise extra-provinciale aux termes de l'art. 92(10)a) de l'*Acte de l'A.N.B.*, il fait partie des lois du Canada au sens de l'art. 101 de l'*Acte de l'A.N.B.*, car le Parlement du Canada pourrait l'édicter, le modifier ou l'abroger. En d'autres termes, le Parlement peut légiférer en matière de contrats dans les domaines relevant de sa compétence à l'égard de ces entreprises.

Je ne partage pas son opinion selon laquelle «dans la mesure où le droit civil du Québec s'applique à une matière tombant sous la compétence législative fédérale ... il fait partie des lois du Canada au sens de l'art. 101 de l'*Acte de l'A.N.B.*, car le Parlement du Canada pourrait l'édicter, le modifier ou l'abroger». Je ne vois pas comment des lois provinciales peuvent être modifiées ou abrogées par le Parlement, même si elles portent sur un domaine relevant de la compétence fédérale, à moins d'être auparavant adoptées ou promulguées en tant que lois fédérales. A mon avis, il serait tautologique de dire à propos de l'expression «ou autrement» que du seul fait que les lois du Québec s'appliquent à la présente demande de redressement, comme ce serait manifestement le cas si l'action était portée devant la Cour supérieure du Québec, ces lois font partie des lois du Canada, sans même avoir été promulguées comme lois fédérales ni adoptées par renvoi.

It must be remembered that when provincial law is applied to disputes involving persons or corporations engaged in enterprises which are within federal competence it applies on the basis of its independent validity: see *Canadian National Railway Co. v. Nor-Min Supplies Ltd.*[5] Provincial legislation cannot interfere with the integrity of enterprises within federal regulatory jurisdiction: see *Johannesson v. West St. Paul*[6]. Moreover, if the provincial legislation is of general application, it will be construed so as not to apply to such enterprises: see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*[7] If independently valid and applicable, as Quebec law obviously is in the present case (indeed, as being the law chosen by the parties to govern the agreement), it is not federal law nor can it be transposed into federal law for the purpose of giving jurisdiction to the Federal Court. Jurisdiction under s. 23 follows if the claim for relief is under existing federal law, it does not precede the determination of that question.

Il convient de rappeler que lorsqu'une loi provincial s'applique à des litiges concernant des personnes ou des compagnies engagées dans une entreprise relevant de la compétence fédérale, c'est parce qu'elle est en elle-même valide: voir *La Compagnie des Chemins de fer nationaux du Canada c. Nor-Min Supplies Ltd.*[5] La législation provinciale ne peut entrer en conflit avec l'intégrité des entreprises relevant de la compétence réglementaire fédérale: voir *Johannesson c. West St. Paul*[6]. En outre, si la législation provinciale est de portée générale, elle devra être interprétée de façon à ne pas s'appliquer à ces entreprises: voir *Campbell-Bennett Ltd. c. Comstock Midwestern Ltd.*[7] Si la loi est en elle-même valide et applicable, comme c'est de toute évidence le cas pour la loi du Québec en l'espèce (les parties ont en effet convenu que leur contrat serait régi par les lois du Québec), elle ne constitue pas une loi fédérale et ne peut être transposée dans le droit fédéral afin de donner compétence à la Cour fédérale. Il y a compétence en vertu de l'art. 23 si la demande de redressement relève du droit fédéral existant et non autrement.

. It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be appli-

Il convient également de souligner que l'art. 101 ne traite pas de la création des tribunaux pour connaître des sujets relevant de la compétence législative fédérale, mais «pour assurer la meilleure exécution des lois du Canada». Le terme «exécution» est aussi significatif que le mot pluriel «lois». A mon avis, ils supposent tous deux l'existence

[5] [1977] 1 S.C.R. 322.
[6] [1952] 1 S.C.R. 292.
[7] [1954] S.C.R. 207.

[5] [1977] 1 R.C.S. 322.
[6] [1952] 1 R.C.S. 292.
[7] [1954] R.C.S. 207.

No. 31

LETTERS PATENT CONSTITUTING THE OFFICE OF GOVERNOR GENERAL OF CANADA

Effective October 1, 1947

"GEORGE R."

CANADA

George the Sixth, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith.

[SEAL]

To All To Whom these Presents shall come,

GREETING:

Preamble Recites Letters Patent of 23rd March, 1931

Whereas by certain Letters Patent under the Great Seal bearing date at Westminster the Twenty-third day of March, 1931, His late Majesty King George the Fifth did constitute, order, and declare that there should be a Governor General and Commander-in-Chief in and over Canada, and that the person filling the office of Governor General and Commander-in-Chief should be from time to time appointed by Commission under the Royal Sign Manual and Signet:

And whereas at St. James's on the Twenty-third day of March, 1931, His late Majesty King George the Fifth did cause certain Instructions under the Royal Sign Manual and Signet to be given to the Governor General and Commander-in-Chief:

And whereas it is Our Will and pleasure to revoke the Letters Patent and Instructions and to substitute other provisions in place thereof:

Revokes Letters Patent of 23rd March, 1931, and Instructions

Now therefore We do by these presents revoke and determine the said Letters Patent,

N° 31

LETTRES PATENTES CONSTITUANT LA CHARGE DE GOUVERNEUR GÉNÉRAL DU CANADA

Applicables à partir du 1er octobre 1947

«GEORGE R.»

CANADA

George VI, par la grâce de Dieu, roi de Grande-Bretagne, d'Irlande et des territoires britanniques au-delà des mers, défenseur de la foi.

