SCC File No. 37562

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JENNIFER HOLLEY

APPLICANT

-and-

NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INC. AND OTHER U.S. DEBTORS, ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR, OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF NORTEL NETWORKS INC. ET AL., AD HOC GROUP OF BONDHOLDERS, THE EMEA DEBTORS, CANADIAN FORMER EMPLOYEES AND DISABLED EMPLOYEES COURT APPOINTED REPRESENTATIVES, NORTEL CANADIAN CONTINUING EMPLOYEES COURT APPOINTED REPRESENTATIVES

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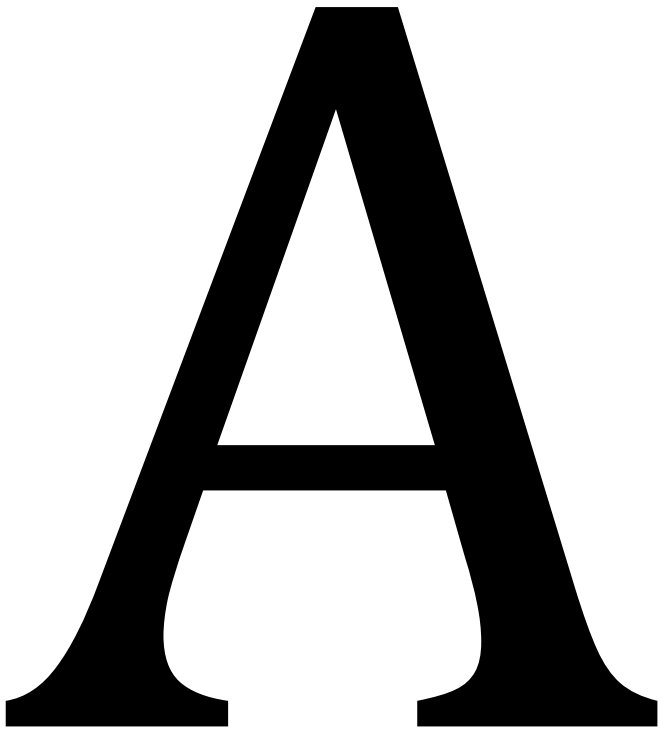

Duncan Cross MacDonald *Appellant*;

and

City of Montreal *Respondent*;

and

The Attorney General of Canada, the Attorney General of Quebec, the Société franco-manitobaine and Alliance Quebec, Alliance for Language Communities in Quebec *Interveners.*

File No.: 17528.

1984: December 18, 19: 1986: May 1.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Jurisdiction of Supreme Court of Canada — Leave to appeal refused by Court of Appeal — Whether leave to appeal to Supreme Court of Canada may be granted by the Supreme Court — Supreme Court Act, R.S.C. 1970, c. S-19, s. 41(1).

Constitutional law — Language rights — Court proceedings — English-speaking person in Quebec given summons for traffic violation in French only — Whether summonses emanating from Quebec courts constitutionally valid if issued in one or other of the official languages — Constitution Act, 1867, s. 133.

Appearing before the Municipal Court of the City of Montréal to answer a charge of violating a municipal by-law, appellant, an English-speaking person, unsuccessfully challenged the jurisdiction of the court to proceed against him on the ground that the unilingual French summons issued by the court violated his fundamental rights as an English speaker under s. 133 of the *Constitution Act, 1867*. In a trial *de novo* in the Superior Court, appellant was again convicted. The court concluded that documents such as summonses emanating from the province's courts must be considered constitutionally valid so long as they are issued in one or other of the French or English languages. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal raises two issues: (1) whether the Supreme Court has jurisdiction to hear a case for which leave to appeal to a provincial

Duncan Cross MacDonald *Appelant*;

et

Ville de Montréal *Intimée*;

et

Le procureur général du Canada, le procureur général du Québec, la Société franco-manitobaine et Alliance Québec, Alliance pour les communautés linguistiques au Québec *Intervenants.*

N° du greffe: 17528.

1984: 18, 19 décembre; 1986: 1er mai.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Compétence de la Cour suprême du Canada — Autorisation d'appel refusée par la Cour d'appel — Une autorisation de pourvoi à la Cour suprême du Canada peut-elle être accordée par la Cour suprême? — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 41(1).

Droit constitutionnel — Droits linguistiques — Procédures judiciaires — Sommation adressée en français seulement à un anglophone au Québec relativement à une infraction à la circulation routière — Les sommations émanant des tribunaux québécois sont-elles constitutionnellement valides lorsqu'elles sont délivrées dans l'une ou l'autre des langues officielles? — Loi constitutionnelle de 1867, art. 133.

