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DEFENDANT	AYSEL IGOREVNA AUER
INTERVENOR	THE ATTORNEY GENERAL OF CANADA
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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** 800, 304 8th Avenue SW Calgary, Alberta T2P 1C2 Laura Warner Tel: 403 571 1520 Fax: 403-571-1528 File: 11823-001

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I. OVERVIEW

1. The Applicant repeats and adopts the submissions from his brief, filed October 2, 2020 (the **Applicant's Brief**). The Intervenor has misconstrued many of those arguments in its written argument.[1]

2. As just one example of that misdirection, Roland does not ask this Court to evaluate whether the *Guidelines* achieve their stated objectives.[2] Rather, Roland asks this Court to evaluate the *Guidelines* against the scheme of the *Divorce Act* and the Limiting Principles. There is a big difference between asking whether a delegate accomplished its own objectives and whether a delegate complied with the parameters set by Parliament. This application is focused on the latter, which is the raison d'être for judicial review.

3. The Intervenor and Applicant have provided this Court with different frameworks for reviewing the *vires* of the *Guidelines*. In drafting the *Guidelines*, the FLC and DOJ considered a number of objectives, some of which reflected the constraints imposed in the *Divorce Act*. The legislators who were later charged with explaining the *Guidelines* provided some thoughts about why the *Guidelines* could be said to comply with those constraints. The Intervenor suggests this is the end of the matter, because it proves that the *Guidelines* are not completely irrelevant or extraneous to the purpose of the *Divorce Act*.

4. This version of *vires* review takes deference to the extreme. If the GIC says that its subordinate legislation is lawful and if that statement appears to be *bona fide*, the Court is precluded from looking behind those statements to verify their plausibility or accuracy.

5. The Supreme Court has predictably and correctly not endorsed that hollow interpretation of deference; that would do a grave disservice to the rule of law.

6. Rather, the Supreme Court has noted that attempts to draw such a hard line between policy and legality have not prevailed.

7. Rightly so. The GIC is afforded deference in its interpretation of the *Divorce Act* but that interpretation must withstand **some** scrutiny. It must be coherent and transparent. What is more, it must pass two different levels of review, which the Intervenor confounds and merges into one.

8. The first level of review relates to the holistic purpose and scheme of the *Divorce Act*. The primary constraint at that level is that child support guidelines must order transfers that cover the direct costs of the child and not something more. It is at this level of analysis that courts sometimes describe the inquiry as to whether the subordinate

1 Brief of the Attorney General of Canada filed November 2, 2020 at para 1 [Intervenor Brief]
2 Intervenor Brief at para 2.

legislation is irrelevant or extraneous to the purpose of the enabling statute. There is, however, no magic in those adjectives - they are part of a non-exhaustive list that is meant to capture the overarching test, namely, whether the *Guidelines* comport with the scheme of the *Divorce Act*.

9. The second level of review relates to any more specific constraints within the *Divorce Act*, such as any principles that prescribed the GIC's exercise of discretion (the Limiting Principles). Here, "irrelevance" is not the described test. Rather, the reviewing Court must take seriously and apply rigorously the limits on the GIC's discretion and determine whether the impugned decision meets the threshold of acceptability and defensibility. The Intervenor does not recognize this as a separate branch of *vires* review and seeks to sidestep the entire issue by arguing that the Limiting Principles do not, in fact, place any limit on the GIC's discretion. That interpretation is wrong in law (in that it confounds the two different aspects of *vires* review)[3] and misinterprets the Limiting Principles, which were deliberately inserted into the *Divorce Act* so that the Courts could meaningfully evaluate whether the *Guidelines* complied with those constraints.

10. The *Guidelines*, which are meant to be about the direct costs of children, are expressed in the language of numbers and math, along with some sections that provide discretion for the Courts to deviate from the presumptive amounts in exceptional cases. In the vast majority of cases, the presumptive table amount is all that matters, and that is by design: the *Guidelines* are meant to standardize child support and dramatically decrease individualization and discretion. Their *vires* should not hinge on discretionary provisions that apply in exceptional cases. While those exceptional provisions are part of the overall analysis, if the presumptive amounts represent an excess of authority, that is a nearly insurmountable indication that the *Guidelines* themselves are *ultra vires*.

11. The simple fact is that, for this Court to assess whether (rather than assume that) the presumptive amounts comply with the relevant legal constraints, it must first understand the basis for those numbers and how they compare to the deemed child costs. That is how child support guidelines are understood and evaluated. The Intervenor does not want this Court to undertake that exercise. The rule of law requires that it do so.

12. The 40/30 Scale calculates child costs in a particular way. The *Guidelines* call for presumptive child support awards in excess of those amounts. None of the discretionary sections of the *Guidelines* solve that problem; rather, they exacerbate it. In the result, the *Guidelines* are *ultra vires* because they call for the transfer of child support, plus something more.

[3] See, for example, the Intervenor Brief at para 65.

II. THE FRAMEWORK FOR *VIRES* REVIEW

13. This application affords an opportunity to clarify the approach to *vires* review. The previous leading decision, *Katz*, was a public law review of a delegated decision (subordinate legislation), yet it did not mention the term standard of review. There had been some confusion about its proper application.[4] *Vavilov* offers crucial guidance about the principles that govern *vires* review of subordinate legislation.

14. As noted, the Intervenor is wrong to suggest that the *Guidelines* may only be found unlawful if they are wholly irrelevant or extraneous to the purpose of the *Divorce Act*.[5]

15. That standard applies when comparing the *Guidelines* against the *Divorce Act* as a whole. Even at this most deferential, purpose-based level of review, the *Guidelines* are unlawful because they do not honour the distinction between child and spousal support, which acts as a constraint on the GIC's discretion.

16. There is a separate way to invalidate the *Guidelines*. In addition to complying with the rationale of the *Divorce Act*, the *Guidelines* must also comport with the specific constraints[6] imposed by the Limiting Principles. In this more specific, scope-based review, the test is not about "irrelevance" but rather the serious and rigorous application of the constraining language.

17. Common public law themes run through both branches of review, namely, the need for the impugned decision to be justified, transparent, and coherent.

A. Purpose Review: Distinction Between Child Support, Spousal Support, and Division of Property

18. The Intervenor predictably relies heavily on paragraph 28 of *Katz*. There, the Supreme Court held that "[Regulations] must be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose to be found to be *ultra vires* **on the basis of inconsistency with statutory purpose**." [emphasis added] This test applies in the face of

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[4] Some Courts held that subordinate legislation was reviewed for correctness. Other Courts accepted that reviewing subordinate legislation was a particular subset of administrative law that remained subject to a reasonableness standard of review. Some Courts tried to reconcile *Katz* and *Dunsmuir*, which is the approach that is ultimately reflected in *Vavilov*, if somewhat inferentially. See, e.g., *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at para 28 [**TAB 1**]; *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643 at para 43 [**TAB 2**] ; *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59 at paras 45-46 [**TAB 3**]; see also *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunals)*, 2018 SCC 22 at paras 68-69 (*West Fraser Mills)* [Book of Authorities of the Applicant, filed October 2, 2020 at **TAB 20** ("Applicant's Authorities")] per Côté J in dissent.

[5] Intervenor Brief at paras 3, 4, 5, 42, 43, 65, 83

[6] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 105 *[Vavilov]* [Book of Authorities of the Applicant, filed October 2, 2020 at **TAB 8** ("Applicant's Authorities")].

broad grants of authority where the delegate's authority is limited only by the overall enabling scheme and not also by any more specific constraining language therein.

19. Even under this purpose-based level of review, the Intervenor has set the bar unworkably low.

20. What would it mean in this context for child support guidelines to be wholly unrelated to the *Divorce Act*? It is hard to picture what an egregious case might look like on the Intervenor's approach.

21. For example, we could posit a scenario where the *Guidelines* call for the NCP to transfer $3K for child costs (child support) plus $3K because those incremental amounts will ostensibly provide a further benefit to the CP household, including the child. In that scenario, the Intervenor seems to suggest that the *Guidelines* are lawful because the $3K is related to the purpose of the enabling provision in the *Divorce Act*, so a further $3K can be justifiably tacked on.

22. So long as any part of the *Guidelines* can be credibly described as relating to child costs, are they lawful? This extreme version of deference would be a setback to the rule of law. It should be rejected in principle, but also on the authorities.

23. *Thorne's Hardware* instructs reviewing Courts to not inquire into the reasons or motives underlying the promulgation of subordinate legislation; if the delegate thought it was acting within its authority, the Court

24. should not look behind that assertion.

25. Taking *Thorne's Hardware* to a far-fetched conclusion produces the kinds of results we see here, where the Intervenor suggests that the objectives in the *Guidelines* coupled with statements from legislators establish the *vires* of the *Guidelines*.

26. The Supreme Court has rejected that approach.

27. In *Catalyst*, the Supreme Court summarized the thrust of *Thorne*'s *Hardware*. In that 1983 decision, the GIC "quite obviously believed" that he had reasonable grounds for passing the impugned Order in Council and the Court declined to look behind that belief. That approach has evolved over time. In *Catalyst*, the Court explained that the *Thorne's Hardware* "attempt to maintain a clear distinction between policy and legality has not prevailed".[7]

[7] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 14 *[Catalyst]* **[TAB 4]**

28. In other words, it cannot be a full answer to the *vires* inquiry to prove that the GIC thought or said it was complying with the purpose of the enabling statute. A grant of discretionary authority cannot be equated with a *carte blanche*.[8]

29. Justice Abella echoed those statements in her dissenting reasons in *Green*. She confirmed that *vires* review is deferential, but it must still allow for meaningful scrutiny. The list of adjectives in *Katz* (irrelevant, extraneous, completely unrelated) "does not represent an exhaustive template". A Regulation can also be inconsistent with the statutory purpose for other reasons, including if it draws unfair distinctions between different classes or if it is manifestly unjust or arbitrary.[9]

30. Fundamentally, that more robust understanding of *vires* was also confirmed in *Vavilov*. As noted in the Applicant's Brief, all prior caselaw must be reviewed carefully to ensure that its application is aligned in principle with *Vavilov*.[10]

31. *Vavilov* is an all-encompassing, seminal decision about the public law function performed by courts when they undertake judicial review. Its principles apply to the full range of judicial review contexts, including *vires* review. *Katz* and *West Fraser Mills* are relevant, but they must be interpreted in light of and reconciled with *Vavilov*.

32. Like it did in *Catalyst* and *Green*, the Supreme Court confirmed in *Vavilov* that there is no such thing as absolute and untrammelled discretion. Any exercise of discretion must accord with the purposes for which it was given.[11]

33. What matters is whether the decision maker can properly justify its interpretation of the enabling statute in light of the surrounding context or whether, instead, that interpretation strays beyond the statutory limits.[12]

34. Here, even at the most holistic level, the GIC's authority was constrained by the distinction between child and spousal support.

35. Child support is about direct costs to maintain children. The Intervenor's own evidence underscores this fundamental distinction. Bill C-41 eliminated the former section 15 which addressed both child and spousal support, and created separate sections for child and spousal support. The purpose and result of that change was that child and spousal

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[8] *Catalyst* at para 24 [**TAB 4**]

[9] *Green v Law Society of Manitoba*, 2017 SCC 20 at para 78 [*Green*] **[TAB 5]**; see also *Vavilov* at para 108 [Applicant's Authorities at **TAB 8**] and the authorities cited there for the importance of evaluating whether delegated decisions are arbitrary.

[10] *Vavilov* at para 143 [Applicant's Authorities at **TAB 8**].

[11] *Vavilov* at para 108 [Applicant's Authorities at **TAB 8**].

[12] *Vavilov* at para 110 [Applicant's Authorities at **TAB 8**].

support were more clearly distinct and would be determined according to their own criteria.[13]

36. To be clear, child support is about the **direct costs of children**.[14] As Professor Thompson emphasized:

> The… *Guidelines* only compensate the custodial parent for the "direct" costs of children… indirect costs of children are left to the law of spousal support.[15]

37. Simply put, the enabling statute distinguishes amounts transferred to maintain the child from amounts transferred to support the other spouse and to divide matrimonial property (a subject of exclusive provincial jurisdiction).

38. Roland has shown that the *Guidelines* violate those distinctions.

39. The Intervenor disagrees, arguing that it is impossible to say where child support ends and spousal support begins.

40. That is a deficient answer, given that the enabling statute draws a distinction between the two things. Even allowing for some margin of appreciation, there is a discernible point at which the amount transferred covers more than child costs.

41. Returning to the hypothetical example above, it would be an excess of authority for the GIC to pass child support guidelines that call for the transfer of $3K to cover the deemed child costs and an additional $3K in respect of spousal support.

42. Scrutinizing the *Guidelines* to discern the extent to which they do that is not an inquiry into their wisdom or effectiveness; rather, it is an inquiry into their legality.

B. Scope Review: The Limiting Principles

43. In addition to according with the overarching scheme of the *Divorce Act*, the *Guidelines* must also be justified in light of specific constraining language.

44. As the Supreme Court put it in *Katz*, "A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute **or** the scope of the statutory mandate".[16] [emphasis added]

45. The non-exhaustive list of adjectives, including "irrelevant", applies to the first purpose-based review. In *Katz*, the Court described the separate scope-based review as follows:

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[13] Intervenor Brief at paras 16-17; Harper Affidavit, Exhibit 28: Standing Senate Committee on Social Affairs, Science and Technology page 3 of 52.
[14] Sarlo Affidavit, Exhibit E at p 47.
[15] Thompson Report at para 34; See also Sarlo Affidavit, Exhibit K at p 73.
[16] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24 [*Katz*] **[Applicant's Authorities at TAB 9]**

> Assessing whether [the] regulation has crossed the line from being a permissible condition into being an impermissible prohibition requires establishing the scope of the activity to be regulated and then determining the extent to which it can continue to be carried on.[17]

46. Notably, **this** is the part of *Katz* that was cited with approval in *Vavilov*.[18]

47. Where the grant of authority is broad, the margin of error is wide; by contrast, precise statutory language necessarily limits the number of reasonable interpretations.[19]

48. As the Supreme Court emphasized in *Vavilov*:

> Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer **should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament**…

49. The Court confirmed in *Vavilov* that a delegate may exceed its authority in different ways:

> Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted"… "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given…

50. That passage describes a more holistic purpose-based review. The Court continued:

> **Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, <u>such as the statutory</u>** definitions, **<u>principles</u>** or formulas that prescribe the exercise of a discretion…[20] [emphasis added; citations omitted]

51. This Court does not undertake its own *de novo* interpretation of the Limiting Principles. It affords the GIC's interpretation deference. That deferential approach, though, must not allow the fox to guard the henhouse. The GIC did not have "free rein" in interpreting the *Divorce Act* nor did it have license to enlarge its powers. The spectre of self-serving and expedient interpretations is avoided only through reviewing courts:

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[17] *Katz* at para 46 **[Applicant's Authorities at TAB 9]**
[18] *Vavilov* at para 111 **[Applicant's Authorities at TAB 8]**
[19] *Vavilov* at paras 66-68 **[Applicant's Authorities at TAB 8]**
[20] *Vavilov* at para 108 **[Applicant's Authorities at TAB 8]**

> … taking seriously and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.[21]

52. This two-pronged approach, focusing on the overall enabling regime **and** any more specific constraining language, was applied post-*Vavilov* in *Innovative Medicine Canada* where the Court divided the Applicant's submissions into "purpose" and "scope" arguments. As to purpose, the Court noted that the GIC "clearly believed she had the authority" to make the impugned amendments. The Court did not leave it at that, however. It went on to evaluate "whether this interpretation was reasonable, having regard to the text, context, and purpose of the provision at issue".[22] At this purpose level, the Court concluded that the impugned provisions were not "'irrelevant', 'extraneous', or 'completely unrelated'" to the statutory purpose as a whole.[23]

53. By contrast, with respect to one of the scope arguments, the Court undertook a stricter textual analysis of the enabling provision.[24] In this regard, it held that the question was "whether the Governor in Council's decision meets the threshold of **acceptability and defensibility** characteristic of a reasonable decision **in light of the relevant constraints**." The Applicant was successful in respect of one of its scope arguments.[25]

54. In short, in addition to evaluating the *Guidelines* against the overall purpose and scheme of the *Divorce Act*, this Court must meaningfully scrutinize whether they comport with the Limiting Principles.

(ii) The Proper Interpretation of the Limiting Principles

55. There is a hierarchy of enabling provisions in the *Divorce Act*.

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[21] *Vavilov* at para 68 **[Applicant's Authorities at TAB 8]**

[22] *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at para 135 [*IMC*] **[Applicant's Authorities at TAB 10]**

[23] *IMC* at para 150 **[Applicant's Authorities at TAB 10]**.

[24] *IMC* at paras 173-198 **[Applicant's Authorities at TAB 10]**.

[25] *IMC* at paras 203 and 218 **[Applicant's Authorities at TAB 10]**. This two-pronged approach is also reflected in *Jafari v Canada (Minister of Employment & Immigration)*, [1995] 2 FC 595, cited by the Intervenor. There, the Court confirmed that *vires* review is not about the wisdom of the impugned regulation but, rather, whether the statutory grant of authority permits the particular delegated legislation. The Court must delineate the purpose and the scope of the enabling statute, considering all limitations, express or implied. That is done on two levels: first, where it is argued that the regulation was not made for the purposes authorized by the statute, the Court must determine whether, in fact, the regulation-making power was used for a completely irrelevant purpose; second, if the regulation is *prima facie* authorized, the Court must nonetheless consider whether it is contrary to some constraint imposed on the exercise of the regulation-making power: *Jafari* at paras 14, 20 [Book of Authorities of the Intervenor, filed November 2, 2020 at **TAB 13** ("Intervenor's Authorities")].

56. Section 26(1) empowers the GIC to make regulations to carry out the purposes of the *Divorce Act*.

57. Section 26.1(1) empowers the GIC to make regulations in respect of child support.[26]

58. The Intervenor suggests that this is a broad enabling provision that calls for the most generous possible level of deference.[27]

59. The Applicant certainly accepts the self-evident point that the *Guidelines* are passed under that enabling provision. It is the provision that makes child support guidelines possible.

60. That provision is, however, circumscribed based on the overall scheme of the *Divorce Act* (distinction between child and spousal support) and, importantly, based on the Limiting Principles in section 26.1(2).

61. The Limiting Principles are in the *Divorce Act* for the sole purpose of constraining the GIC's authority. The Intervenor demonstrates the fox in the henhouse problem by asking this Court to accord that constraint no meaning whatsoever.

62. The language in section 26.1(2) is mandatory and clear: child support is for child maintenance and those costs are to be shared proportionately by the parents.

63. According to the Intervenor, the Limiting Principles add next to nothing to the *Divorce Act*. They are a mere "purpose statement" that simply guided the GIC's discretion.

64. Even on this interpretation of the Limiting Principles, they are nonetheless a guide to discretion. Does that guide not need to be meaningfully followed?

65. More fundamentally, though, the Intervenor's interpretation neuters the Limiting Principles. It goes so far as to suggest that this Court "must not explore whether the *Guidelines* achieve or accomplish their statutory objectives, **including those set out in s. 26.1(2)**".[28] The section was not, according to the Intervenor, "intended by Parliament to significantly constrain the GIC's broad delegated powers".[29]

66. That position is inconsistent with the plain wording of the Limiting Principles and with their purpose.

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[26] It includes a non-exhaustive list of matters that must be addressed in every child support guideline, including those passed by the provinces: Harper Exhibit 28, Standing Senate Committee on Social Affairs, Science and Technology page 3 of 52

[27] Intervenor Brief at paras 65-68

[28] Intervenor Brief at para 45

[29] Intervenor Brief at para 71

67. As to the plain wording, the Limiting Principles are not a purpose statement. They do not apply to the *Divorce Act* as a whole nor do they apply to all guidelines. They appear within the *Divorce Act* hierarchy as an express and mandatory limit on the passage of child support guidelines in particular. This undermines the Intervenor's suggestion that the Limiting Principles are a purpose statement, providing "context for the entire Act".[30] They are simply not analogous to a preamble that provides insight into the purposes of the statute as a whole.[31]

68. The Limiting Principles are also distinguishable from the Intervenor's attempted analogies because they are expressed in mandatory language ("shall"). They are not a mere "guiding principle to be borne in mind". They are not a suggestion; rather, they impose a duty of compliance.[32]

69. The Intervenor suggests that the Limiting Principles are less important because they are separate from section 26.1(1).

70. But this interpretation completely misses the point of section 26.1(2), which is precisely to place a limit on the overarching grant of authority.

71. Nor do the Limiting Principles incorporate or codify any presumption of compliance.[33] Indeed, those who insisted that section 26.1(2) be added to the *Divorce Act* had a real question about that very point.[34]

72. In its February 1997 Report, the Senate Committee[35] noted that it was forced to study the *Guidelines* "under extreme time pressure".[36] In that short time, the Committee identified the absence of the Limiting Principles in the *Divorce Act* as the biggest problem with the originally proposed scheme.

73. As the Intervenor does here, the GIC in 1997 had wanted to rely solely on the reference to joint financial responsibility in the *Guidelines'* objectives. It was only through strenuous negotiation that the Senate achieved the insertion of the Limiting Principles in the *Divorce Act*.

74. This bears some emphasis. An **objective** in the **subordinate** regulation is much different from a **mandatory principle** in the **enabling legislation**. Put simply, it is the difference

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[30] Intervenor Brief at para 75

[31] Intervenor Brief at para 75 and FN 106.

[32] *Interpretation Act*, RSC 1985, c I-21, s 11 **[TAB 6]**; Ruth Sullivan, *Statutory Interpretation*, 3d ed, (Irwin Law: Toronto, 2016) at p 90 **[TAB 13]**

[33] Intervenor Brief at para 71: "[Section] 26.1(2) was intended as an affirmation of the objectives upon which the *Guidelines* were based".

[34] Harper Exhibit 25, Commons Debates (November 6, 1996) Sharon Hayes at p 6206

[35] The Standing Senate Committee on Social Affairs, Science and Technology

[36] Harper Exhibit 39, Debates (related to Bill to Amend Divorce Act Report to Committee Feb 12, 1997) see DeWare at pp 33-34 of 42

between the delegated decision maker offering an aspirational statement that its regulation strives to achieve something versus the delegating authority mandating that the regulation must do that thing.

75. As the Intervenor notes,[37] the principle that parents are jointly responsible for the financial support of their children was one of many principles that guided the development of the *Guidelines.* Notably, it was the only one singled out for inclusion as a mandatory constraint in the enabling *Divorce Act*.

76. Having won the hard-fought battle to codify "this very important principle", Senator Jessiman confirmed that:

> As a result, **the courts will have to be satisfied now that the guidelines themselves and the award table attached thereto are in fact based on this principle**.[38] [Emphasis added]

77. The whole point of negotiating for the inclusion of that section in the *Divorce Act* was to allow the courts to properly scrutinize whether the *Guidelines* complied with it.

78. The interpretation of that section must reflect that context.

79. It should also reflect that the *Guidelines*, which have enormous reach, were passed by cabinet through the vehicle of a regulation. In insisting on the insertion of section 26.1(2), the Senate noted that the use of guidelines removed Parliament and open, public discussion from the process of promulgation.[39] Those comments weigh particularly heavily in this backdrop where the *Guidelines*, which were crafted over many years, were rushed into law even though the lawmakers charged with scrutinizing them did not have an adequate explanation of the *Guidelines*.[40]

80. In short, the Limiting Principles are an important constraint on the GIC's authority. The Intervenor's interpretation is inconsistent with the plain wording of that provision and with its legislative history.

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[37] Intervenor Brief at para 87

[38] Harper Exhibit 40, Bill to Amend the Divorce Act Third Reading in the Senate (February 13, 1997) per Senator Jessiman at p 1539 / 30 of 54. See also p 32 of 54 where Senator Jessiman confirmed that, "having got the bill amended to provide for joint responsibility", it may be that someone would have to delve into the issue to confirm whether the *Guidelines* do indeed comply with those Limiting Principles. He noted Ross Finnie's doubts on the subject and observed that Mr. Finnie had lost his job for making those observations public.

[39] Harper Exhibit 39, Debates (related to Bill to Amend Divorce Act Report to Committee Feb 12, 1997) see DeWare at pp 33-34 of 42

[40] They did not have the Technical Report, which was published post-promulgation. They were provided only high level and inaccurate explanations: Applicant's Brief para 352

C. The *Guidelines* Must be Transparent and Coherent

81. Whether reviewing the *Guidelines* against the holistic purpose of the *Divorce Act* (the distinction between child and spousal support) or the more specific constraints (the Limiting Principles), this Court must also be guided by the legal constraints that apply to all delegated decisions, namely, the need for internally coherent reasoning and transparency.

82. The reviewing court must always evaluate a delegated decision against the entire relevant record, including the underlying reasons and rationale, and the outcome that was reached.[41]

83. The Intervenor suggests that such a holistic review is not proper here because there are no formal reasons from the GIC[42] and it is the *Guidelines* themselves that are the subject of review.[43] That is not the point. Here, the underlying reasons and rationale can be deduced from the debate, deliberations and the statements of policy that gave rise to the *Guidelines*.

84. Reasonableness review is necessarily different when the delegate's logic must be inferred from the context rather than evaluated based on written reasons. But, in either case, the Supreme Court affirmed in *Vavilov* that the impugned decision must be transparent and coherent as evaluated against the entire relevant record and that reasonableness review is no less robust in the absence of formal written reasons.[44]

85. Indeed, despite its attempts to minimize the relevance of the entire context, the Intervenor understands its importance because it has cited precisely that kind of evidence to support its own interpretations of the breadth of the GIC's discretion.[45]

86. Ultimately, it is the full context that allows this Court to evaluate whether the GIC was alive to the essential elements of statutory interpretation. The GIC was prohibited from adopting an interpretation that it knew to be inferior merely because that interpretation was expedient. The decision maker's responsibility is "to discern meaning and legislative

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[41] *Vavilov* at paras 110-125 and para 137 **[**Applicant's Authorities at **TAB 8]** citing *Catalyst* at paras 29 and 33 **[TAB 4]**

[42] Intervenor Brief at para 3

[43] Intervenor Brief at para 58

[44] *Vavilov* at paras 120-123 and 137-138

[45] See, *e.g.*, Intervenor Brief at para 14: the FLC said that the RFP Formula was guided by the principles that both parents have a responsibility to meet the financial needs of the children according to their incomes; Intervenor Brief at para 91: the FLC affirmed that, in their view, the recommended RFP Formula was consistent with the Limiting Principles; Intervenor Brief at para 108 and following: explaining why the FLC adopted the 40/30 Scale and, **therefore**, why the GIC was reasonable to endorse that decision. Compare that to the Intervenor Brief at para 62 where it states that this Court should not infer the GIC's motivations from documents prepared by the FLC or DOJ.

intent, not to reverse-engineer a desired outcome".[46] Such an engineered or expedient interpretation should cause the reviewing Court to lose confidence in the ultimate outcome.[47]

87. What flows from all of the above is that there were important constraints that set the boundaries of the GIC's discretion in enacting the *Guidelines*:

(a) They must relate to the direct costs of the child, not something more;

(b) They must call for the parents to share those child costs proportionally; and

(c) They must be coherent and transparent rather than an expedient and engineered outcome that signals an excess of authority.

88. The Intervenor denies the existence or meaning of these constraints and proposes a legal framework that immunizes the *Guidelines* from review.

III. *VIRES* REVIEW IN THIS CONTEXT

A. The Centrality of Child Costs

89. The Intervenor is incorrect to suggest that this application is founded on Roland's arbitrary sense that the *Guidelines* prescribe overly high child support awards. The *vires* challenge is much more specific than that.

90. Child support transfers are to cover the direct costs of the child. The GIC endorsed the use of the 40/30 Scale to estimate what those are. That Scale is a way of determining how much income needs to be transferred from the NCP to the CP to return the CP to their pre-child standard of living. That incremental income is a proxy for the costs of the child.

91. Amounts transferred above that are for something other than child support, whether that be conceptualized as spousal support or division of property. They are outside the GIC's authority in respect of child support and, in this application, are the very specific thing being referred to as excessive transfers.

92. By way of brief summary, those excessive transfers arise as a result of a myriad of decisions reflected in the *Guidelines*, some of which are readily apparent and others which hide more beneath the surface:

(a) Children are assumed to cost the same at every age;

(b) The 40/30 Scale is applied in a linear fashion and without regard for any savings;

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[46] *Vavilov* at para 121 **[**Applicant's Authorities at **TAB 8]**.
[47] *Vavilov* at paras 120-123 and 137 **[**Applicant's Authorities at **TAB 8]**

(c) The Ignored Benefits are excluded from the calculation of CP income; and

(d) NCP direct spending on the child and the economic consequences of re-partnering are disregarded.

93. When section 7 expenses are added on, they exacerbate the problem of excessive transfers because they are double counted.

94. All of that occurs against the backdrop of the 40/30 Scale, which is a very high (and arbitrary) estimate of child costs to begin with.

95. There is no meaningful way to adjust awards to correct excessive transfers, which is particularly problematic, given that one of the results of all of this is the unjustified discrimination between children of the marriage and the NCP's subsequent children.

96. In short, the *Guidelines* are demonstrably *ultra vires* with reference to specific and verifiable problems in their construction. That is very different from an arbitrary, subjective, or unfounded allegation that the prescribed amounts of child support seem high.

B. To Review the *Guidelines* the Court Must First Understand Them

97. At the heart of the Intervenor's call to resist meaningful review is its emphasis on the notion that there is no one way to estimate child costs.

98. Roland agrees that there is more than one defensible way to estimate child costs. Once the GIC selected from among those options, however, that decision set the bounds for the coherence of the overall regime.

99. If the application of the 40/30 Scale to any given case provides an estimate of child costs of $3K per year and the prescribed table amount is $6K per year, that extra $3K is being transferred from the NCP to the CP for something other than child costs. That is inconsistent with the enabling *Divorce Act*.

100. The Intervenor has criticized how the Applicant has isolated child costs in his evaluation of the *Guidelines*, but it has done that without offering any alternative suggestion about how child costs should be isolated. Without that information, there is no meaningful way to evaluate the *vires* of the *Guidelines.*

101. That common sense point is underscored by Professor Thompson's evidence that even the judges and lawyers who apply the *Guidelines* do not understand how the table amounts are arrived at.[48] This Court should not pronounce on the *vires* of subordinate

[48] Applicant's Brief FN 257 citing Thompson cross 95/19-96/5.

legislation that affects hundreds of thousands of Canadians on a daily basis before understanding the 40/30 Scale as the method for estimating child costs.

102. It is that understanding that allows the Court to assess whether (rather than assume or trust that) the *Guidelines* address only child costs and call for the parents to share those costs proportionately.

103. In deciding between the parties' competing versions of *vires* review, it is compelling to consider that the FLC evaluated guidelines as Roland does here, by determining the percentage of costs paid by each parent and comparing the post-award standards of living.[49]

104. In doing that, the DOJ applied the 40/30 Scale to isolate the deemed child costs and it included all sources of income (including government benefits) in comparing the post-award standards of living.[50]

105. Where the prescribed table amounts called for the NCP to cover all of the child costs, plus more, the FLC rejected those guidelines. The FLC did this analysis for prospective guidelines. It rejected all of those guidelines in favour of the RFP Formula but never conducted any similar analysis of that RFP Formula, save for the Newfoundland Illustration.

106. The Intervenor glosses over that last point.[51] The DOJ's assessment of the RFP Formula was based solely on the **presumption** of CP proportional contribution. Fundamentally, that presumption was made in the context of the original RFP Formula, as crafted by the DOJ Consultants, which contemplated the inclusion of government benefits, the recognition of NCP direct spending, and the rejection of double counted extraordinary expenses. The Intervenor is therefore defending the GIC's *Guidelines* on the basis of FLC and DOJ statements that do not apply in light of the later decision to exclude the Ignored Benefits, set the NCP AEU at 1.0, and incorporate section 7. Those decisions each demonstrably undermine the presumption of CP proportional contribution to child costs.

107. In this application, Roland used the FLC's and DOJ's own logic to show that the *Guidelines* call for the NCP to cover a disproportionate share of child costs (often more than 100%).

108. The Intervenor's answer seems to be twofold.

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[49] The FLC set eight objectives. When it came time to evaluate the prospective awards, the FLC and DOJ judged the resulting awards against only two of those principles: #4 - "responsibility for the financial support of children should be in proportion to the means of each parent"; and #6 "levels of child support should be established in relation to parental means": Sarlo Exhibit G at pp 65-66. It evaluated those principles, that resemble the Limiting Principles, by doing the kind of assessment that the Applicant has allowed the Court to do here.

[50] Sarlo Exhibit G at pp 65-88, pages 65-69 in particular

[51] Intervenor Brief at paras 92-93

109. First, any transfer from the non-custodial to the custodial household can be justified because it is in the best interests of the child.[52]

110. Under the *Divorce Act*, the GIC has authority to order the transfer of funds to cover the direct costs of maintaining the children. Transfers beyond those amounts are for something other than child support. Whether one agrees that such excess transfers are in the best interests of the child, the legal question is how that principle of "best interests" can be used to override the language of the *Divorce Act*. Taken to its logical conclusion, the *Guidelines* could call for the transfer of any amount of money, on any basis, and be defended on the notion that such transfers are in the best interests of the child.

111. The *Divorce Act* does not confer that authority. The Intervenor acknowledges that "in an egregious case, a guidelines regime that ignores [the] joint responsibility of spouses for their children could be found inconsistent with" section 26.1(2).[53] It rebuffs, however, any attempt to prove that these *Guidelines* do just that, because it suggests that any discussion of numbers or math is not in the best interests of the child and the analysis must, therefore, focus on the nebulous notion of the "lived reality" (of CP's and their circles, not NCP's and their circles).

112. That cannot be the test. Rather, the amounts transferred under the *Guidelines* must be transparently and logically related to the direct costs of children. Otherwise, they offend the rule of law and are *ultra vires*.

113. Further, it must be remembered that the *Guidelines* allow Courts to draw distinctions between NCP children from different marriages. Therefore, it is dangerous to elevate the concept of "best interests of the child" without asking the question "which child"?[54]

114. Second, the Intervenor defends against the notion of excessive transfers by, effectively, denying that there could ever be any such thing. The Intervenor has, for example, argued that even the choice of the 40/30 Scale as the means of estimating child costs did not constrain the GIC's discretion in any way.[55] In other words, when the FLC decided that child costs would be estimated as X, it was still entitled to construct *Guidelines* that called for a transfer of X + Y. It is unclear on what basis the Intervenor defends that perspective but it seems to be that child costs are so unknowable that they

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[52] Intervenor Brief at paras 78-80

[53] Intervenor Brief at para 81

[54] Recall that in this application, the support orders with respect to Aysel resulted in a disproportionate amount of Roland's income being diverted to support Aysel and Nikolaus, with very little left for Roland to cover his obligations to his three sons from his first marriage, and his new family: see Applicant's Brief at para 46 and footnote 33. Even on the GIC's logic, the *Guidelines* are only in the "best interests" of Nikolaus; they discriminate against Michael, Mark, Philip, Vladmir, and Alex.

[55] Intervenor Brief at paras 6 and 112

can be based on two (or more) different theories and produce two (or more) estimates of child costs, even within one guideline regime.

115. This problem is reflected most obviously in paragraphs 112 and 133 to 134 of the Intervenor's Brief.

116. There, the Intervenor suggests that, because there is no one true cost of a child, there is no way to draw the line between child and spousal support.[56] It states that "[t]he choice of a particular method of estimating the costs of children within the Table Formula in no way constrained" the GIC's authority to calculate child support amounts.[57]

117. This submission is the heart of this application. It captures the Intervenor's position that the amount of child costs did not in any way constrain the calculation of the child support awards. The GIC was free to deem child costs as X and calculate a child support award of X + Y. That amounts to the GIC being provided with free rein to interpret (and expand) the scope of its delegated authority in any fashion.

118. The Applicant does not shy away from or diminish the fact that it presents this Court with a different interpretation of the scope of the GIC's discretion in passing child support guidelines.

119. The Applicant agrees that there is no one universal cost of a child. But, there is a cost of the child within a given guideline regime. The choice of a model within a particular guideline is the way that the drafter sets the bounds of child costs. To the extent that the GIC did not understand itself to be constrained by those child costs, it misunderstood the scope of its delegated authority.[58]

120. The 40/30 Scale is a comparison of standards of living. Money is supposed to be transferred until, assuming equal starting incomes, the CP household ends up at the same standard of living as the NCP post-award. The 40/30 Scale tells us how much needs to be transferred to equalize the households: the second individual in a household increases income needs by 40% and the third person and all subsequent people by 30%. Those incremental income needs are the deemed child costs. Amounts transferred above those are for something other than maintaining the children. As the Applicant anticipated,[59] the Intervenor seeks to obscure this simple point by suggesting that the GIC's discretion allowed it to order such excessive transfers.

121. The simple fact is that there are different ways of estimating child costs but once the GIC decided how child costs would be estimated within **these** *Guidelines*, that set the bounds of what could be transferred.

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[56] Intervenor Brief at paras 133-134
[57] Intervenor Brief at para 112
[58] Applicant's Brief paras 146-148
[59] Applicant's Brief para 170

122. The Intervenor asks this Court to flip that on its head by finding that the deemed child costs are whatever is ordered through the presumptive table amount. That is a classic tautology.

C. The Newfoundland Illustration Shows How to Isolate Child Costs

123. Recall that the DOJ's Newfoundland Illustration is the only public information about how to understand child costs and proportional sharing under these *Guidelines*. The Intervenor critiques that approach on the basis that it makes questionable assumptions. According to Professor Thompson, the DOJ's analysis produces artificially low numbers. He does not explain how to arrive at accurate numbers.[60]

124. Professor Thompson's critique is levied as much at the DOJ as it is at Professor Sarlo. Professor Sarlo applied the DOJ's own logic. That exercise of isolating child costs should be possible and comprehensible. After all, the *Guidelines* were marketed to Parliament and to the public on the basis that they incorporate "**a method of determining the costs of raising a child used by Statistics Canada**… and… a method for sharing **these costs** between the parents".[61] [emphasis added]

125. That statement comes from cabinet. The Newfoundland Illustration was authored by that same group of people. It is the only information about the GIC's understanding of how its *Guidelines* "determine the costs of raising a child", as touted. Professor Sarlo's analysis is based on that. Professor Thompson has critiqued that approach, although he was not involved in the relevant deliberations and the Intervenor has not adduced evidence from anyone who was. If there is a different and better way to explain how to determine the costs of raising a child under this guideline regime, the Intervenor has not put that in evidence. Instead, it has sought to undermine the only approach available by saying "do not hold us to that, we deleted it".

126. The *vires* of the *Guidelines* hinges in fundamental part on a presumption of equal CP contribution to child costs, which is capable of verification. The Applicant has discharged his burden of showing that the presumption is incorrect. The onus is thus on the Intervenor to show, rather than state, that the amounts transferred are in respect of child costs and not something more. It has not done that, although it could have.[62]

127. Because the Intervenor cannot offer an alternative way to explain how child costs are isolated under these *Guidelines*, Professor Thompson's critique of the Newfoundland Illustration provides no assistance beyond suggesting that the GIC's ultimate formula,

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[60] Intervenor Brief at paras 105-107

[61] Harper Affidavit, Ex 1 at p 1121

[62] As just one example, Ms. Giliberti, a DOJ lawyer, was involved throughout the development process, including in respect of the Newfoundland Illustration: see, for example, Gallaway Affidavit at pp 000056-000057 where Ms. Giliberti wrote emails in February 1998 about the upcoming publication of the Technical Report, the anticipation of questions, and the need to draft briefing notes to the Minister.

which excludes the Ignored Benefits while purporting to calculate child costs using the 40/30 Scale, does not lend itself to coherent explanation.

128. The Newfoundland Illustration represents an entirely reasonable way to assess whether (rather than assume that) the table awards constitute transfers in excess of child costs. What that illustration proves is that the base award transfers more than child costs because of the Excluded Benefits and ignored NCP spending on their children, which problem is compounded when section seven add-ons are double counted. Any alleged anomalies in the Newfoundland Illustration in the context of low CP earned income are the product of the application of the chosen 40/30 Scale and not questionable assumptions made by Professor Sarlo.[63] More specifically, it is the product of the FLC's (and GIC's) decision to apply the 40/30 Scale linearly, across the board, including at low income levels.

129. As stated in the Applicant's Brief,[64] the intellectually honest approach is to accept that excluding the Ignored Benefits leads to transfers in excess of child costs. As Ross Finnie put it, "the availability of the child tax credits to custodial parents means non-custodial parents **will, by the basic formula, pay greater shares of their children's costs than will the custodial parents**".[65] [emphasis added]

130. It is not a question of whether such over-contribution occurs, but the reason and extent of it, and the impact of those things on the *vires* of the *Guidelines*. The Intervenor seeks to sidestep this discussion by describing the exclusion of the Ignored Benefits as a "legislative choice".[66] The Applicant urges this Court to look beyond that language. It engages the fox and henhouse concern of a delegate trying to immunize itself from review through empty platitudes. Excluding the Ignored Benefits was a choice, and one that codified transfers in excess of child costs (that is, in excess of the GIC's authority). Calling an *ultra vires* interpretation a "legislative choice" does not render it *intra vires*. That kind of logic and misguided justification is the reason why we have judicial review.

131. Understanding the history and evolution of the Ignored Benefits assists in establishing the extent to which that decision was an excess of authority.

132. As noted, the GIC was not free to adopt an expedient interpretation of the *Divorce Act* to allow it to reverse-engineer a desired outcome.[67]

133. The exclusion of the Ignored Benefits is a compelling example of this type of impermissible reverse-engineering.

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[63] See, for example, Applicant's Brief at paras 442-450.
[64] Applicant's brief para 262.
[65] Applicant's brief para 259 and FN 191
[66] Intervenor Brief at para 113
[67] *Vavilov* at para 121 **[**Applicant's Authorities at **TAB 8]**

134. Recall that the DOJ Consultants (that is, Ross Finnie and Daniel Stripinis) designed the novel RFP Formula to create a regime that was much more generous to CP households than anything else they studied. They succeeded in doing that, only to receive instructions from the FLC to further increase awards at low income levels. Those directions were given without any reference to the deemed costs of the child according to the 40/30 Scale; they were based solely on the goal of increasing awards generated by the RFP Formula at low income levels, as compared to the DOJ's database.

135. That database was of questionable reliability and, in any event, a comparison of the amounts in that database to the awards generated by the original RFP Formula was a comparison of apples to oranges.[68]

136. The DOJ Consultants protested against the idea of arbitrarily increasing awards on a number of bases, including that:

(a) The basis for increasing awards above those estimated in the DOJ database was illusory and entirely questionable; and

(b) Implementing that reverse-engineered objective would undermine the coherence of the guidelines.[69]

137. Among other things, the FLC's problematic instructions meant that some CP households above the poverty line would receive a child support award that increased the custodial standard of living while simultaneously putting the NCP **further** below the poverty line:

> A problem with this approach occurs when the non-custodial parent's income is $15,000 or less and the custodial parent's is more than $30,000. In this situation, the standard of living of the custodial parent and children increases, on average, as a result of the divorce, while the non-custodial parent is already about 20 per cent below the poverty line. **An increase in the award will** make this situation more extreme - i.e., **put the non-custodial parent even further into poverty and further increase the standard of living of the custodial parent**.[70]

138. To pause and emphasize the import of this observation, these comments reveal the FLC's agenda to engineer child support awards without reference to any intelligible

[68] Sarlo Exhibit D at p 52

[69] Sarlo Exhibit D at pp 52-53: modifying the RFP Formula based on the DOJ database entailed adopting a formula based on an income-award pattern that did not obviously exist; DOJ database awards and awards generated by the original RFP Formula were not necessarily comparable, especially at the targeted low income levels; the RFP Formula, as conceived, was based on principles that would be undermined by the proposed adjustments at low income levels; the DOJ Consultants thought it was important to reject that outcome and apply the RFP Formula consistently at all income levels. Finally, modifying the formula to achieve pre-ordained outcomes at particular income ranges undermined "the coherence of the formula in terms of how awards increase with the non-custodial parents' income and the number of children".

[70] Sarlo Exhibit D at p 55 / FN 49

notion of child costs, even when the result was to push the NCP further below the poverty line.

139. As the DOJ Consultants aptly put it, one of the many challenges with pursuing this agenda was that it made the formula very difficult to explain.[71]

140. In other words, it rendered the basis for the presumptive awards unintelligible. That logic nonetheless won the day,[72] which is a compelling indication that the GIC's understanding of the scope of its discretion was founded in expedience rather than purposive statutory interpretation.

141. That is confirmed by the Intervenor and Professor Thompson who continue to defend the decision to exclude the Ignored Benefits on the simple basis that it allows the CP to spend more on their children.[73]

142. Excluding the Ignored Benefits (like other decisions, such as ignoring NCP direct spending and double counting section 7 add-ons) does indeed mean that more income ends up in the custodial household to be spent on the people who live there, including the child of the marriage.

143. That objective and outcome, however, is untethered to the notion of child costs and emblematic of the Intervenor's, Professor Thompson's, and the GIC's approach: any transferred amount is within the GIC's scope of authority because it means that the CP household has more resources available that might be spent on the child.

144. Again, whether or not one agrees with the outcome reached, it is the result of a misunderstanding of the scope of the GIC's authority to pass child support guidelines.

D. Unequal Standards of Living Disprove the Presumption of CP Contribution

145. In the one paragraph where the Intervenor engages meaningfully with the *vires* question, it echoes the familiar refrain that the *Guidelines* honour the applicable constraints because the CP is presumed to make an equal contribution to child costs.[74]

146. The Intervenor resists any attempt to prove that presumption wrong by showing that the CP makes a disproportionately low (or non-existent) contribution to child costs.

147. The CP's unequal contribution to child costs is equally apparent, though, through reference to standards of living.

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[71] Sarlo Exhibit D at p 59

[72] The manner of achieving this pre-ordained objective evolved over time, but always centered on the treatment (exclusion) of certain government subsidies.

[73] Intervenor Brief at para 115

[74] Intervenor Brief at para 96

148. What allows the presumption of equal CP contribution is the premise that the CP and the child share the same standard of living.

149. The GIC cannot have it both ways. It cannot say that the *Guidelines* honour joint responsibility based on a presumption of shared living standards but define child costs by segregating the CP's and the child's standard of living.

150. Excluding the Ignored Benefits, by design, ensures that parents who start at the same living standard will have different standards post-award.[75] Excluding those amounts from the CP income causes the underlying software to iterate past the point of equality, causing the NCP to contribute a higher amount than they otherwise would.

151. In the RFP Formula, where incomes are presumed to be equal, the fact that CP households end up with higher living standards simultaneously shows that the CP pays a smaller portion of child costs. As the FLC put it:

> **… awards that equalize costs will also equalize standards of living, where this is measured by using the equivalences [sic] scales to adjust total incomes for family size**.[76] [Emphasis added]

152. Awards that do not equalize standards of living do not equalize contributions to child costs. The CP household ends up at a higher standard of living **because** it pays less of the child costs. Again, the RFP Formula is based on an assumption of equal standards of living pre-award. If the CP household ends up at a higher standard of living post-award, that is because the NCP made a disproportionate contribution to child costs.

153. Minister Rock was wrong in 1996 when he suggested that: "the custodial parent is already paying the average proportion".[77] A false statement is not rendered true because it was said by a Minister in the House of Commons.

154. Put another way, the *Guidelines* should not be upheld on the basis of statements by a Minister that directly contradict the *Guidelines* themselves. Minister Rock stated that "it is impossible to look differently at my standard of living and at the standard of living of my children". [78] Yet, the GIC could only exclude the Ignored Benefits by doing just that.

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[75] That same outcome flows from ignoring NCP direct spending and the consequences of re-partnering, double counting section 7 add-ons, applying the 40/30 Scale in a linear fashion, and assuming children cost the same regardless of their age.
[76] Sarlo Exhibit E at p 66
[77] Intervenor Brief at paras 97-98
[78] Intervenor Brief at paras 97-98

155. Again, as stated in the Applicant's Brief,[79] it is unfortunate that the Intervenor continues to evade the point rather than simply concede the impact of excluding the Ignored Benefits.

156. Why are the *Guidelines* presented to the public on the basis that, assuming equal starting incomes, the child support awards are calculated to ensure equal standards of living post-award? Why not acknowledge that is not the case and have an open discussion about the reason why, the extent to which it is not the case, and the impact of all of that on the *vires* of the *Guidelines*?

E. The *Guidelines* as a Whole are *Ultra Vires*

157. This application does not confound the table formula and the *Guidelines*. It has always engaged the whole of the *Guidelines* - as evidenced, for example, by Roland's evidence and submissions about sections 4, 7, and 10.

158. The application does, though, correctly start with and focus on the table amounts.

159. Those are the presumptive amount of child support. As the Intervenor says, their purpose is to consistently resolve the **vast majority of cases**.[80] In other words, in most cases, the presumptive amounts are all that matters. The Intervenor touts the success of the *Guidelines* primarily on the basis that they remove discretion.

160. If those codified and presumptive table awards are an excess of authority, it would take powerful counter-balancing measures to render the *Guidelines* lawful. There is a problematic tension in the Intervenor belabouring the importance of standardization in the vast majority of cases yet suggesting that the *Guidelines* are *intra vires* because of "safety valves" that apply to a minority of cases.[81]

F. There is No Meaningful Discretion to Fix the Problems in the Table Amounts

161. As noted in the Applicant's Brief, section 10 is the one part of the *Guidelines* that allows Courts to decrease presumptive awards. The problem is that there is no relationship between the inherent breakdowns in those base awards and the test the GIC crafted for addressing those breakdowns. Section 10 does not ask whether the base award creates transfers beyond child costs and a disconnect between CP and NCP standards of living. It engages a different test altogether, relating to the impoverishment of the NCP, to the point where that person cannot afford to see their child.

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[79] Applicant's Brief at para 262
[80] Intervenor Brief at para 103
[81] Intervenor Brief at para 56. Section 10, for example, is "not meant to be used often". There is a "strong presumption that paying parents are able to afford the table amounts": Harper Ex 13 at p 77

162. The problem with section 10 is not how Courts have interpreted it, but the core of its construction.[82]

G. Section 7 Creates Known Double Counting

163. The Intervenor has suggested that, because the wording of section 7 distinguishes the add-on expenses from table amounts, they are not double counted.[83]

164. This is another remarkable example of the government defending the *Guidelines* on the logic that "it is so, because we say it is so". The Intervenor's position is incorrect and misses the point.

165. The question is not whether section 7 leads to the double counting of child costs. It does. That is not up for debate.[84]

166. Again, a simple numerical example may assist.

167. If the extraordinary expenses in any given case are determined to be $5K, section 7 calls for those expenses to be shared proportional to the parents' gross income. In the case of equal incomes, the NCP would be ordered to pay $2.5K for these add-on expenses. A portion of that is double counted because an amount representing the average cost of those exact same expenses is already included in the table amount. Therefore, the CP receives $2.5K **plus** an amount within the base award in respect of those precise same expenses.

168. Ross Finnie understood that section 7 created known double-counting:

> …such [section 7] expenses are largely already included in the child cost estimates used in the guidelines and are thus reflected in the base awards. As a result, there would be a double-counting of such expenses where awards were raised for the reasons listed and awards would generally be higher than they should be.[85]

169. Again, a review that engages the rule of law requires that we not evade or confuse the question but, rather, confront it head-on. The question is not whether section 7 results in double counting. It does, and that problem was identified pre-promulgation. The question is whether the resulting transfers in excess of the deemed child costs render the *Guidelines* unlawful.

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[82] See, *e.g.*, Harper Exhibit 13 at p 77
[83] Intervenor Brief at para 123
[84] This is addressed at paragraphs 264 to 285 of the Applicant's Brief
[85] Brief authority 33 Finnie p 91 / Brief FN 205

H. *Guidelines* Objectives and Legislator Statements Do Not Establish Legality

170. A recurring theme through this reply is that aspirational statements within the subordinate legislation[86] and incorrect statements from legislators should not be sufficient to establish the *vires* of the *Guidelines*. Subordinate legislation should not be rubber stamped on the basis of false advertising.

171. The Supreme Court confirmed in *Contino*, a shared custody case, that the wording of the objectives in the *Guidelines* is similar to the wording of the Limiting Principles in 26.1(2).[87] Again, that is self-evident. Roland's point is that it does a grave disservice to this *vires* review to suggest that should be the end of the analysis. Any delegate can state that its decision complies with the constraints in the enabling legislation. To serve its constitutional purpose, judicial review must entail more than taking such statements at face value.

172. Indeed, some of what was at issue in *Contino* was what the table amounts represented and whether they called for the parents to spend an equal amount for the care of the child. The Supreme Court was not aware of the source that would allow verification of those assumptions and reached its conclusion on the topic **with reference to note 5 of the *Guidelines*, which is not accurate.**[88] Put simply, as Professor Thompson has acknowledged, the Courts charged with applying the *Guidelines* do not understand how the table amounts are arrived at.[89]

173. Nor is *Premi v Khodeir*[90] an answer to this application. The case is not binding. Also, like *Contino*, it is based on the misstatement in the *Guidelines* that the presumptive table amounts are "based on economic studies of average spending on children".[91] Further, it reflects the same flawed logic the Intervenor espouses here that inaccurate and selectively-quoted legislator statements are sufficient to establish the *vires* of the *Guidelines*.

174. In this case, the statement of objectives and ministerial assurances are particularly problematic because the *Guidelines* have been repeatedly defended on the basis of inaccuracies.

175. If the Government wants the *Guidelines* to be accepted based on what the Government said about them, it should be prepared to have those statements scrutinized for reliability and accuracy. Where they do not withstand that scrutiny, the decision fails the fundamental public law tests of transparency and intelligibility.

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[86] Intervenor Brief at para 85
[87] *Contino v Leonelli-Contino, 2005 SCC 63* at para 32 [*Contino*] [Intervenor's Authorities at **TAB 2**]
[88] *Contino* at paras 46-47 [Intervenor's Authorities at **TAB 2**]
[89] Applicant's Brief at FN 257 citing Thompson cross 95/19-96/5
[90] *Premi v Khodeir*, 2009 CanLII 42307 (ONSC) [Premi] [Intervenor's Authorities at **TAB 19**]
[91] *Premi* at para 35 citing note 5 to the Guidelines [Intervenor's Authorities at **TAB 2**]

176. That is the case here.

177. As noted, when the *Guidelines* were tabled for consideration, the explanation from Cabinet included the misstatements that the RFP is based on "a method of determining the costs of raising a child used by Statistics Canada" and the table amounts are "fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels".[92]

178. The 40/30 Scale has nothing to do with **child** costs and it is not based on economic data on average expenditures **on children**. The *Guidelines* continue to state on their face that "the amounts in the tables are based on economic studies of average spending on children". Even Professor Thompson has long recognized that statement is false.[93]

179. The GIC has never retracted these statements which is particularly problematic given that, as we have just seen, they are relied on by Courts when interpreting the *Guidelines*.

180. Those statements formed part of the express public justification of the *Guidelines* and the Intervenor is relying on them to ask this Court to find that the *Guidelines* are *intra vires*.

181. Those statements are demonstrably untrue, and that matters. Again, public law is about transparency and justification.

182. The public has been told and the *Guidelines* have been justified on the basis that the formula "calculates the appropriate amount of support in light of economic data on average expenditures on children".[94] There are no such studies or data. At most, the RFP Formula is based on arbitrary numbers that were chosen to represent the average incremental cost of any person (of any age) in a household with income near the poverty line.

183. Perhaps more importantly, StatsCan and the FLC and the DOJ all agree that we determine that incremental cost by applying the 40/30 Scale to household income. The GIC morphed its application of the 40/30 Scale in a novel way by applying it to something other than household income - namely, a portion of household income that ignores an ever-evolving subset of government benefits.

184. There is no recognition of that fact in statements to the effect that the formula calculates the appropriate amount of support in light of the 40/30 Scale. The issue is

[92] Applicant's Brief paras 350-357
[93] Applicant's Brief paras 350-357
[94] Harper Affidavit, Ex 1 at pp 1121; Harper Affidavit, Ex 11 at p 12

swept away in two sentences in a Technical Report published long after the *Guidelines* were law.[95]

185. Further, the Intervenor has repeated the alleged link between ignoring NCP direct spending and the notion of CP hidden costs, suggesting that hidden costs provide a policy reason to ignore NCP direct spending.[96] Again, because this misdirection is so oft-repeated, it bears emphasizing: CP hidden costs are specifically addressed through spousal support, which Professor Thompson acknowledges.[97] They do not provide any rationale for ignoring NCP direct spending on their children.

186. The DOJ acknowledged at the time of promulgation that CP hidden costs were addressed through spousal support; it has subsequently defended the *Guidelines* to the public on the basis that the decision to ignore NCP direct spending was deliberately made as a counter-balance to CP indirect costs. It was not, and it is problematic that the DOJ would state otherwise.[98] It is compelling evidence of a delegate motivated to eschew the constraints on its authority.

187. While Hansard evidence is relevant to understanding the background and purpose of the *Divorce Act* and *Guidelines*, the Supreme Court has repeatedly cautioned Courts to remain mindful of the limited reliability and weight of such evidence:

> The main problem with the use of legislative history is its reliability. First, the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole. Thus, it may be said that the corporate will of the legislature is only found in the text of provisions which are passed into law. Second, the political nature of Parliamentary debates brings into question the reliability of the statements made. Different members of the legislature may have different purposes in putting forward their positions. That is to say the statements of a member made in the heat of debate or in committee hearings may not reflect even that member's position at the time of the final vote on the legislation.[99]

188. These comments are particularly apt here: inaccurate statements were carried forward on the face of the *Guidelines* and remain there today; the people charged with passing the *Guidelines* did not even have the math underlying them at the relevant time;[100] and legislators made repeated inaccurate statements like: the *Guidelines* "take into account

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[95] Sarlo Exhibit F at p 5

[96] Intervenor Brief para 126

[97] Applicant's Brief paras 299-300; In that context, Professor Thompson has acknowledged that, among other things, NCP's incur their own hidden costs related to work and parenting: Applicant's Brief para 250 and FN 184

[98] Applicant's Brief para 300

[99] *R v Heywood*, [1994] 3 SCR 761 at para 43 **[TAB 7]**. See also *R v Morgentaler*, [1993] 3 SCR 463 at para 31 **[TAB 8]**; and *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 35: "the frailties of Hansard evidence are many" **[TAB 9]**

[100] Applicant's Brief para 128

average expenses for raising children";[101] "[t]he amounts are calculated by a formula that takes into account average expenditures on children at various income levels";[102] and "[the *Guidelines*] involve numerical calculations which take into account amounts that families at similar income levels would spend on their children".[103]

189. Those who have spoken in favour of the *Guidelines* are those who have the most to gain by supporting them and the most to lose through their scrutiny and invalidation. The Senate expressed frustration at the time of promulgation, noting that the *Guidelines'* proponents tended to unhelpfully wrap themselves in the flag of rhetorical affirmations for public relations purposes. Since 1996, the Government has been defending the *Guidelines* on the basis of "broad reassurances that all the experts agree, that there has been a long consultative procedure and that these guidelines have been long in the making… all in an attempt to convince us that the process… should persuade us that the result is good". What the Senate needed, but did not receive, were concrete and transparent explanations about the rationale and basis for the *Guidelines*.[104]

190. Judicial review takes its colour from the context. The *Guidelines* are, at base, about dollars and cents; numbers that are capable of verification. Especially in this context, and given what the Applicant has proven on the evidence, it is insufficient for the Intervenor to continue to defend the *Guidelines* on the basis that this Court should "trust us".[105]

191. The *Guidelines* are not lawful based on rhetorical affirmations.

192. Nor can they be sustained based on squatters' rights[106] - that is, because they have been applied frequently over the last 23 years. The record in this application has surfaced the extent to which no one understands what the *Guidelines* are based on. They churn out a table amount that is the presumptive award in the vast majority of cases. That those mis-understood amounts have been applied hundreds of thousands of times should not bring the Court to comfort that the *Guidelines* are lawful - rather, they underscore the

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[101] Harper Exhibit 22, Commons Debates October 1, 1996 Kirkby (Parl. Secretary to Minister of Justice) at p 4902.
[102] Harper Exhibit 14, Commons Committee (October 21, 1996), Allan Rock at page 6 of 17.
[103] Intervenor Brief at para 18.
[104] Harper Exhibit 30, Standing Senate Committee on Social Affairs, Science and Technology page 32 of 57 per Senator Cools; Harper Exhibit 32 at page 25 of 50 per Ross Finnie
[105] A subordinate law written in the language of math will be evaluated, at least to some extent, through the lens of that same language. Using the DOJ's own logic, the Applicant has disproved the presumption of equal CP contribution to child costs. It therefore works against the Intervenor that it declined to put anything on the record to allow the fair evaluation of this essential question. It asks the Court to disregard the Newfoundland Illustration without providing some alternative meaningful way of assessing the *vires* of the *Guidelines*. The reasonable inference is that the Intervenor has no such alternative method*:* Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 128 at para 79 [**TAB 10**] citing *Kabul*
[106] See, e.g., *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at para 45 [**TAB 11**]. Some *vires* challenges arise many years after the fact, whether that be based on division of powers or excess of delegated authority

need for this Court to determine, on a meaningful understanding of what those numbers represent, whether they are lawful.

193. This application asks this Court to avoid the circularity of concluding that the *Guidelines* are lawful on the basis that the executive and/or legislative branches think they are. The entire purpose of judicial review is for the Court to make that determination.

I. The *Guidelines* Cannot be Found Lawful Through Reference to Other Jurisdictions

194. Professor Thompson's extra jurisdictional comparisons are simply irrelevant.

195. Beyond that, though, they are unreliable and incapable of meaningful testing. This is particularly important to understand in light of the Intervenor's continued suggestion that Canadian percentages for NCP net incomes are still at the low end or below comparable U.S. net incomes.[107] That hinges on the comparison being apples to apples, which it is not.

196. Taking just one of Professor Thompson's examples, he stated that the net income ratio for Alaska is 20% for one child compared to 10.9% to 13.9% for Alberta. The source cited is https://public.courts.alaska.gov/web/rules/docs/civ.pdf#page=124. That page shows that child support is based on "adjusted annual income" which is defined to exclude federal, state, and local income tax; Social Security tax; medicare tax; mandatory union dues; contributions to retirement savings or pension plans; child or spousal support from different relationships; work-related child care expenses for the children who are the subject of the child support order; and health insurance premiums paid for health, dental, and vision insurance by the parent for the parent. Account is also taken for NCP time with the child, and the resulting amounts can be varied in a myriad of circumstances.

197. It is only once the Court gets to this NCP "adjusted annual income" that it applies the fixed percentage of 20%. Given the deductions involved in calculating adjusted annual income, a comparison between that regime and Canada's is not relevant. You simply cannot compare child support amounts or ratios without understanding the entire relevant context, including income definitions, tax considerations, rules related to variation, and the prevailing social and economic policies. Here, the American number is irrelevant because it defines income differently, and the Alberta number is deceptively low because it does not acknowledge the impact of the Excluded Benefits or reflect the real financial position of the CP and NCP households post-award.[108]

198. There is an irony in the Intervenor resisting the alleged "deep dive" the Applicant undertook to allow this Court to understand *these Guidelines* only to suggest that he

[107] Intervenor Brief at para 138
[108] Applicant's Brief at paras 373-386

should have also undertaken that same level of analysis to allow for meaningful scrutiny of Professor Thompson's evidence about other regimes.

199. Reliance on these extra-jurisdictional facts also entails the AGC seeking to defend the *Guidelines* based on post-promulgation facts.

200. The AGC argues that "[b]ootstrapping is not possible in this context" because it is not the GIC and is therefore not participating "in a judicial review of its own decision".[109] This artificial distinction ignores the AGC's significant role in the *Guidelines*, as Gates J observed in his decision to grant the AGC intervener status (emphasis added):[110]

> …If the *Guidelines* were found to be *ultra vires*, it would fall directly to the Attorney General to take action to preserve Canada's federal child support framework.
>
> **The Minister of Justice, who also acts as Attorney General, is responsible for the development and maintenance of Canada's child support framework, of which the *Guidelines* are a fundamental part... it would fall to the Minister of Justice to remediate and rework the *Guidelines***. In other words, **the *Guidelines* are more than just an ordinary piece of federal legislation, particularly in terms of scope and reach**.
>
> …**The central player in all of this collaboration has been the Minister of Justice**. Under such circumstances, it seems unlikely any other party exists who can claim to bring as much special knowledge and expertise regarding the *Guidelines* as the Attorney General. [emphasis added]

201. Much like a tribunal on judicial review of its own decision, Gates J allowed the AGC to participate "due to the extraordinary nature of Dr. Auer's otherwise unopposed *vires* challenge to the *Guidelines*"[111] and because it brings special insight. This is not an ordinary *vires* challenge, and the AGC is not exercising its ordinary role.

202. *OEB* is the leading authority on bootstrapping, and it arises in the public law context. Whether a review would be unopposed and whether participation is required to ensure a fully informed adjudication are two of the three relevant factors identified in *OEB*.[112] These are the same reasons the Supreme Court first expanded the role of tribunals on

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[109] Intervenor Brief at para 64.
[110] *Auer v Auer*, 2018 ABQB 510 at paras 112-116 [*Auer*] **[Applicant's Authorities at TAB 4]**.
[111] *Auer* at para 131 **[Applicant's Authorities at TAB 4]**.
[112] *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 59 [*OEB*] **[Applicant's Authorities at TAB 6]**.

judicial review in *CAIMAW v Paccar of Canada Ltd*,[113] and these are the same reasons the AGC is allowed to participate in this case.

203. The Applicant does not suggest the AGC is or should be impartial. The AGC very clearly has a vested interest as the "central player" with responsibility to develop and maintain the *Guidelines*.

204. *OEB* remains relevant, though, with respect to finality and the need for all delegated decisions to be well reasoned and capable of transparent justification. Resort to bootstrapping the original reasons with new explanations on review, including post-promulgation facts, is an important signal that the original decision was based on an expedient interpretation in excess of the delegate's authority.

IV. CONCLUSION

205. The Applicant asks this Court to undertake a meaningful judicial review, based on an understanding of the *Guidelines*. To rubber stamp is to approve without proper consideration. Endorsing the *Guidelines* on the bases proposed by the Intervenor would amount to precisely that.

206. At the core of that meaningful exercise is an understanding of how child costs are determined within the *Guidelines*. The 40/30 Scale is high and arbitrary but does not, on its own, form the foundation of this *vires* challenge (although it is telling that the Scale has been repeatedly misrepresented to the public to cloak the *Guidelines* in an aura of legitimacy).

207. The more fundamental problem is the refusal to engage with the incoherence that arises by excluding the Ignored Benefits.

208. Without ever saying that child costs were something other than what is calculated under the 40/30 Scale (and, rather, as noted, continuing to cloak itself in the supposed legitimacy that flows from relying on that Scale), the FLC and GIC then increased child support transfers above the amounts dictated by the 40/30 Scale. The Intervenor defends that by suggesting that child costs are whatever the GIC said they were. There is, in other words, no way to isolate child costs under the 40/30 Scale and compare the presumptive awards against those. Rather, child costs are whatever the presumptive amounts call for. That position does not allow this Court to evaluate the *Guidelines*; it mandates rubber stamping.

209. Nor does it work to defend the *Guidelines* by saying that any amounts transferred to the CP household are "in the best interests of the child". That gives the GIC untrammelled

[113] *CAIMAW v Paccar of Canada Ltd*, [1989] 2 SCR 983 at paras 48 and 52 (*CAIMAW*) [**TAB 12**], citing *B.C.G.E.U. v Indust. Rel. Council*, 26 BCLR (2d) 145, 32 Admin LR 78; L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of LaForest J.'s analysis at para 55 [not reproduced].

discretion and free rein in interpreting the *Divorce Act*. The best interests principle might work to create a margin of appreciation that allows for a high and arbitrary method for estimating child costs. It does not go beyond that to authorize the transfer of any amount to the CP household, whether that amount is tethered to child costs or not.

210. These problems in the base awards arising from the exclusion of the Ignored Benefits are compounded by the many other parts of the *Guidelines* that create transfers in excess of child costs. Again, the Applicant repeats and adopts his submissions for the Applicant's Brief. To summarize:

(a) The original RFP Formula was as generous as it was to CP households because the 40/30 Scale is such a high estimate of child costs, ignores the ages of children, and is applied in a linear fashion, at all income levels;

(b) That original Formula was then evolved dramatically through the exclusion of the Ignored Benefits and setting the NCP AEU at 1.0;

(c) The overall regime was further imbalanced by the inclusion of section 7;

(d) The *Guidelines* also draw unauthorized and unfair distinctions between the NCP's children from other families and unreasonably fail to account for the very real consequences of re-partnering.

211. The *Guidelines*, by design, do not cause the parents to share equally in the costs of the child or end up at similar standards of living even when they start that way pre-award. That is what the Newfoundland Illustration illustrates.

212. If there is any margin of appreciation,[114] this guideline regime falls well outside of it.

V. RELIEF REQUESTED

213. The Applicant Roland seeks:

(a) a determination and ruling that the *Guidelines* are *ultra vires* the *Divorce Act*, or unlawful, invalid or illegal, and are of no force and effect and should not be applied;

(b) the costs of this Application per the Court's discretion, including on an elevated basis if found to be warranted; and

(c) such further and other relief as this Honourable Court may deem just.

[114] Why, after all, add any amount on top of child costs, given that the separate spousal support regime exists precisely as a residual financial remedy used to compensate the CP for their role in caring for the child?

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2020.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

Laura Warner
Counsel for the Applicant, Roland Auer

Estimated Length of Argument: 6 hours
Calgary, Alberta

VI. LIST OF AUTHORITIES

1. *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160
2. *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643
3. *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59
4. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2
5. *Green v Law Society of Manitoba*, 2017 SCC 20
6. *Interpretation Act*, RSC 1985, c I-21, s 11
7. *R v Heywood,* [1994] 3 SCR 761
8. *R v Morgentaler,* [1993] 3 SCR 463
9. *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27
10. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128
11. *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327
12. *CAIMAW v Paccar of Canada Ltd*, [1989] 2 SCR 983
13. Ruth Sullivan*, Statutory Interpretation,* 3d ed, (Irwin Law: Toronto, 2016)

Tab 1

2016 FCA 160
Federal Court of Appeal

Syncrude Canada Ltd. v. Canada (Attorney General)

2016 CarswellNat 1870, 2016 FCA 160, 100 C.E.L.R. (3d) 179,
266 A.C.W.S. (3d) 624, 398 D.L.R. (4th) 91, 483 N.R. 252

Syncrude Canada Ltd., Appellant and The Attorney General of Canada, Respondent

C. Michael Ryer, Richard Boivin, Donald J. Rennie JJ.A.

Heard: November 3, 2015
Judgment: May 30, 2016
Docket: A-383-14

Proceedings: affirming *Syncrude Canada Ltd. v. Canada (Attorney General)* (2014), 461 F.T.R. 53, 91 C.E.L.R. (3d) 46, 2014 CF 776, 2014 CarswellNat 4763, 2014 CarswellNat 3181, 2014 FC 776, Russel W. Zinn J. (F.C.)

Counsel: Bernard J. Roth, Joshua A. Jantzi, for Respondent
Christine Ashcroft, Darcie Charlton, Maia McEachern, for Respondent

***Donald J. Rennie J.A.*:**

I. Introduction

1 Federal regulations require that all diesel fuel produced, imported or sold in Canada contain at least 2% renewable fuel. Syncrude Canada Ltd. produces diesel fuel at its oil sands operations in Alberta, which it uses in its vehicles and equipment.

2 Syncrude commenced an application in the Federal Court seeking declarations of invalidity of the regulations on constitutional and administrative law grounds. The Federal Court dismissed the application (2014 FC 776 (F.C.)) and Syncrude appeals to this Court. For the reasons that follow, I would dismiss the appeal.

II. Legislative and regulatory scheme

3 Section 139 of the *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33 (CEPA) prohibits the production, importation and sale in Canada of fuel that does not meet prescribed requirements.

4 Subsection 140(1) of the CEPA provides that the Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139. Regulations may be made prescribing the concentrations or quantities of an element, component or additive in a fuel, the physical and chemical properties of fuel, the characteristics of fuel related to conditions of use and the blending of fuels. Subsection 140(2) requires that the Governor in Council be of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from, directly or indirectly, the combustion of fuel. It was under this provision that the *Renewable Fuels Regulations*, SOR/2010-189 (RFRs) were promulgated.

5 Subsection 5(2) of the RFRs requires 2% of diesel fuel to be renewable fuel. Every litre of renewable fuel mixed into other fuel creates one compliance unit (subsection 13(2) of the RFRs), including if it is mixed outside of Canada and then imported (subsection 14(2)). A compliance unit represents one litre of renewable fuel in the total Canadian fuel supply. Pursuant

to subsections 5(2) and 7(1) of the RFRs, a person must expend 2 compliance units for every 100 litres of fuel they produce, import, or sell. Compliance units can be acquired via the above procedure or by purchase in trade (subsection 20(1)).

6 Subsection 272(1) of CEPA makes it an offence to breach section 139. If prosecuted by indictment, an offender is liable for a fine of between $500,000 and $6,000,000. On conviction for a second offence these penalties double.

7 These legislative provisions are set forth in Annexes A and B to these reasons.

III. The development of the Renewable Fuels Regulations

8 Toxic substances are defined in section 64 of CEPA as those which "...may have an immediate or long-term harmful effect on the environment or its biological diversity; constitutes or may constitute a danger to the environment on which life depends; or constitutes or may constitute a danger in Canada to human life or health." Greenhouse gases (GHGs) are gases which, when released, lead to the retention of heat in the atmosphere. Since 2005, six of the most significant GHGs have been listed as toxic substances in Schedule 1 of the CEPA. These include carbon dioxide, methane, and nitrous oxide.

9 The Regulatory Impact Analysis Statement (RIAS) accompanying the addition of GHGs to Schedule 1 in 2005 stated that they were added as toxic substances because, as concluded in the Kyoto Protocol, they "have significant global warming potentials (GWPs), are long lived and therefore of global concern [and] have the potential to contribute significantly to climate change." The RIAS also noted that there has been a substantial rise in GHGs "as a result of human activity, predominately the combustion of fossil fuels" which could lead to an increase in frequency and intensity of heat waves, that in turn could "lead to an increase in illness and death": *Canada Gazette*, *Part II*, Vol. 139, No. 24, (November 21, 2005), pp. 2627, 2634 [2005 RIAS]. The 2005 RIAS cited both the *Montreal Protocol on Substances that Deplete the Ozone Layer* 16 September 1987, 1522 U.N.T.S. 3 and the Intergovernmental Panel on Climate Change, *Third Assessment Report*, 2000 (Cambridge, England: Cambridge University Press, 2002) as the scientific and policy basis for the addition of the six GHGs. The Panel concluded that "there is sufficient evidence to conclude that greenhouse gases constitute or may constitute a danger to the environment on which life depends, therefore satisfying the criteria set out in section 64 of the CEPA 1999" (2005 RIAS, p. 2634).

10 A Notice of Intent to develop the RFRs was subsequently published in the *Canada Gazette Part I*, Vol. 140, No. 52, (December 30, 2006). The Notice observed that:

> Use of renewable fuels offer significant environmental benefits, including reduced greenhouse gas (GHG) emissions, less impact to fragile ecosystems in the event of a spill because of their biodegradability and reduction of some tailpipe emissions, such as carbon monoxide, benzene, 1,3-butadiene and particulate matter. However, ethanol use may result in increased emissions of volatile organic compounds, nitrogen oxides and acetaldehyde.

11 The "Rationale for Action" in the Notice of Intent stated that "use of renewable fuels can significantly reduce emissions" and that the projected environmental benefit of replacing 5% of Canadian transportation fuel would represent a reduction in GHG emissions equivalent to the emissions of almost 675,000 vehicles.

12 The RIAS accompanying the publication of the RFRs in 2010 (*Canada Gazette, Part II*, Vol. 144, No. 18, September 1, 2010) stated that GHGs are a significant air pollutant and contributor to climate change. The stated objective of the RFRs was to reduce GHGs, "thereby contributing towards the protection of Canadians and the environment from the impact of climate change and air pollution."

IV. The Federal Court decision

13 The 2% renewable fuels requirement came into force July 1, 2011, at the same time amendments were made to the RFRs. The accompanying RIAS reiterated and expanded upon the scientific, environmental and policy justifications and consequences of the renewable fuel requirement made in the September 2010 RIAS: *Canada Gazette, Part II*, Vol. 145, No. 15 (July 20, 2011).

14 Syncrude challenged the constitutional validity of subsection 5(2) of the RFRs. It alleged that the subsection was not a valid exercise of Parliament's criminal law power under subsection 91(27) of the *Constitution Act 1867* (U.K.), 30 & 31 Vict.,

c. 3, reprinted in R.S.C. 1985, App. II, No. 5 because it lacked a criminal law purpose and intruded into provincial legislative responsibility for non-renewable natural resources. Syncrude further alleged that the provision was *ultra vires* the regulation-making power of section 140 of CEPA because the Governor in Council was required to form an opinion that the regulation would reduce air pollution, an opinion which the Governor in Council could not reasonably have held. Syncrude also raised challenges arising from the legislative procedure and process leading to the promulgation of the RFRs.

15 Relying on *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 (S.C.C.) [*Hydro-Québec*] the judge found that a valid criminal law purpose existed in the protection of the environment from pollution. He also found that the evidence adduced by Syncrude suggesting that the RFRs would not be effective in achieving their environmental goals to be irrelevant to the characterization of their dominant purpose, and that the criminal law power does not require a total or direct prohibition of the conduct in question. He rejected the argument that, in order to be a legitimate use of the criminal power, the requirement of renewable fuels had to be either an absolute requirement or, alternatively, greater than 2 %.

16 The judge then considered Syncrude's alternative argument that the RFRs were a colourable device to establish a domestic market for renewable fuels, and hence a matter within provincial legislative competence under subsection 92(13) of the *Constitution Act, 1867*. After a review of the evidence, the judge concluded that while the RFRs had economic consequences and goals, the creation of demand for renewable fuels was a necessary and integral part of the strategy to reduce GHGs. The reason the government wanted to create a demand for renewable fuels was to lower GHGs over the long-term. The dominant purpose of the RFRs was the protection of the environment by the reduction of air pollution.

17 The judge then turned to the Attorney General's alternative argument that, assuming subsection 5(2) was not itself a valid exercise of the criminal law power, it would nonetheless be saved by the ancillary powers doctrine. This doctrine permits legislation to be upheld if it is connected to an otherwise valid legislative scheme and furthers its legislative purpose. Applying the criteria in *Sacré-Coeur (Municipalité) c. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453 (S.C.C.) and *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 (S.C.C.) [*Quebec v. Canada*], the judge found that subsection 5(2) of the RFRs would be saved by the ancillary powers doctrine. In addressing the ancillary power question, the judge correctly observed that it was unnecessary to do so, having found as he did that subsection 5(2) was valid.

18 With regard to the claim that the RFRs were not validly promulgated, the judge found that the Governor in Council had formed the requisite opinion under subsection 140(2) that they would reduce air pollution and that this opinion did not have to be ultimately correct as a matter of science. In the judge's view, Syncrude was asking the Court to substitute its view for that of the Governor in Council as to whether the RFRs could, in the language of subsection 140(2), "make a significant contribution to the prevention of, or reduction in, air pollution."

19 Syncrude also advanced alternative administrative law arguments which the judge rejected. Amongst these, it contended that the Minister denied Syncrude procedural fairness by failing to convene a board of review before promulgating the RFRs and that the failure to convene the board of review rendered the opinion of the Governor in Council unreasonable.

V. Issues on appeal

20 It is important to define at the outset what is, and what is not, in issue in this appeal. Syncrude does not challenge the constitutionality of the enabling provisions - sections 139 and 140 of CEPA. Syncrude does not contend that the definition of "air pollution" in subsection 140(2) of CEPA is overbroad, nor does it contest that GHGs contribute to air pollution, and that their reduction is a proper objective of the criminal law power. Syncrude concedes that, if the dominant purpose of the RFRs were in fact to combat climate change, there would be no constitutional infirmity. Rather, the core of Syncrude's challenge is that subsection 5(2) is not aimed at the reduction of air pollution, but is an economic measure aimed at the creation of a local market, a matter within subsection 92(13), or is directed to non-renewable natural resources, a matter of provincial legislative competence under section 92A of the *Constitution Act, 1867*.

21 Syncrude advances two main errors in the decision below.

22 First, Syncrude submits that the judge erred by considering subsection 5(2) in the context of the CEPA regime as a whole before examining the subsection in isolation. It also submits that the judge failed to consider relevant evidence beyond the RIAS which, in its view, points to the true and colourable purpose of the RFRs. Before this Court, Syncrude maintains its position that, properly characterized, the RFRs are an economic measure, and intrude on provincial responsibility for natural resources, or are colourable attempts to achieve those purposes. It further argues that the RFRs are not a valid exercise of the criminal law power because, as a requirement of 2%, and allowing certain exemptions, they do not completely prohibit or ban the use of fossil fuels.

23 Syncrude contends that the consumption of fossil fuels is not inherently dangerous and that this undermines the notion that the RFRs have a valid criminal law purpose. Syncrude contrasts the pollutants it cites as legitimate evils, such as lead and sulphur, with GHGs. As the judge noted, "[i]n Syncrude's view, there is no evil to be suppressed": Reasons, para. 79.

24 However, as the respondent points out, Syncrude's submission at paragraph 66 of its factum that "the production and consumption of petroleum fuels is not inherently dangerous" is inconsistent with its concession that GHG emissions contribute to the evil of climate change. Syncrude's position is problematic and at times concedes the correlation between GHGs, global warming and the consumption of fossil fuels.

25 Syncrude's second ground of appeal is that the judge erred in failing to conclude that the Governor in Council did not, and could not, hold the requisite opinion under subsection 140(2) that the RFRs would reduce air pollution. The remainder of Syncrude's challenges to the statutory validity of the RFRs raised in the Federal Court were not pursued in this Court.

VI. Analysis

A. Standard of review

26 For questions of constitutionality, the standard of review is correctness: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.); *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at para. 58, [2008] 1 S.C.R. 190 (S.C.C.) [*Dunsmuir*]. However, to the extent that Syncrude raises a non-constitutional objection to subsection 5(2), a different standard of review is engaged.

27 On questions of whether the RFRs were lawfully enacted (pursuant to CEPA), the Supreme Court of Canada has reaffirmed in *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64 (S.C.C.) at para. 24, [2013] 3 S.C.R. 810 (S.C.C.) [*Katz*] that regulations can be struck down only if they are "shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate." The regulations must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose. It remains that "it would take an egregious case" to strike down regulations on the basis that they are *ultra vires* the enabling statute: *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.) at 111, (1983), 143 D.L.R. (3d) 577 (S.C.C.).

28 I note that in *Katz*, the Supreme Court opted not to integrate this standard of review for the *vires* of regulations promulgated by the Governor in Council or by a Lieutenant Governor in Council into the *Dunsmuir* scheme for judicial review of administrative decision-making. Consequently, a review of federal or provincial regulations must not be confused, for example, with the standard of a review applied to a municipality's enactment of bylaws. The latter is subject to a reasonableness review pursuant to the *Dunsmuir* framework, owing to the fact that municipalities do not have inherent legislative power under the *Constitution* and instead only "legislate" pursuant to the authority delegated to them by statute: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (S.C.C.) at paras. 14-15, 20-22, [2012] 1 S.C.R. 5 (S.C.C.). In consequence, federal regulations of the type at issue in the case at bar are subject to the *Katz* criteria.

29 While the decision below arose from a judicial review of the Governor in Council' s decision, the judge was called upon to make factual findings. When considering on appeal a decision in which the judge both reviewed an administrative decision and made separate factual findings, those factual findings attract deference on the *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) standard of palpable and overriding error: *Jodhan v. Canada (Attorney General)*, 2012 FCA 161, 350 D.L.R. (4th) 400 (F.C.A.); *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139, 253 A.C.W.S.

(3d) 677 (F.C.A.); *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 (F.C.A.). This standard applies regardless of whether the factual findings are characterised as "adjudicative, social, or legislative": *Bedford v. Canada (Attorney General)*, 2013 SCC 72 (S.C.C.) at paras. 48-56, [2013] 3 S.C.R. 1101 (S.C.C.).

30 In sum, the question of whether subsection 5(2) of the RFRs is constitutional is reviewed on a standard of correctness. The question of whether the Governor in Council validly enacted subsection 5(2) pursuant to CEPA is assessed against the *Katz* standard of inconsistency with the enabling statute. Any factual findings made by the judge in the course of his analysis are reviewed on a standard of palpable and overriding error.

B. Methodology

31 I will deal briefly with the contention that the judge erred in his methodology, specifically, that he did not read the legislation in the manner required for the purpose of constitutional analysis.

32 Syncrude submits that the judge erred in his approach to the analysis of the pith and substance of the impugned provision. It suggests that the correct approach is to examine the impugned provision in isolation first, and that only if the pith and substance cannot be resolved in that manner, is it appropriate to examine the provision in the context of the entire scheme. Because the judge started with the purpose and object of CEPA, Syncrude submits, his constitutional analysis was in error.

33 Syncrude's reliance on *Québec (Procureur général) c. Canada (Procureur général)*, 2010 SCC 61, [2010] 3 S.C.R. 457 (S.C.C.) [*AHR*] to contend that the first stage must be absolutely quarantined from consideration of the broader context is problematic as a matter of doctrine.

34 The Supreme Court of Canada has articulated the framework for determining the validity of a law made pursuant to the criminal law power. In *AHR*, the Chief Justice observed that where the challenge is to only one or more of the provisions of a piece of legislation, as opposed to the legislation as a whole, the inquiry *might* begin with consideration of the challenged provision or provisions alone. If the provision does not, on its face, intrude into the other jurisdiction, then there is no need to make further inquiry. The Chief Justice continued, however, and noted at paragraph 17 that "the impugned provisions must be considered in their proper context" and it might be necessary to consider the impugned provision in light of the entire scheme in order to understand its true purpose and effect.

35 This methodology has a long antecedence: *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 (note) (S.C.C.) [*General Motors*]. *General Motors* affirms that the impugned provision must be examined in two stages, firstly by looking at the provision itself and secondly, as situated within the context of the broader statute. However, the first stage only stops the analysis if the provision is both independently comprehensible and demonstrably *valid*. Consequently, if analysis of the provision in isolation requires greater legislative context to be understood, or the provision is on its face of doubtful validity, then a broader analysis is inevitable.

36 The judge did precisely what the Supreme Court of Canada mandated — he looked at subsection 5(2) and accepted that, when read alone or without reference to its enabling statute it might be considered a matter within provincial jurisdiction. The judge then considered the purpose and effect of subsection 5(2) and how it fit into the regulatory scheme. He framed his analysis in light of the Supreme Court of Canada's direction in *Ward v. Canada (Attorney General)*, 2002 SCC 17 (S.C.C.), at paragraph 19, [2002] 1 S.C.R. 569 (S.C.C.) [*Ward*], that "[t]he question is not *whether* the *Regulations* prohibit the sale so much as *why* it is prohibited" (emphasis in original). The question of whether the judge was correct in his conclusion aside, there was no error in his analytical framework.

37 Against this legislative and jurisprudential landscape, I turn to the central question — the dominant purpose of the RFRs.

C. Characterization of subsection 5(2) of the RFRs

38 There are two stages to the division of powers analysis. The first is an inquiry into the essential character of the law, or, as is often said, its pith and substance. The second is "to classify that essential character" by reference to the heads of power

under the *Constitution Act, 1867*: *Reference re Firearms Act (Canada)*, 2000 SCC 31 (S.C.C.) at para. 15, [2000] 1 S.C.R. 783 (S.C.C.) [*Firearms Reference*].

39 The characterization exercise is informed by both the law's purpose and its effect. Purpose is gleaned first, from the law itself, as stated by Parliament, but also from extrinsic sources such as Hansard and government policy papers: see *Firearms Reference* at paragraph 17 for a discussion of the use of extrinsic evidence in the characterization exercise. The purpose can also be informed by reference to the mischief to which the law is directed.

40 Following identification of purpose, the inquiry turns to the legal effect of the law — how does the law operate and what effect does it have? At this stage, the court may consider both the legal and practical effect of the law. Having regard to Syncrude's argument, which is predicated on the ineffectiveness of a renewable fuel requirement, the language of the Supreme Court in *Firearms Reference*, at paragraph 18, is highly instructive:

> Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler*, *supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler*, *supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) *(Alberta Bank Taxation Reference)*; and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

41 The application of these principles to the regulation in issue leads to the conclusion that subsection 5(2) is directed to maintaining the health and safety of Canadians, as well as the natural environment upon which life depends. At the risk of repetition, the following points can be derived from the enabling statutory framework in support of this conclusion:

- The RFRs were enacted under subsection 140(2) of CEPA, which requires the Governor in Council be of the opinion that the regulation could make a significant contribution to the reduction of air pollution.

- Subsection 3(1) of CEPA defines "air pollution" as a condition of the air arising from any substance that directly or indirectly endangers health and safety.

- Six substances which comprise GHGs were added to Schedule 1 of CEPA in 2005. Section 64 of CEPA defines a toxic substance as one which may have an immediate or long-term harmful effect on the environment, or its diversity, or may constitute a danger to human life or health.

- Subsection 140(1) contemplates a wide range of regulations in respect of fuel, including "the concentrations or quantities of an element, component or additive in a fuel; the physical or chemical properties of a fuel; the characteristics of a fuel [...] related to [...] conditions of use; [and] the blending of fuels [...]."

- In imposing a 2% renewable fuel requirement subsection 5(2) is directed to the reduction of toxic substances in the atmosphere. The Order in Council promulgating subsection 5(2) stated that the regulation "would make a significant contribution to the prevention of, or reduction in, air pollution, resulting from, directly or indirectly, the presence of renewable fuel gasoline, diesel fuel or heating distillate oil."

42 The RFRs impose requirements respecting the concentration of renewable fuels and thus limit the extent to which GHGs that would otherwise arise from the combustion of fossil fuel are emitted. GHGs are listed as toxic substances under Schedule 1 of CEPA. By displacing the combustion of fossil fuels, the renewable fuel requirement reduces the amount of "air pollution" arising from the GHGs (toxic substance) which would otherwise enter the atmosphere. In sum, the purpose and effect of subsection 5(2) is unambiguous on the face of the legislative and regulatory scheme in which it is situated. It is directed to the protection of the health of Canadians and the protection of the natural environment.

43 Resort to the RIAS confirms this conclusion. The Supreme Court of Canada has endorsed reliance on the RIAS for the purpose of constitutional analysis: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 (S.C.C.) at paras. 155-157, [2005] 1 S.C.R. 533 (S.C.C.).

44 The September 1, 2010 RIAS expressly stated that the RFRs were aimed at a reduction of GHG emissions. The RIAS highlighted the projected reduction in GHG emissions and cited the underlying data for those conclusions: see Regulatory Impact Analysis Statement 2010/9/1 - *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1673, 1677, 1687, 1699-1700, 1705-1706.

45 The July 20, 2011 RIAS, (*Canada Gazette, Part II*, Vol. 145, No 15) notes at page 1429 that the Governor in Council was of the opinion that the proposed regulations "could, through the presence of renewable fuel, make a significant contribution to the prevention of, or reduction in, air pollution." It observed that "[t]he most significant source of GHGs [...] is the combustion of fossil fuels" and that GHGs are "the primary contribution to climate change": pp 1435-36. The RIAS reiterates, at considerable length and in considerable detail the environmental and health benefits of a renewable fuel requirement.

46 The purpose and effect of subsection 5(2) having been determined, the inquiry turns to the scope of the criminal law power and whether subsection 5(2) fits within its ambit.

D. Scope of the criminal law power

47 In broad terms, the jurisprudence of the Supreme Court of Canada establishes a three-part test for a valid exercise of the criminal law power. A valid exercise of the criminal law power requires a) a prohibition, b) backed by a penalty, c) for a criminal purpose: *AHR*. Only the last of these is contested in the case at bar.

48 Supreme Court jurisprudence as far back as the *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)* (1948), [1949] S.C.R. 1, [1949] 1 D.L.R. 433 (S.C.C.) [*Margarine Reference*] has described the nature of the criminal purpose requirement as a requirement that the law be aimed at suppressing or reducing an "evil." Put in more contemporary language, to have a valid criminal law purpose the law must address a public concern relating to peace, order, security, morality, health or some other purpose (*AHR* at para. 43), but it must stop short of pure economic regulation.

49 Protection of the environment is, unequivocally, a legitimate use of the criminal law purpose. The Supreme Court of Canada has held that "the protection of a clean environment is a public purpose [...] sufficient to support a criminal prohibition [...] to put it another way, pollution is an 'evil' that Parliament can legitimately seek to suppress": *Hydro-Québec* at para. 123. In dissent although not on this point, at paragraph 43, Chief Justice Lamer and Iaccobucci J. echoed La Forest J.'s view:

> To the extent that La Forest J. suggests that this legislation is supportable as relating to health, therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference*, *supra*. We would not add to his lucid reasoning on this point, save to state explicitly that this purpose does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.). To the extent that Parliament wishes to deter environmental pollution specifically by punishing it with appropriate penal sanctions, it is free to do so, without having to show that these sanctions are ultimately aimed at achieving one of the "traditional" aims of criminal law. The protection of the environment is itself a legitimate basis for criminal legislation.

50 It is useful to recall that, in *Hydro-Québec* at paragraph 150, the disputed regulation was directed to "providing or imposing requirements respecting the quantity or concentration of a substance listed in Schedule 1 that may be released into the environment either alone or in combination with others from any source" and therefore was a valid use of the criminal law power. Subsection 5(2) of the RFRs operates in the same manner.

51 More recently, in AHR the Supreme Court observed that pollution was one of the "new realities" facing Canada, and that Parliament needed flexibility in making decisions as to the types of conduct or activity that required the sanction of criminal law: para. 235.

E. The ineffectiveness of the RFRs

52 I turn to Syncrude's principal argument — that the RFRs are ineffective in achieving their purpose. Syncrude urges that "the evidence of practical effects of the RFRs overwhelmingly contradict the suggestion that the dominant purpose of the RFRs is to reduce GHG emissions."

53 This argument does not succeed on either an evidentiary or legal basis.

54 Syncrude points to evidence which suggests, on certain assumptions, that the actual reduction in GHGs arising from the transition to renewable fuels is illusory, and in fact, the RFRs contribute to GHGs. Syncrude emphasised a 2008 external report commissioned for Natural Resources Canada. That report stated that the upstream GHG emissions for some renewable fuels could be as much as twice that of fossil fuels. The appellant posits that this, combined with an admission on cross-examination that there are no reductions in downstream emissions from renewable fuels, indicates that the government knew that there would be no reduction in GHG emissions over the life cycle of a renewable fuel. This evidence is based on changes in land use patterns, whereby the conversion of agricultural lands from pasture or lower value crops to the production of bio or renewable fuels generate net increases in GHGs. Syncrude also points to US studies indicating increases in death rates from respiratory issues, and to the government's own evidence that "ethanol use may result in increased emissions of volatile organic compounds": see reference to Notice of Intent, paragraph 10 above.

55 Suffice to say, the Governor in Council considered this issue and concluded otherwise. The 2011 RIAS; *Canada Gazette, Part II*, Vol. 145, No. 15, (July 20, 2011), specifically considered the adverse effects of the renewable fuel requirement on air pollution and on human health. It observed that except for a minor increase in Nitrogen Oxide (NOx) all other toxic emissions decreased (RIAS pp. 1462-1465). The RFRs were expected to directly result in an incremental reduction of GHG emissions by 1 megaton per year: RIAS p. 1436.

56 The 2005, 2010 and 2011 RIAS describe a considered body of scientific research in support of the relationship between the RFR requirement and the reduction of GHGs. They also indicate that the renewable fuels requirement would reduce GHGs, as well as other emissions such as acetaldehyde, volatile organic compounds and fine particle pollution, all defined pollutants. The September 1, 2010 RIAS noted that the RFRs "are not expected to result in land use changes": p. 1709. The evidence relied on by Syncrude originated in European Union countries with higher renewable fuel targets and different land use patterns. Syncrude led no evidence of its own to support its argument that the RFRs would increase GHGs when applied to its own operations or to Canada as a whole.

57 Syncrude selectively highlights certain passages from the 2008 report commissioned by Natural Resources. A complete reading of the report makes it clear that while some renewable fuels have greater upstream emissions than fossil fuels, other renewable fuels result in significant GHG emission reductions. Moreover, the government's Strategic Environmental Assessment indicates that the government was cognizant of the fact that "next generation" renewable fuels were under development and would lead to greater long-term reduction in GHGs.

58 The legal and practical effect of legislation is relevant for the purpose of determining the pith and substance of the law: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 (S.C.C.) at para. 23, [2000] 1 S.C.R. 494 (S.C.C.) [*Global Securities Corp.*]. However, it is well established doctrine that "the wisdom or efficacy of the statute" is not

relevant to determining its pith and substance: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.) at 487-488, (1993), 107 D.L.R. (4th) 537 (S.C.C.), citing P. W. Hogg, *Constitutional Law of Canada*, vol. 1, 3d ed. (Toronto: Carswell, 1992, loose-leaf) at 15-15, and more recently, in *Ward*, at para. 18.

59 Syncrude contends that the evidence (which, as noted, is not compelling) that the RFRs would not in fact reduce GHG emissions is relevant to the characterization of the dominant purpose because it addresses *the legal and practical* effect of the provision. It contends that the evidence that the RFRs will not be effective in reducing GHGs is not addressed to the question of whether the provision is *in fact* efficacious. It concedes, correctly, that whether the measure is worthwhile or useful is not germane to the characterization exercise.

60 This distinction simply seeks to circumvent the proposition, consistent since *Global Securities Corp.* at paragraph 22, and more recently iterated in *Ward* at paragraph 26, that the effectiveness of the legislation is irrelevant for the purposes of characterization. There is no doubt as to what the regulations seek to achieve, how they operate, and their practical effect. The argument that there may be a better, more efficacious way to reduce GHGs does not alter the conclusion. As noted in *Ward*, at paragraph 26 "the purpose of legislation cannot be challenged by proposing an alternative, allegedly better, method for achieving that purpose." Syncrude's argument that, because the RFRs are ineffective, an assertion which fails on the evidence, the dominant purpose must have been to establish a local market, fails.

F. The regulation is not an economic measure

61 As noted, Syncrude contends that the dominant purpose of the RFRs was to create a market in renewable fuels. The RIAS reveals careful consideration of the refining industry, transportation to the consumer, and the effect of subsection 5(2) on agriculture. There is also evidence that the creation of long-term demand for renewable fuels was an integral part of the strategy to reduce GHGs.