[SCEAU]

A tous ceux qui les présentes verront,

SALUT:

Préambule. Énonciation des lettres patentes du 23 mars 1931

Considérant que, par certaines lettres patentes sous le Grand Sceau, datées, à Westminster, du vingt-troisième jour de mars 1931, feu Sa Majesté le roi George V a constitué, ordonné et déclaré qu'il devrait y avoir un gouverneur général et commandant en chef dans et sur le Canada, et que la personne remplissant ladite charge de gouverneur général et commandant en chef devrait être nommée, à l'occasion, par une commission sous les seing et sceau royaux;

Considérant qu'à Saint-James, le vingt-troisième jour de mars 1931, feu Sa Majesté le roi George V a fait remettre sous les seing et sceau royaux certaines instructions au gouverneur général et commandant en chef;

Et considérant qu'il Nous plaît de révoquer lesdites lettres patentes et instructions et de les remplacer par d'autres dispositions;

Révocation des lettres patentes du 23 mars 1931 et des instructions

A ces causes, Nous révoquons et terminons, par les présentes, lesdites lettres patentes et tout ce qu'elles renferment, ainsi que toutes leurs modifications, et lesdites instructions,

and everything therein contained, and all amendments thereto, and the said Instructions, but without prejudice to anything lawfully done thereunder:

And We do declare Our Will and pleasure as follows:

Office of Governor General and Commander-in-Chief constituted

I. We do hereby constitute, order, and declare that there shall be a Governor General and Commander-in-Chief in and over Canada, and appointments to the Office of Governor General and Commander-in-Chief in and over Canada shall be made by Commission under Our Great Seal of Canada.

His powers and authorities

II. And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts, 1867 to 1940 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.

[Note: The original text mentioned the "British North America Acts, 1867 to 1946". The B.N.A. Acts, 1943 and 1946 were repealed by the *Constitution Act, 1982* (No. 44 *infra*).]

Great Seal

III. And We do hereby authorize and empower Our Governor General to keep and use Our Great Seal of Canada for sealing all things whatsoever that may be passed under Our Great Seal of Canada.

Appointment of Judges, Justices, etc.

IV. And We do further authorize and empower Our Governor General to constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers (including diplomatic and consular officers) and Ministers of Canada, as may be lawfully constituted or appointed by Us.

Suspension or removal from Office

V. And We do further authorize and empower Our Governor General, so far as We lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person

mais sans préjudice des actes validement accomplis sous leur régime:

Et Nous déclarons qu'il Nous plaît de mander ce qui suit:

Constitution de la charge de gouverneur général et commandant en chef

I. Nous constituons, ordonnons et déclarons, par les présentes, qu'il doit exister un gouverneur général et commandant en chef dans et sur le Canada et que les nominations à la charge de gouverneur général et commandant en chef dans et sur le Canada doivent être faites par commission sous Notre Grand Sceau du Canada.

Ses pouvoirs et attributions

II. Et, par les présentes, Nous autorisons Notre gouverneur général, sur l'avis de Notre Conseil Privé pour le Canada, ou de tous membres dudit Conseil ou individuellement, selon l'exigence du cas, à exercer tous les pouvoirs et attributions dont Nous sommes validement investi à l'égard du Canada, et, pour plus de certitude, mais sans restreindre la portée générale de ce qui précède, à faire et exécuter, de la manière susdite, tout ce qui peut ressortir à sa charge et à la confiance que nous avons mise en lui en conformité des divers pouvoirs et attributions qui lui ont été accordés ou destinés en vertu des Lois constitutionnelles de 1867 à 1940, et des pouvoirs et attributions ci-après conférés par les présentes lettres patentes et dans toute commission qui pourra lui être décernée sous Notre Grand Sceau du Canada et sous le régime des lois qui sont ou pourront être en vigueur au Canada.

[Note : Le texte original mentionnait les «Actes de l'Amérique du Nord britannique, de 1867 à 1946». Les lois de 1943 et de 1946 ont été abrogées par la *Loi constitutionnelle de 1982* (nº 44 *infra*).]

Grand Sceau

III. Et Nous autorisons, par les présentes, Notre gouverneur général à garder et employer Notre Grand Sceau du Canada pour sceller tout ce qui pourra être établi sous Notre Grand Sceau du Canada.

Nomination de juges, etc.

IV. Et Nous autorisons en outre Notre gouverneur général à créer et nommer, en Notre nom et pour Nous, tous les juges, commissaires, juges de paix et autres fonctionnaires et officiers nécessaires (y compris les fonctionnaires diplomatiques et consulaires) et ministres du Canada qui pourront être validement créés ou nommés par Nous.

Suspension ou destitution

V. Et Nous autorisons en outre Notre gouverneur général, dans la mesure où cela Nous est validement possible, pour une raison lui apparaissant suffisante, à démettre de ses fonctions, ou à suspendre de l'exercice de celles-ci,

exercising any office within Canada, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

Summoning, proroguing, or dissolving the Parliament of Canada

VI. And We do further authorize and empower Our Governor General to exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving the Parliament of Canada.

Power to appoint Deputies

VII. And Whereas by the Constitution Acts, 1867 to 1940, it is amongst other things enacted that it shall be lawful for Us, if We think fit, to authorize Our Governor General to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise, during the pleasure of Our Governor General, such of the powers, authorities, and functions of Our Governor General as he may deem it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions from time to time expressed or given by Us: Now We do hereby authorize and empower Our Governor General, subject to such limitations and directions, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise, during his pleasure, such of his powers, functions, and authorities as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise of any such power, authority or function by Our Governor General in person.

[Note: See the note to clause II.]

Succession

VIII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our Governor General out of Canada, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in Our Chief Justice for the time being of Canada, (hereinafter called Our Chief Justice) or, in the case of the death, incapacity, removal or absence out of Canada of Our Chief Justice, then in the Senior Judge for the time being of the Supreme Court of Canada, then residing in Canada and not being under incapacity; such Chief Justice or Senior Judge of the Supreme Court of Canada, while the said powers and authorities are vested in him, to be known as Our Administrator.

toute personne remplissant une charge au Canada, sous le régime ou en vertu d'une commission ou d'un brevet accordé, ou qui pourra être accordé, par Nous en Notre nom ou sous Notre autorité.