Comparaissant en Cour municipale de la ville de Montréal pour répondre à une accusation d'infraction à un règlement municipal, l'appelant, un anglophone, a en vain contesté la compétence de la cour d'être saisie de son affaire, parce que la sommation unilingue française qu'elle avait délivrée violait ses droits fondamentaux d'anglophone en vertu de l'art. 133 de la *Loi constitutionnelle de 1867*. Au cours d'un procès *de novo* en Cour supérieure, l'appelant a été de nouveau reconnu coupable. La cour a conclu que les documents comme les sommations émanant des tribunaux de la province doivent être tenus constitutionnellement valides dans la mesure où ils sont délivrés dans l'une ou l'autre des langues française ou anglaise. La Cour d'appel a refusé d'accorder l'autorisation d'appeler du jugement de la Cour supérieure. Le pourvoi soulève deux questions: (1) la Cour suprême peut-elle connaître d'une affaire pour

court of appeal was denied by the provincial court of appeal and (2) if so, whether the summons, being expressed in the French language only, and not in the language of the English-speaking accused, offends the provisions of s. 133 of the *Constitution Act, 1867*, resulting in a total absence of jurisdiction of the court to proceed against him.

Held (Wilson J. dissenting): The appeal should be dismissed.

(1) *The Jurisdictional Issue*

Per Beetz, Estey, McIntyre, Lamer and Le Dain JJ.: This Court has jurisdiction to hear this case. It is a jurisdiction which, for obvious reasons of policy and comity, should be exercised most sparingly, in very rare cases such as this one, where there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court.

Per Dickson C.J. and Wilson J.: This Court has jurisdiction pursuant to s. 41(1) of the *Supreme Court Act* to review the Quebec Court of Appeal's decision not to grant leave to appeal from a judgment at trial. While the Court should in general maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it should not hesitate, in light of the broad language of s. 41(1) and the role of the Court as the ultimate appellate tribunal, to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly, constitutional significance to be at stake. To the extent that the *Ernewein* and *Nicholson* cases are inconsistent with this view, they should not be followed.

Cases Cited

By Beetz J.

Paul v. The Queen, [1960] S.C.R. 452; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (Que. S.C.), application for leave to appeal refused, Mtl. C.A., November 10, 1980; *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 S.C.R. 92, referred to.

By Wilson J.

Ernewein v. Minister of Employment and Immigration, [1980] 1 S.C.R. 639; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 S.C.R. 92, not followed; *R. v. Gardiner*, [1982]

laquelle une cour d'appel provinciale a refusé l'autorisation d'en appeler devant elle, et (2) si c'est le cas, la sommation, rédigée en français uniquement, et non dans la langue du prévenu anglophone, porte-t-elle atteinte aux dispositions de l'art. 133 de la *Loi constitutionnelle de 1867*, privant ainsi totalement la cour de compétence pour le juger?

Arrêt (le juge Wilson est dissidente): Le pourvoi est rejeté.

(1) *La question de compétence*

Les juges Beetz, Estey, McIntyre, Lamer et Le Dain: La Cour suprême a compétence pour connaître de l'affaire. Elle exerce ainsi une compétence qui, pour des raisons évidentes de principe et de courtoisie, ne devrait l'être qu'avec la plus grande modération, dans les cas très rares où, comme en l'espèce, il y a un risque qu'une question d'une importance constitutionnelle majeure puisse échapper autrement à la possibilité d'être examinée par cette Cour.

Le juge en chef Dickson et le juge Wilson: La Cour suprême a la compétence, en vertu du par. 41(1) de la *Loi sur la Cour suprême*, pour réviser la décision de la Cour d'appel du Québec de ne pas accorder l'autorisation d'en appeler d'une décision de première instance. Bien que la Cour doive en général avoir une attitude de déférence envers le pouvoir discrétionnaire judiciaire exercé par les cours d'appel intermédiaires, elle ne devrait pas hésiter, vu le caractère général du texte du par. 41(1) et de son rôle de tribunal d'appel de dernier ressort, à intervenir dans les décisions discrétionnaires dans les rares cas où elle juge que des principes de droit d'importance nationale, et particulièrement en matière constitutionnelle, sont en jeu. Dans la mesure où les arrêts *Ernewein* et *Nicholson* sont incompatibles avec ce point de vue, ils ne devraient pas être suivis.

Jurisprudence

Citée par le juge Beetz

Arrêts mentionnés: *Paul v. The Queen*, [1960] R.C.S. 452; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (C.S. Qué.), autorisation d'appel refusée, C.A. Mtl., 10 novembre 1980; *Ernewein c. Ministre de l'Emploi et de l'Immigration*, [1980] 1 R.C.S. 639; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 R.C.S. 92.

Citée par le juge Wilson

Arrêts non suivis: *Ernewein c. Ministre de l'Emploi et de l'Immigration*, [1980] 1 R.C.S. 639; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 R.C.S. 92; arrêts mentionnés: *R. c.*

One does not expect a summons to be published but issued, and I do not believe it was intended to distinguish between the printed parts of the summons and the other parts.

The constitutional question being read as I have indicated, I would answer it in the negative.

X—The Jurisdiction of this Court to Entertain the Appeal

I have had the advantage of reading the reasons of my colleague, Wilson J. and I agree with her that we have jurisdiction to hear this case.