62 It must be recalled that it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power. Syncrude concedes that GHGs are air pollution within the definition of CEPA. Nevertheless, Syncrude urges that subsection 5(2) is *ultra vires* because the government foresaw and hoped for the development of a market whereby more renewable fuels would be available for consumption, replacing the consumption of fossil fuels which produce the GHGs. It also contends that the RFRs do not in fact, achieve the goal of reducing air pollution, indeed, it says that the renewable fuel requirement would lead to a net increase in GHGs, arising from the GHG emissions associated with the planting, harvesting, transportation and refining of bio-fuel crops.

63 The Attorney General does not contest that Canada foresaw that the RFRs would have favourable economic consequences and that there would be market responses in agriculture to the increased demand for renewable fuel. The impact on various sectors of agriculture was negligible: *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1708-1710). The overall cost of the RFRs would be borne by consumers, at an estimated cost of 1¢ per litre, and would be lost in day to day fluctuation of fuel prices: pp. 1746-1717. These effects were considered to be minimal.

64 However, these consequential effects cannot be considered in isolation. The reason the government hoped for the development of a renewable fuels market in Canada was because the availability of renewable fuels would lead to a long-term reduction of GHGs. The judge concluded that "these economic effects are *part of* a four-pronged Renewable Fuels Strategy" (emphasis in original).

65 Insofar as the effect on agriculture was concerned, the Minister of the Environment noted that the reason why the government hoped for the emergence of a renewable fuels market was "to provide the maximum opportunity for emissions reductions." When asked whether the RFRs would cause a net benefit for the environment, the Minister replied: "Yes. And that is why we brought these three components together. We can't do this framework without the three components of energy, environment and agriculture."

66 The environment and economy are intimately connected. Indeed, it is practically impossible to disassociate the two. This point was well-made in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R.

(4th) 1 (S.C.C.) where the Court said "it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature."

67 The existence of the economic incentives and government investments, while relevant to the characterization exercise, do not detract from the dominant purpose of what the RFRs do and why they do it. The inquiry does not end with proof of an incentive or market subsidy. Consistent with *Ward*, one must inquire as to the purpose and effect. For example, regulations under the *Firearms Act*, S.C. 1995, c. 39 could call for new, enhanced locking mechanisms. The fact that capital investments are made to assist the lock industry to transition to the new requirements would not detract from the dominate purpose being addressed to "peace, order, security, morality, health or some other purpose" (*AHR* at para. 43). Here, the RIAS (*Canada Gazette, Part I*, Vol. 145, No. 15, (July 20, 2011), p. 699) states the purpose of collateral investments in infrastructure costs related to the production of renewable fuels was "to generate greater environmental benefits in terms of GHG emission reductions."

68 The evidence demonstrates that part of the objective of the RFRs was to encourage next-generation renewable fuels production and to create opportunities for farmers in renewable fuels. However, the evidence also demonstrates that a market demand and a market supply for renewable fuels and advanced renewable fuels technologies had to be created to achieve the overall goal of greater GHG emissions reduction.

69 The criminal law power is not negated simply because Parliament hoped that the underlying sanction would encourage the consumption of renewable fuel and spur a demand for fuels that did not produce GHGs. All criminal law seeks to deter or modify behaviour, and it remains a valid use of the power if Parliament foresees behavioural responses, either in persons or in the economy.

70 To close on this point, the consequential shifts in agriculture and the market for fuel arising from the renewable fuel requirement is not inconsistent with the dominant purpose of subsection 5(2) being the reduction of GHGs, with their uncontroverted costs to the health of the human and natural environment; rather, it reinforces the dominant purpose.

G. The absence of an absolute prohibition

71 Syncrude also argues that the RFRs cannot be a valid exercise of the criminal law power given certain exemptions in the RFR regime, and that in imposing a 2% renewable fuel requirement, they do not ban outright the presence of GHGs in fuel.

72 I note at the outset that this appears to be, in essence, an allegation that the "prohibition" requirement for a valid exercise of the criminal law power is unmet, not the "criminal law purpose" requirement. This gives me pause because, before the Federal Court, Syncrude conceded the presence of a prohibition. This is of no consequence, however, as constitutionality, as a matter of law, cannot be conceded. In any event, the judge found that the absence of a total prohibition on the use of non-renewable fuels (and the absence of a total prohibition on a given supplier using more than 98% non-renewable fuels at a given time) did not preclude subsection 5(2) from being a valid exercise of Parliament's criminal law power.

73 A prohibition need not be total, and it can admit exceptions: *Firearms Reference* at para. 39 and *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) at paras. 52-57, (1995), 127 D.L.R. (4th) 1 (S.C.C.) [*RJR-MacDonald*]. Indeed, environmental regulations often set limits, or concentrations of listed substances; so too do regulations of the food industry. Recall that in *Hydro-Québec* the majority observed, at paragraph 150, that regulations imposing requirements prescribing *the manner and condition of release or the source of release* of substances listed in Schedule 1 to CEPA into the environment were a valid use of the criminal law power. Recall as well that paragraph 140(1)(a) of CEPA authorizes regulations respecting "the concentration or quantities of an element, component or additive in fuel."

74 Syncrude points to the fact that the regulation is, in some circumstances, suspended during the winter due to technical challenges in blending traditional and renewable fuels. There are two answers to this, one legal, the other pragmatic. It may be that a criminal law requires exceptions in circumstances where a total prohibition would either be unjust or contrary to other interests which Parliament is charged with safeguarding. Many uncontroversial exercises of the criminal law establish a regime whereby, if certain measures or steps are taken otherwise-prohibited conduct becomes permissible. The *Food and Drugs Act*, R.S.C. 1985, c. F-27, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and *Firearms Act*, along with many others and

their attendant regulations, require licenses in order to possess particular substances or items. Indeed, other regulations made pursuant to CEPA, such as the *Gasoline Regulations*, SOR/90-247, sections 4 and 6, prescribe a maximum amount of a harmful substance that is allowed in fuel without prohibiting that substance completely.

75 There is no constitutional threshold of harm that must be surpassed before the criminal law power is met, provided there is a reasonable apprehension of harm. Syncrude has no answer to the question of whether the RFRs become constitutional at a 10%, 25%, 50% or 100% renewable fuel requirement. There is no magic number. As the Supreme Court observed in *AHR* at paragraphs 55 to 56, "there is no constitutional threshold of harm."

76 Turning to the pragmatic answer; if the winter exemption is engaged, the RFRs require a greater than 2% utilization during the summer months. The regulatory obligation is met by purchasing compliance units from another user. On a national basis, the net effect is the same.

77 To conclude, Syncrude's argument that the regulation is invalid because it is not a blanket prohibition has no doctrinal support. Further, Syncrude concedes that other regulations, such as those limiting concentration of lead and sulphur in fuel are valid: *Sulphur in Diesel Fuel Regulations*, SOR/2002-254. Nothing distinguishes the prohibition of a certain amount of sulphur or lead in fuel from a positive requirement of a certain amount of renewable fuel in fuels. Both seek to prevent the emission of toxic substances, whether sulphur dioxide or GHGs, and both are addressed to the reduction of air pollution.

H. Intrusion into provincial jurisdiction over non-renewable natural resources

78 The answer to Syncrude's argument that the RFRs intrude into provincial competence over non-renewable resources lies in the structure and operation of the RFRs themselves.

79 The regulatory obligation is met either by meeting the 2% requirement, or by purchasing compliance units from another producer or user who has exceeded their own obligation. Shortfalls arising from the difficulties of blending renewable fuels with fossil fuels in the winter months can be compensated for by excess utilization of renewable fuel in the summer. The RFRs are, in this sense, agnostic as to who is required to meet the target, and importantly, agnostic as to how they do it, whether by blending fuels or purchasing compliance units. The overall effect is the same on a yearly, Canada-wide, basis — 2% less fossil fuel is consumed.

80 It must also be remembered that subsection 5(2) applies to Syncrude as a consumer of diesel fuel in its operations, not its production of synthetic crude oil. Syncrude meets the requirements of the RFRs by purchasing compliance units from another producer. The RFRs do nothing to affect the rate or timing of resource extraction, which Syncrude describes as its core business. Simply put, Syncrude stands no different than any other consumer of diesel fuel in Canada, whether a trucking company, a municipal transit authority or a contractor with a diesel fuel requirement. The RFRs are laws of general application, and not directed to the management of natural resources.

I. The indirect means argument

81 Syncrude argues that the use of the RFRs to create a demand for renewable fuels which would in turn reduce GHG emissions is an indirect, and not direct, means of addressing GHGs. It says that the jurisprudence does not support the use of the criminal law power to trigger indirect economic effects to achieve the dominant purpose of protecting the environment. I have already found above that such creation of demand for renewables was not the dominant purpose of the RFRs. This suffices to dispose of this argument.

82 In the alternative, however, I find that it would be a valid exercise of the criminal law power to use a prohibition to mandate a renewable component in fuel in order to indirectly achieve the consequential reduction of toxic GHGs in the atmosphere. This is precisely what section 139 authorizes. I stress that this point is not necessary to reach the conclusion that the RFRs are *intra vires* Parliament's authority; the reasons I have given above for this conclusion are independently sufficient.

83 Syncrude is right to cite the *Margarine Reference*, as it does establish a relevant limit on Parliament's criminal law power. Specifically, Parliament cannot use the criminal law (in that case, prohibitions on the import, production, and sale of margarine) simply to create economic effects which it considers desirable. In that case, the economic effect — the protection of the dairy industry — was the end goal. However, Syncrude's argument that Parliament cannot use the criminal law power to indirectly reduce an evil has no support in the jurisprudence.

84 The *Firearms Reference* establishes that a law need not have a direct prohibition of the evil in question. In the*Firearms Reference*, the Supreme Court confirmed, at paragraphs 39 and 40, that in exercising the criminal law power "Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required." In *RJR-MacDonald*, the impugned provision prohibited tobacco advertising and promotion in order to reduce tobacco consumption and in turn reduce the negative health effects of tobacco consumption. The Court found that it was permissible for Parliament to prohibit the activity that indirectly causes the evil rather than the activity that directly causes the evil.

85 If a law provides for a prohibition backed by a penalty, with the ultimate effect that an evil is reduced, that suffices to place the law within Parliament's constitutional *vires*. The court should be neutral as to the causal mechanism by which that evil is reduced. *AHR* directs that the exercise of the criminal law power is valid if the three parts of the test are met; it does not direct the court to find an exercise of the criminal law power to be valid if the three parts of the test are met unless the way in which that evil is reduced is of a prescribed type. There is no jurisprudential basis for adjoining this additional element to that test. Indeed, *RJR-MacDonald* expressly affirms that the emphasis must not be on Parliament's method of achieving an otherwise-valid criminal law purpose, no matter how "circuitous" a path Parliament takes to reach its goal.

86 I am reassured in this conclusion by the fact that other exercises of the criminal law power involve a prohibition that changes economic conditions so as to reduce an evil. Consider for instance, section 355.2 of the *Criminal Code*, R.S.C. 1985, c C-46, which prohibits trafficking in property that was obtained via crime. The evil at which section 355.2 is aimed is the commission of the underlying crime, and the mechanism by which it reduces that evil is economic. In prohibiting the downstream trade in property and profit obtained via crime, it creates economic conditions that are less conducive to committing the underlying criminal conduct.

J. The colourability argument

87 Syncrude suggests that the RFRs are ineffective at combating climate change and must, by logical inference, be a colourable attempt to create a market for renewable fuels or to regulate provincially controlled natural resources.

88 Colourability is not lightly inferred, nor is it a backdoor to a reconsideration of the wisdom or efficacy of the law. In *Quebec v. Canada* at paragraph 31, the Court affirmed that colourability "simply means that 'form is not controlling in the determination of essential character'."

89 The Supreme Court of Canada in *Hydro-Québec* made it clear that colourability requires Parliament's declared valid purpose to be a mere pretence for incursion into provincial jurisdiction. This is a high standard. Again, as in the case of characterization of the dominant purpose, Syncrude points to the evidence which it submits demonstrates that the government knew that renewable fuels do not in fact have lower life cycle GHG emissions. Syncrude also submits that the government understood that the RFRs would spur the development of a domestic market for renewable fuels, create collateral economic incentives to agriculture and industry to assist in the transition to planting and refining of biofuels, and have other positive effects on some sectors of agriculture. This, Syncrude submits, establishes that the primary purpose must have been to intrude into provincial responsibilities to create a market for Canadian renewable fuels.

90 Here, however, the evidence supports the opposite conclusion. When the references in the evidence to the creation of a domestic market for renewable fuels is considered in its context, including the evidence that the purpose of subsection 5(2) in particular, was to make a significant contribution to the prevention and reduction in air pollution through a reduction of GHGs as well as the evidence that anticipated the market related consequences and goals were part of the strategy to reduce GHG emissions of fossil fuels, the colourability argument fails.

91 Indeed, this observation highlights the degree to which the valid use of the criminal law power to protect the environment may have consequential economic effects. It would be extremely easy for Parliament to use the criminal law to protect the environment if Parliament had no concern for the economy; it could simply ban the consumption of fossil fuels. The challenge lies in protecting the environment while avoiding or compensating for negative economic side effects. In some cases, crafting the regime so as to mitigate the economic side effects may be the majority of the work. The fact that managing economic effects plays a role, even a large role, in a given law does not mean that the law is a colourable attempt to pursue an unconstitutional objective.

92 Syncrude points to the concomitant capital incentives and subsidies to agriculture and industry to promote the renewable fuels industry as evidence that the RFRs were a colourable attempt to intrude into areas of provincial legislative competence. However, the analysis must go further, and inquiry must be made as to the reason and purpose which underlies these measures. When this is done, it is clear that their objective was to facilitate access to renewable fuels and spur the development of new technologies which would "generate greater environmental benefits in terms of GHG emissions reduction": *Canada Gazette*, Part I, Vol. 145, No. 15, (July 20, 2011), p. 699. As the judge observed, the creation of a demand for renewable fuels was a necessary part of the overall strategy to reduce GHG emissions, but it was not the dominant purpose.

93 These consequential market responses do not detract from the dominant purpose. The RFRs were designed to combat the deleterious effect of GHGs on the atmosphere by mandating that a type of fuel that was foreseeably less GHG-emitting be used in at least 2% of the fuel supply. The evidence points overwhelmingly to the fact that the RFRs were in pith and substance directed to the reduction of air pollution by reducing GHG emissions from the use of fossil fuels.

K. Ancillary powers

94 In light of these reasons, and the determination that subsection 5(2) of the RFRs is within federal legislative competence, it is not necessary to consider whether the ancillary powers doctrine would save the impugned provision. However, even if the law were *ultra vires*, I conclude that it would be saved by the ancillary powers doctrine, substantially for the reasons given by the judge at paragraphs 87 to 97 of the Reasons.

L. Statutory validity

95 As noted, Syncrude contends that the Governor in Council failed to form the opinion in subsection 140(2) that the regulation "could make a significant contribution to the prevention of, or reduction in, air pollution," which is a condition precedent to the promulgation of valid regulations.

96 Substantively, the burden rests with Syncrude to show that the RFRs are inconsistent with the enabling statute. In this regard, the court does not inquire into the policy merits of the RFRs, or whether a regulation is "necessary, wise or effective in practice": *Katz* at para. 28.

97 Syncrude's administrative law argument amounts to the following: CEPA subsection 140(2) requires the Governor in Council to be of the opinion that a regulation will reduce air pollution before making that regulation under subsection 140(1). The RFRs do not in fact reduce air pollution. Therefore, the Governor in Council could not have been of the opinion that they do, because that opinion would have been incorrect, capricious, or otherwise made for improper or extraneous objectives beyond those of the statute.

98 The error inherent in this chain of reasoning is obvious. Subsection 140(2) does not require absolute scientific certainty, if such a state exists. What is required is an opinion, which may not be shared by all, that the regulation could reduce air pollution. There was ample evidence before the Governor in Council, set forth in the RIAS, supporting that opinion.

99 In support of its argument, Syncrude points to evidence in the record to the effect that because of changes in land use patterns, there will be no net reduction in GHG emissions, and that there will be an increase in air pollution which will result in deleterious impacts on the environment. However, it is clear from the evidence that the Governor in Council considered this

issue, noting that in Canada there would be no change in land use patterns. The 2010 RIAS specifically addresses Syncrude's point, noting that the RFRs "are not expected to result in any changes in land use": *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), p. 1709. The evidence falls short of establishing that the biofuel requirement is irrelevant, extraneous, or completely unrelated to the statutory purpose of section 140 and the CEPA.

100 In essence, Syncrude invites the Court to second guess the Governor in Council's opinion, an invitation that this Court should decline. Even if there was a solid evidentiary foundation establishing a different scientific opinion on the net contribution of the RFRs to the reduction of GHGs, it would not detract from the Governor in Council forming a different opinion on admittedly different evidence.

VII. Conclusion

101 I find that subsection 5(2) of the RFRs is *intra vires* both the *Constitution Act 1867* and CEPA and I would dismiss the appeal with costs.

***C. Michael Ryer J.A.*:**

I agree

***Richard Boivin J.A.*:**

I agree

Appeal dismissed.

Annex A

Canadian Environmental Protection Act, 1999, SC 1999, c33

General Requirements for Fuels

Prohibition

139 (1) No person shall produce, import or sell a fuel that does not meet the prescribed requirements.

Regulations

140 (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139 and may make regulations respecting

(a) the concentrations or quantities of an element, component or additive in a fuel;

(b) the physical or chemical properties of a fuel;

Annex B

Renewable Fuels Regulations (SOR/2010-189)

Distillate pool

5 (2) For the purpose of section 139 of the Act, the quantity of renewable fuel, expressed as a volume in litres, calculated in accordance with subsection 8(2), must be at least 2% of the volume, expressed in litres, of a primary supplier's distillate pool for each distillate compliance period.

Representing renewable fuel

7 (1) Compliance units, which represent litres of renewable fuel, created under Part 2 are used to establish compliance with section 5.

Blending in Canada — distillate compliance units

13 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel on its blending in Canada with a batch of diesel fuel or heating distillate oil.

Importation — distillate compliance units

14 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel that is contained in a batch of diesel fuel, or heating distillate oil, on its importation into Canada.

To primary suppliers

20 (1) A compliance unit may only be transferred in trade to a primary supplier.

Tab 2

2018 FC 643, 2018 CF 643
Federal Court

Groupe Maison Candiac inc. c. Canada (Procureur général)

2018 CarswellNat 3416, 2018 CarswellNat 4437, 2018 FC 643,
2018 CF 643, 19 C.E.L.R. (4th) 193, 294 A.C.W.S. (3d) 549

LE GROUPE MAISON CANDIAC INC. (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

René LeBlanc J.

Heard: December 4-5, 2017
Judgment: June 22, 2018
Docket: T-1294-16

Counsel: Alain Chevrier, Adam Jeffrey Beauregard, for the Applicant
Pierre Salois, Michelle Kellam, for the Respondent

***René LeBlanc J.*:**

[ENGLISH TRANSLATION]

I. Introduction

1 The Groupe Maison Candiac Inc. [Groupe Candiac] is a company that works primarily in residential development. It buys large parcels of land, subdivides them, sometimes resells them, develops them and builds houses on them. Its activities are concentrated mainly on the South Shore of Montréal, primarily in the municipalities of La Prairie, Candiac and Saint-Philippe.

2 On July 8, 2016, certain Groupe Candiac properties that were being developed were subject to an emergency order issued by the Governor in Council under the powers conferred by subparagraph 80(4)(c)(ii) of the *Species at Risk Act*, SC 2002, c. 29 [the Act]. The Governor in Council, on the recommendation of the Minister of Environment and Climate Change [the Minister], considers the order necessary to protect a small amphibian — the Western Chorus Frog — included on the List of Wildlife Species at Risk pursuant to the Act and whose population he considers to be facing imminent threats to its recovery.

3 This order, entitled the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*, SOR/2016-211 [the Emergency Order], prohibits, for all practical purposes, on pain of sanctions, any activities involving drainage, excavation, deforestation and infrastructure construction in the area to which it applies. Groupe Candiac believes that the Emergency Order, for all practical purposes, paralyzes its development activities on the lands in question when it already had an authorization certificate from the Minister of Sustainable Development, Environment and the Fight against Climate Change allowing it to proceed with this development, subject to the observance of a number of obligations aimed at protecting the Western Chorus Frog population in that area.

4 Groupe Candiac is asking the Court pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, to cancel the Emergency Order because it believes it was invalid considering that it was adopted under an enabling provision — subparagraph 80(4)(c)(ii) of the Act — which is ultra vires Parliament, because it constitutes a form of expropriation without compensation.

5 For the reasons that follow, I will not allow the conclusions sought by Groupe Candiac.

II. Background

A. The protection of species at risk in Canada

6 The protection of species at risk in Canada is not a new concept. Already, in 1917, Parliament, in response to the *Convention for the Protection of Migratory Birds in the United States and Canada* entered into the previous year by the United States and the United Kingdom, adopted the *Migratory Birds Convention Act* (SC 1917, c. 18). This main purpose of this convention was to establish a uniform protection system to preserve the useful and harmless species of migratory birds.

7 In 1975, Canada ratified the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* pursuant to which the Contracting States recognize:

> a. that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;
>
> b. the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;
>
> c. that peoples and States are and should be the best protectors of their own wild fauna and flora;
>
> d. that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade; and
>
> e. the urgency of taking appropriate measures to this end.

8 This convention was implemented in domestic law in 1992 with the adoption of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (SC 1992, c. 52). This Act specifically targets the protection of animal and plant species threatened with extinction by trade. The Minister is empowered to enter into agreements with provincial governments to ensure the harmonious and effective application of the Act. These agreements must, in particular, aim to avoid conflicts or duplication between the regulations established by the federal and provincial governments.

9 Meanwhile, Canada signs a certain number of international agreements and conventions to protect certain endangered species or natural environments, such as the polar bear, porcupine caribou, and wetlands of international importance, particularly those that provide a habitat for waterfowl.

10 The Earth Summit, held in Rio de Janeiro, Brazil, in June 1992 under the auspices of the United Nations, led to the signing of an important international agreement, the *United Nations Convention on Biological Diversity* [the Convention on Biodiversity]. This convention, which was ratified by 196 countries, is founded on a certain consensus, with the Contracting Parties stating, in particular, that they are:

> a. conscious of "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity" and of "the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere";
>
> b. concerned "that biological diversity is being significantly reduced by certain human activities"; and
>
> c. convinced "that the conservation of biological diversity is a common concern of humankind."

11 Each Contracting Party shall, as far as possible and as appropriate, "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings," "rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies" and "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations" (Article 8). Each Party shall, in accordance with its particular conditions and capabilities, "develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for

this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned" (Article 6).

12 In 1995, Canada revealed its strategy in response to the Convention on Biodiversity. This led to, in 1996, a federal-provincial Accord for the Protection of Species at Risk [the Accord], which provides that the ministers responsible for wildlife at both levels of government commit to a national approach for the protection of species at risk, the goal being to prevent them from becoming extinct as a result of human activity.

13 The signing ministers recognized that species do not recognize jurisdictional boundaries, that cooperation is crucial to the conservation and protection of species at risk, and that lack of full scientific certainty must not be used as a reason to delay measures to avoid or minimize threats to species at risk. They agree to, among other things, coordinate their activities within a pan-national body — the Canadian Endangered Species Conservation Council — to resolve issues for the protection of species at risk in Canada as well as any disputes resulting from implementation of the Accord.

14 They also agree to establish "complementary legislation and programs" that provide for "effective protection of species at risk throughout Canada." According to the Accord, these programs and legislation will:

- address all native wild species;
- provide an independent process for assessing the status of species at risk;
- legally designate species as threatened or endangered;
- provide immediate legal protection for threatened or endangered species;
- provide protection for the habitat of threatened or endangered species;
- provide for the development of recovery plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat;
- ensure multi-jurisdictional cooperation for the protection of species that cross borders through the development and implementation of recovery plans;
- consider the needs of species at risk as part of environmental assessment processes;
- implement recovery plans in a timely fashion;
- monitor, assess and report regularly on the status of all wild species;
- emphasize preventive measures to keep species from becoming at risk;
- improve awareness of the needs of species at risk;
- encourage citizens to participate in conservation and protection actions;
- recognize, foster and support effective and long-term stewardship by resource users and managers, landowners, and other citizens; and
- O provide for effective enforcement.

15 The Act, which was adopted in 2002, followed the implementation of the Canadian government's strategy in response to the Convention on Biodiversity and the Accord. Its stated purpose is to prevent wildlife species "from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened." As

Justice Martineau reminds us in *Centre Québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773[*Centre Québécois du droit de l'environnement*], a case I will get back to because it falls within the factual framework of this case, the Act is therefore intended to implement Canada's obligations under the Convention on Biodiversity (*Centre Québécois du droit de l'environnement* at paragraph 6).

16 I will provide further details on the Act in my analysis.

17 Quebec is doing well. In 1999, it adopted the *Act respecting threatened or vulnerable species*, CQLR c. E-12.01 [*Act respecting threatened or vulnerable species*]. This Act puts the Minister of Sustainable Development, Environment and Parks in charge of proposing to the Quebec government a policy of protection and management of designated threatened or vulnerable species or of species likely to be so designated. The *Act respecting the conservation and development of wildlife*, CQLR c. C-61.1, establishes various prohibitions that relate to the conservation of wildlife resources, including threatened or vulnerable species. The *Environment Quality Act*, CQLR c. Q-2, requires an authorization certificate for any person who wants to undertake any construction, work or activity in wetlands or bodies of water, in order to protect the environment and protect biodiversity. Municipalities also have authority under the *Act respecting land use planning and development* (CQLR c. A-19.1), to identify, in their zoning by-laws, zones dedicated to the conservation of fauna and flora.

18 Since 2012, there has been an agreement between the governments of Quebec and Canada to protect and recover species at risk in Quebec. This agreement — the Cooperation Agreement for the Protection and Recovery of Species at Risk in Quebec — is founded on the recognition that cooperation between the two levels of government and the complementarity of their respective strategies is important to ensure, within the limits of their respective jurisdictions, more effective protection and recovery of species at risk. Essentially, this agreement establishes the principles and modes of cooperation between the two levels of government.

19 According to the evidence in the record, there is a consensus among scientists about a steep decline in biodiversity indicators worldwide, with no sign of a slowdown. Moreover, we are currently experiencing the sixth period of mass extinction since life began on earth, but the first linked to human activity. In Canada, of the 976 species listed on November 1, 2016, by the Committee on the Status of Endangered Wildlife in Canada [COSEWIC], established under section 14 of the Act, 739, a proportion of 76%, are considered species at risk within the meaning of the Act (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1248).

B. The Western Chorus Frog

20 The Western Chorus Frog is a small amphibian. In adulthood, it is generally no more than 2.5 cm in length and weighs about 1 gram. It prefers marshes and wooded wetland areas for breeding. Also for breeding, it requires seasonally dry temporary ponds devoid of predators, particularly fish. It rarely moves more than 300 metres from its breeding ground throughout its life.

21 In Canada, it is found mainly in southern Ontario and southwestern Quebec, mainly in the Outaouais and Montérégie regions. In Montérégie, where the lands targeted by the Emergency Order are located, this species occupies no more than 10% of its former range. Since the 1950s, its population in Quebec has declined an average of 37% every 10 years, which is a "catastrophic" trend, according to COSEWIC. One of the six metapopulations of Western Chorus Frog identified in Montérégie is in the La Prairie region, within the municipalities of Candiac and Saint-Philippe. This is the second largest metapopulation in Montérégie. A metapopulation consists of a set of local populations connected by connectivity areas allowing the movement of frogs from one population to the other (Affidavit of Mark Dionne, Respondent's Record, Volume 1, page 3).

22 The biggest threat to the Western Chorus Frog is that its habitats are on lands deemed suitable for urban or agriculture development. The resulting draining and filling of the land have a fatal effect on many individuals and significantly change the quality of the species' habitat by causing the disappearance of temporary ponds essential for breeding, in particular.

23 Since 2008, the Western Chorus Frog, Great Lakes / St. Lawrence - Canadian Shield population, has been listed as a "threatened species" under the Act. A "threatened species" is defined in section 2 of the Act as a "wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction." In Quebec, since

2001, it has been listed under the *Act respecting threatened or vulnerable species* as a "vulnerable wildlife species." As a result, it was the subject of a recovery plan to halt the decline of its population. In 2008, a conservation plan that specifically addressed the Western Chorus Frog in the Montérégie region was adopted by the Quebec Minister of Natural Resources and Wildlife.

C. The Emergency Order

24 The Emergency Order has its own story.

25 According to subsection 80(1) of the Act, such an order can only be issued on the "recommendation of the competent minister." However, according to subsection 80(2) of the Act, when this minister is of the opinion that a species on the list of wildlife species in Schedule 1 of the Act [the List of Wildlife Species at Risk], "faces imminent threats to its survival or recovery," he or she must recommend to the Governor in Council that an emergency order be made.

26 In this case, the Minister, who is the "competent minister" under section 80, initially refused to make such a recommendation. That was in March 2014. Specifically, the Minister rejected a request from Quebec environmentalist group Nature Québec, which, between May and October 2013, had asked the Minister to recommend the making of an emergency order. It claimed that there was an imminent threat to what may have remained of the Western Chorus Frog metapopulation in La Prairie, namely that of the "Bois de la Commune," as a result of the deforestation and alteration of the wetlands surrounding the completion of a housing project called "Domaine de la Nature" (*Centre Québécois du droit de l'environnement* at paragraph 32).

27 The Minister disagreed, considering that the scope of the project proposed in that sector did not threaten the possibility of the species' presence elsewhere in Quebec and Ontario. The Minister therefore concluded that the Western Chorus Frog was not facing an imminent threat to its survival or recovery.

28 This decision was set aside by Justice Martineau on June 22, 2015, in *Centre québécois du droit de l'environnement*. In particular, he rejected the Minister's view that the mandatory requirement provided in subsection 80(2) of the Act is limited to cases where a species is exposed to imminent threats to its survival or recovery on a national basis. He deemed this view untenable and contrary to the Act:

> [77] The Court has already rejected the restrictive interpretation suggested by the respondents — whereby the mandatory requirement provided in subsection 80(2) is limited to cases where a species is exposed to imminent threats to its survival or recovery on a national basis — in *Adam*, above, at para 39. Not only did the Minister arbitrarily and capriciously ignore the scientific opinion of her own Department's experts and the Chorus Frog recovery team, but the Minister's logic leads to an absurd outcome, in contradiction of the Act: as long as individuals of the species are threatened by human activity locally, an imminent threat cannot exist since other individuals elsewhere in the country are not under threat nationally.
>
> [78] Through the lens of its complex mechanics, the federal Act perceives critical habitat as a single unit, each part contributing to the species' survival and recovery across Canada. The two major threats to the Western Chorus Frog are urbanization and agricultural development. These threats are present across Canada. According to the evidentiary record, these two threats are extreme, serious, continuous and ongoing, and jeopardize the survival and recovery of the Western Chorus Frog in Canada. If we rely on the information that was available at the time of the disputed decision, the work included in the Domaine de la nature project will destroy a portion of the species' critical habitat. The result is the brutal and sudden disappearance of the Bois de la Commune metapopulation in La Prairie — unless, of course, mitigation measures are taken to allow the species to recover in the area identified by the possible recovery program.
>
> [Emphasis in original]

29 Therefore, Justice Martineau ordered the Minister to reconsider her decision within six months following the judgment and to take account of the reasons for judgment and intervening developments.

30 In July 2015, the Minister started the work leading to the reconsideration of her decision. Thus, she began a vast process of information gathering with a number of stakeholders from various backgrounds, governments, and so on. She also ordered

three scientific evaluations from her department on, in particular, the imminent threats facing the Western Chorus Frog and the measures in place to protect it, including those imposed under Quebec legislation.

31 On December 4, 2015, the Minister concluded that there was an imminent threat to the recovery of the Western Chorus Frog and recommended that the Governor in Council make an emergency order. She considered, among other things, that the measures taken to reduce the impact of the "Domaine de la Nature" housing project, renamed "Symbiocité," would likely not ensure the long-term viability of the Western Chorus Frog population affected by the project.

32 Almost at the same time as that decision, the Minister included in the Public Registry established by the Act [the Registry], the recovery strategy for the Western Chorus Frog, Great Lakes / St. Lawrence - Canadian Shield population, which sets out the measures required to halt or reverse the species' decline. One of the short-term objectives of this strategy is to maintain the areas of occupied suitable habitat as well as the breeding population level within each local population. Another is to maintain the level of connectivity between the local populations comprising a metapopulation.

33 On June 17, 2016, the Emergency Order was made. The total area of the zone included in the area covered by the order is 1.85 km^2. It was supposed to take effect on July 17, 2016. However, on July 8, 2016, the Governor in Council made a second emergency order with the same purpose and the same scope as the emergency order of June 17, 2016, but that would take effect immediately to counter the fact that work with heavy machinery continued to be observed in the area covered by the order, even after the order had been issued.

34 The impact study conducted in conjunction with the Emergency Order specified that this was one of the issues leading to its adoption:

> As the population of the Western Chorus Frog (GLSLCS) continues to decline, coupled with the threat to the connectivity and viability of existing metapopulations and the lack of adequate measures to protect its habitat, the Minister of the Environment concluded in December 2015 that, given the threat to the La Prairie metapopulation posed by the Symbiocité residential project, the recovery of the Western Chorus Frog (GLSLCS) is imminently threatened such that immediate intervention is required.
>
> The Minister's conclusion was informed by a scientific assessment based on the best available information, which determined that the planned future phases of residential development in La Prairie, as currently proposed, would result in the loss of connectivity among remaining populations in the La Prairie metapopulation and the direct loss of habitat, including breeding ponds. The areas remaining after such development are therefore unlikely to sustain the viability of the La Prairie metapopulation in the long-term.
>
> Therefore, without immediate intervention, the objectives as set out in the Recovery Strategy of the Western Chorus Frog (GLSLCS) are unlikely to be met. As a result, pursuant to subsection 80(2) of SARA, the Minister recommended to the Governor in Council that an Emergency Order be put in place to address the imminent threat to the Western Chorus Frog (GLSLCS). The Governor in Council accepted the Minister's recommendation and the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence - Canadian Shield Population)* has been made.

35 While precisely indicating its application area, the Emergency Order states it is prohibited to:

> a. remove, compact or plow the soil;
>
> b. remove, prune, damage, destroy or introduce any vegetation, such as a tree, shrub or plant;
>
> c. drain or flood the ground;
>
> d. alter surface water in any manner, including by altering its flow rate, its volume or the direction of its flow;
>
> e. install or construct, or perform any maintenance work on, any infrastructure;

f. operate a motor vehicle, an all-terrain vehicle or a snowmobile anywhere other than on a road or paved path;

g. install or construct any structure or barrier that impedes the circulation, dispersal or migration of the Western Chorus Frog;

h. deposit, discharge, dump or immerse any material or substance, including snow, gravel, sand, soil, construction material, greywater or swimming pool water; and

i. use or apply a *pest control product* as defined in section 2 of the *Pest Control Products Act* or a *fertilizer* as defined in section 2 of the *Fertilizers Act*.

36 It also states that any violation of these prohibitions constitutes an offence under section 97 of the Act, which stipulates that every person commits an offence who "contravenes a prescribed provision of a regulation or an emergency order."

37 In a statement issued in conjunction with the issue of the Emergency Order, the Minister announced that the owners of properties located in the area covered by the order would not be compensated.

D. Groupe Candiac's remedy

38 Groupe Candiac believes that the direct impact of the Emergency Order is that it prevents Groupe Candiac from carrying out its housing project as it was designed, costing the company around 20 million dollars.

39 It brought this application on August 5, 2016. On March 24, 2017, Groupe Candiac filed a motion for leave to amend its notice of application for judicial review and to file a supplementary record and affidavits. With this amendment, it wants to be able to show that making the Emergency Order was unreasonable on the grounds that the population of chorus frogs in the area covered by the Order, and therefore on the properties owned by Groupe Candiac and subject to the order, was not properly classified. They are not Western Chorus Frogs but rather Boreal Chorus Frogs, a species that is not at risk.

40 The motion was dismissed by the Court, because the proposed amendment would radically change the nature of the issues and would unduly delay the legal debate started before the Court. Groupe Candiac tried to have this decision overturned, but its appeal was dismissed by the Federal Court of Appeal (*Groupe Maison Candiac Inc. v. Canada (Procureur général)*, 2017 CAF 216).

III. Issues and standard of review

41 This case raises the following two issues:

a) Is subparagraph 80(4)(c)(ii) of the Act *ultra vires* Parliament, rendering the Emergency Order invalid?

b) Is the Emergency Order void on the grounds that it constitutes a form of expropriation without compensation?

42 It has been well established that the standard of review applicable to the issues that challenge the constitutional validity of a statutory provision is that of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 58).

43 Regarding the second issue, neither party addressed the standard of review that applies in this case. In any event, in my opinion, this issue can be determined as a pure question of law in respect of which neither the Governor in Council nor the Minister has particular expertise. This tends to favour the application of the standard of correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraphs 90-92). Moreover, this standard of review has generally been applied to issues challenging the *vires* of the exercise of regulatory power, and I see no reason to deviate from these earlier decisions, especially since this issue challenges, for all practical purposes, the applicability, in law, of the principles of *de facto* appropriation or disguised expropriation derived from private law to exercise the power of the Governor in Council under section 80 of the Act (*Saputo inc. v. Canada (Attorney General)*, 2011 FCA 69, at paragraph 10; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2014 FC 776, at paragraph 104 [*Syncrude FC*]; *Canadian Generic Pharmaceutical Association v.*

Canada (Health), 2009 FC 725, at paragraph 43). This case does not challenge the reasonableness of the exercise of this power in the circumstances of this case, which, in my opinion, allows us to distinguish it from the case of *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, recently decided by the Supreme Court of Canada.

44 The situation obviously would have been different if the Court had been called to decide on the legality of the Minister's decision not to offer any compensation to the owners affected by the Emergency Order. However, that is not the issue before the Court.

IV. Analysis

A. Is subparagraph 80(4)(c)(ii) of the Act ultra vires Parliament?

(1) The applicable framework for evaluating the constitutionality of subparagraph 80(4)(c)(ii)

45 The applicable test for determining the constitutional validity of a statutory provision in relation to the division of powers is well known. We must first examine the pith and substance of the provision in question. This means defining its primary purpose, thrust or dominant characteristic. To do so, the analysis must consider the purpose of the provision, namely the concerns it aims to address and its impact (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paragraph 113 [*Hydro-Québec*]; *Reference re Firearms Act (Can.)*, 2000 SCC 31, at paragraphs 15-16, [2000] 1 SCR 783 [*Firearms Reference*]; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, at paragraphs 52-53 and 55, [2002] 2 SCR 146 [*Kitkatla*]; *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paragraphs 26-27, [2007] 2 SCR 3 [*Canadian Western Bank*]; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, at paragraph 17, [2010] 2 SCR 536 [*COPA*]).

46 This review is based on the text in this provision. It can also be based on extrinsic materials, such as parliamentary debates and government publications (*Firearms Reference*, at paragraph 17; *Canadian Western Bank*, at paragraph 27).

47 Once this review is complete, we must consider if, based on its pith and substance, the provision in question falls under one of the legislative heads of power attributed by the *Constitution Act, 1867*[CA 1867] to the level of government that enacted it (*Re: Anti-Inflation Act*, [1976] 2 SCR 373, at page 450; *Firearms Reference*, at paragraph 25).

48 If the provision falls within a jurisdiction attributed to this level of government, the provision is constitutionally valid and the analysis is complete. If that is not the case, the provision in question is not necessarily constitutionally invalid. In fact, it can still be saved by the ancillary powers doctrine if it has been sufficiently integrated in an otherwise valid legislative scheme (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, at paragraph 45, [2000] 1 SCR 494; *COPA*, at paragraph 16; *Kitkatla*, at paragraph 58; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, at paragraph 23, [2005] 3 SCR 302).

49 It is useful, at this stage, to bear in mind an important principle of the pith and substance doctrine, namely, that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government (*Canadian Western Bank*, at paragraph 29). In other words, this doctrine tolerates in many respects the overlap of federal and provincial laws, a law that falls under the jurisdiction of one level of government can impact the jurisdiction of the other level of government (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at pages 68-69 [*Oldman River*]; *Canadian Western Bank*, at paragraphs 24 and 28). It also recognizes that certain subjects can have both a provincial and federal dimension. Thus, the fact that a matter may for one purpose and in one aspect fall within one level of government does not mean that it cannot, for another purpose and in another aspect, fall within the competence of another level of government (*Canadian Western Bank*, at paragraph 30; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, at paragraphs 184-185, [2010] 3 SCR 457 [*Assisted Human Reproduction Reference*]).

50 I also think it is useful, at this stage, to bear in mind that environmental protection, which, as the Supreme Court of Canada noted in *Oldman River*, has become "one of the major challenges of our time," is not in the list of legislative heads of power attributed to one of the levels of government by the Canadian Constitution (see also: *Hydro-Québec*, at paragraph 112). In this sense, it is an "abstruse matter which does not comfortably fit within the existing division of powers without considerable

overlap and uncertainty" (*Oldman River*, at pages 16 and 64). In this sense, the courts, when they are called on to define the extent to which each level of government can use its legislative powers in that regard, must bear in mind, while making sure to respect the fundamental balance of the division of powers by the CA 1867, that "the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated" and that the "pervasive and diffuse nature of the environment" poses, in this sense, particular difficulties (*Hydro-Québec*, at paragraph 86).

51 The Attorney General maintains that subparagraph 80(4)(c)(ii) of the Act constitutes a valid measure of criminal law. Alternatively, he claims that it was validly enacted pursuant to the introductory paragraph of section 91 of the CA 1867, which gives Parliament the power to make laws for the peace, order and good government of Canada. Alternatively, he argued that subparagraph 80(4)(c)(ii), if it must be deemed as falling outside of Parliament's jurisdiction, is sufficiently integrated in an otherwise valid vast legislative scheme to be constitutionally saved.

52 However, it is up to Groupe Candiac to establish that subparagraph 80(4)(c)(ii) is *ultra vires* Parliament (*Firearms Reference*, at paragraph 39).

53 Before getting to the heart of the matter, a brief description of the structure of the Act and its key provisions is necessary first to clearly identify the legislative scheme that section 80 and subparagraph 80(4)(c)(ii) fall under.

(2) The Act

54 As I already stated, the Act aims to prevent the disappearance of wildlife species and permit the recovery of those that, as a result of human activity, have become "extirpated," "endangered" or "threatened." It also aims to help manage "species of special concern" to prevent them from becoming endangered or threatened.

55 These species are all "species at risk" within the meaning of the Act. They are defined as follows:

> a) "extirpated" species means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild;
>
> b) "endangered" species means a wildlife species that is facing imminent extirpation or extinction;
>
> c) "threatened" species means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction; and
>
> d) species "of special concern" means a wildlife species that may become a "threatened" or an "endangered" species because of a combination of biological characteristics and identified threats.

56 These four categories of species at risk are all "wildlife species," meaning a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and is native to Canada, or has extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

57 Essentially, the Act is comprised of three main elements: (i) adding wildlife species to the List of Wildlife Species at Risk; (ii) the development and implementation of recovery strategies and management plans for species listed as at risk; and (iii) the implementation of a system of prohibitions, with appropriate sanctions, and law enforcement activities under the Act.

a) Wildlife species listing process

58 First, the Act established a process for listing wildlife species (sections 14 to 31). This process is guided by the COSEWIC, a committee of independent experts appointed by the Minister. These experts, as members of COSEWIC, are not part of the public service of Canada. COSEWIC's main mission is to assess the status of each wildlife species it considers to be at risk and, as part of the assessment, identify existing and potential threats to the species. It is then responsible for classifying the species as extinct, extirpated, endangered, threatened or of special concern. It can conclude whether or not the species is at risk at the

time of its assessment or it can indicate that it does not have sufficient information to render a decision. It is also responsible for periodically assessing the status of species at risk and, if appropriate, reclassifying or declassifying them (section 15).

59 Once it has completed its assessment, COSEWIC must submit a copy of it to the Minister. The Minister must then indicate how the Minister intends to respond to the assessment and, to the extent possible, provide timelines for action (section 25). Then, the Governor in Council may, on the recommendation of the Minister, accept COSEWIC's assessment and add the species in question to the List of Wildlife Species at Risk, decide not to add the species to the List, or refer the matter back to COSEWIC for further information or consideration. However, if, within nine months after receiving COSEWIC's assessment, the Governor in Council still has not made a decision, the Minister shall, by order, amend the List of Wildlife Species at Risk in accordance with COSEWIC's assessment (section 27).

60 A wildlife species can also be listed on the Species at Risk List on an emergency basis when the Minister, at the request of any person, is of the opinion that there is an imminent threat to the survival of the species in question (section 28). When the Minister reaches this conclusion, the Minister must make a recommendation to the Governor in Council that the List be amended to list the species as an "endangered species" (section 29). Within one year after the making of the order, COSEWIC, after having a status report on the wildlife species prepared, must confirm to the Minister the classification of the species, recommend to the Minister that the species be reclassified, or recommend to the Minister that the species be removed from the list (section 30). The Minister may then make a recommendation to the Governor in Council with respect to amending the List (section 31).

b) Development and implementation of recovery strategies and management plans for any species listed as a "species at risk"

61 Second, the Act provides a mechanism for developing and implementing recovery strategies for any species on the Species at Risk List (sections 37 to 55) or management plans for any wildlife species listed as a species of special concern (sections 65 to 72). When possible, such strategies and plans are developed in collaboration with any provincial or territorial minister in the province or territory where the species in question is found or any federal minister responsible for the area where the species is found. This duty of cooperation also extends to any Aboriginal organization that the competent minister believes is directly affected by the strategy or management plan, or to the wildlife management board established under a land claims agreement when the species is in an area where such a board performs functions in respect of wildlife species. Such a strategy must also be prepared in consultation with the landowners and any other persons whom the competent minister considers to be directly affected by the strategy (sections 39 and 66).

62 In developing a recovery strategy for a given species, the competent minister must determine whether the recovery is technically feasible. If the recovery is determined feasible, the competent minister must ensure that the strategy addresses threats to the survival of the species and its habitat, and includes, among other things, a broad strategy to be taken to address those threats (section 41).

63 The competent minister first prepares a proposed recovery strategy and includes it in the Registry (section 42). Within 60 days after it is included in the Registry, any person may file comments with the competent minister regarding the proposed recovery strategy (section 43). The competent minister must report on the implementation of any recovery strategy every five years (section 46). The same requirements apply to the development of a management plan for a wildlife species of special concern (sections 68 and 72).

64 Moreover, any recovery strategy must be accompanied by one or more management plans developed by the competent minister based on the recovery strategy. The development of an action plan is subject to the same collaboration requirements as a recovery strategy (section 47). An action plan must include, with respect to the area to which the action plan relates, an identification of the species' critical habitat, a statement of the measures that are to be taken to implement the recovery strategy for the species' survival and the protection of its critical habitat, a statement of the methods to be used to monitor the recovery of the species and its long-term viability, and an evaluation of the socio-economic costs of the action plan and the benefits to be derived from it (section 49).

65 Just as with the recovery strategy, any person may file written comments with the competent minister regarding any action plan included in the Registry by that minister.

66 In implementing an action plan or management plan with respect to aquatic species, a migratory bird protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c. 22 [Protected Migratory Bird], or any other wildlife species on "federal lands," the competent minister makes any regulations that are necessary in the opinion of the competent minister (sections 59 and 71). An "aquatic species," according to the definition given in the Act, means a wildlife species that is a fish, as defined in section 2 of the *Fisheries Act*, RSC 1985 c. F-14, or a marine plant, as defined in section 47 of that Act. "Federal land" is defined by the Act as three main categories of federal land: (i) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land; (ii) the internal waters of Canada and the territorial sea of Canada; and (iii) reserves and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, RSC 1985, c. I-5 (section 2).

67 The competent minister must monitor the implementation of an action plan five years after the plan comes into effect. The follow-up report must discuss the progress toward meeting the objectives and the ecological and socio-economic impacts of its implementation (section 55).

c) System of prohibitions and law enforcement activities

68 Finally, as the third main component, the Act establishes a prohibition system (sections 32 to 36 and 58 to 64), with sanctions (sections 97 to 119), the application of which is assured by law enforcement activities (sections 85 to 96).

69 A first group of prohibitions concerns the individuals of a species at risk and its residence (sections 32 to 36). Thus, no person, on pain of sanction, shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an endangered or threatened species, nor shall any person possess, collect, buy or sell such an individual, or any part or derivative of such an individual (section 32). Also, no person shall damage or destroy the residence of an individual of a wildlife species that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada (section 33).

70 These prohibitions, if they are not related to individuals of an aquatic species or species of Protected Migratory Birds, or their residence, do not apply in a province other than on federal lands unless it is stipulated in an order by the Governor in Council, adopted on the recommendation of the Minister. However, such a recommendation can be made only after the Minister has consulted the competent provincial minister. If, however, the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals, the Minister shall recommend that the Governor in Council make the order (section 34).

71 This first group of prohibitions also protects the individuals of wildlife species that are not listed as species at risk under the Act but are classified as an endangered species or threatened species by a provincial or territorial minister. However, these prohibitions apply only to individuals and residences on federal land in the province or territory (section 36).

72 A second group of prohibitions aims to protect the critical habitat of a species listed on the List of Wildlife Species at Risk (sections 58 to 64). Critical habitat means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species (section 2). Thus, no person shall destroy any part of the critical habitat of such a species if the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada, or if the species is an aquatic species or a species of Protected Migratory Birds (section 58).

73 This prohibition also applies to any part of the critical habitat of a wildlife species classified by a provincial or territorial minister as an endangered species, that is on federal land and that the provincial or territorial minister has identified as essential to the survival or recovery of the species. However, the prohibition applies only to the portions of this habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify (section 60).

74 Moreover, no person shall destroy any part of the habitat of an endangered or threatened species on the List of Wildlife Species at Risk, other than an aquatic species or species of Protected Migratory Birds that is in a province or territory and that is not a part of federal lands. Once again, the prohibition applies only to the portions of this habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify. This recommendation can be made when a provincial or territorial minister requests it. However, it must be made if, after consultation with the appropriate provincial or territorial minister, the competent minister is of the opinion that there are no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat and the laws of the province or territory do not effectively protect the critical habitat (section 61). Such an order expires five years after the day on which it was made and can be extended.

75 Moreover, the Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of section 58, 60 or 61 (section 64). The regulations must prescribe the procedures to be followed in claiming compensation, the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss, and the terms and conditions for the provision of compensation.

76 The offence and penalty regime associated with these two prohibition groups is set out in section 97 of the Act. Thus, every person commits an offence who contravenes subsection 32(1) or (2), section 33, or subsection 36(1), 58(1), 60(1) or 61(1). The severity of the penalty — a fine, imprisonment or both — varies depending on if there was a conviction on indictment or a summary conviction and on whether the offender is a corporation, a non-profit corporation or an individual. Moreover, section 108 allows alternative measures to be used to deal with a person who is alleged to have committed an offence, if certain conditions are met.

77 However, this regime does not apply to a person who is engaging in activities "related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants," or activities "authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document" (section 83). Section 73 gives the competent minister the power to enter into an agreement with a person — or issue a permit to a person — authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals if (i) the activity is scientific research relating to the conservation of the species and conducted by qualified persons; (ii) the activity benefits the species or is required to enhance its chance of survival in the wild; or (iii) affecting the species is incidental to the carrying out of the activity. Section 74 allows, under the conditions set out in section 73, an agreement, permit, licence, order or other similar document to be entered into, issued or made authorizing a person or organization to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals. According to section 78, the same is true for an agreement, permit, licence or order to be entered into, issued or made by a provincial or territorial minister under an Act of the legislature of a province or a territory.

78 Lastly, the Minister, in implementing the system of prohibitions and offences established by the Act, has the powers vested in him or her under sections 85 to 96, which deal with law enforcement activities. Thus, the Minister has the authority to designate enforcement officers for the purposes of this Act, who are authorized, after obtaining a judicial warrant, to conduct inspections, searches and seizures at any location authorized by the warrant (sections 85 to 92). The Minister has the power to investigate any alleged offence under the Act. The Minister has the authority to investigate all matters that he or she considers necessary to determine the facts relating to the alleged offence (sections 93 and 94). The Minister may suspend or conclude the investigation if he or she is of the opinion that the alleged offence does not require further investigation or the investigation does not substantiate the alleged offence (section 95). At any stage of the investigation, the competent minister may send any documents or other evidence to the Attorney General for a consideration of whether an offence has been or is about to be committed, and for any action that the Attorney General may wish to take (section 95).

79 Finally, this Act is binding on Her Majesty in right of Canada or a province (section 5). It is also based on the principle from the Convention on Biodiversity that if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty (Act, Preamble; also see: *Centre québécois du droit de l'environnement*, at paragraph 6).

(3) Section 80 of the Act

80 Under section 80 of the Act, the Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species. The emergency order may identify any habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates. Before making a recommendation, the competent minister must consult "every other competent minister." This "other competent minister" will be the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans or the Minister, as applicable.

81 Moreover, under subsection 80(2), the Minister must recommend to the Governor in Council that an emergency order be made if he or she is of the opinion that a species "faces imminent threats to its survival or recovery."

82 According to subsections 80(4)(a), (b) and (c)(i), this type of order may be made to protect an aquatic species, a species of Protected Migratory Bird or any other species on the List of Wildlife Species at Risk on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada.

83 When an emergency order is made pursuant to one or more of these paragraphs or subparagraphs, it may provide for three things: (i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; (ii) include provisions requiring the doing of things that protect the species and that habitat; and (iii) include provisions prohibiting activities that may adversely affect the species and that habitat.

84 Subparagraph 80(4)(c)(ii) allows the Governor in Council to make an emergency order to protect any species on the List of Wildlife Species at Risk, on land other than federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada. In other words, this provision allows the Governor in Council to make an emergency order to protect any species on the List of Wildlife Species at Risk, whether or not it is an aquatic or Protected Migratory Bird species and regardless of its range.

85 Like an order made under subparagraphs 80(4)(a), (b) and (c) (i), an order made under subparagraph 80(4)(c)(ii) may identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates and include provisions prohibiting activities that may adversely affect the species and that habitat. However, it may not include provisions requiring the doing of things that protect the species and that habitat.

86 Section 80, in its entirety, reads as follows:

> **Emergency order**
>
> **80 (1)** The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.
>
> **Obligation to make recommendation**
>
> **(2)** The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.
>
> **Consultation**
>
> (3) Before making a recommendation, the competent minister must consult every other competent minister.
>
> **Contents**
>
> **(4)** The emergency order may
>
> (a) in the case of an aquatic species,

(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat;

(b) in the case of a species that is a species of migratory birds protected by the Migratory Birds Convention Act, 1994,

(i) on federal land or in the exclusive economic zone of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

(c) with respect to any other species,

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

Exemption

(5) An emergency order is exempt from the application of section 3 of the Statutory Instruments Act.

Décrets d'urgence

80 (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.

Recommandation obligatoire

(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.

Consultation

(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

Contenu du décret

(4) Le décret peut:

a) dans le cas d'une espèce aquatique:

(i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire;

b) dans le cas d'une espèce d'oiseau migrateur protégée par la Loi de 1994 sur la convention concernant les oiseaux migrateurs se trouvant:

(i) sur le territoire domanial ou dans la zone économique exclusive du Canada:

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

(ii) ailleurs que sur le territoire visé au sous-alinéa (i):

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat;

c) dans le cas de toute autre espèce se trouvant:

(i) sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada:

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

(ii) ailleurs que sur le territoire visé au sous-alinéa (i):

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.

Exclusion

(5) Les décrets d'urgence sont soustraits à l'application de l'article 3 de la Loi sur les textes réglementaires.

87 According to subparagraph 97(1)(b) of the Act, every person who contravenes a provision of an emergency order under section 80 and prescribed by this order commits an offence punishable in the same way as the offence committed in subsections 32(1) or (2), in section 33 or in subsections 36(1), 58(1), 60(1) or 61(1) of the Act. Under subsection 97(2), the emergency order may prescribe which of its provisions may give rise to an offence.

88 The exception system set out in section 83 of the Act, that is, the same, as we saw, that applies to both groups of prohibitions established by the Act, also applies to the emergency orders made under section 80, including subparagraph 80(4)(c)(ii).

89 Finally, the Act does not specify the duration of an emergency order made under its authority. However, it specifies in section 82 that the competent minister must make a recommendation to the Governor in Council that the emergency order be repealed if the competent minister is of the opinion that the species to which the order relates "would no longer face imminent threats to its survival or recovery even if the order were repealed."

(4) Groupe Candiac's position

90 Groupe Candiac does not dispute the Act in its entirety. Apart from subparagraph 80(4)(c)(ii), it submits that the Act is perfectly in line with the division of powers in the CA 1867. That is because, according to the applicant, the Act first and foremost protects wildlife species — aquatic species and Protected Migratory Birds — and spaces — federal land — and there is no question about how it relates to the legislative authority of Parliament.

91 Moreover, it goes on to say that the Act is based on the explicit recognition that responsibility for the conservation of wildlife in Canada is "shared among the governments in this country" and that "it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada" (Act, Preamble). In other words, the Act reflects this recognition by playing, in the protection and recovery of species at risk in Canada, a complementary role to the one played by the provinces, specifically a role limited to the species and areas under federal jurisdiction.

92 Subparagraph 80(4)(c)(ii), according to Groupe Candiac, stands out by offering a "safety net" allowing emergency intervention when a species at risk and area not under federal jurisdiction is facing an imminent threat. By giving the Governor in Council the authority to act as the ultimate protector of species at risk in Canada, all species and all areas combined, it takes away, for all intents and purposes, the provinces' power to play their role with respect to species at risk that are neither aquatic species nor Protected Migratory Birds and are located in areas under their jurisdiction. As evidence of this, it points to the certificate obtained from the Minister of Sustainable Development, Environment and the Fight against Climate Change under the Quebec legislation on the environment, which authorized it to proceed with the development work on lands included in the area to which the Emergency Order relates, and which, according to the applicant, became invalid after the Order was made.

93 The pith and substance of subparagraph 80(4)(c)(ii) is to allow the Government of Canada to impose, under certain circumstances deemed urgent, standards of conduct to ensure, on provincial territory, the protection of species at risk other than the species under its jurisdiction.

94 However, Groupe Candiac contends that, in pith and substance, subparagraph 80(4)(c)(ii) does not fall under any of the heads of power attributed to Parliament by the CA 1867. In particular, it is of the view that this provision does not satisfy the jurisprudential markers of a valid provision of criminal law, because it is purely regulatory in nature. In this way, it differs from the provisions in the *Canadian Environmental Protection Act* that were in issue in *Hydro-Québec* (RSC (1985) version, c. 16 (4th Supp.)) [CEPA], of which the Supreme Court of Canada confirmed the constitutional validity as valid measures of criminal law.

95 This is the case because rather than making general prohibitions that apply to the whole country, accompanied by regulatory exemptions, Parliament chose to implement, with the combined effect of subparagraph 80(4)(c)(ii) and section 83, a system authorizing the executive branch to impose in a discretionary manner, in a designated area, prohibitions with sanctions from which exemptions based on agreements, permits, licences or orders are possible, the content of which is again left to the discretion of the executive branch. Moreover, the technique used puts the alleged offence in the superintending and reforming

power of the courts from an administrative law standpoint, a situation that is in conflict with the rule that the legality of provisions creating criminal offences can be assessed only with respect to the CA 1867 or the *Canadian Charter of Rights and Freedoms* [the Charter].

96 Groupe Candiac adds that subparagraph 80(4)(c)(ii) was not adopted to suppress an evil or counter a feared injury, as required by the validity flags of a measure of criminal law, but strictly in the interest of efficiency or consistency in the application of standards that the Government of Canada wishes to implement across the country to protect species at risk. Therefore, subparagraph 80(4)(c)(ii) has a "colourable purpose" under which Parliament wrongfully interferes in the provinces' jurisdiction.

97 Moreover, according to Groupe Candiac, Parliament's jurisdiction over peace, order and good government does not justify the adoption of subparagraph 80(4)(c)(ii). Justified, according to the Attorney General, under the national dimensions doctrine, one of the two parts of this authority, its purpose — to ensure the protection, on an emergency basis, of a species at risk under the jurisdiction of the provinces, but facing imminent threats to its survival or recovery — does not, in the opinion of Groupe Candiac, have the indivisibility, singleness or particularity required to be clearly distinguishable from matters of provincial interest in this area. In this regard, Groupe Candiac notes that Parliament itself recognized that the conservation of wildlife species in Canada was, on the contrary, "shared among the governments in this country."

98 Moreover, there were no gaps to be filled in the province's powers in that area, as shown by the various measures, legislation and so on adopted by Quebec to protect species at risk on its territory, including the Western Chorus Frog. Regardless, Groupe Candiac argues that if the national dimensions doctrine were to apply to the protection of species at risk, it would apply only to cross-border wildlife species, which is clearly not the case for the Western Chorus Frog, which never travels more than 300 metres on average from its breeding ground throughout its life.

(5) Subparagraph 80(4)(c)(ii) is a valid measure of criminal law

a) The criminal law power

99 Parliament has jurisdiction over criminal law according to subsection 91(27) of the CA 1867. This power is exclusive and plenary, and its reach has always been broadly defined; it is often said it is not "frozen in time" and that it "stands on its own" as federal jurisdiction. It is expressed not only in the *Criminal Code*, RSC 1985, c. C-46, but also in a number of acts, including the *Food and Drugs Act*, RSC 1985, c. F-27; the *Tobacco Act*, SC 1997, c. 13; the *Firearms Act*, SC 1995, c. 39; and the CEPA (*Firearms Reference*, at paragraphs 28-29; *Hydro-Québec*, at paragraphs 119-122).

100 Thus, a law is considered to be under Parliament's jurisdiction in this area when it stipulates a prohibition combined with a sanction and this prohibition is founded on a "legitimate public purpose," associated with an "evil" that the legislature seeks to fight or suppress or with threatened interests that it seeks to safeguard (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paragraph 28 [*RJR-MacDonald*]). Public peace, order, security, health and morality are considered legitimate public purposes of criminal law. However, this list is not exhaustive. Environmental protection was added in recent years (*Hydro-Québec*, at paragraph 123). Groupe Candiac is not arguing that.

101 Parliament's plenary criminal law power has only one reservation with regard to the division of powers: it cannot be employed colourably. In other words, it cannot be used to "colourably invade areas of exclusively provincial legislative competence" (*Hydro-Québec*, at paragraph 121, citing *Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226, at page 237).

102 Consequently, in this case, we must first determine if, in pith and substance, subparagraph 80(4)(c)(ii) has a legitimate public purpose in criminal law and, therefore, a purpose associated with the suppression of an "evil." In my opinion, there is no doubt. We must then determine if it colourably invades areas of exclusively provincial legislative competence. In my view, it does not. Finally, we must determine whether the system of prohibitions established by subparagraph 80(4)(c)(ii) resembles a criminal law system. I am of the opinion that it does.

b) Subparagraph 80(4)(c)(ii) has a legitimate public purpose of criminal law

103 As we have seen, the pith and substance of subparagraph 80(4)(c)(ii) is, according to Groupe Candiac, to allow the Government of Canada to impose, under certain circumstances deemed urgent, standards of conduct to ensure, on provincial territory, the protection of species at risk other than the species under its jurisdiction.

104 According to the Attorney General, it is, by virtue of the purpose and the legal and practical effects of subparagraph 80(4)(c)(ii), to give the Governor in Council emergency intervention authority when a species at risk is about to suffer harm that will compromise its survival or recovery. This is reflected in the Preamble of the Act and serves, as affirmed by the main protagonists of the Act before Parliament, as a "safety net" when the citizen, provincial or territorial measures already in place do not protect a species from an imminent threat to its survival. This emergency power has two parts, namely the identification of the habitat that is necessary for the survival or the recovery of the species and the prohibition, on pain of sanctions, of activities that expose this species to imminent threats against its survival or recovery. The purpose and ultimate legal and practical effect are to obtain immediate protection of the species to prevent, in the words of Justice Martineau in *Centre québécois du droit de l'environnement*, its "brutal and sudden" disappearance (*Centre québécois du droit de l'environnement*, at paragraph 78).

105 I prefer this characterization. I would add the following. Given the necessity of acting quickly in the event of an imminent threat, subparagraph 80(4)(c)(ii) authorizes making an order without having to make consultations and sticking to the formalities necessary in cases where, under sections 34 and 61 of the Act, one of the two groups of prohibitions under the Act must be applied for a species other than an aquatic species or Protected Migratory Bird, and in an area other than on federal lands.

106 Thus, like section 35 of the CEPA, which *Hydro-Québec* considered and which allowed an interim order to be made to deal with a significant danger to the environment, subparagraph 80(4)(c)(ii) is ancillary to the system of prohibitions established by the Act and, also like section 35, it makes it possible to circumvent the ordinary rules of this system when immediate action is required (*Hydro-Québec*, at paragraph 155).

107 Now, does subparagraph 80(4)(c)(ii) intend to suppress an "evil" within the meaning of the criminal law? As the Supreme Court of Canada case law teaches, Parliament has discretion, in exercising its criminal law power, "to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard" (*Hydro-Québec*, at paragraph 119).

108 In this case, Groupe Candiac argues that there is no evil to suppress. It maintains that, as was the case for the provisions struck down in *Assisted Human Reproduction Reference*, subparagraph 80(4)(c)(ii) is motivated first and foremost by a concern for efficiency and consistency in the application of standards that the Government of Canada wishes to establish for the protection of wildlife species in Canada, no matter what species it is or where its population resides in Canada. Thus, from the moment it deems that a particular wildlife species is not sufficiently protected by a province, this provision allows the Government of Canada to apply the Act to wildlife species under "provincial jurisdiction." However, Groupe Candiac argues that ensuring the desired efficiency and consistency, even for wildlife species under "provincial jurisdiction," by exercising the criminal law power, colourably invades the jurisdiction of the provinces.

109 I disagree.

110 For one thing, I believe that subparagraph 80(4)(c)(ii) is intended to suppress an "evil." I have difficulty in understanding how the release of toxic substances into the environment, caused by human activity, can properly constitute a source of legitimate criminal concern, but not an imminent threat, caused by human activity, to the survival or recovery of a species at risk, which, like all other species, is essential to maintaining life-sustaining systems of the biosphere, the depletion of which, by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment.

111 This is, according to a very large consensus reached by nearly every nation on the planet in the very recent Convention on Biodiversity, a "common concern of humankind," a new paradigm, as it were, in how we think about the environment and its preservation for this generation of human beings and the next.

112 I reiterate that, based on the evidence in the record, most of the biodiversity indicators, on a global scale, are showing a marked decline with no sign of a slowdown. This is primarily the result of human activity that, for the first time in human history, is the main cause of the period of mass extinction that we are currently experiencing, the sixth since the origin of life on Earth. Notably, the extinction rates of wildlife species are currently one thousand times higher than in the past. Canada is no exception. Of the 976 species listed by COSEWIC in the fall of 2016, 15 have become extinct, 23 are extirpated, 320 are endangered, 172 are threatened, and 209 are of special concern (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, pages 1255-1256).

113 Moreover, loss of habitat is generally considered the main cause of biodiversity loss for terrestrial species globally. It is the leading cause for amphibians (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1258). According to this report, the impact of biodiversity loss is as follows:

> [TRANSLATION]
>
> Biodiversity loss alters how ecosystems function and makes ecosystems less resilient to environmental changes, including climate change. Biodiversity acts as an independent factor that directly controls many important ecosystem functions, such as nutrient recycling, water filtration, oxygen production or carbon sequestration. Biodiversity loss diminishes ecosystem functions and thereby reduces the quality of the environment.
>
> (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1259).

114 In my opinion, subparagraph 80(4)(c)(ii) follows the same logic of protection of the environment, which is a legitimate public purpose of criminal law, as the system for regulating the release of toxic substances in the environment, determined in *Hydro-Québec*, as having been validly enacted under Parliament's criminal law power. In both cases, the intent was to suppress conduct likely to diminish the quality of the environment. As was the case in the system in question in *Hydro-Québec*, in this case, I believe, there is a real link between the harm feared and the evil to be suppressed, namely between the sudden and brutal disappearance of a species at risk contributing to the preservation of biodiversity and our ecosystems and the reduction of the quality of the environment caused by human activity, which is now a universal concern shared by nearly every nation on the planet.

115 As noted by the majority in *Hydro-Québec*, it would be surprising if Parliament could not use its plenary criminal law powers to protect the environment and suppress the evils associated with it:

> [123] ... But I entertain no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference*, cited *supra*, sufficient to support a criminal prohibition. It is surely an "interest threatened" which Parliament can legitimately "safeguard", or to put it another way, pollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, as I indicated at the outset of these reasons, it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions.
>
> [124] This approach is entirely consistent with the recent pronouncement of this Court in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, where Gonthier J., speaking for the majority, had this to say, at para. 55:
>
> > It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment.... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*, *supra*, which concluded at p. 8 that:

> ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*.
>
> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health*. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.
>
> Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(a) EPA.
>
> [125] It is worthy of note that following Working Paper 44 (1985), from which Gonthier J. cites, the Law Reform Commission of Canada in a subsequent report to Parliament (*Recodifying Criminal Law*, Report 31 (1987)), noted its view of the desirability of using the criminal law to underline the value of respect for the environment itself....
>
> [Italics in original; underlining added.]

116 Moreover, these judges did not hesitate to make stewardship of the environment a fundamental societal value and recognize that the criminal law "must be able to keep pace with and protect our emerging values" (*Hydro-Québec*, at paragraph 127). This stewardship does not stop with regulating the release of toxic substances into the environment; it also extends to countering the biodiversity loss resulting from human activity, because it diminishes the quality of the environment.

117 I also agree with the parallel drawn by Justice Martineau, in *Centre québécois du droit de l'environnement*, with regard to "philosophical and legal" considerations, between what underlies the criminalization of cruelty against animals and what underlies the protection of species at risk:

> [4] While this is not a case involving cruelty to animals, it must be understood that the protection of species at risk is premised on the same type of philosophical and legal considerations. The Honourable Antonio Lamer noted in 1978, as a Quebec Court of Appeal judge, that [TRANSLATION] "[w]ithin the hierarchy of our planet animals occupy a place which, if it does not give rights to animals, at least prompts us, as animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with animals those virtues we seek to promote in our relations among humans. ... Thus humans, by the rule of s. 402(1)(a) [of the *Criminal Code*], do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of the means employed" (*R v Ménard*, [1978] JQ No 187 (QC CA), at paras 19 and 21).
>
> [5] Cruelty to animals is inflicted by exceptionally ill-intentioned individuals whose actions are severely punished by society, and is a crime. Its suppression is therefore within the power of Parliament under subsection 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3. But humans are also gregarious beings who themselves live in society in an environment inhabited by all kinds of animal and plant species. What happens when humans, as supreme creatures pursuing their civilizing mission, settle in places where, just yesterday, the American eastern cougar or the Prairie grizzly bear reigned supreme over vast areas of land with the wolverine feared by our forebears? And when human activity destroys in its wake the natural habitat of all these wildlife species — animals and varieties of plants — that cannot tolerate urban life or agriculture, to the point that their survival is threatened in the relatively short to medium term? Have we collectively

imposed on ourselves a rule of civilization by which we must prevent the annihilation of individuals of a threatened wildlife species and the destruction of their natural habitat?

[6] This does seem to be the case, for otherwise the *United Nations Convention on Biological Diversity*, June 5, 1992, 1760 UNTS 79 [CBD], which entered into force on December 29, 1993, would not have been ratified by 196 states parties, including Canada. The otherness between humans and animals, between owners and their property, between people and things without an owner, has given way to a universal legal concept whereby wildlife species and ecosystems are part of the world's heritage and it has become necessary to preserve the natural habitat of species at risk. The *Species at Risk Act*, SC 2002, c 29 [federal Act], which was assented to on December 12, 2002, is in fact intended to implement Canada's obligations under the CBD. ...

118 Once again, it is entirely up to Parliament "to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard" (*Hydro-Québec*, at paragraph 119). In light of the foregoing, there is no doubt in my mind that subparagraph 80(4)(c)(ii) seeks to suppress an "evil" as interpreted in the Supreme Court of Canada case law on Parliament's criminal law power.

c) Subparagraph 80(4)(c)(ii) does not colourably invade exclusively provincial heads of power

119 Nevertheless, Groupe Candiac is urging me to conclude that subparagraph 80(4)(c)(ii) constitutes a skilled but colourable attempt by Parliament to establish a national, uniform and efficient system of protecting species at risk, no matter what they are or where they reside, without regard for the jurisdiction of the provinces in this matter. It is asking the Court to follow the teachings of the *Assisted Human Reproduction Reference*, which it says is more recent than the *Hydro-Québec* case.

120 An initial comment must be made. The *Assisted Human Reproduction Reference* is the product of a deeply divided Court, as three sets of reasons were needed to break the impasse. Specifically, two groups of four judges confronted each other. Not only did they disagree on the result, but they also disagreed on how to reach it. The decisive reasons, which were relatively brief, were those of a single judge, Justice Cromwell, who, from the outset, said that he disagreed with his colleagues on both sides regarding the first step of the constitutional analysis, that of the pith and substance of the impugned provisions. There was then a disagreement on the outcome of the appeal, and Justice Cromwell took the middle ground, in a way, between the group that would have invalidated each and every impugned provision and the group of judges that would have upheld their validity.

121 Thus, it is hard to get from this Supreme Court judgment a clear consensus on how to approach the division of powers questions involving subsection 91(27) of the CA 1867.

122 Also, if the *Human Assisted Reproduction Reference* questioned the scope of Parliament's criminal law power, it did not do so in a context where the protection of the environment was the focus of concern, which also mitigates, in my opinion, and with all due respect, the usefulness of this judgment in a case such as ours. In my view, this judgment has not superseded *Hydro-Québec* as the leading precedent in questions of validity, with regard to the division of powers, and to exercising jurisdiction over criminal law to protect the environment.

123 In any case, I was not convinced that the immediate or ultimate purpose of subparagraph 80(4)(c)(ii) is to regulate on a national basis, the protection of species at risk with efficiency and consistency, and thereby colourably invade the jurisdiction of the provinces. Like section 35 of the CEPA, it authorizes emergency intervention when a species at risk is facing an imminent threat to its survival or recovery. An order made under subparagraph 80(4)(c)(ii) is not permanent, because the Minister is required to recommend its repeal when, as we have seen, the Minister is of the opinion that the species targeted by the order is no longer exposed to the threat that justified making the order.

124 Moreover, the evidence in the record reveals that the powers conferred on the Governor in Council under subparagraph 80(4)(c)(ii) have been used very sparsely up until now. Indeed, since the Act came into force in June 2003, it has been used only once, to protect the Greater Sage-Grouse, a species of bird that lives mainly in western Canada, from an imminent threat related to farming and oil development.

125 It is also important to note that subparagraph 80(4)(c)(ii), as I have already stated, does not authorize the Governor in Council, unlike an emergency order involving an aquatic species, a Protected Migratory Bird or any species on federal land, to impose protection measures. The power it confers is limited to imposing prohibitions in relation to activities likely to harm the species in question and the habitat that is necessary for its survival or recovery, and the identification of this habitat in the area to which the emergency order relates.

126 It is hard to see, in this context, how subparagraph 80(4)(c)(ii) could be used to regulate, on a national scale, the protection of species at risk in the interest of efficiency and consistency or for any other reason. Parliament simply did not assume this power, at least in the cases covered by this provision. The omission is not benign. It signals, in my view, a desire to remain faithful to the general structure of the Act, which, in many ways, but with a view to complementarity of government action, treats the aquatic species, the Protected Migratory Birds and the species on federal lands differently from other species.

127 Moreover, there is no evidence in this case that Parliament, when it enacted subparagraph 80(4)(c)(ii), had an "ulterior motive" or "was attempting to intrude unjustifiably upon provincial powers" (*RJR-MacDonald*, at paragraph 33). That this provision, according to the extrinsic evidence in the record, was intended as a "safety net" when a species at risk is facing an imminent threat to its survival or recovery and, in an emergency situation, there is no measure in place to counter this threat, in my opinion, reflects no such intent.

128 An emergency order could clearly affect application of the provincial legislation in place. In this case, the Emergency Order affects, at least for Groupe Candiac's lands in the area to which the Emergency Order relates, the scope of the authorization certificate issued to Groupe Candiac in 2010 by the Minister of Sustainable Development, Environment and the Fight against Climate Change pursuant to the *Environment Quality Act*, CQLR c. Q-2, which allows Groupe Candiac to proceed with the housing project located in the area to which the Emergency Order relates, provided that certain conditions, specifically to minimize the impact of said project on the local Western Chorus Frog population, are met. The Emergency Order also affects the permits issued in June 2016 by the municipality of Saint-Philippe, which authorized Groupe Candiac to undertake deforestation and backfilling in the area to which the Emergency Order would apply.

129 However, as we have seen, the pith and substance doctrine tolerates encroachment on the other level of government's jurisdiction. This defining feature of the pith and substance doctrine is particularly important with respect to protection of the environment, which, it should be noted, is not on the list of heads of legislative power assigned to any level of government by the Canadian Constitution. As stated by the Supreme Court of Canada in *Oldman River*, the protection of the environment is an "abstruse matter which does not comfortably fit within the existing division of powers *without considerable overlap and uncertainty*" (*Oldman River*, at pages 17 and 64) [Emphasis added]. Thus, the majority stated in *Hydro-Québec*, "[t]he legitimate use of the criminal law ... in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit" (*Hydro-Québec*, at paragraph 129).

130 The pith and substance doctrine even considers that a matter may fall within one level of government's jurisdiction for one purpose and in one aspect and fall within another level of government's jurisdiction for another purpose and in another aspect (*Canadian Western Bank*, at paragraph 30). It is the double aspect theory. Therefore, if there is an operational conflict between two laws enacted on the same matter by each level of government, in the event that one allows a thing and the other does not, this theory engages the principle of federal paramountcy, which has federal law prevail over provincial law (*Canadian Western Bank*, at paragraph 69; *COPA*, at paragraph 62).

131 While the existence of such a conflict was not identified in this case, this brief reminder of the conterminous properties of the pith and substance doctrine shows how provincial and federal legislation on the environment can coexist, despite the "considerable overlaps" likely to characterize this coexistence. In fact, use of the criminal law power "in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action" (*Hydro-Québec*, at paragraph 131).

132 I note in passing that following the announcement, in December 2015, in response to the judgment in *Centre québécois du droit de l'environnement*, that the Minister would recommend to the Governor in Council that an emergency order be made concerning the Western Chorus Frog, the governments of Canada and Quebec were quick to establish a working group whose mandate was to identify possible solutions and implement procedures in the short and medium term [TRANSLATION] "to avoid situations that might require the use of orders under sections 34, 61 and 80 of the Act to protect terrestrial species in Quebec on non-federal lands" (Respondent's Record, Exhibit MD-11, Volume 2, page 652). The document outlining the working group's mandate stated the principle of shared responsibility of the two levels of government in protecting species at risk in Canada and their complementarity of action in this matter. It underscored that making an order under sections 34, 61 and 80 of the Act was intended as a "last resort," but did not exclude exercising these powers. Rather, the working group's mandate was to find ways to limit its use as much as possible.

133 The working group's creation, in the context of the announcement of the upcoming emergency order, signals, in my view, an acceptable mutual understanding of the role of each government and its respective legislation in the protection of species at risk and of the very clear and defined function of the power under subparagraph 80(4)(c)(ii), in particular. This may be why the government of Quebec did not intervene in this case even if it was served with a Notice of Constitutional Question, since Groupe Candiac is alone in claiming an unjustifiable encroachment of subparagraph 80(4)(c)(ii) on the jurisdiction of the provinces.

134 Moreover, it must be understood, as this document reminds us and as I already mentioned, that the Act already authorizes making orders so that it applies to cases of species that are on non-federal land and are not aquatic species or species of Protected Migratory Birds. This is the case for the prohibitions under sections 32, 33 and 58, which, by order, can be applied to extend to those species. However, the provisions of the Act allowing such an extension — sections 34 and 61 — are not being contested in this case. Their constitutional validity must then be presumed. Thus, if we must accept that such an extension is allowed by the Constitution, it becomes difficult, I think, to claim that the same thing cannot be done when a species at risk is facing an imminent threat to its survival or recovery and that exercising such a power unjustifiably encroaches on the jurisdiction of the provinces.

135 This brings me back to the *Hydro-Québec* case, in which section 35 of the CEPA also allowed an interim order to be made when the ministers concerned were of the view that an immediate intervention was necessary with regard to a substance listed on the List of Toxic Substances established under this Act, because this substance was not regulated as it should be. Such an order could set limits on the quantity and concentration of emissions of the substance, controlling the areas where the substance may be released, controlling the commercial manufacturing or processing activity in the course of which the substance is released, stipulating the manner and conditions in which the substance may be advertised or offered for sale and regulating the packaging and labelling of the substance or of a material containing the substance (*Hydro-Québec*, at paragraph 105).

136 Hydro-Québec and the Attorney General of Quebec maintained that it was impossible to justify such a provision under, *inter alia*, the criminal law power, because it was so invasive of provincial powers (*Hydro-Québec*, at paragraph 108). As we know, this claim did not prevail, the majority stating that the fear that section 35 (and its sister provision, section 34, which gives the Governor in Council broad regulatory power to regulate the quantity of substances considered dangerous to humans and the environment in general that may enter the environment and the conditions in which they may be released) would distort the federal-provincial balance seemed overstated (*Hydro-Québec*, at paragraph 131).

137 I see no reason to find otherwise with regard to subparagraph 80(4)(c)(ii). Stating the opinion of the dissenting judges in *Hydro-Québec* is insufficient to convince me otherwise, considering that their point of view did not prevail. It is also not enough to submit the opinion of authors criticizing the point of view retained by the majority, because that is the point of view binding on me.

138 I also do not think that the principal of subsidiarity, which suggests that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity (*114957 Canada Ltée v. Hudson (Town)*, 2001 SCC 40, at paragraph 3, [2001] 2 SCR 241 [*Spraytech*]), can be used, as Groupe Candiac claims, to limit the otherwise plenary jurisdiction

of Parliament over criminal law. This principle, like the notion of "co-operative federalism," a principle of the same nature, cannot be seen as imposing limits on the valid exercise of legislative authority (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, at paragraph 39, [2016] 1 SCR 467). In this sense, it can neither override nor modify the division of powers. In other words, if it is used to understand what shaped Canadian federalism and what inspired the Fathers of Confederation to share as they did the legislative powers of the two levels of government, the principle of subsidiarity is not to remodel the parameters (*Canadian Western Bank*, at paragraph 45; Peter W. Hogg, *Constitutional Law in Canada*, 5th Ed. supplemented, Toronto (On), Thomson Reuters Canada, 2016 (loose-leaf updated to 2017-Rel.1), at pages 5-12 to 5-13).

139 Finally, I give no weight to the argument that the authority under subparagraph 80(4)(c)(ii) is surplusage because of the system of prohibitions already in the Act. For one thing, I can clearly see the need for an emergency power such as the one in subparagraph 80(4)(c)(ii). The facts of this case, just as the presence of a provision such as section 35 in the CEPA, provide us with a good illustration of that. Moreover, this kind of argument in a way challenges the wisdom of the choices made by Parliament or the efficiency of the measures it established. However, it is well established that this type of consideration is beyond the control of the courts when they question the validity of the laws with regard to the division of powers (*Firearms Reference*, at paragraph 57; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, at paragraph 3, [2015] 1 SCR 693).

140 To succeed, Groupe Candiac had to show that subparagraph 80(4)(c)(ii), under criminal law, constitutes a colourable attempt by Parliament to encroach on the jurisdiction of the provinces. As the Federal Court of Appeal recently pointed out in *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160[*Syncrude*], this burden is significant (*Syncrude*, at paragraph 89). Groupe Candiac did not meet it.

d) The system of prohibitions established by subparagraph 80(4)(c)(ii) resembles a criminal law system

141 A law, I will remind you, is considered to fall within Parliament's criminal law power when it stipulates a prohibition combined with a sanction and this prohibition is founded on a "legitimate public purpose", associated with an "evil" that Parliament seeks to fight or suppress. I have already determined that subparagraph 80(4)(c)(ii) was founded on such an objective and that this objective is associated with an "evil" to suppress within the meaning of the criminal law.

142 Moreover, there is no doubt that subparagraph 80(4)(c)(ii) is intended, through its wording, to impose prohibitions and that these prohibitions, by the operation of section 97 of the Act, are combined with sanctions. However, Groupe Candiac argues that this system is purely regulatory in nature, because, rather than making general prohibitions that apply to the whole country and adding regulatory exemptions to this system of prohibitions, Parliament chose to implement, with the combined effect of subparagraph 80(4)(c)(ii) and section 83, a system authorizing the federal government to impose in a discretionary manner, in a designated area, prohibitions combined with sanctions and to make exemptions, based on agreements, permits, licences or orders, the content of which is again left to the discretion of the same government. However, it insists this is part of a regulatory regime and not a criminal law regime.

143 Once again, I disagree. As the Attorney General pointed out, the Supreme Court of Canada has long recognized that Parliament may delegate to the executive branch the power to define or specify conduct that could have criminal consequences (*Hydro-Québec*, at paragraph 150; *Firearms Reference*, at paragraph 37; see also *Syncrude*, at paragraph 74). It also recognized that Parliament may also delegate the power to define the circumstances resulting in an exemption from the application of a criminal prohibition, as was done in the case of lotteries, which are prohibited by the *Criminal Code*, whereby the authority to order exemptions was delegated to the lieutenant governors of the provinces, who could then, with the issue of licences and permits, authorize holding lotteries in the province (*R. v. Furtney*, [1991] 3 S.C.R. 89, at page 106 [*Furtney*]).

144 In so doing, Parliament may authorize the establishment of detailed, precise and highly complex regulatory systems (*Firearms Reference*, at paragraph 37). Section 34 of the CEPA provides a good example by giving the Governor in Council broad regulatory power authorizing the Governor in Council to prescribe or impose requirements as varied as the quantity or concentration of a substance listed in the List of Toxic Substances that may be released into the environment, the places where such substances may be released, the manufacturing or processing activities in the course of which the substance may be

released, the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport, the packaging and labelling of the substance or a product or material containing the substance, the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites, and the maintenance of books and records for the administration of any regulation made under this section.

145 As the majority stated in *Hydro-Québec*, section 34 "precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences" (*Hydro-Québec*, at paragraph 150). Thus, it is the executive branch and not Parliament that determines what is "criminal." In so doing, it may also, pursuant to subsection 34(2), make exemptions and it may do so on virtually any matter that can be defined as "criminal." It can even order that the regulations enacted under section 34 do not apply in a province that has equivalent provisions, thereby allowing asymmetrical application of the prohibitions in the regulations.

146 Regarding the prohibitions enacted by interim order under section 35 of the CEPA, they are first ordered by the competent minister. In order to make it to the interim order expiry date, they must be approved by the Governor in Council. An order with the same effect as the interim order can then be made by the Governor in Council. It is valid for five years. Pursuant to paragraphs 35(1)(a) and (b), such an order can be made, I repeat, when the minister is of the opinion that a substance listed on the List of Toxic Substances established under this Act is not "adequately regulated" and that "immediate action is required to deal with a significant danger to the environment or to human life or health."

147 Thus, the competent minister has the same powers as those given to the Governor in Council under subsections 34(1) and (2) of the CEPA. As we have seen, this power is very broad and includes that of making exemptions. Once again, the "crime," its conterminous properties and the cases in which it does not apply, are all defined by the executive branch, in this case, a minister.

148 The Attorney General is correct in pointing out that in responding to environmental problems using the criminal law power, a flexible approach is desirable considering the scope and complexity of environmental protection and the wide range of activities that can result in degradation of the environment. Indeed, the Supreme Court of Canada agreed that Parliament can adopt a general approach in this matter, meaning an approach whereby an "exhaustive codification of every circumstance in which pollution is prohibited" is unnecessary, so that it is possible to respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation" (*Hydro-Québec*, at paragraph 134, citing *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at paragraph 43).

149 Moreover, it is for this reason that the doctrine of vagueness established under section 7 of the Charter is not applied with the same intensity to the environmental protection legislation as to legislation on less complex matters, because to do otherwise "would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution" (*Hydro-Québec*, at paragraph 134).

150 In *Hydro-Québec*, the majority stated that it was, "of course," within Parliament's criminal law power to carefully adapt, using regulatory authority, the prohibited activity based on the circumstances in which a toxic substance can be used or dealt with. I believe the same is true for the protection of species at risk facing an imminent threat to their survival or recovery. The measures deemed necessary in one case might not be necessary in another, with each species and each critical habitat having its own particularities. Giving the executive branch the power to carefully adapt the prohibited activity, as does subparagraph 80(4)(c)(ii), according to the particularities of the species and its habitat and the circumstances creating the imminent threat to its survival or recovery is, in my view, a valid exercise of Parliament's criminal law power.

151 While they accepted that environmental protection was a legitimate public purpose of criminal law, the dissenting judges in *Hydro-Québec* concluded that the impugned provisions were more an attempt to regulate environmental pollution than to prohibit it. In particular, they were of the opinion that the prohibitions were ancillary to the regulatory scheme and not the other way around. However, in this case, the Governor in Council's authority is limited, pursuant to subparagraph 80(4)(c)(ii), to imposing prohibitions while identifying, in the area to which the emergency order would apply, the habitat critical to the survival or recovery of the species at risk. As I said, contrary to the emergency orders under subparagraphs 80(4)(a), (b) and

(c)(i), the Governor in Council does not have, under subparagraph 80(4)(c)(ii), the authority to impose protection measures, indicating a more limited intervention authority than the one that seemed to concern the dissenting judges in *Hydro-Québec*.

152 Groupe Candiac placed considerable emphasis on the testimony of the professor of constitutional law, Dale Gibson, before the Standing Committee on Environment and Sustainable Development, which, in the spring of 2001, conducted the assessment, after the second reading, of the bill that would become the Act, and on the study it co-authored, in November 1999, with former Justice of the Supreme Court of Canada, Gérald V. La Forest [the 1999 Study], who notably wrote the reasons of the majority in *Hydro-Québec*, on the federal protection of species at risk and the criminal law power.

153 During his testimony before this Committee, Professor Gibson essentially pointed out "two of the weaknesses that seem to [him] to be most obvious" about the bill. The first weakness was related to the fact that, according to Professor Gibson, Parliament did not "take a very strong position with respect to species that are on provincial or territorial lands unless they happen to be aquatic species or migratory birds." He considered this "an unnecessarily narrow view of federal constitutional powers." He believed that the situation was at least as concerning with regard to the protection of critical habitat "everywhere," because, according to him, the bill was "very weak" in this regard (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 2 of 17).

154 This first big weakness, according to Professor Gibson, was in sections 34, 35, 58 and 61 of the bill, because these provisions made subject to a cabinet order the application of prohibitions enacted by the bill on land other than federal land. He believed that "the advice the government is receiving from some of its advisers says there is not sufficient constitutional jurisdiction to go further than the legislation goes" and that it was his duty, as a constitutional lawyer, to intervene to "say such concern is misplaced" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 3 of 17). Clearly, this does not help Groupe Candiac's case.

155 Citing the 1999 Study, Mr. Gibson's second concern was related to the technique used to apply the prohibitions enacted by the Act to non-federal lands, namely the orders made and the asymmetrical geographical application of the prohibitions enacted by the bill that could result. Section 61 of the bill, regarding the application of prohibitions concerning the critical habitat of species at risk on non-federal land, seemed particularly problematic to him. However, he recognized that "somewhat similar examples of ministerial discretion were held to be constitutionally valid in the Hydro-Québec case — which was a Supreme Court of Canada decision on somewhat similar legislation," and that he was not prepared to say "that they are clearly outside the criminal law jurisdiction of the Parliament of Canada" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 3 of 17). In short, Professor Gibson, in expressing this second concern, favoured the safest possible approach to avoid compromising what he saw as a bill that rests heavily on the powers of Parliament.

156 The 1999 Study concluded as follows:

> [TRANSLATION]
>
> 28 It is very clear that Parliament could, given its sole jurisdiction over criminal law, pass comprehensive legislation including prohibitions and providing a number of exemptions, dealing with the protection of *all* endangered and threatened species and their *habitat*. These exemptions resemble those found in the *Food and Drug Act*, the *Firearms Act* or the *Canadian Environmental Protection Act*, and criteria should be specified to limit the discretionary power for granting exemptions. Such legislation would respect all the necessary requirements for the valid exercise of the criminal law power, that is, a prohibition accompanied by a sanction for the purpose of protecting the environment, a valid criminal law purpose that is not colourable. However, if the legislation had to name prohibitions established by regulation, it would risk being perceived as more regulatory than criminal in nature. Therefore, it would be more cautious to include the prohibitions in the legislation itself.
>
> (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 28)

157 This study focused particularly on the risks associated with the fact that the Government of Canada proposed to include in the legislation [TRANSLATION] "a power to establish, by regulation, prohibitions against destroying habitat that would apply

to some regions, such as those that do not already have efficient provincial or private protection," an approach that, according to the authors [TRANSLATION] "might seem more 'regulatory' than the [*Canadian Environmental Protection Act*] and would more likely lead to an in-depth judicial review to determine whether it is, in fact, a valid measure of criminal law" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 20).

158 Nevertheless, the authors recognized that while a general prohibition in the Act itself may suffice in protecting from destruction the habitat of a species at risk, a regulatory approach on a case by case basis could be necessary to "identify" the habitats. They also recognized that such an approach might be necessary "to address other types of problems with the legislation (and therefore might be justified under the criminal law power)", but specified that this issue went beyond the scope of their study (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 19).

159 I do not think that this second concern of Mr. Gibson, which was based on the 1999 Study, helps Groupe Candiac's case. Parliament ultimately chose, in sections 34, 35, 58 and 61 of the Act, the technique for which Professor Gibson expressed some reservations. However, once again, these provisions are not at issue, because Groupe Candiac is not challenging the Act in itself. Furthermore, there is no question, be it in Professor Gibson's testimony or in the 1999 Study, of section 80 of the bill, adopted as such by Parliament, which intends to give the executive branch the power of emergency intervention to counter an imminent threat to the survival or recovery of a species at risk.

160 As the Supreme Court of Canada instructs us in the *Firearms Reference*, the legislature still must give the executive branch, to which it delegates the authority of defining the "crime", "undue" discretionary power (*Firearms Reference*, at paragraph 37). In this case, I believe that the power vested in the Governor in Council by means of subparagraph 80(4)(c)(ii), although it is poorly defined, is defined well enough to avoid the qualification of undue discretionary power. Thus, in a case such as ours, an emergency order can only be made if the species at risk "faces imminent threats to its survival or recovery" and if the prohibited activities are likely to harm the species or habitat identified in the area to which the order would apply as necessary to the survival of the species or its recovery. The latitude given to the Governor in Council allows him or her to carefully adapt the prohibited activity based on the particularities of the species and its habitat and the circumstances of the imminent threat. This "case-by-case" approach, as we have just seen, is not in conflict with the criminal law power. In this case, I believe it is justified.

161 Regarding Groupe Candiac's complaint about the asymmetrical geographical application of prohibitions imposed by an emergency order, recall that the Supreme Court invariably declared valid the criminal laws applied differently from one region to the other. One example of this, as we saw, was the provisions in the *Criminal Code* dealing with lotteries; this was also the case for provisions in the *Young Offenders Act*, SC 1980-81-82-83, c. 110, authorizing the provinces who make the choice, to substitute alternative measures under this Act with legal procedures otherwise applicable to the adolescent charged with an offence (*R v S (S)*, [1990] 2 SCR 254 [*R v S*]. In this last case, the Supreme Court, citing its former Chief Justice, the late Bora Laskin, in *R v. Burnshine*, [1975] 1 S.C.R. 693, recalled that "there can be no doubt about Parliament's right to give its criminal or other enactments special applications, whether in terms of locality of operation or otherwise" (*R v. S*, at page 290). Once again, the need to carefully adapt the prohibited activity to the particularities of the species and its habitat and the circumstance of the imminent threat justified Parliament, in my view, with "special application" of the Act in these circumstances.

162 Lastly, I cannot accept Groupe Candiac's argument that making an emergency order under subparagraph 80(4)(c)(ii) puts the resulting offence in the superintending and reforming power of the courts from an administrative law standpoint, a situation that is in conflict with the rule that the legality of provisions creating criminal offences can only be assessed with respect to the CA 1867 or the Charter. This argument, if it were accepted, would for all practical purposes spell the end of validly established regulatory schemes under the criminal law power. Moreover, Groupe Candiac provided no authority in support of their argument.

163 Thus, in form, I have no hesitation in concluding that the prohibition regime established by combining subparagraph 80(4)(c)(ii) and section 83 meet the requirements of a criminal law prohibition regime.

164 I therefore conclude that subparagraph 80(4)(c)(ii) of the Act has all the attributes of a measure validly enacted by Parliament under the authority vested in it under subsection 91(27) of the CA 1867.

165 If I am wrong on this point, nevertheless, in my view, as we will see that the validity of subparagraph 80(4)(c)(ii) is saved because it is, in my view, sufficiently integrated in an otherwise valid legislative scheme.

(6) The peace, order and good government clause

166 Having concluded that subparagraph 80(4)(c)(ii) has been validly enacted by Parliament under its criminal law power, it seems unnecessary to determine whether this provision would also have been enacted under Parliament's power to legislate for peace, order and good government, on the basis that the protection of species at risk is a matter of national interest. I agree with the deference shown in this regard by the majority in *Hydro-Québec* for which the national concern doctrine, as a head of power, "raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power" (*Hydro-Québec*, at paragraph 110).

167 Giving Parliament general jurisdiction over environmental protection under the national concern doctrine, according to these judges, "could radically alter the division of legislative power in Canada" (*Hydro-Québec*, at paragraph 115). Since it is not strictly necessary to do so in this case, I won't delve into that.

(7)Assuming subparagraphs 80(4)(c)(ii) is ultra vires *Parliament's legislative authority, it is nevertheless sufficiently integrated in a valid legislative scheme to be saved.*

168 Considering that, in my view, the enactment of subparagraph 80(4)(c)(ii) constitutes a valid exercise of Parliament's legislative power over criminal law, it is not necessary to examine the ancillary powers doctrine that all parties focused on. However, as I said, even if I concluded that Parliament did not have the authority required to enact this provision, I would still be of the view that it is saved by the ancillary powers doctrine.

169 According to this doctrine, a potentially invalid legislative provision, in pith and substance, outside the competence of its enacting government, may be saved where it is an important part of a broader but otherwise valid legislative scheme enacted by this government (*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, at paragraphs 35-36 and 38, [2010] 2 SCR 453 [*Lacombe*]).