Convocation, prorogation ou dissolution du Parlement du Canada

VI. Et Nous autorisons en outre Notre gouverneur général à exercer tous les pouvoirs que Nous possédons validement en ce qui concerne la convocation, la prorogation ou la dissolution du Parlement du Canada.

Pouvoir de nommer des suppléants

VII. Et considérant que, par les Lois constitutionnelles de 1867 à 1940, il est prévu, entre autres choses, qu'il Nous sera loisible, si Nous le jugeons à propos, d'autoriser Notre gouverneur général à nommer une ou plusieurs personnes, conjointement ou séparément, pour agir comme son ou ses suppléants dans quelque partie ou toutes parties du Canada, et exercer, en cette qualité, durant le plaisir de Notre gouverneur général, les pouvoirs, attributions et fonctions de Notre gouverneur général que celui-ci jugera nécessaire ou opportun d'assigner à ce ou ces suppléants, sous réserve de toutes restrictions ou instructions formulées ou communiquées, au besoin, par Nous: A ces causes, Nous autorisons par les présentes Notre gouverneur général, sous réserve des restrictions et instructions susmentionnées, à nommer une ou plusieurs personnes, conjointement ou séparément, pour agir comme son ou ses suppléants, dans quelque partie ou toutes parties du Canada et exercer en cette qualité, durant son plaisir, les pouvoirs, attributions et fonctions de Notre gouverneur général que celui-ci jugera nécessaire ou opportun d'assigner à ce ou ces suppléants. Toutefois, la nomination de ce ou ces suppléants ne doit pas porter atteinte à l'exercice de l'un quelconque de ces pouvoirs, attributions ou fonctions par Notre gouverneur général en personne.

[Note : Voir la note de l'article II.]

Succession

VIII. Et Nous déclarons, par les présentes, qu'il Nous plaît que, en cas de décès, incapacité, renvoi ou absence de Notre gouverneur général hors du Canada, tous et chacun des pouvoirs et attributions qui lui sont ici accordés doivent, jusqu'à ce que Notre nouveau plaisir y soit signifié, être dévolus à Notre juge en chef du Canada à l'époque considérée (ci-après désigné comme Notre juge en chef), ou, en cas de décès, d'incapacité, de renvoi ou d'absence hors du Canada, de Notre juge en chef, ensuite au juge alors le plus ancien de la Cour suprême du Canada, résidant à l'époque au Canada et

Provided always, that the said Senior Judge shall act in the administration of the Government only if and when Our Chief Justice shall not be present within Canada and capable of administering the Government.

Proviso. Administrator to take oaths of office before administering the Government

Provided further that no such powers or authorities shall vest in such Chief Justice, or other judge of the Supreme Court of Canada, until he shall have taken the Oaths appointed to be taken by Our Governor General.

Provided further that whenever and so often as Our Governor General shall be temporarily absent from Canada, with Our permission, for a period not exceeding one month, then and in every such case Our Governor General may continue to exercise all and every the powers vested in him as fully as if he were residing within Canada, including the power to appoint a Deputy or Deputies as provided in the Seventh Clause of these Our Letters Patent.

Officers and others to obey and assist the Governor General

IX. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all the other inhabitants of Canada, to be obedient, aiding, and assisting unto Our Governor General, or, in the event of his death, incapacity, or absence, to such person as may, from time to time, under the provisions of these Our Letters Patent administer the Government of Canada.

Publication of Governor General's Commission

X. And We hereby declare Our Pleasure to be that Our Governor General for the time being shall, with all due solemnity, cause Our Commission under Our Great Seal of Canada, appointing Our Governor General for the time being, to be read and published in the presence of Our Chief Justice, or other Judge of the Supreme Court of Canada, and of members of Our Privy Council for Canada, and that Our Governor General shall take the Oath of Allegiance in the form following:— "I, ... do swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth, His Heirs and successors, according to law. So Help me God"; and likewise he shall take the usual Oath for the due execution of the Office of Our Governor General and Commander-in-Chief in and over Canada, and for the due and impartial administration of justice; which Oaths Our Chief Justice, or, in his absence, or in the event of his being otherwise incapacitated, any Judge of the Supreme Court of Canada shall, and he is hereby required to, tender and administer unto him.

Oaths to be taken by Governor General, etc.

n'étant pas frappé d'incapacité. Ledit juge en chef ou juge le plus ancien de la Cour suprême du Canada, tant qu'il sera investi desdits pouvoirs et attributions, sera appelé Notre administrateur.

Toutefois, ce juge le plus ancien ne doit agir dans l'administration du Gouvernement que si Notre dit juge en chef ne se trouve pas au Canada et n'est pas capable d'administrer le Gouvernement.

Réserve: prestation de serment d'office par le lieutenant-gouverneur, etc., avant d'administrer le Gouvernement

Cependant, aucun de ces pouvoirs ou attributions ne devra être dévolu audit juge en chef ou autre juge de la Cour suprême du Canada tant qu'il n'aura pas prêté les serments destinés à être prêtés par Notre gouverneur général.

En outre, chaque fois et aussi souvent que Notre gouverneur général s'absentera temporairement du Canada, avec Notre permission, pour une période n'excédant pas un mois, Notre gouverneur général pourra alors et dans chacun de ces cas continuer à exercer tous et chacun des pouvoirs à lui dévolus aussi complètement que s'il résidait au Canada, y compris le pouvoir de nommer un ou des suppléants ainsi qu'il est prévu à l'Article VII de Nos présentes lettres patentes.