Since the decision of McCarthy J.A. to refuse leave to appeal has the effect of leaving intact the disposition of the case by Meyer J. and Judge Bourassa, which I think is the correct one, I should be content simply to dismiss the appeal.

However, had I been of the view that the appellant's case was meritorious, I would have allowed the appeal, set aside the judgments of McCarthy J.A., Meyer J. and Judge Bourassa and discharged the appellant. I would have agreed with Wilson J. that the case should not be returned to the Quebec Court of Appeal by leave of this Court.

The Quebec Court of Appeal had already decided the issue on the merits in the *Walsh* case and this is obviously the reason why McCarthy J.A., who was a member of the *coram* in *Walsh*, refused leave to appeal in the case at bar. I believe it would have been improper directly or indirectly to ask the Court of Appeal to reconsider its decision in *Walsh*, whatever view one might take of this decision. (*Vide* the reasons of the minority in *Paul v. The Queen*, [1960] S.C.R. 452, which I find preferable to those of the majority.)

But I wish to stress that this is a jurisdiction which, for obvious reasons of policy and comity, we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance

On s'attend à ce qu'une sommation soit non pas publiée, mais délivrée; je ne crois pas non plus qu'on ait voulu faire la distinction entre les parties imprimées de la sommation et les autres.

La question constitutionnelle étant interprétée comme je l'ai dit, je suis d'avis d'y répondre par la négative.

X—La compétence de la Cour suprême à l'égard du pourvoi

J'ai eu le privilège de lire les motifs de ma collègue, madame le juge Wilson, et je suis d'accord avec elle pour dire que la Cour a compétence pour entendre ce pourvoi.

Comme la décision du juge McCarthy de la Cour d'appel de refuser l'autorisation d'appel ne change rien à la façon dont les juges Meyer et Bourassa ont statué sur l'affaire, qui à mon avis est la bonne, je pourrais simplement me contenter de rejeter le pourvoi.

Toutefois, si j'avais estimé que la thèse de l'appelant était fondée, j'aurais accueilli le pourvoi, annulé les jugements du juge d'appel McCarthy et des juges Meyer et Bourassa et libéré l'appelant de l'accusation portée contre lui. J'aurais été d'accord avec le juge Wilson pour dire que l'affaire ne doit pas être renvoyée à la Cour d'appel du Québec avec l'autorisation de cette Cour.

La Cour d'appel du Québec avait déjà jugé au fond cette question dans l'affaire *Walsh* et c'est évidemment pour cette raison que le juge McCarthy, qui était membre de la formation qui a entendu l'affaire *Walsh*, a refusé d'accorder l'autorisation d'appel en l'espèce. Je suis d'avis qu'il n'aurait pas été directement ou indirectement approprié de demander à la Cour d'appel de réviser sa décision dans l'affaire *Walsh*, quelle que soit la conception qu'on puisse avoir de cette décision—voir les motifs de la Cour à la minorité dans l'arrêt *Paul v. The Queen*, [1960] R.C.S. 452, que j'estime préférables à ceux de la majorité.

Je tiens cependant à souligner qu'il s'agit là d'une compétence que, pour des raisons évidentes de principe et de courtoisie, nous devrions exercer avec la plus grande modération dans les cas très rares où, comme en l'espèce, il existe un risque

might otherwise be put beyond the possibility of review by this Court.

XI—Conclusion

The constitutional question being read as indicated in these reasons is answered in the negative.

The appeal is dismissed with costs. However, there will be no order as to costs for or against the interveners.

The following are the reasons delivered by

WILSON J. (*dissenting*)—This case entails a consideration of s. 133 of the *Constitution Act, 1867* and the extent to which (if at all) that section imposes an obligation on the courts of the Province of Quebec to issue summonses and otherwise deal with an individual in either the English or the French language depending upon the language of the individual. This case also raises the question of this Court's jurisdiction to hear a case for which leave to appeal to a provincial court of appeal was denied by the provincial Court of Appeal.

1. The History of the Matter

On February 25, 1981 the appellant received a summons issued from the Municipal Court of the City of Montréal instructing him to appear before that court on May 14, 1981 to answer a charge of violating a municipal traffic by-law. The summons was printed in the French language only, and reads:

> À CES CAUSES, NOUS VOUS ORDONNONS, au nom de Sa Majesté, de comparaître devant la Cour municipale de la Ville de Montréal, 775, rue Gosford, à la date fixée pour votre comparution, soit à 10 heures, soit à 15 heures, pour répondre à cette inculpation et être ultérieurement traité suivant la loi.

Appearing on his own behalf at trial, the appellant challenged the jurisdiction of the court to proceed against him on the ground that the unilingual French summons violated his fundamental language rights as an English speaker under s. 133 of the *Constitution Act, 1867*. The section reads as follows:

qu'une question d'une importance majeure sur le plan constitutionnel puisse échapper autrement à la possibilité d'être examinée par cette Cour.

XI—Conclusion

La question constitutionnelle, interprétée comme je l'ai indiqué dans les présents motifs, reçoit une réponse négative.