170 To assess its validity, the Court must decide whether such a provision has a rational and functional link to the legislative scheme to which it belongs. In other words, it must question whether the impugned provision actively allows the realization of objectives from that scheme, understanding that it is not enough to simply compensate for this scheme (*Lacombe*, at paragraph 45). In addition, the Court must be satisfied that the ancillary provision functionally completes the other provisions of the legislative scheme and make up for the weaknesses in said scheme, which, otherwise, would lead to an incoherent application of it or uncertainty (*Lacombe*, at paragraph 48). This exercise does not go so far as to require demonstration that without this ancillary provision, the scheme it is a part of is certain to fail (*Lacombe*, at paragraphs 42-43).

171 In the decision he made in *Syncrude FC*, upheld on appeal (*Syncrude*), Justice Zinn applied the three following criteria to determine if, in the event that the provisions contested in this case exceeded Parliament's authority, the ancillary powers doctrine would allow it to be saved:

1. The scope of the heads of power in play and whether they are broad or narrow;

2. The nature of the impugned provision; and

3. The history of legislating on the matter in question.

(*Syncrude FC*, at paragraph 90)

172 The level of integration required to validate an otherwise *ultra vires* legislative provision, explained Justice Zinn, is based on the severity of the encroachment (*Syncrude FC*, at paragraph 90).

173 The approach taken by Justice Zinn and the results of his analysis were endorsed without reserve by the Federal Court of Appeal (*Syncrude*, at paragraph 94).

174 In this case, the applicant challenged the constitutional validity of a regulatory provision enacted under the CEPA, which required that diesel fuel produced in Canada contain at least 2% renewable fuel. Non-compliance with this regulatory provision constituted an offence under subsection 139(1) of the CEPA, which provides that "[n]o person shall produce, import or sell a fuel that does not meet the prescribed requirements" (*Syncrude FC*, at paragraphs 1 and 3).

175 The applicant argued that, contrary to the government's claims, this regulatory provision did not, in pith and substance, constitute a legitimate use of federal power to legislate with respect to the criminal law. The applicant did not see it as a measure to combat atmospheric pollution but rather an attempt to regulate non-renewable resources and promote the economic benefits of protecting the environment by creating a demand for biofuels in the Canadian market. In particular, the applicant saw a specious encroachment in at least four areas of provincial jurisdiction, namely property and civil rights, local works and undertakings; matters of a merely local or private nature; and the development of non-renewable natural resources (*Syncrude FC*, at paragraphs 12 and 92).

176 Justice Zinn concluded that the regulatory provision at issue, by assuming the powers of Parliament *ultra vires* was nevertheless valid under the ancillary powers doctrine. The application of the above three criteria to the circumstances of this case lead me to the same result.

177 Before starting the analysis of these criteria, note that Groupe Candiac is not challenging the constitutionality of the Act in itself, which it deems to be consistent with the division of powers. In any event, subparagraph 80(4)(c)(ii) is part of a broader legislative scheme, the constitutionality of which I have no doubt. In fact, in its main points, the Act is based on the CEPA model: procedure for identifying species at risk, establishment of recovery measures for those species and prohibition regime accompanied by sanctions to protect these species and their habitat from human activities that could harm them, all with a view to offer broader protection of the environment and ecosystems, which determine quality and viability.

178 In the eyes of Professor Gibson and Justice La Forest, it seemed "abundantly clear", as we saw, that Parliament, with the only jurisdiction over criminal law, could enact comprehensive legislation including prohibitions and exemptions to protect *all* species at risk and their habitat [Emphasis added]. In my view, the Act, in varying degrees, tends to do exactly that, even if, according to these two authors, it does not go far enough.

a) The scope of the heads of power in play

179 This criterion considers the scope of heads of power in play and the fact that heads of powers with a broad scope are more prone to encroachment and overflow. Thus, when the legislative scheme is enacted under a head of power with broad scope and the impugned ancillary provision encroaches on another head of power with broad scope, the encroachment is considered less serious and promotes the establishment of a rational and functional link between the provision and the legislative scheme at issue (*Syncrude FC*, at paragraph 91).

180 For all practical purposes, the same heads of power at play in *Syncrude FC* are at play here: criminal law, on the one hand, and property and civil rights, land use planning (via jurisdiction of the provinces with regard to "municipal institutions") and matters of a purely local or private nature, on the other hand. Like Justice Zinn, I conclude that we are dealing with heads of power with broad scope on both sides, which means that there is less severe encroachment under subparagraph 80(4)(c)(ii) on the provincial heads of power in play.

b) The nature of subparagraph 80(4)(c)(ii)

181 As we saw, subparagraph 80(4)(c)(ii) seeks to obtain immediate protection for a species at risk facing an imminent threat to its survival or recovery. It allows for emergency intervention when the measures already in place, whether they are private, provincial or territorial, are insufficient to counter the threat, thereby exposing the species to a sudden and brutal disappearance.

In this sense, based on the extrinsic proof, subparagraph 80(4)(c)(ii) is a "safety net." In other words, in an emergency situation, it seeks to fill the deficits of the provincial and territorial schemes already in place.

182 In *Syncrude FC*, the applicant argued that under the Alberta legislation already in place, it would be exempt from the requirement for renewable fuels that applies to those who produce, import and sell fuel. Groupe Candiac made a similar case by pointing out that it has all the provincial and municipal authorizations required, which already contain measures to protect the Western Chorus Frog, to continue with the development of its lands in the area to which the Emergency Order applies.

183 Justice Zinn noted that even if the general intent of the contested regulatory provision was to complete the provincial legislative measures in place, it would nevertheless prevail over those measures and, in so doing, encroach on certain elements of the provincial legislation on the matter. He concluded that it tended toward more serious encroachment on provincial jurisdictions (*Syncrude FC*, at paragraph 94).

184 We can say the same of subparagraph 80(4)(c)(ii).

c) History of legislating on the matter in question

185 Justice Zinn noted that Parliament had already invoked its power to legislate criminal law to validate regulatory schemes, particularly with respect to protection of the environment. He also noted that the provinces had also legislated regarding the use of renewable fuels. He concluded that this third factor was neutral (in the original version of the judgment: "In my view, this factor is therefore neutral") (*Syncrude FC*, at paragraph 96).

186 In this case, as we have seen, Quebec has also legislated to protect threatened or vulnerable species. Thus, it took an interest in the Western Chorus Frog, which it declared a "vulnerable wildlife species" and adopted a recovery plan to slow the decline of its population.

187 Like Justice Zinn, I conclude that this third factor is neutral and adopt the general conclusion of his analysis of the ancillary powers doctrine, with the necessary modifications:

> [97] Overall, I conclude that had it been found that the [Impugned regulation], was ultra vires the federal government, the intrusion of the ancillary provisions into provincial powers would not be serious enough to warrant striking it down. The regulations are enacted under broad heads of power and only intrude on other broad heads of power. While they override some aspects of provincial legislation, in most respects, they seek to complement it. Finally, Parliament has a history of legislating to protect the environment and although the provinces have some history of legislating on the issue of renewable fuels, in my view, this is insufficient to demonstrate that the intrusion into provincial powers is serious.

188 In summary, it is my opinion that subparagraph 80(4)(c)(ii) is constitutionally valid as a measure of criminal law. If I am wrong and in pith and substance, it turns out to be *ultra vires* Parliament, I think, in this case, it would be saved by the ancillary powers doctrine in that a rational and functional link connects it to a broader legislative scheme, the Act, which is otherwise valid.

189 However, I would like to clarify that my conclusion on the constitutional validity of subparagraph 80(4)(c)(ii) is only true to the extent that the emergency order is made in a context in which, in the opinion of the competent minister, the species under the order, pursuant to subsection 80(2) of the Act, faces imminent threats to its survival or recovery.

190 I am making this clarification because in *Adam v. Canada (Environment)*, 2011 FC 962[*Adam*], the Chief Justice of this Court listed a number of general principles regarding the interpretation of section 80 of the Act. One of these principles is that the wording of subsection 80(1) is sufficiently broad to permit the Governor in Council to make an emergency order on the recommendation of the competent minister *in situations other than those in subsection 80(2)* (*Adam*, at paragraph 39) [Emphasis added].

191 This case does not concern the constitutionality of subparagraph 80(4)(c)(ii) in an application context other than the one in subsection 80(2) of the Act. This broader question was not asked of me and I did not have to answer it to complete the determination of this case.

192 Now all that remains is to determine whether the Emergency Order constitutes a form of disguised expropriation.

B. Is the Emergency Order void on the grounds that it constitutes a form of expropriation without compensation?

(1) Groupe Candiac's position

193 Groupe Candiac argues that while the measure is constitutionally valid, the Emergency Order must nevertheless be invalidated because it has long been accepted that unless it is expressly authorized by the Act, a public authority cannot, without paying compensation, impose on a property owner restrictions amounting to confiscation of property. Otherwise, it said, this constitutes a form of disguised appropriation giving rise to a claim to nullify the expropriative measure.

194 It argues that the prohibitions imposed by the Emergency Order are such that it cannot make reasonable use of its land in the Order's application area. Thus, it has been deprived of the fundamental attributes of its property rights on this land. In concrete terms, Groupe Candiac stated that the Emergency Order will prevent the construction of about 353 of the 1,727 living units that it had reason to believe it could build on this land. It added that the Emergency Order will force it to incur substantial costs by requiring it to build a retention pond on the constructible part of its properties adjacent to the area to which the Order applies and to build a service lane the length of the existing highway.

195 Groupe Candiac argues that section 952 of the *Civil Code of Québec* [CCQ], which stipulates that no owner may be compelled to transfer his ownership except by expropriation according to a law for public utility and in return for a just and prior indemnity, as well as the common law rule of *de facto* expropriation, which creates a rule of construction according to which the confiscation of property rights by the government necessarily includes the obligation to offer compensation unless the legislation at issue expressly indicates that no such compensation will be paid, arguing in favour of the nullity of the Emergency Order.

196 It argues in this regard that paragraph 64(1)(b) of the Act, which gives the Minister the authority to provide fair and reasonable compensation for the losses suffered "as a result of any extraordinary impact of the application of ... an emergency order" does not prevent section 952 of the CCQ or the common law rule of *de facto* expropriation from being applied because the Governor in Council has not always made it, as required in subsection 64(2) of the Act, the regulations supporting the exercise of power vested in the Minister pursuant to subsection 64(1).

197 Subsection 64(2) of the Act reads as follows:

> **Regulations**
>
> (2) The Governor in Council shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing
>
> (a) the procedures to be followed in claiming compensation;
>
> (b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and
>
> (c) the terms and conditions for the provision of compensation.
>
> **Règlements**
>
> (2) Le gouverneur en conseil doit, par règlement, prendre toute mesure qu'il juge nécessaire à l'application du paragraphe (1), notamment fixer:

a) la marche à suivre pour réclamer une indemnité;

b) le mode de détermination du droit à indemnité, de la valeur de la perte subie et du montant de l'indemnité pour cette perte;

c) les modalités de l'indemnisation.

198 Therefore, according to Groupe Candiac, without application regulations, the Minister has no authority to exercise its power to compensate. The result, it argued, is that the Act should be read as though it has no compensation plan for losses resulting from an emergency order, which opens the door to applying the aforementioned private law rules.

(2) Attorney General's position

199 The Attorney General maintains that the Groupe Candiac's argument strays from the actual question at issue at this stage, which is whether the Emergency Order is *ultra vires* the enabling provision under which it was made, a question that must be resolved with a review of the Order and section 80 of the Act. In his view, this review led to an inescapable result: the Governor in Council had all the authority needed to make the Emergency Order, even if it infringed on Groupe Candiac's property rights because the power to grant compensation under such circumstances does not rest with the Governor in Council, but rather with the Minister.

200 Thus, according to the Attorney General, the fact that compensation was not paid has no bearing on the emergency order made under section 80 and does not render it *ultra vires a posteriori*, because, based on the terms of the Act, it is the product of a decision made by another decision maker and this decision is necessarily made after the order.

201 The Attorney General also claimed that the doctrine of de facto expropriation, which is merely an interpretive presumption, is without effect in this case because there is no silence to fill, the Act, in section 64, provides for the possibility of compensation for those affected by an emergency order. This type of presumption, he continued, must yield when there is a clear provision or, in the case of incompatibility with the intention of Parliament, which is not the case.

202 Finally, the Attorney General argues that there is no disguised expropriation or de facto expropriation because Groupe Candiac has not demonstrated that the federal government has acquired a beneficial interest in the land subject to the Emergency Order or that all the reasonable uses of this land have been removed because the Emergency Order was made, the reasonable uses of land not being limited to profitable use.

203 Moreover, he says that Groupe Candiac's submissions on the scope of harm it believes it has suffered in this case are not supported by the evidence on record. He argues that 20% of Groupe Candiac's remaining lands are in the area to which the Emergency Order applies and that a large part of it is wetlands, and therefore land more likely to be subject to protection measures.

(3) The concepts of the de facto expropriation or disguised expropriation have no impact on the validity of the Emergency Order.

204 Like the Attorney General, I am of the view that de facto expropriation or disguised expropriation, which are part of common law and civil law, are of no hope to Groupe Candiac in this case. In other words, the question of the validity of the Emergency Order does not pass with these concepts because Parliament has already provided, in clear terms, a mechanism to compensate for losses suffered following the application of an emergency order and defines the scope of any "extraordinary impact" of such an order.

205 This is not a regulation justifying the application of the rule of construction, which aims to protect a land owner from dispossession from his or her lands without compensation. There is no silence to fill in the Act in this regard, Parliament's intent has been clearly expressed in section 64 of the Act.

206 But what about the absence of regulations pertaining to the Minister's power to pay compensation in relation to the application of an emergency order. Does it prevent the exercise of this power, as Groupe Candiac claims and, in so doing, the application of the concepts of de facto expropriation and disguised expropriation. I do not believe so.

207 It is well established that an administrative decision-maker cannot invoke the absence of a regulation to not act when this inaction is equivalent to stripping a law or countering its application. We want to avoid creating a legal vacuum, thereby giving rise to an abuse of power by conferring to the regulatory authority [TRANSLATION] "a dimension that allows the Administration to indefinitely strip the legislature's express will" (Patrice Garant, *Droit Administratif*, 7th Ed., Montreal, Yvon Blais, 2017 [*Garant*], at pages 215-216). The principles only apply to the exercise of regulatory power, be it facultative or imperative, like in this case (*Garant*, at page 215). They are particularly useful in the absence of a regulation, if it was interpreted as having prevented the application of the legislation, or depriving the offender of a benefit conferred by it (*Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787, at page 795).

208 This is what the Minister seems to have understood in this case, by releasing a statement to address the question of owners' rights to compensation for lands situated in the area to which the Emergency Order applies. I remember that it publicly stated no compensation would be paid. Although it did not address the situation of each owner affected, in my view, a decision was made pursuant to subsection 64(1) of the Act.

209 However, this decision, which comes from a decision maker other than the Governor in Council, is in itself, judicially controllable, independent of the Emergency Order (*Habitations Îlot St-Jacques Inc. v. Canada (Attorney General)*, 2017 FC 535[*Îlot St-Jacques*]). While it is necessarily related, the Minister's decision has no impact on the powers exercised by the Governor in Council under section 80 of the Act. As stated by the Attorney General, this type of decision assumes that an emergency order was made previously.

210 Note that the *Îlot St-Jacques* case involved another owner who had lands in the area to which the Emergency Order applied. That owner argued that the Emergency Order had to be invalidated because it was enacted without first consulting the owners who might be involved. He argued that the Emergency Order was made in violation of the rules of procedural fairness (*Îlot St-Jacques*, at paragraph 17).

211 Once his judicial review began, this owner also wanted to tackle the fact that he had not been paid any compensation after the Emergency Order was made. Thus, he tried to amend his pleadings to force the Governor in Council to adopt the regulatory framework contemplated by subsection 64(2) of the Act. This application was denied by prothonotary Richard Morneau. This refusal was confirmed on appeal by Justice Yvan Roy for the reason that it "is less of an amendment and more of a different application for judicial review" (*Îlot St-Jacques*, at paragraph 15).

212 In the opinion of Justice Roy, it seems indisputable that the amendment, if accepted, would allow in a single application for judicial review, [TRANSLATION] "the dispute of two different decision-making processes with different and independent factual and legislative dynamics" (*Îlot St-Jacques*, at paragraph 23). In particular, he saw no reason to intervene because prothonotary Morneau accepted the respondents' argument that the loss of value of a piece of land located in the area to which an emergency order applied is "completely irrelevant to an application for judicial review to overturn an order to protect a species at risk" (*Îlot St-Jacques*, at paragraph 28).

213 While it was first and foremost founded on procedural considerations, this case, the findings of which I fully support, in my view, strengthens the idea that when an emergency order is made under section 80 of the Act, any debate surrounding the lack of compensation is not relevant in determining the validity of the order, regardless of the basis for the alleged invalidity. Such a debate challenges, to paraphrase Justice Roy, a different decision-making process that meets a different and independent factual and legislative dynamic.

214 This challenge was open to Groupe Candiac and perhaps still is. However, it has its own dynamic, which is distinct and independent from the dynamic associated with the challenge of the Emergency Order itself, the validity of which needs to be

assessed considering the presence of section 64 of the Act, without having to address the matter of compensation and without having to look at the concepts of de facto expropriation and disguised appropriation.

215 These concepts do not apply in this case and the second issue must therefore be answered in the negative.

216 Having concluded that the Emergency Order will not be invalid for any of the reasons given by Groupe Candiac, this application f or judicial review will be dismissed. The Attorney General asks for his costs. Considering the outcome of the case, the Attorney General is entitled to them.

JUDGMENT IN T-1294-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in favour of the respondent.

Application dismissed.

Tab 3

2016 NSCA 59
Nova Scotia Court of Appeal

Nova Scotia Barristers' Society v. Trinity Western University

2016 CarswellNS 623, 2016 NSCA 59, 1185 A.P.R. 1, 267 A.C.W.S. (3d) 836, 362 C.R.R. (2d) 248, 376 N.S.R. (2d) 1, 401 D.L.R. (4th) 56, 6 Admin. L.R. (6th) 18

The Nova Scotia Barristers' Society (Appellant) v. Trinity Western University and Brayden Volkenant (Respondents) and Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, The Catholic Civil Rights League and Faith and Freedom Alliance, The Attorney General of Canada, The Evangelical Fellowship of Canada and Christian Higher Education Canada, Justice Centre for Constitutional Freedoms, Schulich School of Law OUTlaw Society, The Advocates' Society, Canadian Bar Association, Christian Legal Fellowship, The Canadian Secular Alliance (Intervenors)

Fichaud, Beveridge, Farrar, Bryson, Bourgeois JJ.A.

Heard: April 6-8, 2016
Judgment: July 26, 2016
Docket: C.A. 438894

Proceedings: affirming *Trinity Western University v. Nova Scotia Barristers' Society* (2015), 355 N.S.R. (2d) 124, 1123 A.P.R. 124, 2015 NSSC 25, 2015 CarswellNS 47, 381 D.L.R. (4th) 296, 91 Admin. L.R. (5th) 65, 328 C.R.R. (2d) 138, [2015] N.S.J. No. 32, Jamie S. Campbell J. (N.S. S.C.)

Counsel: Marjorie A. Hickey, Q.C., Peter Rogers, Q.C., Jane O'Neill for Appellant
Brian Casey, Q.C., Kevin Sawatsky for Respondents
André Marshall Schutten for Association for Reformed Political Action (ARPA) Canada
Barry W. Bussey for Canadian Council of Christian Charities
Philip H. Horgan for Catholic Civil Rights League and Faith and Freedom Alliance
Albertos Polizopoulos, Kristin Debs for Evangelical Fellowship of Canada and Christian Higher Education Canada
Jay Cameron for Justice Centre for Constitutional Freedoms
Jack Townsend for Schulich School of Law OUTlaw Society
Bruce T. MacIntosh, Q.C. for Advocates' Society
David Grossman, Amy Sakalauskas, Susan Ursel for Canadian Bar Association
David St. Clair Bond, Derek B.M. Ross, Deina Warren for Christian Legal Fellowship
Tim Dickson, Catherine George for Canadian Secular Alliance

***Per curium*:**

1 Trinity Western University is a private institution in Langley, British Columbia. Founded by the Evangelical Free Church of America, it opened as a junior college, then obtained the right to grant university degrees. Trinity Western aims to add a law degree to its offering of 42 undergraduate majors and 17 graduate programs. That objective has situated it in the spotlight of Canada's legal community.

2 In December 2013, the Federation of Canadian Law Societies approved Trinity Western's proposed law degree. Then the Nova Scotia Barristers' Society undertook broad consultations that culminated in a resolution and regulation to restrict the ability of Trinity Western's law graduates to article in Nova Scotia.

3 Trinity Western and Mr. Volkenant, a prospective law student, applied to challenge the Society's statutory authority to pass the resolution and regulation. They also submitted that, if the resolution and regulation were *intra vires* the legislation, they infringed the applicants' religious and associational freedoms under the *Charter of Rights and Freedoms*. A judge of the Supreme Court of Nova Scotia agreed. The judge held that the resolution and regulation overstepped the Society's statutory authority and, in the alternative, unjustifiably infringed the *Charter* freedoms of Trinity Western and Mr. Volkenant. The Society appeals.

4 We dismiss the appeal. The Society did not have the statutory authority to enact the regulation or adopt the resolution. We do not comment on the *Charter* issues.

Background

5 Trinity Western is a private university. It operates under the aegis of the Evangelical Free Church of Canada, and views itself as "an arm of the Church". It was chartered by the *Trinity Junior College Act*, S.B.C. 1969, c. 44. That statute said the College would educate its students "with an underlying philosophy and viewpoint that is Christian". The College later changed its name to Trinity Western University. Since 1984, Trinity Western has belonged to the Association of Universities and Colleges of Canada. Its degrees, including those in nursing and teaching, have been recognized as academically sound in British Columbia and elsewhere. Its enrollment approximates 4,000.

6 It is not Trinity Western's academic standards that have attracted critics' attention. Rather, it is the "Community Covenant" to which all students and staff must adhere. The Covenant is an encompassing code of conduct that, in addition to mundane items, prohibits sexual intimacy outside the marriage between a man and a woman. Excerpts from the Covenant include:

> The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:
>
> . . .
>
> • Observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce...
>
> . . .
>
> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:
>
> . . .
>
> • Sexual intimacy that violates the sacredness of marriage between a man and a woman...
>
> . . .
>
> ... according to the Bible, sexual intimacy is reserved for marriage between one man and one woman ... .

7 Trinity Western's student body includes LGBTQ students. The Covenant prohibits harassment based on sexual orientation.

8 The Covenant governs the student's term at Trinity Western in British Columbia. It does not govern post-graduation activities, such as articling or law practice. Discipline for non-compliance may include suspension or expulsion from Trinity Western.

9 The Covenant has prompted a harsh reaction from the legal community and beyond. It is castigated as a discriminatory infringement of legally protected equality rights of members of the LGBTQ community. Trinity Western and its supporters say the Covenant manifests their genuine beliefs that are protected in a pluralistic society governed by constitutional freedoms of religion, conscience and association. From strongly held opposing convictions, conflict may emerge.

10 Having developed its plan for a law school and its proposed curriculum, Trinity Western sought approval from the Federation of Canadian Law Societies. The Federation represents the 14 law societies in Canada, and has adopted uniform standards for law school curricula. In the decision under appeal, Justice Campbell described the process that followed:

> [45]... After a process that involved consultation with lawyers, judges and legal academics TWU made a presentation to the Federation of Canadian Law Societies (the "Federation"). The Federation is the national coordinating body of the 14 law societies that govern lawyers and notaries across the country. One of its functions is to develop national standards of regulation. Each law society in the common law provinces and territories requires applicants for bar admission to hold a Canadian common law degree or its equivalent. The Federation adopted a uniform national requirement for Canadian common law programs in 2010. The Approval Committee is the body responsible for making the determination as to whether a degree complied with those national standards.
>
> [46] Canadian law societies had agreed to rely on the recommendations of the Approval Committee. That approval would be required for graduates of the school of law to be able to practise in Canada.
>
> [47] By a letter dated 22 April 2013 the Federation advised TWU that it would be establishing a Special Advisory Committee to consider the effect of the Community Covenant on the Federation's decision whether or not to approve the proposal. That Special Advisory Committee had the mandate to consider what additional considerations should be taken into account in determining whether future graduates of TWU's proposed law school should be eligible for admission into any of Canada's law societies, given the requirement that students sign the Community Covenant. The Special Advisory Committee was to take into account all representations that had been received, the applicable law, including the *Charter* and the Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of Teachers*, and any other information that the committee decided was relevant.
>
> [48] The Special Advisory Committee released its final report in December 2013. It found that there was no public interest reason for preventing graduates of the JD Program at TWU from practising law. The Special Advisory Committee acknowledged the arguments raising important issues of equality rights and freedom of religion. If the Approval Committee concluded that the TWU proposed law school met the national requirement there was no public interest bar to the approval of the school.
>
> [49] The Approval Committee approved the law degree from TWU's proposed law school and in doing so referenced and relied on TWU's statements that it was fully committed to addressing ethics and professionalism, that it recognized its duty to teach equality and to promulgate non-discriminatory practices, and that it would ensure that students understood the full scope of protections from discrimination based on sexual orientation. That approval would be followed by an annual review.

11 The Nova Scotia Barristers' Society, through its 21 member Council, regulates the legal profession in Nova Scotia. Its authority stems from the *Legal Profession Act*, S.N.S. 2004, c. 28 and the regulations, enacted by the Society's Council, under that *Act*.

12 At the time of the Federation's approval, the Society's regulations provided simply for the adoption of the Federation's sanctioned law degree. In early 2014, Regulations 3.3.1 and 3.1(b)(i) under the *Legal Profession Act* said:

> -3.3.1 An applicant for enrolment as an articled clerk must:
>
> . . .
>
> (d) have a law degree;
>
> -3.1 In this Part
>
> . . .

(b) "law degree" means

(i) A Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification...

13 Trinity Western's Covenant discomforted the Society. In January 2014, the Society began a consultative process to determine its response should Trinity Western's law graduates apply for articles in Nova Scotia. After two public meetings and hearing Trinity Western's presentation, and with the benefit of over 150 written submissions, on April 16, 2014 the Society's Executive Committee submitted a report to the Society's Council. The Report summarized 3 options:

> The Federation of Law Societies of Canada (FLSC) Approval Committee has granted preliminary approval of the TWU Law School. A Special Advisory Committee of the FLSC has determined that there is no public interest reason to exclude future graduates of the program from law society bar admission programs as long as the program meets the National Requirement, and has noted that each Law Society must make its own decision about the admission of law school graduates. The Nova Scotia Barristers Society (NSBS) held a public consultation that provided for written and oral submissions from members of the public, the profession, students, clergy, and representatives from TWU. This report identifies three (3) options available to Council:
>
> A — Accept the FLSC Approval Committee conclusion and approve the TWU Law School
>
> B — Decline to approve TWU Law School
>
> C — Conditionally approve TWU Law School

14 For Option C, the Report noted:

> It is neither the responsibility nor the right of the NSBS to revise the Community Covenant so, in the context of the historical discrimination in the Nova Scotia justice system, the consequence of TWU preserving the Covenant in its present form is that its law school graduates should not be enrolled in the articling program in Nova Scotia.
>
> TWU has the power to take action to address this discrimination. The University can continue to believe in the sanctity of marriage between a man and a woman so long as the actions it takes in that regard do not negatively affect LGBT individuals. Given the work of the Federation Approval Committee, TWU has an acceptable proposal in all respects other than the Community Covenant. If TWU were to change the Covenant or exempt law students from the Covenant, the school can be approved in Nova Scotia. This approach would minimally impair freedom of religion and promote equality. It balances the competing values by placing freedom of choice on the school rather than on students, and by allowing TWU to find an appropriate and lawful way to promote and practice its religious freedom in a manner that respects the equality of all Canadians.

15 At its meeting on April 25, 2014, the Society's Council accepted Option C. The minutes record a vote of 10 to 9 with one abstention. The resolution reads:

> Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted; the TWU program will meet the national requirement;
>
> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University unless TWU either:
>
> i) exempts law students from signing the Community Covenant; or
>
> ii) amends the Community Covenant for law students in a way that ceases to discriminate.

Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

Council remains seized of this matter to consider any information TWU wishes to present regarding compliance with the condition.

16 There were no further written reasons. The Council's resolution of April 25, 2014 ("Resolution") is a target in this litigation.

17 On May 29, 2014, Trinity Western and Mr. Volkenant filed with the Supreme Court of Nova Scotia a Notice of Judicial Review to quash the Resolution. Mr. Volkenant is an evangelical Christian and a graduate of Trinity Western's undergraduate program. He believes in the precepts of the Covenant and wants to be a lawyer. Trinity Western and Mr. Volkenant challenged the NSBS' statutory authority to pass the Resolution, and alternatively claimed that the Resolution infringed their *Charter* freedoms.

18 On June 23, 2014, the Society filed a Notice of Participation, requesting that the application for judicial review be dismissed with costs.

19 On July 23, 2014, the Society's Council adopted a motion that amended Regulation 3.1(b)'s definition of "law degree", by adding the following italicized words:

3.1 Interpretation

(b) "law degree" means

(i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, ***unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the Charter of Rights and Freedoms and the Nova Scotia Human Rights Act***.

(ii) a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee ***unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the Charter of Rights and Freedoms and the Nova Scotia Human Rights Act***.

20 The amendment of July 23, 2014 ("Amended Regulation") is the second target of this litigation.

21 Normally a resolution would follow the enactment of the law upon which the resolution is based. Here the order was reversed. The April Resolution was premised on an unformulated future amendment of Regulation 3.1(b). In its submissions during the litigation, the Society urged that the Resolution and the Amended Regulation be considered as complementary and indivisible. In the Court of Appeal, Trinity Western took no issue with that approach.

22 We return to the chronology. On August 21, 2014, the Society moved in chambers to include the validity of the Amended Regulation in the issues to be litigated. Justice Coady's Order of October 6, 2014 granted that motion and the parties' request to file supplementary affidavits, and converted the proceeding to "a combined Application for Judicial Review and Application in Court". The combined application challenged both the Resolution and the Amended Regulation. Various parties sought and obtained intervenor status.

The Proceeding in the Supreme Court

23 On December 16-19, 2014, Justice Jamie Campbell heard the combined applications. The parties filed affidavits and tendered exhibits by consent.

24 On January 28, 2015, the judge issued a written decision, followed by an Order on March 26, 2015 and a costs decision on April 21, 2015. The judge granted Trinity Western's motion for judicial review, quashed the Society's Resolution and held that the Amended Regulation was invalid. He directed the Society to pay costs of $70,000.

25 We will summarize the judge's reasons.

26 Justice Campbell identified an administrative or *vires* issue, and a constitutional issue:

> [128] There are really two broad legal issues. The first is the administrative law question of whether the NSBS, in refusing to accept a law degree from TWU, was attempting to regulate a law school or was upholding and protecting the public interest in the practice of law in Nova Scotia. The former it cannot do. The latter it can.
>
> [129] The second issue is a constitutional law matter. It is whether the NSBS appropriately considered and applied the balancing of the *Charter* rights to equality and freedom of religion.

27 On the first issue, the judge held that the Resolution and Amended Regulation were unauthorized by the *Legal Professions Act*. On the second, he held that the Resolution and Amended Regulation infringed Trinity Western's freedom of religion under s. 2(a) of the *Charter* and the infringement was unjustified by s. 1.

28 In our view, the first issue determines the outcome of this appeal. We will confine our synopsis of the judge's reasoning to that matter.

29 The judge (paras. 156-58) held that the standard of review for *vires* was reasonableness under *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.).

30 Justice Campbell held that the *Legal Professions Act* defined the Society's mandate, in the words of s. 4(1), "to uphold and protect the public interest in the practice of law". He said:

> [166] The purpose of the NSBS under the *Legal Profession Act* is to "uphold and protect the public interest in the practice of law". It is not an expansive mandate to oversee the public interest generally, or all things to which the law relates. It is a mandate to regulate lawyers and the practice of law as a profession within Nova Scotia. In order to have any authority over a subject matter, a person or an institution, that subject, matter, person or institution has to relate to or affect the practice of law. Both the federal income tax reporting requirements and the *Civil Procedure Rules* affect lawyers and the practice of law but they are not part of regulation of the profession. In order for the NSBS to take action pertaining to TWU, that institution must in some way affect the practice or the profession of law in Nova Scotia.

31 The judge turned to the Resolution and Amended Regulation. He found that the Society's objective was to regulate the conduct of Trinity Western in British Columbia, not the practice of law in Nova Scotia:

> [168] Once the graduate applies for an articling position in Nova Scotia the NSBS can determine whether or not he or she should be permitted to article. The profession of law is no place for the bigoted or the intolerant. The NSBS has agreed that TWU graduates will be no less willing and capable to comply with ethical requirements to respect LGBT equality rights than anyone else. TWU graduates receive proper training in the ethical issues regarding non-discrimination and equality. There is no reason to place any additional burden on TWU graduates to make sure that they are willing to comply with their ethical obligations. Refusing to accept a TWU law degree has nothing to do with weeding out bigoted or intolerant lawyers.
>
> [169] The NSBS has an obligation [to] make sure that students have the appropriate legal education in order to equip them to practice law in Nova Scotia. The NSBS has the authority to establish qualifications for those seeking admission to the profession. Under that authority it has passed regulations that allow the NSBS to define what law degrees it will accept. The NSBS of course does not have the authority to define what is or is not a "law degree" in Nova Scotia or anywhere else. That is an academic degree and a matter over which the NSBS has no legal authority. Its definition of the degree is for its own regulatory purposes only.

. . .

[172] The regulation passed to implement the resolution focuses on whether the university that grants the law degree, in the opinion of the Council, discriminates in its policies. Once again, though couched in terms of approving the law degree, the action is directed toward the institution of the law school and not the quality of the law degree, or the qualification or lack of qualification of the student or potential lawyer in Nova Scotia.

32 Justice Campbell held that the *Legal Profession Act* gave to the Society no authority to regulate law schools, in British Columbia or Nova Scotia:

[173] The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. There are other regulators in Nova Scotia and in other provinces who have the authority to determine how degree-granting institutions function, including whether they comply with human rights legislation, workplace safety regulations, employment standards regulations, charitable status reporting requirements, and the entire intricate legal web of obligations that apply to post-secondary educational institutions. Legal practice and legal education are now quite different things. Many people receive a legal education and never practice or intend to practice law. An interpretation of the *Legal Profession Act* that supported NSBS general regulatory power over every law school in Canada would undoubtedly prompt a deluge of articles in learned legal journals in support of the traditional independence of those institutions.

[174] The NSBS has no authority whatsoever to dictate directly what a university does or does not do. It could not pass a regulation requiring TWU to change its Community Covenant any more than it could pass a regulation purporting to dictate what professors should be granted tenure at the Schulich School of Law at Dalhousie University, what fees should be charged by the University of Toronto Law School, or the admissions policies of McGill. The legislation, quite sensibly, does not contain any mechanism for recognition or enforcement of NSBS regulations purporting to control how university law schools operate because it was never intended that they would be subject to its control. If it did, the operations of every law school in the country would be subject to the varying requirements of, potentially, 14 law societies. Each could require, for its purposes, that harassment policies reflect its protocols and the human rights legislation in its own jurisdiction, or require admission policies that prefer the equity-seeking group that each law society determines has been most historically disadvantaged.

[175] The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. But the NSBS has used the arbitrary on-off definition of "law degree" to impose a penalty on the graduate. When a body purporting to act under legislative authority imposes a sanction in response to non-compliance with its directives, that's regulation. The NSBS is attempting to regulate TWU and its policies.

33 Justice Campbell concluded:

[181] The NSBS did not act reasonably in interpreting the *Legal Profession Act* to grant it the statutory authority to refuse to accept a law degree from TWU unless TWU changed it[s] Community Covenant. It had no authority to pass the resolution or the regulation.

34 On May 5, 2015, the Society filed a Notice of Appeal. The next day, Trinity Western filed a Notice of Contention. Many parties have intervened to support one side or the other.

Issues

35 The Society's Notice of Appeal cites these grounds:

1. The Court erred in law by concluding that the Nova Scotia Barristers' Society (the "Society") had purported to regulate a law school in British Columbia, as opposed to defining a law degree for the purposes of admission to the Society, a matter clearly within the Society's jurisdiction;

2. The Court erred in law in concluding that the Society had no authority to pass the impugned resolution and the impugned regulation respecting the definition of a law degree, by failing to properly analyze and give weight to the broad statutory authority and mandate of the Society under the *Legal Profession Act*, SNS 2004, c 28;

3. The Court properly identified reasonableness as the standard of review, but erred in law by failing to apply that standard to the reasonableness of the Society's interpretation or application of its statutory mandate;

4. The Court erred in law by failing to consider:

(a) the application of the *Charter* to the actions of the Society;

(b) the Society's obligations to consider the *Charter* when exercising its statutory authority and mandate; and

(c) the Society's obligation to exercise its statutory authority and mandate in a non-discriminatory way, including an obligation to not condone discrimination;

5. The Court erred in law by concluding that no equality rights under section 15(1) of the *Charter* were engaged in the Society's decisions, or ought to have been considered by the Society in its decisions, in relation to the impugned resolution and regulation;

6. The Court properly identified reasonableness as the standard of review when balancing freedom of religion and equality rights, but erred in law by not accepting that the Society reasonably concluded that any infringement of freedom of religion was outweighed by equality rights and values, or alternatively that any infringement of freedom of religion was a reasonable limit justified pursuant to s. 1 of the *Charter*;

7. In reaching its conclusions, the Court erred in law by:

(a) relying on evidence that was not before it; and

(b) ignoring relevant evidence before it;

and

8. Such other grounds as may appear.

36 Trinity Western's Notice of Contention contests Justice Campbell's choice of the reasonableness standard of review for the *vires* issues:

1. The resolution of the Nova Scotia Barristers' Society under review is subject to a correctness standard of review; and

2. The regulations under review are subject to a correctness standard of review.

37 The submissions restructured some of the formal grounds. Points that were mentioned in the factums were expanded in exchanges with the bench over three days of argument. Fully canvassed in the exchanges at the appeal hearing was this issue:

> What is the effect on the validity of both the Amended Regulation and the Resolution of the criterion "unlawfully discriminates ... on grounds prohibited by either or both of the *Charter of Rights and Freedoms* or the Nova Scotia *Human Rights Act*" in the Amended Regulation?

38 As we will explain, the Amended Regulation is *ultra vires* the *Legal Profession Act*. So the Amended Regulation, and the Resolution that depends on it, are invalid. That disposes of the matter. This Court will not comment on either (1) Trinity Western's claimed infringement of s. 2(a) of the *Charter* or (2) whether such an infringement, if it exists, would be either justified under s. 1 and *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), or proportionate under *Doré c. Québec (Tribunal des professions)*, [2012] 1 S.C.R. 395 (S.C.C.) and *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613 (S.C.C.).

39 We will organize the *vires* issues as follows:

1. What standards of review govern whether the Amended Regulation and the Resolution are authorized by the *Legal Profession Act*?

2. Is the Amended Regulation *intra vires* the *Legal Profession Act*?

3. Is the Resolution authorized by the *Legal Profession Act* and its Regulations?

4. If the Amended Regulation is *ultra vires* and the Resolution is unauthorized, should the Court determine what alternative wording in a regulation and resolution would be *intra vires* and authorized by the *Legal Profession Act*?

Issue # 1 — What Standards of Review?

40 The Society says that, to pass its Resolution and enact its Amended Regulation, the Society interpreted its home statute and is owed deference. Though Justice Campbell cited reasonableness, the Society contends that he applied correctness. Trinity Western submits the Society's authority to enact the Amended Regulation and pass the Resolution are both reviewable for correctness.

41 In our view, distinct standards of review govern Council's different functions. The enactment of a regulation and the adoption of a resolution engage separate principles of judicial scrutiny.

42 *The Amended Regulation:* The Council's enactment of the Amended Regulation exercised a subordinate legislative function.

43 In *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, [2013] 3 S.C.R. 810 (S.C.C.), Justice Abella for the Court explained the approach to assess the *vires* of subordinate legislation:

> [24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:
>
> > In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.
> >
> > (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)
>
> [25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that,

where possible [Justice Abella's emphasis], the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach... consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

> ... the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).

44 The *Katz* standard governs whether the Amended Regulation is *intra vires* the *Legal Profession Act*.

45 The *Katz* standard is not *Dunsmuir* 's reasonableness. *Dunsmuir* governs adjudicative or discretionary administrative decisions. In *Canadian National Railway v. Canada (Attorney General)*, [2014] 2 S.C.R. 135 (S.C.C.), Justice Rothstein for the Court noted the distinction:

> [51] This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review of a s. 40 adjudicative decision of the Governor in Council.

46 The *Katz* principles are not supplanted by *Doré* and *Loyola*. In *Loyola* (para. 4), Justice Abella said that *Doré* 's approach applies to "a discretionary administrative decision" (see also paras. 35 and 42). To the same effect: *Doré*, paras. 3-5, 36-38, 43, 56-58; *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80 (N.S. C.A.), leave to appeal refused February 18, 2016 [2016 CarswellNS 84 (S.C.C.)], para. 38; *LIUNA, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40 (N.S. C.A.), para. 122. The Council's enactment of the Amended Regulation was a subordinate legislative function, not a discretionary administrative decision. *Doré* and *Loyola* do not govern the *vires* of subordinate legislation.

47 *The Resolution:* The Council's adoption of the Resolution was an administrative decision. Whether the Resolution was authorized by the *Legal Profession Act* and its regulations is governed by *Dunsmuir's* reasonableness. To the extent the

Resolution engages Trinity Western's *Charter* rights, the proportionality test from *Doré* and *Loyola* would apply: *i.e.* the court would determine whether the Resolution has proportionately balanced the *Charter* values and statutory objectives.

Issue # 2 — Is the Amended Regulation Intra Vires the Act?

48 *Katz* directs the Court to consider the scheme of the *Legal Profession Act — i.e.* its wording, context and objective and the Society's statutory mandate, interpreted purposively and broadly. *Katz* instructs that the impugned regulation benefits from a presumption of validity, and its purpose is interpreted liberally. It is *ultra vires* only if it is "irrelevant", "extraneous" or "completely unrelated" to its statutory authority. Neither the policy merits of the regulation nor the underlying "political, economic, social or partisan considerations" pertain to the inquiry.

49 First, the scheme of the *Legal Profession Act*.

50 Section 4 states the Society's purpose:

> 4(1) **The purpose of the Society is to uphold and protect the public interest in the practice of law.**
>
> (2) **In pursuing its purpose**, the Society shall
>
> (a) **establish standards for the qualifications** of those seeking the privilege of membership in the Society;
>
> (b) establish standards for the professional responsibility and competence of members in the Society;
>
> (c) regulate the practice of law in the Province; and
>
> (d) **seek to improve the administration of justice** in the Province by
>
> (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
>
> (ii) engaging in such other relevant activities as approved by the Council.
>
> [emphasis added]

51 Sections 2(ac) and 16(1) define "practice of law":

> 2. In this Act,
>
> . . .
>
> (ac) "practice of law" means the practice of law as described in subsection 16(1);
>
> 16 (1) The practice of law is the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct on behalf of another:
>
> (a) giving advice or counsel to persons about the persons legal rights or responsibilities or to the legal rights or responsibilities of others;
>
> (b) selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person;
>
> (c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;

(d) negotiating legal rights or responsibilities on behalf of a person.

52 Section 5 deals with membership. It includes:

5 (1) Subject to subsection (8), the following persons are members of the Society:

(a) lawyers registered on the Roll of Lawyers;

(b) articled clerks; and

(c) other persons who qualify as members under the regulations.

(2) No person may become a member of the Society or be reinstated as a member **unless the Council is satisfied that the person meets the requirements established by the regulations.**

. . .

(8) **The Council may make regulations**

(a) establishing categories of membership in the Society and prescribing the rights, privileges, restrictions and obligations that apply to those categories;

(b) **establishing requirements to be met by members, including educational**, good character **and other requirements**, and procedures for admitting or reinstating persons as members of the Society in each of the categories of membership;

(c) governing the educational program for articled clerks;...

[emphasis added]

53 Section 6 empowers the Society's Council:

6(1) The Council under the former Act is continued and is the governing body of the Society.

(2) The Council shall govern the Society and manage its affairs, and may take any action consistent with this Act that it considers necessary for the promotion, protection, interest or welfare of the Society.

(3) The Council may take any action consistent with the Act by resolution.

(4) Where there is a quorum at a meeting of the Council, the Council may exercise its powers under this Act notwithstanding any vacancies among the members of the Council.

(5) In addition to any specific power or requirement to make regulations under this Act, the Council may make regulations to manage the Society's affairs, pursue its purpose and carry out its duties.

[emphasis added]

54 Also pertinent to the Society's mandate is s. 28 from Part III, entitled "Protection of the Public":

28(1) The Society has jurisdiction over

(a) members of the Society in respect of their conduct, capacity and professional competence in the Province or in a foreign jurisdiction;

(b) persons who were members of the Society at the time when a matter regarding their conduct or professional competence occurred;

(c) lawyers from foreign jurisdictions in respect of their practice of law in the Province;

(d) members of the Society, who have been subject to a disciplinary proceeding in a foreign jurisdiction, in respect of the members' behaviour in a foreign jurisdiction and regardless of disciplinary proceedings taken in that jurisdiction.

55 In summary, the *Legal Profession Act* aims to uphold and protect "the public interest in the practice of law" [s. 4(1)]. To that end, the Society's Council may, among other powers: (1) enact regulations that establish educational and other requirements for membership [ss. 4(2)(a) and 5(8)(b)], (2) seek to improve the administration of justice in the Province [s. 4(2)(d)], and (3) act by resolution consistently with the *Act* [s. 6(3)].

56 We turn to the Amended Regulation.

57 The Amended Regulation added the passage that includes these italicized words:

3.1 Interpretation

(b) "law degree" means

(i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such a degree, ***unless Council***, acting in the public interest, ***determines that the university granting the degree unlawfully discriminates*** in its law student admissions or enrollment policies or requirements ***on grounds prohibited by either or both of the Charter of Rights and Freedoms and the Nova Scotia Human Rights Act***.

[emphasis added]

58 Regulation 3.1(b)(ii), governing civil law degrees, was similarly amended.

59 The amended wording prescribes that the Society's Council "determines" whether the University "unlawfully discriminates" under the *Charter* or Nova Scotia's *Human Rights Act*. If the University has a sustainable defence to a hypothetical challenge under the *Charter* or *Human Rights Act*, the University would not act "unlawfully". The Amended Regulation delegates to the Council the function of making this determination.

60 The Amended Regulation does not merely authorize the Council to weigh human rights or *Charter* values in the exercise of an administrative discretion to promote diversity in the practice of law. Nor does it just say the Council may consider a ruling, issued by a tribunal constituted under the *Human Rights Act* or a court of competent jurisdiction under the *Charter*, that the University has violated the *Human Rights Act* or *Charter*. Rather, the Amended Regulation directs the Council to make a free-standing determination whether the University "unlawfully" contravened the *Human Rights Act* and *Charter*.

61 The Society acknowledges that the *Charter* does not apply to Trinity Western. It is a private university. The Supreme Court has held that the *Charter* does not apply even to an autonomous public university: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.), paras. 40-47. The Supreme Court also has said that Trinity Western "is a private institution ... to which the *Charter* does not apply": *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772 (S.C.C.), para. 25. Trinity Western did not "unlawfully" violate an enactment that has no application to it.

62 Trinity Western's conduct respecting the Covenant occurred in British Columbia, not Nova Scotia. Nova Scotia's *Human Rights Act* applies to civil rights "in the Province": *Constitution Act, 1867*, s. 92(13). It has no application to events that occurred entirely outside Nova Scotia. At the appeal hearing, counsel for the Society was asked what would happen to a complaint filed

with Nova Scotia's Human Rights Commission alleging that Trinity Western's Covenant unlawfully violated Nova Scotia's *Human Rights Act.* Counsel replied that the complaint would be "thrown out on its ear" as extraterritorial.

63 Nothing in the *Legal Profession Act* authorizes the Society to issue an independent ruling that someone has violated Nova Scotia's *Human Rights Act*. Nor does the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended, contemplate the Society's intervention. The *Human Rights Act* says the Human Rights "Commission shall ... administer and enforce" the *Act* [s. 24(1)(a)]. A complaint is to be filed with the Human Rights Commission, and may be disposed of by the Commission or referred by the Commission for adjudication by a board of inquiry [ss. 29, 32A]. The *Human Rights Act* prescribes the constitution of and process for appointment of a board of inquiry, and the board of inquiry's procedure [s. 32A]. That procedure includes a public hearing with transcribed sworn evidence, written reasons and an appeal to the Court of Appeal on issues of law [ss. 33-36]. That is the Legislature's intended process leading to a determination whether someone has unlawfully discriminated under the *Human Rights Act*. The Amended Regulation circumvents every step of this process.

64 It is inconceivable that the Legislature, without expressing a supportive word in either the *Legal Profession Act* or the *Human Rights Act*, intended that the Society's Council could assert for itself an autonomous jurisdiction concurrent with that of a human rights board of inquiry.

65 Neither does the *Legal Profession Act* contemplate that the Council may enact a regulation that establishes Council as a court of competent jurisdiction under the *Charter* with the authority to rule that someone's conduct in British Columbia unlawfully violated the *Charter*.

66 The Council's structure and powers under the *Legal Profession Act* do not accommodate such a process. This is apparent from what occurred between April and July, 2014. A ruling of "unlawfulness" is supposed to follow an adjudication that applies facts to law. An adjudicatory tribunal does not determine a dispute by enacting its own legislation in mid-trial. The Resolution of April 25, 2014 said:

> Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

On July 23, 2014, Council enacted the Amended Regulation to justify its earlier Resolution. July 23, 2014 was the first appearance of the pivotal criterion — "Council ... determines that the university ... unlawfully discriminates". On April 25, 2014, the twenty members of Council who attended did not adjudicate the "unlawfulness" of Trinity Western's conduct; that criterion did not yet exist in Council's regulations. After April 25, 2014, there was no adjudication of anything, merely the enactment of the Amended Regulation by a vote among the twenty-two members of Council in attendance on July 23. If, at some point, the "unlawfulness" of Trinity Western's conduct under the *Charter* had been squarely addressed, then one would see some consideration of whether the *Charter* even applied to Trinity Western. In the shuffle, that critical factor escaped Council's attention.

67 The Amended Regulation's key criterion is that Council "determines" that the University "unlawfully discriminates" contrary to the *Charter* or Nova Scotia *Human Rights Act*. In our respectful view, under *Katz* 's test that criterion is completely unrelated to the Council's regulation-making authority under the *Legal Profession Act*.

68 We would dismiss the Society's appeal from the judge's ruling that the Amended Regulation is *ultra vires* the enabling legislation.

Issue # 3 — Is the Resolution Authorized?

69 The Resolution is invalid for two reasons.

70 *First:* The Society urges, and Trinity Western accepts, that the Resolution and Amended Regulation be treated as complementary and indivisible. For instance, the Society's brief of September 2, 2014 to the chambers justice said:

5. ... the NSBS Council passed a conditional resolution not to approve a degree from the proposed TWU law school, which was premised on the enactment of an amended Regulation.

. . .

7. Because the April Resolution could not be given effect without the amended Regulation, it is the language of the amended Regulation that must be considered in determining the jurisdictional issues raised by the Applicants. ...

. . .

12. ... The inclusion of the amended Regulation is not an "expansion of the proceedings", as suggested by the Applicants. It is indeed the very basis for the proceedings, as it is the instrument by which the April Resolution is given effect.

71 The Resolution is premised entirely on the Amended Regulation. If the Amended Regulation was valid, then clearly the Resolution would apply the Council's explicit mandate from the Amended Regulation. The Resolution's *vires* would be assessed for reasonableness under *Dunsmuir*, and Trinity Western's *Charter* claim would trigger *Doré/Loyola*'s proportionality test. Conversely, given that the Amended Regulation is *ultra vires* the *Legal Profession Act*, the Resolution has no support in the *Legal Profession Act* or the *Act*'s remaining regulations and is unreasonable under *Dunsmuir*.

72 *Second:* Even if the Amended Regulation were *intra vires*, the Resolution would be unauthorized. The Resolution assumed that Trinity Western had contravened the standard of the Amended Regulation.

73 The Amended Regulation requires that, before denying a Trinity Western law graduate, the Council must determine that Trinity Western "unlawfully discriminates" under the *Charter* or Nova Scotia's *Human Rights Act*. The *Charter* does not apply to Trinity Western. The Nova Scotia *Human Rights Act* does not apply to Trinity Western's conduct entirely in British Columbia. Trinity Western did not "unlawfully" discriminate under either enactment. The Resolution would not satisfy the Amended Regulation's stated condition.

74 *Result:* The Resolution is unauthorized and unreasonable under *Dunsmuir* 's standard of review. We dismiss the appeal from the judge's order that quashed the Resolution.

75 Because the Resolution is invalid, nothing has infringed or engaged Trinity Western's *Charter* freedoms. The first step of the *Doré* /*Loyola* test is not met: *Loyola*, paras. 4 and 39; *Bonitto*, para. 49. So there is no proportionality analysis to be performed under the second step.

Issue # 4 — What Wording Would be Intra Vires?

76 At the hearing of this appeal, the Society's counsel candidly acknowledged that the Amended Regulation's use of "unlawfully discriminates ..." was problematic. Counsel said that, if necessary, the Society could re-word the Amended Regulation, and invited the court to either read down the Amended Regulation or endorse wording of a prospective replacement regulation.

77 In several respects, this court can respond to the thorough and able submissions on this appeal. But, at the end of the day, we respectfully decline the invitation to redraft the regulation. Moving from the general to the specific:

(a) The Society's Broad Mandate

78 The Society stressed its purpose to protect the public interest [s. 4(1)], and to improve the administration of justice in the Province [s. 4(2)(d)].

79 Section 4(1) is worth repeating:

4(1) **The purpose** of the Society is to uphold and protect the public interest **in the practice of law**.

[Emphasis added]

The Society's function to "improve the administration of justice in the Province" from s. 4(2)(d), is qualified by "in pursuing its purpose".

80 The Society does not have stand-alone authority over the public interest and the administration of justice. The Society's statutory authority may differ, in this respect, from that of the Law Society of Upper Canada expressed in s. 4.2 of the *Law Society Act*, R.S.O. 1990, c. L8, as amended. The Nova Scotia Society's mandate must pertain to the public interest in the "practice of law". Its factum acknowledges the point:

> 42 ... uphold and protect the public interest in the practice of law (s. 4(1)). This broadly stated purpose must guide the Society in all of its decision-making. It is the foundational premise against which all its decisions must be measured. ...

81 The *Legal Profession Act*, s. 16(1), defines "practice of law" as "the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law ..."

(b) Qualifications Referring to a University

82 Justice Campbell's reasons include:

> [173] The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. ...
>
> [174] The NSBS has no authority whatsoever to dictate directly what a university does or does not do. ...
>
> [175] The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. ...

83 These assertions, if unqualified, may imply that any attempt by the Society to fashion requirements for membership based on features of the law graduate's institution, as opposed to the law degree, would be *ultra vires* the *Legal Profession Act*.

84 In our view, the conclusion is not that categorical. The Council may frame a properly worded regulation that establishes requirements based on features of the articling applicant's law school.

85 Section 5(8)(b) of the *Legal Profession Act* enables the Council to make regulations "establishing requirements to be met by members, including educational, good character and other requirements."

86 Regulation 3.1(b) under the *Legal Profession Act* defines "law degree" as a degree in common law from "a Canadian university approved by the Federation of Law Societies of Canada". Regulation 3.1(b) then continues with the words that are subject to this litigation: "unless Council ... determines that the university ... unlawfully discriminates ... on grounds prohibited by either or both the *Charter of Rights and Freedoms* or the Nova Scotia *Human Rights Act*".

87 Nobody has questioned the *vires* of Regulation 3.1(b)'s opening statement that the "university" must be "approved" by the Federation of Law Societies. The *Legal Profession Act* neither mentions nor gives any legal status to the Federation's approval of a university. The Society's Council's authority to enact a regulation that adopts the Federation's approval of the university stems from s. 5(8)(b)'s general words: to make regulations concerning the "educational ... and other requirements" for membership.

88 If the Society may enact a regulation that adopts the Federation's approval of the university, then similarly the Society may enact a regulation to bring the approval process, or aspects of it, in house. Such a regulation, if it squares with the *Katz* principles, would be authorized by s. 5(8)(b).

89 There are sound reasons to feature an approval of the degree-granting institution as a criterion for the law graduate's admission to membership in the Society. For example, some law schools may be taken presumptively to generate satisfactory

legal education, and others not. The "approval of the institution" enables the licensing law society to assess the quality of the applicant's legal education without undertaking a separate detailed inquiry into the particulars of each applicant's law school experience. That outcome fully conforms to the Society's mandate of assessing "the public interest in the practice of law" under s. 4(1) of the *Legal Profession Act*. Under such a regulation, the approval of a particular institution would be a discretionary administrative decision for the Society, subject to *Dunsmuir* or, if there are *Charter* implications, *Doré* and *Loyola* .

90 Ontario's approach is instructive. The *Law Society Act*, R.S.O. 1990, c. L8, as amended, says:

> 27(3) If a person who applies to the Society for a class of license in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of license, the Society shall issue a license of that class to the applicant.
>
> 62 (0.1) Convocation may make by-laws
>
> . . . . .
>
> 4.1 governing the licensing of persons to practice law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of license and governing applications for license.

The LSUC's Convocation enacted By-law 4 ("Licensing") that includes:

> 7. In this Part "accredited law school" means a law school in Canada that is accredited by the Society.
>
> . . . . .
>
> 9(1) The following are the requirements for the issuance of a Class L1 license:
>
> 1. The applicant must have one of the following:
>
> (i) A bachelor of laws or a juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school;
>
> (ii) A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

91 Ontario's LSUC "accredits" law schools as a requirement for the issuance of a practicing license. The system is established by subordinate legislation — *i.e.* the by-laws of the LSUC's Convocation. The LSUC's statutory authority to enact those requirements is generic, as is Nova Scotia's s. 5(8)(b), and does not mention "accreditation" of institutions.

92 In *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518 (Ont. C.A.), the Ontario Court of Appeal accepted that the accreditation system was authorized by the *Law Society Act*. Justice MacPherson for the Court said:

> [35] Pursuant to its by-law making powers, the LSUC introduced accreditation of law schools as part of the licensing process. By-law 4 prescribes that one of the requirements for a class L1 license to practise law is a degree from "an accredited law school". An "accredited law school" is defined as a "law school in Canada that is accredited by the Society".

93 Nova Scotia's *Legal Profession Act* enables the Society's Council to enact a properly worded regulation, relating to qualifications for membership, that incorporates the Society's approval of the *institution* which issued the applicant's law degree. By "properly worded" we mean a regulation that satisfies the *Katz* criteria. To the extent that Justice Campbell's reasons in the decision under appeal indicate otherwise, we respectfully disagree.

(c) Disqualification of a Graduate Based on University's Conduct

94 Justice Campbell found that the Society's aim was not to regulate Trinity Western's law degree or law graduate, but to incentivize and alter Trinity Western's behaviour in British Columbia [see above, paras. 31-32]. In the judge's appraisal, the Society's focus on the University did not relate to the practice of law in Nova Scotia.

95 The judge's factual finding is supported by the evidence. The Report of the Society's Executive Committee explained the Option C that the Council adopted with its Resolution:

> TWU has the power to take action to address this discrimination. ... Given the work of the Federation Approval Committee, TWU has an acceptable proposal in all respects other than the Community Covenant. If TWU were to change the Covenant or exempt law students from the Covenant, the school can be approved in Nova Scotia.
>
> [see above, para. 14]

96 The Resolution said that "Council does not approve the proposed law school at Trinity Western University unless TWU either (i) exempts law students from signing the Community Covenant; or (ii) amends the Community Covenant for law students in a way that ceases to discriminate." [see above, para. 15]

97 At the hearing in this Court, the Society's counsel acknowledged that Trinity Western's law graduate would have an identical law degree whether or not Trinity Western amended the Covenant or exempted law students. Yet, the Amended Regulation treats the amendment or exemption as a fault line for the existence of a "law degree".

98 Before Justice Campbell, and later on the appeal to this Court:

- The Society asserted that its concern was with Trinity Western's discriminatory Covenant, not with Trinity Western law graduates.

- The Society acknowledged that the academic content of the Trinity Western law degree, including legal ethics and professional responsibility, would adequately prepare its graduates to article in Nova Scotia.

- The Society acknowledged that there was no basis to believe that Trinity Western's law graduates would be more likely than anyone else to discriminate against members of the LGBTQ community.

- The Society's stated objective with the Resolution and Amended Regulation, was to ensure that LGBTQ individuals have equal access to enter the legal profession and judiciary in Nova Scotia. The Society says it sought to implement that goal by defining "law degree" to exclude degrees from institutions that discriminate in their admission policies.

99 The judge's findings and the Society's acknowledgements remind us that Trinity Western's law graduate is not Trinity Western's alter ego. The graduate is a vital stakeholder in his or her own right. The Society's purpose is to protect the public interest in the "practice of law". Section 16(1) of the *Legal Profession Act* defines "practice of law" (above, para. 51). Trinity Western's law graduate would have the same ability to practice law, as defined, as would a graduate from another law school.

100 To this, the Society responds that its restriction on Trinity Western's law graduate serves the Society's foundational mandate to serve the "public interest in the practice of law". The Society's factum did not address the *Legal Profession Act*'s definition of "practice of law". Rather, the Society says it is in the broad public interest that the demographics among legal practitioners reflect the diversity of protected human rights criteria, including sexual orientation. The Society's factum elaborates:

> 42. When reviewing the Society's decision, this broad, purposive approach to statutory interpretation must be applied to the *LPA*'s purpose provision (section 4), the regulation making provisions (section 5) and the general Council authority provisions (section 6). Collectively these provisions require and enable the Society to:

• uphold and protect the public interest in the practice of law (s. 4(1)). This broadly stated purpose must guide the Society in all of its decision-making. It is the foundational premise against which all its decisions must be measured;

• establish standards for the qualifications of those seeking the privilege of membership in the Society (s. 4(2)(a)). This section does not restrict the standards to educational or competence standards, but speaks more generally to the "qualifications" of those seeking membership;

• seek to improve the administration of justice in the Province (s. 4(2)(d)). The *LPA* recognizes this can be done in a variety of ways, and the one example the statute provides specifically mentions consulting with those who reflect the sexual diversity of the Province. A strong signal is sent in the *LPA* itself that diversity and equality are necessary parts of the administration of justice;

• make regulations establishing requirements to be met by members, including educational, good character and other requirements (s. 5(8)(b)). Again in this articulation of its authority, the Society is not restricted to regulations addressing educational requirements alone. Authority is more widely given to make other regulations. Notably, and unlike most self-regulating professions in the Province, those regulations are not subject to approval by the Governor-in-Council. It is the Society itself, through its Council that gives final authority to its regulations. This lack of government oversight of the Society's regulations underscores the independence the Society must have to do what is needed to uphold and protect the public interest in the practice of law and to improve the administration of justice in the Province without these, the public will lack confidence in the self-regulation of the profession;

• take any action consistent with the Act that Council considers necessary for the promotion, protection, interest or welfare of the Society, including the making of regulations that assist in carrying out the Society's purpose (s. 6(2)). Under this authority the Council of the Society is reminded that all of its actions must be tied back to the Society's purpose. It is the foundation for its jurisdiction.

43. This collective broad grant of statutory authority, in the context of a regulator that plays a "crucial role" in protecting the public interest provides powerful support for a generous rather than narrow interpretation of the Society's mandate, with a broad range of actions open to it.

101 Those are the intersecting perspectives. At this juncture, the court must exit the field of hypothesis. In the abstract it is not apparent how Council may alter its approach and wording by redrafting the invalid Amended Regulation of July 23, 2014. It is up to the Council to enact its new regulation. Then there would be actual wording, accompanied by a record with evidence of the regulation's background, and if challenged, focused pleadings and submissions of counsel.

Conclusion

102 We would dismiss the appeal.

103 The Society and the respondents agree that substantial costs were incurred in the appeal. The preparation undertaken by the parties and intervenors was evident from the volume of materials before the Court and the high quality of representations made over the three days of hearing. The Society shall pay to the respondents appeal costs of $35,000.00, inclusive of disbursements.

Appeal dismissed.

Tab 4

2012 SCC 2
Supreme Court of Canada

Catalyst Paper Corp. v. North Cowichan (District)

2012 CarswellBC 17, 2012 CarswellBC 18, 2012 SCC 2, [2012] 1 S.C.R. 5, [2012] 2 W.W.R. 415, [2012] B.C.W.L.D. 853, [2012] B.C.W.L.D. 854, [2012] B.C.W.L.D. 857, [2012] B.C.W.L.D. 858, [2012] B.C.W.L.D. 859, [2012] A.C.S. No. 2, [2012] S.C.J. No. 2, 11 R.P.R. (5th) 1, 209 A.C.W.S. (3d) 697, 26 B.C.L.R. (5th) 1, 316 B.C.A.C. 1, 340 D.L.R. (4th) 385, 34 Admin. L.R. (5th) 175, 425 N.R. 22, 537 W.A.C. 1, 93 M.P.L.R. (4th) 1, J.E. 2012-126

Catalyst Paper Corporation, Appellant and Corporation of the District of North Cowichan, Respondent

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell JJ.

Heard: October 18, 2011
Judgment: January 20, 2012 *
Docket: 33744

Proceedings: affirming *Catalyst Paper Corp. v. North Cowichan (District)* (2010), 2010 CarswellBC 958, 2010 BCCA 199, 92 R.P.R. (4th) 1, 318 D.L.R. (4th) 350, 484 W.A.C. 149, 286 B.C.A.C. 149, 5 B.C.L.R. (5th) 203, [2010] 7 W.W.R. 259, 69 M.P.L.R. (4th) 163 (B.C. C.A.); affirming *Catalyst Paper Corp. v. North Cowichan (District)* (2009), 2009 BCSC 1420, 2009 CarswellBC 2763, 98 B.C.L.R. (4th) 355, 66 M.P.L.R. (4th) 35, 88 R.P.R. (4th) 203, [2010] 7 W.W.R. 220 (B.C. S.C.)

Counsel: Roy W. Millen, Joanne Lysyk, Alexandra Luchenko, for Appellant
Sukhbir Manhas, Reece Harding, for Respondent

***McLachlin C.J.C.*:**

1 Catalyst Paper is the largest specialty paper and newsprint producer in Western North America. One of its four mills is located in the District of North Cowichan, on the southeastern shore of Vancouver Island. Nearby forests offer a plentiful supply of wood for Catalyst's operations, while proximity to the ocean offers cheap transportation of supply and product. Labour was historically supplied by small neighbouring communities. Catalyst footed a large portion of the District's modest property tax levy, without demur.

2 In recent decades, the picture has changed. Attracted by the beauty of the Cowichan coast and the benignity of its climate, new residents began flocking to the District. One after another, new subdivisions sprang up. As the population increased, so did the need for new roads, water lines, schools, hospitals and the usual array of municipal services that accompany urban growth.

3 As more people came to the District, residential property values skyrocketed, while the value of Catalyst's property remained relatively stable. The District was concerned that taxing residential property at a rate that reflected its actual value relative to the value of other classes of property in the District would result in unacceptable tax increases to residents, hitting long-term fixed-income residents hard. Instead, the District responded to the demographic shift by keeping residential property taxes low and increasing the relative tax rate on Catalyst's property. The total assessed value of residential property in North Cowichan increased 271 percent between 1992 and 2007, when the mean assessed value of a home in the District reached about $300,000. While residential properties account for almost 90 percent of the total value of property in the District, the taxes payable in respect thereof constitute only 40 percent of tax revenue. The tax rate for Class 1 (residential) property in 2009 was set at $2.1430 per $1,000.00, while the tax rate for Class 4 property (major industry), such as Catalyst's, was set at $43.3499 per $1,000.00. The ratio between residential property and major industrial property was thus 1:20.3 — dramatically higher than the

1:3.4 ratio that until 1984 was prescribed by regulation for all municipalities in British Columbia. The rate currently is among the highest in the province.

4 Catalyst, not surprisingly, was unhappy with this state of affairs. Not only is it required to foot a grossly disproportionate part of the District's property tax levy, it obtains little in exchange in terms of services. It has its own sewer and water systems, and its own deep-sea port. Exacerbating the situation is the fact that in recent years, Catalyst's operation has been losing money. Catalyst cannot pick up its operation and move elsewhere. Its choices are to stay and pay, or to close the mill.

5 To avert this fate, Catalyst has been pressuring the District to lower its tax assessment since 2003. It has had modest success. The District has conducted studies into the problem. It accepts that existing Class 4 tax rates in North Cowichan are at undesirable levels. The work of the District's Tax Restructuring Committee, the reports of its financial officer, Mr. Frame, and the District's Financial Planning Bylaw, all recognized that existing Class 4 rates are significantly higher than they should be. As Mr. Frame put it, they "have gotten off track".

6 Acknowledging the problem, the District has embarked on a gradual program to reduce the rates on Class 4 property, has shifted some special costs to residents ($400,000 for a swimming pool), and in 2008 allocated a $300,000 budget reduction to Class 4 alone. This resulted in the property taxes paid by Catalyst declining from 48 percent in 2007 to 44 percent in 2008, to the current 37 percent. However, for Catalyst, this gradual approach is too little. Having exhausted recourse to the District, its only alternative, it says, is to seek relief from the courts.

7 This raises the issues of when courts of law can review municipal taxation bylaws and what principles guide that review. Catalyst argues that courts can set aside municipal bylaws on the ground that they are unreasonable, having regard to objective factors such as consumption of municipal services. The District of North Cowichan, on the other hand, argues that the judicial power to overturn a municipal tax bylaw is very narrow; in its view, courts cannot overturn a bylaw simply because it places a disproportionate burden on a taxpayer.

8 The British Columbia Supreme Court (2009 BCSC 1420, 98 B.C.L.R. (4th) 355 (B.C. S.C.)) and the Court of Appeal (2010 BCCA 199, 286 B.C.A.C. 149 (B.C. C.A.)) upheld the impugned bylaw. Catalyst now appeals to this Court.

9 I conclude that the power of the courts to set aside municipal bylaws is a narrow one, and cannot be exercised simply because a bylaw imposes a greater share of the tax burden on some ratepayers than on others.

I. Analysis

A. Judicial Review of Municipal Bylaws

10 It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function "judicial review".

11 Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.

12 A municipality's decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements. If a municipality fails to abide by these procedures, a decision or bylaw may be invalid. But in addition to meeting these bare legal requirements, municipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.

13 A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors, including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. See, generally, *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 55. If the applicable standard of review is correctness, the reviewing court requires, as the label suggests, that the administrative body be correct. If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power: *Dunsmuir*, at para. 47.

14 Against this general background, I come to the issue before us — the substantive judicial review of municipal taxation bylaws. In *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.), at p. 115, the Court, referring to delegated legislation, drew a distinction between policy and legality, with the former being unreviewable by the courts:

> The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

(See also pp. 111-13) However, this attempt to maintain a clear distinction between policy and legality has not prevailed. In passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it. Indeed, the parties now agree that the tax bylaw at issue is not exempt from substantive review in this sense.

15 Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner. Numerous cases have accepted that courts can review the substance of bylaws to ensure the lawful exercise of the power conferred on municipal councils and other regulatory bodies: *R. v. Bell*, [1979] 2 S.C.R. 212 (S.C.C.); *O'Flanagan v. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40 (B.C. C.A.); *Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45 (B.C. C.A.); *Canadian National Railway v. Fraser-Fort George (Regional District)* (1996), 26 B.C.L.R. (3d) 81 (B.C. C.A.); *Hlushak v. Fort McMurray (City)* (1982), 37 A.R. 149 (Alta. C.A.), *Ritholz v. Optometric Society (Manitoba)* (1959), 21 D.L.R. (2d) 542 (Man. C.A.).

16 This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes: *Dunsmuir*, at para. 47.

17 Where the parties differ is on *what the standard of reasonableness requires in the context of this case*. This is the nub of the dispute before us. Catalyst argues that the issue is whether the tax bylaw falls within a range of reasonable outcomes, having regard to objective factors relating to consumption of municipal services, factors Catalyst has outlined in a study called the "Consumption of Services Model". The District of North Cowichan, on the other hand, argues that reasonableness, in the context of municipal taxation bylaws, must take into account not only matters directly related to the treatment of a particular taxpayer in terms of consumption, but a broad array of social, economic and demographic factors relating to the community as a whole. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Is it the narrow group of objective consumption-related factors urged by Catalyst? Or is it a broader spectrum of social, economic and political factors, as urged by North Cowichan?

18 The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry: *Dunsmuir*, at para. 64. As stated in

Khosa v. Canada (Minister of Citizenship & Immigration), 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past: *Dunsmuir*, at paras. 54 and 57. To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

19 The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 (S.C.C.), at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

20 The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body could have adopted them", para. 80, *per* Voith J. See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.); *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Alta. Q.B.), aff'd (1994), 157 A.R. 169 (Alta. C.A.).

21 This deferential approach to judicial review of municipal bylaws has been in place for over a century. As Lord Russell C.J. stated in *Kruse v. Johnson*:

> [C]ourts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson*, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.
>
> [Emphasis added; pp. 99-100.]

These are the general indicators of unreasonableness in the context of municipal bylaws. It must be remembered, though, that what is unreasonable will depend on the applicable legislative framework. For instance, Lord Russell C.J.'s reference to inequality in operation as between different classes is inapt in the context of many modern municipal statutes, which contain provisions that expressly allow for such inequality. Subsection 197(3) of the *Community Charter*, which allows municipalities to set different tax rates for different property classes, is such a provision.

22 Catalyst argues that *Dunsmuir* has changed the law and that the traditional deferential approach to the review of municipal bylaws no longer holds. The bylaw, it argues, must be demonstrably reasonable, having regard to objective criteria relating to taxation. The reasonableness standard in *Dunsmuir*, it says, means that all municipal decisions, including bylaws, must meet the test of demonstrable rationality in terms of process and outcome. It follows, Catalyst argues, that a municipality cannot tax major industrial property owners at a substantially higher rate than residential property owners, in order to avoid hardship to long-term or fixed-income residents in a rising housing market. Rather, the municipality should confine itself to objective

factors, such as those set forth in Catalyst's "Municipal Sustainability Model", in fixing the property tax rates of different classes of property owners.

23 This argument misreads *Dunsmuir*. As discussed above, *Dunsmuir* described reasonableness as a flexible deferential standard that varies with the context and the nature of the impugned administrative act. In doing so, *Dunsmuir* expressly stated that the approaches to review developed in particular contexts in previous cases continue to be relevant: *Dunsmuir*, at paras. 54 and 57. Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.

24 It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.

25 Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

26 Here the relevant legislation is the *Community Charter*, S.B.C. 2003, c. 26. Section 197 gives municipalities a broad and virtually unfettered legislative discretion to establish property tax rates in respect of each of the property classes in the municipality, unless limited by regulation. The intended breadth of the legislative discretion under the current legislative scheme is highlighted by the fact that the government of British Columbia ceased to impose regulatory limits on the ratios between tax rates in 1985. Section 199(b) of the *Community Charter* allows the Lieutenant Governor in Council to make regulations on the relationships between Class 1 and Class 4 tax rates, and no regulation of this sort has been reintroduced since the repeal of the 1984 regulation, which prescribed a 1 to 3.4 ratio between residential and major industry tax rates: B.C. Reg. 63/84, adopted pursuant to s. 14.1(3)(b) of the *Municipal Finance Authority Act*, 1979, c. 292, the predecessor of s. 199(b) of the *Community Charter*. Special provisions of the *Community Charter* relating to parcel taxation, local area services, business improvement areas, or property value tax exemptions address particular concerns and do not detract from the broad power of British Columbia municipalities to vary rates between different classes of property.

27 Nor does the *Community Charter* support the contention that property value taxes ought to be limited by the level of service consumed. Section 197 authorizes the imposition of a tax, not a fee. The distinguishing feature between the two is that a tax need bear no relationship to the costs of the service being provided, while the opposite is true for a fee. The ratio of service consumption to the different property classes will differ depending on the service. In light of this, a requirement that municipalities impose property value taxes having in mind the level of services consumed would prevent municipalities from ever exercising their authority under s. 197(3)(b).

28 Another set of limitations on municipalities passing bylaws flows from the need for reasonable processes. In determining whether a particular bylaw falls within the scope of the legislative scheme, factors such as failure to adhere to required processes and improper motives are relevant. Municipal councils must adhere to appropriate processes and cannot act for improper purposes. As Gonthier J. stated for the Court in *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), "[a] municipal act committed for unreasonable or reprehensible purposes, or purposes not covered by legislation, is void" (p. 349).

29 It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the decision-making process at issue. Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.

30 Nor, contrary to Catalyst's contention, is the municipality required to formally explain the basis of a bylaw. As discussed above, municipal councils have extensive latitude in what factors they may consider in passing a bylaw. They may consider objective factors directly relating to consumption of services. But they may also consider broader social, economic and political factors that are relevant to the electorate.

31 This is not to say that it is wrong for municipal councils to explain the rationale behind their bylaws. Typically, as in this case, modern municipal councils provide information in the form of long-term plans. Nor is it to say that municipalities performing decisional or adjudicative functions are exempt from giving reasons as discussed above.

B. Application: Is the Bylaw Unreasonable?

32 To summarize, the ultimate question is whether the taxation bylaw falls within a reasonable range of outcomes. This must be judged on the approach the courts have traditionally adopted in reviewing bylaws passed by municipal councils. Municipal councils passing bylaws are entitled to consider not merely the objective considerations bearing directly on the matter, but broader social, economic and political issues. In judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

33 I turn first to process. Catalyst does not allege that the voting procedures of the District were incorrect; nor does it allege bad faith. Its contention is rather that the District's process is flawed because it provided neither formal reasons for the bylaw, nor a rational basis (viewed in terms of Catalyst's "Consumption of Services Model") for its decision. This contention cannot succeed. As discussed above, municipal councils are not required to give formal reasons or lay out a rational basis for bylaws. In any event, as the trial judge found, the reasons for the bylaw at issue here were clear to everyone. The District's policy had been laid out in a five-year plan. Discussions and correspondence between the District and Catalyst left little doubt as to the reasons for the bylaw. The trial judge found that the District Council considered and weighed all relevant factors in making its decision. If Catalyst has a complaint, it is not with the procedures followed, but with the substance of the bylaw.

34 This brings us to the content of the bylaw at issue. There can be no doubt that the impact of the bylaw on Catalyst is harsh. The ratio between major industrial rates and residential rates imposed is among the highest in British Columbia (only two municipalities exceed it) and far outside the pre-1983 norm. In Catalyst's present economic situation, the consequences are serious — indeed, Catalyst suggests that the industrial rate threatens the continued operation of its mill in the District.

35 However, countervailing considerations exist — considerations that the District Council was entitled to take into account. The Council was entitled to consider the impact on long-term fixed-income residents that a precipitous hike in residential property taxes might produce. The Council has decided to reject a dramatic increase and gradually work toward greater equalization of tax rates between Class 4 major industrial property owners and Class 1 residential property owners. Acknowledging that the rates from Class 4 are higher than they should be, the Council is working over a period of years toward the goal of more equitable sharing of the tax burden. Its approach complies with the *Community Charter*, which permits municipalities to apply different tax rates to different classes of property. Specifically, nothing in the *Community Charter* requires the District to apply anything like Catalyst's "Consumption of Services Model". Indeed, the compelling submission made by Mr. Manhas, Counsel for the Respondent, was that it would be "statutorily *ultra vires* for the [municipality] to impose property value taxes on the basis of consumption alone under section 197(3)(b)" (transcript, at p. 54). The bylaw favours residential property owners, to be sure. But it is not unreasonably partial to them.

36 Taking all these factors into account, the trial court, affirmed by the Court of Appeal, concluded that the bylaw fell within a reasonable range of outcomes. agree. The adoption of the Tax Rates Bylaw 2009, Bylaw No. 3385 does not constitute a decision that no reasonable elected municipal council could have made.

37 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum issued by the court on January 27, 2012 has been incorporated herein.

Tab 5

2017 SCC 20, 2017 CSC 20
Supreme Court of Canada

Green v. Law Society of Manitoba

2017 CarswellMan 136, 2017 CarswellMan 137, 2017 SCC 20, 2017 CSC 20, [2017] 1 S.C.R. 360, [2017] 5 W.W.R. 1, 18 Admin. L.R. (6th) 107, 276 A.C.W.S. (3d) 728, 407 D.L.R. (4th) 573, 6 C.P.C. (8th) 225

Sidney Green (Appellant) and The Law Society of Manitoba (Respondent) and Federation of Law Societies of Canada (Intervener)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: November 9, 2016
Judgment: March 30, 2017
Docket: 36583

Proceedings: affirming *Green v. Law Society of Manitoba* (2015), [2015] 10 W.W.R. 239, 386 D.L.R. (4th) 511, 75 C.P.C. (7th) 73, 638 W.A.C. 189, 319 Man. R. (2d) 189, 2015 CarswellMan 332, 2015 MBCA 67, Christopher J. Mainella J.A., Diana M. Cameron J.A., Marc M. Monnin J.A. (Man. C.A.); affirming *Green v. Law Society of Manitoba* (2014), 66 C.P.C. (7th) 430, 313 Man. R. (2d) 19, [2015] 5 W.W.R. 769, 2014 CarswellMan 760, 2014 MBQB 249, Rempel J. (Man. Q.B.)

Counsel: Charles R. Huband, Kevin T. Williams, for Appellant
Rocky Kravetsky, Jeffrey W. Beedell, for Respondent
Neil Finkelstein, Brandon Kain, for Intervener

Wagner J. **(McLachlin C.J.C. and Moldaver, Karakatsanis and Gascon JJ. concurring):**

I. Introduction

1 A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices.

2 This appeal concerns a basic component of a lawyer's education: continuing professional development ("CPD"). At issue is whether The Law Society of Manitoba ("Law Society") can impose rules that couple a mandatory CPD program with a possible suspension for failing to meet the program's requirements.

3 I agree with the courts below that the Law Society has the authority to do so. The Law Society is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing educational standards for practising lawyers. CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD programs.

4 But educational standards can ensure consistency of legal service only if lawyers adhere to them. If a lawyer fails to complete the required hours of training ("CPD hours") even after having been warned, temporarily suspending him or her until those hours are completed is a reasonable way to ensure compliance. This suspension is administrative, not punitive, in nature.

5 The appeal should be dismissed. The impugned rules with respect to CPD are reasonable in light of the importance of CPD programs and the Law Society's broad rule-making authority over the maintenance of educational standards.

II. Facts

6 The appellant, Mr. Sidney Green, was called to the Bar of Manitoba in 1955. He has been a practising lawyer and member of the Law Society for over 60 years. Mr. Green has served as a bencher of the Law Society [1] and has also participated and lectured in many CPD activities. He has no discipline record and does not face any disciplinary charges.

7 In this case, Mr. Green is challenging the provisions of the *Rules of the Law Society of Manitoba* ("Rules") that make its CPD program mandatory. Manitoba's program has not always been mandatory. In 2007, as a first step, the benchers approved rules requiring that all lawyers report their CPD hours. The Law Society collected and studied the CPD hours reported by its members over a two-year period. Many members had reported completing no CPD activities or less than one hour of such activities per month. Subsequently, the Law Society's Admissions and Education Committee ("Committee") recommended that the benchers move to a mandatory CPD program. At about the same time, the Chief Executive Officer ("CEO") of the Law Society wrote a memorandum to the benchers in which he indicated that voluntary CPD was not working.

8 From late March 2010 to May 2011, the benchers considered making the CPD program mandatory, consulting the members on that subject. Over that period, the benchers and the Committee each met several times and received a variety of comments and other input. Mr. Green made no submissions to the benchers on the proposed CPD requirements even though the Law Society had invited its members to do so.

9 The benchers subsequently approved mandatory CPD and amended the Rules to require all practising lawyers to complete CPD hours (one hour per month of practice for a total of 12 hours a year). Failing to comply with this requirement may lead to the suspension of a lawyer's licence to practise. The Rules specifically provide:

> **2-81.1(8)** Commencing January 1, 2012, and subject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status ....
>
> . . . . .
>
> **2-81.1(12)** Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid.
>
> **2-81.1(13)** Where a member is suspended more than once for failing to comply with subsection (8), the chief executive officer may also refer the matter to the complaints investigation committee for its consideration.

10 Despite these mandatory rules, Mr. Green did not report any CPD activities for 2012 or 2013. On May 30, 2014, over a year after Mr. Green had first failed to report the completion of any CPD hours, the CEO of the Law Society sent Mr. Green a letter notifying him that if he did not comply with the Rules within 60 days, he would be suspended from practising law. The CEO also invited Mr. Green to correct any errors in his self-reported CPD record and informed him that it was possible for the 60 days he had to complete his hours to be extended.

11 Mr. Green did not reply to the letter, nor did he apply for judicial review of the decision to suspend him. Rather, he applied for declaratory relief on June 25, 2014, challenging the validity of certain provisions of the Rules with respect to CPD ("impugned rules"). Although the Law Society subsequently suspended Mr. Green's practising certificate effective July 30, 2014, it has agreed not to enforce the suspension until after the litigation has been resolved.

III. Decisions Below

A. Manitoba Court of Queen's Bench, 2014 MBQB 249, 313 Man. R. (2d) 19 (Man. Q.B.)

12 The application judge dismissed Mr. Green's application, concluding that the impugned rules fall squarely within the Law Society's legislative mandate under *The Legal Profession Act*, C.C.S.M., c. L107 ("Act"). The Law Society is required to "establish standards for the education, professional responsibility and competence" of lawyers (s. 3(2)). As a result, the impugned rules are consistent with the Law Society's broad power under s. 4(5) of the Act to make rules it deems advisable in order to pursue its statutory purpose and uphold the public interest.

13 The application judge also dismissed arguments raised by Mr. Green with respect to natural justice and procedural fairness.

B. Manitoba Court of Appeal, 2015 MBCA 67, 319 Man. R. (2d) 189 (Man. C.A.)

14 The Court of Appeal dismissed the appeal for reasons similar to those of the application judge. It noted that the Law Society's constituent Act is a public interest statute designed to protect members of the public who seek to obtain legal services and concluded that the Law Society's rule-making power must be given a broad and liberal interpretation in order to achieve that objective.

15 Mr. Green conceded in the Court of Appeal that the Law Society has the power to make rules to set up a CPD program. The court held that the Law Society also has the power to make such a program mandatory and to establish consequences under s. 65 of the Act for failing to comply with the program.

16 Further, the Court of Appeal found that the suspension of a lawyer for failing to complete his or her CPD hours is an administrative decision that does not require implementation of the more extensive procedures that apply where a lawyer has been charged with professional misconduct or incompetence (as set out in s. 72 of the Act).

IV. Issues

17 This case raises two questions: (1) What standard of review applies to a question regarding the validity of rules made by a law society? (2) Having regard to the appropriate standard of review, are the impugned rules valid in light of the Law Society's mandate under the Act?

V. Analysis

18 Mr. Green has challenged the impugned rules because he has no interest in complying with them. Since these rules came into force in 2012, Mr. Green has not reported completing any CPD hours. He argues that the impugned rules are unfair because they impose a suspension without a right to a hearing or a right of appeal. Yet Mr. Green has not applied for judicial review of the Law Society's decision to suspend him. He has not complained that the Law Society treated him unfairly. Mr. Green is challenging these rules on these procedural grounds, not for fear of injustice. He is simply not interested in attending a mandated number of CPD activities.

19 Despite these motivations for Mr. Green's challenge to the impugned rules, this Court must now determine whether those rules fall outside the Law Society's statutory mandate. The Court has never addressed the appropriate standard of review to be applied when considering the validity of rules made by a law society. The standard of review framework from *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), applies in this case because it is applicable to "all exercises of public authority" and to "those who exercise statutory powers": para. 28; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.), at para. 53.

A. Standard of Review Is Reasonableness

20 In my view, the standard applicable to the review of a law society rule is reasonableness. A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 24. This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature": *Catalyst Paper*, at para. 25;

see also *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.), at para. 25.

21 Rules made by law societies are akin to bylaws passed by municipal councils. McLachlin C.J. explained the rationale for this standard of review in *Catalyst Paper*:

> ... review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. [para. 19]

22 Similar considerations are relevant in the context of rules made by a law society. In the case at bar, the legislature specifically gave the Law Society a broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest. The Act empowers the benchers of the Law Society to make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity.

23 Further, reasonableness is the appropriate standard because many of the benchers of the Law Society are elected by and accountable to members of the legal profession. While it is true that the public does not directly vote for the benchers, the rules the benchers make apply only to members of the profession. Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: "... reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

24 Beyond the specific guidance provided in *Catalyst Paper*, which I find applicable in the instant case, the general principles developed by the Court in respect of the standard of review also support the argument that reasonableness is the appropriate standard. The Law Society acted pursuant to its home statute in making the impugned rules, and in such a case there is a presumption that the appropriate standard is reasonableness: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at paras. 34 and 39. The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at paras. 50 and 87.

25 Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.), at para. 33. This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions: *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 887.

B. Are the Impugned Rules Reasonable in Light of the Law Society's Mandate Under the Act?

26 To determine whether the impugned rules are reasonable, I am adopting a two-step approach. First, I will construe the scope of the Law Society's statutory mandate in accordance with this Court's modern principle of statutory interpretation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21. Second, I will address whether, in light of this mandate, the impugned rules are unreasonable because they expose a lawyer to a suspension in the event of non-compliance and unreasonable having regard to their procedural protections.

(1) Statutory Mandate

27 The purpose, words, and scheme of the Act support an expansive construction of the Law Society's rule-making authority.

(a) Object of the Act

28 I will begin with the object of the Act. The legislature has given the Law Society a broad public interest mandate and broad regulatory powers to accomplish its mandate. This mandate must be interpreted using a broad and purposive approach:

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485 (S.C.C.), at paras. 6-8; *The Interpretation Act*, C.C.S.M., c. I80, s. 6.

29 First of all, the Act contains an expansive purpose clause that obligates the Law Society to act in the public interest: "The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence" (s. 3(1)). The meaning of "public interest" in the context of the Act is for the Law Society to determine. In pursuing this purpose, the Law Society *must* "(a) establish standards for the education ... of persons practising or seeking the right to practise law in Manitoba; and (b) regulate the practice of law in Manitoba" (s. 3(2)).

30 Moreover, the independence the legislature has given the Law Society under the Act is evidence of an intention to give the Law Society all necessary powers to regulate its members. As this Court once wrote, Manitoba's legal profession "is self-governing in virtually every aspect": *Pearlman*, at p. 886.

31 Finally, construing the Law Society's rule-making authority broadly is consistent with the approach taken by the Court in previous cases. For example, Iacobucci J. wrote in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), that "[t]he Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members" (para. 40). Further, McLachlin C.J. wrote in *Wallace v. Canadian Pacific Railway*, 2013 SCC 39, [2013] 2 S.C.R. 649 (S.C.C.), that "[t]he purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession" (para. 15). These expansive assertions are indicative of the breadth of the Law Society's regulatory authority.

(b) The Words in Their Ordinary and Grammatical Sense

32 The wording of the Act is also indicative of the breadth of the Law Society's authority and its rule-making power. The Act imposes on the benchers a duty to "establish standards for the education ... of persons practising ... law" in Manitoba (s. 3(2)(a)). Sections 4(5) and 4(6) of the Act vest the Law Society with an open-ended rule-making authority to ensure that it can achieve this and its other public interest objectives. Section 4(5) provides that, "[*i]n addition* to any specific power or requirement to make rules", the benchers may make rules to "pursue [the Law Society's] purpose and carry out its duties". Therefore, in addition to the powers already identified in the Act, the benchers can make rules furthering the Law Society's purpose and duties. Section 4(6) provides that the rules made by the benchers are binding on all Law Society members.

33 More explicitly, the Act provides that the benchers may "establish and maintain, or otherwise support, a system of legal education, including ... a continuing legal education program" (s. 43(c)(ii)).

34 Regarding a possible suspension, s. 65 specifically empowers the Law Society "to establish consequences for contravening this Act or the rules". This language could hardly be clearer — the Law Society can establish consequences, such as a suspension, for failing to meet the educational standards it is statutorily required to put in place.

35 Mr. Green relies on the "implied exclusion rule" of statutory interpretation to argue that a suspension cannot be imposed under the Act. In his opinion, because the Act specifically empowers the Law Society to impose a "suspension" in four specific situations but not in the CPD context, the legislature intended to exclude a suspension as a consequence in any situation other than those in which it is mentioned.

36 This argument is flawed for two reasons. First, it disregards the proper approach to assessing the legality of the impugned rules. What the Court must do is to determine not whether the Act specifically refers to this power, but whether the impugned rules are reasonable in light of the Law Society's statutory mandate.

37 Second, Mr. Green's argument is inconsistent with this Court's purposive approach to statutory interpretation. An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 256-57. The words of the statute must be considered in conjunction with its purpose and its scheme. In my view, the purpose of the Act supplements the open-ended wording of the relevant provisions to indicate that the implied exclusion rule should not be applied in this case.

(c) Scheme of the Act

38 The scheme of the Act further undermines Mr. Green's position. It must be borne in mind that the Act does not require the Law Society to set up a CPD program. Rather, it provides that the benchers "*may*" establish and maintain such a program (s. 43(c)(ii)). It would be pointless for the legislature to establish consequences for failing to comply with a program that the Law Society is not even required to set up.

39 While it is true that there are only four provisions of the Act that mention "suspension" as a potential consequence, each of them is responsive to a mandatory rule or procedure that is in fact provided for in the Act. A suspension for failing to pay fees is responsive to the obligation that members pay fees (s. 19(5)). A suspension imposed by the Complaints Investigation Committee is responsive to that committee's obligation to investigate complaints (s. 68(c)). A suspension imposed by the Discipline Committee is responsive to that committee's obligation to conduct disciplinary proceedings (s. 72(1) and (2)). The Act requires the payment of fees and the establishment of the committees in question and then establishes powers and consequences that are incidental to them.

40 In contrast, the Law Society is not required to set up a CPD program (s. 43(c)(ii)). If the legislature had explicitly set out the possible consequences for failing to comply with CPD requirements, but the Law Society never imposed any such requirements, the provisions setting out these consequences would be superfluous. The legislature does not enact unnecessary provisions.

41 In my view, the Act's express references to "suspension" are not indicative of an intention to restrict suspensions to specific circumstances. Rather, these references show that where the legislature intended to confer disciplinary powers on a committee or specify the consequences for a breach of a legislated requirement, it did so expressly. Otherwise, the legislature gave the Law Society the discretion, in exercising its general rule-making authority, to establish consequences for contravening the Rules. This is clear from the broad scope of the authority to make rules and establish consequences that is provided for in ss. 4(5) and 65.

42 In any event, since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards. Given the breadth of the statutory authority, the Act must be construed such that the powers it confers "include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature": *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51. This is consistent with s. 32(1) of *The Interpretation Act*, which provides that "[t]he power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers".

(2) Is It Reasonable for the Rules to Expose a Lawyer to a Suspension as a Consequence for Non-compliance With the CPD Program?

43 Having construed the Act, I will now turn to the reasonableness of the impugned rules. Mr. Green conceded in the Court of Appeal that the Law Society has authority to make rules to establish a CPD program. And he further conceded in this Court, contrary to his position in the courts below, that the Law Society can make that program mandatory. The question that remains is whether the impugned rules are unreasonable because they permit the imposition of a suspension on a lawyer for failing to comply with the mandatory program.

44 In my view, the Act provides clear authority for the Law Society to create a CPD program that can be enforced by means of a suspension. Specifically, ss. 3, 4(5), 4(6), 43(c)(ii) and 65, as interpreted in relation to the Act's public interest purpose, provide statutory authority for the impugned rules. The overall purpose of the Act, the words used in it and the scheme of the Act show that the impugned rules are reasonable in light of the Law Society's statutory mandate.

45 The establishment of mandatory standards such as those provided for in the impugned rules is compatible with the Law Society's purpose and duties as set out in s. 3 of the Act. I agree with the Court of Appeal that "[t]o set such a [mandatory] standard in order to maintain a practicing certificate which, in the benchers' view, serves to protect the public, is in keeping with the duties given to the Law Society under the Act" (para. 17 (emphasis deleted)).

46 To ensure that those standards have an effect, the Law Society must establish consequences for those who fail to adhere to them. As a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational.

47 A suspension is a reasonable way to ensure that lawyers comply with the CPD program's educational requirements. Its purpose relates to compliance, not to punishment or professional competence. Other consequences, such as fines, may not ensure that the Law Society's members comply with those requirements. An educational program that one can opt out of by paying a fine is not genuinely universal. I am mindful of the fact that in making these mandatory rules, the Law Society was responding to the reality that many lawyers in Manitoba had not complied with the CPD program when it was voluntary.

48 To ensure consistency of legal service across the province, the possibility of a suspension effectively guarantees that even lawyers who are not interested in meeting the educational standards will comply. Mr. Green submits that, in his opinion, the CPD activities that were made available to him would not have been helpful to him in his practice. But it is not up to Mr. Green to decide whether CPD activities are valuable or adequate. The legislature has decided that the Law Society must impose educational standards on practising lawyers (s. 3(2)) and that it is for the Law Society to determine the nature of those standards.

49 Mr. Green also argues that the impugned rules exposing a lawyer to a suspension are unreasonable because his "common law right" to practise law cannot be taken away absent clear legislative language. This argument is unpersuasive. The right to practise law is not a common law right or a property right, but a statutory right that depends on the principles set out in the Act and the rules made by the Law Society. As this Court has stated, "the Law Society has total control over who can practise law in the province, over the conditions or requirements placed upon those who practise and, perhaps most importantly, over the means of enforcing respect for those conditions or requirements": *Pearlman*, at p. 886. The Law Society has not interfered with Mr. Green's rights. It is merely doing what the statute requires it to do: regulate the education of lawyers in the public interest.

50 In light of the relevant provisions of the Act and practical concerns related to enforcing educational standards, the provisions of the rules establishing a mandatory CPD program that permit the suspension of a lawyer as a consequence for contravening those rules are not unreasonable.

(3) Is It Reasonable for the Rules to Expose a Lawyer to a Suspension Without a Right to a Hearing or a Right of Appeal?

51 Mr. Green also challenges the impugned rules from the standpoint of procedural fairness. He argues that the rules in question are invalid because they provide for the suspension of a member without a right to a hearing or a right of appeal. In my view, this challenge to the rules is inappropriate in the context of an application for declaratory relief. The common law duty of procedural fairness applies only to a specific decision made by the Law Society that affects a lawyer's interests. Given that Mr. Green has not applied for judicial review of the decision to suspend him, all he can do is allege that the impugned rules are not reasonable given the Law Society's authority under the Act.