Les officiers, fonctionnaires et ministres doivent obéir et prêter leur concours au gouverneur général

IX. Et Nous mandons et ordonnons, par les présentes, à tous Nos officiers, fonctionnaires et ministres, civils et militaires, et à toutes les autres personnes qui habitent le Canada, d'obéir, d'aider et de prêter leur concours à Notre gouverneur général, ou, advenant son décès, son incapacité ou son absence, à la personne qui peut, à l'occasion, administrer le Gouvernement du Canada, sous le régime de Nos présentes lettres patentes.

Publication de la commission du gouverneur général

X. Et Nous déclarons par les présentes qu'il Nous plaît que Notre gouverneur général du jour fasse, avec toute la solennité voulue, lire et publier Notre commission sous Notre Grand Sceau du Canada, nommant Notre gouverneur général du jour en présence de Notre juge en chef, ou autre juge de la Cour suprême du Canada, et de membres de Notre Conseil privé pour le Canada, et que Notre gouverneur général prête le serment d'allégeance selon la formule suivante: «Je, ... jure d'être fidèle et de porter une sincère allégeance à Sa Majesté le roi George VI, à Ses héritiers et à Ses successeurs, en conformité de la loi. Ainsi Dieu me soit en aide»; et que, de même, il prête le serment ordinaire pour l'accomplissement régulier des fonctions de Notre gouverneur général et commandant en chef dans et sur le

Oaths to be administered by the Governor General

XI. And We do authorize and require Our Governor General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every person or persons, as he shall think fit, who shall hold any office or place of trust or profit in Canada, that said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Laws or Statutes in that behalf made and provided.

Grant of Pardons. Remission of Fines. Regulations of Power of Pardon

XII. And We do further authorize and empower Our Governor General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, administering the laws of Canada, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our Governor General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. And We do hereby direct and enjoin that Our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one, at least, of his Ministers.

Power to issue Exequaturs

XIII. And We do further authorize and empower Our Governor General to issue Exequaturs, in Our name and on Our behalf, to Consular Officers of foreign countries to whom Commissions of Appointment have been issued by the Heads of States of such countries.

Governor General's absence

XIV. And whereas great prejudice may happen to Our Service and to the security of Canada by the absence of Our Governor General, he shall not quit Canada without having first obtained leave from Us for so doing through the Prime Minister of Canada.

Power reserved to His Majesty to revoke, alter or amend the present Letters Patent

XV. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

Canada, et pour l'administration convenable et impartiale de la justice; lesquels serments Notre juge en chef ou, en son absence ou s'il est autrement frappé d'incapacité, tout juge de la Cour suprême du Canada, doit lui déférer et faire prêter, et il en est requis par les présentes.

Serments devant être déférés par le gouverneur général

XI. Et Nous autorisons et obligeons Notre dit gouverneur général, par lui-même ou par toute autre personne devant être autorisée par lui à cette fin, à déférer, au besoin, à toutes et à chacune des personnes qui occuperont une charge ou un poste de confiance ou comportant une rémunération au Canada, ledit serment d'allégeance, ainsi que tout autre ou tous autres serments qui peuvent être prescrits, à l'occasion, par des lois ou statuts établis à cette fin.

Grâces

XII. Et Nous autorisons en outre Notre gouverneur général, selon qu'il le jugera opportun, en Notre nom et pour Nous, lorsqu'un crime ou une infraction aux lois du Canada a été commise pour laquelle le délinquant peut subir un procès en vertu desdites lois, à gracier tout complice, à l'égard de ce crime ou de cette infraction, qui fournira des renseignements pouvant amener la condamnation du délinquant principal, ou de l'un quelconque de ces délinquants, s'il y en a plusieurs; et de plus à accorder à tout délinquant déclaré coupable de tel crime ou infraction devant n'importe quel tribunal, ou devant n'importe quel juge, juge de paix ou magistrat administrant les lois du Canada, un pardon, soit libre, soit sujet à des conditions licites, ou un sursis à l'exécution de la sentence de ce délinquant, pendant la période que Notre gouverneur général pourra juger pertinente, et à faire remise de toute amende, peine ou confiscation qui peut Nous devenir due et payable. Et Nous mandons et ordonnons que Notre gouverneur général n'accorde aucune grâce ni aucun sursis à un tel délinquant sans avoir préalablement obtenu, dans les cas de peine de mort, l'avis de Notre Conseil privé pour le Canada et, dans d'autres cas, l'avis d'au moins un de ses ministres.

Pouvoir de délivrer des exequatur

XIII. Et Nous autorisons en outre Notre gouverneur général à délivrer des exequatur, en Notre nom et de Notre part, aux représentants consulaires des pays étrangers, à qui des commissions de nomination ont été délivrées par les chefs d'Etat desdits pays.

Absence du gouverneur général

XIV. Et considérant que l'absence de Notre gouverneur général peut causer un tort considérable à Notre service et à la sécurité du Canada, il ne doit pas quitter le Canada sans

Publication of Letters Patent

XVI. And We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within Canada as Our Governor General shall think fit.

Coming into effect of Letters Patent

XVII. And We do further declare that these Our Letters Patent shall take effect on the first day of October, 1947.

In witness whereof We have caused these Our Letters to be made Patent, and for the greater testimony and validity thereof, We have caused Our Great Seal of Canada to be affixed to these presents, which We have signed with Our Royal Hand.

Given the eighth day of September in the Year of Our Lord One Thousand Nine Hundred and Forty-Seven and in the Eleventh Year of Our Reign.

BY HIS MAJESTY'S COMMAND,

W. L. MACKENZIE KING,
Prime Minister of Canada

que Nous le lui ayons permis par l'entremise du premier ministre du Canada.