Le pourvoi est rejeté avec dépens. Toutefois, il n'y aura pas d'adjudication de dépens pour ou contre les intervenants.

Version française des motifs rendus par

LE JUGE WILSON (*dissidente*)—Ce pourvoi nécessite un examen de l'art. 133 de la *Loi constitutionnelle de 1867* et de la mesure dans laquelle (s'il en est) cet article impose aux tribunaux de la province de Québec l'obligation de délivrer les sommations et de traiter de quelque autre manière avec une personne soit en français soit en anglais selon la langue de cette dernière. Le présent pourvoi soulève aussi la question de la compétence qu'a cette Cour pour entendre une affaire à l'égard de laquelle l'autorisation d'en appeler devant une cour d'appel provinciale a été refusée par cette cour d'appel provinciale.

1. Historique de l'affaire

Le 25 février 1981, l'appelant a reçu une sommation délivrée par la Cour municipale de la ville de Montréal lui enjoignant de comparaître devant cette cour le 14 mai 1981 pour répondre à une accusation d'avoir enfreint un règlement municipal sur la circulation. La sommation était imprimée en français seulement et se lisait ainsi:

> À CES CAUSES, NOUS VOUS ORDONNONS, au nom de Sa Majesté, de comparaître devant la Cour municipale de la Ville de Montréal, 775, rue Gosford, à la date fixée pour votre comparution, soit à 10 heures, soit à 15 heures, pour répondre à cette inculpation et être ultérieurement traité suivant la loi.

Comparaissant pour son propre compte au moment du procès, l'appelant a contesté la compétence de la cour d'instruire sa cause pour le motif que la sommation unilingue française allait à l'encontre des droits linguistiques fondamentaux qu'il possède, en tant qu'anglophone, en vertu de l'art. 133 de la *Loi constitutionnelle de 1867*. Cet article est ainsi rédigé:

B

Canadian Union of Public Employees, Local 79 *Appellant*

v.

City of Toronto and Douglas C. Stanley *Respondents*

and

Attorney General of Ontario *Intervener*

Indexed as: Toronto (City) *v.* C.U.P.E., Local 79

Neutral citation: 2003 SCC 63.

File No.: 28840.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-

Syndicat canadien de la fonction publique, section locale 79 *Appelant*

c.

Ville de Toronto et Douglas C. Stanley *Intimés*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : Toronto (Ville) *c.* S.C.F.P., section locale 79

Référence neutre : 2003 CSC 63.

N° du greffe : 28840.

2003 : 13 février; 2003 : 6 novembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

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

Droit du travail — Arbitrage — Congédiement sans motif valable — Preuve — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Déclaration de culpabilité confirmée en appel — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — Le syndicat est-il habilité à remettre en cause une question tranchée à l'encontre de l'employé dans une instance criminelle? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

Contrôle judiciaire — Norme de contrôle — Arbitrage en relations du travail — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — L'arbitre est-il habilité à revenir sur la déclaration de culpabilité? — La norme de contrôle appropriée est-elle celle de la décision correcte? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

O travaillait comme instructeur en loisirs pour la Ville intimée. Il a été accusé d'agression sexuelle contre un garçon confié à sa surveillance. Il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné

arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in

la préclusion découlant d'une question déjà tranchée n'est pas applicable. Se pose maintenant la question de savoir si la décision de l'arbitre équivalait à une contestation indirecte du verdict du tribunal criminel.

(2) La contestation indirecte

La règle interdisant les contestations indirectes rend irrecevables les actions visant l'infirmation de déclarations de culpabilité par des tribunaux n'ayant pas compétence en cette matière. Comme la Cour l'a affirmé dans l'arrêt *Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599, cette règle est

> un principe fondamental établi depuis longtemps [selon lequel] une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

Ainsi, la Cour a jugé, dans *Wilson*, précité, qu'un juge d'une juridiction inférieure n'avait pas compétence pour examiner la validité d'une autorisation d'écoute électronique délivrée par une cour supérieure. D'autres décisions jurisprudentielles constituant l'assise de cette règle avaient aussi pour contexte des tentatives de faire infirmer des décisions d'autres tribunaux et non une simple remise en cause des faits de l'espèce. Dans *R. c. Sarson*, [1996] 2 R.C.S. 223, par. 35, notre Cour a statué qu'en raison de la règle interdisant les contestations indirectes, le recours en *habeas corpus* par lequel un détenu contestait une déclaration de culpabilité fondée sur une disposition législative subséquemment jugée inconstitutionnelle ne pouvait être accueilli parce que l'affaire du détenu n'était plus « en cours » et que celui-ci « était détenu conformément au jugement d'un tribunal compétent ». De la même façon, la Cour a jugé, dans l'arrêt *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, que le propriétaire d'une mine qui avait décidé de ne pas suivre le processus administratif d'appel applicable relativement à une amende pour pollution n'était pas admis à contester la validité de la

subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of

pénalité devant un tribunal judiciaire parce que la loi prévoyait que les appels étaient entendus par un tribunal administratif. Dans l'arrêt *Danyluk*, précité, par. 20, le juge Binnie a défini la règle prohibant les contestations indirectes comme « la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance » (je souligne).