52 In light of the administrative nature of the suspension and the discretion the CEO has under the Rules when imposing a suspension, I conclude that the fact that the impugned rules do not provide for a right to a hearing or a right of appeal does not make them unreasonable.

(a) Rules Are Not Exhaustive of Common Law Procedural Rights

53 The common law duty of procedural fairness does not reside in a set of enacted rules. As Brown and Evans explain, "delegated legislation that apparently permits a fundamental breach of the duty of fairness will not normally be found to be exhaustive of procedural rights": *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 7:1512. A statutory decision-maker can always provide for procedures in addition to those set out in a rule in order to ensure that the dictates of procedural fairness are met: see *Culligan v. New Brunswick (Commissioner, Inquiries Act)* (1996), 178 N.B.R. (2d) 321 (N.B. Q.B.), at paras. 23-24; *Shewchuk-Dann v. Assn. of Social Workers (Alberta)* (1996), 38 Admin. L.R. (2d) 19 (Alta. C.A.); *Laferrière c. Canada (Procureur général)*, 2015 FC 612 (F.C.), at paras. 13-14; *Irwin v. Alberta Veterinary Medical Assn.*, 2015 ABCA 396, 609 A.R. 299 (Alta. C.A.), at paras. 58 and 63. However, the common law duty of fairness "supplements existing statutory duties and fills the gap" where procedures are not provided for explicitly: G. Huscroft, "From Natural Justice

to Fairness: Thresholds, Content, and the Role of Judicial Review" in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013) 147, at p. 152.

54 Had Mr. Green challenged the Law Society's decision to suspend him instead of simply challenging the impugned rules, this Court could have examined the specific procedure that the Law Society followed in making its decision. If the Law Society's decision was made in a manner that was not procedurally fair, the decision would then have been quashed. But the duty of fairness is engaged only if the Law Society makes a decision that affects the "rights, privileges or interests of an individual" by, for example, imposing a suspension, not when it acts in a legislative capacity to make rules of general application in the public interest: *Dunsmuir*, at para. 79; see also *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), at p. 669.

55 In framing his challenge to the Rules in this way, Mr. Green wrongly assumes that the Law Society will not take its duty of procedural fairness seriously and provide for an appropriate procedure that is responsive to the particular facts and the reasonable expectations of the parties. The benchers can delegate authority to the CEO to provide for additional procedures if the circumstances of a particular case justify protections broader than those set out in the Rules. The Act authorizes the benchers to "take *any action* consistent with [the] Act that they consider necessary for the promotion, protection, interest or welfare of the society" and to delegate that authority to the CEO (ss. 4(2) and 12(2)).

56 Moreover, whether a decision is procedurally fair must be determined on a case-by-case basis. This Court has long recognized that the requirements of the duty of fairness are "eminently variable and [that] its content is to be decided in the specific context of each case": *Dunsmuir*, at para. 79, quoting *Knight*, at p. 682, *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 21, and *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.), at paras. 74 and 75; see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 42. Absent an application for judicial review, it would be unwise for this Court to express an opinion on what procedure the Law Society might follow in making such a decision.

57 Although the Law Society's decision to suspend Mr. Green was not challenged, it shows why procedural fairness cannot be assessed in a factual vacuum. In his letter to Mr. Green, the CEO invited Mr. Green to correct any errors in his CPD report and wrote that the Law Society would "be happy to grant reasonable extensions" to enable him to complete the missing hours. However, the CEO has no such powers under the Rules. Rather, his power is limited to extending the time for members to report their CPD activities or file their annual reports (rr. 2-81.1(6) and 2- 81.2(3)). The CEO was thus willing to adopt a more generous procedure in Mr. Green's case than the one provided for in the Rules by inviting Mr. Green to respond and by offering to consider a request for an extension.

(b) The Rules Imposing an Administrative Suspension Without a Right to a Hearing or a Right of Appeal Are Reasonable

58 Given that Mr. Green did not contest the Law Society's decision, his procedural arguments are merely another way to challenge the validity of the impugned rules. In my view, imposing an administrative suspension on members for failing to comply with the impugned rules without giving such members a right to a hearing or a right of appeal is not unreasonable in light of the Law Society's statutory powers — in fact, it is entirely consistent with the Law Society's duty to establish and enforce educational standards.

59 It must be borne in mind that the suspension at issue in this case is not a disciplinary action. The educational standards in respect of CPD, as defined by the Rules, do not relate solely to the competence of lawyers. While they may improve the currency of a lawyer's knowledge, these standards also protect the public interest by enhancing the integrity and professional responsibility of lawyers, and by promoting public confidence in the profession (r. 2-81.1(1)). A reasonable member of the public would understand that a temporary suspension for failing to complete CPD hours is not akin to a more serious disciplinary suspension. A lawyer's competence in handling a case, to give one example, is not affected by a failure to comply with the CPD requirements.

60 That is why a failure to comply with the impugned rules is not on its own a ground for a finding of misconduct or incompetence. This is evidenced by the Rules themselves — the CEO can refer a failure to comply with r. 2-81.1(8) (which

requires members to complete one hour of CPD activities per month) to the Law Society's complaints investigation committee, but only if the member in question has been suspended under that rule more than once (r. 2-81.1(13)).

61 Moreover, a suspension under the impugned rules is reported and recorded differently than other Law Society suspensions. The Law Society is not required in such a case to give the same notice of a suspension to the public and the profession as it must give where a suspension is imposed by the complaints investigation committee (r. 5-81(2)). Nor is a suspension under the impugned rules recorded in a lawyer's discipline record.

62 The suspension of a lawyer for failing to complete the CPD requirements is administrative in nature. The impugned rules reasonably include no right to a hearing or right of appeal because lawyers are solely in control of complying with the rules in question at their leisure. Members report on their own compliance with the impugned rules — no adjudication is needed in order to determine whether a member has failed to meet the requirements. A suspension under the impugned rules ends immediately when the member comes into compliance with them. There is no residual punishment or fine other than a reinstatement fee. Thus, this suspension is similar to the one that may be imposed on a member for failing to pay fees (s. 19(5), rr. 2-88 and 2-91) or failing to file an annual trust account report (r. 5-47(10)). In both cases, the Act and the Rules reasonably grant no right to a hearing or right of appeal because only the member can end the suspension by complying with the requirements.

63 It must be remembered that Mr. Green has admitted his disinterest in complying with a mandatory CPD program. Thus, even if the Rules did provide for more extensive procedures before a suspension could be imposed, such additional procedures would not exempt a person in Mr. Green's position from the CPD program.

64 Further, the rules permitting a suspension are not self-applying. In addition to a lawyer's common law procedural rights, the impugned rules expressly vest the CEO of the Law Society with discretion to ensure that the effect of the Rules in any given situation is not overly harsh. A suspension is not automatically imposed when a lawyer fails to complete the necessary hours. Rather, the CEO "may" send a letter to a member advising that he or she must comply with the CPD requirements. If a letter is sent, the lawyer has 60 days to comply with the Rules. The Rules also do not prevent the CEO from withdrawing a letter during this 60-day period if circumstances justify such a withdrawal.

65 In this case, the CEO exercised his discretion: rather than sending a letter immediately upon learning of Mr. Green's non-compliance, he waited a full year after Mr. Green had first failed to comply with the requirements before sending the letter. In doing so, the CEO effectively waived the application of the impugned rules to Mr. Green for the first year they were in force.

66 Although the impugned rules could have included more extensive procedures, there is no magic formula for making rules with respect to CPD. The different provincial law societies have implemented CPD programs in different ways. This Court's role is not to rewrite the Rules so as to include every procedural protection imaginable, but to determine whether the impugned rules are reasonable in light of the Act. The approach set out by Lord Russell C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.), which McLachlin C.J. endorsed in *Catalyst Paper*, at para. 21, is applicable in the instant case:

> ... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Emphasis added; pp. 99-100.]

67 While it remains true that a rule is unreasonable if it involves "such oppressive or gratuitous interference with the rights of those subject to them as could find *no justification* in the minds of reasonable men," the rules at issue do not come close to this. A lawyer's failure to comply with the impugned educational rules, even after having been warned and given an opportunity

to seek an extension, provides clear justification for the Law Society to impose a temporary suspension. These rules are not "'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose" of the Law Society in any way: *Katz*, at para. 28.

68 Therefore, I cannot accept Mr. Green's procedural arguments. Given the Law Society's statutory mandate, it was entirely reasonable for it to make the impugned rules that vest its CEO with the discretion to impose an administrative suspension without a right to a hearing or a right of appeal.

VI. Disposition

69 I would dismiss the appeal with costs throughout to The Law Society of Manitoba.

***Abella J.* (dissenting) (Côté J. concurring):**

70 The possible sanctions for a lawyer in Manitoba who is found guilty of professional misconduct or incompetence range from a reprimand or fine to a suspension or disbarment. On the other hand, if a lawyer fails to complete 12 mandatory hours of Continuing Professional Development activities in a calendar year, he or she is automatically suspended.

71 I accept that The Law Society of Manitoba has the authority to require that its members take 12 hours of mandatory Continuing Professional Development courses. I also accept that The Law Society has, theoretically, the authority to suspend members who fail to comply with these requirements. But neither of these issues is at the heart of this case.

72 The real issue is the reasonableness of the Law Society's rule that members who do not comply with those requirements are *automatically* suspended. This, in my respectful view, is inconsistent with the Law Society's mandate to protect the public's confidence in the legal profession because it gratuitously — and therefore unreasonably — impairs public confidence in the lawyer.

Analysis

73 A suspension is, in the panoply of a Law Society's disciplinary sanctions, one of the two most serious. The ultimate sanction is disbarment. When a lawyer is suspended, so is public confidence in him or her. That is why the Law Society of Manitoba takes such care in its investigation of complaints regarding professional misconduct or incompetence — it helps ensure that a suspension is imposed only after at least some minimal procedural protections have been provided, and then only after a range of lesser penalties has been considered.

74 When a suspension is the result of such a process, the loss of public confidence is warranted. Where, however, a suspension is imposed automatically for the least serious disciplinary breach possible — failing to attend classes — the Law Society is in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers.

75 Automatically imposing one of the most serious possible sanctions, brings automatic public opprobrium for the least serious professional misconduct possible. This squanders public trust for no justifiable reason. A sanction for failing to attend? Perhaps. But not a suspension in every case regardless of the reasons for non- compliance.

76 Law Societies have rules and sanctions to maintain and enforce the professionalism of their members, but a Law Society cannot enact *any* rule. It can only enact rules that are consistent with the purposes, scope, and objectives of its enabling statute (Donald J. M. Brown and John M. Evans, with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 15:3261).

77 In *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 (S.C.C.), McLachlin C.J. explained that any such authority must be exercised "in a reasonable manner" (para. 15). This was echoed in *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, [2013] 3 S.C.R. 810 (S.C.C.), where this Court, at para. 24, citing *Waddell v. British Columbia (Governor in Council)* (1983), 8 Admin. L.R. 266 (B.C. S.C.), at p. 292, confirmed that delegated legislation must be consistent with the purposes and objectives of its enabling legislation "read as a whole".

78 I accept that *Katz* suggests a deferential approach when reviewing impugned delegated legislation, but the list of adjectives set out in para. 28 does not represent an exhaustive template. As stated in *Catalyst* at para. 21, there are other grounds for finding delegated legislation to be unreasonable, such as those set out in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.), at p. 99, where Lord Russell said:

> ... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable... If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were *manifestly unjust*...
>
> [Emphasis added.]

The Court confirmed this in *Catalyst* when it said, "[t]he fact that wide deference is owed ... does not mean that [the delegate has] *carte blanche*" (para. 24). It is the mandate "as a whole" that governs the inquiry.

79 That general mandate, as this Court said in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), is to protect "the interests of the public" (para. 36). (See also *Law Society (British Columbia) v. Mangat*, [2001] 3 S.C.R. 113 (S.C.C.), at para. 41.) In Manitoba, the Law Society's purpose is to "uphold and protect the public interest in the delivery of legal services with competence, integrity and independence".[2] Those are the core values of a lawyer's professionalism. Protecting the public interest necessarily involves not only ensuring that a lawyer delivers legal services in accordance with those core values, but also protecting the public's *perception* in the professionalism of the delivery. The professional delivery must not only be done, it must be seen to be done.

80 Law Societies therefore represent — and are dedicated to protecting — the core values of the profession. They also represent — and are dedicated to protecting — the public's confidence that those values will guide the lawyers who serve them. While the primary goal of the Law Society is the protection of the public interest, it cannot do so without also protecting the ability of its members to practise law professionally. As Estey J. stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.):

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the bar and through those members, legal advice and services generally. [p. 336]

(See also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 27-2.)

81 A Law Society must, as a result, exercise its mandate in a way that not only protects the ability of lawyers to act professionally, but that also reinforces the public's perception that lawyers are *behaving* professionally. The flip side is that a Law Society cannot enact rules which unreasonably undermine public confidence in lawyers.

82 Yet that is exactly what happens when a lawyer in Manitoba does not comply with the 12 hour educational requirements.

83 The Continuing Professional Development requirements, defined as "learning activities that protect the public interest by enhancing the *competence*, integrity and professional responsibility of lawyers",[3] were designed to enhance the competence of lawyers under s. 3(2)(a) of Manitoba's *Legal Profession Act*, C.C.S.M., c. L107 ("Act"), which states:

> **3(2)** In pursuing its purpose, the society must
>
> (a) establish standards for the education, professional responsibility and *competence* of persons practising or seeking the right to practise law in Manitoba;

84 When the chief executive officer learns that a lawyer has not completed the required 12 hours, he sends a letter informing him or her that there are 60 days to complete them. The letter is sent automatically[4] and without requesting or receiving

representations from the defaulting lawyer. The failure to complete the requirements results in that lawyer being suspended from practising law. [5]

85 The chief executive officer has only such powers as are given to him or her by or under the *Act* or the *Rules of the Law Society of Manitoba* ("Rules"). [6] Other than granting more time to fulfill the Continuing Professional Development requirements, the chief executive officer has no discretion under rule 2-81.1 (12) to do anything except automatically suspend the lawyer:

> *A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid*.

86 There are no exceptions or exemptions available to any lawyer who, for health or personal reasons for example, is unable to comply with the requirements. At most, the chief executive officer has discretion to permit a "carry over" of hours in "exceptional circumstances", [7] He cannot waive or change them. That means, in reality, an automatic suspension regardless of whether there was a compelling reason for failing to comply. Not even the barest of procedural fairness is authorized, such as the ability to explain. And everyone, regardless of circumstances, is subjected to an identical sanction.

87 The absence of discretion, procedural fairness, or remedial options is in stark contrast to other provisions in the *Act* or the Rules furthering the Law Society's mandate under s. 3(2) of the *Act* to establish standards for the competence of lawyers. Unlike the automatic suspension which attaches to breaches of the 12 annual hours of "learning activities", the following procedural protections apply to all other "competency" breaches: a lawyer who is being investigated is entitled to be notified of a complaint made against him or her; [8] there is an opportunity for a written response; [9] and the chief executive officer can informally resolve the complaint. [10] The chief executive officer can also decide to take no further action, or can refer the matter to the Complaints Investigation Committee for further investigation. [11]

88 If the matter is before the Complaints Investigation Committee, a member can be invited to respond in writing to the substance of the complaint [12] or appear before the committee. [13] The committee may decide to take no further action, or send a letter reminding the member of his or her obligations, or make recommendations to improve a member's practice, or issue a formal caution. [14] The committee may also direct that a charge be laid against the member and refer the matter to the Discipline Committee, [15] with a suspension imposed pending completion of the investigation and any disciplinary proceedings that may follow. [16] If a decision is made to suspend a member at this stage, the member has the right to appeal the decision to a judge of the Court of Queen's Bench under s. 75(1) of the *Act*.

89 If the competence-related matter is referred to the Discipline Committee, the member is entitled to be represented by counsel. [17] The range of consequences for a lawyer found to be incompetent by the Discipline Committee, is found in s. 72(2) of the *Act*:

> (a) if the member is a lawyer, disbar the member and order his or her name to be struck off the rolls;
>
> . . . . .
>
> (c) confirm, vary or impose restrictions on the member's practice *or suspend the member from practising law*, until the member satisfies the panel that he or she is competent to practise law;
>
> (d) order the member to pay a fine;
>
> (e) order the member to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the member was found incompetent;
>
> (f) reprimand the member;
>
> (g) permit the member to resign his or her membership and order his or her name to be struck off the rolls;

(h) if the member is a director, officer or shareholder of a law corporation, revoke or suspend the corporation's permit, or impose conditions on the permit;

(i) order the member to take instruction or submit to examinations, or both, as the panel considers appropriate;

(j) rescind or vary any order made or action taken under this subsection;

(k) make any other order or take any other action the panel thinks is appropriate in the circumstances.

If a decision is made to punish a member for incompetence as set out in s. 72(2), including a suspension, the member is entitled to appeal to the Court of Appeal. [18]

90 There is only one "competence" issue regulated by the Law Society that has *no* procedural protections, no range of remedies, and no discretionary leeway on the part of the chief executive officer: failure to comply with Continuing Professional Development requirements. It is as close to a victimless breach as it is possible to imagine, yet it is the only breach that attracts the automatic loss of the ability to practise law. It alone attracts automatic suspension, regardless of justificatory circumstances. This makes it arbitrary.

91 It is worth contrasting this with the regulations, policies and by-laws of most other Canadian provinces and territories that have Continuing Professional Development related rules. All of these expressly offer discretion to their respective regulatory bodies to deal with breaches of Continuing Professional Development requirements where there is a reasonable and justifiable explanation of why an exemption or a waiver would be required. These law societies explicitly grant their members the possibility of either exemptions or waivers from mandatory Continuing Professional Development requirements.

92 In New Brunswick, an exemption can be requested and, if denied, a hearing can be sought. [19] In Ontario, the Law Society can exempt a lawyer from mandatory Continuing Professional Development, or reduce the number of hours. [20] The Executive Director of Nova Scotia's Barristers' Society can waive the requirements if the waiver is "in the public interest". [21] In British Columbia, if there are "special circumstances", a lawyer can apply to the Practice Standards Committee which can, in its discretion, order that the lawyer not be suspended. [22] In Saskatchewan, an exemption can be granted by the Director of Education "in exceptional circumstances". [23] Quebec's regulations and policy with respect to exemptions specify which exceptional circumstances will allow a member to be "exempted", and which will not. [24] The list of permissible exemptions include parental leave; medical reasons, such as accidents; having to act as a caregiver; being in a disaster zone or a war zone and not being able to attend training activities. Non- permitted exemptions include a gradual return to work following a work stoppage for medical reasons; part-time work; a precarious financial situation; an intensive work period; being outside of Quebec for professional or personal reasons; not actively practicing the legal profession; not being obligated to contribute to the professional insurance; being unemployed; taking a year off; and holidays. In the Yukon, the Chair of the Continuing Legal Education Committee "may order that ... the member not be suspended" [25] .

93 No such discretion is available in Manitoba. This lack of discretion is, in my respectful view, fatal. It is also why judicial review of the chief executive officer's decision is not available. The only remedy is to challenge the reasonableness of the Rule itself. The benchers may, at some point in the future, decide to change the Rule by giving the chief executive officer discretion, but at the moment, no such discretion has been delegated to him.

94 The Law Society argued that the Continuing Professional Development- related suspension is administrative, not punitive, and therefore does not reflect incompetence. It does not provide comforting attenuation of the severity of the penalty to say it was not for "serious" incompetence or misconduct. A suspension is a suspension is a suspension. As Lord Denning noted in *Pett v. Greyhound Racing Assn. Ltd.*, [1968] 2 All E.R. 545 (Eng. C.A.), a decision to suspend someone, or not renew a licence to practice a profession, "concerns his [or her] reputation and his [or her] livelihood" (p. 549). (See also *Joplin v. Vancouver (City) Commissioners of Police* (1982), 144 D.L.R. (3d) 285 (B.C. S.C.), at pp. 298-99.) That is why Dickson J. in *Kane v.*

University of British Columbia, [1980] 1 S.C.R. 1105 (S.C.C.), held that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake" (p. 1113).

95 Public confidence in a lawyer's professionalism is inevitably undermined when it learns that a lawyer has been suspended. The reason for the suspension does not magically transform a punitive consequence into an administrative one. The economic costs of the suspension are manifest. So are the reputational ones, especially since the Rules require the chief executive officer to notify every member of the Law Society and each of the chief justices of the courts in Manitoba of the name of a member who is suspended. [26]

96 While enhancing lawyers' competence is essential, so is upholding the Law Society's responsibility to protect the ability of lawyers to practise their profession with the public's confidence, or, at least, not to attract its unwarranted loss. But a Rule that leads to an *automatic* suspension for failing to attend 12 annual hours of classes, is so far removed from ensuring the public's confidence in lawyers, that it is "manifestly unjust." It is, as a result, unreasonable (*Kruse*, at pp. 99-100).

97 Because rule 2-81(12) unjustifiably undermines public confidence in a lawyer, it is inconsistent with the Law Society's duty to protect the public interest. It is undeniably in the public interest to sanction lawyers for breaches of professionalism; it is in no one's interest to sanction them arbitrarily.

98 I would allow the appeal and set aside the Rule.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 The benchers are a body of elected members and appointed persons who govern the Law Society: *The Legal Profession Act*, C.C.S.M., c. L107, ss. 4(1) and 5.

2 Section 3(1) of *The Legal Profession Act*, C.C.S.M., c. L107.

3 Rule 2-81.1(1) of the *Rules of the Law Society of Manitoba*.

4 Affidavit of Joan Holmstrom, the Law Society's Director of Education, sworn November 7, 2014, A.R., vol. II, at pp. 59-60.

5 Rule 2-81.1(12).

6 Section 12(2) of the *Act*: "The chief executive officer has the powers and duties given to him or her by or under this Act and the rules, and those assigned or delegated to him or her by the benchers, the president or the vice-president".

7 Rules 2-81.1(9) and Rule 2-81.1(6).

8 Rule 5-64(2).

9 Rule 5-64(3).

10 Rule 5-65(1).

11 Rule 5-66.

12 Rule 5-72(1).

13 Rule 5-72(4).

14 Rule 5-74(1).

15 Section 68(b) of the Act.

16 Section 68(b)(i) of the Act.

17 Rule 5-96(2).

18 Section 76(1)(a)(i) of the Act.

19 See The Law Society of New Brunswick's *Rules on Mandatory Continuing Professional Development*, ss. 7(1) to (3) and 8(1) and (2).

20 See The Law Society of Upper Canada's *By-Law 6.1 — Continuing Professional Development*, s. 2(4).

21 See Nova Scotia Barristers' Society's *Regulations*, r. 8.3.9.

22 See British Columbia's *Law Society Rules 2015*, rr. 3-29(1) and (5) and 3-32.

23 See the Law Society of Saskatchewan's *Continuing Professional Development Policy* (online), dealing with "exemptions" and sections 16, 18 and 19.

24 See Barreau du Québec's *Règlement sur la formation continue obligatoire des avocats*, CQLR, c. B- 1, r. 12, ss. 15 to 17, and *Guide sur les dispenses de l'obligation de formation continue* (online), at p. 10.

25 See the *Rules* of the Law Society of Yukon, r. 95.3(5)

26 Rule 2-97.

Tab 6

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

Current to November 2, 2020

Last amended on February 26, 2015

À jour au 2 novembre 2020

Dernière modification le 26 février 2015

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 2, 2020. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of November 2, 2020 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 2 novembre 2020. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 2 novembre 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting the interpretation of statutes and regulations

TABLE ANALYTIQUE

Loi concernant l'interprétation des lois et des règlements

R.S.C., 1985, c. I-21

An Act respecting the interpretation of statutes and regulations

Short Title

Short title

1 This Act may be cited as the *Interpretation Act*.

R.S., c. I-23, s. 1.

Interpretation

Definitions

2 (1) In this Act,

Act means an Act of Parliament; (*loi*)

enact includes to issue, make or establish; (*Version anglaise seulement*)

enactment means an Act or regulation or any portion of an Act or regulation; (*texte*)

public officer includes any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment; (*fonctionnaire public*)

regulation includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council; (*règlement*)

repeal includes revoke or cancel. (*Version anglaise seulement*)

L.R.C., 1985, ch. I-21

Loi concernant l'interprétation des lois et des règlements

Titre abrégé

Titre abrégé

1 *Loi d'interprétation*.

S.R., ch. I-23, art. 1.

Définitions et interprétation

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

fonctionnaire public Agent de l'administration publique fédérale dont les pouvoirs ou obligations sont prévus par un texte. (*public officer*)

loi Loi fédérale. (*Act*)

règlement Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. (*regulation*)

texte Tout ou partie d'une loi ou d'un règlement. (*enactment*)

Expired and replaced enactments

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

R.S., 1985, c. I-21, s. 2; 1993, c. 34, s. 88; 1999, c. 31, s. 146; 2003, c. 22, s. 224(E).

Abrogation

(2) Pour l'application de la présente loi, le remplacement d'un texte emporte son abrogation; vaut aussi abrogation du texte sa cessation d'effet par caducité ou autrement.

L.R. (1985), ch. I-21, art. 2; 1993, ch. 34, art. 88; 1999, ch. 31, art. 146; 2003, ch. 22, art. 224(A).

Application

Application

3 (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

Application to this Act

(2) The provisions of this Act apply to the interpretation of this Act.

Rules of construction not excluded

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.

R.S., c. I-23, s. 3.

Champ d'application

Ensemble des textes

3 (1) Sauf indication contraire, la présente loi s'applique à tous les textes, indépendamment de leur date d'édiction.

Présente loi

(2) La présente loi s'applique à sa propre interprétation.

Autres règles d'interprétation

(3) Sauf incompatibilité avec la présente loi, toute règle d'interprétation utile peut s'appliquer à un texte.

S.R., ch. I-23, art. 3.

Enacting Clause of Acts

Enacting clause

4 (1) The enacting clause of an Act may be in the following form:

> "Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:".

Order of clauses

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

R.S., c. I-23, s. 4.

Formule d'édiction

Présentation

4 (1) La formule d'édiction des lois peut être ainsi conçue :

> « Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte : ».

Disposition

(2) En cas de préambule, la formule d'édiction s'y rattache; viennent ensuite, en énoncés succincts, les articles du dispositif.

S.R., ch. I-23, art. 4.

Operation

Royal Assent

Royal assent

5 (1) The Clerk of the Parliaments shall endorse on every Act, immediately after its title, the day, month and year when the Act was assented to in Her Majesty's name and the endorsement shall be a part of the Act.

Effet

Sanction royale

Inscription de la date

5 (1) Le greffier des Parlements inscrit sur chaque loi, immédiatement après son titre, la date de sa sanction au nom de Sa Majesté. L'inscription fait partie de la loi.

Date of commencement

(2) If no date of commencement is provided for in an Act, the date of commencement of that Act is the date of assent to the Act.

Commencement provision

(3) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent to the Act, that provision is deemed to have come into force on the date of assent to the Act.

Commencement when no date fixed

(4) Where an Act provides that certain provisions thereof are to come or are deemed to have come into force on a day other than the date of assent to the Act, the remaining provisions of the Act are deemed to have come into force on the date of assent to the Act.

R.S., c. I-23, s. 5.

Day Fixed for Commencement or Repeal

Operation when date fixed for commencement or repeal

6 (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day.

When no date fixed

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name; and

(b) in the case of a regulation, on the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of the *Statutory Instruments Act* or, if the regulation is of a class that is exempted from the application of subsection 5(1) of that Act, on the expiration of the day immediately before the day the regulation was made.

Entrée en vigueur

(2) Sauf disposition contraire y figurant, la date d'entrée en vigueur d'une loi est celle de sa sanction.

Report de l'entrée en vigueur

(3) Entre en vigueur à la date de la sanction d'une loi la disposition de cette loi qui prévoit pour l'entrée en vigueur de celle-ci ou de telle de ses dispositions une date ultérieure à celle de la sanction.

Absence d'indication de date

(4) Lorsqu'une loi prévoit pour l'entrée en vigueur de certaines de ses dispositions une date antérieure ou postérieure à celle de la sanction, ses autres dispositions entrent en vigueur à la date de la sanction.

S.R., ch. I-23, art. 5.

Prise et cessation d'effet

Cas où la date est fixée

6 (1) Un texte prend effet à zéro heure à la date fixée pour son entrée en vigueur; si la date de cessation d'effet est prévue, le texte cesse d'avoir effet à vingt-quatre heures à cette date.

Absence d'indication de date

(2) En l'absence d'indication de date d'entrée en vigueur, un texte prend effet :

a) s'il s'agit d'une loi, à zéro heure à la date de sa sanction au nom de Sa Majesté;

b) s'il s'agit d'un règlement non soustrait à l'application du paragraphe 5(1) de la *Loi sur les textes réglementaires*, à zéro heure à la date de l'enregistrement prévu à l'article 6 de cette loi, et, s'il s'agit d'un règlement soustrait à cette application, à zéro heure à la date de sa prise.

Judicial notice

(3) Judicial notice shall be taken of a day for the coming into force of an enactment that is fixed by a regulation that has been published in the *Canada Gazette*.

R.S., 1985, c. I-21, s. 6; 1992, c. 1, s. 87.

Admission d'office

(3) La date d'entrée en vigueur d'un texte fixée par règlement publié dans la *Gazette du Canada* est admise d'office.

L.R. (1985), ch. I-21, art. 6; 1992, ch. 1, art. 87.

Regulation Prior to Commencement

Preliminary proceedings

7 Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective on its commencement, be exercised at any time before its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective on its commencement.

R.S., c. I-23, s. 7.

Règlement antérieur à l'entrée en vigueur

Mesures préliminaires

7 Le pouvoir d'agir, notamment de prendre un règlement, peut s'exercer avant l'entrée en vigueur du texte habilitant; dans l'intervalle, il n'est toutefois opérant que dans la mesure nécessaire pour permettre au texte de produire ses effets dès l'entrée en vigueur.

S.R., ch. I-23, art. 7.

Territorial Operation

Territorial operation

8 (1) Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment.

Amending enactment

(2) Where an enactment that does not apply to the whole of Canada is amended, no provision in the amending enactment applies to any part of Canada to which the amended enactment does not apply, unless it is provided in the amending enactment that it applies to that part of Canada or to the whole of Canada.

Exclusive economic zone of Canada

(2.1) Every enactment that applies in respect of exploring or exploiting, conserving or managing natural resources, whether living or non-living, applies, in addition to its application to Canada, to the exclusive economic zone of Canada, unless a contrary intention is expressed in the enactment.

Continental shelf of Canada

(2.2) Every enactment that applies in respect of exploring or exploiting natural resources that are

(a) mineral or other non-living resources of the seabed or subsoil, or

Portée territoriale

Règle générale

8 (1) Sauf disposition contraire y figurant, un texte s'applique à l'ensemble du pays.

Texte modificatif

(2) Le texte modifiant un texte d'application limitée à certaines parties du Canada ne s'applique à une autre partie du Canada ou à l'ensemble du pays que si l'extension y est expressément prévue.

Zone économique exclusive du Canada

(2.1) Le texte applicable, au Canada, à l'exploration et à l'exploitation, la conservation et la gestion des ressources naturelles biologiques ou non biologiques s'applique également, à moins que le contexte n'exprime une intention différente, à la zone économique exclusive du Canada.

Plateau continental du Canada

(2.2) S'applique également au plateau continental du Canada, à moins que le contexte n'exprime une intention différente, le texte applicable, au Canada, à l'exploration et à l'exploitation :

(b) living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil

applies, in addition to its application to Canada, to the continental shelf of Canada, unless a contrary intention is expressed in the enactment.

a) des ressources minérales et autres ressources naturelles non biologiques des fonds marins et de leur sous-sol;

b) des organismes vivants qui appartiennent aux espèces sédentaires, c'est-à-dire les organismes qui, au stade où ils peuvent être pêchés, sont soit immobiles sur le fond ou au-dessous du fond, soit incapables de se déplacer autrement qu'en restant constamment en contact avec le fond ou le sous-sol.

Extra-territorial operation

(3) Every Act now in force enacted prior to December 11, 1931 that expressly or by necessary or reasonable implication was intended, as to the whole or any part thereof, to have extra-territorial operation shall be construed as if, at the date of its enactment, the Parliament of Canada had full power to make laws having extra-territorial operation as provided by the *Statute of Westminster, 1931*.

R.S., 1985, c. I-21, s. 8; 1996, c. 31, s. 86.

Extra-territorialité

(3) Dans le cas de lois fédérales encore en vigueur, édictées avant le 11 décembre 1931 et dont la portée extra-territoriale était, en tout ou en partie, expressément prévue ou susceptible de se déduire logiquement de leur objet, le Parlement est réputé avoir été investi, à la date de leur édiction, du pouvoir conféré par le *Statut de Westminster de 1931* de faire des lois à portée extra-territoriale.

L.R. (1985), ch. I-21, art. 8; 1996, ch. 31, art. 86.

Rules of Construction

Property and Civil Rights

Duality of legal traditions and application of provincial law

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

2001, c. 4, s. 8.

Terminology

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

2001, c. 4, s. 8.

Règles d'interprétation

Propriété et droits civils

Tradition bijuridique et application du droit provincial

8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

2001, ch. 4, art. 8.

Terminologie

8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

2001, ch. 4, art. 8.

Private Acts

Provisions in private Acts

9 No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9.

Law Always Speaking

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

Imperative and Permissive Construction

"Shall" and "may"

11 The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28.

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

Preambles and Marginal Notes

Preamble

13 The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

R.S., c. I-23, s. 12.

Lois d'intérêt privé

Effets

9 Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9.

Permanence de la règle de droit

Principe général

10 La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Obligation et pouvoirs

Expression des notions

11 L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28.

Solution de droit

Principe et interprétation

12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. I-23, art. 11.

Préambules et notes marginales

Préambule

13 Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. I-23, art. 12.

Marginal notes and historical references

14 Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

R.S., c. I-23, s. 13.

Notes marginales

14 Les notes marginales ainsi que les mentions de textes antérieurs apparaissant à la fin des articles ou autres éléments du texte ne font pas partie de celui-ci, n'y figurant qu'à titre de repère ou d'information.

S.R., ch. I-23, art. 13.

Application of Interpretation Provisions

Application of definitions and interpretation rules

15 (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

R.S., c. I-23, s. 14.

Dispositions interprétatives

Application

15 (1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Restriction

(2) Les dispositions définitoires ou interprétatives d'un texte :

a) n'ont d'application qu'à défaut d'indication contraire;

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

S.R., ch. I-23, art. 14.

Words in regulations

16 Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

R.S., c. I-23, s. 15.

Terminologie des règlements

16 Les termes figurant dans les règlements d'application d'un texte ont le même sens que dans celui-ci.

S.R., ch. I-23, art. 15.

Her Majesty

Her Majesty not bound or affected unless stated

17 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

R.S., c. I-23, s. 16.

Sa Majesté

Non-obligation, sauf indication contraire

17 Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

S.R., ch. I-23, art. 16.

Proclamations

Proclamation

18 (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Governor in Council.

Proclamations

Auteur

18 (1) Les proclamations dont la prise est autorisée par un texte émanent du gouverneur en conseil.

Proclamation to be issued on advice

(2) Where the Governor General is authorized to issue a proclamation, the proclamation shall be understood to be a proclamation issued under an order of the Governor in Council, but it is not necessary to mention in the proclamation that it is issued under such an order.

Effective day of proclamations

(3) A proclamation that is issued under an order of the Governor in Council may purport to have been issued on the day of the order or on any subsequent day and, if so, takes effect on that day.

(4) [Repealed, 1992, c. 1, s. 88]

R.S., 1985, c. I-21, s. 18; 1992, c. 1, s. 88.

Prise sur décret

(2) Les proclamations que le gouverneur général est autorisé à prendre sont considérées comme prises au titre d'un décret du gouverneur en conseil; toutefois il n'est pas obligatoire, dans ces proclamations, de faire état de leur rattachement au décret.

Date de prise d'effet

(3) La date de la prise d'une proclamation sur décret du gouverneur en conseil peut être considérée comme celle du décret même ou comme toute date ultérieure; le cas échéant, la proclamation prend effet à la date ainsi considérée.

(4) [Abrogé, 1992, ch. 1, art. 88]

L.R. (1985), ch. I-21, art. 18; 1992, ch. 1, art. 88.

Oaths

Administration of oaths

19 (1) Where, by an enactment or by a rule of the Senate or House of Commons, evidence under oath is authorized or required to be taken, or an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered may be given by

(a) any person authorized by the enactment or rule to take the evidence; or

(b) a judge of any court, a notary public, a justice of the peace or a commissioner for taking affidavits, having authority or jurisdiction within the place where the oath is administered.

Where justice of peace empowered

(2) Where power is conferred on a justice of the peace to administer an oath or solemn affirmation or to take an affidavit or declaration, the power may be exercised by a notary public or a commissioner for taking oaths.

R.S., c. I-23, s. 18.

Serments

Prestation

19 (1) Dans les cas de dépositions sous serment ou de prestations de serment prévues par un texte ou par une règle du Sénat ou de la Chambre des communes, peuvent faire prêter le serment et en donner attestation :

a) les personnes autorisées par le texte ou la règle à recevoir les dépositions;

b) les juges, notaires, juges de paix ou commissaires aux serments compétents dans le ressort où s'effectue la prestation.

Exercice des pouvoirs d'un juge de paix

(2) Le pouvoir conféré à un juge de paix de faire prêter serment ou de recevoir des déclarations ou affirmations solennelles, ou des affidavits, peut être exercé par un notaire ou un commissaire aux serments.

S.R., ch. I-23, art. 18.

Reports to Parliament

Reports to Parliament

20 Where an Act requires a report or other document to be laid before Parliament and, in compliance with the Act, a particular report or document has been laid before Parliament at a session thereof, nothing in the Act shall be construed as requiring the same report or document to be laid before Parliament at any subsequent session.

R.S., c. I-23, s. 19.

Rapports au Parlement

Dépôt unique

20 Une loi imposant le dépôt d'un rapport ou autre document au Parlement n'a pas pour effet d'obliger à ce dépôt au cours de plus d'une session.

S.R., ch. I-23, art. 19.

Corporations

Powers vested in corporations

21 (1) Words establishing a corporation shall be construed

(a) as vesting in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property for the purposes for which the corporation is established and to alienate that property at pleasure;

(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, as vesting in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;

(c) as vesting in a majority of the members of the corporation the power to bind the others by their acts; and

(d) as exempting from personal liability for its debts, obligations or acts individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation.

Corporate name

(2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.

Banking business

(3) No corporation is deemed to be authorized to carry on the business of banking unless that power is expressly conferred on it by the enactment establishing the corporation.

R.S., c. I-23, s. 20.

Majority and Quorum

Majorities

22 (1) Where an enactment requires or authorizes more than two persons to do an act or thing, a majority of them may do it.

Personnes morales

Pouvoirs

21 (1) La disposition constitutive d'une personne morale comporte :

a) l'attribution du pouvoir d'ester en justice, de contracter sous sa dénomination, d'avoir un sceau et de le modifier, d'avoir succession perpétuelle, d'acquérir et de détenir des biens meubles dans l'exercice de ses activités et de les aliéner;

b) l'attribution, dans le cas où sa dénomination comporte un libellé français et un libellé anglais, ou une combinaison des deux, de la faculté de faire usage de l'un ou l'autre, ou des deux, et d'avoir soit un sceau portant l'empreinte des deux, soit un sceau distinct pour chacun d'eux;

c) l'attribution à la majorité de ses membres du pouvoir de lier les autres par leurs actes;

d) l'exonération de toute responsabilité personnelle à l'égard de ses dettes, obligations ou actes pour ceux de ses membres qui ne contreviennent pas à son texte constitutif.

Dénomination bilingue

(2) La dénomination d'une personne morale constituée par un texte se compose de son libellé français et de son libellé anglais même si elle ne figure dans chaque version du texte que selon le libellé correspondant à la langue de celle-ci.

Commerce de banque

(3) Une personne morale ne peut se livrer au commerce de banque que si son texte constitutif le prévoit expressément.

S.R., ch. I-23, art. 20.

Majorité et quorum

Majorité

22 (1) La majorité d'un groupe de plus de deux personnes peut accomplir les actes ressortissant aux pouvoirs ou obligations du groupe.

Quorum of board, court, commission, etc.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an "association",

(a) at a meeting of the association, a number of members of the association equal to,

(i) if the number of members provided for by the enactment is a fixed number, at least one-half of the number of members, and

(ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one-half of the number of members in office if that number is within the range,

constitutes a quorum;

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association; and

(c) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

R.S., c. I-23, s. 21.

Quorum

(2) Les dispositions suivantes s'appliquent à tout organisme — tribunal, office, conseil, commission, bureau ou autre — d'au moins trois membres constitué par un texte :

a) selon que le texte attribue à l'organisme un effectif fixe ou variable, le quorum est constitué par la moitié de l'effectif ou par la moitié du nombre de membres en fonctions, pourvu que celui-ci soit au moins égal au minimum possible de l'effectif;

b) tout acte accompli par la majorité des membres de l'organisme présents à une réunion, pourvu que le quorum soit atteint, vaut acte de l'organisme;

c) une vacance au sein de l'organisme ne fait pas obstacle à son existence ni n'entrave son fonctionnement, pourvu que le nombre de membres en fonctions ne soit pas inférieur au quorum.

S.R., ch. I-23, art. 21.

Appointment, Retirement and Powers of Officers

Public officers hold office during pleasure

23 (1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.

Effective day of appointments

(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect.

Appointment or engagement otherwise than under Great Seal

(3) Where there is authority in an enactment to appoint a person to a position or to engage the services of a

Nominations, cessation des fonctions et pouvoirs

Amovibilité

23 (1) Indépendamment de leur mode de nomination et sauf disposition contraire du texte ou autre acte prévoyant celle-ci, les fonctionnaires publics sont réputés avoir été nommés à titre amovible.

Actes de nomination revêtus du grand sceau

(2) La date de la prise d'un acte de nomination revêtu du grand sceau peut être considérée comme celle de l'autorisation de la prise de l'acte ou une date ultérieure, la nomination prenant effet à la date ainsi considérée.

Autres actes de nomination

(3) Les actes portant nomination à un poste ou louage de services et dont un texte prévoit qu'ils n'ont pas à être

person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which that person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, is deemed to be the day on which the appointment or engagement takes effect.

revêtus du grand sceau peuvent fixer, pour leur date de prise d'effet, celle de l'entrée en fonctions du titulaire du poste ou du début de la prestation des services, ou une date ultérieure; la date ainsi fixée est, sauf si elle précède de plus de soixante jours la date de prise de l'acte, celle de la prise d'effet de la nomination ou du louage.

Remuneration

(4) Where a person is appointed to an office, the appointing authority may fix, vary or terminate that person's remuneration.

Rémunération

(4) L'autorité investie du pouvoir de nomination peut fixer ou modifier la rémunération de la personne nommée ou y mettre fin.

Commencement of appointments or retirements

(5) Where a person is appointed to an office effective on a specified day, or where the appointment of a person is terminated effective on a specified day, the appointment or termination is deemed to have been effected immediately on the expiration of the previous day.

R.S., c. I-23, s. 22.

Entrée en fonctions ou cessation de fonctions

(5) La nomination ou la cessation de fonctions qui sont prévues pour une date déterminée prennent effet à zéro heure à cette date.

S.R., ch. I-23, art. 22.

Implied powers respecting public officers

24 (1) Words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to

(a) terminate the appointment or remove or suspend the public officer;

(b) re-appoint or reinstate the public officer; and

(c) appoint another person in the stead of, or to act in the stead of, the public officer.

Pouvoirs implicites des fonctionnaires publics

24 (1) Le pouvoir de nomination d'un fonctionnaire public à titre amovible comporte pour l'autorité qui en est investie les autres pouvoirs suivants :

a) celui de mettre fin à ses fonctions, de le révoquer ou de le suspendre;

b) celui de le nommer de nouveau ou de le réintégrer dans ses fonctions;

c) celui de nommer un remplaçant ou une autre personne chargée d'agir à sa place.

Power to act for ministers

(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

(a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;

(b) the successors of that minister in the office;

(c) his or their deputy; and

(d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over

Exercice des pouvoirs ministériels

(2) La mention d'un ministre par son titre ou dans le cadre de ses attributions, que celles-ci soient d'ordre administratif, législatif ou judiciaire, vaut mention :

a) de tout ministre agissant en son nom ou, en cas de vacance de la charge, du ministre investi de sa charge en application d'un décret;

b) de ses successeurs à la charge;

c) de son délégué ou de celui des personnes visées aux alinéas a) et b);

d) indépendamment de l'alinéa c), de toute personne ayant, dans le ministère ou département d'État en cause, la compétence voulue.

which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

Restriction as to public servants

(3) Nothing in paragraph (2)(c) or (d) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the *Statutory Instruments Act*.

Successors to and deputy of public officer

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name of office, include his successors in the office and his or their deputy.

Powers of holder of public office

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

R.S., 1985, c. I-21, s. 24; 1992, c. 1, s. 89.

Restriction relative aux fonctionnaires

(3) Les alinéas (2)c) ou d) n'ont toutefois pas pour effet d'autoriser l'exercice du pouvoir de prendre des règlements au sens de la *Loi sur les textes réglementaires*.

Successeurs et délégué d'un fonctionnaire public

(4) La mention d'un fonctionnaire public par son titre ou dans le cadre de ses attributions vaut mention de ses successeurs à la charge et de son ou leurs délégués ou adjoints.

Pouvoirs du titulaire d'une charge publique

(5) Les attributions attachées à une charge peuvent être exercées par son titulaire effectivement en poste.

L.R. (1985), ch. I-21, art. 24; 1992, ch. 1, art. 89.

Evidence

Documentary evidence

25 (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

Queen's Printer

(2) Every copy of an enactment having printed thereon what purports to be the name or title of the Queen's Printer and Controller of Stationery or the Queen's Printer is deemed to be a copy purporting to be printed by the Queen's Printer for Canada.

R.S., c. I-23, s. 24.

Preuve

Preuve documentaire

25 (1) Fait foi de son contenu en justice sauf preuve contraire le document dont un texte prévoit qu'il établit l'existence d'un fait sans toutefois préciser qu'il l'établit de façon concluante.

Imprimeur de la Reine

(2) La mention du nom ou du titre de l'imprimeur de la Reine et contrôleur de la papeterie ou de l'imprimeur de la Reine, portée sur les exemplaires d'un texte, est réputée être la mention de l'imprimeur de la Reine pour le Canada.

S.R., ch. I-23, art. 24.

Computation of Time

Time limits and holidays

26 Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

R.S., 1985, c. I-21, s. 26; 1999, c. 31, s. 147(F).

Calcul des délais

Jour férié

26 Tout acte ou formalité peut être accompli le premier jour ouvrable suivant lorsque le délai fixé pour son accomplissement expire un jour férié.

L.R. (1985), ch. I-21, art. 26; 1999, ch. 31, art. 147(F).

Clear days

27 (1) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

Not clear days

(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.

Beginning and ending of prescribed periods

(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

After specified day

(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

Within a time

(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

R.S., c. I-23, s. 25.

Calculation of a period of months after or before a specified day

28 Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by

(a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;

(b) excluding the specified day; and

(c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.

R.S., c. I-23, s. 25.

Time of the day

29 Where there is a reference to time expressed as a specified time of the day, the time is taken to mean standard time.

R.S., c. I-23, s. 25.

Jours francs

27 (1) Si le délai est exprimé en jours francs ou en un nombre minimal de jours entre deux événements, les jours où les événements surviennent ne comptent pas.

Délais non francs

(2) Si le délai est exprimé en jours entre deux événements, sans qu'il soit précisé qu'il s'agit de jours francs, seul compte le jour où survient le second événement.

Début et fin d'un délai

(3) Si le délai doit commencer ou se terminer un jour déterminé ou courir jusqu'à un jour déterminé, ce jour compte.

Délai suivant un jour déterminé

(4) Si le délai suit un jour déterminé, ce jour ne compte pas.

Acte à accomplir dans un délai

(5) Lorsqu'un acte doit être accompli dans un délai qui suit ou précède un jour déterminé, ce jour ne compte pas.

S.R., ch. I-23, art. 25.

Délai exprimé en mois

28 Si le délai est exprimé en nombre de mois précédant ou suivant un jour déterminé, les règles suivantes s'appliquent :

a) le nombre de mois se calcule, dans un sens ou dans l'autre, exclusion faite du mois où tombe le jour déterminé;

b) le jour déterminé ne compte pas;

c) le jour qui, dans le dernier mois obtenu selon l'alinéa a), porte le même quantième que le jour déterminé compte; à défaut de quantième identique, c'est le dernier jour de ce mois qui compte.

S.R., ch. I-23, art. 25.

Heure

29 La mention d'une heure est celle de l'heure normale.

S.R., ch. I-23, art. 25.

Time when specified age attained

30 A person is deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of that person's birth.

R.S., c. I-23, s. 25.

Mention de l'âge

30 En cas de mention d'un âge, il faut entendre le nombre d'années atteint à l'anniversaire correspondant, à zéro heure.

S.R., ch. I-23, art. 25.

Miscellaneous Rules

Reference to provincial court judge, etc.

31 (1) Where anything is required or authorized to be done by or before a judge, provincial court judge, justice of the peace or any functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

Ancillary powers

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

Powers to be exercised as required

(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Power to repeal

(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

R.S., 1985, c. I-21, s. 31; R.S., 1985, c. 27 (1st Supp.), s. 203.

Forms

32 Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.

R.S., c. I-23, s. 26.

Gender

33 (1) Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.

Number

(2) Words in the singular include the plural, and words in the plural include the singular.

Divers

Ressort

31 (1) Les actes auxquels sont tenus ou autorisés soit des juges, juges de la cour provinciale, juges de paix, fonctionnaires ou agents, soit quiconque devant eux, ne peuvent être accomplis que par ou devant ceux dans le ressort desquels se trouve le lieu de l'accomplissement.

Pouvoirs complémentaires

(2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

Modalités d'exercice des pouvoirs

(3) Les pouvoirs conférés peuvent s'exercer, et les obligations imposées sont à exécuter, en tant que de besoin.

Pouvoir réglementaire

(4) Le pouvoir de prendre des règlements comporte celui de les modifier, abroger ou remplacer, ou d'en prendre d'autres, les conditions d'exercice de ce second pouvoir restant les mêmes que celles de l'exercice du premier.

L.R. (1985), ch. I-21, art. 31; L.R. (1985), ch. 27 (1er suppl.), art. 203.

Formulaires

32 L'emploi de formulaires, modèles ou imprimés se présentant différemment de la présentation prescrite n'a pas pour effet de les invalider, à condition que les différences ne portent pas sur le fond ni ne visent à induire en erreur.

S.R., ch. I-23, art. 26.

Genre grammatical

33 (1) Le masculin ou le féminin s'applique, le cas échéant, aux personnes physiques de l'un ou l'autre sexe et aux personnes morales.

Nombre grammatical

(2) Le pluriel ou le singulier s'appliquent, le cas échéant, à l'unité et à la pluralité.

Parts of speech and grammatical forms

(3) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.

R.S., 1985, c. I-21, s. 33; 1992, c. 1, s. 90.

Famille de mots

(3) Les termes de la même famille qu'un terme défini ont un sens correspondant.

L.R. (1985), ch. I-21, art. 33; 1992, ch. 1, art. 90.

Offences

Indictable and summary conviction offences

34 (1) Where an enactment creates an offence,

(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

(b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and

(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

***Criminal Code* to apply**

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Documents similarly construed

(3) In a commission, proclamation, warrant or other document relating to criminal law or procedure in criminal matters,

(a) a reference to an offence for which the offender may be prosecuted by indictment shall be construed as a reference to an indictable offence; and

(b) a reference to any other offence shall be construed as a reference to an offence for which the offender is punishable on summary conviction.

R.S., c. I-23, s. 27.

Infractions

Mise en accusation ou procédure sommaire

34 (1) Les règles suivantes s'appliquent à l'interprétation d'un texte créant une infraction :

a) l'infraction est réputée un acte criminel si le texte prévoit que le contrevenant peut être poursuivi par mise en accusation;

b) en l'absence d'indication sur la nature de l'infraction, celle-ci est réputée punissable sur déclaration de culpabilité par procédure sommaire;

c) s'il est prévu que l'infraction est punissable sur déclaration de culpabilité soit par mise en accusation soit par procédure sommaire, la personne déclarée coupable de l'infraction par procédure sommaire n'est pas censée avoir été condamnée pour un acte criminel.

Application du *Code criminel*

(2) Sauf disposition contraire du texte créant l'infraction, les dispositions du *Code criminel* relatives aux actes criminels s'appliquent aux actes criminels prévus par un texte et celles qui portent sur les infractions punissables sur déclaration de culpabilité par procédure sommaire s'appliquent à toutes les autres infractions créées par le texte.

Application aux documents

(3) Dans tout document, notamment commission, proclamation ou mandat, relatif au droit pénal ou à la procédure pénale :

a) la mention d'une infraction punissable sur déclaration de culpabilité par mise en accusation équivaut à celle d'un acte criminel;

b) la mention de toute autre infraction équivaut à celle d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

S.R., ch. I-23, art. 27.

Powers to Enter Dwelling-houses to Carry out Arrests

Authorization to enter dwelling-house

34.1 Any person who may issue a warrant to arrest or apprehend a person under any Act of Parliament, other than the *Criminal Code*, has the same powers, subject to the same terms and conditions, as a judge or justice has under the *Criminal Code*

(a) to authorize the entry into a dwelling-house described in the warrant for the purpose of arresting or apprehending the person, if the person issuing the warrant is satisfied by information on oath that there are reasonable grounds to believe that the person is or will be present in the dwelling-house; and

(b) to authorize the entry into the dwelling-house without prior announcement if the requirement of subsection 529.4(1) of the *Criminal Code* is met.

1997, c. 39, s. 4.

Entrée dans une maison d'habitation pour arrestation

Autorisation de pénétrer dans une maison d'habitation

34.1 Toute personne habilitée à délivrer un mandat pour l'arrestation d'une personne en vertu d'une autre loi fédérale que le *Code criminel* est investie, avec les mêmes réserves, des pouvoirs que le *Code criminel* confère aux juges ou juges de paix pour autoriser quiconque est chargé de l'exécution du mandat :

a) à pénétrer dans une maison d'habitation désignée en vue de l'arrestation, si elle est convaincue, sur la foi d'une dénonciation sous serment, qu'il existe des motifs raisonnables de croire que la personne à arrêter s'y trouve ou s'y trouvera;

b) à ne pas prévenir au préalable, pourvu que l'exigence posée au paragraphe 529.4(1) du *Code criminel* soit remplie.

1997, ch. 39, art. 4.

Definitions

General definitions

35 (1) In every enactment,

Act, in respect of an Act of a legislature, includes a law of the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*loi provinciale*)

bank means a bank listed in Schedule I or II to the *Bank Act*; (*banque*)

British Commonwealth or ***British Commonwealth of Nations*** has the same meaning as *Commonwealth*; (*Commonwealth*, *Commonwealth britannique*, *Commonwealth des nations* ou *Commonwealth des nations britanniques*)

broadcasting means any radiocommunication in which the transmissions are intended for direct reception by the general public; (*radiodiffusion*)

Canada, for greater certainty, includes the internal waters of Canada and the territorial sea of Canada; (*Canada*)

Canadian waters includes the territorial sea of Canada and the internal waters of Canada; (*eaux canadiennes*)

Clerk of the Privy Council or ***Clerk of the Queen's Privy Council*** means the Clerk of the Privy Council and

Définitions

Définitions d'application générale

35 (1) Les définitions qui suivent s'appliquent à tous les textes.

agent diplomatique ou consulaire Sont compris parmi les agents diplomatiques ou consulaires les ambassadeurs, envoyés, ministres, chargés d'affaires, conseillers, secrétaires, attachés, les consuls généraux, consuls, vice-consuls et leurs suppléants, les suppléants des agents consulaires, les hauts-commissaires et délégués permanents et leurs suppléants. (*diplomatic or consular officer*)

banque Banque figurant aux annexes I ou II de la *Loi sur les banques*. (*bank*)

Canada Il est entendu que les eaux intérieures et la mer territoriale du Canada font partie du territoire de celui-ci. (*Canada*)

caution ou ***cautionnement*** L'emploi de ***caution***, de ***cautionnement*** ou de termes de sens analogue implique que la garantie correspondante est suffisante et que, sauf disposition expresse contraire, il suffit d'une seule personne pour la fournir. (*security* and *sureties*)

Commonwealth, ***Commonwealth britannique***, ***Commonwealth des nations*** ou ***Commonwealth des nations britanniques*** Association des pays figurant à

Secretary to the Cabinet; (*greffier du Conseil privé* ou *greffier du Conseil privé de la Reine*)

commencement, when used with reference to an enactment, means the time at which the enactment comes into force; (*Version anglaise seulement*)

Commonwealth or ***Commonwealth of Nations*** means the association of countries named in the schedule; (*Commonwealth*, *Commonwealth britannique*, *Commonwealth des nations* ou *Commonwealth des nations britanniques*)

Commonwealth and Dependent Territories means the several Commonwealth countries and their colonies, possessions, dependencies, protectorates, protected states, condominiums and trust territories; (*Commonwealth et dépendances*)

contiguous zone,

(a) in relation to Canada, means the contiguous zone of Canada as determined under the *Oceans Act*, and

(b) in relation to any other state, means the contiguous zone of the other state as determined in accordance with international law and the domestic laws of that other state; (*zone contiguë*)

continental shelf,

(a) in relation to Canada, means the continental shelf of Canada as determined under the *Oceans Act*, and

(b) in relation to any other state, means the continental shelf of the other state as determined in accordance with international law and the domestic laws of that other state; (*plateau continental*)

contravene includes fail to comply with; (*contravention*)

corporation does not include a partnership that is considered to be a separate legal entity under provincial law; (*personne morale*)

county includes two or more counties united for purposes to which the enactment relates; (*comté*)

county court [Repealed, 1990, c. 17, s. 26]

diplomatic or consular officer includes an ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul, acting consular agent, high l'annexe. (*Commonwealth* or *Commonwealth of Nations*, *British Commonwealth* or *British Commonwealth of Nations*)

Commonwealth et dépendances Les pays du Commonwealth et leurs colonies ou possessions, ainsi que les États ou territoires placés sous leur protectorat, leur condominium, leur tutelle ou, d'une façon générale, leur dépendance. (*Commonwealth and Dependent Territories*)

comté Peut s'entendre de plusieurs comtés réunis pour les besoins de l'application d'un texte. (*county*)

contravention Est assimilé à la contravention le défaut de se conformer à un texte. (*contravene*)

cour de comté [Abrogée, 1990, ch. 17, art. 26]

Cour fédérale [Abrogée, 2002, ch. 8, art. 151]

déclaration solennelle Déclaration faite aux termes de l'article 41 de la *Loi sur la preuve au Canada*. (*statutory declaration*)

deux juges de paix Au moins deux titulaires de cette fonction réunis ou agissant ensemble. (*two justices*)

eaux canadiennes Notamment la mer territoriale et les eaux intérieures du Canada. (*Canadian waters*)

eaux intérieures

a) S'agissant du Canada, les eaux intérieures délimitées en conformité avec la *Loi sur les océans*, y compris leur fond ou leur lit, ainsi que leur sous-sol et l'espace aérien correspondant;

b) s'agissant de tout autre État, les eaux situées en deçà de la ligne de base de la mer territoriale de cet État. (*internal waters*)

écrit Mots pouvant être lus, quel que soit leur mode de présentation ou de reproduction, notamment impression, dactylographie, peinture, gravure, lithographie ou photographie. La présente définition s'applique à tout terme de sens analogue. (*writing*)

États-Unis Les États-Unis d'Amérique. (*United States*)

force de réserve S'entend au sens de la *Loi sur la défense nationale*. (*reserve force*)

force régulière S'entend au sens de la *Loi sur la défense nationale*. (*regular force*)

commissioner, permanent delegate, adviser, acting high commissioner, and acting permanent delegate; (*agent diplomatique ou consulaire*)

exclusive economic zone,

(a) in relation to Canada, means the exclusive economic zone of Canada as determined under the *Oceans Act* and includes the seabed and subsoil below that zone, and

(b) in relation to any other state, means the exclusive economic zone of the other state as determined in accordance with international law and the domestic laws of that other state; (*zone économique exclusive*)

Federal Court [Repealed, 2002, c. 8, s. 151]

Federal Court — Appeal Division or ***Federal Court of Appeal*** [Repealed, 2002, c. 8, s. 151]

Federal Court — Trial Division [Repealed, 2002, c. 8, s. 151]

Governor, ***Governor General*** or ***Governor of Canada*** means the Governor General of Canada or other chief executive officer or administrator carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title that officer is designated; (*gouverneur*, *gouverneur du Canada* ou *gouverneur général*)

Governor General in Council or ***Governor in Council*** means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada; (*gouverneur en conseil* ou *gouverneur général en conseil*)

Great Seal means the Great Seal of Canada; (*grand sceau*)

Her Majesty, ***His Majesty***, ***the Queen***, ***the King*** or ***the Crown*** means the Sovereign of the United Kingdom, Canada and Her or His other Realms and Territories, and Head of the Commonwealth; (*Sa Majesté*, *la Reine*, *le Roi* ou *la Couronne*)

Her Majesty's Realms and Territories or ***His Majesty's Realms and Territories*** means all realms and territories under the sovereignty of Her or His Majesty; (*royaumes et territoires de Sa Majesté*)

herein used in any section shall be understood to relate to the whole enactment, and not to that section only; (*Version anglaise seulement*)

gouverneur, ***gouverneur du Canada*** ou ***gouverneur général*** Le gouverneur général du Canada ou tout administrateur ou autre fonctionnaire de premier rang chargé du gouvernement du Canada au nom du souverain, quel que soit son titre. (*Governor*, *Governor General* or *Governor of Canada*)

gouverneur en conseil ou ***gouverneur général en conseil*** Le gouverneur général du Canada agissant sur l'avis ou sur l'avis et avec le consentement du Conseil privé de la Reine pour le Canada ou conjointement avec celui-ci. (*Governor General in Council* or *Governor in Council*)

grand sceau Le grand sceau du Canada. (*Great Seal*)

greffier du Conseil privé ou ***greffier du Conseil privé de la Reine*** Le greffier du Conseil privé et secrétaire du Cabinet. (*Clerk of the Privy Council* or *Clerk of the Queen's Privy Council*)

heure locale L'heure observée au lieu considéré pour la détermination des heures ouvrables. (*local time*)

heure normale Sauf disposition contraire d'une proclamation du gouverneur en conseil destinée à s'appliquer à tout ou partie d'une province, s'entend :

a) à Terre-Neuve-et-Labrador, de l'heure normale de Terre-Neuve, en retard de trois heures et demie sur l'heure de Greenwich;

b) en Nouvelle-Écosse, au Nouveau-Brunswick, dans l'Île-du-Prince-Édouard, dans les régions du Québec situées à l'est du soixante-troisième méridien de longitude ouest et dans les régions du territoire du Nunavut situées à l'est du soixante-huitième méridien de longitude ouest, de l'heure normale de l'Atlantique, en retard de quatre heures sur l'heure de Greenwich;

c) dans les régions du Québec situées à l'ouest du soixante-troisième méridien de longitude ouest, dans les régions de l'Ontario situées entre les soixante-huitième et quatre-vingt-dixième méridiens de longitude ouest, dans l'Île Southampton et les îles voisines, et dans les régions du territoire du Nunavut situées entre les soixante-huitième et quatre-vingt-cinquième méridiens de longitude ouest, de l'heure normale de l'Est, en retard de cinq heures sur l'heure de Greenwich;

d) dans les régions de l'Ontario situées à l'ouest du quatre-vingt-dixième méridien de longitude ouest, au Manitoba, et dans les régions du territoire du Nunavut, sauf l'Île Southampton et les îles voisines, situées entre les quatre-vingt-cinquième et cent deuxième méridiens de longitude ouest, de l'heure normale du

holiday means any of the following days, namely, Sunday; New Year's Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Canada Day; the first Monday in September, designated Labour Day; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; and any of the following additional days, namely,

(a) in any province, any day appointed by proclamation of the lieutenant governor of the province to be observed as a public holiday or as a day of general prayer or mourning or day of public rejoicing or thanksgiving within the province, and any day that is a non-juridical day by virtue of an Act of the legislature of the province, and

(b) in any city, town, municipality or other organized district, any day appointed to be observed as a civic holiday by resolution of the council or other authority charged with the administration of the civic or municipal affairs of the city, town, municipality or district; (*jour férié*)

internal waters,

(a) in relation to Canada, means the internal waters of Canada as determined under the *Oceans Act* and includes the airspace above and the bed and subsoil below those waters, and

(b) in relation to any other state, means the waters on the landward side of the baselines of the territorial sea of the other state; (*eaux intérieures*)

legislative assembly, ***legislative council*** or ***legislature*** [Repealed, 2014, c. 2, s. 14]

legislative assembly or ***legislature*** includes the Lieutenant Governor in Council and the Legislative Assembly of the Northwest Territories, as constituted before September 1, 1905, and the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*législature* ou *assemblée législative*)

lieutenant governor means the lieutenant governor or other chief executive officer or administrator carrying on the government of the province indicated by the enactment, by whatever title that officer is designated, and in Yukon, the Northwest Territories and Nunavut means the Commissioner; (*lieutenant-gouverneur*)

lieutenant governor in council means

centre, en retard de six heures sur l'heure de Greenwich;

e) en Saskatchewan, en Alberta, dans les Territoires du Nord-Ouest et dans les régions du territoire du Nunavut situées à l'ouest du cent deuxième méridien de longitude ouest, de l'heure normale des Rocheuses, en retard de sept heures sur l'heure de Greenwich;

f) en Colombie-Britannique, de l'heure normale du Pacifique, en retard de huit heures sur l'heure de Greenwich;

g) au Yukon, de l'heure normale du Yukon, en retard de neuf heures sur l'heure de Greenwich. (*standard time*)

jour férié Outre les dimanches, le 1er janvier, le vendredi saint, le lundi de Pâques, le jour de Noël, l'anniversaire du souverain régnant ou le jour fixé par proclamation pour sa célébration, la fête de Victoria, la fête du Canada, le premier lundi de septembre, désigné comme fête du Travail, le 11 novembre ou jour du Souvenir, tout jour fixé par proclamation comme jour de prière ou de deuil national ou jour de réjouissances ou d'action de grâces publiques :

a) pour chaque province, tout jour fixé par proclamation du lieutenant-gouverneur comme jour férié légal ou comme jour de prière ou de deuil général ou jour de réjouissances ou d'action de grâces publiques, et tout jour qui est un jour non juridique au sens d'une loi provinciale;

b) pour chaque collectivité locale — ville, municipalité ou autre circonscription administrative —, tout jour fixé comme jour férié local par résolution du conseil ou autre autorité chargée de l'administration de la collectivité. (*holiday*)

juridiction supérieure ou ***cour supérieure*** Outre la Cour suprême du Canada, la Cour d'appel fédérale, la Cour fédérale et la Cour canadienne de l'impôt :

a) la Cour suprême de Terre-Neuve-et-Labrador;

a.1) la Cour d'appel de l'Ontario et la Cour supérieure de justice de l'Ontario;

b) la Cour d'appel et la Cour supérieure du Québec;

c) la Cour d'appel et la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

(a) the lieutenant governor of the province indicated by the enactment acting by and with the advice of, by and with the advice and consent of, or in conjunction with, the executive council,

(b) in Yukon, the Commissioner of Yukon acting with the consent of the Executive Council of Yukon,

(c) in the Northwest Territories, the Commissioner of the Northwest Territories acting with the consent of the Executive Council of the Northwest Territories, and

(d) in Nunavut, the Commissioner; (*lieutenant-gouverneur en conseil*)

local time, in relation to any place, means the time observed in that place for the regulation of business hours; (*heure locale*)

military shall be construed as relating to all or any part of the Canadian Forces; (*militaire*)

month means a calendar month; (*mois*)

oath includes a solemn affirmation or declaration when the context applies to any person by whom and to any case in which a solemn affirmation or declaration may be made instead of an oath, and in the same cases the expression ***sworn*** includes the expression "affirmed" or "declared"; (*serment*)

Parliament means the Parliament of Canada; (*Parlement*)

person, or any word or expression descriptive of a person, includes a corporation; (*personne*)

proclamation means a proclamation under the Great Seal; (*proclamation*)

province means a province of Canada, and includes Yukon, the Northwest Territories and Nunavut; (*province*)

radio or ***radiocommunication*** means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide; (*radiocommunication* ou *radio*)

regular force means the component of the Canadian Forces that is referred to in the *National Defence Act* as the regular force; (*force régulière*)

d) la Cour d'appel et la Cour suprême de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard;

e) la Cour suprême du Yukon, la Cour suprême des Territoires du Nord-Ouest ou la Cour de justice du Nunavut. (*superior court*)

législature, ***assemblée législative*** ou ***conseil législatif*** [Abrogée, 2014, ch. 2, art. 14]

législature ou ***assemblée législative*** Sont assimilés à la législature et à l'assemblée législative l'ensemble composé du lieutenant-gouverneur en conseil et de l'Assemblée législative des Territoires du Nord-Ouest, en leur état avant le 1er septembre 1905, la Législature du Yukon, la Législature des Territoires du Nord-Ouest et la Législature du Nunavut. (*legislative assembly* or *legislature*)

lieutenant-gouverneur Le lieutenant-gouverneur d'une province ou tout administrateur ou autre fonctionnaire de premier rang chargé du gouvernement de la province, quel que soit son titre, ainsi que le commissaire du Yukon, celui des Territoires du Nord-Ouest et celui du territoire du Nunavut. (*lieutenant governor*)

lieutenant-gouverneur en conseil Le lieutenant-gouverneur d'une province agissant sur l'avis ou sur l'avis et avec le consentement du conseil exécutif de la province ou conjointement avec celui-ci, le commissaire du Yukon agissant avec l'agrément du Conseil exécutif du Yukon, le commissaire des Territoires du Nord-Ouest agissant avec l'agrément du Conseil exécutif des Territoires du Nord-Ouest ou le commissaire du Nunavut, selon le cas. (*lieutenant governor in council*)

loi provinciale Sont assimilées aux lois provinciales les lois de la Législature du Yukon, de la Législature des Territoires du Nord-Ouest ou de la Législature du Nunavut. (*Act*)

mer territoriale

a) S'agissant du Canada, la mer territoriale délimitée en conformité avec la *Loi sur les océans*, y compris les fonds marins et leur sous-sol, ainsi que l'espace aérien correspondant;

b) s'agissant de tout autre État, la mer territoriale de cet État, délimitée en conformité avec le droit international et le droit interne de ce même État. (*territorial sea*)

militaire S'applique à tout ou partie des Forces canadiennes. (*military*)

reserve force means the component of the Canadian Forces that is referred to in the *National Defence Act* as the reserve force; (*force de réserve*)

security means sufficient security, and ***sureties*** means sufficient sureties, and when those words are used one person is sufficient therefor, unless otherwise expressly required; (*caution* ou *cautionnement*)

standard time, except as otherwise provided by any proclamation of the Governor in Council that may be issued for the purposes of this definition in relation to any province or territory or any part thereof, means

(a) in relation to the Province of Newfoundland and Labrador, Newfoundland standard time, being three hours and thirty minutes behind Greenwich time,

(b) in relation to the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, that part of the Province of Quebec lying east of the sixty-third meridian of west longitude, and that part of Nunavut lying east of the sixty-eighth meridian of west longitude, Atlantic standard time, being four hours behind Greenwich time,

(c) in relation to that part of the Province of Quebec lying west of the sixty-third meridian of west longitude, that part of the Province of Ontario lying between the sixty-eighth and the ninetieth meridians of west longitude, Southampton Island and the islands adjacent to Southampton Island, and that part of Nunavut lying between the sixty-eighth and the eighty-fifth meridians of west longitude, eastern standard time, being five hours behind Greenwich time,

(d) in relation to that part of the Province of Ontario lying west of the ninetieth meridian of west longitude, the Province of Manitoba, and that part of Nunavut, except Southampton Island and the islands adjacent to Southampton Island, lying between the eighty-fifth and the one hundred and second meridians of west longitude, central standard time, being six hours behind Greenwich time,

(e) in relation to the Provinces of Saskatchewan and Alberta, the Northwest Territories and that part of Nunavut lying west of the one hundred and second meridian of west longitude, mountain standard time, being seven hours behind Greenwich time,

(f) in relation to the Province of British Columbia, Pacific standard time, being eight hours behind Greenwich time, and

(g) in relation to Yukon, Yukon standard time, being nine hours behind Greenwich time; (*heure normale*)

mois Mois de l'année civile. (*month*)

Parlement Le Parlement du Canada. (*Parliament*)

personne Personne physique ou morale; l'une et l'autre notions sont visées dans des formulations générales, impersonnelles ou comportant des pronoms ou adjectifs indéfinis. (*person*)

personne morale Entité dotée de la personnalité morale, à l'exclusion d'une société de personnes à laquelle le droit provincial reconnaît cette personnalité. (*corporation*)

plateau continental

a) S'agissant du Canada, le plateau continental délimité en conformité avec la *Loi sur les océans*;

b) s'agissant de tout autre État, le plateau continental de cet État, délimité en conformité avec le droit international et le droit interne de ce même État. (*continental shelf*)

proclamation Proclamation sous le grand sceau. (*proclamation*)

province Province du Canada, ainsi que le Yukon, les Territoires du Nord-Ouest et le territoire du Nunavut. (*province*)

radiocommunication ou ***radio*** Toute transmission, émission ou réception de signes, de signaux, d'écrits, d'images, de sons ou de renseignements de toute nature, au moyen d'ondes électromagnétiques de fréquences inférieures à 3 000 GHz transmises dans l'espace sans guide artificiel. (*radio* or *radiocommunication*)

radiodiffusion Toute radiocommunication dont les émissions sont destinées à être reçues directement par le public en général. (*broadcasting*)

royaumes et territoires de Sa Majesté Tous les royaumes et territoires placés sous la souveraineté de Sa Majesté. (*Her Majesty's Realms and Territories*)

Royaume-Uni Le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord. (*United Kingdom*)

Sa Majesté, ***la Reine***, ***le Roi*** ou ***la Couronne*** Le souverain du Royaume-Uni, du Canada et de Ses autres royaumes et territoires, et chef du Commonwealth. (*Her Majesty*, *His Majesty*, *the Queen*, *the King* or *the Crown*)

statutory declaration means a solemn declaration made pursuant to section 41 of the *Canada Evidence Act*; (*déclaration solennelle*)

superior court means

(a) in the Province of Newfoundland and Labrador, the Supreme Court,

(a.1) in the Province of Ontario, the Court of Appeal for Ontario and the Superior Court of Justice,

(b) in the Province of Quebec, the Court of Appeal and the Superior Court in and for the Province,

(c) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Appeal for the Province and the Court of Queen's Bench for the Province,

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal and the Supreme Court of the Province, and

(e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice,

and includes the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada; (*juridiction supérieure* ou *cour supérieure*)

telecommunications means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (*télécommunication*)

territorial sea,

(a) in relation to Canada, means the territorial sea of Canada as determined under the *Oceans Act* and includes the airspace above and the seabed and subsoil below that sea, and

(b) in relation to any other state, means the territorial sea of the other state as determined in accordance with international law and the domestic laws of that other state; (*mer territoriale*)

territory means Yukon, the Northwest Territories and Nunavut; (*territoires*)

two justices means two or more justices of the peace, assembled or acting together; (*deux juges de paix*)

Section d'appel de la Cour fédérale ou ***Cour d'appel fédérale*** [Abrogée, 2002, ch. 8, art. 151]

Section de première instance de la Cour fédérale [Abrogée, 2002, ch. 8, art. 151]

serment Ont valeur de serment la déclaration ou l'affirmation solennelle dans les cas où il est prévu qu'elles peuvent en tenir lieu et où l'intéressé a la faculté de les y substituer; les formulations comportant les verbes « déclarer » ou « affirmer » équivalent dès lors à celles qui comportent l'expression ***sous serment***. (*oath* and *sworn*)

télécommunication La transmission, l'émission ou la réception de signes, signaux, écrits, images, sons ou renseignements de toute nature soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout procédé technique semblable. (*telecommunications*)

territoires S'entend du Yukon, des Territoires du Nord-Ouest et du Nunavut. (*territory*)

zone contiguë

a) S'agissant du Canada, la zone contiguë délimitée en conformité avec la *Loi sur les océans*;

b) s'agissant de tout autre État, la zone contiguë de cet État, délimitée en conformité avec le droit international et le droit interne de ce même État. (*contiguous zone*)

zone économique exclusive

a) S'agissant du Canada, la zone économique exclusive délimitée en conformité avec la *Loi sur les océans*, y compris les fonds marins et leur sous-sol;

b) s'agissant de tout autre État, la zone économique exclusive de cet État, délimitée en conformité avec le droit international et le droit interne de ce même État. (*exclusive economic zone*)

United Kingdom means the United Kingdom of Great Britain and Northern Ireland; (*Royaume-Uni*)

United States means the United States of America; (*États-Unis*)

writing, or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form. (*écrit*)

Governor in Council may amend schedule

(2) The Governor in Council may, by order, amend the schedule by adding thereto the name of any country recognized by the order to be a member of the Commonwealth or deleting therefrom the name of any country recognized by the order to be no longer a member of the Commonwealth.

R.S., 1985, c. I-21, s. 35; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 26; 1992, c. 1, s. 91, c. 47, s. 79, c. 51, s. 56; 1993, c. 28, s. 78, c. 38, s. 87; 1995, c. 39, s. 174; 1996, c. 31, s. 87; 1998, c. 15, s. 28, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 71, c. 28, s. 168; 2002, c. 7, s. 188, c. 8, s. 151; 2014, c. 2, s. 14; 2015, c. 3, s. 124.

Modification de l'annexe

(2) Le gouverneur en conseil peut, par décret, reconnaître l'acquisition ou la perte, par un pays, de la qualité de membre du Commonwealth et, selon le cas, inscrire ce pays à l'annexe ou l'en radier.

L.R. (1985), ch. I-21, art. 35; L.R. (1985), ch. 11 (1er suppl.), art. 2, ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 26; 1992, ch. 1, art. 91, ch. 47, art. 79, ch. 51, art. 56; 1993, ch. 28, art. 78, ch. 38, art. 87; 1995, ch. 39, art. 174; 1996, ch. 31, art. 87; 1998, ch. 15, art. 28, ch. 30, art. 13(F) et 15(A); 1999, ch. 3, art. 71, ch. 28, art. 168; 2002, ch. 7, art. 188, ch. 8, art. 151; 2014, ch. 2, art. 14; 2015, ch. 3, art. 124.

Construction of *telegraph*

36 The expression ***telegraph*** and its derivatives, in an enactment or in an Act of the legislature of any province enacted before that province became part of Canada on any subject that is within the legislative powers of Parliament, are deemed not to include the word "telephone" or its derivatives.

R.S., c. I-23, s. 29.

Télégraphe et téléphone

36 Le terme ***télégraphe*** et ses dérivés employés, à propos d'un domaine ressortissant à la compétence législative du Parlement, dans un texte ou dans des lois provinciales antérieures à l'incorporation de la province au Canada ne sont pas censés s'appliquer au terme « téléphone » ou à ses dérivés.

S.R., ch. I-23, art. 29.

Construction of *year*

37 (1) The expression ***year*** means any period of twelve consecutive months, except that a reference

(a) to a ***calendar year*** means a period of twelve consecutive months commencing on January 1;

(b) to a ***financial year*** or ***fiscal year*** means, in relation to money provided by Parliament, or the Consolidated Revenue Fund, or the accounts, taxes or finances of Canada, the period beginning on April 1 in one calendar year and ending on March 31 in the next calendar year; and

(c) by number to a Dominical year means the period of twelve consecutive months commencing on January 1 of that Dominical year.

Notion d'année

37 (1) La notion d'année s'entend de toute période de douze mois, compte tenu des dispositions suivantes :

a) ***année civile*** s'entend de l'année commençant le 1er janvier;

b) ***exercice*** s'entend, en ce qui a trait aux crédits votés par le Parlement, au Trésor, aux comptes et aux finances du Canada ou aux impôts fédéraux, de la période commençant le 1er avril et se terminant le 31 mars de l'année suivante;

c) la mention d'un millésime s'applique à l'année civile correspondante.

Governor in Council may define year

(2) Where in an enactment relating to the affairs of Parliament or the Government of Canada there is a reference to a period of a year without anything in the context to indicate beyond doubt whether a financial or fiscal year,

Précision de la notion

(2) Le gouverneur en conseil peut préciser la notion d'année pour l'application des textes relatifs au Parlement ou au gouvernement fédéral et où figure cette notion sans que le contexte permette de déterminer en

any period of twelve consecutive months or a period of twelve consecutive months commencing on January 1 is intended, the Governor in Council may prescribe which of those periods of twelve consecutive months shall constitute a year for the purposes of the enactment.

R.S., c. I-23, ss. 28, 31.

toute certitude s'il s'agit de l'année civile, de l'exercice ou d'une période quelconque de douze mois.

S.R., ch. I-23, art. 28 et 31.

Common names

38 The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation thereof.

R.S., c. I-23, s. 30.

Langage courant

38 La désignation courante d'une personne, d'un groupe, d'une fonction, d'un lieu, d'un pays, d'un objet ou autre entité équivaut à la désignation officielle ou intégrale.

S.R., ch. I-23, art. 30.

Affirmative and negative resolutions

39 (1) In every Act,

(a) the expression ***subject to affirmative resolution of Parliament***, when used in relation to any regulation, means that the regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and shall not come into force unless and until it is affirmed by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses;

(b) the expression ***subject to affirmative resolution of the House of Commons***, when used in relation to any regulation, means that the regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House;

(c) the expression ***subject to negative resolution of Parliament***, when used in relation to any regulation, means that the regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses; and

(d) the expression ***subject to negative resolution of the House of Commons***, when used in relation to any regulation, means that the regulation shall be laid before the House of Commons within fifteen days after

Résolutions de ratification ou de rejet

39 (1) Dans les lois, l'emploi des expressions ci-après, à propos d'un règlement, comporte les implications suivantes :

a) ***sous réserve de résolution de ratification du Parlement*** : le règlement est à déposer devant le Parlement dans les quinze jours suivant sa prise ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs, et son entrée en vigueur est subordonnée à sa ratification par résolution des deux chambres présentée et adoptée conformément aux règles de celles-ci;

b) ***sous réserve de résolution de ratification de la Chambre des communes*** : le règlement est à déposer devant la Chambre des communes dans les quinze jours suivant sa prise ou, si la chambre ne siège pas, dans les quinze premiers jours de séance ultérieurs, et son entrée en vigueur est subordonnée à sa ratification par résolution de la chambre présentée et adoptée conformément aux règles de celle-ci;

c) ***sous réserve de résolution de rejet du Parlement*** : le règlement est à déposer devant le Parlement dans les quinze jours suivant sa prise ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs, et son annulation peut être prononcée par résolution des deux chambres présentée et adoptée conformément aux règles de celles-ci;

d) ***sous réserve de résolution de rejet de la Chambre des communes*** : le règlement est à déposer devant la Chambre des communes dans les quinze jours suivant sa prise ou, si la chambre ne siège pas, dans les quinze premiers jours de séance ultérieurs, et son annulation peut être prononcée par résolution de la chambre présentée et adoptée conformément aux règles de celle-ci.

it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and may be annulled by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

Effect of negative resolution

(2) Where a regulation is annulled by a resolution of Parliament or of the House of Commons, it is deemed to have been revoked on the day the resolution is passed and any law that was revoked or amended by the making of that regulation is deemed to be revived on the day the resolution is passed, but the validity of any action taken or not taken in compliance with a regulation so deemed to have been revoked shall not be affected by the resolution.

R.S., c. 29(2nd Supp.), s. 1.

Effet d'une résolution de rejet

(2) Le règlement annulé par résolution du Parlement ou de la Chambre des communes est réputé abrogé à la date d'adoption de la résolution; dès lors toute règle de droit qu'il abrogeait ou modifiait est réputée rétablie à cette date, sans que s'en trouve toutefois atteinte la validité d'actes ou omissions conformes au règlement.

S.R., ch. 29(2e suppl.), art. 1.

References and Citations

Citation of enactment

40 (1) In an enactment or document,

(a) an Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted or by reference to its long title or short title, with or without reference to its chapter number; and

(b) a regulation may be cited by reference to its long title or short title, by reference to the Act under which it was made or by reference to the number or designation under which it was registered by the Clerk of the Privy Council.

Citation includes amendment

(2) A citation of or reference to an enactment is deemed to be a citation of or reference to the enactment as amended.

R.S., c. I-23, s. 32.

Reference to two or more parts, etc.

41 (1) A reference in an enactment by number or letter to two or more parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules, appendices or forms shall be read as including the number or letter first mentioned and the number or letter last mentioned.

Mentions et renvois

Désignation des textes

40 (1) Dans les textes ou des documents quelconques :

a) les lois peuvent être désignées par le numéro de chapitre qui leur est donné dans le recueil des lois révisées ou dans le recueil des lois de l'année ou de l'année du règne où elles ont été édictées, ou par leur titre intégral ou abrégé, avec ou sans mention de leur numéro de chapitre;

b) les règlements peuvent être désignés par leur titre intégral ou abrégé, par la mention de leur loi habilitante ou par leur numéro ou autre indication d'enregistrement auprès du greffier du Conseil privé.

Modifications

(2) Les renvois à un texte ou ses mentions sont réputés se rapporter à sa version éventuellement modifiée.

S.R., ch. I-23, art. 32.

Renvois à plusieurs éléments d'un texte

41 (1) Dans un texte, le renvoi par désignation numérique ou littérale à un passage formé de plusieurs éléments — parties, sections, articles, paragraphes, alinéas, sous-alinéas, divisions, subdivisions, annexes, appendices, formulaires, modèles ou imprimés — vise aussi les premier et dernier de ceux-ci.

Reference in enactments to parts, etc.

(2) A reference in an enactment to a part, division, section, schedule, appendix or form shall be read as a reference to a part, division, section, schedule, appendix or form of the enactment in which the reference occurs.

Reference in enactment to subsections, etc.

(3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or subclause shall be read as a reference to a subsection, paragraph, subparagraph, clause or subclause of the section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.

Reference to regulations

(4) A reference in an enactment to regulations shall be read as a reference to regulations made under the enactment in which the reference occurs.

Reference to another enactment

(5) A reference in an enactment by number or letter to any section, subsection, paragraph, subparagraph, clause, subclause or other division or line of another enactment shall be read as a reference to the section, subsection, paragraph, subparagraph, clause, subclause or other division or line of such other enactment as printed by authority of law.

R.S., c. I-23, s. 33.

Renvoi aux éléments du même texte

(2) Dans un texte, le renvoi à un des éléments suivants : partie, section, article, annexe, appendice, formulaire, modèle ou imprimé constitue un renvoi à un élément du texte même.

Renvoi aux éléments de l'article

(3) Dans un texte, le renvoi à un élément de l'article — paragraphe, alinéa, sous-alinéa, division ou subdivision — constitue, selon le cas, un renvoi à un paragraphe de l'article même ou à une sous-unité de l'élément immédiatement supérieur.

Renvoi aux règlements

(4) Dans un texte, le renvoi aux règlements, ou l'emploi d'un terme de la même famille que le mot « règlement », constitue un renvoi aux règlements d'application du texte.

Renvoi à un autre texte

(5) Dans un texte, le renvoi à un élément — notamment par désignation numérique ou littérale d'un article ou de ses sous-unités ou d'une ligne — d'un autre texte constitue un renvoi à un élément de la version imprimée légale de ce texte.

S.R., ch. I-23, art. 33.

Repeal and Amendment

Power of repeal or amendment reserved

42 (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

Amendment or repeal at same session

(2) An Act may be amended or repealed by an Act passed in the same session of Parliament.

Amendment part of enactment

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

R.S., c. I-23, s. 34.

Effect of repeal

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

Abrogation et modification

Pouvoir d'abrogation ou de modification

42 (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

Interaction en cours de session

(2) Une loi peut être modifiée ou abrogée par une autre loi adoptée au cours de la même session du Parlement.

Incorporation des modifications

(3) Le texte modificatif, dans la mesure compatible avec sa teneur, fait partie du texte modifié.

S.R., ch. I-23, art. 34.

Effet de l'abrogation

43 L'abrogation, en tout ou en partie, n'a pas pour conséquence :

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

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

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

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

R.S., c. I-23, s. 35.

a) de rétablir des textes ou autres règles de droit non en vigueur lors de sa prise d'effet;

b) de porter atteinte à l'application antérieure du texte abrogé ou aux mesures régulièrement prises sous son régime;

c) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;

d) d'empêcher la poursuite des infractions au texte abrogé ou l'application des sanctions — peines, pénalités ou confiscations — encourues aux termes de celui-ci;

e) d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas c) et d).

Les enquêtes, procédures ou recours visés à l'alinéa e) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.

S.R., ch. I-23, art. 35.

Repeal and substitution

44 Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

(a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another person is appointed in the stead of that person;

(b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal in so far as they are consistent with the new enactment;

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,

Abrogation et remplacement

44 En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

a) les titulaires des postes pourvus sous le régime du texte antérieur restent en place comme s'ils avaient été nommés sous celui du nouveau texte, jusqu'à la nomination de leurs successeurs;

b) les cautions ou autres garanties fournies par le titulaire d'un poste pourvu sous le régime du texte antérieur gardent leur validité, l'application des mesures prises et l'utilisation des livres, imprimés ou autres documents employés conformément à ce texte se poursuivant, sauf incompatibilité avec le nouveau texte, comme avant l'abrogation;

c) les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte, dans la mesure de leur compatibilité avec celui-ci;

d) la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible :

(i) pour le recouvrement des amendes ou pénalités et l'exécution des confiscations imposées sous le régime du texte antérieur,

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

R.S., c. I-23, s. 36.

(ii) pour l'exercice des droits acquis sous le régime du texte antérieur,

(iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;

e) les sanctions dont l'allégement est prévu par le nouveau texte sont, après l'abrogation, réduites en conséquence;

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

g) les règlements d'application du texte antérieur demeurent en vigueur et sont réputés pris en application du nouveau texte, dans la mesure de leur compatibilité avec celui-ci, jusqu'à abrogation ou remplacement;

h) le renvoi, dans un autre texte, au texte abrogé, à propos de faits ultérieurs, équivaut à un renvoi aux dispositions correspondantes du nouveau texte; toutefois, à défaut de telles dispositions, le texte abrogé est considéré comme étant encore en vigueur dans la mesure nécessaire pour donner effet à l'autre texte.

S.R., ch. I-23, art. 36.

Repeal does not imply enactment was in force

45 (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

Amendment does not imply change in law

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

Absence de présomption d'entrée en vigueur

45 (1) L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que le texte était auparavant en vigueur ou que le Parlement, ou toute autre autorité qui l'a édicté, le considérait comme tel.

Absence de présomption de droit nouveau

(2) La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

Repeal does not declare previous law

(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

Judicial construction not adopted

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

R.S., c. I-23, s. 37.

Absence de déclaration sur l'état antérieur du droit

(3) L'abrogation ou la modification, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit.

Absence de confirmation de l'interprétation judiciaire

(4) La nouvelle édiction d'un texte, ou sa révision, refonte, codification ou modification, n'a pas valeur de confirmation de l'interprétation donnée, par décision judiciaire ou autrement, des termes du texte ou de termes analogues.

S.R., ch. I-23, art. 37.

Demise of Crown

Effect of demise

46 (1) Where there is a demise of the Crown,

(a) the demise does not affect the holding of any office under the Crown in right of Canada; and

(b) it is not necessary by reason of the demise that the holder of any such office again be appointed thereto or, having taken an oath of office or allegiance before the demise, again take that oath.

Continuation of proceedings

(2) No writ, action or other process or proceeding, civil or criminal, in or issuing out of any court established by an Act is, by reason of a demise of the Crown, determined, abated, discontinued or affected, but every such writ, action, process or proceeding remains in full force and may be enforced, carried on or otherwise proceeded with or completed as though there had been no such demise.

R.S., c. I-23, s. 38.

Dévolution de la Couronne

Absence d'effet

46 (1) La dévolution de la Couronne n'a pas pour effet :

a) de porter atteinte à l'occupation d'une charge publique fédérale;

b) d'obliger à nommer de nouveau le titulaire d'une telle charge ou de lui imposer la prestation d'un nouveau serment professionnel ou d'allégeance.

Procédures judiciaires

(2) La dévolution de la Couronne n'a pour effet, ni au civil ni au pénal, de porter atteinte aux actes émanant des tribunaux constitués par une loi ou d'interrompre les procédures engagées devant eux, ni d'y mettre fin, ces actes demeurant valides et exécutoires et ces procédures pouvant être menées à leur terme sans solution de continuité.

S.R., ch. I-23, art. 38.

SCHEDULE

(Section 35)

Antigua and Barbuda
Australia
The Bahamas
Bangladesh
Barbados
Belize
Botswana
Brunei Darussalam
Canada
Cyprus
Dominica
Fiji
Gambia
Ghana
Grenada
Guyana
India
Jamaica
Kenya
Kiribati
Lesotho
Malawi
Malaysia
Maldives
Malta
Mauritius
Nauru
New Zealand
Nigeria
Pakistan
Papua New Guinea
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Seychelles
Sierra Leone
Singapore
Solomon Islands
South Africa
Sri Lanka
Swaziland

ANNEXE

(article 35)

Afrique du Sud
Antigua et Barbuda
Australie
Bahamas
Bangladesh
Barbade
Belize
Botswana
Brunéi Darussalam
Canada
Chypre
Dominique
Fidji
Gambie
Ghana
Grenade
Guyane
Îles Salomon
Inde
Jamaïque
Kenya
Kiribati
Lesotho
Malaisie
Malawi
Maldives
Malte
Maurice
Nauru
Nigeria
Nouvelle-Zélande
Ouganda
Pakistan
Papouasie-Nouvelle-Guinée
Royaume-Uni
Saint-Christophe-et-Nevis
Sainte-Lucie
Saint-Vincent-et-Grenadines
Samoa occidental
Seychelles
Sierra Leone

Tanzania
Tonga
Trinidad and Tobago
Tuvalu
Uganda
United Kingdom
Vanuatu
Western Samoa
Zambia
Zimbabwe

R.S., 1985, c. I-21, Sch.; SOR/86-532; SOR/93-140; SOR/95-366.

Singapour
Sri Lanka
Swaziland
Tanzanie
Tonga
Trinité et Tobago
Tuvalu
Vanuatu
Zambie
Zimbabwe

L.R. (1985), ch. I-21, ann.; DORS/86-532; DORS/93-140; DORS/95-366.

RELATED PROVISIONS

— 1998, c. 30, s. 10

Transitional — proceedings

10 Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

DISPOSITIONS CONNEXES

— 1998, ch. 30, art. 10

Procédures

10 Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

Tab 7

1994 CarswellBC 592
Supreme Court of Canada

R. v. Heywood

1994 CarswellBC 1247, 1994 CarswellBC 592, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101, [1995] B.C.W.L.D. 048, 120 D.L.R. (4th) 348, 174 N.R. 81, 24 C.R.R. (2d) 189, 25 W.C.B. (2d) 438, 34 C.R. (4th) 133, 50 B.C.A.C. 161, 82 W.A.C. 161, 94 C.C.C. (3d) 481, J.E. 94-1938, EYB 1994-67091

R. v. ROBERT LORNE HEYWOOD; ATTORNEY GENERAL OF CANADA (Intervenor)

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

Heard: April 27, 1994
Judgment: November 24, 1994 *
Docket: Doc. 23384

Counsel: *Robert A. Mulligan*, for the Crown
B. Morahan, for respondent.
Bernard Laprade, for intervenor.

***Cory J.* (*Lamer C.J.C., Sopinka, Iacobucci* and *Major JJ.* concurring):**

1 Section 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, s. C-46 as amended, makes it a crime for persons convicted of specified offences to be "found loitering in or near a school ground, playground, public park or bathing area". It must be determined whether the section infringes s. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Facts

2 The respondent was charged with two counts of vagrancy under s. 179(1)(*b*) alleging that on or about July 5, 1989, he did commit vagrancy by loitering at Beacon Hill Park in Victoria. The first count was framed as loitering "at or near a playground". The second count, which referred to the same events, was framed as loitering "in or near a public park".

3 In 1987 the respondent was convicted of two counts of sexual assault contrary to the former s. 246.1(1) (now s. 271(1)) of the *Criminal Code*. These convictions made him subject to the prohibition set out in s. 179(1)(*b*).

4 On June 16, 1989, for about two minutes, Police Constable Ronald German observed the respondent standing in Beacon Hill Park in Victoria, British Columbia at the edge of a playground area. Around his neck the respondent was carrying a camera with a telephoto lens. The constable did not see the respondent take any pictures or approach or speak to any children. The respondent then went to another area of the park. Constable German followed the respondent and called to him. The respondent stopped, and German identified himself and produced his badge. He asked the respondent what he was doing in the park. The respondent replied that he was walking through the park just as he did every day.

5 After some further discussion, the officer asked the respondent for his address, date of birth, and if he had a criminal record. The respondent replied that he had a criminal record for sexual assault. Constable German then told the respondent that his hanging around the park was contrary to the vagrancy section of the Code, and that a convicted sex offender was not permitted to loiter near a public park, school yard or playground. The respondent asked the officer what he meant by "loitering", to which Constable German very astutely replied: "loitering meant standing around, apparently doing nothing, standing stationary in a location, or moving slowly in a certain area, stopping at regular intervals and standing around, or else loitering also could mean

stopping in a location where it would obstruct persons who use that area too [*sic*] frequent". The officer did not charge the respondent, but warned him not to loiter near the playground at the park again.

6 On the afternoon of July 5, 1989, Constable Wayne Coleman observed the respondent walking on a pathway leading from the children's playground area in the Beacon Hill Park towards the petting zoo. After stopping there for a few minutes, the respondent went to his car. The respondent was once again carrying a camera with a large lens. Constable Coleman, who was in plain clothes, followed the respondent in an unmarked police car. After driving around for approximately half an hour, the respondent returned to the park. There, the officer saw the respondent seated at a table approximately 50 yards from the playground area. He then moved to a bench approximately 20 yards from the playground and appeared to be using his camera. Some five minutes later, the respondent left the park and returned to his car. Constable Coleman followed the respondent to his residence, where he arrested Heywood and charged him with vagrancy. The police seized his camera and film. A search warrant was subsequently executed at his residence. A picture on the film found in the camera, and a number of pictures found in the respondent's residence and at the drugstore where he had his photographs developed, showed young girls playing in the park, their clothing disarranged from play so that the area of their crotch, although covered by underclothes, was visible.