Pouvoirs réservés à Sa Majesté de révoquer, changer ou modifier les présentes lettres patentes

XV. Et, par les présentes, Nous Nous réservons, ainsi qu'à Nos héritiers et successeurs, le plein pouvoir et la pleine faculté, au besoin, de révoquer, changer ou modifier Nos présentes lettres patentes selon qu'il semblera Nous convenir ou leur convenir.

Publication des lettres patentes

XVI. Et Nous mandons et ordonnons en outre que Nos présentes lettres patentes soient lues et proclamées à l'endroit ou aux endroits au Canada que Notre gouverneur général jugera appropriés.

Entrée en vigueur des lettres patentes

XVII. Et Nous déclarons en outre que Nos présentes lettres patentes entreront en vigueur le premier jour d'octobre 1947.

EN FOI DE QUOI Nous avons fait émettre les présentes à titre de lettres patentes et, en vue d'en rendre plus grandes l'attestation et la validité, Nous avons fait apposer Notre Grand Sceau du Canada aux présentes, que Nous avons revêtues de Notre seing royal.

Donné ce huitième jour de septembre en l'an de grâce mil neuf cent quarante-sept, onzième année de Notre règne.

D'ORDRE DE SA MAJESTÉ,

W. L. MACKENZIE KING,
Premier Ministre du Canada

spondent an estoppel which was rejected urt of Appeal and was not put forward nts. The appeal is dismissed with costs.

dismissed with costs.

rs for the appellants: Viau Hébert Montréal.

rs for the respondent: Péloquin, Allard , Montréal.

lité pour les appelants d'opposer à l'intimée une fin de non recevoir que la Cour d'appel a écarté et que les appelants n'invoquent pas. Le pourvoi est rejeté avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants: Viau Hébert Denault, Montréal.

Procureurs de l'intimée: Péloquin, Allard & Lacroix, Montréal.

Retail, Wholesale and Department Store Union, Local 580, Al Peterson and Donna Alexander *Appellants*

v.

Dolphin Delivery Ltd. *Respondent*

and

Attorney General of Canada, Attorney General of British Columbia, Attorney General for Alberta and Attorney General of Newfoundland *Interveners*

INDEXED AS: RWDSU *v.* DOLPHIN DELIVERY LTD.

File No.: 18720.

1984: December 6, 7; 1986: December 18.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Freedom of expression — Interlocutory injunction against secondary picketing — Application based on common law rule against inducing breach of contract — Whether injunction offending Charter right to freedom of expression — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 32(1) — Constitution Act, 1982, s. 52(1).

Appellant was the federally certified bargaining agent for the locked out employees of Purolator, an Ontario based courier. Prior to the lockout, respondent made deliveries for Purolator in its area and afterwards, for Supercourier, a company connected with Purolator. Appellant applied to the British Columbia Labour Relations Board for a declaration that respondent and Supercourier were allies of Purolator in their dispute with appellant. Such a finding would have rendered the picketing of respondent's business premises lawful, and consequently would have affected its business in that its collective agreement provided that its employees' refusal to cross a lawful picket line was not a violation of the agreement or grounds for disciplinary action or discharge. When the Board declined to hear the application for want of jurisdiction, the labour relations of the appellant being within federal jurisdiction, the legality of appellant's proposed picketing then fell for determination under the common law because the *Canada Labour Code* was silent on the issue. No picketing occurred at respondent's premises as respondent was

Syndicat des détaillants, grossistes et magasins à rayons, section locale 580, Al Peterson et Donna Alexander *Appelants*

c.

Dolphin Delivery Ltd. *Intimée*

et

Procureur général du Canada, procureur général de la Colombie-Britannique, procureur général de l'Alberta et procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: SDGMR *c.* DOLPHIN DELIVERY LTD.

N° du greffe: 18720.

1984: 6, 7 décembre: 1986: 18 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Liberté d'expression — Injonction interlocutoire empêchant le piquetage secondaire — Demande fondée sur la règle de common law interdisant l'incitation à la rupture de contrat — L'injonction porte-t-elle atteinte au droit à la liberté d'expression conféré par la Charte? — Charte canadienne des droits et libertés, art. 1, 2b), 32(1) — Loi constitutionnelle de 1982, art. 52(1).

Le syndicat appelant était accrédité en vertu de la loi fédérale comme agent négociateur des employés lock-outés de Purolator, une entreprise de messageries ayant son siège social en Ontario. Antérieurement au lock-out, l'intimée effectuait des livraisons pour Purolator dans la région qu'elle desservait et, après le lock-out, en a fait autant pour Supercourier, une société ayant des liens avec Purolator. L'appelant a demandé à la Commission des relations de travail de la Colombie-Britannique une déclaration portant que l'intimée et Supercourier étaient des alliées de Purolator dans le conflit en cause. Une pareille déclaration aurait rendu légal le piquetage de l'établissement de l'intimée, ce qui aurait eu un effet sur son entreprise puisque, aux termes de la convention collective, le refus des employés de franchir une ligne de piquetage légalement dressée ne constituait pas une violation de la convention et n'entraînait ni mesures disciplinaires ni renvoi. Quand la Commission s'est déclarée incompétente pour entendre la demande, les relations de travail de l'appelant étant de compétence fédérale, la légalité du piquetage envisagé par l'appelant

ted a *quia timet* injunction which was upheld on
al. At issue here is whether secondary picketing in a
ur dispute is protected as freedom of expression
r s. 2(*b*) of the *Charter* and accordingly not the
er subject of an injunction to restrain it.

eld: The appeal should be dismissed.