34 Chacune des affaires susmentionnées soulève la question du tribunal compétent pour connaître de contestations relatives au jugement lui-même. En l'espèce, toutefois, le syndicat ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration. Il s'agit d'une attaque implicite du bien-fondé factuel de la décision, non pas de la contestation de la validité juridique de celle-ci, puisqu'elle est manifestement valide. Les « contestations indirectes » prohibées constituent un abus du processus judiciaire. Or, comme la règle qui prohibe les contestations indirectes met l'accent sur la contestation de l'ordonnance elle-même et de ses effets juridiques, la meilleure façon d'aborder la question en l'espèce me paraît être de recourir directement à la doctrine de l'abus de procédure.

(3) L'abus de procédure

35 Les juges disposent, pour empêcher les abus de procédure, d'un pouvoir discrétionnaire résiduel inhérent. L'abus de procédure a été décrit, en common law, comme consistant en des procédures « injustes au point qu'elles sont contraires à l'intérêt de la justice » (*R. c. Power*, [1994] 1 R.C.S. 601, p. 616) et en un traitement « oppressif » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667). La juge McLachlin (plus tard Juge en chef) l'a défini de la façon suivante dans l'arrêt *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007 :

. . . l'abus de procédure peut avoir lieu si : (1) les procédures sont oppressives ou vexatoires; et (2) elles violent les principes fondamentaux de justice sous-jacents au sens de l'équité et de la décence de la société. La première

oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

condition, à savoir que les poursuites sont oppressives ou vexatoires, se rapporte au droit de l'accusé d'avoir un procès équitable. Cependant, la notion fait aussi appel à l'intérêt du public à un régime de procès justes et équitables et à la bonne administration de la justice.

La doctrine de l'abus de procédure s'applique dans des contextes juridiques divers. Le traitement injuste ou oppressif d'un accusé peut priver le ministère public du droit de continuer les poursuites relatives à une accusation : *Conway*, précité, p. 1667. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, notre Cour a statué qu'un délai déraisonnable causant un préjudice grave peut constituer un abus de procédure. Lorsque la *Charte canadienne des droits et libertés* est invoquée, la doctrine de l'abus de procédure reconnue en common law est subsumée sous les principes de la *Charte* de telle sorte que les principes de l'abus de procédure et les recours constitutionnels empiètent souvent les uns sur les autres (*R. c. O'Connor*, [1995] 4 R.C.S. 411). La doctrine continue néanmoins de trouver application comme réparation non fondée sur la *Charte* : *États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616, 2001 CSC 21, par. 33.

Dans le contexte qui nous intéresse, la doctrine de l'abus de procédure fait intervenir [TRADUCTION] « le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière [. . .] qui aurait [. . .] pour effet de discréditer l'administration de la justice » (*Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, approuvé par [2002] 3 R.C.S. 307, 2002 CSC 63). Le juge Goudge a développé la notion de la façon suivante aux par. 55 et 56 :

> [TRADUCTION] La doctrine de l'abus de procédure engage le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. C'est une doctrine souple qui ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité (voir *House of Spring Gardens Ltd. c. Waite*, [1990] 3 W.L.R. 347, p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application

Un cas d'application de l'abus de procédure est lorsque le tribunal est convaincu que le litige a essentiellement pour but de rouvrir une question qu'il a déjà tranchée. [Je souligne.]

Ainsi qu'il ressort du commentaire du juge Goudge, les tribunaux canadiens ont appliqué la doctrine de l'abus de procédure pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée (généralement les exigences de lien de droit et de réciprocité) n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. (Voir par exemple *Franco c. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. c. Stevenson*, [1986] 5 W.W.R. 21 (C.A. Sask.); et *Bjarnarson c. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (B.R. Man.), conf. par (1987), 21 C.P.C. (2d) 302 (C.A. Man.).) Cette application a suscité des critiques, certains disant que la doctrine de l'abus de procédure pour remise en cause n'est ni plus ni moins que la doctrine générale de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, à laquelle il manque les importantes conditions que les tribunaux américains ont reconnues comme parties intégrantes de la doctrine (Watson, *loc. cit.*, p. 624-625).

38 Certes, la doctrine de l'abus de procédure a débordé des stricts paramètres du principe de l'autorité de la chose jugée tout en lui empruntant beaucoup de ses fondements et quelques-unes de ses restrictions. D'aucuns la voient davantage comme une doctrine auxiliaire, élaborée en réaction aux règles établies de la préclusion (découlant d'une question déjà tranchée ou fondée sur la cause d'action), que comme une doctrine indépendante (Lange, *op. cit.*, p. 344). Les raisons de principes étayant la doctrine de l'abus de procédure pour remise en cause sont identiques à celles de la préclusion découlant d'une question déjà tranchée (Lange, *op. cit.*, p. 347-348) :

[TRADUCTION] Les deux raisons de principe, savoir qu'un litige puisse avoir une fin et que personne ne puisse être tracassé deux fois par la même cause d'action, ont

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Most Negative Treatment: Check subsequent history and related treatments.