7 At his trial, the respondent pleaded not guilty and challenged the constitutionality of s. 179(1)(*b*) on the grounds that it infringed ss. 7, 11(*d*), 11(*h*), 12 and 15 of the *Charter*. The trial judge found that s. 179(1)(*b*) violated ss. 7 and 11(*d*) of the *Charter*, but that it was a justifiable limit under s. 1. The respondent was convicted of the first count of vagrancy under s. 179(1)(*b*). The second count was conditionally stayed pursuant to the principle expressed in *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729. The respondent was sentenced to three months' incarceration to be followed by three years' probation. The respondent appealed to the Supreme Court of British Columbia, which dismissed his appeal [reported at (1991), 65 C.C.C. (3d) 46]. The Supreme Court judge accepted the trial judge's finding that s. 179(1)(*b*) violated ss. 7 and 11(*d*) of the *Charter*, but like the trial judge found that they were justified under s. 1.

8 The respondent appealed to the British Columbia Court of Appeal. The Court of Appeal allowed the respondent's appeal, and quashed the conviction [reported at (1992), 18 C.R. (4th) 63]. Hutcheon J.A. (Rowles J.A. concurring) accepted the breaches of ss. 7 and 11(*d*) as found by the lower courts. Southin J.A. only found a breach of s. 7. All three judges of the Court of Appeal found that s. 179(1)(*b*) was not justified under s. 1 of the *Charter*. The Crown appellant was granted leave to appeal to this Court.

Relevant Legislation

9 Section 179(1)(*b*) provides that:

> 179. (1) Every one commits vagrancy who
>
> . . . . .
>
> (*b*) having at any time been convicted of an offence under section 151, 152 or 153, subsection 160(3) or 173(2) or section 271, 272 or 273, or of an offence under a provision referred to in paragraph (*b*) of the definition "serious personal injury offence" in section 687 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read before January 4, 1983, is found loitering in or near a school ground, playground, public park or bathing area.

10 The definition of "serious personal injury offence" in s. 687 of the *Criminal Code*, R.S.C. 1970, c. C-34, as it read before January 4, 1983, was as follows:

> 687. ...
>
> (*b*) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).

Judgments

11

Provincial Court (Filmer Prov. J.)

12 The trial judge found that s. 179(1)(*b*) of the Code violated s. 7 of the *Charter* because it was "an impediment on the freedom and liberty of persons who have been previously convicted of the enumerated sections of the *Criminal Code*". He also found that s. 179(1)(*b*) violated s. 11(*d*) of the *Charter*. However, he concluded that s. 179(1)(*b*) could be saved under s. 1 of the *Charter*.

13 The trial judge found that the word "loiter" in s. 179(1)(*b*) did not connote innocent behaviour; rather, there must be an untoward or improper motive. In his opinion that motive did not need to be illegal. It was sufficient if it was "malevolent", or something a reasonable person would not consider innocent. In light of this interpretation of the word "loiter", the trial judge found that s. 179(1)(*b*) was justified under s. 1 of the *Charter*. He held that the objective of the section, namely protecting children and vulnerable persons from those within the community who might be sexually predatory, was pressing and substantial and that the means chosen were rationally connected to this objective.

14 Based on the evidence of the photographs taken by the respondent, the trial judge found that the respondent did not have an innocent purpose for being in the park. He stated:

> It is my view that the conduct of [the respondent] transcended the bounds of what is harmless and innocent. His conduct pandered to a purely prurient interest; that is, it arose from indulgence in lewd ideas. Lewd in this context means that it involved obscenity, indecency, or lasciviousness of thought. Such conduct is so reprehensible in my view no reasonable person could characterize it as innocent or lawful. As I said when reviewing the constitutionality of this section, the section is not intended to limit innocent attendances or attendances where a lawful purpose is involved. I cannot find such a purpose exists here.

15 He further noted that the provisions of the *Criminal Records Act*, R.S.C. 1985, c. C-47, applied to permit a person who was subject to s. 179(1)(*b*) to obtain a pardon so that they would no longer be subject to the prohibition. He found that this provision acted as a safeguard against the unfair application of s. 179(1)(*b*).

Supreme Court (1991), 65 C.C.C. (3d) 46 (Melvin J.)

16 Melvin J. held at p. 56 that the meaning of the word "loiter" should be determined "by reference to the general use of the word in everyday language as found in dictionaries, other sections in the same statutory enactment, and in the context of the offence section itself". He found, at pp. 57-58, that:

> I am satisfied that the word "loiter" in s. 179(1)(*b*) requires the existence of some unlawful, or evil, or malevolent intention or purpose on the part of the accused to complete the offence. Such an interpretation of the section demonstrates that a guilty mind is an essential component of the offence which must be established beyond a reasonable doubt. It is not sufficient to convict an individual under this section, in my view, of loitering on the basis that he attended at a park and sat watching flowers grow or ducks swim. There must be more to his conduct which will demonstrate an untoward or improper purpose.

He then concluded that the respondent's purpose was not innocent and it was that purpose or state of mind which brought him within the definition of "loitering" in s. 179(1)(*b*).

17 The appeal before Melvin J. was argued on the basis that the trial judge was correct to find violations of ss. 7 and 11(*d*) of the *Charter*. On this basis, he accepted that s. 179(1)(*b*) violated ss. 7 and 11(*d*) of the *Charter*. However, after reviewing the expert evidence he was satisfied that s. 179(1)(*b*) was justified under s. 1 of the *Charter*. He stated, at p. 63, that:

> The objective, namely, the controlling of the impulses of potential reoffenders and the protection of the public, is of great importance and clearly justifies overriding a constitutionally protected right or freedom, such as found in s. 7 or 11(*d*) of the Charter. When one considers the means chosen under those circumstances, if the section contains an evil or malevolent intent as a component to be demonstrated by the evidence led on behalf of the [appellant], then the proportionality test

in *R. v. Oakes* is satisfied as the measures are designed to achieve their objective and are rationally connected with that objective and have little impairment of the rights or freedom in question.

18 As a result of his conclusions he dismissed the respondent's appeal.

Court of Appeal (1992), 77 C.C.C. (3d) 502 [18 C.R. (4th) 63]

Hutcheon J.A. (Rowles J.A. concurring)

19 In the Court of Appeal the Crown accepted the trial judge's finding that the provisions of s. 179(1)(*b*) violated ss. 7 and 11(*d*) of the *Charter*. Hutcheon J.A. proceeded on this basis and as a result dealt only with the question as to whether the section was saved by s. 1 of the *Charter*. He concluded that it was not.

20 Hutcheon J.A. carefully reviewed the jurisprudence pertaining to the word "loiter" and determined that there was no support for the position that the word implies an evil or malevolent intent. He wrote at p. 509 [C.C.C., p. 73 C.R.]:

> I cannot find any support in those authorities for the proposition that the word "loiter" implies an evil or malevolent intent or purpose or an untoward or improper motive. Moreover, I question whether the taking of the photographs would qualify as an evil or malevolent intent. To be a criminal offence under the *Criminal Code*, the intent must be directed toward the corruption of others, not oneself.

21 He observed that the objectives of s. 179(1)(*b*) were to control the impulses of potential re-offenders and to protect the public. However, he found at p. 511 [C.C.C., p. 75 C.R.] that the lack of a provision for notice in s. 179(1)(*b*) caused the means chosen to achieve the objectives of s. 179(1)(*b*) "to be unfair and not carefully designed to achieve the two objectives". Thus, they were not justified under s. 1. Hutcheon J.A. stated that the Crown could not invoke s. 19 of the Code since s. 179(1)(*b*) was not a provision applicable to everyone. He concluded, at p. 511 [C.C.C., p. 75 C.R.], that:

> Our system of criminal justice could not operate if accused persons could raise the defence that they did not know it was contrary to the law to steal or to assault someone or to defraud. But if the fundamental liberty of movement of a particular group, convicted sexual offenders, is to be controlled, proper notice of the prohibition to the members of that group is an essential element of the control. Because of lack of a provision for notice I have concluded that s. 179(1)(*b*) is inconsistent with the Constitution, in the words of s. 52, and is of no force and effect. Section 179(1)(*b*) is not the law of which one could be ignorant.
>
> In other words, s. 19 has no application if no offence has been committed and that is the result in this case of declaring s. 179(1)(*b*) to be of no force or effect. Nothing of s. 179(1)(*b*) is left to be saved by s. 19.

Southin J.A. (concurring)

22 Southin J.A. agreed with Hutcheon and Rowles JJ.A. that the word "loiter" did not imply any evil or malevolent intent. She then considered whether s. 179(1)(*b*) violated either s. 7 or 11(*d*) of the *Charter*. She found that the section did not violate s. 11(*d*) because the Crown had to prove the prior conviction and that the accused was "loitering" at one of the prohibited places.

23 Southin J.A. was of the view at p. 523 [C.C.C., p. 91 C.R.] that Parliament, in the exercise of the authority conferred by s. 91(27) of the *Constitution Act, 1867*, could "attach new disabilities to persons convicted of a crime". Southin J.A. stated that, although s. 179(1)(*b*) did not expressly say that a person convicted of a sexual crime could not go to certain places, she was proceeding on the basis that it was a form of prohibition. She found that a measure imposing a disability has aspects of both punishment and prevention. She noted that the purpose of s. 179(1)(*b*) was to protect young persons from sexual attacks.

24 Southin J. approached the question of whether s. 7 was violated by making commendable use of analogy to case law under s. 12 with respect to minimum sentences. She considered whether s. 179(1)(*b*) was grossly disproportionate to its purpose, and whether it was necessary to achieve a valid criminal law purpose. In her opinion although the purpose of the section was valid, the means were not proportional. She found that the deprivation of liberty in s. 179(1)(*b*) was not in accordance with

the principles of fundamental justice because it is for life, and there is no avenue of review to relieve those covered by the section in whole or in part from the disability. She was not satisfied that the s. 7 breach due to the lack of a review process could be justified under s. 1.

Constitutional Questions

25 On October 18, 1993 the Chief Justice stated the following constitutional questions:

1. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*?

2. If the answer to question 1 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

3. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent to be presumed innocent until proven guilty according to law as guaranteed by s. 11(*d*) of the *Charter*?

4. If the answer to question 3 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

5. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent not to be subjected to any cruel and unusual treatment or punishment as guaranteed by s. 12 of the *Charter*?

6. If the answer to question 5 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

7. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent not to be arbitrarily detained or imprisoned as guaranteed by s. 9 of the *Charter*?

8. If the answer to question 7 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

9. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent, if finally found guilty and punished for the offence, not to be tried or punished for it again, as guaranteed by s. 11(*h*) of the *Charter*?

10. If the answer to question 9 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

Analysis

26

I. Legislative History of Section 179(b)

27 A review of the history of the vagrancy sections can be found in the decision of the Ontario Court of Appeal in *R. v. Munroe* (1983), 5 C.C.C. (3d) 217 [34 C.R. (3d) 268]. The offence of vagrancy was codified in ss. 207 and 208 of the 1892 *Criminal Code*, although its history dates back to the Middle Ages in England: See *Ledwith v. Roberts*, [1937] 1 K.B. 232 (C.A.), at p. 271. Section 207 of the *Criminal Code*, S.C. 1892, c. 29, provided:

207. Every one is a loose, idle or disorderly person or vagrant who —

(*a*.) not having any visible means of maintaining himself lives without employment;

(*b*.) being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*c*.) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;

(*d*.) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;

(*e*.) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;

(*f*.) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;

(*g*.) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(*h*.) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(*i*.) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;

(*j*.) is a keeper or inmate of a disorderly house, bawdy house or house of ill-fame, or house for the resort of prostitutes;

(*k*.) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or

(*l*.) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

Section 208 provided:

208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both.

28 Historically, the essence of the offence of vagrancy was that of *being* a loose, idle or disorderly person or vagrant, rather than the *doing* of any of the specific acts referred to in the vagrancy provisions. The vagrancy provisions remained virtually unchanged until the 1950s. The predecessor to s. 179(1)(*b*) was added to the vagrancy offences in S.C. 1951, c. 47, s. 13. This section provided that everyone is a loose, idle or disorderly person or vagrant who:

238. ...

(*k*) having at any time been convicted of an offence under paragraph *(a)* of section two hundred and ninety-two, section two hundred and ninety-three, subsection one or two of section three hundred and one, or section three hundred and two, is found loitering or wandering in or near a school ground or playground or public park or public bathing area.

29 In 1953-54 *Criminal Code* (S.C. 1953-54, c. 51) the vagrancy provisions were restructured so that the focus shifted from being a vagrant to doing the acts prohibited by the section. However, it is significant that the acts prohibited were still primarily related to the status of the accused rather than the nature of the acts themselves. Section 164(1) of the 1953-54 Code provided:

164. (1) Every one commits vagrancy who

(*a*) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;

(*b*) begs from door to door or in a public place;

(*c*) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;

(*d*) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or

(*e*) having at any time been convicted of an offence under a provision mentioned in paragraph (*a*) or (*b*) of subsection (1) of section 661, is found loitering or wandering in or near a school ground, playground, public park or bathing area.

Section 164(1)(*e*), which eventually became the present s. 179(1)(*b*), has been amended since that time to conform to changes in the numbering of the predicate offences in the Code, and in the definitions of sexual offences in the Code. However, it has not changed in substance.

II. How Should the Word "Loiter" be Defined in Section 179(1)(b)?

30 The appellant submits that the word "loiter" in s. 179(1)(*b*) should be interpreted as requiring a malevolent intent while the respondent takes the position than "loiter" should be given its ordinary meaning.

31 When a statutory provision is to be interpreted the word or words in question should be considered in the context in which they are used, and read in a manner which is consistent with the purpose of the provision and the intention of the legislature: Elmer A. Driedger, *Construction of Statutes*, 2nd ed., at p. 87; *R. v. Hasselwander*, [1993] 2 S.C.R. 398. If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the Act, then that is the interpretation which should govern.

32 What then is the ordinary meaning of the word "loiter"? *The Oxford English Dictionary*, 2nd ed., defines "loiter" in this manner:

loiter: ...

1. ... a. In early use: To idle, waste one's time in idleness. Now only with more specific meaning: To linger indolently on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task, to dawdle. Freq. in legal phr. to *loiter with intent* (to commit a felony).

Similarly, *Black's Law Dictionary*, 5th ed., defines "loiter" as follows:

To be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; lag behind.

33 It is significant that these definitions are essentially the same as those Constable German provided to the respondent on June 16, 1989. None of these definitions requires a malevolent intent or makes any reference to such a requirement.

34 Cases which have considered the meaning of "loiter" in other sections of the Code support the use of the ordinary meaning of "loiter" in s. 179(1)(*b*). In *R. v. Munroe* (1983), 5 C.C.C. (3d) 217 [34 C.R. (3d) 268], the Ontario Court of Appeal considered the meaning of "loiter" in what was then s. 171(1)(*c*) of the *Criminal Code* (now s. 175(1)(*c*)). That section makes it an offence to loiter in a public place and in any way obstruct persons who are in that place. The Ontario Court of Appeal gave "loiter" its ordinary dictionary meaning of "hanging idly about a place". It further held that if a person has some purpose for "hanging idly about" such as waiting for a spouse, then he or she cannot be said to be idling. The decision in *Munroe* was followed by the Ontario Court of Appeal in *R. v. Gauvin* (1984), 11 C.C.C. (3d) 229, at p. 232.

35 The same definition of "loiter" has been applied to s. 177 of the Code. That section like its predecessor makes it an offence to loiter or prowl by night near a dwelling-house on the property of another person without a lawful excuse. In *R. v. Andsten* (1960), 33 C.R. 213 (B.C. C.A.), Davey J.A., writing for the court, held at p. 215 that "'hanging around' well expresses what is meant by 'loiters' as used in s. 162 [now s. 177]."

36 In *R. v. Lozowchuk* (1984), 32 Sask. R. 51 (Q.B.) Geatros J., after considering *Munroe*, supra, and *Andsten*, supra, concluded at p. 54: "I find nothing in Code s. 173 to suggest that 'loiter' is to be construed other than in its ordinary and natural meaning". A similar definition was endorsed by the Québec Court of Appeal in *R. v. Cloutier* (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149. Chevalier J.A. writing for the court held at p. 147 [Q.A.C.] and at pp. 154-55 [C.C.C.]:

> [TRANSLATION]
>
> I will also not undertake to repeat here the definitions supported by dictionaries, given in several judgments that I previously quoted, of the English terms "loitering" and "prowling". Their French equivalents "flâner" and "rôder" reflect the same notions in respect of the attitudes or acts involved. Other than mere dictionary definitions, and as confirmation of their correctness, the average person who hears these two words immediately knows the difference. And, for him, it is of great importance.
>
> In the loiterer, he sees an individual who is wandering about, apparently without precise destination, who does not have, in his manner of moving, a purpose or reason to do so other than to pass the time, who is not looking for anything identifiable and who often is merely motivated by the whim of the movement. The dictionnaire des synonymes Bordas (1988), p. 424 gives the following as synonyms for this verb "to wander, stroll, to go for a jaunt, saunter, bum about, dawdle, dillydally, hang about, and so on". In short, it is conduct which essentially has nothing reprehensible about it if, as required by s. 173, it does not take place on private property where, in principle, a loiterer has no business.

See also *R. v. Willis* (1987), 37 C.C.C. (3d) 184 (B.C. Co. Ct.).

37 Thus, where it is used in other sections of the Code, the word "loiter" has been given its ordinary dictionary definition.

38 The United States Supreme Court has also interpreted vagrancy statutes as not requiring proof of any special intent or malevolence in order to convict. In *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), the court held that a municipal vagrancy law was void for vagueness. In discussing the application of the vagrancy law, DouglasJ., writing for the court, held that the law did not require a specific intent to commit an unlawful act. He wrote at p. 163 "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent".

39 The ordinary definition of "loiter" is also consistent with the purpose of s. 179(1)(*b*). The section is aimed at protecting children from becoming victims of sexual offences. This is apparent from the places to which the prohibition of loitering applies. School grounds, playgrounds, public parks and public bathing areas are typically places where children are likely to congregate. The purpose of the prohibition on loitering is to keep people who are likely to pose a risk to children away from places where they are likely to be found. Prohibiting any prolonged attendance in these areas, which is what the ordinary definition of "loiter" does, achieves this goal.

40 Furthermore, the concept of malevolent intent favoured by the appellant (as opposed to a narrower formula such as unlawful intent, which the appellant does not endorse) raises problems of definition which make it unworkable. *The Oxford English Dictionary* defines "malevolent" as a person "Desirous of evil to others; entertaining, actuated by, or indicative of ill-will; disposed or addicted to ill-will". These definitions make it apparent that it is a concept of very broad scope that is extremely difficult to define. Malevolent intent could mean almost anything, and its definition would be dependent upon the subjective views of the particular judge trying the case.

41 The appellant and the Attorney General of Canada argue that the legislative debates surrounding the passage of the section in 1951, and again when it was reconsidered in 1986-87 provide support for the proposition that "loiter" in s. 179(1)(*b*) includes

the notion of some sort of malevolent intent. In my opinion this argument is not well founded. The admissibility of legislative debates to determine legislative intent in statutory construction is doubtful: Drieger, supra, at pp. 156-58; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed., at pp. 353-67. This Court has repeatedly held that legislative history is not admissible as proof of legislative intent in the construction of statutes: *Gosselin v. R.* (1903), 33 S.C.R. 255, at pp. 264-68, *per* Taschereau C.J.C.; *Canada (Attorney General) v. Reader's Digest Assn.*, [1961] S.C.R. 775; *R. v. Govedarov*, (sub nom. *R. v. Popovic*, [1976] 2 S.C.R. 308, at p. 318; *Highway Victims Indemnity Fund v. Gagné* (1975), [1977] 1 S.C.R. 785, at p. 792.

42 It is apparent that legislative history may be admissible for the more general purpose of showing the mischief Parliament was attempting to remedy with the legislation: *Toronto Railway v. R.* (1894), 4 Ex. C.R. 262, at pp. 270-71; *R. v. Lyons*, [1984] 2 S.C.R. 631, at pp. 683-84. Additionally, more flexible rules apply in the admission of legislative history in constitutional cases. In those cases the legislative history will not be used to interpret the enactments themselves, but to appreciate their constitutional validity *Reference re Anti-Inflation Act 1975 (Canada)*, [1976] 2 S.C.R. 373; *Reference re Residential Tenancies Act*, (sub nom. *Re Residential Tenancies Act of Ontario*) [1981] 1 S.C.R. 714; *Schneider v. R.*, (sub nom. *Schneider v. British Columbia)* [1982] 2 S.C.R. 112; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Québec (Commission de la santé & de la sécurité du travail du Québec) v. Bell Canada*, (sub nom. *Bell Canada v. Quebec (Commission de la santé & de la sécurité du travail))* [1988] 1 S.C.R. 749; *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R. v. Whyte*, [1988] 2 S.C.R. 3. Legislative history is also admissible in *Charter* cases to help interpret its provisions: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at pp. 506-09 [hereinafter "*Re: B.C. Motor Vehicle Act*"].

43 Nonetheless there are persuasive reasons advanced which support the position that legislative history or debates are inadmissible as proof of legislative intent in statutory construction. Many of these same reasons are also put forward to demonstrate that such materials should be given little weight even in those cases where they are admitted. The main problem with the use of legislative history is its reliability. First, the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole. Thus, it may be said that the corporate will of the legislature is only found in the text of provisions which are passed into law. Second, the political nature of Parliamentary debates brings into question the reliability of the statements made. Different members of the legislature may have different purposes in putting forward their positions. That is to say the statements of a member made in the heat of debate or in committee hearings may not reflect even that member's position at the time of the final vote on the legislation.

44 Despite the apparent merits of the rule that legislative history is inadmissible to determine legislative intent in statutory construction, this Court has on occasion made use of such materials for this very purpose: see *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. R.*, [1982] 1 S.C.R. 621.

45 However, it is not necessary in this case to determine the admissibility of the debates for the purpose of determining legislative intent. The debates concerning s. 179(1)(*b*) are inconclusive with regard to the meaning of loitering. In both the 1951 debates (Hansard, June 25, 1951 at pp. 4664-66) and the 1986-87 debates (Hansard, November 27, 1986 at p. 1:46; December 11, 1986 at pp. 3:24-3:25; December 18, 1986 at pp. 6:18-6:19; February 5, 1987 at pp. 8:29-30; February 17, 1987 at pp. 9:70-9:75; March 3, 1987 at p. 10:27-10:31) different members of Parliament applied different meanings to the word "loiter". Some used it to mean simply "hanging around", while others attached to it the connotation of lurking or the concept of not being able to give a good account of oneself. Thus, even if the debates were held to be admissible, they are of no assistance in determining the meaning that Parliament intended to be given to the word "loiter" in s. 179(1)(*b*).

46 Thus, the word "loiter" in s. 179(1)(*b*) should be given its ordinary meaning, namely to stand idly around, hang around, linger, tarry, saunter, delay, dawdle, etc. This is consistent with the meaning given to the word as used elsewhere in the Code, and with the context and purpose of s. 179(1)(*b*).

III. Section 7 of the Charter

47 There can be no question that s. 179(1)(*b*) restricts the liberty of those to whom it applies. Indeed, the appellant made no argument to the contrary. The section prohibits convicted sex offenders from attending (except perhaps to quickly walk through

on their way to another location) at school grounds, playgrounds, public parks or bathing areas — places where the rest of the public is free to roam. The breach of this prohibition is punishable on summary conviction and, as this case demonstrates, imprisonment is the consequence.

48 The question this Court must decide is whether this restriction on liberty is in accordance with the principles of fundamental justice. The respondent conceded in oral argument that a prohibition for the purpose of protecting the public does not *per se* infringe the principles of fundamental justice. *R. v. Lyons* (sub nom. *R. v. L. (T.P.)*), [1987] 2 S.C.R. 309, at pp. 327-34, held that the indeterminate detention of a dangerous offender, the purpose of which was the protection of the public, did not *per se* violate s. 7. In light of that decision this concession was appropriate. If indeterminate detention in order to protect the public does not *per se* violate s. 7, then it follows the imposition of a lesser limit on liberty for the same purpose will not in itself constitute a violation of s. 7. The question, then, is whether some other aspect of the prohibition contained in s. 179(1)(*b*) violates the principles of fundamental justice. In my opinion it does. It applies without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review. It restricts liberty far more than is necessary to accomplish its goal.

A. Overbreadth

49 This Court considered the issue of overbreadth as a principle of fundamental justice in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 [hereinafter "*R. v. Nova Scotia Pharmaceutical Society*"]. Writing for the Court, GonthierJ. discussed the relationship between overbreadth and vagueness at pp. 627-31. After looking at the notion of overbreadth in American constitutional law, he wrote at pp. 629-31:

> This Court has repeatedly emphasized the numerous differences which exist between the *Charter* and the American Constitution. In particular, in the interpretation of s. 2 of the *Charter*, this Court has taken a route completely different from that of U.S. courts. In cases starting with *Irwin Toy* up to *Butler*, including the *Prostitution Reference* and *Keegstra*, this Court has given a wide ambit to the freedoms guaranteed by s. 2 of the *Charter*, on the basis that balancing between the objectives of the State and the violation of a right or freedom should occur at the s. 1 stage. Other sections of the *Charter*, such as ss. 7 and 8, do however incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.
>
> A notion tied to balancing such as overbreadth finds its proper place in sections of the *Charter* which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada* that overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the *Charter*. This is also in accordance with the trend evidenced in *Osborne* and *Butler*. Furthermore, in determining whether s. 12 of the *Charter* has been infringed, for instance, a court, if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (*R. v. Smith*, [1987] 1 S.C.R. 1045, and *R. v. Goltz*, [1991] 3 S.C.R. 485). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.
>
> In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument.
>
> The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58:
>
> > Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad.

> Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of *Charter* rights under the *Oakes* test. This Court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the *Charter*, in *Osborne* and *Butler*.

For the sake of clarity, I would prefer to reserve the term "vagueness" for the most serious degree of vagueness, where a law is so vague as not to constitute a "limit prescribed by law" under s. 1 *in limine*. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.

50 Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58, cited with approval by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, supra, the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

51 Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is over broad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

52 Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court: see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, *per* Sopinka J. at pp. 592-95; *R. v. Jones*, [1986] 2 S.C.R. 284 *per* La Forest J. at p. 298; *R. v. Lyons*, supra, *per* La Forest J. at pp. 327-29 [[1987] 2 S.C.R.]; *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3; *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425, at pp. 538-39; *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-53. However, where an independent principle of fundamental justice is violated, such as the requirement of *mens rea* for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the *Charter*: *Re: B.C. Motor Vehicle Act*, supra, at p. 517; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977.

53 In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re: B.C. Motor Vehicles Act*, supra, at p. 502. There he observed:

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.

54 However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

55 The purpose of s. 179(1)(*b*) is to protect children from becoming victims of sexual offences. This is apparent from the prohibition which applies to places where children are very likely to be found. In determining whether s. 179(1)(*b*) is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. In those situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal. In *Cunningham v. Canada*, supra, at p. 153, McLachlin J. held that changes to the *Parole Act* which adversely affected the liberty

of prisoners were in accordance with the principles of fundamental justice because "the prisoner's liberty interest is limited only to the extent that it is shown to be necessary for the protection of the public".

56 In my opinion, s. 179(1)(*b*) suffers from overbreadth and thus the deprivation of liberty it entails is not in accordance with the principles of fundamental justice.

Overbreadth in geographical ambit

57 The section is overly broad in its geographical ambit. It applies not only to school grounds and playgrounds, but also to all public parks and bathing areas. Its application to schools and playgrounds is appropriate, as these are the very places children are likely to con gregate. But its application to all public parks and bathing areas is overly broad because not all such places are places where children are likely to be found. Public parks include the vast and remote wilderness parks. Bathing areas would include all the lakes in Canada with public beaches. Prohibiting individuals from loitering in all places in all parks is a significant limit on freedom of movement. Parks are places which are specifically designed to foster relaxation, indolent contemplation and strolling; in fact it may be assumed that "hanging around" and "idling" is encouraged in parks. The overly broad scope of this section was remarked upon by Maughan Prov. J. in *R. v. Graf* (1988), 42 C.R.R. 146 (B.C. Prov. Ct.), in which she found that what was at the time s. 175 (now s. 179(1)(*b*)) of the *Criminal Code* violated the *Charter*. She wrote at p. 150:

> The wording of s. 175 makes a person such as Mr. Graf, the accused, a person in a permanent state of exile within his community who is, because of his status, absolutely prohibited from standing idly in vast areas of this country. Mr. Graf, because of his status, does not have the liberty of movement and locomotion to go where other citizens are entitled to go and in the same manner as they are entitled to do. He is, for example, banned for life from standing idly about Stanley Park, including the aquarium and the zoo area, Lost Lagoon, the playing fields, the beaches and the entertainment area. Similarly are included Queen Elizabeth Park, English Bay, the Planetarium, Vanier Park, the endowment lands at the University of British Columbia, the Courthouse gardens, Jericho Beach, Spanish Banks, Kitsilano Park, the Sky Train greenbelt, the multitude of small city parks, Manning Park, the marine parks in the province, waterfront parks, Cleveland Dam, Capilano Hatchery, Mount Seymour ski area, Lynn Valley Park, Lynn Canyon Park and all beaches, lake and rivers in Canada capable of being used by people for bathing.

58 If the particular park or part of the park or bathing area is not a place frequented by children, the object of protecting children is not enhanced by limiting the individual's freedom. In my opinion, such a limit should be more narrowly defined, to apply only to those parks and bathing areas where children can reasonably be expected to be present.

Overbreadth by the life-time prohibition without a review process

59 Section 179(1)(*b*) is also overly broad in another aspect. It applies for life, with no possibility of review. The absence of review means that a person who has ceased to be a danger to children (or who indeed never was a danger to children), is subject to the prohibition in s. 179(1)(*b*). In *R. v. Lyons*, supra [[1987] 2 S.C.R.], La Forest J., writing for the Court on this issue, held that the fact that a review process existed was essential to the finding that indeterminate sentences under the dangerous offender provisions did not violate s. 12. La Forest J. wrote at p. 341:

> In my opinion, if the sentence imposed under Part XXI was indeterminate, *simpliciter*, it would be certain, at least occasionally, to result in sentences grossly disproportionate to what individual offenders deserved. However, I believe that the parole process saves the legislation from being successfully challenged under s. 12, for it ensures that incarceration is imposed for only as long as the circumstances of the individual case require.

60 Thus the imposition of an indeterminate sentence upon dangerous offenders in the absence of a review procedure would constitute a cruel and unusual punishment and violate the principles of fundamental justice. It follows that there must be some review available for the prohibition in s. 179(1)(*b*) if it is to accord with the principles of fundamental justice. Admittedly, the prohibition in s. 179(1)(*b*) is a lesser infringement of liberty than the indeterminate detention of a dangerous offender. Yet, it is still a very significant limit on an individual's freedom of movement. Attendance at the places listed in s. 179(1)(*b*) has not as a rule been regulated in Canada, and still is not regulated for the general public who have not committed sex offences. In passing

I would observe that a different conclusion regarding the need for a review might have been reached if the prohibition was in respect of a regulated activity such as driving or the possession of firearms.

61 The appellant and the Attorney General of Canada argued that the availability of a pardon under the *Criminal Records Act*, R.S.C. 1985, c. C-47, as amended, or the royal prerogative of mercy, meet any concerns about the need for review. In my opinion they do not. It is true that a pardon or the exercise of the royal prerogative of mercy would (subject to any conditions) vacate the conviction and remove the disqualification that resulted from the conviction: s. 5(*b*) of the *Criminal Records Act*; s. 749(3) of the Code; Clayton C. Ruby, *Sentencing*, 3rd ed., at pp. 108-09. However, there are limits to the availability of pardons which make it inadequate and insufficient as a substitute for the review of the prohibition in s. 179(1)(*b*). For example, the conditions for granting pardons are not necessarily related to the dangerousness of the individual. A person who is not a danger to children may be denied a pardon. Under the *Criminal Records Act*, an individual may not apply for a pardon until five years after the completion of sentence in the case of an indictable offence, and three years after the completion of sentence in the case of a summary conviction offence, see s. 4 of the *Criminal Records Act*. As the prohibition applies to all persons convicted of the listed offences, there are individuals who will not be dangerous yet will, during the time they cannot apply for a pardon, still be subject to s. 179(1)(*b*).

62 A more serious problem is presented by the conditions which must be met in order to obtain a pardon. A person convicted of an indictable offence may only obtain a pardon if he has been "of good behaviour", and has not been convicted of an offence under federal legislation: s. 4.1(1) of the *Criminal Records Act*. A sex offender who has not committed any further sexual offences, and is not considered a danger to re-offend, would not be eligible for a pardon if he was considered not to have been of good behaviour in a manner completely unrelated to sexual offences. Even if the conditions are met, in the case of indictable offences a pardon is still discretionary. In the case of a person convicted of a summary conviction offence, a pardon is mandatory if the person has not been convicted of any offence under federal legislation: s. 4.1(2) of the *Criminal Records Act*. However, a person who was no longer a danger, but who had committed an unrelated driving offence would not be eligible for a pardon. With respect to the royal prerogative of mercy, its use is exceptional: *National Parole Board, Pardon Decision Policies, Annex: The Royal Prerogative of Mercy* (June 1993). Neither the availability of a pardon nor the royal prerogative of mercy can constitute an acceptable review process.

Overbreadth as to the people to whom section 179(1)(b) applies

63 Section 179(1)(*b*) is overly broad in respect to the people to whom it applies. It applies to all persons convicted of the listed offences, without regard to whether they constitute a danger to children. This approach is contrary to the position taken by this Court in earlier decisions. In *R. v. Swain*, supra, the detention of all persons found not guilty by reason of insanity was found to be arbitrary because it was based on the overly inclusive assumption that all such persons were still dangerous at the time of sentencing: see pp. 1009, 1011-13. Similarly, in *R. v. Lyons* [[1987] 2 S.C.R.], the necessity of showing that an individual was likely to be a danger in the future was one of the features which saved the legislation from violating s. 12 of the *Charter* (at p. 338). It is difficult to accept that a person who had sexually assaulted an adult fifteen years earlier with no subsequent offences should be assumed to still be a threat to children.

64 This Court has approved the use of reasonable hypotheses in determining whether legislation violates s. 12 of the *Charter*: *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485. I think the same process may properly be undertaken in determining the constitutionality of s. 179(1)(*b*). The effect of the section is that it could be applied to a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his con consumption of alcohol. Even if that man never committed another offence, and was not considered to be a danger to children, at the age of 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada. The limitation on liberty in s. 179(1)(*b*) is simply much broader than is necessary to accomplish its laudable objective of protecting children from becoming victims of sexual offences.

65 A new s. 161 was passed following the decision of the B.C. Court of Appeal in this case and is set out later in these reasons. It is significant and telling that the new section only applies to persons who have committed the listed offences in respect of a person who is under the age of fourteen years. In addition, under the new section, the order is discretionary, so that only

those offenders who constitute a danger to children will be subject to a prohibition. I would add that in certain circumstances, legislative provisions for notice and for review of the prohibition may reduce the significance of the factor of overbreadth in the application of one impugned provision. It is noteworthy that the new s. 161 provides for both notice and review of the prohibition. These provisions are absent in s. 179(1)(*b*).

iv. Absence of notice

66 There is another aspect in which the section offends the principles of fundamental justice. As Hutcheon J.A. observed, there is no provision for notice to be given to a person convicted of a predicate offence of his potential liability for breaching s. 179(1)(*b*). As he points out, great care is taken to give notice in connection with other provisions of the Code. For example, the prohibition against ownership, custody or control of a firearm under s. 100 must be made part of the sentencing proceeding following a conviction for the indictable offence involving violence. Notice must also be given of the prohibition of operating a motor vehicle, vessel or aircraft pursuant to s. 260. Similarly notice must be given of the terms of a probation order. The lack of a notice requirement for s. 179(1)(*b*) is unfair and unnecessarily so. It demonstrates that the section by the absence of a requirement of notice violates s. 7.

67 In summary, s. 179(1)(*b*) is overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the *Charter* for a number of reasons. First, it is overly broad in its geographical scope embracing as it does all public parks and beaches no matter how remote and devoid of children they may be. Secondly, it is overly broad in its temporal aspect with the prohibition applying for life without any process for review. Thirdly, it is too broad in the number of persons it encompasses. Fourth, the prohibitions are put in place and may be enforced without any notice to the accused.

68 I am strengthened in this conclusion by a consideration of the new s. 161 of the *Criminal Code*, S.C. 1993, c. 45, s. 1 which was enacted shortly after the decision of the British Columbia Court of Appeal in this case. The section provides:

> 161. (1) Where an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 736, of an offence under section 151, 152, 155 or 159, subsection 160(2) or (3) or section 170, 171, 271, 272 or 273, in respect of a person who is under the age of fourteen years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
>
> (*a*) attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; or
>
> (*b*) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authoritytowards persons under the age of fourteen years.
>
> (2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of
>
> (*a*) the date on which the order is made; and
>
> (*b*) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.
>
> (3) A court that makes an order of prohibition or, where the court is for any reason unable to act, another court of equivalent jurisdiction in the same province, may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.
>
> (4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

69 It can be seen that this section is limited to clearly defined geographical areas where children are or can reasonably be expected to be present. Further, the prohibition may be for life or a shorter period and a system of review is provided. Additionally, the order of prohibition is made part of the sentencing procedure so that the accused is aware of and notified of the prohibitions. It is thus apparent that overly broad provisions are not essential or necessary in order to achieve the aim of s. 179(1)(*b*).

70 The violation of s. 7 of the *Charter* is thus established. It is now necessary to consider whether the section may be saved by the provisions of s. 1 of the *Charter*.

IV. Section 1 of the Charter

71 This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re: B.C. Motor Vehicle Act*, supra, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

72 The objective of s. 179(1)(*b*) is certainly pressing and substantial. The protection of children from sexual offences is obviously very important to society. Furthermore, at least in some of their applications, the means employed in s. 179(1)(*b*) are rationally connected to the objective. However, for the same reasons that s. 179(1)(*b*) is overly broad, it fails the minimal impairment branch of the s. 1 analysis. The new s. 161 is a good example of legislation which is much more carefully and narrowly fashioned to achieve the same objective as s. 179(1)(*b*). Section 179(1)(*b*) cannot be justified under s. 1 of the *Charter*.

V. Remedy

73 Counsel for the appellant argued that even if s. 179(1)(*b*) of the *Criminal Code* is so overbroad as to result in a violation of s. 7 which cannot be saved by s. 1, rather than striking the section down in its entirety, the section should be read down so as to come within constitutional limits. In my opinion reading down is not appropriate in this case. The changes which would be required to make s. 179(1)(*b*) constitutional would not constitute reading down or reading in; rather, they would amount to judicial rewriting of the legislation.

74 This Court considered the application of flexible remedial alternatives under s. 52 of the *Constitution Act, 1982* such as reading in and reading down in *Schachter v. Canada*, [1992] 2 S.C.R. 679. LamerC.J.C., writing for himself and four other members of the Court, held that reading in or reading down will only be warranted where: (i) the legislative objective is obvious, and reading in or reading down would constitute a lesser intrusion on that objective than striking down the legislation; (ii) the choice of means used by the legislature is not so unequivocal that reading in or reading down would unacceptably intrude into the legislative sphere; and (iii) reading in or reading down would not impact on budgetary decisions to such an extent that it would change the nature of the legislation at issue.

75 Reading in or reading down in this case would create an entirely new scheme. Parliament chose unequivocal means in s. 179(1)(*b*), namely, a prohibition on loitering for *all* persons convicted of the listed offences in *all* school grounds, playgrounds, public parks and bathing areas, *for life, with no possibility of review*. The changes required to make the section comply with s. 7 of the *Charter* would constitute a completely different approach to the problem, and would amount to an unwarranted intrusion into the legislative domain. Any changes required to be made over and above the provisions of the new s. 161 should be made by Parliament.

Disposition

76 The constitutional questions are, therefore, answered as follows:

1. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*?

A. Yes.

2. If the answer to question 1 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the *Charter*?

A. No.

In view of the answers to the first two constitutional questions, it is unnecessary to answer the other constitutional questions. The appeal is dismissed.

***Gonthier J.* (dissenting) (*La Forest, L'Heureux-Dubé*] and *McLachlin JJ.* concurring):**

77 I have read the opinion of Justice Cory and, with all due respect, find I am unable to agree. The central issue in this case concerns the interpretation of s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. By giving the word "loiter" its ordinary meaning, Cory J. would interpret the provision as prohibiting lingering, tarrying, standing idly around, sauntering, delaying, dawdling, etc. in the enumerated areas. This interpretation leads him to conclude that the prohibition created by s. 179(1)(*b*) violates s. 7 of the *Charter* and is not saved by s. 1 because it is overbroad in terms of the persons, places and time period to which it applies and because notice to the accused is not required. In my view, however, s. 179(1)(*b*) should be interpreted as prohibiting the persons affected from being in one of the enumerated places for a malevolent or ulterior purpose related to the predicate offences. My reasons for favouring this interpretation are drawn from the purpose and legislative history of s. 179(1)(*b*) as well as precedent and statutory context. The first two parts of my reasons are devoted to these points. In the third part, I examine the constitutionality of this interpretation.

A. The Legislative History and Purpose of s. 179(1)(b) of the Criminal Code

78 Section 179(1)(*b*) makes it an offence for persons who have been convicted of certain enumerated offences to "loiter in or near a school ground, playground, public park or bathing area". The enumerated offences are:

- sexual interference, sexual touching or sexual exploitation of a person under 14 (ss. 151, 152 and 153 respectively);
- bestiality in the presence of a person under 14 (s. 160(3));
- sexual exposure to a person under 14 (s. 173(2));
- the sexual assault provisions (ss. 271, 272, 273); and
- the "serious personal injury offences" identified in s. 687 as it read before January 4, 1983 (rape, attempted rape, sexual intercourse with a female under fourteen or between fourteen and sixteen, indecent assault on a female or male and gross indecency).

Clearly a wide range of offenders are affected, in part because of the inclusion of the general sexual assault provisions and their antece dents. The central interpretive question relates to the scope of the prohibition. Guidance in answering this question can be taken from an examination of the legislative history of the section and an analysis of its purpose.

79 Though the prohibition of "vagrancy" in the common law world dates from at least the fourteenth century, s. 179(1)(*b*) of the Code was only added in 1951 (S.C. 1951, c. 47, s. 13). Excerpts from the parliamentary debates prior to the adoption of the offence aid in identifying the mischief which the offence was aimed at and its intended scope:

> Mr. Garson: ... The British Columbia section of the Canadian Bar Association made the suggestion. I think they were actuated in making it by several rather nasty cases that had arisen in which, as my hon. friend knows is often the case, children were the victims of these sex perverts. They thought that by keeping them away from the places indicated in this section the purpose they had in mind might be served.
>
> . . . . .
>
> Mr. Fleming: ... If a man is listening to a band concert and behaves himself I do not think anyone will say he is loitering or wandering about. It seems to me a very sound idea that people with records like that who are found in these public areas loitering or wandering about should be liable to conviction on a charge of vagrancy. It is not any more serious than that, but I am sure it will give more effective opportunity to keep such people moving out of such places.
>
> (House of Commons Debates, June 25, 1951, at pp. 4664 and 4666.)

These two passages demonstrate an intention to keep sex offenders away from places frequented by children, but not to prohibit them totally from the enumerated areas. As with legislative debates generally, the above passages are not determinative. They are, however, properly part of the evidence which a court may consider to identify the purpose of a statutory provision (see *R. v. Videoflicks Ltd.*, *(*sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713, at pp. 744-45, per Dickson C.J.C. for the majority).

80 Turning to the legislative history of s. 179(1)(*b*), it should be noted that the original provision enacted in 1951 prohibited persons convicted of the enumerated offences from loitering *or wandering* in the same areas now listed in s. 179(1)(*b*). In 1985, after the reports of the Badgley and Fraser Commissions, the provision was kept, but amended to remove the word "wander". This specific deletion would indicate that the word "loiter" was considered by Parliament to have a different meaning from "wander". Indeed, the word "wander" is somewhat broader than "loiter". "Wander" merely connotes move ment without specific destination; "loiter" has a variable connotation according to the context, though these connotations share the common element of idleness. *The Oxford English Dictionary*, 2nd ed., defines "wander" in the following general terms:

> **wander: ...**
>
> *1.a.* ... To move hither and thither without fixed course or certain aim; to be (in motion) without control or direction; to roam, ramble, go idly or restlessly about; to have no fixed abode or station.
>
> . . . . .
>
> *e.* To go or take one's way casually or without predetermined route; to go *to* a place by a devious and leisurely course; to stroll, saunter.

The word "loiter", by contrast, is defined more narrowly:

> **loiter: ...**
>
> *1.a.* ... In early use: To idle, waste one's time in idleness. Now only with more specific meaning: To linger indolently on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task, to dawdle. Freq. in legal phr. *to loiter with intent* (to commit a felony).

81 Other evidence before the trial judge which is of assistance in understanding the purpose and scope of s. 179(1)(*b*) is the testimony of the psychiatric and psychological experts called on behalf of the Crown. Filmer Prov. J. summarized a crucial portion of this evidence in the following terms:

> ... the root cause of sexual offending is difficult to diagnose and treat. It involves a mechanism wherein sexual stimulation is found and relieved in various ways but usually in a fairly predictable cycle. The cycle involves an increasing need to be stimulated and is usually marked by an ever-increasing need to be near the object of arousal. To treat this drive, the subject must be disassociated from the objects, such as children, which may arouse. This separation is paramount in treatment. In many cases treatment is a lifelong endeavour.

A portion of the evidence of Dr. Semrau, a psychiatrist, more fully explains some of these points:

> ... one does not speak of curing sexual offenders and — and particularly so of pedophiles. The — one can hope to bring their offending tendency under some degree of control, but treatment has to involve a very long-term relapse prevention sort of component and so this kind of restriction is — is a critical part of that because perhaps an analogy could be made with that of an alcoholic, [the example was of an alcoholic going into a bar thinking it would not kill him. Such a person, however, is at perpetual risk of slipping into alcoholism again] but that same sort of analogy can be made that once one has engaged in some such behaviour it — it starts you on a slippery slope towards re-offending.
>
> So that sort of provision in the *Criminal Code* is entirely compatible with, and in keeping with, and supportive of, the basic principles of treatment of sexual offenders.

The psychiatrist stated that offenders will often believe that their conduct is perfectly lawful; however, in reality they will be "on a slippery slope towards re-offending". He stressed that it is an important part of treatment to help offenders to recognize that such conduct, though normally lawful for everyone else, is not benign in their case but rather is part of the cycle of re-offending.

82 In addition to the possibility that the risk of re-offending may be perpetual and that disassociation aids treatment, there was also considerable evidence before the trial judge on the issue of crossover. Crossover refers to the situation where a sexual offender commits a different type of offence when she/he re-offends. An example of such crossover would be where a person convicted of a sexual assault against an adult later molests a child. Both Dr. Semrau and Dr. Glackman made reference to the work of Dr. Abel. Dr. Abel was described as one of "half a dozen top experts in the world in the area of sexual offenders". Contrary to conventional wisdom, Dr. Abel discovered that there is extensive cross-offending so that a given offender is likely to be involved in a variety of different activities throughout a lifetime. Dr. Semrau summarized the implications of this research in the following terms: "So that there is — there's, in fact, a large crossover from one category to another. A sexual offender convicted of a particular offence must be viewed also, in general, as having a substantial risk for all of the other kinds of sexual offences as well". The current state of knowledge therefore suggests that a person who demonstrates one form of sexually deviant behaviour may present a more general risk.

83 It is hard to deny that there will be individual cases where the risk of crossover or the risk of re-offending will not be present, but as both Dr. Semrau and Dr. Glackman stressed it is impossible, given the current state of knowledge, to identify such persons with any certainty. Dr. Semrau explained the problem in this way:

> Again, for some individuals it may not be important, but given our lack of ability to get people to be honest with us or, indeed, we have no — we have some psychological and psychiatric testing and assessment methods which give us some clues to what an individual's tendencies are but it's very easy, given our current methods, for offenders to grossly mislead us with regard to what their tendencies are. Anyone who's worked in this area has had many painful experiences of finding that — that, despite perhaps a lot of experience, that they are — that they were woefully naive in believing people, and so we don't have the ability to separate out which, let's say adult female rapists, are going to be at risk for molesting children and which aren't. We know that a substantial proportion will, but we don't have any method of reliably identifying which of those individuals are at the highest risk for such behaviour, and so it certainly would be appropriate for all sexual offenders to — to avoid those kinds of high risk situations.

Later he reiterated a similar sense of frustration:

> Again though one can never be fully satisfied in any situation as to being able to relax the restrictions necessary. I've had more cases than I would like to think of in which an individual who seemed to be of the most benign sort and to be well treated and the problem seemed to be thoroughly dealt with, and — and I really felt inclined to relax about the particular offender where, you know, some horrendous thing comes out of the blue.
>
> So, I mean, our — our ability to — to be certain that one can relax surveillance or restrictions on a particular individual is not very good at this point in history. Our methods of assessing sexual offenders are relatively crude and we — the best

> therapists in this area frequently get nasty surprises in which they — they realize that they have been naive. We don't have very good methods of being able to make accurate predictions about what will happen with an individual, so one can speak in relative terms of individuals who have lesser or greater risk and where restrictive conditions are more or less necessary or appropriate, but it — one would never encounter a situation in which you could say that you could totally relax and completely omit any concern about a future problem.

(See also the evidence of Dr. Glackman.) The concerns with regard to crossover and the potentially perpetual nature of the risk of re-offending contributed to the conclusion of both Dr. Glackman and Dr. Semrau that a person who was convicted of a "date rape" type sexual assault offence or a random sexual assault offence involving physical contact would be a person who should be subject to the kind of prohibition contained in s. 179(1)(*b*). The evidence on cross-offending and the difficulty of predicting who will cross-offend or repeat offend would thus seem to justify some form of restriction on the liberty of persons convicted of sexual offences given our current state of knowledge.

84 Taking the above as a whole, the objectives embodied in the s. 179(1)(*b*) prohibition are relatively clear. The courts below have unanimously recognized that the section has at its foundation a concern for public safety and a desire to aid in the treatment and rehabilitation of offenders. I agree and would stress that the provision applies broadly to all persons convicted of the enumerated offences and therefore provides protection not only to children but also to others who could be victims of sexual assault in the listed areas. These areas, it should be remembered, are places where people will generally lower their guard.

85 The above, though, does not allow us to identify as easily the specific conduct prohibited. The identified objectives are clearly achieved, and perhaps most efficiently, by the broad interpretation of the prohibition adopted by Cory J. A less intrusive interpretation which prohibits the persons affected from being in one of the enumerated places for a malevolent or ulterior purpose related to the predicate offences, however, is also consistent with the objectives. The more narrow interpretation would go beyond a mere "attempts" offence. It would preserve the preventive aspect of the section by allowing the state to deal with activities that are part of the cycle of re-offending, such as taking photos, which can be proven to reflect a malevolent or ulterior purpose related to the predicate offences. At the same time, this interpretation would allow the affected persons to use the listed areas for the legitimate purposes for which they were intended.

86 The deletion of "wandering" and the use of the word "loitering" as opposed to simply "attending at" or some other formulation can be seen as reflecting a concern to limit the scope of the prohibition. Portions of the legislative debates which I have noted above can also be invoked in this regard. My conclusion to adopt the less intrusive interpretation, however, is supported by the case law interpreting offences defined in terms of loitering as well as the statutory context in which s. 179(1)(*b*) is situated.

B. Case Law Interpreting the Word "Loiter" and the Statutory Context of Section 179(1)(b)

87 As Cory J. has noted, the ordinary or usual *dictionary* meaning of loiter is "to stand idly around, hang around, tarry, saunter, delay, dawdle, etc." There is no suggestion in this definition that the term includes an evil or malevolent purpose. The dictionary definition of the French term "flâner" is similar.

88 The Canadian case law interpreting the word "loiter" deals primarily with ss. 175(1)(*c*) and 177 of the Code:

> 175. (1) Every one who
>
> . . . . .
>
> (*c*) loiters in a public place and in any way obstructs persons who are in that place,
>
> . . . . .
>
> is guilty of an offence punishable on summary conviction.
>
> 177. Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

As will be seen, the interpretation given to "loiter" in relation to these sections, though generally involving some part of the ordinary meaning of the word, has not been exactly the same in all cases.

89 In *R. v. Munroe* (1983), 5 C.C.C. (3d) 217 [34 C.R. (3d) 268] (Ont. C.A.), per Cory J.A., as he then was, and in *R. v. Gauvin* (1984), 11 C.C.C. (3d) 229, the Ontario Court of Appeal gave loiter its ordinary meaning in the context of s. 175(1)(*c*): idly hanging about. *Munroe* dealt with a woman suspected of being a prostitute, while *Gauvin* concerned a man who insisted upon taking a seat reserved for others at a political meeting. In both cases the court refused to convict the accused persons on the basis that their activities were purposeful. Purposeful activity was held to be the antithesis of idleness.

90 In terms of prohibited physical activity, loiter has been given a similar meaning in the context of s. 177. In *R. v. Cloutier* (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149, the Quebec Court of Appeal also gave loiter its ordinary dictionary meaning and noted the absence of purpose as a defining element. In distinguishing loiter from prowl ("flâner" from "rôder"), the court underlined the "innocent" nature of loiter as compared to prowl. The court wrote, at pp. 147-48 and at pp. 154-55, respectively:

> [TRANSLATION]
>
> In the loiterer, he sees an individual who is wandering about, apparently without precise destination, who does not have, in his manner of moving, a purpose or reason to do so other than to pass the time, who is not looking for anything identifiable and who often is merely motivated by the whim of the moment ... In short, it is conduct which essentially has nothing reprehensible about it if, as required by s. [177], it does not take place on private property where, in principle, a loiterer has no business.
>
> Opposite to this, for the average person, "prowl" inspires a pejorative reaction. The verb includes a notion of evil; it depreciates in his eyes the person who is involved in the action that it represents.

Similarly, in *R. v. Lozowchuk* (1984), 32 Sask. R. 51 (Q.B.), Geatros J. held that the accused could not be convicted of loitering within the terms of s. 177 because, in going to his girlfriend's home late one evening, he had a definite purpose in mind.

91 The interpretation of s. 177, however, has not been entirely consistent. In at least one case, a Court of Appeal has departed from the interpretation that the offence is defined by the absence of purpose associated with idleness. In *R. v. Andsten* (1960), 33 C.R. 213, the British Columbia Court of Appeal upheld the convictions of two private detectives who had been snooping around the complainant's house looking for evidence which would be relevant to divorce proceedings. The court concluded that "hanging around" expressed what was meant by loiter in s. 177. The existence or absence of a purpose was held to be irrelevant to the question of whether a person is loitering within the terms of s. 177 (ibid., at p. 214). Davey J.A., perhaps foreseeing the difficulties presented by the different uses of the word loiter in the Code, was careful to stress that the court's discussion of the meaning of loiter was restricted to issues involving invasion of private property.

92 In my view, the case law summarized above suggests that the term "loiter" will vary to some extent according to its context. Ascribing an absence of purpose may make sense in terms of s. 175; however, as at least *Andsten*, supra, clearly demonstrated, it may not be applicable under s. 177. Similarly, the absence of purpose element in the ordinary meaning of loiter can have no application in the context of s. 179(1)(*b*). Clearly Parliament intended to include conduct of convicted sex offenders whose purpose was related to re-offending.

93 My suggestion that the meaning of loiter will vary according to the specific statutory context is merely an illustration of a caveat to the general rule that words be given their ordinary meaning. Pierre-André Côté expressed this caveat in *The Interpretation of Legislation in Canada*, 2nd ed., at p. 221, citing Laskin C.J.C., in *Peel (Regional Municipality) v. Viking Houses*, (sub nom. *Ontario (Attorney General) v. Peel (Regional Municipality)*; *Ontario (Attorney General) v. Metropolitan Toronto (Municipality)*) [1979] 2 S.C.R. 1134, at p. 1145, in the following terms:

> The need to determine the word's meaning within the context of the statute remains. Dictionaries provide meanings for a number of standard and recurring situations. Even the best of them will only tersely indicate the context in which a

particular meaning is used. The range of meanings in a dictionary is necessarily limited. It cannot be sufficiently repeated "how much context and purpose relate to meaning".

An illustration of this basic principle in relation to the word loiter and of the nuances which arise from context is found in a recent decision of the Judicial Committee of the Privy Council, *Attorney-General of Hong Kong v. Sham Chuen*, [1986] A.C. 887.

94 In *Sham Chuen*, the Privy Council considered s. 160(1) of the Hong Kong Crimes Ordinance. Section 160(1) made it an offence to loiter in a public place or in the common parts of any building unless the person was able to give a satisfactory account of her/his presence. The crucial portions of the Privy Council's reasoning as to the scope of the offence are contained in a single rather long paragraph. For ease of discussion, I have broken the paragraph (at pp. 895-96) into two parts.

> A considerable amount of argument before the Board was directed to the meaning of "loitering" in section 160(1). Given that the acceptable dictionary meaning of the word was simply "lingering", three possible constructions of the word in its present context were suggested. These were (i) any lingering; (ii) lingering with no apparent purpose at all; and (iii) lingering in circumstances which suggest an unlawful purpose ... Reference was made at some length to the legislative history of this particular enactment and of similar enactments in other Commonwealth jurisdictions, as well as to a number of reported decisions on the interpretation of such enactments. In their Lordships' opinion no helpful guidance is to be obtained from any of them. The word is to be construed in the light of the context in which it appears in this particular enactment.

My review of the Canadian case law summarized above supports the Privy Council's suggestion that the task of ascertaining the specific meaning of "loiter" and therefore of the offence of which loiter is an element in any given case will not always be eased by referring to the interpretation of other enactments. Rather, as I have suggested and as the Privy Council concluded, a contextual approach attuned to the particular enactment is more apposite. The Privy Council's contextual interpretation of s. 160(1), however, is of some assistance to the interpretive question now before this Court. The Privy Council wrote, at p. 896:

> Subsections (2) and (3) of section 160 are each concerned with loitering of a particular character, the first being loitering which causes an obstruction and the second being loitering which causes reasonable concern to a person for his safety or well-being. In their Lordships' opinion subsection (1) is also concerned with loitering of a particular character, namely loitering which calls for a satisfactory account of the loiterer and a satisfactory explanation for his presence. Obviously a person may loiter for a great variety of reasons, some entirely innocent and others not so. It would be unreasonable to construe the subsection to the effect that there might be subjected to questioning persons loitering for plainly inoffensive purposes, such as a tourist admiring the surrounding architecture. The subsection impliedly authorises the putting of questions to the loiterer, whether by a police officer or by any ordinary citizen. The putting of questions is intrusive, and the legislation cannot be taken to have contemplated that this would be done in the absence of some circumstances which make it appropriate in the interests of public order. So their Lordships conclude that the loitering aimed at by the subsection is loitering in circumstances which reasonably suggest that its purpose is other than innocent.

Despite the absence of any sort of charter of rights and freedoms in Hong Kong, the Privy Council concluded that the legislation should be given a circumscribed interpretation so that "innocent" loitering was not subject to criminal sanction. The Privy Council's decision demonstrates that the word "loiter" on its own may create an offence which is excessively intrusive. Generally, this has been the chief problem identified in regard to vagrancy or loitering provisions (see the discussion contained in the decision of the United States Supreme Court in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972)). As the decision in *Sham Chuen*, supra, demonstrates, however, such excessive intrusiveness can and should be avoided where it would be consistent with the statutory context.

95 As stated at the outset, I am of the view that the prohibition contained in s. 179(1)(*b*) should be narrowed to render the prohibition less intrusive and to tailor it more carefully to the objectives being pursued. Just as in *Sham Chuen*, supra, not all loitering should be caught by the prohibition contained in s. 179(1)(*b*). Rather, the intrusion into the activities of individuals should be tied to some reason of public order. The three provisions in which loiter is used in our Code suggest a structure with some parallels to the situation in Hong Kong. In each case, it is loitering of a particular character which is being prohibited.

Section 175(1)(*c*) deals with loitering which causes an obstruction. Section 177 pertains to loitering at night on the property of another without lawful excuse. In this context, s. 179(1)(*b*) prohibits loitering related to the enumerated sexual offences. The enumerated offences thus qualify the word "loiter" and limit the otherwise broad scope of the prohibition.

96 I draw additional support for narrowing the scope of the prohibition created by s. 179(1)(*b*) from the opinion of a distinguished commentator of the *Criminal Code*. In the 1962 edition of his treatise, *Droit pénal canadien*, Irénée Lagarde explained the antecedent version of s. 179(1)(*b*) as follows, at p. 224:

> [TRANSLATION]
>
> [Persons who have been convicted of one of the enumerated offences] may not "loiter" or "prowl" near (1) a school, (2) a playground, (3) a public park or (4) a public beach. Like anyone else such a person is entitled to sit on a bench in a public park, to bathe at a public beach and to be found near a school or playground. The legislature is prohibiting not his or her presence but "loitering" or "prowling". What are we to understand by these terms? It seems to me that they mean a presence which tends to indicate a *probable* guilty intent and which by its persistence *might reasonably suggest* that the accused has the intention of sexually attacking children or adults. In other words, the legislature prohibits him or her from hanging about near a schoolyard, public beach or playground without any specific purpose. In a public park, the accused may relax peacefully but without "watching", "being on the lookout for" or "abnormally observing" persons who might become his or her victims. The particular circumstances of the case will determine whether or not there was "loitering"... [Emphasis in original.]

While I do not entirely agree with Lagarde's description of the offence, his concern to exclude from the criminal prohibition presence in the enumerated areas for legitimate purposes would appear to be well founded. I also support the suggestion that the restriction created by s. 179(1)(*b*) will not be the same in each of the listed areas. While it may be perfectly legitimate to rest in a public park with no other apparent purpose, the same cannot be said for hanging around a school yard. An application of the section which is not sensitive to these points will create a prohibition which is more intrusive than necessary.

97 Additional support for the interpretation I would give to s. 179(1)(*b*) is found when the section is analyzed in conjunction with ss. 161 and 810.1. Sections 161 and 810.1 were enacted by Parliament following the decision of the British Columbia Court of Appeal in this case. Section 161 allows a court at the time of sentencing to make an order prohibiting a sexual offender from *attending* at daycare centres, school grounds, playgrounds, community centres, or any public park or swimming area where persons under the age of 14 years are present or can reasonably by expected to be present. The section relies on a similar list of offences to that contained in s. 179(1)(*b*), but the s. 161 prohibition is available only in relation to persons who have committed offences against children under the age of 14. The prohibition may be for life or any shorter duration and the court which makes the order can vary it at any time on application of the offender or the prosecutor. This provision is thus a powerful means of enhancing public safety and aiding offender treatment. Section 161 though does not apply to sex offenders convicted prior to its enactment.

98 Sections s. 179(1)(*b*) and 810.1 read together, however, produce a similar result to that achieved by s. 161 in relation to those convicted prior to the enactment of s. 161. Section 810.1 allows any person who has reasonable grounds to fear that another person will commit one of a number of sexual offences to appear before a provincial court judge and seek an order prohibiting the person in question from *attending* areas where children under 14 are likely to be present. This procedure, while eventually achieving the same result as s. 161, would obviously require the expenditure of significant time and energy before a prohibition could be ordered. The interpretation I would give to s. 179(1)(*b*) allows it to serve as a useful means for law enforcement officers to take immediate preventive steps when a person who has been convicted of one of the enumerated sexual offences is in one of the listed areas and demonstrates an ulterior or malevolent purpose related to the predicate offences. In short, the provision allows the police to intervene before a previous offender re-offends. In such cases, s. 810.1 would then be available to subject the offender to a prohibition similar to s. 161 if it can be shown that there are reasonable grounds to fear that the person will commit one of the predicate offences specified in s. 161. Satisfying the requirements of s. 179(1)(*b*) and demonstrating that the accused had a malevolent or ulterior purpose related to one of the predicate offences would no doubt

help to satisfy the reasonable grounds requirement in s. 810.1. An excessively broad view of the prohibition contained in s. 179(1)(*b*) would destroy this symmetry.

99 My review of the legislative history, purpose and context of s. 179(1)(*b*) thus leads to the conclusion that the offence should be interpreted as lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offences. This interpretation is suggested by the terms of the offence and general desire to limit the intrusiveness of the prohibition while still achieving the objectives of public safety and offender treatment. As will be seen in the next section, this interpretation is also consistent with the *Charter*.

C. Section 179(1)(b) and Its Conformity with the Charter

100 The two primary *Charter* concerns raised by s. 179(1)(*b*) pertain to vagueness and overbreadth. The interpretation of the provision adopted by Filmer Prov. J. and Melvin J., requiring proof of an "untoward or improper motive" is arguably unconstitutionally vague. Cory J.'s broader interpretation of s. 179(1)(*b*) eliminates any vagueness problem, but, in his view, leads to a prohibition which is unjustifiably overbroad. The interpretation I have adopted avoids both these problems.

101 As discussed in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606, at p. 643, a provision which is unconstitutionally vague provides an intolerable level of prosecutorial discretion and fails to give those subject to the provision notice of its content. Put in its most simplistic form, what is prohibited will be what those charged with law enforcement decide at any given moment should be prohibited. Interpreting s. 179(1)(*b*) to prohibit lingering with an "untoward or improper motive" would arguably be an example of an unconstitutionally vague restriction on liberty. "Untoward or improper motive" gives little basis for legal debate within the terms of *Pharmaceutical Society (Nova Scotia)*. It is difficult to identify the factors to be considered or the determinative elements in ascertaining whether a motive is untoward or improper. The United States Supreme Court made a similar suggestion in *Papachristou v. Jacksonville*, supra, at p. 164. Qualifying malevolent or ulterior purposes by reference to the predicate offences, however, eliminates any concerns as to vagueness. The enumerated offences provide a clear basis for legal debate and narrow the scope of potential liability. The persons affected would thus have notice of what is prohibited and prosecutorial discretion would be sufficiently restricted.

102 Cory J., however, suggests that the prohibition created by s. 179(1)(*b*) is overbroad in terms of the persons, places and time period to which it applies. I express no opinion on the soundness of this analysis of liberty because it is not necessary in this case to decide the issue. The interpretation I advocate eliminates Cory J.'s concern that the prohibition is overbroad. A lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending is in no way objectionable or overbroad. Such a prohibition would impose a restriction on the liberty of the affected individuals to which ordinary citizens are not subject, but that restriction is directly related to preventing re-offending. The affected persons' history of offending, the uncertainties prevalent in treating offenders and a desire to disrupt the cycle of re-offending justify what is in effect a minor intrusion which does not breach the principles of fundamental justice.

103 That restraint of the affected persons' liberty is minor and easily illustrated. As noted above, use of public parks for the legitimate purposes for which they are intended would not be caught. Furthermore, though trite, it must be remembered that the Crown will bear the burden of proving all elements of the offence beyond a reasonable doubt. This burden guarantees that only loitering which can be proven to be related to one of the predicate offences will be subject to the criminal prohibition. I recognize that this formulation of the offence will likely lead to certain evidentiary presumptions which, absent a satisfactory explanation, may cause a judge to draw an adverse inference. Take for example a person with a history of offences in relation to children who is observed hanging around a playground and offering children candy. Similarly, as discussed above, just lingering about a school yard with no apparent purpose, as distinct from a public park, would give rise to legitimate suspicions. Such presumptions, however, in no way reverse the burden of proof, nor do they violate the accused's right to silence.

104 One of the most obvious objections to the more narrow formulation is that it is potentially less efficient than the alternatives in terms of achieving the legislative objective. As I noted above, a broad prohibition preventing certain persons from even attending at areas where the risk of re-offending is high may be a superior way to achieve the objectives of public safety and offender treatment. As Cory J. convincingly demonstrates, however, for such a broad prohibition to be constitutional,

it would probably have to be accompanied by the same kind of guarantees present in the new s. 161. It is well beyond the proper scope of the judicial role to contemplate such extensive additions in this case.

105 In addition to overbreadth, the absence of any notice of the prohibition contained in s. 179(1)(*b*) was relied upon by Cory J. in concluding that s. 7 of the *Charter* was violated. The basis for this conclusion was that notice is provided for in the case of certain other prohibitions contained in the Code and that the lack of notice in the case of s. 179(1)(*b*) "is unfair and unnecessarily so". In so concluding, Cory J. would make notice, albeit in limited circumstances, a principle of fundamental justice. With all due respect, I cannot agree. It is a basic tenet of our legal system that ignorance of the law is not an excuse for breaking the law. This fundamental principle has been given legislative expression in s. 19 of the *Criminal Code*: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence." Though formal notice of the content of s. 179(1)(*b*) might be preferable, I can see no basis for transforming the legislator's decision to provide notice in respect of certain Code prohibitions into a principle of fundamental justice.

106 For his part and in addition to s. 7, the respondent alleges that s. 179(1)(*b*) violates ss. 9, 11(*d*), 11(*h*) and 12 of the *Charter*. These allegations are without foundation and can be dismissed summarily.

107 Section 9 of the *Charter* provides a guarantee against being arbitrarily detained or imprisoned. The respondent's argument that any detention or imprisonment pursuant to s. 179(1)(*b*) would be arbitrary related largely to his objection to the absence of notice. As I have stated, the absence of notice does not provide a basis for attacking the validity of s. 179(1)(*b*). The reasoning set out above applies with equal force to the respondent's arguments in respect of s. 9 of the *Charter*.

108 Section 11(*d*) of the *Charter* enshrines the right to be presumed innocent until proven guilty. The respondent argues that s. 179(1)(*b*) presumes that an offender will re-offend and therefore violates the presumption of innocence. In reality, the provision does not assume recidivism, but rather provides the means to prevent it when convicted sex offenders demonstrate, through their conduct, a malevolent intent related to re-offending. Furthermore as I stressed above, anyone charged under s. 179(1)(*b*) will be presumed innocent and the burden remains on the Crown to prove beyond a reasonable doubt that the accused committed the offence as interpreted.

109 Section 11(*h*) protects a person found guilty and punished for an offence from being tried or punished again for the same offence. The class of persons to whom s. 179(1)(*b*) applies is identified by the fact of having been convicted of one of the enumerated offences. Any conviction under that section, however, will be based on violating its terms and not of having been convicted of one of the enumerated offences. Section 11(*h*) is therefore not violated.

110 Finally, the s. 12 guarantee against cruel and unusual treatment or punishment is also of no avail to the respondent. Even if the respondent could demonstrate that he is subject to a punishment or treatment within the meaning of s. 12, which I doubt, it is clear that any such punishment or treatment is not cruel and unusual. A punishment or treatment will only be cruel and unusual where it is "so excessive as to outrage the standards of decency" or where its effect is "grossly disproportionate to what would have been appropriate" (see *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 499). As explained above in the context of my discussion of s. 7 of the *Charter*, the lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending is both a minor and justifiable restraint of the affected persons' liberty. In the circumstances, neither the prohibition created by s. 179(1)(*b*) or any punishment which would result from its infringement can be said to be grossly disproportionate to what would be appropriate or so excessive as to outrage the standards of decency.

111 Prohibiting lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to one of the predicate offences thus survives *Charter* scrutiny. The predicate offences provide an ample basis for limiting prosecutorial discretion and giving guidance as to what is prohibited to those affected. Furthermore, prohibiting only conduct which can be demonstrated to be part of the cycle of re-offending carefully balances the objectives of public safety and offender treatment with a desire to limit the intrusiveness of the prohibition.

D. Disposition

112 For the foregoing reasons, s. 179(1)(*b*) of the Code should be interpreted as prohibiting lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offences. Based on this interpretation the constitutional questions are, therefore, answered as follows:

1. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*?

A. No.

3. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent to be presumed innocent until proven guilty according to law as guaranteed by s. 11(*d*) of the *Charter*?

A. No.

5. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent not to be subjected to cruel and unusual treatment or punishment as guaranteed by s. 12 of the *Charter*?

A. No.

7. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent not to be arbitrarily detained or imprisoned as guaranteed by s. 9 of the *Charter*?

A. No.

9. Does s. 179(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, limit the right of the respondent, if finally found guilty and punished for the offence, not to be tried or punished for it again, as guaranteed by s. 11(*h*) of the *Charter*?

A. No.

Given the negative answers to questions 1, 3, 5, 7 and 9, it is unnecessary to answer questions 2, 4, 6, 8 and 10.

113 In this case, the evidence demonstrated beyond any doubt that the accused had a malevolent purpose related to the predicate offences. I would therefore allow the appeal and restore the accused's conviction.

Appeal dismissed.

Footnotes

* On January 31, 1995 the Supreme Court of Canada issued a corrigendum to paras. 3 and 88 of the reasons. The changes have been incorporated herein.

Tab 8

1993 CarswellNS 19
Supreme Court of Canada

R. v. Morgentaler

1993 CarswellNS 19, 1993 CarswellNS 272, [1993] 3 S.C.R. 463, [1993] S.C.J. No. 95, 107 D.L.R. (4th) 537, 125 N.S.R. (2d) 81, 157 N.R. 97, 20 W.C.B. (2d) 585, 25 C.R. (4th) 179, 349 A.P.R. 81, 85 C.C.C. (3d) 118, J.E. 93-1654, EYB 1993-67381

R. v. HENRY MORGENTALER; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR NEW BRUNSWICK, R.E.A.L. WOMEN OF CANADA and CANADIAN ABORTION RIGHTS ACTION LEAGUE (Intervenors)

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

Heard: February 4, 1993
Judgment: September 30, 1993
Docket: Doc. 22578

Counsel: *Marian F.H. Tyson* and *Louise Walsh Poirier*, for the Crown.
Anne S. Derrick and *Jacqueline Mullenger*, for respondent.
Edward R. Sojonky, Q.C. and *Yvonne E. Milosevic*, for intervenor Attorney General of Canada.
Bruce Judah, for intervenor Attorney General for New Brunswick.
Angela M. Costigan and *Lynn Kirwin*, for intervenor R.E.A.L. Women of Canada.
Mary Eberts and *Ian Godfrey*, for intervenor Canadian Abortion Rights Action League.

The judgment of the court was delivered by *Sopinka J.*:

Introduction

1 The question in this appeal is whether the Nova Scotia *Medical Services Act*, R.S.N.S. 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are ultra vires the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital.

2 Between October 26 and November 2, 1989, the respondent performed fourteen abortions at his clinic in Halifax. He was charged with fourteen counts of violating the *Medical Services Act*. He was acquitted at trial after the trial judge held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in pith and substance criminal law [reported (1990), 99 N.S.R. (2d) 293 (Prov. Ct.)]. This decision was upheld by the Nova Scotia Court of Appeal [reported (1991), 104 N.S.R. (2d) 361, 7 C.R. (4th) 1]. The Crown appeals from the Court of Appeal's decision with leave of this Court.

Facts And Legislation

3 In January, 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler (1988)*). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (*Morgentaler (1975)*). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January, 1989, it was rumoured in Nova Scotia that the respondent intended to establish a free-standing abortion clinic in Halifax. Subsequently, the respondent publicly confirmed his intention to do so.

4 On March 16, 1989, the Nova Scotia government took action to prevent Dr. Morgentaler from realizing his intention. The Governor in Council approved two identical regulations, one under the *Health Act*, R.S.N.S. 1989, c. 195 (N.S. Reg. 33/89), and one under the *Hospitals Act*, R.S.N.S. 1989, c. 208 (N.S. Reg. 34/89), which prohibited the performance of an abortion anywhere other than in a place approved as a hospital under the *Hospitals Act*. At the same time it made a regulation (N.S. Reg. 32/89) pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations."

5 On May 8, 1989, one of the intervenors in the present case, the Canadian Abortion Rights Action League (CARAL), launched a court challenge to the constitutionality of the March regulations. The matter was set for hearing on June 22, 1989. The case was adjourned and ultimately dismissed for lack of standing, primarily because the same issues would be determined in the present case: *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (C.A.), affirming (1989), 93 N.S.R. (2d) 197 (T.D.), leave to appeal to S.C.C. refused, [1990] 2 S.C.R. v.

6 CARAL's court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act progressed rapidly through the legislature. It received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

> 2. The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.
>
> 3. In this Act,
>
> (*a*) "designated medical service" means a medical service designated pursuant to the regulations;
>
> . . . . .
>
> 4. No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.
>
> 5. Notwithstanding the *Health Services and Insurance Act*, a person who performs or for whom is performed a medical service contrary to this Act is not entitled to reimbursement pursuant to that Act.
>
> 6(1) Every person who contravenes this Act is guilty of an offence and liable upon summary conviction to a fine of not less than ten thousand dollars nor more than fifty thousand dollars.
>
> . . . . .
>
> 7. Notwithstanding any other provisions of this Act, where designated medical services are being performed contrary to this Act, the Minister may, at any time, apply to a judge of the Supreme Court for an injunction, and the judge may make any order that in the opinion of the judge the case requires.
>
> 8(1) The Governor in Council, on the recommendation of the Minister, may make regulations
>
> (*a*) after consultation by the Minister with the Medical Society of Nova Scotia, designating a medical service for the purpose of this Act;

The Medical Society was consulted after the passage of the Act, and a list of medical services was finalized. On July 20, 1989, the *Medical Services Designation Regulation*, N.S. Reg. 152/89, was made, designating the following medical services for the purposes of the Act:

> (a) Arthroscopy
>
> (b) Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy)
>
> (c) Upper Gastro-Intestinal Endoscopy

(d) Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion

(e) Lithotripsy

(f) Liposuction

(g) Nuclear Medicine

(h) Installation or Removal of Intraocular Lenses

(i) Eletromyography, including Nerve Conduction Studies.

The March regulations were revoked on the same day by N.S. Regs. 149-151/89. Item (d) of the new regulation continued the March regulations' prohibition of the performance of abortion outside hospitals. Section 5 of the Act continued the denial of health insurance coverage for abortions performed in violation of the prohibition.

7 Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. At first the clinic only provided counselling and referrals to Dr. Morgentaler's Montreal clinic. On October 26, 1989, however, Dr. Morgentaler defied the Nova Scotia legislation by performing seven abortions. He announced that he had done so at a press conference later that day. Several days later he performed seven more abortions. He was charged with fourteen counts of unlawfully performing a designated medical service, to wit, an abortion, other than in a hospital approved as such under the *Hospitals Act*, contrary to s. 6 of the *Medical Services Act*. Dr. Morgentaler publicly announced his resolve to continue his activities in contravention of the Act, and on November 6, 1989 the government of Nova Scotia obtained an interim injunction under s. 7 of the Act to restrain him from further violations of the Act pending the resolution of the charges and the constitutional challenge in court: *Nova Scotia (Attorney General) v. Morgentaler* (1989), 64 D.L.R. (4th) 297 (N.S. T.D.), affirmed (1990), 69 D.L.R. (4th) 559 (N.S. C.A.), leave to appeal to the S.C.C. refused [1990] 2 S.C.R. ix.

8 When the case proceeded to trial in June, 1990, Dr. Morgentaler did not dispute that he had performed the abortions as alleged. He argued, instead, that the Act and the regulation were inconsistent with the Constitution of Canada and consequently of no force or effect, on the grounds that they violate women's *Charter* rights to security of the person and equality and that they are an unlawful encroachment on the federal Parliament's exclusive criminal law jurisdiction. He also argued that the regulation was an abuse of discretion by the provincial cabinet and therefore in excess of its jurisdiction.

Judgments Below

9

A. Provincial Court of Nova Scotia (1990), 99 N.S.R. (2d) 293

10 Kennedy Prov. J. decided to address the distribution of powers issue first and having done so, found it unnecessary to go any further. He concluded that "the prohibition and regulation of abortion has been and remains criminal law in this country" and held:

> It would seem, therefore, that if the prohibition or regulation of abortion is criminal law and if Parliament, as part of its proper exercise of its exclusive criminal law-making power, may determine what is not criminal as well as what is criminal, then by restricting the performance of therapeutic abortions to hospitals the Province of Nova Scotia has trespassed into an area of Federal Government competence. [At p. 295.]

He held that he could properly look beyond the four corners of the legislation to consider extrinsic evidence of the legislative history in determining the pith and substance of the legislation. He found that the Nova Scotia government had notice in January, 1989 of Dr. Morgentaler's intention to open an abortion clinic in Halifax. He reviewed the chronology of events that followed

and held that it was reasonable to infer that the government believed that the *Medical Services Act* and regulation accomplished the same purpose as the March regulations. He observed that the provincial government had created a Royal Commission on Health Care Issues in 1987, with a mandate to recommend health care policy, and that the Act was passed before the Commission had rendered its report even though the Throne Speech of February 23, 1989 indicated that the government was awaiting the report. Kennedy Prov. J. also noted that the Medical Society was not consulted until after the Act was passed and that even then, according to the then president of the Society, the restriction of abortion was not negotiable.

11 Kennedy Prov. J. held evidence of statements and speeches made in the legislature during debates to be relevant and admissible. He found that the Health Minister had openly stated the government's policy to stop free-standing abortion clinics, in particular Dr. Morgentaler's, that this sentiment permeated the debates on both sides of the Assembly, and that Dr. Morgentaler was an acknowledged "mischief" against which the legislation was directed. He also considered relevant, though not determinative, the substantial penalties imposed by the Act (s. 6(1)).

12 He concluded that the Act and regulation were in pith and substance criminal law, "made primarily to control and restrict abortions within the province" and "to keep free-standing abortion clinics, and in the specific, Dr. Morgentaler out of Nova Scotia" (at p. 302). The province's privatization concerns, while real, were incidental to the paramount purpose of the legislation. Given this conclusion, KennedyProv.J. acquitted the respondent. He refrained from dealing with the *Charter* issues unless directed by an appeal court to do so.

B. Nova Scotia Supreme Court, Appeal Division (1991), 104 N.S.R. (2d) 361

(1) Freeman J.A., Clarke C.J.N.S. and Hart and Chipman JJ.A. concurring

13 Freeman J.A. held that while the province had the legislative power to pass a law in the present form, the question was whether it was colourable criminal law, i.e.:

> ... whether the province properly used [its] powers and created a law within the provincial competence, or whether it improperly attempted to use federal powers to pass a law that, regardless of its form, is actually a criminal law. [At p. 363.]

He held that both purpose and effect are relevant to characterizing the "matter" in relation to which a law is enacted. He found that the legis lation effectively duplicated s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 287), the section struck down by this Court in *Morgentaler (1988)*, supra. On the other hand, he also held that the effect of the Act was to prevent privatization, and since legislative effects alone were inconclusive, he examined purpose in more depth. He held that the legislative debates were admissible and relevant to the background and purpose of the legislation. They demonstrated that the government's intent in making the March regulations and introducing the Act was to prevent the establishment of Morgentaler clinics in Nova Scotia, and that the members of both sides of the House understood this as the paramount purpose of the legislation.

14 Freeman J.A. conceded that a credible case could be made out for the provincial objective of stamping out privatization of health care services, but disagreed that this was the primary target of the legislation. Six factors pointed in the other direction, and they are worth repeating in full:

> 1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.
>
> 2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature ... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*.

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission ...

4. The Crown's evidence as to the official policy of the government of Nova Scotia on the privatization issue was given by Mr. Malcom [a senior bureaucrat] ... The Minister of Health or other cabinet Ministers could have given the best evidence as to the real purpose of the *Medical Services Act*. While Mr. Nantes emphasized privatization in moving second reading of the *Medical Services Act*, his remarks to the house about the abortion clinics left little doubt about the government's objectives for the *Act*.

5. The Department of Health had been engaged in discussion with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks.

6. Under s. 35 of the *Health Services and Insurance Act* the penalty for a violation of either the *Act* or regulations made under it is a maximum fine of $100 for the first offence and $200 for a subsequent offence. Under the *Hospitals Act* the maximum fine is $500. The *Medical Services Act* provides for a minimum fine of $10,000 and a maximum fine of $50,000. The Crown's explanation for the substantial penalties under the *Medical Services Act* is noteworthy:

> Penalties are a means of enforcing compliance with provincial laws ... Where a person is determined to carry on a lucrative business, as is Dr. Morgentaler, who charged an average of $350 per procedure (Admission of Facts), and who anticipates being open for business in Halifax two days per week, (Transcript, p. 1165) at 15 procedures per day, or approximately $10,000 for two days work, if the penalty was not substantial, it would not ensure compliance with the law. *In this case a penalty of $10,000 represents approximately two days work for Dr. Morgentaler*.

[At pp. 376-77, Freeman J.A.'s emphasis.]

15 Freeman J.A. concluded as follows:

In summary, there is little in the evidence of the purpose of the *Medical Services Act* to suggest that its primary thrust was privatization, and a great deal that shows it was primarily intended to prohibit Morgentaler abortion clinics. It will be recalled that the effect was somewhat equivocal: it impacted upon private abortion clinics in the same manner as s. 251 of the *Criminal Code*, but it also had the effect of preventing privatization. When the purpose and effect of the *Act* are considered together, against the background of all the relevant circumstances, the conclusion is inescapable.

The *Medical Services Act* is in its pith and substance criminal law, as Judge Kennedy found it to be. As such, it is beyond the jurisdiction of the government of Nova Scotia; it must be struck down. [At p. 378.]

(2) Jones J.A. dissenting

16 In Jones J.A.'s view, the issue was "simply whether the province has the power to regulate how and where medical services may be performed in the province" (at p. 378). He referred to the province's general jurisdiction over health matters including the non-criminal aspects of abortion, and after considering the terms of the *Medical Services Act*, he concluded:

In the absence of federal legislation the province has a legitimate interest in the performance of abortions in doctors' offices where that practice is objectionable to the public. Obviously that was the view of the Legislature. In my view the pith and substance of the *Act* is simply the regulation of where these medical services can be ... performed. I see no difference in principle between such legislation and legislation requiring the treatment of aids patients or battered children in hospitals. Those are matters within the power of the provinces to legislate in relation to public health. That being so it is not open to this Court to review the reasons for the legislation. [At p. 383.]

He considered the "colourability" doctrine inapplicable since here the province was empowered to deal with the subject, and "[l]egislation is not open to review on the issue of colourability where a legislature is clearly acting within its powers" (at pp. 384-85). He would have allowed the appeal and ordered the trial to continue.

Issues

17 On February 18, 1992, the Chief Justice stated the following constitutional questions:

> 1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislature jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> 2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Lieutenant Governor in Council on the ground the regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

18 It is important to keep in mind that the question before us is limited to the distribution of powers. The impact of the *Canadian Charter of Rights and Freedoms* on legislation of this kind, while an important subject, is not in issue here. A holding that this legislation relates to a matter within the legislative competence of one or the other level of government does not mean that such legislation would either survive or fail the scrutiny of the *Charter*.

19 Moreover, even for purposes of the distribution of powers the issues are limited in this case: the criminal law power is the only federal head of power in issue. This is the basis on which the case has proceeded since the trial, and is reflected in the terms of the constitutional questions. Although the argument has been made elsewhere that abortion falls properly under the federal government's residual power to legislate for peace, order and good government (see, e.g., M. McConnell and L. Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14 Dalhousie L.J. 81), that argument cannot be entertained here because of the way in which the issues were framed. Hence the intervenor CARAL was not allowed to present argument on this issue in this case: *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (motion in chambers). The only issues are whether the legislation is within the competence of the province under s. 92 of the *Constitution Act, 1867*, or whether it is in relation to the criminal law and thus within the exclusive competence of Parliament under s. 91(27).

Analysis

20

A. General

21 The appellant argued that the *Medical Services Act* and the regulation are valid provincial legislation enacted pursuant to the province's legislative authority over hospitals, health, the medical profession and the practice of medicine. It relies particularly on heads (7), (13), and (16) of s. 92 of the *Constitution Act, 1867*, which give the province exclusive legislative authority over:

> 92. ...
>
> 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
>
> . . . . .
>
> 13. Property and Civil Rights in the Province.
>
> . . . . .
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

The ground on which the legislation is challenged is head (27) of s. 91, which reserves "The Criminal Law ..." to Parliament. On the basis of the analysis that follows I conclude that the *Medical Services Act* and *Medical Services Designation Regulation* are criminal law in pith and substance and consequently ultra vires the province of Nova Scotia. The appeal must therefore be dismissed.

22 In my opinion, the Act and *Medical Services Designation Regulation* must be considered together for the purposes of constitutional characterization. The Act is in general terms, and only by N.S. Reg.152/89 were its terms given specific meaning by attachment to particular medical services. The history of the Act, including its consideration in the House of Assembly and its connection to the earlier March regulations, shows that it was always considered in light of the medical services to which it would apply, and it was almost always discussed with particular reference to one of them, namely abortion. The Act and the list of services eventually embodied in the regulation were intertwined from the start.

23 The situation is similar to that in *Texada Mines Ltd. v. British Columbia (Attorney General)*, [1960] S.C.R. 713, in which British Columbia enacted legislation providing for a tax to be imposed in respect of a mineral or minerals found in a "producing area". The rate of tax, the minerals subject to it and the producing area in which it would apply were all left to be designated. Regulations were made designating a certain area as a "producing area", designating iron as the only mineral subject to the tax and setting the rate of tax. This Court considered the statute together with the regulations for the purposes of constitutional characterization, and found (after referring also to related statutes, the legislative history and background including the province's historical efforts to encourage iron smelting in the province by means of what were effectively export taxes, the nature of the iron ore market, and the deterrent effect of the tax) that the statute was an ultra vires attempt to encourage the establishment of an iron ore smelter by imposing a prohibitive export tax. The regulations gave concrete meaning and content to the statute and were indispensable to its classification for constitutional purposes.

24 In similar fashion, the statute and regulation are considered together in the following analysis. I will refer to them both together as "the legislation." Together, in my opinion, they constitute an indivisible attempt by the province to legislate in the area of criminal law.

B. Classification of Laws

25

(1) "What's the 'matter'?"

26 Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. This process of classification is "an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning". B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 U.T.L.J. 114, at p. 127. Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science": F.R. Scott, *Civil Liberties and Canadian Federalism* (1959), at pp. 26-27.

27 A law's "matter" is its leading feature or true character, often described as its pith and substance: *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. See P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization (see, e.g., *Alberta (Attorney General) v. Canada (Attorney General)*, [1939] A.C. 117 (P.C.) (the *Alberta Bank Taxation Reference*), at p. 130; *Starr v. Ontario (Commissioner of Inquiry)*, *(*sub nom. *Starr v. Houlden)* [1990] 1 S.C.R. 1366 [hereinafter *Starr v. Houlden*], at pp. 1389, 1392), it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. Rand J. put it this way in *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 302-3:

> The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action ... The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power.

See also *Carnation Co. v. Quebec (Agricultural Marketing Board)*, [1968] S.C.R. 238; *Canadian Indemnity Co. v. British Columbia (Attorney General)*, [1977] 2 S.C.R. 504, at p. 512; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 354-55, 357-58; and *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713 [hereinafter *R. v. Edwards Books & Art Ltd.*], at pp. 744-45, 747 and 751 (Dickson C.J.C.), p. 788 (Beetz J.), and p. 807 (Wilson J.).

(2) Purpose and Effect

(a) "Legal effect" or strict legal operation

28 Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect". The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation" refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. See Hogg, supra, at pp. 15-13, 15-15. Legal effect is often a good indicator of the purpose of the legislation (see, e.g., *Reference re Alberta Bill of Rights Act*, [1947] A.C. 503 (P.C.) (the *Alberta Bill of Rights case*), and *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, at p. 326, Rand J.), but is relevant in constitutional characterization even when it is not fully intended or appreciated by the enacting body. Thus in *Starr v. Houlden*, supra, the terms of reference of the Patricia Starr inquiry were held to duplicate the purposes and functions of a police investigation and preliminary inquiry into criminal allegations against specific individuals, which are criminal law matters, even though the province may not have intended that result.

29 The analysis of pith and substance is not, however, restricted to the four corners of the legislation (see, e.g., *Reference re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373, at pp. 388-89). Thus the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve", its background and the circumstances surrounding its enactment (Hogg, supra, at p. 15-13) and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation (*Alberta Bank Taxation Reference*, supra, at p. 130). The ultimate long-term, practical effect of the legislation will in some cases be irrelevant. See *Reference re Anti-Inflation Act*, supra, at p. 389.

(b) The use of extrinsic materials

30 In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable: *Reference re Residential Tenancies Act*, (sub nom. *Re Residential Tenancies Act of Ontario)* [1981] 1 S.C.R. 714, at p. 723, per DicksonJ. This clearly includes related legislation (such as, in this case, the March regulations and the former s. 251 of the *Criminal Code*), and evidence of the "mischief" at which the legislation is directed: *Alberta Bank Taxation Reference*, supra, at pp. 130-33. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, supra, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

31 The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (*Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*, [1984] 1 S.C.R. 297 [hereinafter *Reference re Upper Churchill Water Rights Reversion Act*], at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in *Reference re Residential Tenancies Act*, supra, at p. 721 as "inadmissible as having little evidential weight," and was excluded in *Reference re Upper Churchill Water Rights Reversion Act*, supra, at p. 319, and *Canada (Attorney General) v. Reader's Digest Assn.*, [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporated body, but that is equally true of other forms of

legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. See *Reference re Anti-Inflation Act*, supra, at p. 470, Beetz J. (dissenting); *R. v. Edwards Books & Art Ltd.*, supra, at p. 749; *Starr v. Houlden*, supra, at pp. 1375-76, 1404 (distribution of powers); *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 24-25; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, at pp. 983-84 (*Charter*); and *R. v. Mercure*, [1988] 1 S.C.R. 234, at pp. 249-251 (language rights). I would adopt the following passage from Hogg, supra, as an accurate summary of the state of the law on this point:

> In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. [At pp. 15-14 to 15-15, footnotes omitted.]

32 I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se. I will return to the evidence below.

(c) Practical effect

33 In the present case the Attorney General of Nova Scotia submits that the evidence shows that the future administration of the Act will not result in a restriction on abortion services; the respondent submits the opposite. This raises the question of the relevance of evidence of practical effect. I have noted that the legal effect of the terms of legislation is always relevant. Barring material amendments, it does not change over time. The practical effect of legislation, on the other hand, has a less secure status in constitutional analysis. Practical effect consists of the actual or predicted results of the legislation's operation and administration (see, e.g., *Saumur*, supra). Courts are often asked to adjudicate the constitutionality of legislation which is not yet in force or which, as here, has only been in force a short time. In such cases any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation.

34 In the *Anti-Inflation Act* reference, supra, Laskin C.J.C. was willing to admit evidence of the circumstances in which the legislation was passed (at p. 391), but did not admit evidence of its predicted operation and effect, finding that "no general principle of admissibility or inadmissibility can or ought to be propounded by this Court" (at p. 389). The difficulty with practical effect is that whereas in one context practical effect may reveal the true purpose of the legislation (see *Saumur*, supra), in another context it may be incidental and entirely irrelevant even though it is drastic (*Saskatchewan (Attorney General) v. Canada (Attorney General)*, [1949] A.C. 110 (P.C.), *Canadian Indemnity Co. v. British Columbia (Attorney General)*, supra, *Whitbread v. Walley*, supra, at p. 1286); and in yet another context provincial and federal enactments with the same practical impact may both stand if the matter to which they relate has two "aspects" of roughly equivalent importance, one within federal and the other within provincial competence (*Hodge v. R.* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Québec (Commission de la santé & de la sécurité du travail du Québec) v. Bell Canada* (sub nom. *Bell Canada v. Québec (Commission de la santé & de la sécurité du travail*)), [1988] 1 S.C.R. 749).

35 In the majority of cases the only relevance of practical effect is to demonstrate an ultra vires purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of intra vires or confirming an impression of ultra vires. It was in light of the difficult status of practical effect (particularly

as exemplified in *Walter v. Alberta (Attorney General)*, [1969] S.C.R. 383, wherein provincial legislation banning communal landholding was held intra vires even though the legislation drastically infringed the Hutterite community's religious freedom) that Wilson J., concurring in *R. v. Big M Drug Mart Ltd.*, supra, held that legislative purpose is the focal point in distribution of powers analysis. One of the issues in that case was whether the *Lord's Day Act*, R.S.C. 1970, c. L-13, was enacted pursuant to Parliament's criminal law power. Dickson J. (as he then was), writing for the majority, held that the Act was valid criminal law because its purpose was to compel religious observance of a Sunday sabbath (at p. 352), and emphasized that his conclusion depended on the identification of the purpose of the Act (at p. 355). Wilson J. held, in a passage not in conflict with Dickson J.'s approach to division of powers, that the pith and substance of legislation is determined through "an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects" (at p. 357). She concluded, at p. 358, that:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance ...

36 If, however, pith and substance can be determined without reference to evidence of practical effect, the absence of evidence that the legislation has a practical effect in line with this characterization will not displace the conclusion as to the legislation's invalidity. In such a case, "evidence as to the likely effect of legislation would not add anything useful to the task of characterization, but would merely bear on the wisdom or efficacy of the statute. In those cases the evidence is not relevant" (Hogg, supra, at p. 15-16). See also *Reference re Anti-Inflation Act*, supra, at pp. 424-25. Such evidence will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its object. The court is not concerned with the wisdom of a statute, and the government surely cannot justify legislation already determined to be ultra vires by arguing that it will not realize its aim or objective. Moreover, as I have said, legislation is often considered before experience has shown its actual impact, and prediction of future impact is necessarily short-term. I would adapt what La Forest J. said in another context (*R. v. Edwards Books & Art Ltd.*, supra, at p. 803) to this situation: "[i]t is undesirable that an Act be found constitutional today and unconstitutional tomorrow" simply because of the absence of conclusive evidence as to future impact or the possibility of a change in practical effect.

(3) Scope of the Applicable Heads of Power

37 The issue we face in the present case is whether Nova Scotia has, by the present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

(a) The criminal law

38 Section 91(27) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative jurisdiction over criminal law in the widest sense of the term: *Reference re Lord's Day Act (Ontario)*, (sub nom. *Ontario (Attorney General) v. Hamilton Street Railway)* [1903] A.C. 524 (P.C.), at p. 529. In *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (P.C.), at p. 324, the Judicial Committee took this to include any act prohibited with penal consequences, but this interpretation was too generous and the missing ingredient was supplied by Rand J. in his classic formulation of the scope of the tests for criminal law in the *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)*, [1949] S.C.R. 1 (the *Margarine Reference*), at pp. 49-50:

> ... we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> . . . . .
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ...

39 The presence or absence of a criminal public purpose or object is thus pivota: see *Lord's Day Alliance v. British Columbia (Attorney General)*, [1959] S.C.R. 497, at pp. 508-9; *Goodyear Tire & Rubber Co. of Canada v. R.*, [1956] S.C.R. 303, at p. 313; and *R. v. Boggs*, [1981] 1 S.C.R. 49. This is not contradicted by the decision in *Starr v. Houlden*, supra. In that case the province of Ontario established a commission of inquiry to investigate and find whether Patricia Starr and Tridel Corporation had, in their dealings with public officials, conferred benefits, advantages or rewards of any kind on any public official. The terms of reference specified individuals by name and used language virtually indistinguishable from that of s. 121.1(*b*) of the *Criminal Code*. Lamer J. (as he then was), speaking for the majority, held the inquiry ultra vires:

> ... it is the combined and cumulative effect of the names together with the incorporation of the *Criminal Code* offence that renders this inquiry *ultra vires* the province. The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry ... [At p. 1402.]