r Dickson C.J. and Estey, McIntyre, Chouinard
Le Dain JJ: All picketing involves some form of
ession and enjoys *Charter* protection unless some
n on the part of the picketers alters its nature and
ves it from *Charter* protection. *Charter* protection
is freedom does not encompass violence, threats of
nce or other unlawful acts. The picketing at issue,
ugh intended to bring about economic pressure and
duce the common law tort of breach of contract,
protected by the *Charter*.

e *Charter* applies to the common law. The lan-
e of s. 52(1) of the *Constitution Act, 1982* clearly
des the common law and a construction of that
n that would exclude the common law from the
ter's application would be wholly unrealistic.

e *Charter* does not apply to private litigation com-
ly divorced from any connection with government.
on 32 specifies that the *Charter* applies to the
ative, executive and administrative branches of
nment: their actions are subject to the *Charter*
her invoked in public or private litigation. An order
e Court, however, cannot be equated with govern-
action for the purposes of *Charter* application
ithstanding political theory. The Courts, while
d by the *Charter*, act as neutral arbiters and to
d a court order as an element of government action
sary to invoke the *Charter* would unduly widen the
of the *Charter*'s application to virtually all
tion.

though government action is generally dependant
tatutory authority, it may rely as well on the
non law as in the case of the prerogative. The
ter will apply to the common law where the
non law is the basis for some governmental action

a donc dû être déterminée en fonction de la *common law* étant donné le silence du *Code canadien du travail* sur la question. Il n'y a pas eu de piquetage à l'établissement de l'intimée parce que celle-ci a obtenu une injonction *quia timet*, laquelle a été confirmée en appel. La question en l'espèce est de savoir si le piquetage secondaire dans le cadre d'un conflit de travail relève de la liberté d'expression accordée par l'al. 2*b*) de la *Charte*, de sorte qu'il ne peut pas à bon droit être empêché par voie d'injonction.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Estey, McIntyre, Chouinard et Le Dain: Tout piquetage comporte un certain élément d'expression et jouit de la protection de la *Charte*, à moins que quelque acte des piqueteurs ne vienne changer la nature du piquetage de manière qu'il ne bénéficie plus de la protection de la *Charte*. La protection que la *Charte* accorde à cette liberté n'englobe ni les cas de violence ou de menaces de violence ni d'autres actes illégaux. Quoiqu'il ait eu pour objet la création d'une pression économique et l'incitation à la perpétration du délit civil de rupture de contrat prévu par la *common law*, le piquetage en cause était protégé par la *Charte*.

La *Charte* s'applique à la *common law*. Les termes du par. 52(1) de la *Loi constitutionnelle de 1982* comprennent manifestement la *common law* et il serait tout à fait irréaliste d'interpréter ce paragraphe de manière à exclure la *common law* du champ d'application de la *Charte*.

La *Charte* ne s'applique pas aux litiges privés n'ayant aucun lien avec le gouvernement. L'article 32 précise que la *Charte* s'applique aux branches législative, exécutive, et administrative du gouvernement: leurs actes sont soumis à la *Charte*, qu'elle soit invoquée dans un litige public ou un litige privé. Toutefois, malgré ce que dit la théorie politique, on ne saurait aux fins de l'application de la *Charte* assimiler l'ordonnance d'un tribunal à un acte du gouvernement. Les tribunaux, bien que liés par la *Charte*, agissent en tant qu'arbitres impartiaux et, si l'ordonnance d'un tribunal devait être considérée comme l'élément d'intervention gouvernementale requise pour que la *Charte* puisse être invoquée, on se trouverait à élargir indûment la portée de la *Charte* pour la rendre applicable à presque tous les litiges.

Bien que les actes du gouvernement dépendent généralement d'une autorisation conférée par la loi, un acte peut aussi reposer sur la *common law*, comme dans le cas de la prérogative. La *Charte* s'applique à la *common law* dans la mesure où celle-ci constitue le fondement

which is alleged to have infringed a guaranteed right or freedom.

It is difficult and probably dangerous to attempt to define with narrow precision that element of government intervention necessary to bring the *Charter* into play by private litigants in private litigation. It would seem that the *Charter* would apply to delegated legislation such as regulations, orders in council, possibly municipal by-laws and by-laws and regulations of other creatures of Parliament and the legislatures. Where government action of such nature is present, and where a private litigant relies on it to cause an infringement of the *Charter* rights of another, the *Charter* applies. Where, however, a private party sues another relying on the common law and where no government action is relied upon to support the action, the *Charter* will not apply.

The *Charter* did not apply to the case at bar. This litigation was between purely private parties and did not involve any exercise of or reliance on governmental action which would invoke the *Charter*. The application for the injunction was supported in this Court solely on the basis of the common law tort of inducing a breach of contract. Had the *Charter* applied, s. 1 of the *Charter* would have been effective to justify the granting of the injunction.

Per Beetz J.: For reasons stated by the majority of the British Columbia Court of Appeal, the picketing enjoined here would not have been a form of expression and consequently no question of infringement of s. 2(*b*) of the *Charter* could arise. The reasons of McIntyre J. were otherwise agreed with.

Per Wilson J.: On a s. 1 analysis the purpose and objectives of a common law principle must be ascertained through an objective approach in the same way as the purposes and objectives of an impugned piece of legislation are ascertained. Two distinct questions must be answered in this case. First, does the tort of inducing breach of contract represent a reasonable limit under s. 1 on freedom of expression in the labour relations context? Second, if the tort represents a reasonable limit under s. 1, should injunctive relief be granted in this case? If the tort does not survive the first question, the conduct is not wrongful and no injunction can issue. If the tort survives the first question, the facts must be considered to see whether the other requirements for the award of an interlocutory injunction are present, i.e.,

d'un acte gouvernemental qu'on dit porter atteinte à un droit ou à une liberté garantis.