2002 BCSC 324
British Columbia Supreme Court

Carpenter Fishing Corp. v. Canada

2002 CarswellBC 505, 2002 BCSC 324, [2002] B.C.W.L.D. 251, [2002] B.C.J. No. 442, [2002] B.C.T.C. 324, 111 A.C.W.S. (3d) 1117, 92 C.R.R. (2d) 357, 99 B.C.L.R. (3d) 69

Carpenter Fishing Corporation, Kaarina Etheridge, White Hope Holdings Ltd., Simpson Fishing Co. Ltd., Norman Johnson and Titan Fishing Ltd., Petitioners and Her Majesty the Queen in Right of Canada, Respondent

Stromberg-Stein J.

Heard: February 11-13, 2002
Judgment: March 4, 2002
Docket: Vancouver L011342

Counsel: *M.L. Smith*, *T. Martin*, for Petitioners
R.S. Whittaker, for Respondent

Subject: Constitutional; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.v Nature of prior proceedings
XXII.23.a.v.A Jurisdiction of court

Constitutional law

XI Charter of Rights and Freedoms
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XIV.2 Standing

Constitutional law

XIV Procedure in constitutional challenges

case is unlike *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.), relied upon by the petitioners, where the impugned statute would have been immunized from challenge if that petitioner was not granted standing. Here, as in *Canadian Council of Churches*, no such immunization exists since those most directly affected-litigants, affected judges or potential judges of the Federal Court-may challenge the impugned legislation. Hence, the rationale for public interest standing disappears as there are other reasonable and effective means by which the validity of the *Federal Court Act* can be challenged: *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.).

30 The absence of a proper factual foundation in which to consider the issues raised in this case, particularly when it is apparent that other litigants could supply such a foundation, is another basis for the finding that no standing should be granted to the petitioners: *Hy & Zel's Inc.*; *Danson v. Ontario (Attorney General)* (1990), 73 D.L.R. (4th) 686 (S.C.C.).

Conclusion on Standing

31 Sections 5(6) and 7(1) of the *Federal Court Act* affect Federal Court judges. Challenges to ss. 5(6) and 7(1) of the *Federal Court Act* should be advanced by those directly affected — prospective judicial candidates or current Judges of the Federal Court. As a general rule, a provision of the *Charter* may only be invoked by those who enjoy its protection: *Canadian Egg Marketing Agency v. Richardson* at para. 36.

32 It should be emphasized that there is absolutely no evidence before this Court that any current or prospective judge of the Federal Court has had his or her *Charter* rights infringed by ss. 5(6) or 7(1) of the *Federal Court Act*. The petitioners cannot establish any reason why they should be permitted to advance arguments in their petition on behalf of current or prospective judges. They, as former litigants, are neither exceptionally prejudiced nor directly affected by provisions relating to current or prospective judges.

33 The petitioners lack private or public interest standing to bring this claim and for this reason alone this petition must be dismissed. However, I will comment briefly on the other preliminary objections raised by the respondent regarding the jurisdiction to hear this petition.

Collateral Attack

34 The respondent submits that this petition is nothing more than a collateral attack on the decision of the Federal Court of Appeal. The doctrine of collateral attack arises from judicial policy favouring finality in litigation. The rule provides that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings, except subsequent proceedings provided by law for the express purpose of attacking the order: *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.). In *Wilson*, McIntyre J. defines a collateral attack as "an attack made in proceedings other than those whose specific object is reversal, variation or nullification of the order or judgment."

35 The true purpose of this petition is illustrated in the affidavit of Robert Carpenter, sworn April 27, 2001 in support of the petition, seeking to declare unconstitutional the panel that heard the appeal in 1997. Further evidence is found in the material filed in the Supreme Court of Canada on the third leave application, where it is stated at para. 18:

> If the Applicants are found to have been denied their rights under the Charter to equality and fundamental justice by virtue of no judges on the Federal Court of Appeal being from British Columbia then the only effective remedy is for the Supreme Court of Canada to reconsider the appeal from the strong trial judgment in favour of the Applicants. A very strong judgment in favour of the Applicants at trial before a judge from British Columbia was overturned on appeal to a court with no judges from British Columbia. Only the Supreme Court can provide an effective remedy.

I agree with the respondent that this petition is nothing more than the petitioners' attempt to question the correctness of the decision of the Federal Court of Appeal. This is barred as a collateral attack.

36 Breach of individual constitutional rights is no exception to the collateral attack doctrine. The collateral attack doctrine and the importance of finality trumps constitutional rights and/or arguments. Thus, in the case at bar, the collateral attack

doctrine would preclude an attack on the appeal decision on the basis of alleged *Charter* violations: *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867* (1985), 19 D.L.R. (4th) 1 (S.C.C.); *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.). A declaration that a court that heard an appeal was unconstitutional would call into question the original judgment and would constitute a collateral attack on that decision. I agree with the respondent that the appeal decision is immune from collateral attack and for this reason this petition should be dismissed as an abuse of process.