Lamer J. found the circumstances surrounding the establishment of the inquiry and the legal effect of its terms of reference to be overpowering and determinative of the inquiry's criminal character. That the province may not have intended to usurp the criminal process of an investigation and preliminary inquiry into specific offences by named individuals was irrelevant. That does not mean, however, that the purpose or object of the inquiry was irrelevant. It was simply a case in which the legal effect of the terms of reference was paramount in establishing a criminal public purpose within Rand J.'s tests. In sum, Lamer J. found that the inquiry offended the principle that the province cannot use an inquiry "for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie case*" (at pp. 1411-12).

(b) Provincial health jurisdiction

40 The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the *Constitution Act, 1867*, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. R.*, *(*sub nom. *Schneider v. British Columbia)* [1982] 2 S.C.R. 112, at p. 137. The *Schneider* case gives an indication of the watershed between valid health legislation and criminal law. In that case, British Columbia's *Heroin Treatment Act* was held to be intra vires because its object was not to punish narcotics addicts, but to treat their addiction and ensure their safety and security. Narcotic addiction was targeted not as a public evil but as a "physiological condition necessitating both medi cal and social intervention" (at p. 138). Accordingly, if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction.

41 In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.

(c) The regulation of abortion

42 In the U.K. and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law. As early as the mid-nineteenth century, with the adoption of legislation imitating *Lord Ellenborough's Act, 1803* (U.K.), 43 Geo. 3, c. 58, through the time of Confederation and up to the 1969 amendments to the *Criminal Code* which introduced the relieving portion of s. 251 (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 18), the criminal law in Canada prohibited abortions with penal consequences; before the introduction of the relieving portion of s. 251 there was no such thing as a non-criminal abortion. As Dickson J. (as he then was) said in *Morgentaler (1975)*, supra, at p. 672,

"since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place ..."

43 Section 251 of the *Criminal Code* was a valid exercise of the criminal law power. Why? In *Morgentaler (1975)*, supra, Dr. Morgentaler argued that s. 251 was an encroachment on provincial legislative power in relation to hospitals and the regulation of the profession of medicine and the practice of medicine, but this argument was dismissed unanimously from the bench without hearing from the Crown. Laskin C.J.C., who dissented as to the result, was the only judge who gave reasons for the Court's rejection of the argument that s. 251 was legislation for the protection of a pregnant woman's health:

> This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power. [At p. 626.]

He held, on the contrary, that s. 251 was well within Rand J.'s tests for criminal law in the *Margarine Reference*, supra, because:

> What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that the interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. [At p. 627.]

The presence of the dispensing provisions in s. 251 was explained on the basis that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation" (at p. 627). Finally, in so far as s. 251 had "any relationship to the establishment of hospitals or the regulation of the medical profession or the practice thereof," Laskin C.J.C. held this relationship to be "so incidental as to be little short of ephemeral" (at p. 628).

44 In *Morgentaler (1988)*, supra, this Court unanimously reaffirmed the holding that s. 251 was valid criminal law for purposes of the distribution of powers. Beetz J. (with whom Estey J. concurred), at pp. 82 and 122-3, and Wilson J., at p. 181, held that while s. 251 had as an ancillary objective the protection of the life or health of pregnant women, its principal objective was the protection of the state interest in the foetus. (I would note that although in this case the objective of the legislation was also discussed in the context of the *Charter*, a statute's "objective" for *Charter* purposes necessarily reflects its "purpose" for distribution of powers purposes: *R. v. Big M Drug Mart Ltd.*, supra, at pp. 353, 361-62.). Beetz J. held, at pp. 128-29, that this made it a valid exercise of the criminal law power. On the other hand, Dickson C.J.C. (Lamer J., as he then was, concurring), at p. 75, and McIntyre J. (dissenting, La ForestJ. concurring), at pp. 135 and 156, held that the objective of the section was to balance the interests of the foetus and the pregnant woman. McIntyre J. held, at p. 156, that this objective made the section a valid exercise of the criminal law power. Dickson C.J.C. and Wilson J. did not give reasons for finding the section intra vires.

45 The two *Morgentaler* decisions focus attention on the purpose or concern of abortion legislation to determine if it is truly criminal law: is the performance or procurement of abortion prohibited as socially undesirable conduct; is protecting the state interest in the foetus or balancing the interests of the foetus against those of women seeking abortions a primary objective of the legislation; is the protection of the woman's health only an ancillary concern; and are other provincial concerns such as the establishment of hospitals or the regulation of the medical profession or the practice thereof merely incidental?

46 It is not necessary for the purposes of this appeal to attempt to delineate the scope of provincial jurisdiction to regulate the performance of abortions. Suffice it to say that any provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy.

C. Application of the Principles to the Case at Bar

47 An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

(1) Legal Effect: the Four Corners of the Legislation

48 Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s.6), to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act* (s.4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be ultra vires the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s.5), and provides for injunctive relief against violations of its terms (s.7). It is entitled "An Act to Restrict the Privatization of Medical Services", and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s.2). The allegation of ultra vires and the decisions in the courts below focused on the offence provisions of the legislation. No argument was directed toward the "de-insurance" section in this Court (s.5). Although the "de-insurance" and injunction provisions clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case. It is sufficient for the purposes of characterizing this legislation to concentrate on the prohibition of the performance of a designated service outside a hospital. It is apparent from the combined effect of the offence and the regulation that one purpose of the legislation is to prohibit the establishment of free-standing abortion clinics.

49 The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. In *Scowby v. Saskatchewan (Board of Inquiry)*, *(*sub nom. *Scowby v. Glendinning)* [1986] 2 S.C.R. 226, [hereinafter *Scowby v. Glendinning*], a majority of this Court held provincial legislation creating an offence of arbitrary arrest or detention and a right to relief in the form of habeas corpus to be suspect on its face since arbitrary arrest or detention and the availability of habeas corpus in such circumstances have been dealt with by Parliament in the criminal law "almost since the advent of Confederation" (at p. 240). Likewise, one of the reasons behind this Court's invalidation of a municipal by-law prohibiting street prostitution in *R. v. Westendorp*, [1983] 1 S.C.R. 43, was that conduct relating to prostitution has long been regarded as criminal. The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable validity on its face: *Rio Hotel Ltd. v. Liquor Licensing Board (New Brunswick)*, *(*sub nom. *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board))* [1987] 2 S.C.R. 59, at p. 80 [hereinafter *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*], Estey J. (concurring in the result).

50 This conclusion makes it unnecessary to invoke the "colourability doctrine," but since it figured prominently in the courts below and in argument before us, I will address it briefly. The respondent attacks the legislation on the basis that it is colourable criminal law. The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction: *Starr v. Houlden*, supra, at p. 1403; *Reference re Upper Churchill Water Rights Reversion Act*, supra, at p. 332; *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), at p. 482. There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation's vires on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference*, supra, at p. 48, a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all the circumstances".

51 In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:

> [t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers ... Selection of the aspect that matters is the exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule ...

See W.R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" (1965), reprinted in Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law, and Federal Systems of Canada* (1981), 266, at p. 282; see also A.S. Abel, "The Neglected Logic of 91 and 92" (1969) 19 U.T.L.J. 487, at p. 494; *Ontario (Attorney General) v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337; and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at p. 76. Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J.C. in *Potash*, supra, at p. 76, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing."

(2) Beyond the Four Corners

52

(a) Duplication of Criminal Code provisions

53 Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government. The majority of the Court of Appeal found that the present legislation effectively duplicated s. 251 (now s. 287) of the *Criminal Code*. Freeman J.A. held that:

> Using s. 251 as a starting point, even a cursory examination discloses that the *Medical Services Act* has an impact and effect on abortions in private clinics virtually indistinguishable from that of s. 251. [At p. 367.]
>
> . . . . .
>
> If a distinction exists, it is a philosophical one too subtle to alter the outcome. Under either piece of legislation, a doctor who performed an abortion in a private clinic might find a policeman in the waiting room. He or she could be convicted on precisely the same evidence under either enactment. [At pp. 371-72.]

54 Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*: *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662, at p. 699; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, supra, at pp. 70-71, 80; and *Starr v. Houlden*, supra, at pp. 1402, 1405-6. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Smith v. R.*, [1960] S.C.R. 776; *Stephens v. R.*, [1960] S.C.R. 823; *R. v. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), at p. 636, affirmed [1984] 1 S.C.R. 266. The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

55 The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein (*Scowby v. Glendinning*, supra, at p. 238). The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which is present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course, inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be intra vires, no problem of paramountcy arises.

56 In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) Background and surrounding circumstances

57 The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The course of events

58 It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. The Minister of Health made this clear upon announcing the regulations:

> ... Cabinet has today approved two new regulations relating to the provision of abortion services.
>
> As all members know, it is not the policy of this government to endorse or support in any way the provision of these services through free-standing clinics or other facilities which do not fall within the category of an approved hospital.
>
> (Nova Scotia, House of Assembly, *Debates and Proceedings* (March 16, 1989), at p. 1008.)

The March regulations singled out abortion, and the Morgentaler clinic in particular.

59 In May, 1989, the March regulations were challenged in court by CARAL on the ground that they were unconstitutional: see *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)*, supra. Shortly before the date when that action was first to come on for hearing (June 22, 1989), and days before the close of the legislative session, the government introduced and rushed the Act through the House of Assembly. It was introduced on June 6 and received third and final reading and Royal assent on June 15. The legislation was enacted in what can only be considered great haste. The Act, considered along with the services that were proposed to be designated, accomplished all the purposes of the March regulations. Yet instead of singling out abortion, it took the form of a general "floating" prohibition of the performance of medical services other than in a hospital, which would crystallize upon the designation of several services among which abortion was to be found. On July 20, 1989, the Executive Council made the *Medical Services Designation Regulation* and simultaneously revoked the March Regulations. I am in complete agreement with Freeman J.A.'s characterization of the course of events, which I reproduce again here for convenience:

> 2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature ... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*. [At pp. 376-77.]

60 Neither the timing nor the overlap of subject matter can be viewed as coincidental. It is reasonable to infer, as did the trial judge, and the government believed that the new legislation would accomplish the purpose of the March regulations, and intended it to do so. The March regulations were the first response to Dr. Morgentaler's announcement, and the subsequent legislation was the continuation and consolidation of that response. Together they constituted a hastily-devised plan aimed directly at ridding the province of Dr. Morgentaler and his proposed clinic. The course of events suggests that this purpose was the principal purpose of the legislation and contributes to the impression that privatization and quality assurance were only incidental concerns at best.

(ii) Hansard

61 I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. Both the trial judge and Freeman J.A. referred extensively to excerpts from Hansard. The following passage from the trial judge's reasons fairly captures the flavour of the proceedings:

> During the debate at the time of second reading on June 12, 1989, the Opposition Health Critic, Sandra Jolly, says at page4678:
>
> > ... It is a dilemma that is both complex and emotional and the Liberal caucus of Nova Scotia agrees with the Minister of Health and Fitness that the Morgentaler clinic should not be set up in this province. I want to make that point very clear. (Applause)
> >
> > The Liberal caucus is of the opinion that it is unnecessary for the clinic to come to Nova Scotia, so in that part of the bill, we do agree with the current government. We are in agreement and we have stated that right from the very beginning, that we do not feel that the clinic is required here. What concerns me is that the government has very hurriedly put together this legislation, and what they are doing is not only trying to work at keeping the Morgentaler clinic out, but we really do see it as a regression or a step backwards in regard to medical services for the people of Nova Scotia.
>
> The Opposition critic went on at length expressing concerns about the broad implications of the Bill.
>
> When the Minister of Health had a chance to respond, he states: (at page 4716):
>
> > I heard the most weak-kneed, weak-hearted support for the question of the control of free-standing abortion clinics that I heard yet in this entire session of the Legislature. It was always the Liberal caucus that has this position, we have this position. Well, I am going to make mine personal and say I, as the Minister of Health and I, as an MLA, am not supportive of free-standing abortion clinics.
>
> (Applause)
>
> On June 5, 1989, the day before the proposed Act was introduced in First Reading, the Minister of Health and Fitness, in discussions concerning the budget estimates for the Department of Health said at p. 785:
>
> > ... we have adopted a policy as government that we are not going to be supportive [of free-standing abortion clinics] and we will do everything in our effort to stop them. That is what we have said and that is what we are doing, if we need more steps, if we have to take more steps, we are going to take them. I am going to be carrying out that policy ... and I am going to be supportive of that policy.
>
> [At pp. 300-301.]

62 Freeman J.A. made reference, among others, to the following excerpts:

> Paul MacEwan, member for Cape Breton Nova, said:
>
> > So certainly, you know, if this government wants to pose as being the great champion of those that want to keep Mr. Morgentaler out of Nova Scotia, let it be noted that it was the very last thing that they thought of before they adjourned the House for the year ...
> >
> > Now we are led to believe that this is a bill that is not really just to restrict the privatization of medical services, whatever that is, but it is a bill to make it impossible or to make it unlikely I suppose that the abortion clinic that Morgentaler wants to establish can be set up ...
>
> Following the remarks by members of opposition parties Mr. Nantes spoke again:

> I do not think you can play both sides of this issue. You cannot criticize the health care system and say, we do it all wrong and talk about clinics and all that sort of thing without coming out on this particular element. Do you support or do you not support a free-standing abortion clinic? I want you to know that not only can I speak personally, but also, I think we represent the consensus and overwhelming view of this side of the legislature. (Applause)
>
> I think I am even prepared to go a little further and say that I do think it represents the majority view of quite a number of members on the other side of the house, also.

(Applause). [At pp. 375-76.]

63 The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics per se. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed — privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services — were conspicuously absent throughout most of the legislative proceedings. They were emphasized by the Minister, Mr. Nantes, on moving second reading of the bill on June 12, 1989. This does not, however, in my view, detract significantly from the overall impression left by the debates.

64 Of course, one must be mindful of the limited use to which such evidence can be put, as I discussed earlier. To quote Kennedy Prov. J., at first instance:

> I recognize that it would be a folly for a court to conclude that everything that is said in a political forum has meaning in relation to the characterization of the legislation produced by that body. [At p. 301.]

Nonetheless, I see no reason to interfere with Freeman J.A.'s assessment of the tone of the proceedings, at p. 367:

> One need not look beyond the pages of Hansard ... to realize the sense of moral outrage of representatives in the House of Assembly engendered by the prospect of Morgentaler clinics in Nova Scotia. Moral considerations attach not only to the performance of abortions, but to where they are performed and under what circumstances.

65 The appellant argues that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction. Although there has been some recognition of a provincial "morality" power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power: *Rio Hotel Ltd. v. New Brunswick*, supra, at pp. 71-80; *Canada (Attorney General) v. Dupond*, (sub nom. *Canada (Attorney General) v. Montreal (City))* [1978] 2 S.C.R. 770; R. Pepin, "Le pouvoir des provinces canadiennes de légiférer sur la moralité publique" (1988) 19 R.G.D. 865; *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307, at p. 364.

66 While legislation which authorizes the establishment and enforcement of a local standard of morality does not ipso facto "invade the field of criminal law" (see *McNeil v. Nova Scotia (Board of Censors)*, supra, at pp. 691-92), it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law, as established in the *Margarine Reference*, supra, at p. 50: see *R. v. Westendorp*, supra, and *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127, at pp. 148-49.

67 As Wilson J. recognized in *Morgentaler (1988)*, supra, at p. 171, a woman's decision to have an abortion is "profound[ly] social and ethical;" indeed it is "essentially a moral decision" (cf. M.L. McConnell, " 'Even by Commonsense Morality': *Morgentaler, Borowski* and the Constitution of Canada" (1989) 68 Can. Bar Rev. 765, at p. 766) and it seems clear to me that the present legislation, whose primary purpose is to prohibit abortions except in certain circumstances, treats of a moral issue.

68 In view of the foregoing, there is a strong inference that the purposeof the legislation and its true nature relate to a matter within the federal head of power in respect of criminal law. In order to determinewhether this is its dominant purpose or characteristic, it is necessary to compare the above indicia of federal subject matter with indications of provincial objectives.

(iii) Searching for provincial objectives

69 At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical services so as to avoid duplication and reduce public costs. The principal Crown witness on these points, John Malcom, the Health Department Administrator, testified that Nova Scotia's health care system evolved around the public hospital and that there have never been private, "for-profit" medical clinics in the province. He said that Nova Scotia has a policy of equal access to health care services, and that duplication of health care services creates a two-tier system. Moreover, his evidence was that rationalization of health care services was the most cost-effective approach.

70 It may be that this evidence represented the policy of the government of Nova Scotia at one time. The respondent correctly pointed out, however, that this evidence was not established at trial to have been the basis for the impugned legislation. Indeed, Kennedy Prov. J. considered the evidence and found that any privatization concerns were "incidental to the paramount purpose of the legislation" (at p. 302). I see no good reason to question this finding.

71 First, as to the health and safety of women and the argument that the in-hospital requirement was enacted because of a concern over quality assurance, there is no evidence in the record to indicate that abortions performed in clinics like Dr. Morgentaler's pose any danger to the health of women. Counsel conceded that the quality of medical service in free-standing abortion clinics is comparable to that available in hospitals. I also note that in *Morgentaler (1988)*, supra, Beetz J. held that studies, experience and expert evidence established that abortions can safely be performed in clinics and that the in-hospital requirement was no longer justified from a medical point of view. Since the appellant agrees that the quality of medical service in clinics is comparable to that in hospitals, the argument that the legislation was directed at quality assurance and women's health and safety is deprived of any force.

72 Second, the government did not express concerns about privatization in relation to this legislation or the March regulations until the Act was moved for second reading. Again, I would adopt Freeman J.A.'s statement of the relevant facts, at pp. 376-77:

> 1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.
>
> . . . . .
>
> 3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission ...

On February 23, 1989, just three weeks before the adoption of the March regulations, the Throne Speech was delivered. Although it discussed health care policy, it made no mention of a policy with respect to privatization. As Freeman J.A. observes, it did refer to the Royal Commission on Health Care, which had been established in 1987 to undertake a thorough examination of the province's health care system. The Throne Speech indicated that the government was awaiting the Commission's report.

73 That report was delivered in December, 1989. Its recommendations were inconsistent with a policy of opposing privatization. It recommended, inter alia, moving as many services as possible out of hospitals and minimizing the length of hospital stays, in order to reduce public health care costs. It stated, in part, that while institutions should continue to be the focal points of health care delivery in Nova Scotia:

> ... there is an increasing understanding that health care services can be provided safely and appropriately outside of the institutional setting.

John Malcom, the Crown health care policy expert, testified, on cross-examination, that the directions enunciated in the report were consistent with the approach the Department of Health had been taking. The Throne Speech of 1990, delivered two months after the report, discussed the report, and again — understandably, in light of the Commission's recommendations — made no mention of a policy of opposing the private delivery of health care services.

74 Third, it is significant that there is no evidence of any prior study or consultation regarding the cost-effectiveness or quality of medical services delivered in private clinics. Again, Freeman J.A.'s words are apropos and I repeat them for convenience:

> 5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks. [At p. 377.]

The Medical Society was not consulted until after the legislation was introduced, and then only to discuss the services to be designated. This would not be particularly significant on its own, but, according to the evidence of Dr. Vincent Audain, who was the president of the Medical Society at the relevant time, the Medical Society had been engaged in discussions with government toward moving more health care services outside hospitals. Dr. Audain learned of the Act through a telephone message the day the bill was introduced. He testified that the Society was perturbed by this unexpected action and suspected that the motive behind it was the "abortion issue". The Society passed a resolution, which it communicated to the government, condemning the legislation on the basis that it would have a negative impact on the delivery of medical care, would add to the cost of hospital care and conflict with emerging technological advances in medicine. The legislation was seen to contradict the government's stated policy goals of moving more services outside hospitals. Furthermore, according to Dr. Audain, when the Medical Society was consulted in June, 1989 as to the medical services to be designated, the restriction of abortion was non-negotiable.

75 Although the Crown's expert witness, Mr. Malcom, testified as to the adequacy of access to abortion in Nova Scotia, no studies or consultation on the delivery of, access to, or cost-effectiveness of abortion services in hospitals or clinics were conducted, and the Crown relied at trial on dated statistical evidence as to the adequacy of existing facilities. The appellant argued, on the basis of Mr. Malcom's opinion evidence, that quality assurance is best ensured through the Canadian Council on Hospital Accreditation. There is no evidence, however, that the government had inquired into either the quality of services provided in hospitals vis-à-vis clinics or the existence of standards for the delivery of abortion services.

76 The appellant refers to a meeting of the House of Assembly's Committee on Community Services at the abortion unit of the Victoria General Hospital ("VGH"), in Halifax, on May 30, 1989, as evidence of prior consultation. Eighty-three per cent of all abortions performed in Nova Scotia are performed at this hospital. The topic of the meeting was the VGH's termination of pregnancy unit. The Committee met with the head of the gynaecology department, the head of the abortion unit and the charge nurse of the ambulatory care unit. The head of the abortion unit said that in his view Nova Scotia adequately met its own abortion needs and a Morgentaler clinic was unnecessary; however, he also said that such a clinic would serve all the Atlantic provinces. The three guests generally praised the efficiency and safety of existing abortion services, although it was revealed that average delays at the VGH were from a week to ten days, the medical staff willing to perform abortions at the hospital had fallen from ten to five, the quarters were cramped, and the greatest concern was a lack of information and counselling for both patients and doctors. Little hard data was provided. The meeting, indeed, seems to have provided more of a political platform for the expression of the views of the politicians on the committee than a forum for consultation and fact-finding regarding the issues the legislation was purported to address.

77 The lack of prior study or consultation is not raised to show that the province acted indiscreetly or ineffectually in pursuing provincial objectives, but rather to indicate that the evidence simply does not support the submission that these provincial objectives were the basis for the legislative action in question.

78 Another factor I consider relevant is that the "cost- effectiveness" rationale appears to be divorced from reality. Dr. Morgentaler's clinic will not represent a direct increase in the cost to the province of the provision of health care services. The parties dispute the actual cost of abortion services in and out of hospitals, but I do not propose to enter into that argument.

In response to questions from the bench, appellant's counsel agreed that the fee paid to the respondent in respect of abortion services would be the same as that provided to a doctor who performed an abortion in a hospital. Consequently the establishment of an abortion clinic would not result in an increased direct cost to the province in the form of doctors' fees. The appellant's argument, as developed through Mr. Malcom's evidence, was that the duplication of services would lower the number of abortions performed in hospitals and eventually lead to an increase in the cost per procedure. The evidence did not establish, however, that the erosion in the number of abortions performed in hospitals would be great enough to have this effect.

79 A fifth consideration is the list of designated medical services itself. There is no apparent link between the different services. The only common denominator suggested by the appellant is that the government anticipated that these services might be attractive to private facilities. The appellant argued at trial and maintained before us, however, that the government's policy was to oppose the performance of any and all surgical procedures outside hospital. If that were the case, one might wonder why the Act did not prohibit the performance of surgical procedures generally outside a hospital. Designating nine apparently unrelated procedures does not accomplish this purpose.

80 If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *R. v. Westendorp*, supra, Laskin C.J.C. held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

81 Finally, although I put little weight on this factor, I agree with both courts below that the relatively severe penalties provided for by the Act are relevant to its constitutional characterization. Section 6(1) of the Act prescribes fines of $10,000 to $50,000 for each infraction of the Act. Kennedy Prov. J. and Freeman J.A. considered the relative severity of the fines as one indication that the fines were not simply measures to enforce a regulatory scheme, but penalties to punish abor tion clinics as inherently wrong. Of course, s. 92(15) of the *Constitution Act, 1867* allows the provinces to impose punishment to enforce valid provincial law, and the mere addition of penal sanctions to an otherwise valid provincial legislative scheme does not make the legislation criminal law: *Smith v. R.*, supra, at p. 800; *McNeil v. Nova Scotia (Board of Censors)*, supra, at p. 697; *Irwin Toy Ltd. c. Québec (Procureur général)*, supra, at p. 965. However, the unusual severity of penalties may be taken into account in characterizing legislation: *R. v. Westendorp*, at p. 51.

D. Conclusion

(1) Pith and Substance

82 This legislation deals, by its terms, with a subject historically considered to be part of the criminal law — the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct s. 251 of the *Criminal Code*, in so far as both precluded the establishment and operation of free-standing abortion clinics. Its legislative history, the course of events leading up to the Act's passage and the making of N.S. Reg. 152/89, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the *Medical Services Act* and the *Medical Services Designation Regulation* were aimed primarily at suppressing the perceived public harm or evil of abortion clinics. The legislation meets the tests set out in the *Margarine Reference*, supra and of *Morgentaler (1975)* and *Morgentaler (1988)*, supra. The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes, to echo Cannon J.'s words in *Reference re Alberta Legislation*, [1938] S.C.R. 100, at p. 144 (appeal dismissed as moot in *Alberta Bank Taxation Reference*, supra, at pp. 127-28):

> I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, *not from the viewpoint of private wrongs or civil injuries* resulting from any alleged infringement or privation of civil rights

which belong to individuals ... *but from the viewpoint of public wrongs or crimes*, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. [Emphasis added.]

83 Paraphrasing what Lamer J. said in *Starr v. Houlden*, supra, at p. 1405: I find unpersuasive the argument that this legislation is solidly anchored in s. 92(7), (13) or (16) of the *Constitution Act, 1867*. There is nothing on the surface of the legislation or in the background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment.

(2) Practical Effect

84 This legislation will certainly restrict abortion in the sense that it makes abortions unavailable in any place other than hospitals. But will it lead to a practical restriction of access to abortion in Nova Scotia? Will the present hospital system be able and willing to accommodate all the women who desire to terminate a pregnancy, given among other things that the hospital in which 83 per cent of all abortions are performed has lost half of its medical staff willing to perform the procedure? These are questions that the trial judge did not answer, and on which the parties are resolutely divided. Women may not wish to have an abortion in a hospital for any number of legitimate reasons. Clearly restrictions as to place can have the effect of restricting abortions in practice, and indeed it was the operation of s. 251 of the *Criminal Code* in restricting abortions to certain hospitals that contributed largely to its demise. One of the reasons that the former s. 251 of the *Criminal Code* was struck down in *Morgentaler (1988)*, supra, was that the in-hospital requirement in that section led to unacceptable delays, undue stress and trauma, and a severe practical restriction of access to abortion services. Several years of experience under s. 251 showed that the combined decisions and actions of individual anti-abortion hospital boards could render access to legal abortion non-existent in large areas of the country. Something similar may occur in Nova Scotia but that is something we have no way of predicting. One of the effects of the legislation is consolidation of abortions in the hands of the provincial government, largely in one provincially-controlled institution. This renders free access to abortion vulnerable to administrative erosion.

85 Having applied the ordinary tests as to the matter of the present legislation, I am able to conclude that the legislation was an ultra vires invasion of the field of criminal law. I am able to reach this conclusion without predicting the ultimate practical effect of this legislation, and it is consequently unnecessary to adjudicate the intractable dispute between the parties as to whether this legislation will, in fact, restrict access to abortion in Nova Scotia. The appellant's evidence that the legislation will not have the practical effect of restricting abortions is simply evidence that the legislation will not actually accomplish what it set out to do. In view of my conclusion as to the pith and substance of the legislation, I am not concerned with whether the legislation is effective and such evidence can no more be used to validate ultra vires legislation than to invalidate intra vires legislation, as was held in *Reference re Anti-Inflation Act*, supra.

(3) Severance

86 Severance is infrequently applied in distribution of powers cases. The general rule is that severance is available where the remaining good part can survive independently and would have been enacted by itself (see the *Alberta Bill of Rights case*, supra, at p. 518). Here there is no "remaining good part", since the foregoing analysis has shown that the pith and substance of the entire legislation taken together, Act and regulation alike, is criminal law. As Hogg says, "[f]or constitutional purposes the statute is one law, and it will stand or fall as a whole" (supra, p. 15-21); the same reasoning applies where, as here, two pieces of legislation are intertwined parts of a single legislative plan or scheme (see *Ontario (Attorney General) v. Reciprocal Insurers*, supra, *Alberta Bank Taxation Reference*, supra), two separate provisions or enactments "are so interconnected that they must be read together as expressing a single legislative purpose" (*Switzman v. Elbling*, supra, at p. 315, per Nolan J.), or the regulations "are so intertwined with the authorizing statute as to stamp it with their character" (*Central Canada Potash Co. v. Saskatchewan*, supra, at p. 64).

87 As a result, the Act and regulation are ultra vires in their entirety.

(4) Disposition

88 For the foregoing reasons, I would answer the constitutional questions as follows:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislature jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s.8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Lieutenant Governor in Council on the ground the regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

The appeal is therefore dismissed. I would award the respondent his costs of the appeal on a party and party scale.

Appeal dismissed.

Tab 9

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered

a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . . . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay

provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed.

1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous

consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give

notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

Tab 10

2017 CAF 128, 2017 FCA 128
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2017 CarswellNat 2708, 2017 CarswellNat 6822, 2017 CAF 128,
2017 FCA 128, [2017] F.C.J. No. 601, 280 A.C.W.S. (3d) 228

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA (Intervener)

David Stratas J.A.

Heard: June 16, 2017
Judgment: June 16, 2017
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-73-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

Counsel: Scott A. Smith (written), Paul Seaman (written), for Applicant, Tsleil-Waututh Nation
F. Matthew Kirchner (written), Emma K. Hume (written), for Applicants, Squamish Nation (Also known as the Squamish Indian Band), Xàlek/Sekyú Siý Am, Chief Ian Campbell on his own behalf and on behalf of all members of the Squamish Nation, Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band
Crystal Reeves (written), for Applicant, Upper Nicola Band
Jana McLean (written), for Applicants, Aitchelitz, Skowkale, Shxqhá:y Village Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Kwaw-Kwaw-Apilt and Chief David Jimmie on his own behalf and on behalf of all members of the Ts'elxwéyeqw Tribe
Sarah D. Hansen (written), Megan E. Young (written), for Applicant, Chief Fred Seymour on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation
Cheryl Sharvit (written), for Applicants, Musqueam Indian Band
Jan Brongers (written), for Respondent, Attorney General of Canada
Maureen Killoran, Q.C. (written), for Respondent, Trans Mountain Pipeline ULC

***David Stratas J.A.*:**

A. Introduction

1 There are two motions before the Court:

• *The June 2, 2017 motion of the applicant, the Tsleil-Waututh Nation*. It objects to the inadequate state of the evidentiary record placed before the Court in these consolidated applications for judicial review. Among other things, it seeks production of relevant documents from Canada.

• *The June 6, 2017 motion of the Attorney General of Canada.* The Attorney General seeks leave to add a supplementary affidavit to the evidentiary record. The supplementary affidavit corrects errors and omissions in an earlier affidavit.

B. The judicial review proceedings before the Court

2 Before the Court are fifteen applications for judicial review, now consolidated, in which, collectively, twenty-seven parties seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and the Order in Council, PC 2016-1069, dated November 29, 2016 and made by the Governor in Council. It can be found in the *Canada Gazette*, Part I, vol. 150, no. 50, December 10, 2016.

3 In brief, the Project — the capital cost of which is $7.4 billion — adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

4 The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law and relevant statutory law. The Indigenous applicants also invoke section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to them, including Canada's duty to consult and, in some cases, to accommodate. The applicants also raise many issues concerning the Project's "environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

5 These consolidated applications have been progressing quickly. In the space of roughly three months, counsel have worked hard getting the matter ready for hearing, guided by 3 sets of detailed reasons, 8 orders and 14 directions (including the reasons and order on these motions). The hearing will take place in early October, 2017.

C. The motion of the Attorney General of Canada

6 In response to the applications for judicial review and several affidavits filed in support of the applications, the Attorney General filed an affidavit of Mr. Gardiner. The aim of his affidavit is to supply evidence concerning what has taken place concerning the duty to consult and accommodate Indigenous groups.

7 Mr. Gardiner has now sworn a supplementary affidavit to correct dates in his original affidavit and supply missing records. The errors and omissions are said to be inadvertent.

8 The Attorney General of Canada now moves for leave to file the supplementary affidavit. Trans Mountain consents.

9 The Indigenous applicants either take no position or do not oppose the Attorney General's motion. However, four Indigenous applicants noted that portions of the supplementary affidavit were irrelevant to the consolidated applications. The Attorney General has agreed to remove the irrelevant portions.

10 The authority for allowing a party to file an additional affidavit on judicial review is Rule 312 of the *Federal Courts Rules*, SOR/98-106. The Rule merely permits such a filing with leave of the Court. It does not set out any criteria for the granting of that leave.

11 However, case law under Rule 312 assists. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 (Fed. C.A.) at paras. 8-9. The case law shows that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);
- admitting the evidence will cause substantial or serious prejudice to the other side;
- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, 392 N.R. 248 (F.C.A.) at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 (F.C.A.) at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule 369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19 (F.C.A.).

12 On balance, these factors lie in favour of admitting Mr. Gardiner's supplementary affidavit into these consolidated applications.

13 The dominant consideration underlying my exercise of discretion is that a fuller and more accurate record will promote the proper determination of the applications on their merits, consistent with Rule 3 of the *Federal Courts Rules*. Rule 3 provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

14 The applicants have offered no evidence of prejudice and, in fact, do not oppose. Cross-examinations of Mr. Gardiner have not yet taken place. Corrections of errors and the supplementing of information likely would have taken place at those cross-examinations anyway. The Court will also be open to an extension of the period for cross-examinations should the applicants request it, as long as the consolidated applications are ready for hearing on the date set by the Court.

15 No doubt more complete and more accurate information was available earlier and ideally should have appeared in Mr. Gardiner's first affidavit. This motion could have been brought sooner but it was delayed by Mr. Gardiner's absence from Canada. The Attorney General has brought this motion just before cross-examinations were to start. The delay is unfortunate — especially since this Court's Order of March 9, 2017 expedites these proceedings, sets a strict schedule, and warns all parties that "the schedule will be amended only if absolutely necessary." But the Attorney General's motion does not materially affect the progress of these proceedings.

16 Thus, leave shall be granted to admit Mr. Gardiner's supplementary affidavit (with the irrelevant portions removed) into these proceedings.

D. The motion of the Tsleil-Waututh Nation

(1) Introduction

17 The Tsleil-Waututh Nation has moved for an order to address what it says are serious deficiencies in the evidentiary record before this Court. The Indigenous applicants support the Tsleil-Waututh Nation.

18 The Tsleil-Waututh Nation says that a request for disclosure under Rule 317 *Federal Courts Rules* has gone unfulfilled. It also says that the materials that the Governor in Council relied upon in making its decision to approve the Trans Mountain Extension Project are not all before the Court. And, more generally, it says that more evidence is in the possession of Canada and should be produced.

19 Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed. Canada issued a section 39 certificate here. As we shall see, it also did this in the recent successful challenge in this Court to the Northern Gateway Pipeline Project: *Gitxaala Nation v. R.*, 2016 FCA 187 (F.C.A.) ("*Gitxaala Nation (2016)*"). As a result, certain information the Governor in Council considered in making its decision will not be placed before the Court.

(2) The issues before the Court

20 The motion brought by the Tsleil-Waututh Nation raises several issues concerning the record before the reviewing court in judicial review proceedings:

- The sufficiency of Canada's certificate under section 39 of the *Canada Evidence Act* and the effect of the certificate, which is to prohibit any disclosure of the evidence considered by the Governor in Council to the parties and to the reviewing court.

- The importance and role of the record before the reviewing court.

- The function and limits of Rule 317 of the *Federal Courts Rules*. This is the Rule that provides for an applicant to obtain the evidence that was before the administrative decision-maker. Related to this, though not in issue here, is how the applicant places the evidence, once obtained, before the administrative decision-maker.

- The admissibility in the reviewing court of evidence other than that which was before the administrative decision-maker.

- Whether, notwithstanding the above, an applicant in a judicial review may compel production of evidence from the administrative decision-maker or from others and have it placed before the reviewing court. In what circumstances should the reviewing court make a production order?

- Where, in the end, there are gaps in the evidentiary record before the reviewing court, how, if at all, can the reviewing court go about its task of review?

The submissions before me address or touch on these issues — all of which bear to a varying degree on what the Tsleil-Waututh Nation seeks in this motion.

(3) Should this Court decide the motion now?

21 This motion has been brought on an interlocutory basis. As is the normally the case for interlocutory motions raised on judicial review, the Court must consider whether the motions should be decided now or whether they should be left for the hearing panel.

22 Before us are issues concerning the content and sufficiency of the evidentiary record before the reviewing court. On an application for judicial review, the reviewing court can handle these issues and often does.

23 In my view, there is enough legal certainty surrounding this motion and its outcome on the facts for it to be determined now. As well, resolving a number of points raised by the motion and settling the parties' situations in this litigation will allow the parties to proceed in an orderly way with the pre-hearing cross-examinations and the hearing itself. Indeed, I expect that these reasons may assist the parties in focusing the submissions that they will make to the panel hearing these consolidated applications. See generally *Collins v. R.*, 2014 FCA 240, 466 N.R. 127 (F.C.A.) at paras. 6-7; *Gitxaala Nation v. Canada*, 2015 FCA 27 (F.C.A.) at paras. 7 and 12; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.) at paras. 9-12 ("*Bernard (2015)*"); *McConnell v. Canada (Human Rights Commission)*, 2004 FC 817 (F.C.), aff'd 2005 FCA 389 (F.C.A.); *P.S. Part Source Inc. v. Canadian Tire Corp.*, 2001 FCA 8, 200 F.T.R. 94 (note) (Fed. C.A.).

(4) Has Canada complied with section 39 of the Canada Evidence Act?

24 Canada has issued a certificate under section 39 of the *Canada Evidence Act*. Section 39 "is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings": *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (S.C.C.) at para. 21.

25 Certificates are issued to protect Cabinet confidences and nothing more. A certificate cannot be issued to "thwart public inquiry" or "gain tactical advantage in litigation": *Babcock* at para. 25.

26 According to the Supreme Court in *Babcock* (at para. 27), a certificate is valid if it is done by the Clerk or a Minister of the Crown, it relates to the information set out in subsection 39(2), it is done *bona fide*, and it is aimed at preventing disclosure of information that has been and is confidential.

27 The role of this Court in reviewing a section 39 certificate is limited. We must refuse disclosure of the information covered by the certificate "without examination or hearing of the information": *Babcock* at para. 38. We only review to ensure that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised": *Babcock* at para. 39, citing *Roncarelli c. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.).

28 In practice, this means the Court may consider whether the information for which immunity is claimed does not fall within subsection 39(2) or whether the Clerk or Minister has improperly exercised the discretion conferred by subsection 39(2): *Babcock* at para. 39. The Supreme Court amplified on this as follows (at para. 40):

> The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

29 The certificate covers the following documents:

> #1: Letter to the Honourable Scott Brison, President of the Treasury Board, in November 2016 from the Honourable Jim Carr, Minister of Natural Resources, regarding the scheduling of consideration of a proposed Order in Council concerning the Trans Mountain Expansion Project.
>
> This information is a record reflecting communications between ministers of the Crown concerning agenda of Council. The information is therefore within the meaning of paragraphs 39(2)(c) and 39(2)(d) respectively of the *Canada Evidence Act*.
>
> #2: Submission to the Governor in Council in November, 2016 in English and French from the Honourable Jim Carr, Minister of Natural Resources, regarding a proposed Order in Council concerning the Trans Mountain Expansion Project, including signed Ministerial recommendation, summary and accompanying materials.
>
> This information, including all its attachments in their entirety which are integral parts of the document, constitutes a memorandum the purpose of which is to present proposals or recommendations to Council. The information is therefore within the meaning of paragraphs 39(2)(a) of the *Canada Evidence Act*.

30 The Tsleil-Waututh Nation submits that Canada has not complied with section 39 of the *Canada Evidence Act*: the documents are not sufficiently described. It says that the certificate does not specify the exact dates on which Documents #1 and #2 on the certificate were delivered to their recipients. Further, it says that there is no itemized and specific description of the materials that are said to have accompanied Document #2.

31 *Babcock* guides this Court in cases where, as here, the sufficiency of the description of documents is contested (at para. 28):

> It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.
>
> [emphasis added]

32 In this passage, the Supreme Court says that the description should approximate "the kind of description required for claims of solicitor-client privilege under the civil rules of court." But it adds that "normally" the "date, title, author and recipient of the document" should be disclosed.

33 These two statements conflict somewhat. To assert solicitor-client privilege successfully over a document, it is not always necessary to disclose the date, title, author and recipient of the document. Sometimes the disclosure of this information — especially the title of the document — can reveal privileged information. In my view, based on a complete reading of Babcock, the dominant consideration that overrides this potential conflict is that the certificate must provide enough information to allow a court to assess, from the face of the certificate, that the Clerk has listed documents that fit under section 39, and has not exceeded her or his statutory powers.

34 Document #2 meets this overall test. A submission from a particular Minister to the entire Governor in Council during the month of its meeting (November, 2016) with "signed Ministerial recommendation, summary and accompanying materials" — attachments that are said to be "integral parts of the document [i.e., the submission]" — qualifies for protection under paragraph 39(2)(*a*) ("a memorandum the purpose of which is to present proposals or recommendations to Council") and paragraph 39(2)(*d*) ("a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy").

35 Would a description such as the one provided here be adequate for the assertion of a claim of solicitor-client privilege? In my view, yes.

36 Suppose a lawyer writes a memorandum dated "November 2016" to her team of lawyers concerning litigation their client is defending. The litigation concerns breach of contract. The memorandum is for the team to consider in advance of a meeting at which the team will decide upon a course of action for their client. In the memorandum, the lawyer set out her recommendations and attached certain documents so that her team could consider the matter properly. On this description alone, the entire bundle of documents would be privileged. See, for example, the discussion of privilege in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.).

37 This is not to say that individual documents that are attached are privileged for all time in all contexts. Suppose one of the documents considered by the lawyer team is a contract entered into between the client and the opposite party in litigation. In the bundle of documents supplied to the lawyer team, it is privileged. The opposite party has no right to see what the lawyer team considered in its meeting about the client's affairs. However, the contract itself will be admissible in the litigation.

38 The Tsleil-Waututh Nation complains that the exact dates and titles of documents are not disclosed and this triggers a consequence: under *Babcock* (at para. 28) when there is such non-disclosure, "the onus falls on the government to establish [the documents fall under section 39], should a challenge ensue." That may be so, but for the reasons set out above, that onus has been met, merely from the description provided on the face of the certificate: a description that has persuaded me that here there has not been any exceedance of statutory power.

39 Further, concerning the undisclosed exact dates and titles, I note that in the solicitor-client context — one that *Babcock* invites us to use — disclosure of such information can reveal privileged information. In the above example, if the lawyer team were to disclose to the other side the title, the authors and the date of the contract, the other side would know that the lawyer team had the contract before them. If the lawyer team were to disclose the title, the authors, the dates and recipients of all the attachments, the other side might well be able to piece together what was placed before the lawyer team. Indeed, with that information, it might be able to take an informed guess regarding the subject matter of the issue the lawyer team was considering.

40 The description of Document #2 says that "all its attachments in their entirety...are integral parts of the document" which is described as a "[s]ubmission to the Governor in Council." This suggests that a more particularized description of the attachments, such as their exact dates, authors and titles — like the contract in the above example — would shed light on what the submission said and, thus, reveal a Cabinet confidence.

41 In its reply submissions, the Tsleil-Waututh Nation asks the Court to draw an inference that the Clerk has selectively withheld disclosure of the exact dates to gain a tactical litigation advantage. On the material before me, I see no basis for drawing that inference, nor do I see any evidence of bad faith. As I have explained, the more likely reason why exact dates and some other specifying information have not been provided is that parties may be able to deduce exactly what was placed before and discussed by the Governor in Council, undercutting the protective purpose of section 39 of the *Canada Evidence Act*.

42 In this case, I consider the description of Document #2 adequate. If more particularity in the descriptions were supplied, there would be a substantial likelihood that the information that lies at the heart of what section 39 exists to protect would be disclosed to some extent. Enough concerning Document #2 has been disclosed to convince me that the decision to make the certificate and the certificate itself, in the words of *Babcock*, "flow from statutory authority clearly granted and properly exercised."

43 Document #1 stands in a different position. It is a letter in November 2016 from one Minister to another "regarding the scheduling of consideration" of a proposed order in council concerning the Project. We know that the Order in Council was made on November 29, 2016. Is a discussion of the timing of a meeting, without more, a confidence falling under subsection 39(2)? The Attorney General offered no cases on this specific point, nor could I find any myself.

44 But the description does not stop with timing. It adds that the communication is "concerning [the] agenda" of the Council. This injects vagueness and inconsistency into the description. Does Document #1 go beyond the timing and shed light on substantive reasons that might affect the timing, such as the preparation of the submission to the Governor in Council? Does the mere fact there is a discussion of timing taking place reveal something that is covered within subsection 39(2)? Does the communication contain a discussion about the substance of the agenda, such as the topics that the Governor in Council should, could or will discuss? If the answer to any of those questions were "yes," I would have found that Document #1 falls under subsection 39(2) and there is no exceedance of statutory power. But I cannot tell.

45 In short, the description of Document #1 does not lead me to conclude that it falls under subsection 39(2).

46 As well, I am not satisfied that a document in November 2016 discussing only timing and nothing else — which is what the first part of the description of Document #1 suggests — falls within subsection 39(2). Going back to cases like *Babcock* and *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 (S.C.C.), I am not persuaded on the evidence or the brief submissions presented by the Attorney General on this point that a document that merely asks, "Should we do this on November 22 or November 29?" without any argumentation, debate or reasons is a Cabinet confidence falling under the specific paragraphs of subsection 39(2).

47 Although the description of Document #1 does not persuade me that it falls under subsection 39(2), I would not grant the Tsleil-Waututh Nation any relief. If Document #1 concerns only timing and nothing more, it is irrelevant and, thus, not admissible in the consolidated applications. Nothing in these consolidated applications turns on discussions of the timing of Cabinet's consideration of the matter. The only thing that matters is the legality of the Order in Council, which we all know is dated November 29, 2016.

48 The Tsleil-Waututh Nation makes a wider argument against the certificate. It suggests that the certificate is defective because it "adversely impacts [the Tsleil-Waututh Nation's] ability to review the decision(s) being challenge[d]." In particular, the failure to identify the documents in question with specificity — and here I believe the Tsleil-Waututh Nation has the attachments to Document #2 front of mind — undercuts its ability to know whether certain matters raised by it as late as November 28, 2016, were considered by the Governor in Council when it approved the Project.

49 I reject this submission. The Supreme Court in *Babcock*, above, makes it clear that the impact that a section 39 certificate might have on litigation is not a relevant factor for assessing the validity or sufficiency of a certificate.

50 Putting this aside for a moment, the Tsleil-Waututh Nation's concern about immunization is a significant one and in no way do I minimize it. I wish to discuss this for a moment, as it will be relevant later in my reasons to the Tsleil-Waututh Nation's request for a production order against Canada and it may benefit the parties as they prepare for the hearing of the consolidated applications.

51 As will be discussed below, under our law the exercise of public powers is not to be immunized from meaningful review. But I do not share the Tsleil-Waututh Nation's concern that this certificate necessarily has the effect of immunizing from review what the Governor in Council has done.

52 In a sense, this sort of effect caused by a certificate is nothing new. Administrative tribunals can rely on deliberative secrecy and, thus, can withhold key information from an applicant for judicial review: see *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) at page 965. Legal professional privilege can also apply even on key issues in the judicial review: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.). In these cases, the reviews of the administrative decision-makers still went ahead. The withholding of just some materials from the reviewing court does not, by itself, necessarily mean that the administrative decision-maker is being immunized from review.

53 And while the impact of a section 39 certificate on litigation is not a relevant consideration in assessing the validity of the certificate, the issuance of a section 39 certificate may indeed impact the litigation to a challenger's benefit. The issuance of a certificate is no small thing. In *Gitxaala Nation (2016)*, this Court registered its concern about the issuance of a certificate as follows (at para. 319):

> The balance of the record that could shed light on this, *i.e.*, the staff recommendations flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act* and thus do not form part of the record. Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council.

54 Can this sort of concern lead to an adverse finding? Arguably yes. In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), a majority of the Supreme Court found that a tobacco advertising ban was contrary to the Charter and was of no force or effect. In finding that the ban was not justified under section 1 of the Charter, McLachlin J. (as she then was), writing in separate reasons for three Justices, appeared to take into account the issuance of the certificate (at paras. 165-166):

> These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no

> answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.
>
> This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

55 In its submissions, the Attorney General suggests that the section 39 certificate does not have the drastic effect the Tsleil-Waututh Nation suggests. Ultimately, this will be for the hearing panel of the Court to assess, but there are certain matters raised by the Attorney General or consequent to what she has raised that are worth mentioning.

56 First, in this case there is an evidentiary record, partly described below. It is growing. It seems to be at least equivalent to the one placed before this Court in *Gitxaala Nation (2016)*. And in that case this Court did not find that the issuance of a certificate improperly immunized the Governor in Council's approval of the Northern Gateway Project from review. In fact, in *Gitxaala Nation (2016)*, this Court was able to meaningfully review the Order in Council. It quashed it on account of inadequate consultation with Indigenous groups.

57 Second, the Attorney General submits that the issue whether the Crown met its duty to consult Indigenous applicants "is determined on the basis of the evidence filed by the parties in relation to what actually took place during the consultation process" rather than by what the Governor in Council may have considered. This is seen from a Federal Court case where a section 39 certificate had been filed and the issue before the Court was whether the duty to consult had been fulfilled:

> The record does not reveal a lack of transparency; on the contrary, it shows that the Crown repeatedly shared information, replied to the [First Nation's] correspondence, met the [First Nation's] representatives, and made policy decisions in light of the [First Nation's] concerns. The applicant was not entitled to disclosure of the Minister's advice to Cabinet: as they acknowledge, the Minister properly asserted privilege (*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(2)). Furthermore, the duty to consult is determined by the actions that Canada took during the consultation process, not by what the Governor in Council may have considered.

(*Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2014 FC 1185 (F.C.) [hereinafter Adam] at para. 79.)

58 As well, in the same vein, this Court stated in *Gitxaala Nation (2016)* that the duty to consult arises in cases like this in two ways. Before the Governor in Council, it can be a basis for finding unreasonableness on the basis of the evidence before it. But, notwithstanding whatever was before the Governor in Council, if the duty to consult owed by the Crown has not been fulfilled, the approval cannot stand: *Gitxaala Nation (2016)* at para. 159; *semble*, *Adam*, above.

59 No doubt the parties will make submissions on these and related matters at the hearing of these consolidated applications.

60 This suffices to determine the portion of the Tsleil-Waututh Nation's motion dealing with section 39 of the *Canada Evidence Act*. I turn now to a consideration of the Rule 317 issue the Tsleil-Waututh Nation has raised in its motion and its request for an order requiring Canada to produce more material.

61 To set the stage for this, it is necessary to offer some background legal discussion regarding the record before reviewing courts.

62 First, I shall examine the role of the evidentiary record before the reviewing court in judicial reviews and the principles that govern the court's interpretation of relevant statutory provisions and procedural rules. I shall also review the basic principles of admissibility in judicial review proceedings.

63 Then I shall descend into more practical and mechanical considerations concerning issues relating to the record before the reviewing court: how applicants can obtain evidence relevant to an application for judicial review and how all of the evidence is to be placed before the reviewing court. These two concepts, along with issues relating to the admissibility of evidence, are frequently confused. They must be kept separate.

64 I do not apologize for starting at such a level of generality. As we journey through areas like this, we can get lost in a dense forest of case law, with multiple issues flying about and various procedural rules seeming like predators poised to strike. But if we step back and view things from above, we can see the whole forest and find our way.

65 Here, the whole forest is an appreciation of the important role played by the record in judicial reviews, certain fundamental principles concerning judicial reviews, legislative provisions that bear on the problem, and how courts go about their task of review. With that appreciation in mind, we can better understand different things in the forest and their relationship to each other.

66 Only by doing this can Rule 317 — a rule about obtaining evidence from the administrative decision-maker — be placed in its proper context and understood. Only then can the Tsleil-Waututh Nation's complaint about non-compliance of Rule 317 be considered. And only then can its broader request for an order requiring Canada to produce further material be addressed.

(5) The evidentiary record before reviewing courts: some background

(a) The role of the evidentiary record before reviewing courts and relevant principles governing it

67 Subject to constitutional considerations, we must follow the statutory provisions and rules that govern and define the content of the evidentiary record before the reviewing court. Properly interpreted in accordance with their text, context and purpose, they sometimes give reviewing courts some ambit for discretion. Thus, we must have front of mind the role that the evidentiary record plays in reviewing courts. It lies at the heart of meaningful judicial review. Its importance cannot be understated.

68 First is the role the evidentiary record plays in the reviewing court's discernment of the reasons of the administrative decision-maker. Where the reasons of the administrative decision-maker are sparse or even non-existent on a key point, they can sometimes be deduced from comparing the result reached with the evidentiary record: see, *e.g.*, *P.S.A.C. v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572 (S.C.C.).

69 Even where the reasons are more fulsome, the record the administrative decision-maker had in front of them can play a key role in construing and interpreting its reasons. See generally *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at para. 15; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 86 (F.C.A.) at para. 39.

70 The reasons of the administrative decision-maker — and, thus, the evidentiary record intimately associated with them — are no small thing. They are the starting point and the focus for the reviewing court's judicial review analysis: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at paras. 48 and 56; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 26.

71 And, quite apart from the foregoing, the evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and — most importantly for present purposes — the evidentiary record before the administrative decision-maker.

72 For example, a key evidentiary finding made without anything in the evidentiary record in circumstances where evidence was necessary can render an administrative decision unreasonable: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 (F.C.A.) at para. 100; *Delios*, above at para. 27. So can a finding that is completely at odds with the evidentiary record. In the case of reasonableness review, where a key part of the record — for example, any evidence on an essential element — is missing and, as a result, the reviewing court cannot assess whether the decision is within the range of acceptability and defensibility and, thus, reasonable, sometimes the reviewing court has no choice but to quash the administrative decision: see, *e.g.*, *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766 (F.C.A.) at para. 137; *Kabul Farms Inc. v. R.*, 2016 FCA 143 (F.C.A.) at paras. 31-39.

73 Related to this is the role of the evidentiary record in preventing administrative decision-makers and their decision-maker from being immunized from review.

74 Where the record placed before the reviewing court is deficient, certain grounds for setting aside an administrative decision can be foreclosed. To take an extreme example, if the evidentiary record of the administrative decision-maker is not before the reviewing court, how can a reviewing court evaluate whether the administrative decision-maker's decision was based on any evidence at all?

75 This point has been expressed in different ways. The Saskatchewan Court of Appeal put it this way:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question.

(*Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.) at para. 24.)

76 An academic commentator expressed it this way:

> Without knowing the reasoning behind a decision, it is impossible for a judge to determine if it is founded upon arbitrary reasoning. Thus, in order for a judge to determine whether a decision maker acted lawfully, the decision maker must provide reasons adequate to allow a reviewing judge to determine why the decision maker made the decision they did and whether it followed explicit statutory requirements [or the basis for the decision must be apparent in the record]. If the judge cannot ascertain how the decision was made [even in light of the evidentiary record], then the court cannot fulfill this role and decisions made in violation of the rule of law may be sanctioned by the court.

(Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113.)

77 In support of its motion, the Tsleil-Waututh Nation forcefully and repeatedly makes the point about immunization. It cites the dissenting reasons of this Court in *Slansky*, above, correctly noting that the majority did not disagree with the propositions put on this point. *Slansky* put the point this way (at para. 276):

> If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the tribunal. In other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

78 In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (S.C.C.) at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts

within the constitutional separation of powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 (S.C.C.); *Dunsmuir*, above; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737 (F.C.A.) at para. 66; *Habtenkiel v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 (F.C.A.) at para. 38; *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89, 382 D.L.R. (4th) 720 (F.C.A.) at para. 140. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever — *i.e.*, there is not even a summary or hint of what was before the administrative decision-maker — or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.

79 In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element — situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right" — have seen their decisions quashed: see, *e.g.*, *Leahy* above at para. 137; *Kabul Farms Inc.* at paras. 31-39; *Public Performance of Musical Works 2003-2007 & Public Performance of Sound Recordings 2003-2007, Re*, 2006 FCA 337, 54 C.P.R. (4th) 15 (F.C.A.) at para. 17. The test would seem to be that if a particular evidentiary record — even if bolstered by permissible inferences and any evidentiary presumptions — disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like *Delios*, above and *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 (F.C.A.)), the decision must be quashed.

80 There are a number of other principles that can affect the reviewing court's consideration of the adequacy of the evidentiary record before it.

81 In an ideal world, in complicated cases like this, a judicial review should not go ahead until every available crumb of evidence has been placed before the reviewing court. But this is simply not possible.

82 Subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 requires judicial reviews to be heard and determined "without delay and in a summary way." This is a Parliamentary commandment writ in law. Under the hierarchy of law, a statutory provision takes precedence over any subordinate Rules found in the *Federal Courts Rules* and the case law of this Court: Stratas, David, *The Canadian Law of Judicial Review: Some Doctrine and Cases*, at pp. 10-15 (April 20, 2017 version) (online: https://ssrn.com/abstract=2924049). The rationale for promptness was discussed by this Court in *Larkman v. Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204, 433 N.R. 184 (F.C.A.) at paras. 86-88 (albeit in the context of the short limitation period in subsection 18.1(2)).

83 Further, Rule 3 of the *Federal Courts Rules* provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." The concepts in Rule 3 have been underscored by the Supreme Court's recent call for courts and litigants to embrace a new litigation culture: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

84 There are also certain general values and principles in administrative law — the rule of law, good administration, democracy and the separation of powers — that on occasion deserve voice in decisions concerning the content of the record before the reviewing court: see generally Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

85 Finally, and perhaps most significantly, reviewing courts are not trial courts. Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers — not the reviewing courts — have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, *e.g.*, *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.) at paras. 14-19; *Bernard (2015)*, above at paras. 22-28. This consideration alone significantly affects the law of admissibility of evidence in the reviewing court, a topic I turn to now.

(b) The general rule of admissibility in judicial review courts: the record before the administrative decision-maker is the record on review

86 As a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.).

87 The main principle behind this general rule is the one just discussed: the distinction between the administrative decision-makers as the bodies designated by Parliament as the merits-deciders and the Federal Courts as merely reviewing courts, nothing more.

(c) How do applicants for judicial review obtain the record before the administrative decision-maker?

88 Usually applicants for judicial review participated fully before the administrative decision-maker whose decision is under review. Sometimes they already will have the record in their possession.

89 Sometimes, however, applicants for judicial review do not have the full record or are not certain that they do. This is where Rule 317 comes in. Under Rule 317, applicants can request the administrative decision-maker for "material relevant to an application that is in the possession of [the decision-maker]...and not in the possession of the [applicants] by serving on [the decision-maker] and filing a written request, identifying the material requested."

90 Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canadian Transportation Agency*, 2016 FCA 103 (F.C.A.) and *Bernard v. PSAC*, 2017 FCA 35 (F.C.A.).

91 Note that Rule 317 is only a mechanism by which applicants can obtain the record before the administrative decision-maker. It is not a means by which the record is placed before the reviewing court.

(d) How does the record before the administrative decision-maker get before the reviewing court?

92 In the Federal Courts system, applicants can place the record of the administrative decision-maker — whether obtained through their own participation before the administrative decision-maker or obtained under Rules 317-318 — before the reviewing court by offering an affidavit in support of their application for judicial review: Rule 306. The record of the administrative decision-maker is appended as one or more exhibits.

93 Insofar as placing the record before the administrative decision-maker before the reviewing court is concerned, respondents who consider the affidavit of the applicant to be incomplete or inaccurate may offer their own affidavit material: Rule 307.

94 Thereafter, cross-examinations on affidavits can take place: Rule 308.

95 The parties place their affidavits, the transcripts of the cross-examinations and the exhibits from any cross-examinations into records that they file with the Court: Rules 309 and 310.

96 The entire process of placing the record before the administrative decision-maker before the reviewing court is set out in more detail in *Canadian Copyright Licensing Agency v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (F.C.A.).

(e) Exceptions to the admissibility of evidence on judicial review

97 There are exceptions to the general rule that only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. These do not offend the distinction between the administrative decision-maker as the merits-decider and the reviewing court whose role is restricted to review. See, *e.g.*, *Association of Universities*, above; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.); *Bernard (2015)*, above; *Delios*, above at paras. 41-42.

98 These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.

- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.

- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

99 Suppose, for example, that an administrative decision-maker received a payment from a party after a hearing. In the reviewing court, the applicant alleges, with some credence, that this payment was a corrupt bribe. The bribe can only be proven by adducing post-hearing evidence, *i.e.*, evidence that was not before the administrative decision-maker. Or suppose that in the reviewing court the applicant alleges an improper purpose on the part of the administrative decision-maker in circumstances where the allegation has some basis and is not just a bare allegation made to engage in a fishing expedition. Evidence of that improper purpose is often not in the record before the administrative decision-maker and must be proven by collateral evidence. This is another example where reviewing courts will admit evidence that was not before the administrative decision-maker. See, *e.g.*, *Roncarelli c. Duplessis*, above; *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Ont. Div. Ct.).

100 For the purposes of these reasons, I shall refer to this sort of evidence — evidence admitted by way of exception to the general rule of admissibility — as "exceptional evidence."

(f) How does one obtain the exceptional evidence and place it before the Court?

101 Exceptional evidence may be available from witnesses. The standard way and the way that allows judicial reviews to be heard and determined "without delay and in a summary way" (as required by subsection 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules*) is through an affidavit; because of subsection 18.4(1), this will always be the preferred way. The affidavits can be subject to cross-examination and are presented to the Court by including them in the records that are filed with the Court.

102 Another way to gather exceptional evidence is to cross-examine a deponent in the course of the judicial review proceeding. Undertakings can be given that, in some circumstances, where appropriate, exceptional evidence will have to be produced.

103 In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:

- the evidence is necessary;

- there is no other way of obtaining the evidence;

- it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and

- a witness is likely to have relevant evidence on the matter.

104 As well, a judicial review may be treated and proceeded with as an action, thereby allowing for discovery and live witnesses: sections 18.4(2) and 28(2) of the *Federal Courts Act*. However, the situations where this is allowed are most rare: see, *e.g.*, the requirements set out in *Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)*, 2009 FCA 357, 402 N.R. 123 (F.C.A.).

105 Finally, rather than taking the foregoing steps to obtain exceptional evidence, the parties can agree to facts and submit them to the reviewing court. However, caution must be exercised: the reviewing court must always respect the fact that the administrative decision-maker has been designated under the administrative regime as the exclusive decider of the merits.

(g) The limits of a request under Rule 317

106 Rule 317 plays a limited role. As mentioned above, it allows applicants to obtain from the administrative decision-maker "material relevant to an application that is in the possession of [the decision-maker]...and not in [their] possession."

107 Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.

108 The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 21. The principles canvassed above — particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews — discourage fishing expeditions.

109 Relevance is defined by the grounds of review in the notice of application:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

(*Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.) at page 460.)

110 The grounds of review are to be read in order to obtain "a realistic appreciation" of their "essential character" by reading them holistically and practically without fastening onto matters of form: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 50 and 102; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79 (F.C.A.) at para. 29.

111 It is evident from the text of Rule 317 that it cannot be used to obtain material that is in the possession of others.

112 It is often said in the case law that Rule 317 is restricted to the actual material the administrative decision-maker had before it when making the decision and nothing more: *Pathak*, above; *1185740 Ontario Ltd. v. Minister of National Revenue*, [1998] 3 C.T.C. 215, 150 F.T.R. 60 (Fed. T.D.).

113 This standard has been repeatedly applied by this Court. In *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60 (Fed. C.A.) at page 66, this Court stated:

> The obligation which is imposed on the tribunal by rules 1612 and 1613 [now Rules 317 and 318] is "without delay" to "provide" or "forward" a "certified copy" of "material" which is "in its possession" and which is "specified". In my view, this presumes that it is material which already exists at the time when the request to obtain the material is made, which the tribunal used in its hearing, deliberations or decision, which is part of its record and of which it is in a [position] to provide a certified copy.

114 In cases where some other government entity has information and supplied some of it to the administrative decision-maker, again only the information that was actually before the administrative decision-maker is obtainable under Rule 317:

> This surely has reference to "material" that was before the federal board, commission or other tribunal whose decision is the subject of an application for judicial review pursuant to section 18.1 of the [*Federal Courts Act*] and not to the contents of a Minister's file where no decision of his [or her] is the subject of the judicial review.

(*Eli Lilly & Co. v. Nu-Pharm Inc.* (1996), [1997] 1 F.C. 3 (Fed. C.A.) at pages 28-29.) To the same effect, see *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 35 C.E.L.R. (N.S.) 1, 183 F.T.R. 267 (Fed. T.D.) at para. 27:

> To engage in such a review of all of the documents that were before the Responsible Authorities would in effect be a challenge to the comprehensiveness of the Comprehensive Study Report and indeed of the underlying science relied upon by the Responsible Authorities and of their expertise. This goes far beyond the judicial review of a Minister's decision which was based upon a report arising out of many months investigation by the Responsible Authorities.

115 Rule 317 does not in any way "serve the same purpose as documentary discovery in an action": *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1156 (Fed. T.D.) at para. 11.

116 As a result of the foregoing, it is hard to see Rule 317 being used to obtain exceptional evidence. The only circumstance I can imagine is where the exceptional evidence happens to be in the possession of the administrative decision-maker — quite rare, I suspect.

117 The Tsleil-Waututh Nation submits that materials other than those before the administrative decision-maker may be considered relevant and producible under Rule 317 where it is alleged the decision-maker breached procedural fairness. Perhaps underneath this is a confusion of concepts of admissibility — exceptional evidence can sometimes be adduced to demonstrate procedural unfairness — with the substantive requirements of Rule 317. These must be kept apart. Not everything that is admissible can be obtained under Rule 317. For one thing, this submission overlooks the point, developed above, that the materials must be in the possession of the administrative decision-maker.

118 In support of this submission, the Tsleil-Waututh Nation cites the Federal Court decisions in *Canadian National Railway v. Louis Dreyfus Commodities Ltd.*, 2016 FC 101 (F.C.) and *Gagliano v. Gomery*, 2006 FC 720 (F.C.). In *Dreyfus*, the Federal Court suggests that materials that should have been before the administrative decision-maker are producible under Rule 317. In support of this, the Federal Court cites *Access Information Agency*, above and *Gagliano*, above. *Access Information Agency* nowhere says that materials that should have been before the administrative decision-maker are producible under Rule 317. And *Gagliano* is best construed as the rare case where exceptional evidence was admissible and happened to be in the possession of the administrative decision-maker.

119 Both *Dreyfus* and this particular submission of the Tsleil-Waututh Nation underscore the need to keep analytically separate different concepts such as obtaining evidence, placing the evidence before the Court, the admissibility of evidence, the requirements for particular tools (*e.g.*, Rule 317), and how courts go about reasonableness review.

(6) Analysis of the Rule 317 request in this case

(a) Procedures followed concerning Rule 317 in this case

120 The Tsleil-Waututh Nation placed its Rule 317 request in its application for judicial review.

121 Under Rule 318(1), the Attorney General was to have responded to the request within twenty days.

122 The Attorney General did not do so. And the Tsleil-Waututh Nation did not register a protest against the Attorney General's inaction for approximately two months.

123 Neither can be faulted. In its Order dated March 9, 2017, this Court granted leave to apply for judicial review in nine cases, consolidated these nine applications with seven others, and then comprehensively scheduled the consolidated applications. The March 9, 2017 Order contemplated that the Attorney General would produce the record of the Governor in Council.

(b) The Rule 317 request in this case

124 I have reviewed the grounds of review in the application for judicial review of the Tsleil-Waututh Nation.

125 I am broadly summarizing, but in terms of the issues relating to the duty to consult and accommodate, the Tsleil-Waututh Nation is arguing that:

- the Governor in Council's decision cannot stand on the state of the evidence before it; and

- as the duty to consult and accommodate has not been fulfilled at the present time, the Governor in Council's decision must be quashed.

126 This mirrors the grounds that were considered in *Gitxaala Nation (2016)*, above. In that case, this Court noted that the duty to consult arose in two potential ways. If the Governor in Council incorrectly or unreasonably held that the Crown's obligations had been fulfilled at the time of its decision, its Order in Council is liable to be quashed. But, more generally, "if that duty [owed by the Crown] were not fulfilled, the Order in Council cannot stand": *Gitxaala Nation (2016)* at para. 159.

127 In its notice of application in file A-78-17, the Tsleil-Waututh Nation requested "any material that was before the [Governor in Council] or that it considered or relied on in making the Order."

128 To assess whether Rule 317 has been satisfied, it is first necessary to examine what has been produced concerning the current state of the record on these issues. Has the Tsleil-Waututh Nation persuaded me that — excluding the material covered by the section 39 certificate — there is still evidence in the hands of the administrative decision-maker, here the Governor in Council, that was before it and that is relevant to the grounds raised by the Tsleil-Waututh Nation?

(c) The current state of the record: has the Rule 317 request been satisfied?

129 As far as consultation is concerned, the Order in Council that approved the Project and that is attacked in these proceedings provides as follows:

> Whereas, by Order in Council P.C. 2016-435 of June 3, 2016, the Governor in Council, pursuant to subsection 54(3) of the *National Energy Board Act*, extended the time limit referred to in that subsection by four months to allow for additional Crown consultation with potentially affected Aboriginal groups, public engagement, and an assessment of the upstream greenhouse gas emissions associated with the Project;
>
> Whereas the Governor in Council, having considered Aboriginal concerns and interests identified in the *Joint Federal/ Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project* dated November 21, 2016, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated;

130 Behind this is an explanatory note: *Canada Gazette*, vol. 150, no. 50, December 10, 2016, pp. 4-23. The explanatory note discusses the participation of Indigenous peoples before the National Energy Board, the concerns they raised and other views. In assessing the impact on Indigenous groups, the explanatory note says the following (starting on page 14):

> Both social and environmental issues raised by Indigenous groups were considered and addressed through the NEB review process. The 157 conditions recommended by the NEB will require Trans Mountain to implement all commitments it made through the review process, and further implement mitigation measures for impacts that might otherwise occur to people and the environment, including in relation to air quality and greenhouse gases; water quality; soil, vegetation and wetlands;

wildlife and wildlife habitat; fish and fish habitat; and marine mammals. Several of the conditions specifically address Aboriginal interests, such as requiring the proponent to continue reporting on the availability and findings of traditional use studies, hiring of Aboriginal monitors during construction, and ongoing filing of Aboriginal engagement reports. There are also specific conditions tied to concerns by the Coldwater Indian Band and Stó:l? Collective.

With respect to rights associated with subsection 35(1) of the *Constitution Act, 1982*, the Board concluded that, having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests, and Board imposed requirements for ongoing consultation, it was satisfied that the Board's recommendation and decisions with respect to the Project are consistent with subsection 35(1) of the *Constitution Act, 1982*.

131 These paragraphs may shed light on what the Governor in Council had in mind when it approved the Project: submissions at the hearing before the panel in these consolidated applications will be required on that. Contextual materials such as the explanatory note may shed light on what was considered by the Governor in Council: *New Brunswick Broadcasting Co. v. Canadian Radio-Television & Telecommunications Commission*, [1984] 2 F.C. 410, 13 D.L.R. (4th) 77 (Fed. C.A.).

132 In this regard, I note that none of the parties in their notices of application or in their affidavits has alleged bad faith in the sense that an explanatory note or any preambles or factual statements cannot be taken as true. Statements such as these often enjoy a rebuttable presumption of regularity and as best as I can tell no evidence has yet emerged that would suggest otherwise: see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, 41 D.L.R. (4th) 429 (S.C.C.) at para. 38 and authorities cited therein; *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221, 194 D.L.R. (4th) 385 (S.C.C.).

133 As well, it is apparent from these paragraphs in the explanatory note that the Governor in Council was aware of the proceedings before the National Energy Board and its Report. Just how aware is a matter on which submissions should be made to the panel in these consolidated applications.

134 Also of possible significance are an Amending Order to National Energy Board Order CPCN OC-49 and an Amending Order to Certificate of Public Convenience and Necessity OC-2 that the Governor in Council approved: *Canada Gazette*, vol. 150, no. 50, December 10, 2016 at pp. 23-247 and 248-501. These documents point to a body of information that must have been before the Governor in Council. Just what information is a matter on which submissions should be made to the panel in these consolidated applications.

135 Mr. Gardiner's first affidavit points to other evidence of consultation before the Order in Council was made but whether this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion. His affidavit also points to post-Order in Council consultations. I have discussed the possible relevance of this evidence elsewhere: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.).

136 There is now also the supplementary affidavit from Mr. Gardiner that corrects certain mistakes in his original affidavit and that adds additional information about consultative activities. Whether any of this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion.

137 In various places in its submissions, the Tsleil-Waututh Nation appears to misunderstand the limits of Rule 317. For example, it appears to be under the misapprehension that Rule 317 can be used to access documents held by government departments other than the Governor in Council. For the reasons explained above, this is not so.

138 Overall, I am not persuaded at this time that, aside from its section 39 certificate, Canada has withheld information responsive to the Rule 317 request that must be produced. This can be tested by the Tsleil-Waututh Nation on cross-examination.

139 The Tsleil-Waututh Nation suggests that the fact that the Attorney General has adduced a supplementary affidavit from Mr. Gardiner to fix errors and omissions in disclosure shows that it and others have not taken care in the disclosure process both under Rule 317 and overall. This submission overlooks the scope and complexity of these proceedings. Although it is not desirable, at the best of times mistakes can be made. I believe that the offering of the supplementary affidavit shows that the

Attorney General and her lawyers are cognizant of their ethical responsibilities and their responsibilities as officers of the Court and have stressed the importance of disclosure to those that hold documents. The evidence disclosed by the supplementary affidavit does not suggest to me otherwise. Below, at para. 151 of these reasons, I refer to a further commitment the Attorney General has made concerning disclosure. I conclude that the Attorney General is taking steps on an ongoing basis to ensure that any disclosure she is required to give is complete and accurate.

140 By itself, this is not at all dispositive of the Tsleil-Waututh Nation's motion for enforcement of its Rule 317 request. But it affords the Court some comfort that a genuine effort has been made to ensure that, despite the section 39 certificate, the material responsive to the Rule 317 request has been produced.

141 Under para. 7(3)(*b*) of this Court's Order of March 9, 2017, the Attorney General was obligated to produce "documents before the Governor in Council leading up to its determination." By necessary implication, this was subject to section 39 of the *Canada Evidence Act* if a certificate were to be filed. The Court is not satisfied on the evidence before it that the Attorney General has breached this Order.

142 To the extent that material supplied by the Tsleil-Waututh Nation was not placed before the Governor in Council, counsel can make submissions to the panel hearing these consolidated applications. To the extent that the material was considered by others in various Ministries and only summaries provided to the Governor in Council, the sufficiency of that is a matter for argument before the panel hearing these consolidated applications.

(7) The Tsleil-Waututh Nation's request for production of evidence from Canada

143 As mentioned, I am not persuaded that there is any evidence that has been improperly withheld under Rule 317. But, as I have explained, except in the rare circumstance explained above, Rule 317 allows for the obtaining of only materials relevant to the judicial review that were in the possession of the administrative decision-maker and that it relied upon in making the decision.

144 Here, more materials — materials not obtainable under Rule 317 — are potentially relevant. As mentioned, quite aside from what the Governor in Council had before it to support the reasonableness of its decision, if the duty to consult has not been complied with overall, the decision of the Governor in Council (*i.e.*, its Order in Council) cannot stand. Thus, evidence other than that which was before the Governor in Council is relevant to this ground of review. This evidence is what I have called exceptional evidence.

145 In this case, should the Court make an order requiring Canada to produce more evidence, including exceptional evidence? The Tsleil-Waututh Nation asks for just that. As mentioned, it seeks documents relevant to the grounds it has raised relating to the overall adequacy of Canada's consultation with it concerning the Project.

146 In my view, on the material before me, such an order should not be made.

147 First, to some extent, the Tsleil-Waututh Nation appears to be suggesting in its submissions that Rule 317 can be used to get exceptional evidence. As discussed, except for the rare situation described in paragraph 116, above, it cannot.

148 Next, there is no such thing as a "production order" for exceptional evidence under the *Federal Courts Rules*. As I have explained above, exceptional evidence may be obtained through cross-examination, by adducing an affidavit from a witness (which the Indigenous applicants have done), by a motion under Rule 41 or by converting the applications to actions under section 18.4(2) and section 28(2) of the *Federal Courts Act*.

149 Even if the Tsleil-Waututh Nation were to pursue these methods by motion at this time, I would dismiss the motion.

150 I understand that cross-examinations of Mr. Gardiner are about to be conducted. Plenty of exceptional evidence, if admissible, may be obtained in that way.

151 Further, the Attorney General has made the following commitment:

> ...Canada is willing to informally assist [Tsleil-Waututh Nation] in obtaining relevant consultation documents that may, by inadvertence, have been omitted from the affidavit and supplementary affidavit of Timothy Gardiner. Should [Tsleil-Waututh Nation] (or any other applicant) be aware of any such documents, counsel for Canada would welcome being advised as soon as possible in light of the impending deadline for completion of cross-examinations on affidavits.

152 As well, I am not persuaded at this time that there is exceptional evidence that cannot be had as a result of cross-examination. The Attorney General has filed evidence from Mr. Gardiner that relates to Canada's consultative activities both before and after the Order in Council was made. This falls into the category of exceptional evidence. The Indigenous applicants have filed evidence about their consultative activities and Canada's consideration or non-consideration of things put to it and its responses or non-responses. All of this is also exceptional evidence going to the overall issue of the duty to consult.

153 The Tsleil-Waututh Nation complains that Canada has not produced all of its evidence concerning its consideration of things put to it by the Indigenous applicants. One answer to that is that gaps in evidence do not always call for production orders. If there are gaps in the evidence Canada may suffer for that if, on the law and the state of the imperfect evidentiary record, it deserves to. In preparing their submissions for the panel hearing these consolidated applications, the parties may wish to consider when the Court can draw adverse inferences from missing evidence: see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at paras. 169-170 and authorities cited therein. If the Tsleil-Waututh Nation put something important to Canada and there is a gap in the evidence concerning what Canada did in reaction to it, Canada may have to explain the gap. Absent evidence of Canada's reaction, the panel may be driven to find that Canada did not react. As well, I have already mentioned some of the disadvantages that Canada might suffer as a result of its issuance of a section 39 certificate.

154 It is also worth mentioning that gaps in the evidence concerning Canada's responses do not automatically determine the consultation issues against Canada. Errors and omissions in fulfilment of the duty to consult and accommodate can be tolerated — but only to a certain point. Put another way, compliance with the duty to consult and accommodate need not be exacting. As this Court said in *Gitxaala Nation (2016)* (at paras. 182-183):

> Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.
>
> In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, at paragraph 133; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, at paragraph 56; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA*, 2015 FCA 179, 474 N.R. 96, at paragraph 47.

155 In support of its view that there are serious gaps in the evidence offered by the Attorney General, the Tsleil-Waututh Nation points to information requests it has made under the *Access to Information Act*, R.S.C. 1985, c. A-1. It has directed these requests to Natural Resources Canada, Transport Canada, Fisheries and Oceans Canada and Environment and Climate Change Canada. These departments have each asked for significant extensions of time to address the requests. Natural Resources Canada has sought the longest extension: 510 days.

156 However, the requests are of exceptionally broad scope and seek every last crumb of information, even information that has absolutely no realistic bearing on this matter.

157 All four requests are similar. To illustrate their scope, here is the request addressed to Natural Resources Canada:

> Please provide: any and all information, documents, or correspondence created between August and November, 2016 and shared between Major Projects Management Office (Natural Resources Canada) and Environment Canada, Fisheries and Oceans Canada, or transport Canada officials/staff in relation to Trans Mountain Expansion Project, including but

not limited to: any meeting minutes and/or notes of representatives that attended any meetings; any draft Order in Council materials or information; any briefing notes that were prepared in advance of or after any meetings; and any correspondence, including emails in August, September, October, and November 2016 to or from Ms. Erin O'Gorman, Assistant Deputy Minister, Major Projects Management Office, and/or related emails in August, September, October, and November 2016 to or from Timothy Gardiner, Director-General — Strategic Projects Secretariat, Major Projects Management Office.

Also, please provide: emails, documents and/or briefing notes related to any terms, conditions, migration measures or accommodation measures proposed or considered by Natural Resources Canada in relation to the Trans Mountain Expansion Project; any briefing notes to Minister Carr prepared by Major Projects Management Office official(s)/staff or the Deputy Minister of Natural Resources Canada in relation to the Governor in Council's decision under the National Energy Board Act and the Canadian Environmental Assessment Act, 2012 for the trans Mountain Expansion Project; any briefing notes to the federal cabinet, the prime minister, or the Governor in Council prepared by Major Projects Management Office official(s)/staff, the Deputy Minister of Natural Resources Canada, or Minister Carr in relation to the Governor in Council's decision for the Trans Mountain Expansion Project; and any briefing notes, emails or other documents in relation to Canada's engagement or consultation with the Tsleil-Waututh National in relation to the Trans Mountain Expansion.

158 No doubt, some of this information is covered by the section 39 certificate. No doubt some is already on the table. And no doubt more will emerge from the cross-examinations. And at some point, materiality and proportionality — not just bare relevance — must come to bear on the matter.

159 I have mentioned Rule 3 above: the need to "secure the just, most expeditious and least expensive determination of every proceeding on its merits" I have also mentioned subsection 18.4(1) of the *Federal Courts Act*: the Parliamentary commandment that judicial reviews be heard and determined "without delay and in a summary way." And there is the admonition of the Supreme Court of Canada in *Hryniak*, above.

160 These concerns are significant in this case.

161 Before the Court made its Order of March 9, 2017 scheduling these consolidated applications, it circulated a draft version of it to all parties. The draft contained the following recitals:

AND WHEREAS it is appropriate that this Court issue an order to ensure that these proceedings are conducted in an orderly, fair and prompt manner;

AND WHEREAS this Order is intended to give effect in these proceedings to the principles set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, which provides that proceedings are to be conducted in a manner that secures the just, most expeditious and least expensive determination of every proceeding on its merits;

. . . . .

AND WHEREAS concerning the issue of scheduling:

(a) without expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;

(b) therefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

162 No party took issue with these recitals.

163 The Order of March 9, 2017 also scheduled the proceedings on an expedited basis up until the filing of the overall electronic record and the memoranda of fact and law. Here again, the schedule was circulated in advance and no objections were received. By direction on May 29, 2017, this Court sought the parties' input on a schedule it suggested for the rest of the proceedings and for the date of the hearing. Except for minor modifications, the parties accepted the proposed schedule.

164 And in their submissions on these motions, all parties urged the Court to rule now on the motions so the schedule is not disrupted.

165 For all these reasons, this Court will not delay or adjourn these consolidated applications so that every last crumb of information sought by the information requests, no matter how microscopic, can be gathered. Nor did I take any party to suggest seriously that this should happen.

166 The paramount consideration for this Court is whether the state of the evidence is such that the spectre of immunization of public decision-making looms. I am not persuaded of this here. Even without having the benefit of the transcripts of cross-examinations and exhibits from the cross-examinations before me, I can conclude that the evidentiary record here is as great or greater than that which was before the Court in *Gitxaala Nation (2016)*. In *Gitxaala Nation (2016)*, faced with substantially similar arguments put by the Indigenous applicants, this Court was able to conduct a very meaningful review, one that was cognizant of the gaps in the evidentiary record and one that resulted in the quashing of the Governor in Council's Order in Council.

167 Overall, this Court is satisfied that the record before it, including the exceptional evidence, will be sufficient and any gaps can be properly assessed and evaluated. This Court is not persuaded that its assistance is needed to augment the evidentiary record before the reviewing court at this time.

168 As the parties enter the cross-examination phase of this litigation, it goes without saying that the Court continues to stand ready to continue to facilitate the parties' progress towards a just, most expeditious and least expensive determination of these consolidated applications on their merits.

E. Disposition

169 The motion of the Attorney General shall be granted. The supplementary affidavit of Mr. Gardiner shall be admitted into the Electronic Record but the Attorney General shall first remove the portions that the parties agree are irrelevant. Costs in the cause.

170 The motion of the Tsleil-Waututh Nation is dismissed. Costs in the cause.

First Nation's motion dismissed; Crown's motion dismissed.

Tab 11

1993 CarswellOnt 1012
Supreme Court of Canada

Ontario Hydro v. Ontario (Labour Relations Board)

1993 CarswellOnt 1012F, 1993 CarswellOnt 1012, [1993] 3 S.C.R. 327, [1993] O.L.R.B. Rep. 1071, [1993] S.C.J. No. 99, 107 D.L.R. (4th) 457, 158 N.R. 161, 43 A.C.W.S. (3d) 52, 66 O.A.C. 241, 93 C.L.L.C. 14,061, J.E. 93-1718, EYB 1993-67593

Ontario Hydro, Appellant v. Ontario Labour Relations Board, Society of Ontario Hydro Professional and Administrative Employees, Canadian Union of Public Employees — C.L.C. Ontario Hydro Employees Union, Local 1000, Coalition to Stop the Certification of the Society on Behalf of Certain Employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, Respondents and The Attorney General of Canada, Respondent and The Attorney General for Ontario, the Attorney General of Quebec and the Attorney General for New Brunswick, Interveners

Canadian Union of Public Employees — C.L.C. Ontario Hydro Employees Union, Local 1000, Appellants v. Ontario Hydro, Ontario Labour Relations Board, Society of Ontario Hydro Professional and Administrative Employees, Coalition to Stop the Certification of the Society on Behalf of Certain Employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, Respondents and The Attorney General of Canada, Respondent and The Attorney General for Ontario, the Attorney General of Quebec and the Attorney General for New Brunswick, Interveners

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

Judgment: November 9, 1992
Judgment: September 30, 1993
Docket: 22355; 22387

Proceedings: Board decision reported at [1988] OLRB Rep. Feb. 187; Divisional Court decision reported at [1989] OLRB Rep. June 698, 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC 14,014; Court of Appeal decision reported at [1991] OLRB Rep. Jan. 115, 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC 14,014.

Counsel: *Neil Finkelstein, Jeffrey W. Galway* and *George Vegh*, for Ontario Hydro.
R. Ross Wells and *Christopher M. Dassios*, for CUPE — C.L.C. Ontario Hydro Employees Union, Local 1000.
Kathleen A. MacDonald, for the respondent the Ontario Labour Relations Board.
Paul J.J. Cavalluzzo, for the respondent Society of Ontario Hydro Professional and Administrative Employees.
Eric A. Bowie, Q.C., Lewis E. Levy, Q.C., and *Roslyn J. Levine*, for the respondent the Attorney General of Canada.
M. Philip Tunley and *John Terry*, for the intervener the Attorney General for Ontario.
Alain Gingras and *André Couture*, for the intervener the Attorney General of Quebec.
Bruce Judah, for the intervener the Attorney General for New Brunswick.

The following are the reasons delivered by *Lamer C.J.*:

I. Introduction

1 I have read with interest the thorough and thoughtful reasons of my colleague, Justice Iacobucci, and although I agree with much of his analysis of the law applicable to these appeals, I cannot, with respect, agree with his disposition of these

appeals. Although there are two appeals before the Court, they are in substance one, and I shall refer to the proceedings herein as "the appeal".

2 I agree with Iacobucci J. that Parliament's legislative jurisdiction over works such as nuclear generating stations, whether it arises pursuant to a declaration under s. 92(10)(*c*) of the *Constitution Act, 1867*, or pursuant to Parliament's power under s. 91 of that Act to make laws for the peace, order and good government of Canada (the "p.o.g.g." power), is not "plenary". Rather, federal jurisdiction over such works must be carefully described to respect and give effect to the division of legislative authority on which our federal constitutional scheme is based. Under s. 92(10)(*c*), I fully agree with Iacobucci J. that "Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved" (p. 404). The p.o.g.g. power is similarly subject to balancing federal principles, limiting the federal government's p.o.g.g. jurisdiction to "the national concern aspects of atomic energy ... namely the fact of nuclear production and its safety concerns" (p. 425).

3 However, I cannot agree with Iacobucci J.'s assessment of how this balance ought to be struck; specifically, I am of the view that the power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy *is* integral to Parliament's declaratory and p.o.g.g. jurisdictions. I reach this conclusion through an examination of the national and international regulatory framework applicable to the production of nuclear energy, previous decisions of this and other courts respecting constitutional jurisdiction over labour relations, and the effect of s. 92A(1)(*c*) of the *Constitution Act, 1867*.

II. Analysis

A. Regulatory Framework

(a) The Atomic Energy Control Act

4 The production of nuclear energy in Canada is regulated by legislation (the *Atomic Energy Con trol Act*, R.S.C., 1985, c. A-16 (the "*AECA*")), regulations made under that Act, and licences granted by the Atomic Energy Control Board pursuant to that Act and the regulations.

5 The declaration in s. 18 *AECA*, that "[a]ll works and undertakings constructed (*a*) for the production, use and application of atomic energy ... are, and each of them is declared to be, works or a work for the general advantage of Canada" is the primary indication of Parliament's interest in the production of atomic energy. The scope of that interest is suggested by the preamble to the *AECA*, which states:

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;

6 I cannot, with respect, agree that the preamble does not reveal a federal interest in regulating labour relations. Rather, I think that stating Parliament's interest in the "control and supervision of the ... application and use of atomic energy" directly implicates regulation of the activities involved in that application and use, which in turn involves the regulation of those employed in producing nuclear power. In fact, Iacobucci J. agrees at p. 416 that "the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear *production*, with all its attendant safety, health and security concerns" (emphasis added). With respect, I believe that all of the concerns attendant on the production of nuclear energy arise in the regulation of labour relations at nuclear production facilities, as is shown by the way in which the general content of the preamble is particularized in the *AECA* and its regulations.

7 As the discussion below of the regulations made under the *AECA* makes clear, the Atomic Energy Control Board is given broad regulation-making power, through which the production of nuclear energy is primarily controlled and supervised. Section 9(*b*) *AECA*, for example, allows the Board to make regulations "for developing, controlling, supervising and licensing

the production, application and use of atomic energy". It is through this regulation-making power that the Board has made clear the federal government's interest in labour relations matters affecting nuclear energy, and to which I shall now turn.

(b) The Atomic Energy Control Regulations

8 The *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365, evince a strong federal interest in the employment of the men and women who operate Ontario Hydro's nuclear production facilities. Although none of the provisions seek to regulate the collective bargaining process, or refer explicitly to terms or conditions which must be included in collective agreements covering such workers, the regulations do show in a more general way that Parliament's interest in health, safety and security at nuclear production facilities is in large part an interest in the employment of those persons who operate such facilities.

9 An application made to the Atomic Energy Control Board, under s. 7(2) in Part I of the regulations, for a licence to, *inter alia*, use any prescribed substance must, if the Board so requires, set out "(*g*) a description of the qualifications, training and experience of any person who is to use the prescribed substance". The licence granted by the Board may include conditions respecting measures to be taken to protect against excessive doses of radiation (s. 7(3)(*a*)), instruction to be given to workers respecting radiation hazards and procedures (s. 7(3)(*c*)), measures to be taken against theft, loss or unauthorized use of prescribed substances (s. 7(3)(*f*)), and the qualifications, training and experience of anyone who is to use or supervise the use of prescribed substances (s. 7(3)(*g*)).

10 Similar provisions govern the licensing procedure for operating a nuclear facility described in Part II of the regulations.

11 Where a licence has been issued, records must be kept of the names of all persons involved in the use and handling of prescribed substances, doses of radiation received by any person, and medical examinations required under the regulations (Part III, s. 11(1)).

12 Part IV of the regulations concerns security, and prohibits unauthorized disclosure of various types of information about prescribed substances and nuclear facilities (s. 13(1)). Furthermore, the Board may designate "protected places" for secrecy into which unauthorized persons may not enter.

13 Part V of the regulations concerns health and safety, and s. 17 requires radiation dosage notification and examination procedures for atomic radiation workers, as well as prohibiting some persons from working as atomic radiation workers. Indeed, Part V is almost exclusively concerned with employees at nuclear facilities such as Ontario Hydro's.

14 Part VI, the general part of the regulations, imposes several employment-related obligations on licensees, including providing appropriate safety equipment and clothing, and providing adequate warning to any person (which would include employees) who may be affected by an escape of radioactive material. Employees are under similar obligations to observe safety procedures and use safety equipment and clothing.

15 I think that it can be foreseen how these stringent and detailed obligations of licensees such as Ontario Hydro might be reflected in collective agreements between the management and em ployees of nuclear facilities, especially where dosage monitoring, notification, and protection are concerned. The various restrictions on who may be employed at the facility might be incorporated into the collective agreement. The Atomic Energy Control Board's training and experience requirements might influence the negotiation and drafting of promotion and seniority clauses. An employee's failure to use the required safety equipment, or to observe required safety procedures, could be the subject of discipline governed by the collective agreement. The labour relations board might have to distinguish between a legitimate plant shutdown and an illegal lock-out during a labour dispute. The requirement that the collective agreement conform to the regulatory requirements of the statute, regulations and licence might be relevant to proceedings to determine whether the parties were bargaining in good faith. Other examples of the mutual concerns in the regulations and most collective agreements are not difficult to anticipate.

16 I draw these parallels not to suggest that the regulations will dictate the substantive content of collective agreements for those employed on or in connection with nuclear energy production facilities, but rather to show that the matters of concern to management and labour in drafting and negotiating a collective agreement are reflected in the regulations, and that the interests

in both cases are quite similar. As is the case with the *AECA*, Parliament's regulation of nuclear facilities, under the concerns of health, safety and security, includes a strong employment and labour relations component.

(c) Licences

17 One of the licences described in the *AECA* and the regulations has been put before this Court (Reactor Operating Licence No. 10/86, for the Bruce Nuclear Generating Station "A").

18 Article A.A.3 sets out detailed staffing requirements, including written Atomic Energy Control Board approval of certain employees, minimum staffing requirements, and notice of staffing changes. Article A.A.19 requires the prompt reporting of any attempted or actual breaches of security, threats or sabotage (sub-article (iv)), and of "actual or impending instances of industrial disputes or civil demonstrations which could affect the safety or security of the nuclear facility" (sub-article (v)), and "any event which constitutes or reveals a violation of the conditions of this licence, the Physical Security Regulations or the Atomic Energy Control Regulations" (sub-article (ix)). This last sub-article covers all of the personnel requirements of the regulations and licence described above.

19 It is said that the lack of any imposition of federal *control* over labour disputes in the licence indicates that such control is not integral to federal jurisdiction. However, with respect, I believe that what demonstrates that jurisdiction over labour relations is integral to federal jurisdiction over the production of energy power is not an actual exercise of that jurisdiction (indeed, no such jurisdiction has been exercised in this case, as I discuss below), but a commonality of interests and concerns between the existing federal regulatory framework, and the matters to which labour relations legislation is addressed. The licence provisions do indicate a strong and compelling federal interest in labour relations matters at nuclear facilities, not the least of which is the reporting of potential labour disturbances because of their serious health, safety and security implications. It appears to me that the reporting of labour disturbances to the Atomic Energy Control Board, mandated by the licence, in fact dovetails neatly with federal regulation and supervision of the disturbance itself.

20 Therefore, I think that the domestic regulation of the production of nuclear energy demonstrates a strong federal interest in the employment of those employed on or in connection with facilities for the production of nuclear energy. Where those employees are unionized, that federal interest extends to the labour relations regime which governs the relationship between the employer and the employees, through their bargaining agent.

(d) International Regulation

21 The production of nuclear energy is also closely monitored and regulated at the international level, primarily by the International Atomic Energy Agency ("IAEA") and the treaties and agreements negotiated through the IAEA to which Canada is a party. The IAEA is mainly concerned with the promotion of the peaceful and safe use of atomic energy, and the prevention of the diversion of nuclear materials to non-peaceful uses.

22 Many of the security provisions affecting employees in the regulations described above (especially those in Part IV), and the licences under which nuclear facilities operate, can be traced to Canada's international obligations in the field of nuclear energy. Canada is a "non-nuclear weapon" party to the *Treaty on the Non-Proliferation of Nuclear Weapons*, Can. T.S. 1970 No. 1, which in Article III imposes "safeguards" on such parties to prevent the diversion of nuclear materials to other than peaceful purposes.

23 Other IAEA activities demonstrate the vital link between the safe production of nuclear energy and the persons employed in that enterprise. For example, in the *IAEA Yearbook 1992*, at p. D25, the development of a concept called "safety culture" is discussed. Recognizing that (at p. D49) "[a] principal root cause of failures is human error, which is often the initiator of incidents", safety culture, the Yearbook explains, directs individuals, managers, and policy makers to implement strategies and organizational structures to prevent and detect such errors.

24 A paper presented to an international symposium on the operational safety of nuclear power plants organized by the IAEA also warned against treating employees engaged in the production of nuclear energy like other utility employees. B.J. Csik of

the IAEA, in "International Guidance on the Qualifications of Nuclear Power Plant Operations Personnel" (*Operational Safety of Nuclear Power Plants* (1984), vol. II, 315) noted with disapproval (at p. 323) that:

> Some utilities maintain the attitude in their personnel management policy that a nuclear power plant is just another electric generation plant, even though they are fully aware of the differences between nuclear and fossil-fuelled units for all other purposes.

25 On the international level, then, there is a consistent recognition that supervising employment on or in connection with facilities for the production of nuclear energy is an integral part of assuring the safety of nuclear facilities and materials. The question remains whether the jurisprudence of this and other courts supports the strong practical reasons in favour of placing the responsibility for both matters with the federal government.

B. Labour Relations Jurisprudence

26 The trilogy (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868 ; and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897), with the cases Beetz J. relied upon in the trilogy, emphasize the intimate link between the power to regulate an industrial activity like producing nuclear energy, and the authority to make laws respecting the management of that activity, which authority usually extends to making laws respecting labour relations. For example, Beetz J. described (at p. 825) the following passage (from *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedoring* case), at p. 592, *per* Abbott J.) as "a classic statement on point":

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion, a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

27 My colleague distinguishes this and other such general statements by observing that Ontario Hydro as a whole is a "provincial", rather than a "federal" "undertaking", so that these passages in fact demonstrate the necessity of provincial control over labour relations at Ontario Hydro. Federal jurisdiction over Ontario Hydro's nuclear facilities, it is suggested, extends only so far as the "work" and the "integrated activities related to the work". However, with respect, the description of Ontario Hydro as a provincial undertaking to limit federal jurisdiction under s. 92(10)(*c*) to the work alone proves too much; a scrupulous application of the works/undertakings distinction relied upon by Iacobucci J. would leave Parliament jurisdiction over nothing more than the physical shell of the nuclear generating facilities, a result which none of the parties supporting provincial jurisdiction go so far as to assert.