Il est difficile et probablement dangereux de tenter de définir avec une précision trop rigoureuse l'élément d'intervention gouvernementale nécessaire pour que des justiciables privés puissent invoquer la *Charte* dans un litige privé. Il semblerait que la *Charte* s'applique à la législation déléguée, tels les règlements, les décrets, peut-être les règlements municipaux et les règlements administratifs et généraux d'autres organes créés par le Parlement et les législatures. Lorsqu'il y a un acte gouvernemental de ce genre et qu'un justiciable privé l'invoque et que cela occasionne une violation des droits conférés à une autre personne par la *Charte*, celle-ci doit s'appliquer. Quand toutefois une partie privée en poursuit une autre en s'appuyant sur la *common law* et que l'action n'est fondée sur aucun acte du gouvernement, la *Charte* ne s'applique pas.

La *Charte* ne s'applique pas en l'espèce. Il s'agit d'un litige entre parties privées seulement, litige dans lequel il n'y a pas eu d'acte gouvernemental susceptible d'entraîner l'application de la *Charte* et dans lequel aucun acte du gouvernement n'a été invoqué. La demande d'injonction ne s'est appuyée en cette Cour que sur le délit civil d'incitation à la rupture de contrat prévu par la *common law*. Si la *Charte* s'était appliquée, l'article premier aurait joué pour justifier la délivrance de l'injonction.

Le juge Beetz: Pour les motifs exposés par la majorité en Cour d'appel de la Colombie-Britannique, le piquetage qui a été interdit en l'espèce ne peut constituer une forme d'expression et il ne peut donc être aucunement question de violation de l'al. 2*b*) de la *Charte*. Pour le reste, les motifs du juge McIntyre reçoivent un accord.

Le juge Wilson: Au cours d'une analyse en vertu de l'article premier, il faut déterminer les buts et objectifs d'un principe de *common law* selon une démarche objective comme celle suivie pour déterminer les buts et objectifs d'un texte législatif en litige. Il faut répondre à deux questions distinctes en l'espèce. D'abord le délit civil d'incitation à la rupture de contrat représente-t-il, au sens de l'article premier, une limite raisonnable de la liberté d'expression dans le contexte des relations de travail? Ensuite, si le délit civil représente une limite raisonnable au sens de l'article premier, une injonction doit-elle être accordée en l'espèce? Si le délit civil ne passe pas le cap de la première question, il s'ensuit évidemment que la conduite n'est pas préjudiciable et qu'on ne peut pas délivrer d'injonction. Si, par contre, il passe ce cap, on doit considérer les faits pour déterminer si les autres critères de délivrance d'une injonction interlocutoire sont présents, c'est-à-dire, la prépondérance des inconvénients est-elle favorable au demandeur? Pour

whether the balance of convenience favours the plaintiff. The reasons of McIntyre J. were otherwise agreed with.

Cases Cited

By McIntyre J.

Considered: *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513; **referred to:** *Abrams v. United States*, 250 U.S. 616 (1919); *Boucher v. The King*, [1951] S.C.R. 265; *Switzman v. Elbling*, [1957] S.C.R. 285; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians*, [1971] 5 W.W.R. 328; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Cat Productions Ltd. v. Macedo*, [1985] 1 F.C. 269.

By Wilson J.

Referred to: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103.

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le reste, les motifs du juge McIntyre reçoivent un accord.

Jurisprudence

Citée par le juge McIntyre

Arrêt examiné: *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513; **arrêts mentionnés:** *Abrams v. United States*, 250 U.S. 616 (1919); *Boucher v. The King*, [1951] R.C.S. 265; *Switzman v. Elbling*, [1957] R.C.S. 285; *Reference re Alberta Statutes*, [1938] R.C.S. 100; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians*, [1971] 5 W.W.R. 328; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Cat Productions Ltd. c. Macedo*, [1985] 1 C.F. 269.

Citée par le juge Wilson

Arrêts mentionnés: *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Oakes*, [1986] 1 R.C.S. 103.

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APPEAL from a judgment of the British Columbia Court of Appeal, [1984] 3 W.W.R. 481, 52 B.C.L.R. 1, 84 CLLC ¶14,036, dismissing an appeal from an order of Sheppard L.J.S.C., [1983] B.C.W.L.D. 100, granting an interlocutory injunction. Appeal dismissed.

F. Schroeder, for the appellants.

Peter Gall and *Donald Jordan*, for the respondent.

James M. Mabbutt and *Peter K. Doody*, for the intervener the Attorney General of Canada.

Jack Giles, Q.C., and *Robert McDonell*, for the intervener the Attorney General of British Columbia.

Brian R. Burrows, for the intervener the Attorney General for Alberta.

James L. Thistle and *Deborah E. Fry*, for the intervener the Attorney General of Newfoundland.

The judgment of Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ. was delivered by

MCINTYRE J.—This appeal raises the question of whether secondary picketing by members of a trade union in a labour dispute is a protected activity under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, accordingly, not the proper subject of an injunction to restrain it. In reaching the answer, consideration must be given to the application of the *Charter* to the common law and as well to its application in private litigation.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique, [1984] 3 W.W.R. 481, 52 B.C.L.R. 1, 84 CLLC ¶14,036, qui a rejeté un appel d'une ordonnance du juge local Sheppard de la Cour suprême, [1983] B.C.W.L.D. 100, qui avait accordé une injonction interlocutoire. Pourvoi rejeté.

F. Schroeder, pour les appelants.

Peter Gall et *Donald Jordan*, pour l'intimée.

James M. Mabbutt et *Peter K. Doody*, pour l'intervenant le procureur général du Canada.

Jack Giles, c.r., et *Robert McDonell*, pour l'intervenant le procureur général de la Colombie-Britannique.

Brian R. Burrows, pour l'intervenant le procureur général de l'Alberta.