Res Judicata

37 The respondent submits that despite the petitioners' assertion regarding the impropriety of the Federal Court of Appeal dismissing their claim in its entirety, the petitioners never raised a constitutional challenge to ss. 5(6) and 7(1) of the *Federal Court Act* prior to their third leave application to the Supreme Court of Canada; yet they could have done so. The respondent argues that on these facts, pursuant to the doctrine of *res judicata*, the petitioners cannot raise these *Charter* arguments now in their petition.

38 The respondent's *res judicata* argument is based on the branch of *res judicata* referred to as cause of action estoppel. This principle was articulated by the British Columbia Court of Appeal in *Lim v. Lim* (1999), 180 D.L.R. (4th) 87 (B.C. C.A.), where the Court quoted at para. 8 from *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.), at 319:

> ... the court requires the parties ... to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion or pronounce a judgment, but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time.

39 In *Lim*, the Court quoted with approval *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430 (N.S. C.A.), a decision of the Nova Scotia Court of Appeal, at para. 9:

> Res judicata is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the re-litigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991), at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid. at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

40 The parties to this petition are the same as those in the Federal Court of Appeal and on the leave applications to the Supreme Court of Canada. The issue of the constitutionality of ss. 5(6) and 7(1) of the *Federal Court Act* could and should have been raised at the trial level or, at the very least, in the Federal Court of Appeal or in the first two of three leave applications to the Supreme Court of Canada. These issues properly belong to the earlier litigation. There are no special circumstances here that would justify an exception to the *res judicata* doctrine, such as fraud or fresh evidence, that would be conclusive and could not have been discovered with reasonable diligence.

41 Undelivered *Charter* arguments are not a special circumstance justifying an exception to the *res judicata* doctrine. As noted by McKenzie J. (as he then was) in *MacDonald v. Marriott* (1984), 7 D.L.R. (4th) 697 (B.C. S.C.) at p. 8:

> There are no special circumstances which would justify a second hearing. If an undelivered Charter argument was to be

2002 BCCA 611
British Columbia Court of Appeal

Carpenter Fishing Corp. v. Canada

2002 CarswellBC 2718, 2002 BCCA 611, [2002] B.C.J. No. 2536, 117 A.C.W.S. (3d) 896, 174 B.C.A.C. 38, 286 B.C.A.C. 38, 286 W.A.C. 38

CARPENTER FISHING CORPORATION, KAARINA ETHERIDGE, WHITE HOPE HOLDINGS LTD., SIMPSON FISHING CO. LTD., NORMAN JOHNSON and TITAN FISHING (Appellants / Petitioners) and HER MAJESTY THE QUEEN IN RIGHT OF CANADA (Respondent)

Ryan J.A., Mackenzie J.A. and Thackray J.A.

Heard: October 29, 2002
Judgment: November 12, 2002
Docket: Vancouver CA029606

Proceedings: affirming *Carpenter Fishing Corp. v. Canada* (2002), 2002 BCSC 324, 2002 CarswellBC 505, 99 B.C.L.R. (3d) 69, 92 C.R.R. (2d) 357 (B.C. S.C.)

Counsel: *M.L. Smith*, *T. Martin*, for Appellants
R.S. Whittaker, for Respondent

Subject: Constitutional; Civil Practice and Procedure; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XXII Judgments and orders
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Constitutional law

XI Charter of Rights and Freedoms
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XIV Procedure in constitutional challenges
XIV.2 Standing

Minister of Fisheries and Oceans that implemented individual vessel quotas for the West Coast halibut fishery. The appellants were owners of or otherwise interested in licences to fish for halibut in Canadian waters.

[4] Campbell J. of the FCTD, in reasons dated 14 November 1996 [1996 CarswellNat 2064, 1996 CarswellNat 2677 (Fed. T.D.)], found the quotas to be in excess of the Minister's jurisdiction and therefore a nullity. That decision was overturned on appeal by the Federal Court of Appeal, in reasons dated 23 December 1997 delivered by Décary J.A. and concurred in by Pratte J.A. and Linden J.A. An application for leave to appeal that decision was dismissed by the Supreme Court of Canada on 20 August 1998 [[1998] 2 S.C.R. vi (S.C.C.)]. A motion for reconsideration of the denial of leave was declined by the Court on 18 September 1998.

[5] The appellants then brought an application before Campbell J. for directions. Campbell J. declined to hear the motion on the ground that the action had been conclusively dismissed and he was *functus officio*. The Federal Court of Appeal ruled that no appeal lay from that direction and an application for leave to appeal that ruling to the Supreme Court of Canada was dismissed on 14 October 1999 [(S.C.C.)]. That leave application raised, for the first time, the constitutional challenges to the provisions of the ***Federal Court Act*** that are the subject of the present petition. I will refer to the proceedings in the Federal Court comprehensively as the "Federal Court Action".