28 To avoid finding such an empty and ineffective jurisdiction over the work alone, commentators and courts have accepted that Parliament's jurisdiction over a work subject to a declaration includes some level of control over the activities which occur on or in connection with it; such activities have often been described as the "undertaking" connected with the work, although the strict terms of s. 92(10)(*c*) would seem to limit Parliament's jurisdiction to the work only. For example, the author of *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, asserts (at p. 629) that the effect of a declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character". My colleague holds that this latter authority does not include labour relations. However, if federal jurisdiction applies to the "integrated activities related to the work", I see no convincing distinction between what is called the "undertaking" of Ontario Hydro's nuclear facilities (which must be distinguished from the "undertaking" of Ontario Hydro's non-nuclear facilities and operations) and the "integrated activities related to" those nuclear facilities. With respect, I think further that the trilogy suggests the same parallel.

29 Bell Canada, the subject of the lead judgment in the trilogy, is itself the subject of a declaration by S.C. 1987, c. 19, s. 5, which is confined to the strict limits of s. 92(10)(*c*): "The works of the Company are hereby declared to be works for the general

advantage of Canada." At the time the trilogy was decided, a declaration to the same effect was contained in S.C. 1882, c. 95, s. 4. While Bell Canada was also within federal jurisdiction under s. 92(10)(*a*), the declaration, if it is not completely redundant, must have been seen as necessary to complete Parliament's control over the enterprise. In the trilogy, Beetz J. used Bell Canada as the paradigm of a "federal undertaking", the labour relations of which would be federally regulated, notwithstanding that Parliament's jurisdiction was at least partly founded under s. 92(10)(*c*). I would therefore not interpret Beetz J.'s references in the trilogy to "federal undertakings" as restrictively as is suggested, but rather would rely on those cases for the simple but compelling proposition that jurisdiction to regulate a work and its related *integrated activity*, here the production of nuclear energy, *prima facie* includes jurisdiction to make laws respecting its labour relations.

30 The special problems raised by such divided activities within a single enterprise were canvassed by this Court in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733. Most of Northern Telecom's employees were subject to provincial labour law. However, some employees were "installers", who installed telephone equipment in Bell Canada's telephone network. The Canada Labour Relations Board determined that the installers were not employed on or in connection with the federal enterprise that was Bell Canada, and so were outside of its jurisdiction. This Court held that the installers were sufficiently integrated into the operations of Bell Canada to fall within federal labour relations jurisdiction. Writing for the majority of this Court, Estey J. described the inquiry before the Court, as it had been outlined by Dickson J. (as he then was) in an earlier incarnation of the litigation (*Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115). Dickson J. wrote (at p. 133):

> In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, *i.e.*, the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Estey J. found that the installers were an integral part of the core federal undertaking, so that they fell under federal jurisdiction.

31 Applying the same test to employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities, I think it is clear that their "normal or habitual activities" are intimately related to the federal interests in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interests in health, safety and security, matters completely within the daily control of those operating nuclear facilities. The IAEA materials make this clear.

32 Therefore, I would conclude under both the declaratory jurisdiction and the p.o.g.g. jurisdiction, that the labour relations of Ontario Hydro's employees involved in the production of nuclear energy, related as it is to the federal interest in atomic energy, is an integral and essential part of Parliament's jurisdiction, as it was found to be in previous cases like the trilogy in connection with other integrated activities connected to federally declared works.

33 The courts below, and the parties in this appeal supporting federal jurisdiction over labour relations, relied on the decision of the Ontario High Court of Justice in *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862. My colleague fully reviews the facts and result in this decision, which upheld federal p.o.g.g. jurisdiction over atomic energy and a resulting jurisdiction over labour relations, but seeks to limit its persuasive authority on four bases: (i) it was decided before this Court's decision in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; (ii) its conclusion is not supported by any reasons; (iii) the issue of jurisdiction over labour relations was conceded by the parties; and (iv) it does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the extent possible.

34 Responding to the first ground of distinction, with respect, I see nothing in *Pronto* which is inconsistent with this Court's decision in *Crown Zellerbach*. While I agree that *Crown Zellerbach* set a high threshold for finding jurisdiction under the national concern branch of p.o.g.g., I think that atomic energy meets that threshold, as does Iacobucci J. when he states at p. 425 that "there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power". Where I understand my colleague to disagree with the holding in *Pronto*, based on the subsequent jurisprudence of this Court, is the question of whether labour relations are integral to a great enough extent to Parliament's p.o.g.g. jurisdiction to merit recognition. If they are not, then the p.o.g.g. jurisdiction cannot be allowed to so entrench on provincial jurisdiction.

I do not understand my colleague to claim that where such jurisdiction is integral, the scale of impact must nevertheless be reconcilable with provincial jurisdiction. Given my position that labour relations are integral to Parliament's p.o.g.g. jurisdiction, I do not see that anything in *Pronto* fails to satisfy the high threshold in *Crown Zellerbach*.

35 On the second and third grounds, the fact that the parties did not dispute the issue, and that McLennan J. did not, therefore, need to detail his reasoning does not mean that the decision is wrong: McLennan J. could not have accepted the parties' concessions on the very question before him (the jurisdiction of the Ontario Labour Relations Board) if he was of the view that Parliament did not have jurisdiction over labour relations as part of its p.o.g.g. jurisdiction. In fact, his concise reasoning with respect to what must necessarily be included in Parliament's jurisdiction over labour relations over atomic energy was based on the *Stevedoring* case, and McLennan J. even expressed his holding in a paraphrase of the words of Rand J. in that decision.

36 Finally, on the fourth ground, the precise accommodation to be worked out between the federal and provincial governments is the issue in this appeal, and in my view, the division of authority I arrive at, which is the same as that found by McLennan J., respects this accommodation, for the reasons I have outlined above.

37 Therefore, while this Court is by no means bound by the decision in *Pronto*, the judgment is not entirely without persuasive force, presaging as it does the close link between Parliament's interests in regulating nuclear energy and its interest in regulating the labour relations of those involved in the production of nuclear energy.

38 An instructive contrast is provided by this Court's decision in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031. Four B was an Ontario corporation operating a factory on a Mohawk Indian reserve, pursuant to a licence issued by the Minister of Indian Affairs and Northern Development under the *Indian Act*, R.S.C. 1970, c. I-6. The company was privately owned and operated by four members of the Band, in a building leased from the Band Council. Of Four B's 68 employees, 48 were Band members, 10 were former Band members, and 10 were non-Indians. The respondent union was certified as the bargaining agent for the employees under the Ontario *Labour Relations Act*, R.S.O. 1970, c. 232, but Four B objected to the jurisdiction of the Ontario Labour Relations Board to make the certification order. Four B asserted that labour relations at the company were within the exclusive jurisdiction of Parliament, pursuant to s. 91(24) of the *Constitution Act, 1867*.

39 Beetz J., for the majority of the Court, rejected Four B's submission. He began by stating the principles applicable in *Four B*, based on the jurisprudence of this Court (at p. 1045):

> With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activites, can be characterized as federal undertakings, services or businesses....

Applying these principles to Four B, Beetz J. concluded (at p. 1046):

> There is nothing about the business or operation of *Four B* which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is *an ordinary industrial activity* which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on *the operational nature of that business*. [Emphasis added.]

40 This focus on the nature of the activity involved and the operational nature of the business, instead of on the external trappings of the business, is equally apt in the case of Ontario Hydro's nuclear facilities. With respect, Iacobucci J.'s reliance on the fact that Ontario Hydro, as a whole, is a provincial undertaking fails to appreciate the nature of the activity involved in, and the operational nature of, Ontario Hydro's nuclear facilities in particular. Unlike the situation in *Four B*, producing nuclear energy is not an "ordinary industrial activity" which is only incidentally carried on by federally regulated persons. Instead, the activity itself is within the federal legislative domain. Similarly, the "operational nature" of the business of producing nuclear

energy directly engages Parliament's interest in controlling and supervising the application and use of atomic energy. As in *Four B*, then, the provincial trappings of Ontario Hydro's nuclear facilities should not mask their essentially federal operational nature.

C. The Effect of Section 92A(1)(c)

41 Ontario Hydro and the intervenors supporting its position argue as if the federal government were seeking jurisdiction over the labour relations of *all* Ontario Hydro employees, simply because *some* Ontario Hydro employees are engaged in the production of nuclear energy. If this were the case, I would agree that Ontario Hydro's status as "a provincial undertaking" was relevant, and that s. 92A(1)(*c*) operates to foreclose such a result. Provincial jurisdiction over all aspects of the majority of Ontario Hydro's operations, pursuant to s. 92A(1)(*c*), remains undisturbed by my holding in this case that the labour relations of those employed on or in connection with facilities for the production of nuclear energy are federally regulated.

42 This is how I would respond to concerns that s. 92A(1)(*c*) be given some meaning in this case. Only those employees actually employed on or in connection with facilities for the production of nuclear energy are federally regulated. In his affidavit, Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, explains that generating electricity requires a source of energy, a turbine, and a generator. The source of energy at nuclear facilities is a nuclear fission reaction, which generates heat energy, which is then used to turn water into steam. That steam drives the turbine, which spins the generator, which produces the electricity by means of an electromagnet and wire coils. The affidavit makes it clear that, once the steam is produced, there is no difference between thermal (i.e., fossil-fuel) and nuclear electrical generation. Although I would leave it to the Ontario Labour Relations Board to exclude those particular employees from its jurisdiction who are covered by the *Canada Labour Code*, in general terms I am of the view that it is only those employees involved in the first of the three parts of the generation phase who would be federally regulated. That is, those employees engaged in using nuclear reactors to generate heat energy would be covered by the federal legislation, while those who are involved with using that heat energy to run the turbine, which in turn runs the generator, would be provincially regulated. The former employees are employed in the production of nuclear (heat) energy, and come under federal jurisdiction under both the declaratory and p.o.g.g. powers; the latter employees are employed in the production of electricity, and the management of their activities falls to the provinces under s. 92A(1)(*c*).

43 It appears to me that Ontario Hydro's facilities where nuclear power is used actually involve two plants: one for the production of nuclear (heat) energy, and another for the generation of electricity using that heat energy. Once the heat energy is produced, it matters little how it was produced for the rest of the generation phase. As the parties have not, unfortunately, presented detailed evidence of job classifications and descriptions at Ontario Hydro's nuclear facilities, I would leave the precise details to the appropriate Labour Relations Boards. The Ontario Labour Relations Board in this case did not indicate that it foresaw any difficulty in making such a determination, should its decision as to its jurisdiction be upheld on judicial review.

D. Other Factors

(a) Laches

44 It was suggested by parties and interveners supporting provincial jurisdiction in this appeal that the failure of the federal government to actually regulate the labour relations of Ontario Hydro employees involved in the production of nuclear energy should weaken its present claim that federal jurisdiction over labour relations is integral to the federal regulation of atomic energy.

45 There is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis. In this respect, I would adopt the statement of Reed J. in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1985] 2 F.C. 472 (T.D.), at p. 488:

> The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights. (Refer: *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032 for a case in which unconstitutional action had remained unchallenged for ninety years.)

46 I do not understand any of the parties or interveners to suggest that any form of the doctrine of laches applies. At best, the failure of the federal government to exercise its jurisdiction weakens the factual argument that such federal jurisdiction is necessary, but does not dispose of it.

47 However, just because labour relations have been successfully regulated under provincial law up to this challenge does not mean that authority to regulate them should be left there for the sake of expediency. Similarly, the hypothesis that a provincial labour relations regime *could* respond to safety concerns as well as a federal regime, does not dispose of the question of which level of government *should* respond to such concerns.

(b) Problems of Divided Jurisdiction

48 It is important to remember the words of Estey J. in the 1983 *Northern Telecom* decision, *supra*, at p. 760, that this Court is not concerned "with the question of relative efficiency as between the assignment of the labour relations here in question to the federal or the provincial jurisdiction". To similar effect are the comments of McIntyre J., for the Court, in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 334: "... it is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised". McIntyre J. also quoted Laskin C.J. in *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, who wrote at p. 76:

> They [governments] are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for the serious consequences of holding them *ultra vires*. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern.

49 In this case, Galligan J.A., and the parties and interveners supporting provincial jurisdiction, argued that "it would make no labour relations sense" to divide Ontario Hydro's labour relations between those employees engaged in the production of nuclear energy, and those employed in the other aspects of the generation phase, as well as the transmission and distribution phases. While this is no doubt a concern, given my finding that Parliament has jurisdiction over the labour relations of these employees, it cannot be allowed to be a determinative one.

50 I am confident that the Ontario Labour Relations Board is capable of determining which employees fall under its jurisdiction, as was the Board itself. Labour lawyers have worked out much more complicated matters than divided jurisdiction within Ontario Hydro's nuclear generating facilities.

III. Disposition

51 I would dismiss the appeals, and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the *Canada Labour Code* does apply to employees of Ontario Hydro who are employed on or in connection with those nuclear facilities that come under s. 18 *AECA*. I would make no order as to costs.

The judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. was delivered by *La Forest J.*:

52 The issue in these appeals is whether the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, or the federal Act, the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally applies to govern the labour relations between Ontario Hydro and its employees at Hydro's nuclear electrical generating stations.

Background

53 Ontario Hydro, a provincially owned corporation established for the purpose of generating and distributing electric power, produces electric power through 81 electrical generating stations of which five are nuclear generating stations. The Society of Ontario Hydro Professional and Administrative Employees applied for certification pursuant to the Ontario *Labour Relations Act* as exclu sive bargaining agent for a unit of employees of Ontario Hydro, including those employed at the nuclear plants. Another group of employees, the Coalition to Stop the Certification of the Society, challenged the application on the ground that the employees who worked at the nuclear generating stations fell within the jurisdiction of the Canada Labour Relations

Board established under the *Canada Labour Code*. The Ontario Labour Relations Board held it had no jurisdiction to certify the bargaining unit in the Society's application because the unit included employees who worked at the nuclear generating station, which in its view were governed by the *Canada Labour Code*: [1988] OLRB Rep. Feb. 187. This decision was quashed by the Ontario Divisional Court (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC ¶ 14,044, but was reinstated by a majority of the Ontario Court of Appeal (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC ¶ 14,014. Leave was sought and granted to appeal to this Court, [1991] 3 S.C.R. x. The Chief Justice stated the following constitutional question:

> Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16?

54 As in the courts below, those who supported federal jurisdiction relied on Parliament's power to declare works, although wholly situate within a province, to be for the general advantage of Canada (ss. 92(10)(*a*) and 91(29) of the *Constitution Act, 1867*), and its general power to legislate for the peace, order and good government of Canada in the opening words of s. 91 of that Act. I note that all works and undertakings constructed "for the production, use and application of atomic energy" were declared works for the general advantage of Canada by s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16, and none of the parties contests that Ontario Hydro's nuclear facili ties fall within the ambit of the declaration. The appellants argue, however, that this does not bring within Parliament's jurisdiction the labour relations at those facilities, about which it has purported to legislate under the *Canada Labour Code*, which by the combined effect of ss. 2(*h*) and 4 applies to works and undertakings within the legislative authority of Parliament, including works declared to be for the general advantage of Canada.

55 Those who supported provincial jurisdiction relied on the province's traditional power under s. 92 of the *Constitution Act, 1867* to exclusively make laws in relation to local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and matters of a merely local or private nature (s. 92(16)), but they placed especial reliance on s. 92A(1) (enacted by the *Constitution Act, 1982*, s. 50), which empowers the provinces to exclusively make laws in relation to non-renewable natural resources, forestry resources, and electrical energy, and specifically on s. 92A(1)(*c*), which reads as follows:

> *92A.* (1) In each province, the legislature may exclusively make laws in relation to
>
> . . . . .
>
> (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Ontario Hydro, while conceding that it was not a Crown agent, also argued that it should be immune from federal regulation because it was a provincial instrumentality set up to advance provincial purposes.

56 Justice Iacobucci (who fully sets forth the facts, judicial history and relevant legislation) is of the view that Parliament has exclusive jurisdiction under its declaratory power and the general power under s. 91 of the *Constitution Act, 1867* over some aspects of the nuclear generating facilities, but that the control of labour relations at these facilities is not integral to Parliament's effective regulation of these facilities, and in consequence are governed as a provincial matter under the *Labour Relations Act*. The Chief Justice, on the other hand, is of the view that the power to regulate the labour relations of those employed at these facilities for the production of nuclear energy is integral to Parliament's declaratory and general power. For the reasons that follow, I agree with the conclusion reached by the Chief Justice. In my view, the regulation of the labour relations of employees engaged in the production of nuclear energy falls within the exclusive powers granted to Parliament under the combined effect of the opening and closing words and head (29) of s. 91, and s. 92(10)(*c*) of the *Constitution Act, 1867*. I shall first discuss the declaratory power.

The Declaratory Power

57 Section 92(10)(*c*) of the *Constitution Act, 1867* authorizes Parliament to declare local works (which by s. 92(10) would otherwise fall within provincial power) to be for the general advantage of Canada. When such a declaration is made, any work subject to the declaration falls, by virtue of s. 91(29), within the legislative jurisdiction of Parliament. The effect of the declaration is the same as if such work was expressly enumerated in s. 91; see *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333, at p. 342. This is scarcely surprising. The opening and closing words of s. 91 make it clear that (notwithstanding anything in the Act) Parliament's exclusive legislative authority extends to such classes of subjects as are expressly excepted from the provincial enumeration of powers, including, of course, those specified in s. 92(10)(*c*); see also *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 (*Bell Canada 1966*), at pp. 771-72, *per* Martland J. for the Court. A work subject to a dec laration thus falls within the exclusive legislative power of Parliament, and provincial jurisdiction *over the work* is ousted; see *Wilson v. Esquimalt and Nanaimo Railway Co.*, [1922] 1 A.C. 202, at p. 207. Laws of general application in the province (such as taxation) will, of course, apply to the work, but these cannot touch an integral part of Parliament's jurisdiction over the work. The province cannot legislate respecting the work *qua* work. As early as 1899, the Privy Council made it clear that classes of subjects expressly excepted from the enumeration of provincial subjects of provincial legislative power (which, of course, includes works subject to a declaration) included the power not only to construct, repair and alter such a work but its *management* as well; see *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, at pp. 372-73.

58 The law on the matter has not really changed since then, though it has been subjected to considerable elaboration. Thus, as Iacobucci J. notes, recent authorities underscore that federal jurisdiction over declared works includes jurisdiction to regulate their operations; see *Chamney v. The Queen*, [1975] 2 S.C.R. 151, at p. 159; see also *The Queen v. Thumlert* (1959), 20 D.L.R. (2d) 335 (Alta. S.C., App. Div.), at p. 341. A declaration incorporates a work as a functioning unit; in Laskin's words, the declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character"; see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 629. For my part, I am at a loss to see how one can have exclusive power to operate and manage a work without having exclusive power to regulate the labour relations between management and the employees engaged in that enterprise. That is what this Court has repeatedly stated; see *Bell Canada 1966, supra*, and *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 (*Bell Canada 1988*), esp. at pp. 839-40. As Beetz J. put it in the latter case, "these are two elements of the same reality" (p. 798).

59 In my view, most of the issues raised in this case have been fully disposed of by Beetz J. in his characteristically clear and thorough manner in the *Bell Canada 1988* case and its companion cases in the 1988 trilogy (*Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897), but it seems necessary, in light of the argument, to draw attention to those parts of his analysis specifically relevant here. I begin by noting that in the *Bell Canada 1988* case, at p. 825, he approved what he described as the classic statement on the subject by Abbott J. in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedoring* case), at p. 592, which reads as follows:

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, *working conditions* and the like, is in my opinion *a vital part of the management and operation of any commercial or industrial undertaking*. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures. [Emphasis added by Beetz J.]

60 I should observe that Beetz J. had earlier very generally described "working conditions" for the purposes of the trilogy as including the conditions of work settled by contracts of employment or collective agreements. As he put it, at pp. 798-99: "working conditions are conditions under which a worker or workers, individually or collectively, provide their services, in accordance with the rights and obligations included in the contract of employment by the consent of the parties or by operation of law, and under which the employer receives those services".

61 It is argued, however, that *Bell Canada 1988* and other earlier cases were confined to "undertakings" in s. 92(10)(*a*) and (*b*) and not to works in s. 92(10)(*c*). Simply put, I cannot accept this. I have already observed that the *Bonsecours* case in its terms applied to all the exceptions in s. 92(10). And that is true of several of the cases relied upon by Beetz J. in *Bell Canada 1988*. Thus in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (cited in *Bell Canada 1988*, at p. 820), Ritchie J. stated at p. 181 that "it has been established that it is not within the competency of a provincial legislature to legislate concerning industrial relations of persons employed in a *work*, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada" (emphasis added). Similar statements may be found in the *Stevedoring* case, *supra*. Thus Fauteux J., at p. 585 (cited in *Bell Canada 1988*, at p. 825) spoke of "labour operations within this limited field of *works*, undertakings and businesses as to which the regulation by law is, under the *B.N.A. Act*, committed to the legislative authority of Parliament". Beetz J. in *Bell Canada 1988*, at pp. 830-31, like Martland J. before him in *Bell Canada 1966*, at pp. 774-75, also relied on Duff J.'s statement in *Reference re Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505, at p. 511, regarding the federal powers of regulation touching the employment of persons on *works* or undertakings.

62 Beetz J. himself makes it clear on at least three occasions (pp. 761-62, 816-17 and 820) that despite the fact that labour relations ordinarily fall within s. 92(13) of the *Constitution Act, 1867* (his "proposition two") that is not so of works or undertakings legislative jurisdiction over which is vested in Parliament. He says at pp. 761-62:

> Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)*a., b.* and *c.* of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statues relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking.... [Emphasis added.]

I emphasize that Beetz J. there includes s. 92(10)(*c*), i.e., declared works, among those undertakings subject to exclusive federal power. And he continues in the next paragraph (at p. 762):

> It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: *works*, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.... [Emphasis added.]

I underline that in the last line of this statement Beetz J. explains that provincial laws cannot apply to matters specifically of federal jurisdiction, and that in the previous paragraph he had unequivocally asserted that labour relations are an integral part of Parliament's primary and exclusive juris diction over matters covered by, *inter alia*, s. 92(10)(*c*) "declared works".

63 These statements are scarcely surprising. As I noted earlier, the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management. And as I recently noted in *Re Canada Labour Code*, [1992] 2 S.C.R. 50, at p. 78, inevitably "labour relations tribunals impinge upon powers that have traditionally been considered to be management prerogatives". Labour relations are integral and vital parts of the operation of a work. There is no room for mutual modification of federal and provincial power. A province undoubtedly has power by general legislation to affect the operation of a declared work, but legislation governing labour relations on such works is legislation in relation to that work and falls outside provincial legislative competence; see the reasons of Pratte J.A. (Stone J.A. concurring) in *Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1992] 2 F.C. 3, at pp. 35-37, and the other Federal Court of Appeal cases there cited. Labour

relations are an integral part of Parliament's exclusive power to legislate in relation to declared works. No evidence is required to establish this.

64 I add in passing that the current goals of labour relations, upon which my colleague Iacobucci J. places considerable stress, have nothing to do with the source of the legislative power. As I understand it, he argues for provincial power over labour relations from what he perceives to be the primary purpose of labour relations, i.e., the preservation of industrial peace and empowerment of workers. The provinces undoubtedly have a direct interest in such goals in furtherance of their general jurisdiction over property and civil rights, but this general power must give way in specific areas exclusively assigned to the federal Parliament, specifically in relation to federal works, i.e., works falling within federal legislative competence. In legislating on labour relations in this area, Parliament is engaged in regulating the work. In doing so, it may adopt, and indeed, has adopted legislation similar to provincial legislation. But this it does under its legislative power to manage and control the work, and this, of course, affects property and civil rights. The fact that Parliament in operating and controlling federal works adopts labour relations policies that are similar to policies adopted by the provinces does not make these policies fall within property and civil rights within s. 92(13). Beetz J. made it clear that the regulation of labour relations in the exercise of a federal power constitutes an exception to the general provincial power to legislate on the matter as property and civil rights in the province.

65 It is not necessary for me to engage in a consideration of the possible difference in scope between "undertakings" and "works" for the purposes of the various items in s. 92(10). I mentioned earlier that a work under s. 92(10)(*c*) means a work as a going concern, and to manage that going concern Parliament must have power to regulate the labour relations between management and labour engaged in operating the work. I see no logical or practical difference in the need for control of the labour relations in the management of an undertaking and in the management of a work as so understood. In that sense, a work is an undertaking, an undertaking, however, that must include a work. Rand J. in the *Stevedoring* case, *supra*, at p. 553, appears to have had this idea in mind in the following statement:

> The former [i.e., declared works], so far as the works themselves are likewise undertakings, would be such as yield some mode of service of a public or quasi-public nature. I see no distinction to be made between them and dominion works and undertakings generally. Undertakings, existing without works, do not appear in 92(10)(*c*) and cannot be the subject of such a declaration.

This would appear to have been the sense in which Beetz J., in *Bell Canada 1988*, referred to undertakings in s. 92(10)(*c*) because he knew, of course, that that provision referred to works only. As well, we saw, he relies on numerous statements that refer to both works and undertakings.

66 In this context, I note that s. 18 of the *Atomic Energy Control Act, inter alia*, makes both "works *and undertakings* ... for the production, use and application of atomic energy" subject to the declaration. This probably was meant to include matters necessary to the operation of a nuclear facility, and as such would be superfluous. Certainly, it was not meant to cover the whole of the undertaking of Ontario Hydro. The declaration is confined to facilities *constructed for the production, use and application of atomic energy*, not to those constructed for the production of electrical energy by other means. The precise determination of which persons are employed in one type of facility or the other may, no doubt, give rise to problems of categorization. That issue is not, however, before us, we have no evidence on it, and I refrain from commenting on the matter.

Specific Arguments

67 What has already been said is sufficient to dispose of this aspect of the case but I shall attempt to respond to a number of specific arguments made by the appellants.

68 It was argued that the declaratory power must be read narrowly to make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists. It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. That is clearly set forth in the statement of Duff J. in *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, at p. 220, cited by Iacobucci J. at pp. 397-398. This is scarcely

an isolated statement. Mignault J. had expressed the same thought in at least as strong terms in the following passage in *Luscar Collieries Ltd. v. McDonald*, [1925] S.C.R. 460, at p. 480:

> The power conferred on Parliament to declare that works wholly situate within the province are for the general advantage of Canada or for the advantage of two or more of the provinces, is obviously a far-reaching power. Parliament is the sole judge of the advisability of making this declaration as a matter of policy which it alone can decide. And when the power is exercised in conformity with the grant, it vests in Parliament exclusive legislative authority over the local work which it removes from the provincial to the federal field of jurisdiction.

69 There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary. It might, I suppose, have been possible to interpret s. 92(10)(*c*) so as to confine it to works related to communications and transportation such as those specifically listed in s. 92(10)(*a*) and (*b*) but the courts, including this Court, have never shown any disposition to so limit its operation, and a wide variety of works — railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munition factories — have been held to have been validly declared to be for the general advantage of Canada. I note that neither the Chief Justice nor Iacobucci J. have any doubt about this.

70 The restricted view advanced here for the first time appears to be based on the danger thought to be posed to the structure of Canadian federalism if the courts do not confine federal power in this area. To begin with, I fail to see how abstracting from Parliament the power to regulate labour relations (which I have observed is necessary for the proper management of a work), while leaving all other regulation of the work to the federal government, does much to advance the federal principle. And I scarcely see the logic of having labour relations in federal undertakings fall within federal legislative power, but not labour relations in federal works. But more fundamentally I think the argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution.

71 I should first of all observe that the declaratory power is not the only draconian power vested in the federal authorities. The powers of disallowance and reservation accorded the federal government by ss. 55-57 and 90 of the *Constitution Act, 1867* give it unrestricted authority to veto any provincial legislation; see *Wilson v. Esquimalt and Nanaimo Railway Co., supra*, at p. 210; see also *Reference re Disallowance and Reservation*, [1938] S.C.R. 71. The exercise of this authority is wholly a matter of discretion for the federal government, and in the Reference case just noted, it was stated that the courts are not constitutionally empowered to express an opinion about its exercise (see p. 95); for a similar statement regarding the declaratory power, see *The Queen v. Thumlert, supra*. The declaratory and veto powers were frequently used in tandem in the early years following union to accomplish the original constitutional mandate by establishing the authority of the central government and its policies, and in particular to ensure the construction of the intercontinental railway. Later, the declaratory power was effectively used as a tool to regulate the national grain market in the pursuit of the constitutional vision of intergrating the western region of Canada into the country.

72 But even in the heady early days when the exercise of these powers was commonplace because of the constitutional mandate to create a single country, their use for other purposes was firmly, and ultimately successfully, challenged. Both powers faded almost into desuetude when these large constitutional and national tasks had been accomplished. The power of disallowance, which had long been in decline, has not been used since 1942. The declaratory power has suffered a similar fate and has been used only twice since the 1960s. It is the very breadth of these powers that protects against their frequent or inappropriate use. It was not the courts but political forces that dictated their near demise. They are, as was said of the power of disallowance, "delicate" and "difficult" powers to exercise and "will always be considered a harsh exercise of power, unless in cases of great and manifest necessity ..."; see *Severn v. The Queen* (1878), 2 S.C.R. 70, *per* Richards C.J., at p. 96, and Fournier J., at p. 131. Their inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise. In a word, protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism.

73 I see nothing in the statement in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, to the effect that a substantial measure of provincial consent was required before the Constitution could be amended that is in any way at odds with this. For the Court in that case made it clear that it was not within its province to enforce this requirement. It was, it noted,

a *convention*. The enforcement of conventions lies in the political, not the legal field. They can be broken, and the courts have no power to prevent this, but there is a political price to pay. The courts have not engaged in the task of defining the manner in which these broad political bases of Canadian federalism should be protected. The Constitution has not accorded them that mandate. These are matters for the people. This is not to say that the courts do not have an important, indeed essential, role in balancing federalism as they go about their task of defining the nature and effect of those great but more subtle powers, not susceptible of definition and direction by those elemental political forces that undergird Canadian federalism. Finally I should add that Dickson C.J.'s description in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 671, of federal power under s. 92(10) as "narrow and distinct" has nothing to do with the present case at all. He was there comparing this and other particularized powers with broadly described powers, such as trade and commerce, and the extent to which incidental exercises of jurisdiction could be "tacked-on" to these various powers.

74 I next note the argument that the declared nuclear facilities fall to be regulated by federal authorities but only in relation to their safety and security aspects not labour relations generally. This approach is supported by reliance on the preamble to the *Atomic Energy Control Act*. The preamble may set forth the purpose why Parliament declared works for the development of atomic energy to be for the general advantage. But once the declaration is made the legislative power flowing therefrom is governed by the Constitution. As noted earlier, the work subject to the declaration is in the same position as if it were expressly mentioned in the Constitution. At best, the preamble might give some clue as to what works were intended to be covered by the declaration; it cannot, however, define the scope of legislative power to be exercised by Parliament in respect of a work, once it is determined that it falls within the ambit of a declaration. I should add that I find difficulty in understanding the argument because safety and security are as much in jeopardy from the manner in which employees do their work as in the manner in which a facility is constructed, and, as the Chief Justice points out, many of the regulations of the Atomic Energy Control Board have to do with labour relations. The fact that these are established by one federal organism rather than another does not affect their character.

75 In truth, I find that this attempted restriction of federal power to health and security considerations flies in the face of the Act. What the declaration there gives Parliament is jurisdiction, *inter alia*, over works constructed for the production, use and application of atomic energy. In making legislation to that end, I fail to see how one can logically limit it to health and security concerns.

76 Again, there is the argument that for many years the parties resorted to the Ontario *Labour Relations Act* rather than the *Canada Labour Code*. But this, as I see it, is of no moment. The case is not dissimilar in that respect from *Attorney-General for Ontario v. Winner*, [1954] A.C. 541, where the province had exercised jurisdiction over interprovincial motor transportation for an even longer period.

77 Finally there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activity has always raised practical difficulties. Even the present type of difficulty is not unique. In *Shur Gain Division, supra*, the Federal Court of Canada had occasion to deal with a similar situation. Again, it is obvious from a close reading of the *Stevedoring* case, *supra*, that had the shipping company there been engaged solely in intraprovincial shipping (as opposed to interprovincial as was assumed), stevedores could not have been combined in a unit comprising office employees or other workers engaged in matters not related to navigation. Similar views are expressed in other cases; see, for example, *R. v. Picard, Ex parte International Longshoremen's Association, Local 375* (1967), 65 D.L.R. (2d) 658 (Que. Q.B.), and *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115. Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of *Winner, supra*. If the problems here are sufficiently acute, and Parliament deems it appropriate to do so, resort could be had to such techniques.

Other Provincial Powers Over Works — Section 92A

78 The appellants also sought to argue that the works described in s. 92(10)(*c*) did not extend to works specifically mentioned in other provisions of the Constitution. As Iacobucci J. has observed, this involves interpreting the Constitution as consisting of logic type compartments. The Constitution must, rather, be interpreted as an organic instrument. I accept my colleague's conclusion that s. 92(10)(*c*) extends to works created under other headings in s. 92, and s. 92A cannot be considered any different in this respect. Provisions granting legislative powers placed in separate sections to provide for qualifications to those powers should be treated, subject of course to those qualifications, in the same way; see *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, *per* Estey J. (Beetz J. concurring), at p. 1201. As will be seen, I agree with Iacobucci J. as well that s. 92A does not have the effect of removing from the ambit of Parliament's authority works declared to be for the general advantage of Canada. Where I differ from my colleague is with his view of the nature of the power accorded to the provinces by s. 92A(1)(*c*) to legislate in relation to the development, conservation and *management* of sites and facilities in the province for the generation of electrical energy.

79 It must be confessed that s. 92A(1), including para. (*c*), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers; see P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 29-19. So it is tempting to seek additional meaning from the provision. It may be, however, that s. 92A(1) is merely preliminary to the provisions that follow, although, as I will indicate, it, at a minimum, fortifies the pre-existing provincial powers. There is reason to think this was one of its major goals.

80 To understand the situation, it is useful to examine the backdrop against which s. 92A was passed. In a general sense, the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces. These concerns were by no means minimized by cases such as *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, which underlined the severe limits on provincial power over resources that are mainly exported out of the province, as well as on the provincial power to tax these resources.

81 It was to respond to this insecurity about provincial jurisdiction over resources — one of the mainstays of provincial power — that s. 92A was enacted. Section 92A(1) reassures by restating this jurisdiction in contemporary terms, and the following provisions go on, for the first time, to authorize the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area, as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces.

82 Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(*a*) of the *Constitution Act, 1867*; see *British Columbia Power Corp. v. Attorney-General of British Columbia* (1963), 44 W.W.R. 65 (B.C.S.C.). More important, provincial power commissions supply electrical energy to other provinces and the United States on "a regular and continuing basis", which a number of cases in other areas have held to be sufficient to make an integrated undertaking fall within federal legislative competence; see, for example, *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 1 O.R. 272 (C.A.). There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking. For a discussion of these problems as they appeared in the period preceding the enactment of s. 92A, see G.V. La Forest and Associates, *Water Law in Canada* (1973), at pp. 46 *et seq.*, esp. at pp. 50-51, 53-56. While a number of commentators, including myself, did not share this view of the law, the result on the authorities was by no means certain. The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(*c*)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating

facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.

83 What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(*a*). But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "[a]ll works and undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations.

Peace, Order and Good Government

84 This case can equally well be disposed of under Parliament's power to legislate over matters of national concern under the peace, order and good government clause in s. 91 of the *Constitution Act, 1867*. There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power; see *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, and *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. No one seriously disputed this assertion, and my colleagues both agree that this is so. The view of the Attorney General of Canada is supported by authority in the lower courts; see *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.), at p. 869; and *Denison Mines Ltd. v. Attorney-General of Canada*, [1973] 1 O.R. 797 (H.C.), at p. 808. The strategic and security aspects of nuclear power in relation to national defence and the catastrophe and near catastrophe associated with its peaceful use and development at Chernobyl and Three Mile Island bespeak its national character and uniqueness.

85 The appellants, we saw, argue, however, that the distinct aspects over which atomic energy rises to the national level are those concerned with health and safety. But this very argument is self-defeating. With the inherent potential dangers associated with nuclear fission, industrial safety — indeed the safety of people hundreds of miles from a nuclear facility — is necessarily dependant on the personnel who operate the facility. A strike, and indeed mere carelessness, could invite disaster. As the Attorney General of Canada put it: "The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions for employment of the individuals who operate the plant, both for their own safety, and for that of the general public."

86 Quite apart from this doomsday scenario, what was said in the context of a work subject to the declaratory power applies equally to a work over which Parliament has jurisdiction under its general power in relation to matters of national concern. Labour relations are an integral part of that jurisdiction. I observe that this approach had been adopted in *Pronto, supra*.

87 I add that what I have had to say about the relationship of nuclear facilities to various provincial legislative powers, including those arising out of s. 92A of the *Constitution Act, 1867*, fully applies here.

Provincial Instrumentality

88 Finally, the appellant Ontario Hydro advanced the notion that federal legislation should be so interpreted as not to apply to corporations set up to advance a provincial purpose. It conceded, however, that it was not a Crown agent and so not entitled to Crown immunity in the traditional sense. The Attorney General for New Brunswick did, however, argue that Crown immunity should apply where Crown agency is established. It is, therefore, right to say that the latter argument cannot stand in view of my holding that provincial laws regarding labour relations are inapplicable to works falling within the exclusive legislative jurisdiction of Parliament, since such legislation falls within the core of that jurisdiction.

89 Turning to Ontario Hydro's argument about provincial instrumentalities, I note that a similar argument was advanced by Alberta in relation to a "provincial project", the Oldman River Dam; see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63, 68-69. The Court rejected this contention, which it branded as not particularly helpful in sorting out constitutional authority over the work and as positing a type of interjurisdictional immunity that had earlier been rejected in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at p. 275. Similar considerations apply here. The fallacy in this context appears to result from the failure to recognize labour relations as vital aspects of the management of nuclear facilities, for no similar argument is made in respect of regulations under the *Atomic Energy Control Act*.

Disposition

90 I would dismiss the appeals and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the *Canada Labour Code* applies to employees of Ontario Hydro who are employed on or in connection with nuclear facilities that come under s. 18 of the *Atomic Energy Control Act*. I would make no order as to costs.

The reasons of Sopinka, Cory and Iacobucci JJ. were delivered by *Iacobucci J.* (dissenting):

91 The question in these appeals is whether the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally applies to govern labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations. Although technically there are two appeals involved, in substance there is only one and so I refer herein to both as "the appeal".

I. Facts

92 Ontario Hydro is a corporation owned by the province of Ontario and no one disputes that it is not a Crown agent. Its affairs are governed by the *Power Corporation Act*, R.S.O. 1990, c. P.18. Ontario Hydro has 81 electrical generating stations of which five are nuclear electrical generating stations. These five nuclear plants provide roughly 48 percent of Ontario Hydro's total electrical power generating capacity. Power is generated in the nuclear stations by way of CANDU reactors which, through the process of nuclear fission, produce enough energy to drive the facilities' turbines. Once generated, this power (along with that originating from thermal and hydraulic generating stations) is distributed throughout the province by way of a network of transformer and distribution stations. Plutonium, deuterium and deuterium oxide, cobalt-60, and tritium and tritium oxide are produced during the electricity generating process: these substances are all prescribed under the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16.

93 The operation of a nuclear reactor is heavily regulated by federal legislation. Section 18 of the *Atomic Energy Control Act* declares that all works and undertakings constructed for the production of atomic energy and the production of prescribed substances are works for the general advantage of Canada. Each of Ontario Hydro's CANDU reactors is covered by a licence issued by the Atomic Energy Control Board ("AECB") under the regulations made under the *Atomic Energy Control Act*. These licences impose requirements with respect to the way Ontario Hydro operates the facilities, Ontario Hydro's radiation protection measures and emergency procedures, and the measures taken regarding the physical security of fissionable prescribed substances and of the facilities themselves. The licences also dictate minimum staffing levels in the control rooms, require written AECB approval of certain staff positions in the facilities (including those in positions affected by the application for certification which initiated the present action), and prescribe that significant staffing and organizational changes in the facilities require prior notice to and the written permission of the AECB. Notwithstanding the declaration in s. 18 of the *Atomic Energy Control Act*, some employees at Ontario Hydro's Bruce nuclear plant have been unionized under provincial labour legislation since 1973.

94 This case arose when the Society of Ontario Hydro Professional and Administrative Employees ("Society") applied under the Ontario *Labour Relations Act* to the Ontario Labour Relations Board ("OLRB") for certification as the exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Ontario Hydro, including those employed at Ontario Hydro's nuclear plants. The application was challenged by a group of employees calling themselves the Coalition to Stop the Certification of the Society. One of the grounds for the challenge was that the OLRB was without jurisdiction to

certify the proposed bargaining unit because some of the employees within the proposed unit, viz. those who worked at Ontario Hydro's nuclear generating stations and at the construction site for the nuclear generating station at Darlington, fall under the jurisdiction of the *Canada Labour Code*. The Coalition claimed that the declaration in s. 18 of the *Atomic Energy Control Act*, combined with ss. 91(29) and 92(10)(*c*) of the *Constitution Act, 1867*, brought Ontario Hydro's nuclear generating stations within exclusive federal jurisdiction with respect to labour relations because s. 4 of the *Canada Labour Code* declares the Code applicable to all persons employed on or in connection with a federal work.

95 The OLRB held hearings to determine whether or not it had jurisdiction to include in the proposed bargaining unit a category of employees definable by reference to s. 18 of the *Atomic Energy Control Act*. The Attorneys General of Canada and Ontario declined to participate in these hearings but the Canadian Union of Public Employees ("CUPE"), which was then certified as the bargaining agent for all unionized employees of Ontario Hydro including employees at the Bruce nuclear plant, participated with the consent of the parties. The OLRB held that it had no jurisdiction to certify the bargaining unit in the Society's application because the proposed unit included employees, employed on or in connection with the nuclear generating stations, who fell under the jurisdiction of the *Canada Labour Code*: [1988] OLRB Rep. Feb. 187.

96 Ontario Hydro, supported by the Society and CUPE, applied to the Ontario Divisional Court for judicial review by way of an order in the nature of *certiorari* quashing this decision of the OLRB; the Attorney General of Canada intervened at this stage of the proceedings in support of the OLRB. The Divisional Court granted the application for *certiorari*, quashed the OLRB's decision, and issued mandamus ordering the OLRB to deal with the Society's certification application: (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC ¶ 14,044.

97 The Attorney General of Canada appealed that decision to the Ontario Court of Appeal. The Court of Appeal, Galligan J.A. dissenting, allowed the appeal, set aside the decision of the Divisional Court and ordered that the decision of the OLRB be reinstated: (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC ¶ 14,014 (hereinafter cited to O.R.). This Court granted leave to appeal, [1991] 3 S.C.R. x, and the Chief Justice stated the following constitutional question:

> Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16?

II. Relevant Legislation and Constitutional Provisions

Atomic Energy Control Act, R.S.C., 1985, c. A-16

98

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;
>
> . . . . .
>
> *18.* All works and undertakings constructed
>
> (*a*) for the production, use and application of atomic energy,
>
> (*b*) for research or investigation with respect to atomic energy, and
>
> (*c*) for the production, refining or treatment of prescribed substances,
>
> are, and each of them is declared to be, works or a work for the general advantage of Canada.

Canada Labour Code, R.S.C., 1985, c. L-2

99

2. In this Act, "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

. . . . .

(*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(*i*) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

. . . . .

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

Constitution Act, 1867

100

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . . . .

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . . . .

10. Local Works and Undertakings other than such as are of the following Classes: —

. . . . .

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private Nature in the Province.

92A. (1) In each province, the legislature may exclusively make laws in relation to

. . . . .

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

. . . . .

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

III. Judgments Below

Ontario Labour Relations Board

101 The OLRB held that by virtue of ss. 92(10)(*c*) and 91(29) of the *Constitution Act, 1867*, Parliament has exclusive legislative authority over local works it declares to be to the general advantage of Canada. Such a declaration, applicable to Ontario Hydro's nuclear generating stations, had been made in s. 18 of the *Atomic Energy Control Act*. Counsel for Ontario Hydro argued that Ontario Hydro was an undertaking and not a work constructed for any of the purposes set out in s. 18. The OLRB held that a work used by and forming part of an undertaking can be the object of a declaration under s. 92(10)(*c*). When Parliament makes such a declaration, its jurisdiction over the work extends to the regulation of the use and management of the work forming part of the undertaking (relying on *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434).

102 The OLRB rejected Ontario Hydro's argument that Parliament only has jurisdiction to make laws with respect to matters of national interest in a work declared to be to the general advantage of Canada: Ontario Hydro's position on this matter was inconsistent with the preamble to s. 91 of the *Constitution Act, 1867* which expressly gives Parliament legislative jurisdiction to all matters in the enumerated classes of subjects, including s. 91(29). Ontario Hydro argued that s. 92A excludes federal jurisdiction over labour relations because such jurisdiction would conflict with the power of the provinces to "manage" electrical generating facilities: the OLRB held that s. 92A has no special place in the *Constitution Act, 1867* and accordingly must be read in light of s. 91 which gives Parliament exclusive jurisdiction over matters coming within the classes of subjects enumerated in s. 91 "notwithstanding anything in this Act".

103 The OLRB held that the declaration made in s. 18 of the *Atomic Energy Control Act* was valid and proper with respect to Ontario Hydro's nuclear generating facilities. There was no basis for Ontario Hydro's argument that s. 92(10)(*c*) declarations cannot extend to matters within s. 92A(1), or that a declaration may only be made with respect to matters falling solely within s. 92(10)(*c*): given the wide scope of matters within s. 92, such as property and civil rights, this argument would totally neutralize the s. 92(10)(*c*) declaratory power. Further, nothing in s. 92A(1) repealed or neutralized the declaration in s. 18 of the *Atomic Energy Control Act*. Accordingly, the federal government had authority to legislate with respect to Ontario Hydro's labour relations with persons employed on or in connection with the nuclear generating facilities. The OLRB declared that it did not have jurisdiction to deal with the Society's application for certification since the proposed unit included employees who fell within federal labour law jurisdiction.

Divisional Court (per Steele, Montgomery and White JJ.)

104 The Divisional Court held that the special provision for electrical generating facilities in s. 92A removed those facilities from the category of works contemplated by s. 92(10)(*c*). "Such Works" in s. 92(10)(*c*) can only refer to local works and undertakings contemplated to be within s. 92(10). This expression cannot refer to a power specifically granted to a province in s. 92A. Section 92A(1)(*c*) was enacted after the *Atomic Energy Control Act* and Parliament must be deemed to have known that it was placing the generation and production of electrical energy within the jurisdiction of the provinces. Therefore, s. 18 of the *Atomic Energy Control Act* is inapplicable in so far as it purports to declare Ontario Hydro's works to be totally for the general advantage of Canada.

105 The Divisional Court held that Parliament had the jurisdiction to enact the *Atomic Energy Control Act* in the national interest under the peace, order and good government power ("p.o.g.g. power") in the opening words of s. 91 of the *Constitution Act, 1867*. Parliament's p.o.g.g. power is residuary in nature and should be read together with the specific power in s. 92A(1)(*c*) not to exclude provincial jurisdiction except where absolutely necessary. Even where there is a conflict between s. 91 and s. 92, the doctrine of mutual modification holds that the general power should be narrowed to exclude the narrower class of subjects.

106 The Divisional Court also held that, under the double aspect doctrine, the federal p.o.g.g. power does not necessarily exclude provincial power over labour relations. The pith and substance of the *Atomic Energy Control Act* and the regulations passed under it, is not the management or labour relations of a facility. Section 92A(1)(*c*) gives the provinces the exclusive power to manage facilities for electrical energy; the provinces therefore have the power to legislate with respect to labour relations at those facilities. The *Atomic Energy Control Act* imposes aspects of Parliament's concerns that must be obeyed with respect to the works but this does not totally exclude provincial jurisdiction where the core undertaking is clearly provincial. The Divisional Court distinguished the decision of this Court in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 ("*Bell Canada*"), since that case concerned a *federal* undertaking. Accordingly, under the double aspect doctrine, provincial labour legislation is applicable to the employees who work at the sites in question.

107 The Divisional Court held that Ontario Hydro is not a federal work or undertaking; therefore the *Canada Labour Code* does not apply according to the scope of the statute set out in s. 4. Further, Ontario Hydro is a "provincial public policy instrument" to which the statute should not be interpreted to apply. Only if Parliament validly amended the *Atomic Energy Control Act* to provide that it was in the national interest that all labour relations at nuclear generating sites be governed by federal legislation would provincial labour legislation be supplanted. The Divisional Court noted finally that the licence for the Bruce nuclear facility, which is representative of the licences issued to all of Ontario Hydro's nuclear generating sites, indicates that all general laws of the province are applicable to the facility, subject to the conditions of the licence. The Ontario labour legislation is a law of general application in the province and can stand together with the federal requirements for health, safety and security.

108 The Divisional Court ordered that the decision of the OLRB be quashed and directed the OLRB to deal with the Society's certification application.

Ontario Court of Appeal

Tarnopolsky J.A. (Lacourcière J.A. concurring)

109 Tarnopolsky J.A. indicated that there were two issues before the court. First, did the enactment of s. 92A remove electrical facilities from the cate gory of works contemplated by s. 92(10) of the *Constitution Act, 1867*, rendering the declaration in s. 18 of the *Atomic Energy Control Act* inapplicable to Ontario Hydro's nuclear generating facilities? Second, even if s. 18 does apply to Ontario Hydro's nuclear generating facilities, does Parliament's power extend to the labour relations of the employees of those facilities?

110 With respect to the first issue, Tarnopolsky J.A. held that the provincial legislative powers in s. 92A cannot be exercised to the exclusion of other federal powers. This view was supported by academic commentators and the pertinent proceedings of the Special Joint Committee on the Constitution. The Divisional Court erred in not distinguishing between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the character or nature of those facilities (i.e., being local works). The wording of s. 92A fails to support the conclusion that electrical facilities were removed from the category of works contemplated by s. 92(10)(*c*).

111 Further, Tarnopolsky J.A. held that to accept that the federal declaratory power is an exception only to the provincial legislative authority over local works and undertakings in s. 92(10) would result in an absurdity. The jurisdictional basis of a matter over which a province has legislative competence may arise from any number of heads of power; there is no authority for the claim that legislative competence over a particular subject matter must be founded on or restricted to one head of provincial power. Tarnopolsky J.A. continued (at p. 760):

> ... I would endorse the finding of the OLRB that, if the declaratory power refers to local works or undertakings *only*, then s. 92 ¶ 16 — "Generally all Matters of a merely local or private Nature in the Province" — would neutralize Parliament's power to declare anything to be for the general advantage of Canada, for undoubt edly a local work could reasonably be found to be a matter of a local or private nature in the province. It is that absurdity which must be avoided. [Emphasis in original.]

112 Section 92A must be read in light of s. 91 using the doctrine of mutual modification, i.e., the provincial power in s. 92A should not be read to exclude the federal power in s. 92(10)(*c*) and s. 91(29) where the two powers can co-exist. Moreover, Parliament may touch on those classes of subjects assigned exclusively to the provinces under a valid exercise of its legislative powers.

113 Works or undertakings declared to be to the general advantage of Canada are withdrawn from provincial legislative competence through the operation of s. 92(10)(*c*) and s. 91(29). Since there is nothing to indicate that works within s. 92A were removed from the class of works in s. 92(10), there is nothing to preclude the declaration in s. 18 of the *Atomic Energy Control Act* from applying to Ontario Hydro's nuclear facilities. The declaration has the effect of granting Parliament control over these works. That control includes the power to regulate the operation of the work, including the employment of persons employed on such works (in this regard, Tarnopolsky J.A. relied on the decision of this Court in *Bell Canada, supra*).

114 Even if s. 92A removed electrical generating works from s. 92(10), Parliament could validly exercise jurisdiction over Ontario Hydro's nuclear generating facilities using its p.o.g.g. power from the opening words of s. 91. Section 92A does not detract from the scope of Parliament's authority under the p.o.g.g. power. Tarnopolsky J.A. held that "the regulation of atomic energy, as a matter of national concern, must include the labour relations of Ontario Hydro's nuclear facilities, in spite of the practical difficulties that may be encountered as a result of this decision" (p. 764).

115 Tarnopolsky J.A. concluded (at p. 768):

> In conclusion, Ontario Hydro's nuclear facilities are works that, although wholly situate within a province, are declared by Parliament to be for the general advantage of Canada within the meaning of s. 2(*h*) of the *Labour Code*. As indicated above, by s. 4 Parliament has expressly made the *Labour Code* applicable to all employees who are employed upon or in connection with such works as defined in s. 2. Ontario Hydro's nuclear workers, accordingly, must be governed by the federal *Labour Code*.

Galligan J.A., dissenting

116 Galligan J.A. felt that, according to the testimony of Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, the division of labour relations between two separate jurisdictions would cause Ontario Hydro serious practical difficulties. This result was to be avoided unless the Constitution required it. Galligan J.A. held that it was not necessary to decide whether federal jurisdiction over the nuclear generating sites arose from the federal declaratory power or from the federal p.o.g.g. power. He set out the issue in the case as follows (at p. 771):

> Because Parliament has exclusive authority to regulate atomic energy it is not contested that it has power to regulate Hydro's five nuclear generating sites. The issue is whether, because of that authority it also has power, to the exclusion of the province, to regulate Hydro's labour relations with its employees working on or in connection with those generating stations.

117 Galligan J.A. distinguished this Court's trilogy on the interrelation of provincial statutes of general application with federal statutes regulating enterprises which come within Parliament's exclusive legislative sphere (*Bell Canada, supra; Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897) on the ground that the undertakings in those cases were truly federal while Ontario Hydro is a provincial undertaking: "Only part of one of its many activities is within the federal sphere of legislative competence" (p. 772). He continued (at p. 773):

> I think the principle to be drawn from the treatment of this subject in the trilogy is that a class of subject-matter within the exclusive legislative competence of Parliament will be held to include labour relations if labour relations is an integral part, an essential part or a vital part, of the exercise of that jurisdiction. To apply that principle to this case, I think that, if labour relations is an integral, essential or vital part of the power to regulate atomic energy at Hydro's nuclear generating sites, then the exception to the general rule of provincial power over labour relations would apply.

118 Galligan J.A. concluded that no evidence had been led to demonstrate that labour relations were such an integral part of the regulation of atomic energy. Indeed, since the federal government had not controlled labour relations at Ontario Hydro's nuclear generating sites to date, there was evidence that labour relations were not such an integral part of the regulation of atomic energy. For the same reason that labour relations of a federal undertaking must be regulated federally, the labour relations of a provincial undertaking should be regulated provincially. Therefore there was no reason to apply the exception to the general rule that labour relations fall within the exclusive jurisdiction of the provincial legislatures: "... if the provincial law does not bear on the specifically federal nature of the federal exercise of power the rule excluding application of the provincial law does not apply" (pp. 774-75).

119 The doctrine of federal paramountcy does not apply where there is no conflict between the two statutes (*Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838). Galligan J.A. was disinclined to interpret the stat utes so as to create a conflict where they had been applied together without conflict for 25 years. While the licences issued by the AECB to Ontario Hydro's nuclear generating facilities contained provisions relating to the staffing of those stations, there was no demonstrated conflict between these provisions and Ontario Hydro's labour relations with its employees. Galligan J.A. would have dismissed the appeal and affirmed the order of the Divisional Court.

IV. The Constitutional Question

120

> Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16?

V. Issues

121 The constitutional question raises the following issues:

> 1. What are the nature and effect of the federal declaratory power?
>
> 2. May Parliament validly make declarations under s. 92(10)(*c*) of the *Constitution Act, 1867* with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction in the areas of development, conservation and management by virtue of s. 92A(1)(*c*) of the *Constitution Act, 1867*?
>
> 3. Does a valid declaration by Parliament under s. 92(10)(*c*) of the *Constitution Act, 1867* over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?
>
> 4. If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s. 91 of the *Constitution Act, 1867*, does that juris diction include the labour relations of employees employed in those stations?
>
> 5. Is Ontario Hydro immune from the operation of the *Canada Labour Code* by virtue of interjurisdictional Crown immunity?

VI. Analysis

1. What are the nature and effect of the federal declaratory power?

(a) History of the Declaratory Power

122 The first appearance of a declaratory power that was to be given to the federal government was in the final Resolutions of the Quebec Conference of 1864. The power was listed with the other specific heads of power of the federal government and was worded as follows:

> 29. The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects: —
>
> . . . . .
>
> 11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.

In the final version of the *Constitution Act, 1867*, the declaratory power appeared as an exception to the provincial power over local works and undertakings:

> *92.* In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —
>
> . . . . .
>
> 10. Local Works and Undertakings other than such as are of the following Classes: —
>
> . . . . .
>
> *c.* Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

123 In its early years, the declaratory power was used almost exclusively in relation to local railways. The federal government began to make declarations regarding electricity companies as well as telegraph and other communications companies in the 1880s. The frequency of declarations, which was at its peak in the late 19th century, began to drop off in the early 20th century. The declaration over atomic energy at issue in this case was passed in 1946. Since the 1960s, the federal government has used the declaratory power only twice although old declarations are still reenacted along with the originating legislation (see P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at pp. 22-15 to 22-16, and A. Lajoie, *Le pouvoir déclaratoire du Parlement* (1969), at pp. 123-51).

(b) Nature of the Declaratory Power

124 The federal declaratory power, which is found in the combined operation of s. 92(10)(*c*) and s. 91(29) of the *Constitution Act, 1867*, is unique in the constitutional division of powers. As Duff J. wrote for this Court in *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, at p. 220:

> The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction — exclusive jurisdiction — in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertak ings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

125 Professor Hogg, *supra*, has also noted the exceptional nature of the federal declaratory power (at p. 22-17):

> [T]he federal Parliament's power under s. 92(10)(c) is in conflict with classical principles of federalism because it enables the federal Parliament, by its own unilateral act, to increase its own powers and diminish those of the provinces.

126 Former Chief Justice Bora Laskin referred to the federal declaratory power as "extraordinary" (see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 627). The uniqueness of the federal declaratory power lies in Parliament's ability to decide to assume jurisdiction over a work which would normally be within exclusive provincial jurisdiction.

127 How is this extraordinary power to be exercised by the federal Parliament? First, Parliament must make an explicit declaration that the work is for the general advantage of Canada, or of two or more provinces. Whether or not a work is for the general advantage of Canada is a policy decision of Parliament which will not normally be reviewed by the courts.

128 In *The Queen v. Thumlert* (1959), 20 D.L.R. (2d) 335, the Alberta Court of Appeal indicated that the doctrine of colourability provides a limitation to the exercise of the declaratory power. However, as one commentator has argued:

> [B]ecause of the very nature of the declaratory power, it is doubtful whether the doctrine of colourability would apply to it. The very purpose of s. 92(10)(c) is to extend federal jurisdiction into what otherwise would be the provincial field. Therefore the mere fact that by the declaration the federal Parliament intends to vest in itself jurisdiction over works which otherwise would be within provincial jurisdiction cannot itself be cause for complaint....

(K. Hanssen, "The Federal Declaratory Power Under the British North America Act" (1968-69), 3 *Man. L.J.* 87, at p. 103.)

129 Hanssen suggested that the only limit on Parliament's exercise of the declaratory power would be a narrow version of colourability, namely proof that Parliament had acted in bad faith in making a declaration. However, the Court does not need to decide for the purposes of the present appeal whether or not some form of the doctrine of colourability provides a limit on the federal declaratory power.

130 What may Parliament make the subject of a declaration under s. 92(10)(*c*) of the *Constitution Act, 1867*? Section 92(10)(*c*) refers to "Works" which stands in contrast to the reference in s. 92(10)(*a*) to "Works and Undertakings". This distinction would appear on its face to limit the federal declaratory power to works or tangible things and to exclude undertakings from the operation of the power. However, Parliament has on occasion declared undertakings to be works for the general advantage of Canada. This Court upheld one such declaration in *Quebec Railway Light & Power Co. v. Town of Beauport*, [1945] S.C.R. 16, which concerned a federal declaration that the undertaking of a company was a work to the general advantage of Canada. Both Rand J. and Hudson J. (who dissented in the result) recognized the validity of the declaration without any explicit discussion thereof. Rinfret J. was of the opinion that the declaration was meant to bring "the whole of the works of the company" within the declaration (p. 24). Davis J., who dissented in the result of the case, agreed with Rinfret J. and wrote as follows (at p. 29):

> It seems to me that the word "undertaking" there used involves the totality of the works of the company and that the effect of the statute was that they were declared to be for the general advantage of Canada. Such a decla ration was within the competence of the Dominion Parliament when the meaning and scope of the statute is fairly construed.

Kerwin J. held at p. 32 that "no more extended meaning than the word 'works' [in s. 92(10)(*c*)] bears on its proper construction may be ascribed to the word 'undertaking' in section 1 of the 1895 Act".

131 The line of reasoning that "undertaking" in a federal declaration refers only to the totality of a company's works is thrown into doubt by other federal declarations, such as that found in s. 35 of the *Cape Breton Development Corporation Act*, R.S.C., 1985, c. C-25, which declared the "works and undertakings operated or carried on" by various coal mining and railway companies on Cape Breton Island to be works for the general advantage of Canada. Decisions of this Court such as *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, have assumed that the federal government can declare undertakings as undertakings to be works for the general advantage of Canada.

132 Thus, Parliament may validly declare an undertaking to be a work for the general advantage of Canada. The outer limit of Parliament's power to declare undertakings to be works for the general advantage of Canada is that the undertaking must be linked to a work. As Rand J. stated in his partially dissenting opinion in *Reference re Industrial Relations and Disputes*

Investigation Act, [1955] S.C.R. 529, at p. 553, "Undertakings, existing without works, do not appear in 92(10)(*c*) and cannot be the subject of such a declaration".

133 In my view, "undertaking" refers to the whole of the enterprise within which a work or works is or are situated. In this case, the undertaking is Ontario Hydro. The undertaking is to be distinguished from the set of integrated activities related directly to the work (here, the production of electricity using nuclear power) and from the work itself (the electrical nuclear generating facilities). In some respects, all undertakings for the purposes of s. 92(10)(*c*) involve works but not all works may involve undertakings.

134 As I discussed above, the declaratory power has been used most often with respect to local railways. Other typical subjects of federal declarations include canals, bridges, harbours, telephones, grain elevators and factories of various kinds. Parliament has also made declarations with respect to national battlefields. As Professor Hogg, *supra*, has noted (at p. 22-18):

> It appears, however, that the federal government and Parliament are sensitive to the anomalous character of the power and are now inclined to use the power only sparingly. It has been used very rarely in recent times.

(c) The Effect of a Declaration

135 Having briefly considered the background to and nature of the federal declaratory power and how that power is exercised, one must deal with the most obvious question as to the effect of a declaration that a work is to the general advantage of Canada. To begin with, the Court has rejected the proposition that Parliament gains jurisdiction over no more than the physical shell of a work when it makes a declaration that a work is for the general advantage of Canada. In several cases involving grain elevators, the Court has held that jurisdiction over declared works includes jurisdiction to regulate the operations of declared works. One example of this is *Chamney v. The Queen*, [1975] 2 S.C.R. 151, where Martland J. stated for the Court (at p. 159):

> Having concluded that the premises in question here are works declared to be for the general advantage of Canada, it is clear that Parliament could control the quantities of grain which could be received into an elevator and could enact s. 16(2) of the *Canadian Wheat Board Act* as a means of exercising control over the work and that the appellant could properly be convicted of an offence under that subsection.

136 Laskin, *supra*, has described federal jurisdiction over declared works as follows (at pp. 628-29):

> [T]he result of a declaration of a "work" to be for the general advantage of Canada must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character.

137 Contrary to the holding of Desjardins J.A. in her concurring reasons in *Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1992] 2 F.C. 3, at p. 34, Parliament's legislative jurisdiction over a declared work is not "plenary". As Beetz J. said for the Court in *Bell Canada, supra*, at p. 762:

> [W]orks, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction....

138 The Court reaffirmed this principle in *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission), supra*, where Gonthier J. wrote for the Court (at p. 853):

> The immunity pertaining to federal status applies to things or persons falling within federal jurisdiction, some specifically federal aspects of which would be affected by provincial legislation. This is so because these specifically federal aspects are an integral part of federal jurisdiction over such things or persons and this jurisdiction is meant to be exclusive.

> It is the fundamental federal responsibility for a thing or person that determines its specifically federal aspects, those which form an integral part of the exclusive federal jurisdiction over that thing or person.

139 As a result, when the federal government makes a declaration under s. 92(10)(*c*) of the *Constitution Act, 1867*, that a work is to the general advantage of Canada, Parliament obtains jurisdiction not only over the physical parts of the work but also over those aspects of the operation of the work which makes the work specifically of federal jurisdiction, i.e., those aspects of the work which make the work one for the general advantage of Canada.

140 This limit on Parliament's jurisdiction over a declared work is consistent with the interpretation of the declaratory power as a "narrow and distinct" power in order that the power not seriously encroach on provincial jurisdiction (*per* Dickson C.J. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 671).

141 This limit is also consistent with the traditional approach to division of powers questions which has been one of balancing federal and provincial powers through the application of doctrines such as mutual modification, double aspect and pith and substance. The *Constitution Act, 1867* set up a federalist system of government for Canada and should be interpreted so as not to allow the powers of either Parliament or the provincial legislatures to subsume the powers of the other. As Henri Brun and Guy Tremblay have written:

> [TRANSLATION] The history of the birth of the federation, the first "whereas" in the preamble to the *Constitution Act, 1867* and, in particular, the usually exclusive division of powers contained therein show clearly that the purpose of this Act was to establish a federal system.
>
> That is why, in numerous decisions, the courts have tried to protect the federal foundations of the Canadian system. They have sought the maintenance of a certain balance between the federal government and the provinces.

(*Droit constitutionnel* (2nd ed. 1990), at p. 402.)

142 This Court recognized the primacy of the balance between federal and provincial powers in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, where the Court held that a substantial measure of provincial consent was required by convention before the Canadian Constitution could be amended. The majority held that the reason for the convention was the federal principle (at pp. 905-6):

> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.

While the use of the declaratory power is not as dramatic as the unilateral amending of the Constitution, in my view the federal principle should be respected nonetheless. Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.

143 Confining Parliament's jurisdiction over declared works within the sphere of those aspects of the work which make the work of federal jurisdiction accords with the jurisprudence on Parliament's other unusual power, the power to legislate for the peace, order and good government of the country found in the preamble to s. 91 of the *Constitution Act, 1867*. The cases concerning the p.o.g.g. power have developed a set of strict criteria which the federal government must meet before it can exercise its residual authority. This prevents the p.o.g.g. power from being abused to disturb the balance of federalism. See, for example, the decision of this Court in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, which I will discuss below.

144 To summarize, the federal declaratory power is unique in that under it, Parliament may decide as a matter of policy to withdraw a work or an under taking linked to works from what would normally be provincial jurisdiction by declaring the work or undertaking to be a work for the general advantage of Canada, or of two or more provinces. Parliament's jurisdiction over a declared work is not plenary, but extends only to those aspects of the work which make the work specifically of federal jurisdiction. Put another way, Parliament obtains exclusive jurisdiction to regulate those aspects of the work that are integral to the federal interest in the work.

2. May Parliament validly make declarations under s. 92(10)(c) of the Constitution Act, 1867 with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction in the areas of development, conservation and management by virtue of s. 92A(1)(c) of the Constitution Act, 1867?

145 The parties do not dispute that the combined effect of s. 92(10)(*c*) and s. 91(29) of the *Constitution Act, 1867* is to give the federal government the power to declare works to be for the general advantage of Canada and to bring those works within the exclusive jurisdiction of Parliament. Parliament has made an express declaration in s. 18 of the *Atomic Energy Control Act* that all works and undertakings constructed for the production, use and application of atomic energy are works to the general advantage of Canada. It is not contested that Ontario Hydro's nuclear electrical generating stations are works which by definition fall within Parliament's declaration. However, Ontario Hydro and CUPE submit that Parliament's declaration is not valid with respect to nuclear electrical generating stations.

146 The argument of Ontario Hydro and CUPE, which was accepted by the Divisional Court, is that where identified types of works (such as electrical generating facilities) are specifically assigned to the exclusive jurisdiction of the provinces, the federal declaratory power cannot operate with respect to those works for two reasons. First, the federal declaratory power is authorized only with respect to local works under s. 92(10) which does not include local works which fall under another head of s. 92. Second, the federal declaratory power is a general power which must be read narrowly to exclude those classes of subjects which are assigned exclusively to the provincial legislatures.

147 With respect to the first reason, the Ontario Court of Appeal rejected Ontario Hydro and CUPE's argument that the declaratory power applies only to works which do not fall within the terms of any other subject matter enumerated in s. 92. The basis on which the Ontario Court of Appeal rejected this argument was that it would result in an absurdity since, for example, s. 92(16) gives the provinces exclusive jurisdiction over all matters of a merely local or private nature in the province. This would mean that the declaratory power could never be exercised because s. 92(16) would prohibit its exercise. I find the response of the Court of Appeal persuasive on this point. I would also point out that the argument of Ontario Hydro and CUPE depends on construing the various heads of power as mutually exclusive watertight compartments and on slotting every matter into one and only one head of power. The watertight compartments approach to the interpretation of ss. 91 and 92 of the *Constitution Act, 1867* has often been rejected by the courts, and rightly so (see, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 180-81).

148 Ontario Hydro refined its argument before this Court to claim in the alternative that the federal declaratory power applies only to works which do not fall within a category specifically assigned to the provinces, such as electrical generating facilities under s. 92A(1)(*c*). However, this argument has no merit since under s. 92A(1)(*c*), it is not the *works* themselves which are given to provincial jurisdiction, but the *conservation*, *development* and *management* of those works. As the Court of Appeal held, it is an error not to distinguish between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the character or nature of those facilities (i.e., being works). It is still open to the federal government to make a declaration that a work of a type specifically mentioned in s. 92A(1)(*c*) is to the general advantage of Canada, bringing the work under federal jurisdiction. The question, which will be addressed below, is what sort of jurisdiction does the federal government gain over a work mentioned in s. 92A(1)(*c*) through the operation of such a declaration, given that the provinces have explicitly been assigned the exclusive jurisdiction over the management of those works.

149 As I mentioned above, Ontario Hydro and CUPE argued that the second reason why works which are specifically identified in s. 92 are not subject to the declaratory power is that the federal declaratory power is a general power which must be read narrowly to exclude those classes of subjects assigned exclusively to the provinces. This argument refers to the interpretative process known as the doctrine of mutual modification which was established by the Privy Council in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, where the Privy Council said at pp. 108-9:

> With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal

> with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

150 This method of balancing the provisions in ss. 91 and 92 of the *Constitution Act, 1867* was adopted by this Court in *Reference re Waters and Water-Powers, supra*, where Duff J. wrote for the Court (at p. 216):

> There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole.

151 However, as already mentioned, since the works themselves have not been specifically assigned to the provinces under s. 92A(1)(*c*), there is no apparent conflict between the federal declaratory power and the provincial jurisdiction over management which would require a reading down of the federal declaratory power. Further, given that the very nature of the declaratory power is to enable Parliament to assume jurisdiction over a work which would otherwise be within provincial jurisdiction, it is arguable that the doctrine of mutual modification is of little application to the determination of what works are subject to the federal declaratory power.

152 Despite the lack of conflict between the federal declaratory power and the provincial power over management, Ontario Hydro argued that Parliament gave up its declaratory power over nuclear electrical generating stations when s. 92A was added to the *Constitution Act, 1867* in 1982. I note that Ontario Hydro, as well as the Ontario Court of Appeal, placed some emphasis on what Parliament must have intended when s. 92A was ratified as part of the *Constitution Act, 1867*. In my view, CUPE is correct in indicating that Tarnopolsky J.A. should not have relied so heavily on the Minutes of the Special Joint Committee on the Constitution in concluding that s. 92A was not meant to diminish the federal declaratory power. However, neither can Ontario Hydro claim that Parliament must be deemed to have known that it was neutralizing its past declarations or its future declaratory power with respect to nuclear electrical generating stations.

153 This Court has indicated that the Minutes of the Special Joint Committee on the Constitution carry limited weight in the arena of constitutional interpretation (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 509, where Lamer J., as he then was, held with respect to interpreting the *Canadian Charter of Rights and Freedoms* that "it would in my view be erroneous to give these materials anything but minimal weight"). This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution. Rather, in Canada, constitutional interpretation rests on giving a purposive interpretation to the wording of the sections. As Professor Hogg notes in "The Charter of Rights and American Theories of Interpretation" (1987), 25 *Osgoode Hall L.J.* 87, at pp. 97-98:

> The principle of progressive interpretation of the constitution is as firmly established in Canada as is the principle of minimal reliance on legislative history. The Supreme Court has repeatedly asserted that the language of the constitution is not to be frozen in the sense in which it would have been understood in 1867. Rather, the constitution is to be regarded as "a living tree capable of growth and expansion within its natural limits".

154 While the wording of s. 92A is unambiguous that management of electrical generating facilities is within the exclusive jurisdiction of the province, the section does not indicate that any special reservation from the federal declaratory power was made. In my opinion, Parliament did not give up its declaratory power over nuclear electrical generating stations when s. 92A of the *Constitution Act, 1867* was added to the Constitution in 1982.

155 I would add that these conclusions accord with academic writings on s. 92A which have indicated that the resource amendment, as the section is called, increased provincial power with respect to the raising revenues from resources and to regulating the development and production of resources without diminishing Parliament's pre-existing powers. See R.D. Cairns, M.A. Chandler and W.D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986), 24 *Osgoode Hall L.J.* 299, at p. 300; and W.D. Moull, "The Legal Effect of the Resource Amendment — What's New in Section 92A", in J.P. Meekison, R.J. Romanow and W.D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (1985), 33, at pp. 53-54.

156 As I noted above, the scope of federal jurisdiction over the works it makes subject to declarations is not absolute in the context of traditional interpretations of federalism and the declaratory power. Therefore, Ontario Hydro's exhortation that this Court must, by removing certain classes of works from the ambit of the declaratory power, stand firm against the onslaught of federal gutting of all provincial power through the declaratory power loses its force.

157 The declaration in s. 18 of the *Atomic Energy Control Act* is therefore valid with respect to Ontario Hydro's nuclear electrical generating stations which are works within the definition of that section. This declaration brought Ontario Hydro's nuclear electrical generating stations as works within the jurisdiction of Parliament which, according to the opening words of s. 91 of the *Constitution Act, 1867*, is exclusive jurisdiction. The next question to be addressed is whether or not Parliament's exclusive jurisdiction over On tario Hydro's nuclear generating facilities as works includes the labour relations of employees employed in those stations.

3. Does a valid declaration by Parliament under s. 92(10)(c) of the Constitution Act, 1867 over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?

158 To answer this question, one should begin with the proposition that, generally speaking, labour relations are a matter falling under the provincial jurisdiction over property and civil rights found in s. 92(13) of the *Constitution Act, 1867*. This was the conclusion of the Privy Council in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, when they struck down the federal *Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20, which purported to regulate industrial disputes in the mining industry as well as public utilities.

159 Beginning with the decision of the Court in *Reference re Industrial Relations and Disputes Investigation Act, supra*, there came to be recognized a principle that, despite jurisdiction over labour relations being normally a matter under provincial jurisdiction, where federal *undertakings* were concerned Parliament obtained legislative authority over labour relations. The rationale behind this principle is that labour relations are an integral part of an undertaking and Parliament cannot effectively regulate an undertaking without control over labour relations. Martland J. held for the Court in *Commission du salaire minimum v. Bell Telephone Co. of Canada, supra*, at p. 772:

> In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament within s. 91(29).... Similarly, I feel that the regulation and control of the scale of wages to be paid by an inter provincial undertaking, such as that of the respondent, is a matter for exclusive federal control.

160 This theme was taken up in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, which was the first of the cases in this area to articulate the rules by which the sharing of jurisdiction over labour relations is to be achieved. *Construction Montcalm* concerned the issue of whether provincial minimum wage laws were applicable to the labour relations of a construction company involved in the construction of Mirabel airport on federal Crown land. Beetz J. wrote the reasons for the majority and made the following statement of the law (at pp. 768-69):

> The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider*. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single

> federal subject: *In re the validity of the Industrial Relations and Disputes Investigation Act* (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one....

The Court held that there was nothing specifically federal about Construction Montcalm's business simply because it was building an airport. Therefore Construction Montcalm was not immune from the operation of provincial laws regarding minimum wages and other conditions of employment.

161 The Court reaffirmed the principles of *Construction Montcalm* in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, where Dickson J. stated since labour relations are integral to the operation of an undertaking, service or business, labour relations will be removed from provincial jurisdiction where federal undertakings are concerned. Northern Telecom was appealing the decision of the Canada Labour Relations Board certifying the respondent union as the bargaining agent for a unit of Northern Telecom's installation supervisors. The Court was unable to determine the nature of Northern Telecom's business on the evidence before the Court, and dismissed Northern Telecom's appeal on the ground that Northern Telecom had failed to show reversible error by the Canada Labour Relations Board.

162 The most recent series of cases in this area is the trilogy of *Bell Canada, Courtois* and *Alltrans Express, supra*. Again, these decisions emphasized that, where a federal undertaking is concerned, jurisdiction over labour relations will fall to the federal government. As Beetz J. held in the lead case of the trilogy, *Bell Canada, supra*, at pp. 761-62:

> ... Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)*a., b.* and *c.* of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada.

163 Although these cases concluded that federal jurisdiction over labour relations automatically flows from federal jurisdiction over an undertaking because labour relations are an integral part of the management of an undertaking, they are not dis positive of the case at bar for two reasons. First, we are concerned here with works and not undertakings, and the parties have conceded that Ontario Hydro is a provincial undertaking. Second, the Court must consider the effect of the explicit grant of authority to the provinces in s. 92A over management of electrical generating facilities.

164 However, the cases I have just discussed do provide the general analytic framework within which to determine who has jurisdiction over labour relations at Ontario Hydro's nuclear electrical generating facilities. The question to be answered is whether or not federal authority over labour relations is integral to the exercise of federal competence over the nuclear electrical generating plants as works declared to be to the general advantage of Canada. As I see it, answering this question in turn raises three additional questions. In the first place, what is the character of labour relations, both generally and in the context of nuclear generating of electricity? Secondly, what is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations? And finally, what is the effect of s. 92A?

165 As to the first question, I note at the outset that the Ontario and federal labour codes are substantially similar. Indeed, labour codes across Canada largely correspond to one another. As George Adams (now Mr. Justice Adams) has noted:

> Obviously not all provisions are identical; each jurisdiction has included in its own legislation measures which reflect or are designed to respond to the economic, political and cultural forces peculiar to it. Nevertheless, the over-all tenor of the legislative enactments throughout Canada remains remarkably similar.

(*Canadian Labour Law* (2nd ed. 1993), at p. 2-94.)

166 Canadian labour legislation is concerned with developing procedures for the interaction between management and employees. Each code governs the rules under which unions are certified as bargaining agents, under which collective agreements are negotiated, and under which strikes and lock-outs may proceed legally. There is usually no prescribed content to collective agreements, except that the agreement be for a definite term and that it contain a method for settling disputes during the life of the agreement.

167 Of course, the form that Canadian labour legislation has taken is only one consideration in describing the character of labour relations as a matter for constitutional purposes. It may be said that labour relations law is generally concerned with the regulation and control of industrial disputes, and not with the unique concerns of individual industries except where industry-specific measures have been enacted. It is also apparent that Canadian labour law is concerned with the equalization of power between workers and employers to protect workers from the arbitrary exercise of authority. Professor David M. Beatty has asserted that this latter goal of labour legislation has become paramount in Canadian labour law:

> Whereas the earlier regulation was directed primarily to securing a balance of interests favourable to employers and consumers, in our own time legislators have been more concerned to promote and protect the interests a worker has in his or her job. Instead of procuring labour peace in the community by legal sanctions of criminal and civil liability, in more recent times it has been purchased by legislation aimed at enhancing the opportunity for self-control.
>
> Taken together, all the laws we have come to rely upon to regulate and coordinate work activities in our community, can be seen as providing more extensive forms of protection for workers against arbitrary authority.

(*Putting the Charter to Work* (1987), at p. 41.)

168 Thus, there are two primary features to labour relations: the preservation of industrial peace and the empowerment of workers. It remains to be seen whether or not these features make the legislative control of labour relations integral to Parlia ment's effective exercise of its jurisdiction over the nuclear plants of Ontario Hydro.

169 The second question is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations. When Parliament made the declaration in s. 18 of the *Atomic Energy Control Act* the federal government obtained exclusive jurisdiction over the specifically federal aspects of nuclear electrical generating stations such as those owned and operated by Ontario Hydro. The preamble to the *Atomic Energy Control Act* provides a statement of the federal interest in atomic energy. That statement also provides the parameters of the federal interest in the operations of the nuclear electrical generating facilities since the preamble effectively defines what Parliament determined to be to the general advantage of Canada with respect to the means of production of atomic energy. I reproduce the preamble for convenience:

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in the measures of international control of atomic energy that may hereafter be agreed on;

There is nothing in this statement, nor in the rest of the Act, that explicitly or implicitly reveals a federal interest in regulating labour relations. It is apparent from the *Atomic Energy Control Act* that the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns.

170 The terms of the *Atomic Energy Control Act* are relevant to determining what Parliament itself determined was integral to the exercise of its jurisdiction over atomic energy. So too are the terms of the regulatory scheme put in place under the Act. Nothing in these regulations indicates any interest in labour relations. Indeed, the mandatory licences for facilities which use nuclear fuel to produce electricity contemplate *reporting* labour disturbances, but are silent on the need for federal control over labour disputes. Of course, with respect to Parliament's intent, it may be argued that s. 4 of the *Canada Labour Code* proclaims all works declared to the general advantage of Canada to be subject to federal labour laws. Obviously a more detailed inquiry into the relationship between Parliament's jurisdiction over the works in question and the matter of labour relations must be undertaken.

171 This inquiry must proceed in the light of the third question, namely what is the effect on this issue of s. 92A of the *Constitution Act, 1867*. This section of the Constitution grants to the provinces the exclusive jurisdiction over the "development, conservation and *management* of sites and facilities in the province for the generation and production of electrical energy" (emphasis added). Ontario Hydro's nuclear electrical generating facilities fall within this provision of the *Constitution Act, 1867*. Past jurisprudence, such as *Bell Canada, supra*, has held that regulation of labour relations is integral to the regulation of the management of an undertaking. This strengthens the presumption of provincial jurisdiction over labour relations in the specific context of this case since Ontario has been given constitutional jurisdiction over the management of works such as Ontario Hydro's nuclear electrical generating sites.

172 I emphasize that the province's jurisdiction over the management of the nuclear electrical generating stations does not come by way of a unilateral statutory assertion. Section 92A of the *Constitution Act, 1867* is an explicit constitutional statement of jurisdiction, and not a self-serving assertion of jurisdiction. There is no higher authority for the interpretation of the federal declaratory power in the specific circumstances of this case than another provision of the Constitution, namely s. 92A. The specific constitutional grant to the provinces of jurisdiction over the management of electrical generating stations combines with both the presumption that labour relations fall to the provinces and the fact that Ontario Hydro as a whole is a provincial undertaking to weigh heavily against a finding that the federal government exercises the type of jurisdiction over the nuclear electrical generating plants such that control over labour relations is federal.

173 In view of the answers to these three questions, can control of labour relations be said to be integral to the effective exercise of federal jurisdiction over Ontario Hydro's nuclear electrical generating stations? Unfortunately, the record is almost non-existent on the practical necessity of control by one jurisdiction or the other over labour relations in this particular case. Provincial labour laws have been applied to some of the employees at one of Ontario Hydro's nuclear plants without any problem for 25 years. However, that evidence cannot be conclusive in determining constitutional jurisdiction over the labour relations of all the employees employed at the nuclear plants, including the scientific and engineering employees. The Attorney General of Canada has filed no evidence on this point since its position is that it need not justify its control over labour relations at a federally declared work. Ontario Hydro filed several affidavits from company officials purporting to address the problems that divided jurisdiction over labour relations within the company would raise. But again, these affidavits are not dispositive of the issue, particularly since the officials' only complaint is that divided jurisdiction would create uncertainty.

174 I am therefore faced with the difficult task of determining jurisdiction over labour relations in this case with the help of very little evidence. I stated above that the federal interest in Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production and its attendant health and safety concerns. I also concluded that labour relations legislation is generally concerned with regulating the process of industrial relations and aims at securing both industrial peace and better working conditions for workers. In the context of labour relations, the safety of workers and of the public appears to be the most significant of the federal government's interests. Therefore, I have tried to consider those labour relations issues which could impact on the safe operation of the plant. In my opinion, there are two potential concerns. First, a collective agreement negotiated under provincial labour legislation might contain provisions which would interfere with the staffing requirements in the licences issued under the *Atomic Energy Control Act*. Second, a lockout by Ontario Hydro or other work stoppage under provincial labour law could threaten the safe operation of the plant. Both of these concerns appear to me to be easily addressed.

175 Section 8 of the *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365, forbids the operation of a nuclear facility except in accordance with a licence issued by the AECB. The licences issued by the AECB may contain such conditions as the AECB deems necessary "in the interests of health, safety and security" (s. 9(2)). The licences issued to Ontario Hydro set out a variety of such conditions (see generally pp. 501-9 C.O.A.). Staffing and organization of the nuclear plants must conform with a specified organization plan that is filed with the AECB. Any changes to that plan must be reported to the AECB. The AECB must approve in writing staffing of certain management and supervisory positions. The licence also specifies minimum staffing levels to ensure the safe operation of the nuclear facility, as well as the training that some employees are required to receive. Finally, there are requirements that any concerns affecting the safety or security of the plant must be reported to the AECB.

176 Any collective agreement provision that contravened these conditions, imposed pursuant to a valid federal regulation over a federal aspect of the nuclear facility, would be null and void because the provisions of the federal licence would be paramount. Valid federal legislation regarding nuclear plants would be paramount over provincial legislation and collective agreements reached pursuant to provincial legislation, as counsel for Ontario Hydro and the Society conceded in their oral submissions. The double aspect doctrine applies here. The federal licence, federal regulations and the *Atomic Energy Control Act* are in pith and substance directed towards the regulation of the safety of nuclear electrical generating facilities and the effective control of the development and use of reactors. The Ontario *Labour Relations Act* is in pith and substance directed towards the regulation of the relations between employees and employers. The two can operate concurrently, except in cases of outright conflict in which case the provisions of the federal law would apply under the doctrine of paramountcy.

177 Further, on a practical level, if a collective agreement led to the violation of the licence conditions, the AECB could shut the plant down by revoking or suspending the licence under which the plant operates (see ss. 27 and 28 of the *Atomic Energy Control Regulations*).

178 The evidence does not disclose that work stoppages represent a significant threat to safety. The licences under which Ontario Hydro's nuclear electrical generating stations operate seem to allow for work stoppages: the licences require the reporting of any actual or impending industrial disputes "which could affect the safety or security of the nuclear facility" (Art. A.A. 19, sub-article (v)). The licences do not prohibit work stoppages. Further, the affidavit of Ontario Hydro's Senior Vice-President of Operations outlines the practical concerns the company must face in the event of an imminent strike. This affidavit suggests that a temporary shut-down in the event of a strike, while undesirable, is a response that would preserve public safety in extreme cases.

179 As a result, federal control of labour relations does not appear to be integral to the effective regulation of the federal government's concerns with respect to Ontario Hydro's nuclear electrical gen erating facilities. Both staffing and work stoppages would be tempered by the conditions of the licences issued by the federal AECB. Moreover, if specific safety issues were of concern to the federal government, it could legislate with respect to those issues under its valid interest in safety flowing from its jurisdiction over the declared works. This would result in some trenching on provincial powers over labour relations and the management of electrical generating sites. However, the necessary trenching on provincial jurisdiction is much more in harmony with the principles of federalism than is the wholesale withdrawing of labour relations from provincial jurisdiction.

180 As I discussed above, the conclusion that labour relations are not integral to the exercise of federal jurisdiction is only strengthened by the presence of s. 92A of the *Constitution Act, 1867*. This section expressly provides for provincial jurisdiction over the management of electrical generating sites, including those fuelled by nuclear reactors. Provincial control over labour relations appears to me to be integral to provincial jurisdiction over the management of nuclear electrical generating facilities. Further, as accepted by everyone, Ontario Hydro as a whole is a provincial undertaking. In this regard, I would adopt the reasoning of Galligan J.A., who dissented in the Ontario Court of Appeal. In discussing the trilogy of cases headed by *Bell Canada*, Galligan J.A. stated as follows (at p. 774):

> I made earlier reference to what seems to me to be a fundamental distinction between the situation in the trilogy of cases and the situation in this case. Those undertakings were truly national while this is undoubtedly provincial. The general language used by Beetz J. in those cases must be considered in that context and care should be taken so that they are not taken out of context and given a meaning which was not intended. His finding that labour relations is a vital part of management can indicate, quite apart from the ordinary principle that labour relations is a provincial matter, that labour rela tions is an integral, essential and vital part of the management of a provincial undertaking and the provincial power to legislate respecting a provincial undertaking must include the corresponding legislative power to regulate its labour relations. Thus for the same reason that labour relations of a federal undertaking must be regulated federally I think that labour relations of a provincial undertaking should be regulated provincially.

181 In conclusion, I am of the view that, notwithstanding s. 4 of the *Canada Labour Code*, a valid declaration by Parliament under s. 92(10)(*c*) of the *Constitution Act, 1867* over nuclear electrical generating stations does not give Parliament jurisdiction

over the labour relations of employees employed in those stations. Put another way, at issue herein are works not undertakings and as Hugessen J.A. said in *Central Western Railway Corp. v. U.T.U.*, [1989] 2 F.C. 186, at p. 214, works, being physical things, do not have labour relations, but undertakings do. Control of labour relations is not integral to the federal interest in the nuclear plants. Indeed, it may be said on the contrary that, because of s. 92A of the *Constitution Act, 1867* and the fact that Ontario Hydro is a provincial undertaking, control of labour relations is integral to the exercise of provincial jurisdiction over the nuclear electrical generating facilities. This result accords with the jurisprudence and the underlying principles that apply to federalism in general and the declaratory power in particular.

4. If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s. 91 of the Constitution Act, 1867, does that jurisdiction include the labour relations of employees employed in those stations?

182 It is not disputed in this case that Parliament has jurisdiction over atomic energy and therefore the power to enact the *Atomic Energy Control Act* under the p.o.g.g. power in the opening words to s. 91 of the *Constitution Act, 1867*. The Attorney General of Canada argued that, if Parliament's jurisdiction over Ontario Hydro's nuclear electrical generating stations through the declaration in s. 18 of the *Atomic Energy Control Act, supra*, does not extend to labour relations, Parliament can regulate labour relations at the facilities through the exercise of its jurisdiction over atomic energy under the p.o.g.g. power. In my view, the answer to whether Parliament's jurisdiction under the p.o.g.g. power over Ontario Hydro's nuclear electrical generating plants extends to labour relations must be based on principles similar to those I applied in discussing the declaratory power. Both the p.o.g.g. power and the declaratory power are unusual in the division of powers scheme, and it is logical to apply the same balancing principles of federalism to both, absent special circumstances.

183 There are two recognized doctrines under the p.o.g.g. power which are relevant to this appeal: the emergency doctrine and the national concern doctrine. Under the emergency doctrine, Parliament may use its p.o.g.g. powers to enact legislation that would normally be *ultra vires* to combat a national emergency (see generally *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373). The type of legislation permissible under the emergency doctrine will be temporary in nature (*R. v. Crown Zellerbach Canada Ltd., supra*, at p. 432).

184 The Court developed the parameters of the national concern doctrine of the p.o.g.g. power in *Crown Zellerbach*. In his reasons for the majority, Le Dain J. described the following contours of the national concern doctrine (at pp. 431-32):

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

With regard to the last factor, the "provincial inability" test, Le Dain J. hastened to caution that the test "must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem" (p. 434). Therefore, that the federal government may

have jurisdiction over atomic energy by reason of the national concern branch of the p.o.g.g. power does not give Parliament plenary power over all aspects of nuclear power.

185 The p.o.g.g. power, like all of Parliament's powers, must be interpreted in accordance with the specific grants of power to the provinces under ss. 92 and 92A of the *Constitution Act, 1867*. While there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy which would appear to be the same as those aspects of the nuclear electrical generating stations which render them to the general advantage of Canada, namely the fact of nuclear production and its safety concerns.

186 I concluded above that Parliament does not require control over labour relations at Ontario Hydro's nuclear electrical generating stations in order to exercise effectively its jurisdiction over the works through the declaratory power. Similarly, it is not integral to the exercise of the p.o.g.g. power over atomic energy that Parliament regulate the labour relations of employees employed at Ontario Hydro's nuclear electrical generating stations.

187 To allow Parliament to control labour relations at these facilities where such regulation is not integral to the effective securing of Parliament's interest in the facilities would not be reconcilable with the distribution of legislative powers under which the provinces are accorded jurisdiction over both property and civil rights, including labour relations, and the management of electrical generating facilities. To define the federal jurisdiction under the p.o.g.g. power in this case to include labour relations would render the provincial power to manage the facilities meaningless since labour relations and management are "two elements of the same reality" (*Bell Canada, supra*, at p. 798). This would not have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamen tal distribution of legislative power under the Constitution" (*Crown Zellerbach, supra*, at p. 432).

188 The Attorney General of Canada cited *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.), as authority that Parliament's jurisdiction over atomic energy under the p.o.g.g. power extends to the labour relations of workers employed in the atomic energy industry. In *Pronto*, the Canadian Mine Workers Union applied to the OLRB for certification as the bargaining agent for the employees of two mining companies engaged in the mining and concentrating of uranium ores. The OLRB certified the union and the companies applied for an order to quash the certification decision on the ground that the OLRB had no jurisdiction to hear the application. The companies argued that the federal *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, was applicable to their employees. McLennan J. held that control of atomic energy fell within the federal p.o.g.g. power and that "it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament" (pp. 869-70).

189 *Pronto* was decided prior to the decision of this Court in *Crown Zellerbach, supra*, under which the present p.o.g.g. claim falls to be decided. Further, the judgment in *Pronto* is not supported by any reasons and does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the extent possible. Finally, it appears that the parties in *Pronto* conceded that if the mine fell within federal jurisdiction in some aspect then federal labour laws applied (at p. 868). Because of the structure of the parties' arguments, the result in the case was a foregone conclusion once federal jurisdiction over atomic energy was established. For these reasons, *Pronto* does not provide authority for the Attorney General of Canada's claim that through the p.o.g.g. power Parliament has jurisdiction over the labour relations at Ontario Hydro's nuclear electrical generating facilities.

190 In summary, while Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, that jurisdiction does not extend to the labour relations between Ontario Hydro and those of its employees employed in the nuclear electrical generating stations. The federal government does not require control over labour relations at Ontario Hydro's nuclear facilities for the exercise of jurisdiction over atomic energy. In other words, the labour relations at issue in this case are not part of the single, distinctive and indivisible matter identified as atomic energy. This is not the say, however, that Parliament, where circumstances warrant, may not, in exercising its valid jurisdiction over nuclear energy, enact legislation which has an impact on the labour relations of Ontario Hydro's employees under either the national concern branch or the national emergency branch of the power to legislate for the peace, order and good government of Canada.

5. Is Ontario Hydro immune from the operation of the Canada Labour Code by virtue of interjurisdictional Crown immunity?

191 In view of the conclusion I have reached that it is the Ontario *Labour Relations Act* and not the *Canada Labour Code*, which constitutionally applies in the circumstances of this case, it is not strictly necessary that I address this question. Nonetheless, I am of the opinion that had I reached a different conclusion on the applicability of the *Canada Labour Code*, Ontario Hydro would not be immune from the operation of federal labour legislation.

192 The Divisional Court held that Ontario Hydro was a public policy instrument to which the *Canada Labour Code* should not be interpreted to apply unless the Code expressly and specifically states that it does apply. I respectfully disagree. There is no jurisprudence indicating that a company like Ontario Hydro, described by the Divisional Court (at p. 279 O.R.) as a "provincial public policy instrument" and which the parties agreed is not a Crown agent, is entitled to interjurisdictional Crown immunity. Based on the arguments submitted on this issue, I see no reason to create a new category of interjurisdictional Crown immunity for a species of organization known as a public policy instrument. Therefore, I agree with the Attorney General of Canada's submission that Ontario Hydro stands on no higher footing than would any other employer in the province of Ontario, in so far as immunity from federal legislation is concerned.

VII. Conclusion

193 The federal government exercises exclusive jurisdiction over some aspects of Ontario Hydro's nuclear electrical generating facilities through its declaratory and p.o.g.g. powers. However, control of labour relations at those facilities is not integral to Parliament's effective regulation of the sites in terms of its interest in those sites. Therefore, in answer to the constitutional question, it is the Ontario *Labour Relations Act* which constitutionally applies to the labour relations between Ontario Hydro and those of its employees at its nuclear electrical generating facilities.

VIII. Disposition

194 For the foregoing reasons, I would allow the appeals, set aside the order of the Ontario Court of Appeal, and restore the order of the Divisional Court except the mandamus. Under the circum stances, I would award costs only in this Court to Ontario Hydro, CUPE and the Society, to be paid by the Attorney General of Canada.

Appeals dismissed, Sopinka, Cory and Iacobucci JJ. dissenting.

Solicitors of record:
Solicitors for Ontario Hydro: *Blake, Cassels & Graydon*, Toronto.
Solicitors for CUPE — C.L.C. Ontario Hydro Employees Union, Local 1000: *Gowling, Strathy & Henderson*, Toronto.
Solicitor for the respondent the Ontario Labour Relations Board: *Kathleen A. MacDonald*, Toronto.
Solicitors for the respondent the Society of Ontario Hydro Professional and Administrative Employees: *Cavalluzzo, Hayes & Shilton*, Toronto.
Solicitor for the respondent the Attorney General of Canada: *John C. Tait*, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: *George Thomson*, Toronto.
Solicitor for the intervener the Attorney General of Quebec: *The Department of Justice*, Ste-Foy.
Solicitor for the intervener the Attorney General for New Brunswick: *Paul M. LeBreton*, Fredericton.

Tab 12

1989 CarswellBC 174
Supreme Court of Canada

C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.