James L. Thistle et *Deborah E. Fry*, pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement du juge en chef Dickson et des juges Estey, McIntyre, Chouinard et Le Dain rendu par

LE JUGE MCINTYRE—Ce pourvoi soulève la question de savoir si le piquetage secondaire fait par les membres d'un syndicat ouvrier dans le cadre d'un conflit de travail est une activité protégée par l'al. 2*b*) de la *Charte canadienne des droits et libertés* et qui, en conséquence, ne peut pas à bon droit être empêchée par voie d'injonction. En cherchant la réponse à cette question, il faut prendre en considération l'application de la *Charte* à la *common law* ainsi que son application aux litiges privés.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province pour tous les domaines relevant de cette législature.

Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it refers not to government in its generic sense—meaning the whole of the governmental apparatus of the state—but to a branch of government. The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word 'government' is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the *Constitution Act, 1867*. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada', particularly where they follow a reference to the word 'Parliament', almost always refer to the executive government.

It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those

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Le paragraphe 32(1) mentionne le Parlement et le gouvernement du Canada ainsi que la législature et le gouvernement de chaque province en ce qui concerne tous les domaines qui relèvent de leurs compétences respectives. À cet égard, on peut constater que le Parlement et les législatures sont traités comme des branches de gouvernement séparées ou spécifiques, distinctes de l'exécutif, et que, par conséquent, le terme «gouvernement» utilisé à l'art. 32 désigne non pas le gouvernement au sens général—c'est-à-dire au sens de l'ensemble de l'appareil gouvernemental de l'État—mais plutôt une branche de gouvernement. Le terme «gouvernement», qui suit les termes «Parlement» et «législature», doit alors, semble-t-il, désigner la branche exécutive ou administrative du gouvernement. C'est en ce sens qu'on parle en général du gouvernement du Canada ou d'une province. Je suis d'avis que le mot «gouvernement» utilisé à l'art. 32 de la *Charte* désigne le pouvoir exécutif à l'échelon fédéral et à l'échelon provincial. C'est en ce sens que l'expression «gouvernement du Canada» est ordinairement utilisée dans d'autres articles de la *Loi constitutionnelle de 1867*. Les articles 12, 16 et 132 désignent tous le Parlement et le gouvernement du Canada comme des entités distinctes. L'expression «gouvernement du Canada», en particulier lorsqu'elle suit le mot «Parlement», désigne presque toujours le pouvoir exécutif.

J'estime donc que l'art. 32 de la *Charte* mentionne de façon précise les acteurs auxquels s'applique la *Charte*. Il s'agit des branches législative, exécutive et administrative. Elle leur est applicable

branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

The element of governmental intervention necessary to make the *Charter* applicable in an otherwise private action is difficult to define. We have concluded that the *Charter* applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a *Charter* infringement. The argument is made that the common law, which is itself subject to the *Charter*, creates the tort of civil conspiracy and that of inducing a breach of contract. The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their *Charter* right of freedom of expression under s. 2(*b*). Professor Hogg meets this problem when he suggests, at p. 677 of his text, after concluding that the *Charter* does not apply to private litigation, that:

> Private action is, however, a residual category from which it is necessary to subtract those kinds of action to which s. 32 does make the Charter applicable.

peu importe que leurs actes soient en cause dans des litiges publics ou privés. Il semblerait que ce n'est que dans sa législation qu'une législature peut porter atteinte à une liberté ou un droit garantis. Les actes de la branche exécutive ou administrative du gouvernement se fondent généralement sur une loi, c'est-à-dire sur un texte législatif. Toutefois, ces actes peuvent aussi se fonder sur la *common law* comme dans le cas de la prérogative. Dans la mesure où ils se fondent sur un texte législatif qui constitue ou entraîne une atteinte à une liberté ou à un droit garantis, la *Charte* s'applique et ils sont inconstitutionnels. Ces actes sont également inconstitutionnels dans la mesure où ils sont autorisés ou justifiés par une règle de *common law* qui constitue ou engendre une atteinte à une liberté ou à un droit garantis par la *Charte*. C'est ainsi que la *Charte* s'applique à la *common law* tant dans les litiges publics que dans les litiges privés. Cependant, elle ne s'applique à la *common law* que dans la mesure où la *common law* constitue le fondement d'une action gouvernementale qui, allègue-t-on, porte atteinte à une liberté ou à un droit garantis.

Il est difficile de définir l'élément d'intervention gouvernementale nécessaire pour rendre la *Charte* applicable dans un litige par ailleurs privé. Nous avons conclu que la *Charte* s'applique à la *common law*, mais non pas entre particuliers. Le problème en l'espèce est qu'il s'agit d'une action entre des particuliers, dans laquelle l'appelant oppose une violation de la *Charte* à la demande de l'intimée fondée sur la *common law*. On fait valoir que la *common law*, qui est elle-même assujettie à la *Charte*, crée le délit de complot civil et celui d'incitation à la rupture de contrat. L'intimée a demandé et obtenu une injonction empêchant le piquetage en invoquant la perpétration de ces délits civils. Les appelants de leur côté affirment que l'injonction porte atteinte au droit à la liberté d'expression que leur confère l'al. 2*b*) de la *Charte*. Le professeur Hogg fait face à ce problème lorsque, après avoir conclu que la *Charte* ne s'applique pas aux litiges privés, il fait remarquer, à la p. 677 de son ouvrage:

> [TRADUCTION] Les actions de particuliers constituent toutefois une espèce de catégorie résiduelle dont il faut exclure le genre d'actions auxquelles l'art. 32 rend la *Charte* applicable.

Finlay v. Minister of Finance of Canada

See Tab 9

A.G. (Canada) Book of Authorities

R. v Big M Drug Mart Ltd.

See Tab 16 above