1989 CarswellBC 174, 1989 CarswellBC 716, [1989] 2 S.C.R. 983, [1989] 6 W.W.R. 673, [1989] S.C.J. No. 107, 102 N.R. 1, 17 A.C.W.S. (3d) 769, 40 B.C.L.R. (2d) 1, 40 Admin. L.R. 181, 62 D.L.R. (4th) 437, 89 C.L.L.C. 14,050, J.E. 89-1493, EYB 1989-66992

PACCAR OF CANADA LTD. (CANADIAN KENWORTH COMPANY DIVISION) v. CANADIAN ASSOCIATION OF INDUSTRIAL, MECHANICAL AND ALLIED WORKERS, LOCAL 14 et al.

Dickson C.J.C., McIntyre [*], Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

Heard: December 13, 1988
Judgment: October 26, 1989
Docket: No. 20174

Counsel: *D.M.M. Goldie, Q.C.*, and *B.R. Grist*, for appellant.
I. Donald, Q.C., and *B. Laughton*, for respondent Canadian Association of Industrial, Mechanical and Allied Workers, Local 14.
No one for respondent British Columbia Hydro & Power Authority.
No one for respondent International Brotherhood of Electrical Workers, Local 213.
J.S. Clyne, Q.C., and *E.C. Jamieson*, for respondent Industrial Relations Council of British Columbia.

Wilson J. **(dissenting):**

1 I have had the advantage of reading the reasons of both Justice La Forest and Justice L'Heureux-Dubé and, while I agree with the result arrived at by L'Heureux-Dubé J., I reach it by somewhat different reasons [appeal from 7 B.C.L.R. (2d) 80, 16 C.C.E.L. 294, 32 D.L.R. (4th) 523, affirming [1986] B.C.W.L.D. 2745, which reversed 10 C.L.R.B.R. (N.S.) 355, which affirmed 7 C.L.R.B.R. (N.S.) 227 and [1984] 3 W.L.A.C. 180].

2 I am in agreement with my colleague, La Forest J., as to the broad scope of the principle of curial deference to the decisions of administrative tribunals such as Labour Relations Boards because of their special expertise. I also agree with him that s. 27 of the Labour Code of British Columbia is not, as such, "a jurisdiction limiting provision upon the interpretation of which the board cannot err without being subject to judicial review" [p. 19]. I do believe, however, that a decision of the board which meets what La Forest J. calls [at pp. 20-21] the "severe test" of being "patently unreasonable" is not protected by the principle of curial deference. The principle does have its own built-in limitation. The question before us therefore is whether the board's decision to the effect that an employer can, while employer and employees are, so to speak, between collective agreements, unilaterally impose terms or conditions of employment on the employees is "patently unreasonable" so as to constitute jurisdictional error or is, at most, an error of law made by the board within its jurisdiction.

3 It is my view that the test of patent unreasonableness is met in this case and I say that while fully recognizing that the board's initial jurisdiction to deal with the question is not in issue. Accordingly, if it were simply a question of whether the board's interpretation of the Code was the correct one, or even whether it was a reasonable one, there would be no issue for the courts. In such circumstances the principle of curial deference would require that the board's decision be respected. But the courts must not defer to decisions that are patently unreasonable. Such decisions cannot be passed off as the product of special expertise or, as the appellant submits, "policy choices" which are not subject to review by the courts. They can only be treated as decisions which the board had no jurisdiction to make.

4 I accept, of course, that when we postulate the test of patent unreasonableness we are attempting to assess the reasonableness of the board's decision, not in terms of the reasonable man or reasonable member of the general public, but in terms of the reasonable board. This must be so if we are to allow for the fact that the board is deemed to have special expertise. A patently unreasonable decision is accordingly one which no reasonable board applying its expertise could possibly have arrived at.

5 My colleague, La Forest J., suggests that the test the courts should apply in determining whether a decision is patently unreasonable is whether there is a rational basis for it. If there is no rational basis for it, then, in his view, it is patently unreasonable. But if there is a rational basis for it, then the courts must defer to the decision. It is sufficient, my colleague says, that the board's decision is "rationally defensible".

6 I am not sure how helpful it is to substitute one adjectival phrase for another and define patent unreasonableness in terms of rational indefensibility. It seems to me that this simply injects one more opportunity for ambiguity into a test which is already fraught with ambiguity. There is, it seems to me, a good argument to be made that "rational indefensibility" is an even stricter test than "patent unreasonableness". Be that as it may, both tests pose problems for the courts which, as my colleague points out, are to be viewed as lacking the special expertise required for the resolution of labour disputes which specialized labour boards enjoy.

7 If the resolution of the problem involves the application of the tribunal's special expertise, can a court be heard to say that the tribunal's decision was "patently unreasonable"? In this case, for example, would it be open to the board to say: we know from experience in dealing with these matters that, strange as it may seem to the untrained person, the unilateral imposition of terms by an employer helps to promote settlement and secure industrial peace. Or would a complete answer to that be: maybe so, but that is not *the right way* to achieve that result: bringing economic pressure to bear on the employees during the bargaining process may achieve that result, but it is not conducive to harmonious relations between employers and employees and, indeed, is antithetical to the collective bargaining process, which the legislature has obviously concluded is the highest and best means of achieving that result. In other words, does describing a board's decision as a "policy choice" insulate it from review if the policy on which the choice is based is inconsistent with the policy of the legislation under which it purports to have been made? I do not believe so. A policy choice is only truly a policy choice if the choice is made between policies which are equally consistent with and supportable by the legislation. Is that the case here?

8 It seems to me that the key to the problem lies in the fundamental obligation of employer and union to bargain in good faith towards a new collective agreement once the earlier agreement has been properly terminated. I do not see how an employer can be bargaining in good faith towards a new collective agreement while at the same time unilaterally imposing detrimental terms upon the employees which he knows have already been rejected. (By detrimental terms I mean terms less beneficial to the employees than the terms in the earlier agreement.) I agree with the British Columbia Court of Appeal that where the employer continues to employ the employees and the employees continue to work for the employer after the earlier agreement has been terminated, the terms and conditions of employment should be deemed to be the same terms and conditions as those in the earlier agreement until such time as new terms result from the process of bargaining in good faith. This must be so if good faith bargaining between employer and union is to have any opportunity to work. If, however, the parties cannot agree on new terms then, subject to the further requirements of the Code, the parties have their rights of lockout and strike. But it seems to me that to interpret the Code (where the Code is silent on the subject) as permitting the employer to unilaterally impose new terms on the employees in the interval is to allow the employer to effectively bring the good faith bargaining period to an end. It is to say that the employer may decide when an impasse has been reached, when the time has come that further bargaining is useless because he, the employer, is not prepared to move from his position, and that, having so decided, he may then proceed unilaterally to impose new terms even if those terms were the very ones which brought about the impasse. Compromise, which is the accepted means of ensuring the ongoing nature of the good faith bargaining process, is thus declared by the employer to be at an end and the employees are confronted with the option of living with the employer's new terms until the union is in a strike position or leaving their employ and trying to find work elsewhere.

9 Why, one might ask, should an employer be able to destroy in this way the freedom and equality of bargaining power both parties must have at the bargaining table? Why should he have this new power? It seems to me obvious that to permit the employer to decide when an impasse in the collective bargaining process has been reached and then give him the power

to impose new terms unilaterally on his employees will do nothing to promote the collective bargaining process which is the legislatively accredited means of achieving collective agreements and industrial peace. As the British Columbia Court of Appeal pointed out at p. 85:

> The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.

10 Must we conclude that in the absence of a specific provision in the Code the employer is free to do anything which he is not specifically prohibited from doing? This seems to be the underlying premise of the appellant's position. Nothing in the Code, they say, prevents the employer from unilaterally imposing new terms. Or do we in filling the legislative vacuum take guidance from the legislative scheme? It seems to me that the latter must be the proper course. I would respectfully adopt the following comment from the majority reasons of Professor Bora Laskin (as he then was) in *Re Peterboro Lock Mfg. Co.* (1953), 4 L.A.C. 1499 at 1502:

> In this Board's view, it is a very superficial generalization to contend that a Collective Agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.

11 I cannot believe that the legislature intended in the circumstances before us to return the parties to pre-collective bargaining standards, particularly if there is another interpretation of the Code which does not give one of the negotiating parties the power to alter dramatically the balance of bargaining power between them in his own favour and which also has the very significant advantage of endorsing rather than undermining the collective bargaining process. That interpretation is, of course, to permit the same terms and conditions which were the product of the earlier bargaining process to apply in the event of an impasse until such time as the parties are in a strike/lockout position.

12 It is true that this solution will probably benefit the union. It must be assumed that where the employer terminates the earlier agreement it is because circumstances have changed and he considers it no longer to his advantage to have that agreement continue in effect. The important point, however, is that an interpretation of the Code which supports this solution does not interfere with the balance of bargaining power between the parties. It does not create a new power in the union. It does not undermine the collective bargaining process. It does not compel the parties to "re-enter a world which has ceased to exist". I cannot agree with La Forest J., therefore, that one interpretation of the Code is as reasonable as the other, that it is a matter of choosing between equally viable "policy choices". Far from it. One is completely consistent with the concept of freedom and equality of bargaining power between the parties and the paramount role of the collective bargaining process in labour dispute resolution. The other is completely inconsistent with and inimical to both. It is on that basis that I would find that the decision of the board was "patently unreasonable" and constituted jurisdictional error.

13 I would dismiss the appeal with costs.

***La Forest J.* (*Dickson C.J.C.* concurring):**

14 The narrow issue in this appeal is whether the decision of the respondent Labour Relations Board of British Columbia permitting an employer, after the termination of a collective agreement, to unilaterally alter terms and conditions of employment is patently unreasonable and therefore subject to review by this court. A subsidiary issue concerns the standing before this court of the Labour Relations Board.

Facts

15 The respondent, Canadian Association of Industrial, Mechanical and Allied Workers (Local 14) ("C.A.I.M.A.W."), is the certified bargaining agent for the employees of the appellant Paccar of Canada Ltd. (Canadian Kenworth Division) ("Paccar"). C.A.I.M.A.W. and Paccar were parties to a collective agreement with a stated term extending from 1st May 1982 to 30th April 1983. Paccar had been engaged in the manufacture of trucks, but during the course of the collective agreement, it laid off a large number of employees and limited its activities to warehouse operations. Instead of employing 350 people before the layoffs, it employed only 10 thereafter.

16 The collective agreement contained a renewal and termination provision, the relevant parts of which read as follows:

> 21.01 This [a]greement shall be effective as and from May 1, 1982 to and including April 30, 1983, and shall continue thereafter from year to year unless written notice of contrary intention is given by either [party] to the other four (4) months prior to April 30, 1983, or any anniversary date thereafter.
>
> 21.03 In the event of a notice of termination, this [a]greement shall remain in full force and effect while negotiations are being carried on, it being agreed that negotiations shall be discontinued upon delivery of a written notice by either [p]arty.

17 On 4th January 1983 Paccar notified C.A.I.M.A.W. in a document entitled "Notice to Terminate", that:

> This is notice to terminate the [c]ollective [a]greement between the parties and to commence negotiations for a new agreement, pursuant to the terms of the agreement and the Labour Code of B.C.
>
> Please contact the undersigned to arrange a mutually acceptable time and place to meet.

The parties negotiated over the next six months, but without success. On 29th June 1983 Paccar wrote to C.A.I.M.A.W.:

> In accordance with Article 21.03 and in view of the impasse the parties have reached, this is the requisite notice to discontinue negotiations and that the Company considers the [c]ollective [a]greement terminated effective July 4, 1983. All terms and conditions of the [a]greement, including the COLA clause are cancelled except as noted below and/or required by the Labour Code and the Employment Standards Act.

Paccar then set out the terms and conditions which it would put into effect on 4th July 1983. The employees of Paccar have continued to work since that date.

18 C.A.I.M.A.W. then applied to the respondent Labour Relations Board (now the Industrial Relations Council) under s. 28 of the Labour Code, R.S.B.C. 1979, c. 212 ("the Code"), alleging that Paccar had violated ss. 65, 79(2) and 82(2) of the Code, and requesting a determination under s. 34(1)(*g*) as to whether a collective agreement was in full force and effect. A three-member panel of the board decided against the union [reported at 7 C.L.R.B.R. (N.S.) 227]. The union sought and was granted a rehearing pursuant to s. 36 of the Code. At the rehearing, the application was heard along with another application between British Columbia Hydro & Power Authority and the International Brotherhood of Electrical Workers, Loc. 213 ("I.B.E.W.") [appeal from [1984] 3 W.L.A.C. 180], and a consolidated decision in respect of both applications was issued by a unanimous five-member panel of the board, upholding, though for different reasons, the decisions of the original boards.

19 Both C.A.I.M.A.W. and I.B.E.W. petitioned the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for an order quashing the decision of the review panel of the Labour Relations Board. Meredith J. granted the applications. Paccar and B.C. Hydro appealed to the British Columbia Court of Appeal, but the appeals were dismissed by a unanimous five-member panel of that court. Paccar appeals to this court with leave. B.C. Hydro has been named as a respondent but neither it nor I.B.E.W. appeared before this court or submitted factums.

Decisions Below

20 Before the first board, two issues required resolution. The first was whether Paccar had in fact terminated the collective agreement. The board held, interpreting those portions of art. 21 set out above, that the employer had duly terminated the

agreement in accordance with its terms. The issue that then arose was whether, in spite of the termination of the agreement, its terms necessarily bound Paccar and governed its relationship with its employees or whether Paccar had the authority to impose, unilaterally, upon the employees in the bargaining unit terms and conditions of employment different from those set out in the terminated agreement. The board concluded in favour of the latter position. The essence of its reasoning is set out in the following passage [at pp. 243-44]:

> We conclude that the employer and the trade union may unilaterally impose terms and conditions of employment to be "incorporated" into the individual contracts of employment which spring up on the termination of the collective agreement. The appropriate response by the employer or the trade union to unacceptable "new terms" proposed by the other is to lock out or strike. That is not to say that an employer has a free hand. Certainly the employer's behaviour will be limited by the unfair labour practice provisions of the Code (for example, s. 6 thereof) and by s. 46.

The board concluded that changing the terms and conditions on which an employer will continue to employ its workforce after the expiry of a collective agreement did not violate the exclusive bargaining authority given to the union by s. 46 of the Code. It therefore dismissed the complaint.

21 The rehearing panel gave extensive, considered reasons and upheld the decision of the original board, though for different reasons [reported at 10 C.L.R.B.R. (N.S.) 355]. Before the rehearing panel, the unions made two arguments in support of the proposition that the earlier decision was inconsistent with the law and policy under the Labour Code. The first argument was premised on the view that when a collective agreement expires, individual contracts of employment between the employer and the employee resume operation, and that in accordance with the principles of employment law, those contracts cannot be altered except by agreement: see *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 (Ont. C.A.). In the present case, it cannot be said that the employees either expressly or impliedly accepted the varied terms.

22 The second argument was based on the earlier decision of the labour board in *Cariboo College v. Cariboo College Faculty Assn.* (1983), 4 C.L.R.B.R. (N.S.) 320 (B.C.L.R.B.), and on s. 46(*a*) of the Labour Code. That section gives the union the exclusive authority to bargain collectively for the bargaining unit, and to bind the employees by collective agreement. The union argued that the effect of s. 46(*a*) was to preclude the employer from unilaterally altering terms of employment without the agreement of the union.

23 The labour board decided against the union on both arguments. In doing so, the board found it useful to examine the extensive American experience, though it did not blindly follow it. It held that, on termination of a collective agreement, individual contracts of employment do not revive. They stated [at pp. 377-78]:

> In light of the Supreme Court of Canada's decision in *McGavin Toastmaster Ltd.* [[1976] 1 S.C.R. 718], and Chief Justice Laskin's above-quoted comments, we have concluded that it is no longer appropriate to speak of individual contracts of employment and common law principles flowing therefrom in respect of an employer-employee relationship which is governed by the *Labour Code*. Such contracts and principles are based on individual relationships between employer and employee, whereas the *Labour Code* and other similar labour relations legislation is premised on a collective relationship between an employer and his employees, with individual dealings between employer and employee being prohibited ...
>
> We are of the view that the comments of Chief Justice Laskin concerning the inapplicability of individual contracts of employment and the common law apply regardless of whether a collective agreement is in force. This conclusion flows from the fundamental change brought about by the certification of a trade union to represent a group of employees in a bargaining unit. Once certified, that union has the exclusive authority to bargain on behalf of and bind the employees in the unit. The individual employee has no authority to bargain on his own behalf whether a collective agreement is in force or not. In these circumstances, it does not make sense to speak of individual contracts of employment at any time. Individual employees may no longer make contracts regarding terms and conditions of employment; only the trade union may. Further, it no longer makes sense to speak of the common law. The collective bargaining relationship is governed by the provisions of the *Labour Code*, not the common law.

24 The board then turned to the second argument based on s. 46(*a*) and said [at p. 380]:

> Having given this matter serious consideration, we have concluded that s. 46(*a*) of the *Labour Code* does not prevent an employer from making unilateral alterations to terms and conditions of employment after the expiry of the collective agreement and after he has sought to negotiate those alterations with the union and the union has rejected them.

In doing so, the board explicitly disagreed with the decision in *Cariboo College*, supra. The board concluded [at p. 381]:

> After the expiry of the collective agreement, no unilateral alterations to terms and conditions of employment may be made by an employer unless they are done so in compliance with his duty to bargain in good faith with the union. Further, we wish to make it clear that the fact that an employer has made unilateral alterations to his employees' terms and conditions of employment does not extinguish his obligation to continue to bargain in good faith with the trade union and make every reasonable effort to conclude a collective agreement.
>
> In the period after the expiry of the collective agreement, where the employer continues to operate and the employees continue to work, it will be implied that the terms and conditions of employment for the employees will continue to be the same as those contained in the just expired collective agreement. This conclusion flows from the scheme of the *Labour Code* as a whole, but in particular, from the duty to bargain in good faith which limits the "when" and "how" of unilateral changes to terms and conditions of employment. It is that scheme, and, in particular, the limits on unilateral action prescribed by the duty to bargain in good faith which requires the initial maintenance of the status quo and the resulting implication of the terms and conditions of employment from the just expired collective agreement.

In the result, the union's complaint was dismissed.

25 Meredith J. allowed the application to quash [[1986] B.C.W.L.D. 2745]. His reasons are brief and not entirely clear. They begin by saying:

> I take it that counsel for the employers and the unions agree with me that at law, labour or otherwise, the employers in these cases have no authority to make unilateral alterations in terms and conditions of employment at any time.

That agreement, if it ever existed, did not survive into this court. Whether an employer has the asserted authority was strongly debated before us. The essence of Meredith J.'s reasoning appears to be that employment necessarily involves an agreement. Agreement and unilateral alteration are each other's antithesis. As a result, the board was "wrong" in concluding that there had been unilateral alterations at all, and so the matter was remitted back to the Labour Relations Board for further consideration.

26 The Court of Appeal dismissed the appeal from that order [reported at 7 B.C.L.R. (2d) 80, 16 C.C.E.L. 294, 32 D.L.R. (4th) 523]. It held that the common law, and more particularly basic contract law, had not been ousted by the Labour Code and applied not only to individual contracts of employment but also to collective agreements. The court held that terms could not be unilaterally imposed by an employer. Seaton J.A. said [at p. 85]:

> No foundation is given for the statement that "an employer has the authority under the Labour Code to make unilateral alterations ..." No section says that; nor does any imply it. The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.

The Court of Appeal rejected all reliance on the American authorities. These, it thought, were concerned with the issue of whether unilateral changes constituted a failure to bargain in good faith, an argument the unions had abandoned in the present case at the opening of the original board hearing, or alternatively dealt with changes favourable to the employees, which is unlike the case at bar. As the Court of Appeal was of the view that the three panels of the Labour Relations Board were wrong in finding that an employer had the authority to unilaterally alter terms and conditions of employment after the expiry of the collective agreement, the court, in the last line of its decision, held that to find such a power in the employer was patently unreasonable.

Analysis

27 In oral argument before this court, counsel for C.A.I.M.A.W. conceded that the Labour Relations Board had jurisdiction to embark upon the specific inquiry as to whether the employer has the authority to alter unilaterally the terms and conditions of employment. He submitted, however, that the labour board lost jurisdiction by coming to the conclusion that that right exists without having any rational basis for so determining. In finding such a right, he submitted, the labour board went beyond making a serious error within its jurisdiction and into the realm of patently unreasonable errors.

28 The first step in determining whether an administrative tribunal has exceeded its jurisdiction by answering a question of law in a patently unreasonable manner is to determine its jurisdiction. "At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal": see *U.E.S., Loc. 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088, *(*sub nom. *Syndicat national des employés de la Comm. scolaire régionale de l'Ouataouais v. Union des employés de service, loc. 298)* 35 Admin. L.R. 153, 95 N.R. 161 [Que.].

29 The Labour Relations Board derives its authority from Pt. 2 of the Labour Code, particularly ss. 27 and 31-34. It is useful to set out these provisions. They read:

> 27. (1) The board, having regard to the public interest as well as the rights and obligations of parties before it, may exercise its powers and shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interest of achieving or maintaining good working conditions and the well being of the public. For those purposes, the board shall have regard to the following purposes and objects:
>
> (*a*) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
>
> (*b*) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees; and
>
> (*c*) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions.
>
> (2) The board may formulate general guidelines to further the operation of this Act; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.
>
> 31. Except as provided in this Act, the board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under this Act and to make an order permitted to be made. Without limiting the generality of the foregoing, the board has and shall exercise exclusive jurisdiction in respect of
>
> (*a*) a matter in respect of which the board has jurisdiction under this Act or regulations;
>
> (*b*) a matter in respect of which the board determines under section 33 that it has jurisdiction; and
>
> (*c*) an application for the regulation, restraint or prohibition of a person or group of persons from
>
> (i) ceasing or refusing to perform work or to remain in a relationship of employment;
>
> (ii) picketing, striking or locking out; or
>
> (iii) communicating information or opinion in a labour dispute by speech, writing or other means.
>
> 32. (1) Except as provided in this section, no court has or shall exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 28 or a matter referred to in section 31, and, without restricting the generality of the foregoing, no court shall make an order enjoining or prohibiting an act or thing in respect of them.

33. The board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, a collective agreement or the regulations, to determine a fact or question of law necessary to establish its jurisdiction and to determine whether or in what manner it shall exercise its jurisdiction.

34. (1) The board has exclusive jurisdiction to decide a question arising under this Act, and, on application by any person or on its own motion, may decide for all purposes of this Act any question, including, without restricting the generality of the foregoing, any question as to whether

(*d*) a person is, or what persons are, bound by a collective agreement;

(*e*) a person is, or what persons are, parties to a collective agreement;

(*g*) a collective agreement is in full force and effect;

(*h*) a person is bargaining collectively or has bargained collectively in good faith.

(2) Except in respect of the constitutional jurisdiction of the board, a decision or order of the board under this Act, a collective agreement or the regulations, on a matter in respect of which the board has jurisdiction, or determines under section 33 that it has jurisdiction under this Act, a collective agreement or the regulations, is final and conclusive and is not open to question or review in a court on any grounds, and no proceedings by or before the board shall be restrained by injunction, prohibition, mandamus or another process or proceeding in a court, or be removable by certiorari or otherwise into a court.

30 Section 27 requires that the labour board make its decisions having regard to the public interest and the object of promoting harmonious relations between employers and employees. This direction to the board does not, however, allow a court to substitute its judgment for that of the board as to what actions will "develop effective industrial relations" and "secur[e] and [maintain] industrial peace". Section 27 is not, in this sense, a jurisdiction limiting provision upon the interpretation of which the board cannot err without being subject to judicial review. Indeed, if the courts could intervene every time they were of the opinion that a particular decision of the board did not accord with the objectives set out in s. 27, the notion of curial deference would be deprived of virtually all meaning. Every decision of the tribunal would be open to review whether patently unreasonable or not. In my opinion, s. 27 amounts to a direction to the board simply as to the purposes and objects to which it should have regard. Implicit in the establishment of an expert administrative tribunal, however, is that that tribunal is the best judge of what actions would develop "effective" industrial relations and "further" industrial peace and harmony. Thus, in *Lorne W. Camozzi Co. v. I.U.O.E., Loc. 115*, [1986] 3 W.W.R. 312, 68 B.C.L.R. 338 at 345, 17 Admin. L.R. 78, 24 D.L.R. (4th) 266 (C.A.), Esson J.A. said:

> But where, as here, the interpretation depends upon the question whether the specific exercise of power is justified by the purposes and objects of the Act, there is an element of "curial deference" involved. *The board is uniquely qualified to know what is necessary to develop effective industrial relations or maintain good working conditions*. So, where the question is whether a particular exercise of power not prevented by the express words of the Code is one intended to be granted to the board, the court must show reasonable deference to the board's views and reasons in support of it. [emphasis added]

31 That it was the legislative intention that the interpretation of s. 27 should be left for the board alone to determine is made clear by s. 33. That section gives the board the exclusive jurisdiction to determine the extent of its jurisdiction under the Act, to determine any fact necessary to establish its jurisdiction, and to determine in what manner it shall exercise its jurisdiction. At the very least, the effect of this section must be that it establishes that it is for the board to determine whether any particular decision accords with the purposes and objects of s. 27, provided its interpretation is not patently unreasonable.

32 Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function: see *C.U.P.E.,*

Loc. 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, 79 C.L.L.C. 14,029, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). The test for review is a "severe test": see *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476 at 493, 14 Admin. L.R. 133, 14 D.L.R. (4th) 289, 84 C.L.L.C. 14,070, 55 N.R. 194 [Que.]. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31-34 of the Code, are permissible exercises of legislative authority, and to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the court should respect that limitation and defer to the board.

33 In *C.U.P.E., Loc. 963 v. N.B. Liquor Corp.*, supra, Dickson J., as he then was, thus put it at pp. 235-36:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The comments of McIntyre J. in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, [1987] 1 S.C.R. 313 at 416, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 38 D.L.R. (4th) 161, *(*sub nom. *A.U.P.E. v. Alta. (A.G.))* 28 C.R.R. 305, 87 C.L.L.C. 14,021, *(*sub nom. *Ref. re Compulsory Arb.)* 78 A.R. 1, 74 N.R. 99, are particularly apt:

> Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions.

See also *Inter City Glass Co. v. B.C. (A.G.)*, B.C.S.C., 24th January 1986 (not yet reported), at p. 6.

34 I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this court on their merits. It is sufficient to say that the result arrived at by the board is not patently unreasonable. Indeed, I would go so far as to say that the result reached by the board is as reasonable as the alternative. It is not necessary to go beyond that.

35 I am of the opinion that the courts below did not apply the appropriate standard of review to the decisions of the board. I cannot escape the conclusion that, instead of examining the reasonableness or rationality of the board's decision, the courts substituted their view of the appropriate result. In doing so, they became the arbiters of labour policy, as can be seen from the finding that, while "The Code as a whole seeks stability resulting from agreement[, this] new power creates instability resulting

from unilateral action". With respect, one cannot imagine that the labour board did not consider the implications of a finding that the employer could unilaterally alter the terms and conditions of employment.

36 Other passages in the Court of Appeal's reasons also support the view that its decision was arrived at because it accorded with the court's view of the appropriate policy. Thus, Seaton J.A. held that "*I do not accept* that terms can be imposed unilaterally by an employer" (emphasis added) [p. 85]. Later he said [at p. 86]:

> *I accept that* after the expiry of a collective agreement the implied terms and conditions of employment are those found in the expired agreement. *That must be so*. The employees are not working for nothing. Unless something happens, the seniority rights, the pension rights, the dental plan and all those benefits that have been won by unions over the years must continue. *The alternative is chaos*. [emphasis added]

Labour relations policy is a matter for the specialized tribunal. As noted in *Lorne W. Camozzi Co. v. I.U.O.E., Loc. 115*, supra, at p. 345: "The board is uniquely qualified to know what is necessary to develop effective industrial relations or maintain good working conditions." By substituting its view of the effect of the conclusion of the labour board, I am of the opinion that the Court of Appeal exceeded its function.

37 The Court of Appeal was also influenced by its view of the role of the common law in labour relations. While it accepted that individual contracts of employment no longer arise if the parties are in a collective bargaining relationship, a conclusion inescapable since the decision of this court in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 54 D.L.R. (3d) 1, 75 C.L.L.C. 14,277, 4 N.R. 618 [B.C.], they limited the ratio of that decision to the rejection of common law only insofar as it relates to individual employment contracts. They maintained that the essence of employment is not a "relationship", but agreement. Since the employer cannot "agree" directly with the employee, because that is precluded by statute (s. 46(*a*)), and since an agreement cannot be altered if one party does not expressly or impliedly consent to the alteration (see *Hill v. Peter Gorman Ltd.*, supra), even though the agreement has by its own terms expired, the same terms and conditions must continue in force. Before this court, counsel for the union did not try to defend the approach taken by the Court of Appeal with respect to the common law. While he submitted that the common law remains the substratum underlying the Labour Code, a position it is not necessary to accept or reject in this appeal, he submitted that the common law was only relevant to this appeal in that no express power to unilaterally alter a collective agreement could be found in it.

38 I do not see that the common law has any relevance to this appeal. The Labour Relations Board dealt with the application of the common law in specific response to the argument of the union that on termination of the collective agreement individual contracts of employment revive. The tribunal correctly rejected that argument as inconsistent with the decision of this court in *McGavin Toastmaster Ltd. v. Ainscough*. In that case, Laskin C.J.C. found that employer-employee relations governed by a collective agreement displaced the common law of individual employment. He noted at pp. 726-27:

> Neither this Act [the Mediation Services Act, S.B.C. 1968, c. 26] nor the companion *Labour Relations Act* could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.

I can see no reason why this finding should be restricted to those cases where the collective agreement continues in existence. The operative factor, it seems to me, is the ongoing duty on the parties to bargain collectively and in good faith. So long as that obligation remains, then the tripartite relationship of union, employer and employee brought about by the Code displaces common law concepts. The termination of the collective agreement has no effect on the obligation of the parties to bargain in good faith imposed by s. 6. The union retains its certification as the representative of the employees whether a collective agreement is in force or not. The scheme of the Labour Code, requiring the union and the employer to bargain collectively as the expiry of a collective agreement approaches (ss. 62-63), does not leave any room for the operation of common law principles. To the extent the decision of the Court of Appeal relied on them in holding the decision of the Labour Relations Board to be unreasonable, I am of the opinion that the court erred.

39 The union submitted that the decision of the board permitting the employer to alter terms and conditions of employment after unsuccessful bargaining towards a new agreement should be considered patently unreasonable because it is not expressly provided for in the Code or supported by implication from the scheme of the Code. Finding such a power, it maintained, would upset the balance of the labour relations legislation which offsets the union's right to strike against the employer's power to lock out. The balance of the statute, it continued, would also be disturbed because the union has no countervailing or equivalent power. The union could not, for example, unilaterally decide that after expiry of the collective agreement a salary increase would take effect. Since the employer controls the payroll and manages the operation, such an attempt by the union to single-handedly alter the employment terms would simply be ignored by the employer.

40 It is not suggested that the Industrial Relations Council did not have the right to determine the existence of this power in the employer. This complaint was originally brought pursuant to s. 34(1)(*g*) of the Labour Code for a determination as to whether a collective agreement was in effect. It logically follows that if the council has the power to determine if a collective agreement is in force, it can also determine the labour relations consequences of a determination that a collective agreement has been terminated. It is no longer suggested that the collective agreement was not properly terminated. The question is simply as to the consequences of that termination.

41 Both the board and the Court of Appeal relied on a passage from *Re Telegram Publishing Co. and Zwelling* (1975), 11 O.R. (2d) 740, 67 D.L.R. (3d) 404 at 412, 76 C.L.L.C. 14,047 (C.A.), where Kelly J.A. described the position upon the termination of a collective agreement as follows:

> ... the accepted view appears to be that where, after the collective agreement has expired, the employee has continued to work for the employer and the employer has continued to accept the benefit of his services, there being no agreement to the contrary, *and no other circumstances from which there may be implied terms and conditions of employment different from those set out in the collective agreement*, the terms and conditions of the employment after expiry are to be implied and would be similar to those spelled out in the collective agreement which related directly to the individual employer-employee relationship. [emphasis added]

The Court of Appeal seems to have attached no importance to the words I have emphasized. It is only sensible that the terms and conditions formerly contained in a collective agreement be presumed to continue to govern the relationship, absent circumstances that would imply otherwise. The alternative to this, it is fair to say, would be chaos. However, denying to the employer the power within the context of a collective bargaining relationship to, subject to its duty to bargain in good faith, change the terms on which it will make employment available denies almost all effect to the termination clause agreed to by the parties. Instead of terminating the agreement in any real sense, it simply would signal the commencement of a new bargaining session, coupled with the threat of strikes or lockouts. The position taken by Judson J. in *C.P.R. v. Zambri*, [1962] S.C.R. 609 at 624, 34 D.L.R. (2d) 654, 62 C.L.L.C. 15,407 [Ont.], that "When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship", seems more satisfying. The relationship continues, of course, to be subject to the requirements contained in the appropriate statutory scheme.

42 While it is true that the Act does not expressly provide that the employer has the power contended for, it was not unreasonable for the board to find that the power existed. Professor Weiler, the first chairman of the British Columbia Labour Relations Board and one of the drafters of the Code, discusses the issue of unilateral alteration as follows (Paul Weiler, Reconcilable Differences (1980), at pp. 65-66):

> Suppose the employer cannot get an agreement from the union to change these requirements in a new contract. In that event, management is entitled to act unilaterally. It can simply post an announcement to its employees that it is reducing the price it will pay for labour and the amount of labour that it is going to use. That is what it means for management to exercise the rights of property and of capital; to be able to propose the terms upon which it will purchase labour for its operations.

> What rights and resources do the employees and their union have in response? In essence, they have only the collective right to refuse to work on those terms, to withdraw their labour rather than to accept their employer's offer. That is what a strike consists of.

It was argued that the Labour Code as a whole was designed to balance the power of the employer and the union by balancing the right to strike against the right to lock out. On this point, Professor Weiler writes as follows (p. 67):

> A lockout is not the employer equivalent of a strike. As I have shown, the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer will pay its employees who want to work in its operations. (A lockout is usually the instrument of an employer association, an employer "union," which wants to defend itself against selective trade union strikes of its members.)

43 Two further considerations support the view that it was not unreasonable to find that the employer has the power to alter the terms and conditions on which he will make employment available. First, the experience of other jurisdictions shows that allowing the employer this power will not have a catastrophic effect or upset the delicate balance of power between the union and the employer. Put another way, the experience of other jurisdictions does not show that the power of unilateral alteration introduces any unfairness into the bargaining relationship. Nothing was advanced to support the view that a denial of this power is an essential element of an effective labour relations regime. Secondly, the power to change the terms of employment once an agreement has expired and the parties have been unable to agree can be inferred from the existence of provisions in the Code which limit the circumstances in which unilateral changes can be made.

44 No Canadian labour relations legislation grants an employer explicit power to unilaterally change terms and conditions of employment. Rather, the different jurisdictions have either declared that it shall be an unfair labour practice to effect such changes without first bargaining collectively in respect of those changes or unless a strike or lockout has occurred (see Labour Relations Act, R.S.M. 1987, c. L-10, s. 10(4); the Trade Union Act, R.S.S. 1978, c. T-17, s. 11(1)(*m*)) or have placed limits on the circumstances upon which such changes can be made. Thus, in the majority of jurisdictions an employer is prohibited from effecting changes until a strike or lockout has or could occur: see Labour Relations Code, S.A. 1988, c. L-1.2, s. 145; Labour Code, R.S.Q. 1977, c. C-27, s. 59; Canada Labour Code, R.S.C. 1985, c. L-2, ss. 50, 89; or until the parties have bargained collectively and failed to reach an agreement and a conciliator or mediator has either been unable to resolve the dispute or has not been appointed; see Labour Relations Act, R.S.O. 1980, c. 228, s. 79; Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 35(2); Labour Act, R.S.P.E.I. 1974, c. L-1, s. 23; Labour Relations Act, S.N. 1977, c. 64, s. 74; Trade Union Act, S.N.S. 1972, c. 19, s. 33. While none of these statutes exactly parallels the British Columbia Labour Code, much can be drawn from the fact that no jurisdiction has found it necessary to expressly permit an employer to unilaterally alter terms of employment, and implicitly all other jurisdictions allow it, albeit with some limitations. See also *I.A.M. v. Air Can.*, decision of the Canada Labour Relations Board released 18th January 1988 [now reported 88 C.L.L.C. 16,010]; *Can. Safeway Ltd. v. R.W.D.S.U., Loc. 454 & 480* (1985), 11 C.L.R.B.R. (N.S.) 68 (Sask. L.B.).

45 The American authorities provide further support for the approach taken by the labour board, and cannot be dismissed as cursorily as was done by the Court of Appeal. The relevant American statute is the National Labour Relations Act, as amended, 29 U.S.C., particularly ss. 8(a)(5) and 9(a), which provide that it shall be an unfair labour practice to refuse to bargain collectively with the union and that the union shall be the exclusive bargaining agent of the employees. In this the American legislation is broadly similar to many of the Canadian statutes. Though no express power of alteration exists, subject to limitations relating to the obligation to bargain in good faith with the union, it is clear that an employer does not violate the Act by making unilateral changes that are reasonably comprehended within the pre-impasse negotiating framework; see *A.F.T.R.A. v. Nat. Lab. Rel. Bd.*, 395 F. 2d 622 (C.A.D.C., 1968); *Atlas Metal Parts Co. v. Nat. Lab. Rel. Bd.*, 660 F. 2d 304 (C.A. 7th Circ., 1981); *Amer. Ship Bldg. Co. v. Nat. Lab. Rel. Bd.*, 380 U.S. 300 at 316, 13 L. Ed. 2d 855, 85 S. Ct. 955 (1965); and *Nat. Lab. Rel. Bd. v. Cone Mills Corp.*, 373 F. 2d 595 (C.A. 4th Circ., 1967). The Court of Appeal rejected reliance on these cases because the issue facing the American courts was whether the employer had committed an unfair labour practice. The labour board derived guidance from these cases as showing that such a power is not inconsistent with effective labour relations. The exercise of this power

is moderated by the obligation imposed in s. 6 to bargain in good faith. It is not unreasonable for the board to determine that this power can be tempered by that duty.

46 The British Columbia legislation expressly provides for two statutory freeze periods. The applicable provisions read:

> 51. (1) Where an application for certification is pending, a trade union or person affected by the application shall not declare or engage in a strike, an employer shall not declare a lockout, and an employer shall not increase or decrease rates of pay, or alter a term or condition of employment of the employees affected by the application, without the board's written permission.
>
> 61. (1) Where the board certifies a trade union as bargaining agent for employees in a unit and no collective agreement is in force,
>
> > (*c*) the employer shall not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until
> >
> > (i) 4 months after the board has certified the trade union as bargaining agent for the unit; or
> >
> > (ii) a collective agreement is executed,
>
> whichever occurs first.

47 These sections provide statutory protection to the union at a time when it would be particularly vulnerable to management initiatives designed to weaken or destabilize it. The employer is expressly prohibited from pursuing a course of action it would otherwise be able to pursue, subject of course to the unfair labour practice provisions of the Code. The scheme of the Code is such that it prohibits certain courses of action. The board came to the conclusion that what is not prohibited by either the wording or the policy of the statute is permitted. Counsel for the union was unable to persuade me that this is an unreasonable approach. Clearly the legislature could have prohibited an employer from exercising this power. We were not directed to any legislation where such a prohibition, other than for a limited period of time, exists. In all these circumstances, it will be clear that I must respectfully disagree with the reasoning of the Court of Appeal.

Standing of the Industrial Relations Council

48 The union argued that the Industrial Relations Council, having had the opportunity in two lengthy sets of reasons to offer a rational basis for its conclusion, has no standing to make submissions before this court in support of the reasonableness of its decision. It takes the position that while the board could legitimately show that it had jurisdiction to embark upon the enquiry it did, a point the union concedes in any event, it cannot argue that it has not subsequently lost that jurisdiction through a patently unreasonable decision. With respect, I cannot accept this argument. In my view, the Industrial Relations Council has standing before this court to make submissions not only explaining the record before the court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.

49 In *Northwest. Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 12 A.R. 449, 23 N.R. 565, Estey J., for a unanimous court, commented on the right of an administrative tribunal to make submissions before the court. In that case, the Public Utilities Board Act, R.S.A. 1970, c. 302, s. 65, conferred on the Public Utilities Board a specific right to be heard on the argument of any appeal from its decisions, but by implication in s. 63(2), it was precluded from bringing an appeal. In these circumstances, Estey J. stated at pp. 708-709:

> The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

In that case, the board had presented "detailed and elaborate arguments" in support of the merits of its decision. Estey J., at p. 709, commented:

> Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

In these circumstances, the tribunal is limited to an explanatory role and "to the issue of its jurisdiction to make the order in question" [p. 710]:

50 Estey J. then, however, limited the meaning of jurisdiction so as not to "include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice". He continued (p. 710):

> In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

51 At first sight, this may seem to conflict with Lamer J.'s comments in *Bibeault v. McCaffrey; Vassart v. Carrier*, [1984] 1 S.C.R. 176 at 191, *(*sub nom. *Bibeault v. McCafferty)* 7 D.L.R. (4th) 1, 84 C.L.L.C. 14,026, *(*sub nom. *Bibeault v. McCaffrey; Assn. des Employés de la Laurentienne v. Carrier)* 52 N.R. 241 [Que.], that

> ... an infringement of the *audi alteram partem* rule in the case at bar postulates a patently unreasonable interpretation of s. 32 *L.C.* Such an inter pretation by the commissioners, the judge or the Labour Court would in itself be an excess of jurisdiction of the kind recognized by the above-cited decisions of this Court as conferring on the [commissioners] the necessary interest (*locus standi*) to be appellants.

There is, however, no conflict between these two decisions if it is recognized that the right to be heard was, in that case, a statutory right, and the issue for decision by the Labour Commissioners was as to the scope of that right. It is not every case in which a denial of natural justice will flow from a patently unreasonable interpretation of a statute. In the latter case, however, the administrative tribunal will be able to make certain limited submissions.

52 In *B.C.G.E.U. v. Indust. Rel. Council*, B.C.C.A., 24th May 1988 [now reported 26 B.C.L.R. (2d) 145, 32 Admin. L.R. 78], the British Columbia Court of Appeal held that the Industrial Relations Council had the right to make the submissions that the court below had erred in substituting its judgment for that of the Industrial Relations Council, and that the court erred in finding the council's interpretation of the Act to be patently unreasonable. In the course of his judgment, Taggart J.A. for the court made the following statement with which I am in complete agreement, at p. 13 [p. 153]:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

53 Before this court, the Industrial Relations Council confined its submissions to two points. It first argued that the Court of Appeal erred in applying the wrong standard of review to the decision of the board. It submitted that the Court of Appeal reviewed for correctness instead of for reasonableness. As I have already indicated, I agree that the Court of Appeal erred in

adopting such an approach. The second branch of the council's submissions was to show that the board had considered each of the union's submissions before it and had given reasoned, rational rejections to each of the arguments. The argument before us emphasized that the council had made a careful review of the relevant authorities and had made a decision that was within its exclusive jurisdiction. At no point did it argue that the decision of the board was correct. Rather it argued that it was a reasonable approach for the board to adopt. The council had standing to make all these arguments, and in doing so it did not exceed the limited role the court allows an administrative tribunal in judicial review proceedings.

Disposition

54 I would allow the appeal and restore the order of the Industrial Relations Council insofar as it relates to Paccar and C.A.I.M.A.W. Paccar shall have its costs, but no order as to costs is made with respect to the Industrial Relations Council.

L'Heureux-Dubé J. **(dissenting):**

55 Having carefully considered the opinion of my colleague Justice La Forest, I agree with him that the British Columbia Labour Relations Board had standing to make arguments relative to the applicable standard of review as well as to the steps it followed in reaching the decision now being challenged. With great respect, however, I must differ from his conclusion that the board committed no jurisdictional error when it stated that an employer may unilaterally impose the terms of employment upon the termination of the collective agreement, subject only to the obligation to bargain in good faith.

56 As noted by La Forest J., the British Columbia Labour Code specifically prevents an employer from altering the terms of employment where an application for certification is pending (s. 51) and, upon certification, either for a period of four months or until the execution of a collective agreement, whichever comes first (s. 61). However, the Code provides for no statutory freeze of working conditions following the termination of a collective agreement, nor are there any applicable policy guidelines previously issued by the board in this respect. In both the initial C.A.I.M.A.W. application [reported at 7 C.L.R.B.R. (N.S.) 227], as well as in the subsequent C.A.I.M.A.W./I.B.E.W. rehearing [reported at 10 C.L.R.B.R. (N.S.) 355 (which also affirmed [1984] 3 W.L.A.C. 180), reversed [1986] B.C.W.L.D. 2745, which was affirmed 7 B.C.L.R. (2d) 80, 16 C.C.E.L. 294, 32 D.L.R. (4th) 523], the board accordingly proceeded on the basis of its general statutory jurisdiction to decide "any question as to whether ... a collective agreement is in full force and effect" pursuant to s. 34(1)(*g*) of the Labour Code. At the hearing before this court, the respondent properly conceded that the board was initially empowered to embark upon this specific inquiry. However, it must be determined whether in carrying out this inquiry the board exceeded its jurisdiction. To this end it is necessary to examine s. 27 of the British Columbia Code, which expresses the fundamental objectives of the legislation.

I The Fundamental Objectives of the Labour Code

57 In 1973 a general purposes and objects clause appeared for the first time in the Labour Code. The clause then read as follows:

> 27. (1) *The board* may exercise the powers and *shall perform the duties conferred or imposed upon it under this Act with the object of securing and maintaining industrial peace and promoting conditions favourable to settlement of disputes*, and, for this purpose, the board may from time to time formulate general policies not contrary to this Act for the guidance of the general public and the board; but the board is not bound thereby in the exercise of its powers or the performance of its duties. [emphasis added]

58 This disposition was amended by the Labour Code Amendment Act, S.B.C. 1977, c. 72, and thereafter provided:

> 27. (1) *The board, having regard to the public interest as well as the respective rights and obligations of parties before it*, may exercise its powers and *shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interest of achieving or maintaining good working conditions and the well-being of the public*, and for those purposes the board shall have regard to the following purposes and objects:
>
> (*a*) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;

(*b*) improving the practices and procedures of collective bargaining between employers and trade-unions as the freely chosen representatives of employees;

(*c*) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade-unions. [emphasis added]

59 This is the formulation of s. 27(1) of the Labour Code which applies to the present appeal. It is appropriate, however, to complete the legislative history of s. 27(1) by noting that it was once again modified in 1987 by S.B.C. 1987, c. 24, to reads as follows:

27. (1) The council, having regard to the public interest as well as the rights of individuals and the rights and obligations of the parties before it and recognizing the desirability for employers and employees to achieve and maintain good working conditions as participants in and beneficiaries of a competitive market economy, shall exercise the powers and perform the duties conferred or imposed on it under this Act so as to achieve the expeditious resolution of labour disputes, and for these purposes the council shall have regard to the following purposes and objects:

(*a*) securing and maintaining industrial peace and furthering harmonious relations between employers and employees;

(*b*) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees;

(*c*) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions;

(*d*) encouraging the voluntary resolution of collective bargaining disputes;

(*e*) minimizing the harmful effects of labour disputes on persons who are not involved in the disputes;

(*f*) providing such assistance to employers and bargaining agents as may facilitate the making or renewing of collective agreements;

(*g*) gathering and publishing information and statistics respecting collective bargaining in the Province.

60 General purpose clauses such as s. 27(1) of the Labour Code not only aim to provide guidance to the administrative agency, they also identify the limits of the discretion it enjoys in the exercise of its statutory powers. The role of such clauses is described by D.J. Galligan, Discretionary Powers: A Legal Study of Official Discretion (1986), as follows (at p. 109):

The legislative statement of objects and purposes is of clear and central importance in exercising delegated powers. By that means the content and scope of powers are defined, and guidance is provided to the official in making decisions; moreover, it is in terms of those objects that an assessment or evaluation of a decision is to be made.

61 Purposes and objects clauses find their historical roots in the common law. In *Padfield v. Min. of Agriculture, Fisheries & Food*, [1968] A.C. 997 at 1030, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694 (H.L.), Lord Reid explained why the fundamental objects of the enabling legislation restrict the delegation of discretionary powers:

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision — either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. *Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court*. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter

to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. [emphasis added]

62 Complying with legislative intent is as valid a policy consideration in Canada as it is in England: [Translation] "when Parliament delegates certain powers, it intends to enable the administrative agency concerned to meet the objectives which are either expressly or implicitly written in the act" (G. Pépin & Y. Ouellette, Précis de contentieux administratif, 2nd ed. (1982), at p. 264). In the well-known case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 156, 16 D.L.R. (2d) 689 [Que.], Martland J. expressed views foreshadowing those later adhered to by Lord Reid:

... the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act.

63 In the specific area of labour relations, it has long been recognized by this court that the statutory imperatives of maintaining industrial peace and harmonious industrial relations are to be implied to limit the discretion conferred by the enabling legislation. In *Smith & Rhuland Ltd. v. R.*, [1953] 2 S.C.R. 95, 107 C.C.C. 43, [1953] 3 D.L.R. 690 [N.S.], the question raised was whether a provincial labour relations board could validly decline to certify a union on the basis that the secretary-treasurer of the union was a communist and exercised a dominant influence in the union. A majority of this court found that, while the board enjoyed a discretion to certify, this discretion could not be exercised on the basis of matters extraneous to the underlying purposes and objectives of the Act. Speaking for three members of the majority, Rand J. said at p. 100:

I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization.

In Rand J.'s view, the issue was one of vires: the board exceeded its powers in exercising its discretion to certify based on considerations unrelated to the fundamental purposes of the legislation. Were such a case to arise today in British Columbia, it would no doubt be dealt with similarly under s. 27(1).

64 In *Tremblay v. Comm. des relations de travail du Qué.*, [1967] S.C.R. 697, *(*sub nom. *Tremblay v. Que. Lab. Rel. Bd.)* 64 D.L.R. (2d) 484, this court was asked to determine whether s. 96 of the British North America Act, 1867, allowed the Labour Relations Board of Quebec to validly exercise the discretion conferred by s. 50 of the provincial Labour Relations Act. This provision stated: "If it be proved to the Board that an association has participated in an offence against s. 20 [domination by employer], the Board may ... decree the dissolution of such association". In deciding that the board had constitutional authority to apply s. 50, Abbott J., who delivered the opinion of the court, wrote at pp. 701-702:

The power given to the Board under s. 50 is a limited and discretionary power. It is purely incidental to the accomplishment of one of the primary purposes for which the association was granted corporate status, namely the maintenance of industrial peace.

65 *Smith & Rhuland v. R.* and *Tremblay v. Comm. des relations de travail du Qué.* demonstrate that general purposes and objects clauses such as s. 27(1) of the Labour Code are not enacted in a juridical vacuum. Such clauses codify the common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute. In this historical context, s. 27(1) amounts to more than a simple guide to the board; it constitutes a statutory direction to carefully consider the goal of developing effective industrial relations having regard to certain specific purposes and objects.

66 The board is generally well aware of the obligation s. 27(1) imposes upon it (see, e.g., *Wall & Redekop Corp. v. C.J.A.*, [1986] 6 W.W.R. 153, 5 B.C.L.R. (2d) 335 (S.C.), dismissing an application for judicial review from (1986), 86 C.L.L.C. 16,054, itself denying a reconsideration from (1985), 85 C.L.L.C. 16,050). However, in deciding the complaints which gave rise to the present proceedings, the board gave no consideration at all to the underlying purposes and objectives of the Code. In the initial C.A.I.M.A.W. application and in the joint C.A.I.M.A.W./I.B.E.W. rehearing, there was not a single reference to s. 27 of the Code. Further, there was no discussion of the public interest or the development of effective industrial relations, with the result that it cannot be presumed that the board implicitly considered that provision.

67 The board's failure to discuss the requirements of s. 27 is especially fraught with consequence since the policy decision it was called to make affects by its very nature not only the parties before it but also all other unions, employees and employers in a highly sensitive area of collective bargaining. That the board envisaged making a policy determination which would affect unions and employers at large is illustrated by the following extract from the C.A.I.M.A.W./I.B.E.W. rehearing [at p. 381]:

> We now wish to summarize our conclusions above by describing the rights and obligations of the parties under the *Labour Code* after the expiry of a collective agreement ...
>
> After the expiry of the collective agreement, no unilateral alterations to terms and conditions of employment may be made by an employer unless they are done so in compliance with his duty to bargain in good faith with the union ...
>
> In the period after the expiry of the collective agreement, where the employer continues to operate and the employees continue to work, it will be implied that the terms and conditions of employment for the employees will continue to be the same as those contained in the just expired collective agreement.

The general references to "an employer" leave no doubt that the board is engaged in an attempt to fill the void in the Labour Code with respect to the unilateral alteration of terms after the expiration of a collective agreement. This decision constitutes a "mini-Code" on "the rights and obligations" of employers and unions at that stage. The board's policy decision goes well beyond the specific interests of the parties before it and acquires an importance akin to the enactment of a new legislative provision. This additional significance accentuates the necessity for the board to meet head on the arguments based on the development of harmonious labour relations.

68 I agree with my colleague La Forest J. that courts must defer to the judgment of administrative tribunals in matters falling squarely within the area of their expertise. It is now well established that an administrative tribunal exceeds its jurisdiction because of error only if (1) it errs in a patently unreasonable manner in respect of a question which is within its jurisdiction, or (2) it commits a simple error in respect of a legislative provision limiting the tribunal's powers: see *U.E.S., Loc. 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1086, *(*sub nom. *Syndicat national des employés de la Comm. scolaire régionale de l'Ouataouais v. Union des employés de service, loc. 298)* 35 Admin. L.R. 153, 95 N.R. 161 [Que.]. However, unlike my colleague La Forest J., I cannot accept that the board's decision is anything but unreasonable. Here, as I said earlier, there is no indication that the board even considered the requirements of effective industrial relations and the purposes and objects expressed in s. 27. Such an omission, in my view, played a crucial role in leading the board astray and causing it to come to a patently unreasonable solution.

69 I now turn to my reasons for finding no rational basis for the board's decision.

II Infringement upon the Fundamental Objectives

70 Collective bargaining has been entrenched in Canadian labour relations law and policy for over 50 years. It is indispensable to the development of "effective industrial relations" pursuant to s. 27. From a legislative standpoint, collective bargaining involves the recognition of three basic freedoms on the part of employees: "to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining": A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, Collective Bargaining Law in Canada, 2nd ed. (1986), at p. 4. The scheme postulates that the employees' control over the supply of labour will match the employer's control over its demand, thereby fostering the proper conditions for constructive and successful negotiations. The strike and the lockout are the principal economic sanctions which are provided for and regulated by labour legislation. These, however, are but two of a wide array of economic sanctions in the labour context.

71 While they may be different in accessory respects, all economic sanctions used in collective bargaining share three fundamental characteristics: they only come into play after concerted attempts at settlement; they hurt both parties economically; and they presuppose the existence of countervailing measures.

1. The Characteristics of Economic Sanctions

72 First, all Canadian labour jurisdictions have adopted a legislative policy of postponing the exercise of the economic sanctions until all other attempts at an agreement have failed. As noted by Professors H.W. Arthurs, D.D. Carter and H.J. Glasbeek in Labour Law and Industrial Relations in Canada, 2nd ed. (1984), at p. 213:

> Canadian collective bargaining legislation usually requires the parties to exhaust certain dispute resolution procedures before striking or locking out.

For instance, in British Columbia, the use of the strike and lockout is subject to tight control by the Labour Code and close scrutiny on the part of the labour board. Under the Code, there is no right to strike or to lock out during the term of the collective agreement. These rights only arise upon the termination of the agreement, after the parties have "bargained collectively about the dispute which is the cause or occasion of the strike or lockout and failed to conclude a collective agreement" (s. 80). In the case of the strike, there is the further requirement of holding a vote "by secret ballot and in accordance with the regulations, of the employees in the unit affected, as to whether to strike" in which a "a majority of those employees who vote have voted for a strike" (s. 81). Where the vote favours a strike, the right to strike may only be exercised within three months following the vote (s. 81(3)(*a*)), and after 72 hours have elapsed following written notice given by the trade union that the employees are going to strike (s. 81(3)(*b*)(i) and (ii)). Where a mediation officer has been appointed, a further delay may be necessary to allow for the officer's report to be made to the minister (s. 81(3)(*b*)(iii)).

73 In deferring the use of the strike and lockout until the negotiations come to a deadlock, the legislation furthers the fundamental commitment to the "orderly and constructive settlement of disputes", which is expressed in s. 27(1)(*c*) of the British Columbia Labour Code.

74 Second, the use of an economic sanction in collective bargaining necessarily entails that a party will suffer some loss in having recourse to it. Bargaining is premised upon mutual compromise. By engaging in a strike, members of a trade union accept that they will be out of work and receive no salary from the employer during the length of the strike. Likewise, where an employer locks out its employees, the employer accepts that its production may shut down and that its flow of revenues may eventually come to a halt.

75 Third, the existence of an economic sanction presupposes the availability of a countervailing sanction of proportionate impact (Carrothers, Palmer and Rayner, at p. 577):

> The systems of industrial relations in Canada are, as a matter of deliberate legislative policy, based on collective action, the use of market forces and *the concept of countervailing power*. [emphasis added]

2 Discussion

76 The unilateral imposition of the terms of employment as recognized by the board in the present instance shares none of these three characteristics. First, the policy stated by the board in the C.A.I.M.A.W./I.B.E.W. rehearing provides for no ban on the unilateral imposition of terms of employment in the early stages of negotiation. Such unilateral sanction may theoretically, on the basis of that policy, take place at any time following the termination of the previous collective agreement. This result is most unusual when compared to the law in other jurisdictions. In the United States, an exception to the general prohibition against the imposition of the terms of employment was created in the case of an impasse. This exception is itself subject to restrictions with respect to the extent, context and manner of the changes brought about by the employer: see the discussion by T.H. Murphy, "Impasse and the Duty to Bargain in Good Faith" (1977), 37 U. Pitt. L. Rev. 1, at pp. 24-34. Moreover, as noted in the reasons of my colleague La Forest J., the majority of Canadian jurisdictions prohibit unilateral changes either until the right to strike or lock out is acquired or until negotiation, conciliation and mediation have all failed to produce an agreement. Consequently, there is a near unanimous recognition of the need to freeze working conditions until either an impasse is reached or the right to strike or lock out arises — a situation which typically takes a number of months after termination. However, on the basis of the policy formulated by the board, British Columbia would be the only jurisdiction in North America where the imposition of terms can occur before such time.

77 Second, the employer is not detrimentally affected if it decides to reduce the salaries and cut other employment benefits. The unilateral imposition of terms may thus actually be profitable to the employer since it allows continued production at lower costs.

78 Third, since the imposition of terms could conceivably take place before the right to strike arises under the Labour Code, no sanction is available to the union to countervail the unilateral setting of terms. The union cannot impose on the employer the wages, hours and other benefits it seeks to obtain. It has no choice but to live with the new conditions until the right to strike springs into existence, and even then it may have no option.

79 More importantly, unlike the strike and lockout, the unilateral imposition of the terms of employment does not necessarily pressure both parties into agreeing upon a settlement. This sanction opens the door to a number of abuses of the process of collective negotiation. Altering terms may have detrimental repercussions on the process of bargaining, such as discrediting the union's authority to negotiate an agreement or unduly forcing the union's hand in the decision to call for a strike.

80 The risk that the union's authority may be curtailed was discussed in a decision of the Canadian Labour Relations Board, *Can. Air Pilots Assn. v. Air Can., Montreal, Que.* (1977), 24 di 203. While that Code expressly freezes the working conditions until the right to strike arises, this prohibition was designed to address the same concerns (at p. 214):

> The prohibition [against unilateral alteration of terms] is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst [sic] avoidable legal or illegal industrial conflict. *Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code, Part V*. [emphasis added]

The objective of "cooperative relationship" in the Canada Labour Code is similar to the objective of "furthering harmonious relations between employers and employees" set out in s. 27(1)(*a*) of the British Columbia Labour Code.

81 Similar concerns are expressed in *U.E.W. and DeVilbiss Ltd.* (1976), 2 C.L.R.B.R. 101 at 115 (Ont. L.R.B.):

> When an employer, while negotiating with a trade union, implements new conditions of employment that have not even been first proposed to the trade union, the inference logically arises that the tactic is designed to undermine the status of the trade union — amounting to a suggestion that beneficial terms and conditions of employment do not require the presence of the bargaining agent.

Here again, I have no doubt that s. 27 of the Labour Code is designed to protect the integrity of the bargaining process against possible abuses of the type described above by the Ontario Labour Board.

82 These concerns with respect to the integrity of the bargaining process are most acute when the employer proceeds to reduce or cancel employment benefits. Such changes are by their very nature inherently prejudicial to the freedom of unions to decide whether or not to strike. Indeed, in reducing the conditions of employment, the employer leaves the union and the employees with the following choices: to continue to work under the new, less favourable, conditions or to strike even though that may not otherwise have been the employees' intention. If no strike is called, then the employees lose faith in a union under whose leadership the benefits have decreased. If the union is forced into calling a strike at an inopportune time, the same destructive result can follow. To force such a choice upon the union is to make a mockery of the bargaining system. Such an ultimatum is especially disparaging of the system since the pressures are brought to bear upon the most vulnerable participants in the process: the individual employees. The basic imbalance sought to be corrected by the right of employees to associate is described in detail by Carrothers, Palmer and Rayner, at p. 4:

> The employee, treating with his employer over terms under which he is to sell his services, is, individually, at an incompensable disadvantage. Where the process of production displays a high capacity for substituting one person for another, or one job function for another, and where the economy is operating at a level short of full employment, most individual workmen must take the terms offered or go without.

83 In focusing on the individual employees and forcing them either to accept the lower terms or to stop working altogether, the unilateral imposition of terms stands in a class by itself as an economic sanction which is inherently destructive of the freedom to engage in collective bargaining and strikes a fundamental blow to the freedom of employees to form themselves into a union and engage the employer in collective bargaining. The only foreseeable effect of this measure is to uselessly fuel the flames of the labour dispute. Such a result is inimical to the statutory purposes set out in s. 27 of the Labour Code. These concerns were addressed in *I.M.A.W., Loc. 155 v. Nat. Lab. Rel. Bd.*, 442 F. 2d 742 (C.A.D.C., 1971), where the employer decreased employment benefits with a view to pressuring the union into going on strike. The board, later confirmed by the Court of Appeals, found that (p. 747):

> It would seems reasonable to infer that when one party to the bargaining takes action which has a work stoppage as at least one of its objects, such conduct is inimical of the statutory purposes and reveals a purpose inconsistent with good-faith bargaining.

84 In stating as a goal the improvement of collective bargaining "between employers and trade unions as the freely chosen representatives of employees", s. 27(1)(*b*) of the Labour Code emphasizes the sovereign role of the union in the bargaining. This role is also underscored in s. 46(*a*) of the Code, which states:

> 46. Where a trade union is certified as bargaining agent for an appropriate bargaining unit,
>
> (*a*) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled.

Since the Code's definition of "collective bargaining" includes "the regulation of relations between an employer and employees" (s. 1), s. 46 confers exclusive bargaining authority to a certified union even after the collective agreement has expired.

85 In *Cariboo College v. Cariboo College Faculty Assn.* (1983), 4 C.L.R.B.R. (N.S.) 320 (B.C.L.R.B.), the board found that s. 46 prevents an employer, upon the termination of a collective agreement, from unilaterally implementing new working conditions through direct communication with the employees. Vice-Chairman Sheen wrote at pp. 336-38:

> In British Columbia, due to the provisions of s. 46 of the *Labour Code*, an employer cannot unilaterally alter an employee's terms of employment even in the interregnum between the expiration of the agreement and the commencement of a strike or lockout. For, by virtue of that section, a trade union certified to represent the employees in a bargaining unit, has the exclusive authority to "bargain collectively" for that unit and to conclude an agreement binding upon it ...
>
> ... although there is no collective agreement in force, if an employer wishes to alter the terms and conditions of employment of the employees in that unit, it must do so by means of negotiations with the certified bargaining agent — it cannot get legally binding agreements by means of bargaining with, or unilateral imposition upon, individual employees. For, so long as the union is the certified bargaining agent for those employees, the termination of the collective agreement does not give the employer the right to deal with the employees individually ...

He added [at p. 341]:

> ... the College sought to sign and implement the nine-month contract, *at least* until the settlement of a new collective agreement. In so doing it sought to achieve directly with the employees what it could not accomplish in bargaining with the Faculty Association. Such conduct is an attempt to undermine the latter's exclusive bargaining authority and is a violation of s. 6.

86 This reasoning, however, was subsequently distinguished by the board in the C.A.I.M.A.W. application and the C.A.I.M.A.W./I.B.E.W. rehearing, which are at the origin of the present proceedings, on the basis that [pp. 240-41 (7 C.L.R.B.R. (N.S.)]:

> ... by virtue of s. 46 of the Code an employer may not engage in any negotiation or bargaining in respect of terms or conditions of employment directly with the employees within a bargaining unit. Such direct employer-employee negotiations would certainly fail to recognize the exclusivity of the trade union's collective bargaining authority: s. 46.

The board read *Cariboo College* narrowly as not extending to cases where unilateral action respecting the terms and conditions of employment is initiated by the employer in communicating with the bargaining agent instead of individual employees. The board wrote [at pp. 240-41]:

> With the greatest of respect to the panel in *Cariboo College* [reported (1983), 4 C.L.R.B.R. (N.S.) 320], we find that we cannot concur with some of the conclusions made in that case ... We are not, however, persuaded by the analysis in *Cariboo College* that any of the authorities cited therein stand for the proposition that an employer may not alter the terms and conditions of employment after the expiry of a collective agreement. To put it another way, we do not conclude that the unilateral imposition by an employer of new terms and conditions of employment after the termination of a collective agreement constitutes negotiating directly with employees and a failure to recognize the exclusivity of the trade union's collective bargaining authority.

87 After reconsidering *Cariboo College*, the board felt that it "went too far" [p. 380 (10 C.L.R.B.R. (N.S.))] and that there was "unyielding rigidity" [p. 203 ([1984] 3 W.L.A.C.)] in its previous interpretation of s. 46. The reasons for this change of position were set out at length by the panel in the C.A.I.M.A.W./I.B.E.W. rehearing. First, the board found that the "weight of authority" [p. 206] favoured the new interpretation, and it expressed the view that *Cariboo College*'s reliance on *Re Telegram Publishing Co. and Zwelling* (1975), 11 O.R. (2d) 740, 67 D.L.R. (3d) 404, 76 C.L.L.C. 14,047 (C.A.), was "misplaced" [p. 199]. The board added the following, which states the ratio for the board's disagreement with the interpretation offered in *Cariboo College* [pp. 203-204 ([1984] 3 W.L.A.C.)]:

> Consider, as well, the overall structure of the Labour Code as it is pertinent to the issue under discussion. Section 51 states that where an application for certification is pending, the employer is prohibited, except with the consent of the Labour Board, from altering any terms or conditions of employment of the employees affected by the application. Where a certificate is granted, the prohibition is extended by section 61 until four months after the issuance of the certificate, or until a collective agreement is reached, whichever occurs first. Of course, by the time section 61 enters the picture, so has section 46. Thus, three propositions emerge. First, section 61 would be quite unnecessary if section 46 had the *per se* result contemplated by the panel in *Cariboo College, supra*. Second, if that result is correct, the dissipation after four months of the absolute prohibition against unilateral prohibitions (subject only to the consent of the Labour Relations Board) would be rendered illusory. Third, the expiry of the four month period, far from leading to a loosening of restraints on the employer, would lead to a complete sterilization of the capacity to make non-negotiated alterations (subject only to an abandonment by the trade union of its certificate of bargaining authority), regardless of whether the Labour Relations Board might wish to consent. The board would simply lack the power to consent.
>
> To state such a situation is to repudiate it. Section 51 is a recognition that the pre-certification stage is the most sensitive of all. Section 61 is an acknowledgement that the early post-certification stage is also quite sensitive; that statutory protection against unilateral employer action continues to be warranted for a while. But not forever. At some stage, the new collective must stand on its own feet. It must rely on its own negotiating strengths, and its will to resort to the devices of collective bargaining.

88 As noted by La Forest J., it is apparent that the board sought to rationalize its conclusion. However, in so doing the board omitted to consider an essential element of its mandate: s. 27. Had it turned its mind to the fundamental policies expressed in

that provision, the board would have had no choice but to come to a conclusion such as the one previously set forth in *Cariboo College* and to endorse a solution similar to the policies of control which are universally applied in other jurisdictions.

89 At any rate, the board's interpretation lacks a proper rationale. While there may be some overlap between the statutory freeze provided for by s. 61 and the principle of exclusive bargaining authority, it does not necessarily follow that s. 61 is rendered unnecessary, nor that the freeze is illusory. Once the agreement is reached, there is no longer any need for the protection afforded by s. 61 and the freeze, because the protection then is afforded by the binding nature of the agreement. Indeed, it is beyond dispute that, during the life of a collective agreement, an employer is bound by the terms of the agreement: see s. 64, and *Syndicat catholique des employés de magasins de Qué. Inc. v. Paquet Ltée*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346 [Que.], and *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 54 D.L.R. (3d) 1, 75 C.L.L.C. 14,277, 4 N.R. 681 [B.C.]. This does not render, to quote the panel in the C.A.I.M.A.W./I.B.E.W. rehearing, "the dissipation ... of the absolute prohibition against unilateral [alterations] ... illusory". Simply, the prohibition finds its source elsewhere in the Code. The conclusion of a collective agreement, to use the board's language, may also "lead to a complete sterilization of the capacity to make non-negotiated alterations"; yet, that is not an undesirable situation. Quite the contrary: parties negotiate precisely with a view to reaching an agreement which will provide certainty in labour relations for a specified period of time.

90 Moreover, it seems to me that, to be more in line with s. 27, the board should have given the reasoning in *Cariboo College* a liberal application. The main infringement upon the union's exclusive bargaining authority in that case did not flow from the mere fact that an employer had notified the individual employees personally or through a circular posted in the workplace of the proposed alteration of terms. While that may have formed a subordinate part of the problem, the undermining of the union's authority resulted from the fact that changes in the terms and conditions of employment were brought about without any participation by the employees' representative. To limit the principle of exclusive bargaining authority as the board did, namely, as merely requiring the employer to "communicate the terms and conditions of the new post-collective agreement relationship directly to the trade union and not directly to the employees", is to amputate the efficiency of the collective bargaining scheme entrenched in the legislation.

91 The Court of Appeal found that the alternative proposed by the board would bring "chaos" to labour relations in British Columbia. The five-member panel of the Court of Appeal determined [at p. 89] that it was "patently unreasonable" for the board to find that the employer had this power, in part because that power conflicted with the need to develop effective industrial relations. For the court, Seaton J.A. noted [at p. 85]:

> No foundation is given for the statement that "an employer has the authority under the Labour Code to make unilateral alterations ..." No section says that; nor does any imply it. *The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.* [emphasis added]

I share the Court of Appeal's opinion as regards the patently unreasonable nature of unilateral action as allowed by the board in the present case.

92 While the foregoing reasons suffice to dispose of the present appeal, I find it necessary to add brief remarks on the procedure followed by the board.

III Policy-making Procedure

93 The failure of the board to reject a policy solution contrary to the fundamental objectives of the Act may be due to the fact that the board chose to make this policy decision within the context of a private adjudication between individual parties. The board did not benefit from the input other parties may have had to offer in this respect had another route been chosen to formulate its policy. In that fashion the spectrum of the consequences of the proposed policy may not have been fully brought to the board's attention.

94 The Code does provide for mechanisms allowing the board to broaden the reach and scope of the proceedings before it. The first set of mechanisms involves procedural adjustments which can be brought to the adjudicative hearing:

35. The board, in relation to a proceeding or matter before it, has power to

(*a*) summon and enforce attendance of witnesses and compel them to give oral or written evidence on oath and to produce documents and things the board considers necessary for full investigation and consideration of a matter within its jurisdiction that is before it in the proceeding;

(*k*) adjourn or postpone the proceeding;

(*n*) add a party to the proceeding at any stage.

95 The second involves a more radical change in the nature of the proceedings. The board is empowered to conduct full-scale, public policy-making hearings during the course of which the board is more completely liberated from the restrictions inherent to private adjudication:

27. (2) The board may formulate general guidelines to further the operation of this Act; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.

(3) In formulating general guidelines the board may request that submissions be made to it by any person.

(4) The board shall make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

96 In a policy-making hearing held under s. 27(2) and (3), any interested party would have the opportunity to make representations, thereby enabling the board to make a policy decision consistent with the public interest and the fundamental purposes of the legislation. These provisions indicate a legislative intent favouring broad participation by the members of the labour relations community in proceedings involving issues of widespread interest. While policy issues may be present in some form in private adjudications, and while the board is empowered by s. 38 to make declaratory opinions in certain cases, some policy issues necessarily involve the use of the mechanisms provided for by ss. 27 and 35. I would only add that in a case like the present one, where a previous policy orientation is reversed, where the area concerned involves a void in the enabling statute, and where the question raised is of crucial importance to employers, unions and individual employees at large, the matter may more properly have been dealt with in a policy-making hearing.

IV Conclusion and Disposition

97 From the foregoing, I conclude that, in allowing an employer to unilaterally impose the terms of employment upon the termination of a collective agreement subject only to an obligation to bargain in good faith, the Labour Relations Board of British Columbia interpreted the Labour Code in a patently unreasonable manner. In so doing, the board committed a jurisdictional error and its decision cannot stand.

98 As a result, I would dismiss the appeal and confirm the order of the Court of Appeal, itself confirming Meredith J.'s order quashing the board's decisions and remitting the matter to the board for further consideration, the whole with costs.

***Sopinka J.* (concurring) (*Lamer J.* concurring):**

99 I have had the benefit of reading the reasons for judgment prepared in this appeal by Justice Wilson, Justice La Forest, and Justice L'Heureux-Dubé, and I am in agreement with La Forest J. that the appeal must be allowed [appeal from 7 B.C.L.R. (2d) 80, 16 C.C.E.L. 294, 32 D.L.R. (4th) 523, affirming [1986] B.C.W.L.D. 2745, which reversed 10 C.L.R.B.R. (N.S.) 355, which affirmed 7 C.L.R.B.R. (N.S.) 227 and [1984] 3 W.L.A.C. 180]. My route in arriving at this conclusion differs in an important respect from my colleague's, and it is thus necessary for me to set out my approach to the matter.

100 While I agree generally with La Forest J. on the principles underlying the scope and standard of review of labour board decisions, I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision

under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable", it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.

101 I share La Forest J.'s opinion of the importance of curial deference in the review of specialist tribunals' decisions. But, in my view, curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness. The test is, as La Forest J. points out, citing *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 14 D.L.R. (4th) 289, 84 C.L.L.C. 14,070, 55 N.R. 194 [Que.], a "severe test". But even here an appreciation of the merits is not irrelevant. Lamer J., speaking for himself and McIntyre J. in *Blanchard*, stated at pp. 494-95:

> ... though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

So long as the court is satisfied with the correctness of the tribunal's decision, any reference to reasonableness is superfluous.

102 Concerning the merits of the present case, I can be brief, since this ground has been substantially covered by La Forest J. in finding that the board's decision was "not unreasonable". I am of the view that the board's decision is consistent with the Labour Code, R.S.B.C. 1979, c. 212, which expressly provides for "freezes" in employment conditions in some circumstances, though not those with which we are concerned here (see ss. 51 and 61). Moreover, the board's decision is consistent with the contractual expectations of the parties, since the insertion of the termination clause would have been meaningless if the terms of the collective agreement were held to persist indefinitely, or until a new collective agreement is concluded.

103 The board concluded that the duty to bargain in good faith prevented the employer from altering the terms of the collective agreement until an impasse was reached. Thereafter, the employer reverted to its right to change these terms because no collective agreement was in force, nor was the employer bound by any ordinary contract. This result is summed up in the following statement [at p. 383 (10 C.L.R.B.R. (N.S.)]:

> The B.C. Legislature has not enacted a statutory freeze covering the period after the expiry of a collective agreement, with the result that the employer's authority to make unilateral alterations to terms and conditions of employment is left limited only by his duty to bargain in good faith.

104 In this respect, the board's decision accords with the rule that a legislature is presumed not to depart from the general system of the law without expressing its intention to do so: *Goodyear Tire & Rubber Co. of Can. v. T. Eaton Co.*, [1956] S.C.R. 610 at 614, 4 D.L.R. (2d) 1, 56 D.T.C. 1060 [Exch.].

105 In dealing with labour and other remedial legislation, this rule must be tempered by the rule of statutory construction that requires that such legislation be given a liberal construction. Accordingly, the legislation is not to be "whittled to a minimum" or given a narrow interpretation in the face of the expressed will of the legislature: *Bakery & Confectionery Wkrs. of Amer., Loc. 468 v. White Lunch Ltd.*, [1966] S.C.R. 282 at 292, 55 W.W.R. 129, *(*sub nom. *Bakery & Confectionery Wkrs. of Amer., Loc. 468 v. Salmi; White Lunch Ltd. v. Lab. Rel. Bd. (B.C.))* 56 D.L.R. (2d) 193 [B.C.]. The Labour Code, notwithstanding the use of the word, is not a code in the true civil law sense. It does not purport to totally exclude the general law. Accordingly, in respect of some matters, it is silent. This lacuna cannot be filled by any amount of liberal construction short of out-and-out judicial legislation. Rather, the general law applies to fill the void. In common law jurisdictions, this is the common law. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 589, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 87 C.L.L.C. 14,002, 71 N.R. 83, McIntyre J. stated:

> I am aware that the labour relations of the appellants are governed by the *Canada Labour Code*. However, since the *Canada Labour Code* is silent on the question of picketing, the common law applies, in this case the common law of British Columbia ...

106 The effect of the board's decision is that, while the springing up of individual contracts of employment on the expiry of the collective agreement would be inconsistent with the statutory scheme of collective bargaining, the right of the employer to change the terms and conditions of employment in the absence of any agreement, collective or otherwise, is not. This result conforms with the principles referred to above and is the correct result. It is, therefore, not necessary to consider whether the decision was reasonable or, much less, patently unreasonable.

107 I would therefore dispose of the appeal as proposed by La Forest J.

Appeal allowed.

Footnotes

* McIntyre J. took no part in the judgment.

Tab 13

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the meaning of a provision setting qualification requirements for appointment to the Supreme Court substantively altered the provision and constituted an amendment to the Constitution.[27]

D. DRAFTING CONVENTIONS

Certain words or expressions are used by drafters repeatedly in legislation to signal particular meanings. For example, the use of the word "knowingly" in a regulatory offence indicates that *mens rea* is required for a conviction. The use of the word "deems" indicates that the legislature is declaring the law with respect to a matter even though the declaration may be contrary to common understanding. The use of the word "or" inclusively to mean "and/or" is another example, examined below. The effect of these conventions is to establish accepted legal meanings or usages for the relevant terms. Although these meanings are not binding, they are strongly presumed.

1) "May" and "Shall" or "Must"

Section 11 of the federal *Interpretation Act* provides that the meaning of "may" is permissive and "shall" is imperative.[28] Other Interpretation Acts have similar provisions. Section 29 of British Columbia's *Interpretation Act* includes the following definitions:

> "**may**" is to be construed as permissive and empowering;
>
> "**must**" is to be construed as imperative;
>
> "**shall**" is to be construed as imperative.

Despite these definitions, both "may" and "shall" are a recurring source of ambiguity, and "must" is not immune from ambiguity. "May" is ambiguous because it may or may not be coupled with a duty; "shall" and "must" are ambiguous because they may be either mandatory or directory.

a) "May" Confers Powers: Discretionary versus Obligatory

"May" is generally used in legislation to confer a power or legal authority on a person or a body. The expression "X may do y" means that X has a legal authority to do y and cannot be found guilty of an offence or liable

27 *Ibid* at para 106.

28 In French, "*pouvoir*" is permissive, and the use of the present indicative tense of verbs is imperative.

in damages for doing y. The interpretation question that arises in connection with "may" is not whether it is permissive but whether the power it confers must be exercised. If the power is discretionary, the person or body on whom it is conferred must decide whether to exercise it and may choose not to. If it is obligatory, the recipient of the power must exercise it and has no choice but to do so. The difficulty lies in determining when a power is discretionary and when it is obligatory.

The leading authority on this problem is the judgment of Lord Cairns in *Julius v Lord Bishop of Oxford*.[29] In that case the court had to interpret the phrase "it shall be lawful," which was used by drafters of the day as "may" now is used, to confer legal authority. Lord Cairns wrote:

> The words "shall be lawful" [or "may"] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.[30]

In the absence of evidence to the contrary, powers conferred by "may" are taken to be discretionary. But when failure to exercise the power would tend to defeat the purpose of the legislation, undermine the legislative scheme, create a contextual anomaly, or otherwise produce unacceptable consequences, the courts may conclude that the power was meant to be exercised, that it is a power coupled with a duty. In particular, when exercising a power is made conditional on specific findings or the fulfilment of a set of conditions, the courts are apt to conclude that the power must be exercised once all the relevant findings are made or once all the conditions are met. This reasoning is exemplified in *Bates v Bates*,[31] involving section 17 of the *Divorce Act*:

> 17(1) A court of competent jurisdiction *may* make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order . . .
>
> . . .
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change in circumstances as provided for in the applicable [child support] guidelines

29 (1880), 5 App Cas 214 (HL).

30 *Ibid* at 222–23.

31 (2000), 49 OR (3d) 1 (CA).

> has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> . . .
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable [child support] guidelines.

The child support guidelines set out a formula to determine the amount each parent must contribute to the support of his or her child. Section 14 of the guidelines provides:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances:
>
> . . .
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act.

One of the issues that arose in interpreting subsection 17(1) of the Act was whether a court could refuse to vary a support order made before 1 May 1997 for which the coming into force of section 15.1 is deemed to constitute a change of circumstances. The following from the judgment of Laskin JA sets out the reasoning of the Ontario Court of Appeal:

> Provincial appellate courts have divided on this issue.
>
> . . .
>
> Those who argue in favour of giving the court an overriding discretion to refuse to apply the Guidelines focus on the word "may" in s. 17(1) of the Act: "[a] court . . . may make an order varying . . . a support order." . . . But the word "may" has to be read in its context.
>
> In the context of the new child support regime under s. 17 of the *Divorce Act* and the Guidelines it seems to me "may" in s. 17(1) is not permissive but authorizing or empowering, in the sense that if the condition of the section is met—if there has been a change in circumstances—the court must vary the child support order to comply with the Guidelines. Because the mere coming into force of the Guidelines is a change in circumstances, on application, a court must vary a previous child support order to comply with the Guidelines . . . .
>
> . . .
>
> This interpretation of the word "may" best reflects the purpose of the Guidelines. Their purpose is to promote uniformity, fairness, objectivity and efficiency in child support orders by curtailing, not expanding, judicial discretion.
>
> . . .

> Assuming the Guidelines reflect what Parliament considers "fair" support, adopting an interpretation of s. 17 of the *Divorce Act* that gives judges an open-ended discretion to refuse to apply the Guidelines does not promote fair support. Expanding the scope of judicial discretion to permit judges to refuse to apply the only objective standard of child support available, the Guidelines, will increase, not reduce, conflict and tension between spouses. Permitting judges to ignore the Guidelines will make the resolution of family disputes less efficient, not more efficient. And giving judges broad discretion to refuse to vary previous child support orders to comply with the Guidelines regime will not ensure that spouses and children in similar circumstances are treated consistently, because their treatment will differ depending on the wholly arbitrary factor of when separation or divorce took place.[32]

The courts have similarly divided over the proper interpretation of the dangerous offender provision in the *Criminal Code*,[33] which is in the following terms:

> **753** (1) The court *may* . . . find the offender to be a dangerous offender if it is satisfied
>
> (*a*) that the offence for which the offender has been convicted is a serious personal injury offence . . . and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons . . .
>
> (*b*) that the offence for which the offender has been convicted is a serious personal injury offence . . . and the offender, by his or her conduct in any sexual matter . . . has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses. [Emphasis added.]

In *R v Johnson*, Iacobucci and Arbour JJ commented on this provision:

> The language of s. 753(1) indicates that a sentencing judge retains a discretion whether to declare an offender dangerous who meets the criteria for that designation. As mentioned above, s. 753(1) provides that the court may find an offender to be a dangerous offender if it is satisfied that the statutory criteria set out in paras. (*a*) or (*b*) are

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32 *Ibid* at para 24. See also *R v Ahmad*, 2011 SCC 6 at para 39, where the court affirmed that enabling words are always compulsory where they are used to effectuate a legal right; *AE (Litigation guardian of) v DWJ*, 2011 BCCA 279 at para 36.

33 A list of the relevant cases is set out in *R v Johnson*, 2003 SCC 46 at para 25.

> met. On its face, the word "may" denotes a discretion, while the word "shall" is commonly used to denote an obligation: see for example *R. v. Potvin*, [1989] 1 S.C.R. 525, at p. 549. Indeed, s. 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, requires "shall" to be construed as imperative and "may" to be construed as permissive. If Parliament had intended that an offender must be designated dangerous if each of the statutory criteria have been satisfied, one would have expected Parliament to have used the word "shall" rather than "may."
>
> That said, cases do exist in which courts have found that the power conferred by "may" is coupled with a duty once all the conditions for the exercise of the power have been met.
>
> . . .
>
> In this case, there is no indication of a duty to find an offender dangerous once the statutory criteria have been met. As we will elaborate, neither the purpose of the dangerous offenders regime, nor the principles of sentencing, nor the principles of statutory interpretation suggest that a sentencing judge must designate an offender dangerous if the statutory criteria in s. 753(1)(*a*) or (*b*) have been met.[34]

In examining the relevant purpose and principles, the Court emphasized the need for judicial discretion in sentencing to ensure that the goals of punishment are appropriately balanced in each individual case. In these circumstances, there was no basis for coupling the power conferred by "may" with a duty.

In *Julius v Lord Bishop of Oxford*, Lord Cairns emphasizes that words of permission (such as "may") do not themselves impose obligation; the obligation (if any) arises from the context in which the words appear. Strictly speaking, then, it is incorrect, though commonplace, to say that "may" is sometimes imperative or that "may" sometimes means "shall." "May" is always permissive, in the sense that it always confers a power or authority. Exercise of the power or authority is presumed to be discretionary, but that presumption can be rebutted by something in the context or by considering the effects of non-exercise.

When a power is conferred to do something in a particular way, although the exercise of the power may be discretionary, the manner in which it is exercised is not. This is illustrated in *Reference re Canadian Agricultural Review Tribunal*.[35] It concerned section 14 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, providing that a person

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34 *Ibid* at paras 16–18. [Emphasis in original.] See also *Alberta (Minister of Justice and Attorney General) v Sykes*, 2011 ABCA 191 at paras 25 and 31.

35 2012 FCA 130.

> may make a request [to have a tribunal decision reviewed] by delivering it by hand or by sending it by registered mail, by courier or by electronic means, including electronic registered mail and fax, to a recipient and place authorized by the Minister.

The applicant argued that it should be allowed to make the request by ordinary mail on the basis that "may make a request" was permissive. Noël JA rejected this argument based on other provisions of the regulations and a consequential analysis:

> In my view, section 14 cannot be construed as authorizing regular mail as a means of communicating a request. Subsection 9(2) of the Act provides that a person may request a review by the Tribunal "in the prescribed time and manner". Section 14 of the Regulations simply does not prescribe regular mail as a manner of requesting a review by the Tribunal.
>
> The common thread that appears to run through section 14 is that the question whether a request has been filed within the time allowed for doing so can either be assessed independently by the Tribunal based on the time when a request is actually "delivered" or "received" by hand or by electronic transmission pursuant to paragraphs 14(2)(*a*) or (*c*), or by reference to independent third party evidence as to when a request has been "sent" when registered mail or courier service are resorted to as a mode of transmission. In such a case, paragraph 14(2)(*b*) provides that the request is considered to have been made on the earlier of the date on which the request is received or the date indicated on the receipt issued by the postal or courier service.
>
> In contrast, regular mail if read into section 14 would allow for no independent means of establishing whether and when the mailed request was sent in the event that it does not reach its proper destination.[36]

Finally, it should be noted that the scope of discretion is always limited as a matter of administrative law. As Rand J said in *Roncarelli v Duplessis*, "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'."[37] *R v Lavigne*[38] offers a good illustration of how courts analyse the scope of discretion conferred by "may." The issue was whether a court could take into account an offender's ability to pay when deciding to impose a fine instead of ordering

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36 *Ibid* at paras 22–24.

37 [1959] SCR 121 at 140.

38 2006 SCC 10 [*Lavigne*]. See also *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 54.

forfeiture under subsection 462.37(1) of the *Criminal Code*.[39] Subsection 462.37(3) provided that if a court is satisfied of certain conditions, "the court may, instead of ordering that property or part thereof or interest therein to be forfeited pursuant to subsection (1), order the offender to pay a fine in an amount equal to the value of that property, part or interest." Justice Deschamps concluded that the offender's ability to pay was irrelevant to the decision to order a fine instead of forfeiture:

> According to one interpretation, the word "may" indicates that the court has a broad discretion to adjust the amount of the fine by applying the general principles of sentencing, subject to the specific rules that have been expressly provided for . . . . According to a second interpretation, the word "may" conveys an obligation and is equivalent to "shall" once the court finds that the property cannot be forfeited . . . . Finally, according to a third interpretation, the court has a limited discretion when it imposes a fine, but the offender's ability to pay is not a factor that may be taken into consideration.[40]

After reviewing the various contextual features, she opted for the third interpretation:

> The effect of the word "may" cannot therefore be to grant a broad discretion. The exercise of the discretion is necessarily limited by the objective of the provision, the nature of the order and the circumstances in which the order is made.[41]

b) "Shall" or "Must" Imposes Duties: Mandatory versus Directory

The word "shall" also causes problems in interpretation. "Shall" is used in legislation to impose a duty on persons or to indicate the binding character of conditions or rules.[42] "Shall" is always imperative in the sense that it always imposes binding duties or requirements. The same can be said of "must."[43] The interpretation question that arises in connection with them is determining the consequences of breaching the binding duty or ignoring the binding requirement. Often the legislation

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39 RSC 1985, c C-46.

40 *Lavigne*, above note 38 at para 21.

41 *Ibid* at para 27.

42 Note that "shall" is never used to indicate future action. However, in older legislation, it has been used to define terms ("'X' shall mean . . ."), state rules of law ("this Act shall come into force on royal assent"), and declare legal effects ("it shall be lawful for women to vote"). The present indicative is now used instead.

43 In fact, "must" has been held to entail a "more mandatory obligation and admitting of less discretion" than "shall": see *Lovick v Brough*, [1998] BCJ No 539 at para 7 (SC).

itself stipulates what the consequences are, but when the legislation is silent, the courts or other interpreters must decide. If "shall" or "must" is judged to be mandatory, the result of the breach is total nullity. If it is judged to be directory, the result is an irregularity that can be cured.[44]

The leading authority on the distinction between mandatory and directory "shall" is a passage from the judgment of the Privy Council in *Montreal Street Railway Co v Normandin*:

> The question whether provisions in a statute are directory or imperative [mandatory] has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at . . . . When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.[45]

Generally, "shall" is taken to be mandatory unless this interpretation would lead to unacceptable consequences or is otherwise inappropriate. The *Montreal Street Railway* case describes one type of unacceptable consequence—causing gratuitous hardship to innocent parties or to the public at large. The courts look at other things as well, including context and purpose, to arrive at an appropriate result. As Iacobucci J wrote in *British Columbia (Attorney General) v Canada (Attorney General)*,

> the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.[46]

In *Blueberry River Indian Band v Canada*, Gonthier J wrote:

> This Court has . . . held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory.[47]

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44 Courts sometimes use the word "imperative" as a synonym for "mandatory"; but this is confusing and misleading given the use of "imperative" to mean "binding" in Interpretation Acts.

45 [1917] AC 170 at 174–75 (PC) [*Montreal Street Railway*].

46 [1994] 2 SCR 41 at 123–24.

47 [1995] 4 SCR 344 at para 42.

The courts also rely on a distinction between procedural requirements, which are likely to be considered directory, and substantive requirements, which are mandatory.[48]

Judicial reasoning in response to "shall" is well illustrated by *Canada v Harbour*,[49] in which the Federal Court of Appeal concluded that "shall" in section 55(4) of the *Unemployment Insurance Act* and in section 34(1) of the *Regulations* is directory rather than mandatory. The relevant parts of the Act provide:

> 54(1) No person is entitled to any benefit for a week of unemployment . . . until he makes a claim for benefit for that week in accordance with section 55.
>
> 55(4) A claim for benefit for a week of unemployment in a benefit period *shall* be made within such time as is prescribed [by regulation]. [Emphasis added.]

Section 34(1) of the *Regulations* provided:

> 34(1) . . . a claim for benefit for a week of unemployment . . . *shall* be made within three weeks of the week for which benefit is claimed. [Emphasis added.]

In this case the claimant filed his claim after the lapse of the three-week period. The issue was whether this late submission was an irregularity that could be cured or a nullity that could not.

The court first drew attention to the unfairness that might result from a mandatory reading of these requirements. In this case, for example, the claimant was late through no fault of his own but because the Unemployment Insurance Commission had failed to supply him with the necessary forms. The court also drew attention to the purpose of the requirements, distinguishing between substantive and procedural prerequisites to statutory rights. Because substantive prerequisites are conditions precedent to the right, they must be strictly complied with, or the right does not arise. However, this reasoning does not apply to procedural requirements the purpose of which is merely to facilitate efficient administration of the statutory scheme. Finally, the court relied on context. It pointed out that treating these provisions as mandatory would be inconsistent with other provisions of the Act which clearly contemplated the possibility of payment for late claims. In light of these considerations, the court found that "shall" in this context was

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48 See *Strata Plan LMS 1751 v Scott Management Ltd*, 2010 BCCA 192 at paras 78–82, leave to appeal to SCC refused, [2010] SCCA No 215.

49 (1986), 26 DLR (4th) 96 (FCA).

directory rather than mandatory and that the claimant's missed deadline could therefore be cured.

Not all procedural requirements are held to be directory. In *Doucet v British Columbia (Adult Forensic Psychiatric Services, Director)*,[50] for example, Lambert JA concluded that the "shall" in section 672.47(1) of the *Criminal Code* is mandatory and that a review board's untimely disposition under the section was therefore a nullity. The section read as follows:

> 672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board *shall*, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition. [Emphasis added.]

The accused in the case received a verdict of not criminally responsible on account of mental disorder, but the review board did not hold a hearing and make a disposition until seventy-three days after the verdict had been rendered. Lambert JA wrote:

> If s-s. 672.47(1) stood alone within the section, it might well be difficult to determine whether the provision was intended to be directory, involving no loss of jurisdiction if the time limit were not met, or mandatory, in the sense that failure to comply entails nullity and a loss of jurisdiction. But s-s. 672.47(1) does not stand alone. It is immediately followed by s-s. 672.47(2) which provides that the time limit of 45 days set by s-s. (1) may be extended by the Court to give a total period of up to 90 days under these conditions: "Where the court is satisfied that there are exceptional circumstances that warrant it." . . . It is contrary to one of the most fundamental principles of statutory interpretation to suppose that Parliament enacted a totally ineffective provision. If the "shall" in s-s. 672.47(1) were directory only, and involved no loss of jurisdiction if the time limit was not met, then s-s. 672.47(2) would be wholly ineffective and unnecessary. In my opinion, against the background of s-s. 672.47(2), the imperative "shall" must be construed as being mandatory in the sense that failure to comply entails nullity. If no extension is granted, then the Review Board's initial jurisdiction is lost after the lapse of 45 days from the date of the verdict.[51]

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50 2000 BCCA 195.

51 *Ibid* at para 13.

Lambert JA also pointed out that treating "shall" as directory would have reduced the protection available to an accused suffering from mental disorder, something Parliament would not have intended.

2) "And" and "Or"

a) Joint or Joint and Several "And"

Both "and" and "or" are inherently ambiguous. "And" is always conjunctive in the sense that it always signals the accumulation of the possibilities listed before and after the "and." However, "and" is ambiguous in that it may be joint or joint and several. In the case of a joint "and," every listed possibility must be included: both (a) and (b); all of (a), (b), and (c). In the case of a joint and several "and," all the possibilities may be, but need not be, included: (a) or (b) or both; (a) or (b) or (c) or any two or all three. In other words, the joint and several "and" is equivalent to "and/or."[52]

This ambiguity can always be avoided by drafting so as to indicate which sense of "and" is intended by including phrases such as "any of the following" or "all of the following." In the absence of such clarifying language, which meaning is appropriate depends on the context. When "and" is used before the final item in a list of powers, for example, it is joint and several:

> To carry out the purposes of this Act, the Governor in Council may make regulations respecting
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> (a) the conditions on which licences may be issued;
>
> (b) the information and fees that firearm vendors may be required to furnish; and
>
> (c) the annual fees that firearm owners may be charged.

In this provision the Governor in Council is empowered to make regulations on any one or more of the listed subjects. However, notice what happens if "may" is replaced by "shall." If the Governor in Council is obliged to make regulations respecting (a) conditions, (b) information, *and* (c) fees, the joint and several "and" becomes joint.

b) Exclusive or Inclusive "Or"

"Or" is always disjunctive in the sense that it always indicates that the things listed before and after the "or" are alternatives. However, "or" is ambiguous in that it may be inclusive or exclusive. In the case of an exclusive "or," the alternatives are mutually exclusive: (a) or (b) but not both; (a) or (b) or (c) but only one of them to the exclusion of the others.

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52 In this book, "and/or" is equivalent to "and or or."

In the case of an inclusive "or," the alternatives may be cumulated: (a) or (b) or both; (a) or (b) or (c) or any two or all three.

Like the joint and several "and," the inclusive "or" expresses the idea of "and/or." In the provision conferring powers on the Governor in Council set out above, "and" could be replaced by "or" without changing the meaning. In this context, joint and several "and" is equivalent to inclusive "or."

In legislation, "or" is presumed to be inclusive, but the presumption is rebutted when it is clear from the context that the listed alternatives are meant to be mutually exclusive. For example, many *Criminal Code* provisions say that a person who acts in a certain way is guilty of an indictable offence *and* is liable to imprisonment for a stipulated number of years *or* is guilty of an offence punishable on summary conviction. In this context, the "and" is joint: the person is both guilty of an offence and also liable to punishment. As for "or," the presumption of inclusive "or" is rebutted. Since a given *Code* violation cannot be handled simultaneously through both indictable and summary conviction procedures, the "or" in this provision is exclusive: an indictable offence or a summary conviction offence but not both.

In referring to the inclusive "or," courts sometimes say that the "or" is conjunctive or, worse still, that "or" means "and." "Or" is always disjunctive, and, unless the drafter has made a mistake, "or" should never be understood to mean "and."