[6] Section 5(6) of the ***Federal Court Act*** requires that at least 10 of the 31 judges [now 15 of 46] of the Federal Court of Canada be appointed from the province of Quebec. Section 7(1) requires that the judges of the court shall reside within 40 kilometres of the National Capital Region. The petitioners assert that the preponderance of judges of the court are appointed from Quebec and Ontario and the impugned provisions are unconstitutional and discriminatory because the result is a court that lacks regional representation. They also claim that the residency requirement discourages appointments from British Columbia.

Analysis

3

[7] The learned chambers judge concluded that the petition was a collateral attack upon the decision of the Federal Court of Appeal in the Federal Court Action. The record supports that conclusion. The relief claimed in the petition includes "a declaration that the composition of the Federal Court of Appeal on December 23, 1997 in File No. A941-96 was unconstitutional", thereby linking that relief to the Federal Court Action. The affidavit of Robert James Carpenter, a principal of the appellant Carpenter Fishing Corporation, dated 27 April 2001 and filed in support of the petition, is directed exclusively to complaints related to the Federal Court Action.

[8] It is firmly established that a court order made by a court having jurisdiction to make it is binding and conclusive unless it is set aside on appeal or lawfully quashed. Such an order cannot be attacked collaterally: that is, in proceedings other than those in which the specific object is the reversal, variation, or nullification of the order. *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at 599. This rule extends to collateral attacks on constitutional grounds. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), the appellant's application to set aside his conviction and sentence for second degree murder failed, even though the constructive murder provision under which he was convicted, s. 213(d) of the ***Criminal Code***, was struck down after the expiry of the appeal period following his conviction in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.). Similarly here, the order of the Federal Court of Appeal could only be attacked directly through an appeal, and those rights of appeal have been exhausted.

[9] The appellants effectively concede that the order of the Federal Court of Appeal is now conclusive, notwithstanding the claim in the petition's prayer for relief. Instead they contend that "their experience [in the Federal Court] provides a factual backdrop that highlights how the impugned legislation affects litigants from British Columbia." They emphasize their reliance on fishing for their livelihoods and their way of life. They also claim discrimination simply as citizens resident in British Columbia. They argue that these factors give them status to obtain standing on both private interest and public interest grounds. In short, the appellants claim standing to seek a declaration that the impugned provisions are unconstitutional while recognizing that the result in the Federal Court Action rendered by an "unconstitutional" court must stand.

appellants in the constitutional issue, and casts doubt on the genuineness of the public interest required by the second ***Canadian Council of Churches*** factor. In any event, since the appellants did have open to them another reasonable and effective way to bring the issue before the court in the Federal Court Action, they fail to satisfy the third element of the ***Canadian Council of Churches*** test.

[17] As I am satisfied that the appellants fail to meet the second and third requirements of the ***Canadian Council of Churches*** test for public interest standing, it is not necessary to consider the first factor. I do not think that there was any error of law or principle in the exercise of the discretion of the chambers judge to deny standing to the appellants that would allow this Court to interfere with her decision.

[18] As the chambers judge properly exercised her discretion to deny standing to the appellants, I do not find it necessary to address the other issues raised by the appellants. I would dismiss the appeal.

***Ryan J.A.*:**

4 I agree.

***Thackray J.A.*:**

5 I agree.

Appeal dismissed.

D

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Coppola | 2007 ONCJ 184, 2007 CarswellOnt 2629, [2007] O.J. No. 1624, 73 W.C.B. (2d) 576 | (Ont. C.J., Apr 12, 2007)

1996 CarswellOnt 4539
Ontario Court of Appeal

R. v. Domm

1996 CarswellOnt 4539, [1996] O.J. No. 4300, 111 C.C.C. (3d) 449, 31 O.R. (3d) 540, 33 W.C.B. (2d) 108, 40 C.R.R. (2d) 289, 4 C.R. (5th) 61, 95 O.A.C. 262

Her Majesty the Queen (respondent) and Gordon Domm (appellant)

Osborne, Doherty and Austin JJ.A.

Heard: September 5, 1996
Judgment: December 6, 1996
Docket: CA C19293

Counsel: *Frank Addario*, for appellant.
W. Graeme Cameron, for the Crown.

Subject: Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Criminal law

IV Charter of Rights and Freedoms
IV.8 Freedom of expression [s. 2(b)]

Criminal law

VI Offences
VI.38 Disobedience
VI.38.a Disobeying court order
VI.38.a.iv Miscellaneous

Headnote

Criminal law --- Offences against administration of justice — Disobedience — Disobeying court order — Miscellaneous issues

7 Mr. Addario, counsel for the appellant, does not challenge Justice Kovacs' jurisdiction to make the order delaying publication of some of the evidence adduced in the proceedings before him. While Kovacs J. may have erred in relying on s. 486(1) of the *Criminal Code*, *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.) establishes a trial judge's common law authority to make an order delaying publication of evidence adduced at a criminal trial. Counsel also accepts that normally orders of a superior court remain in effect until varied or terminated by process of law or by the operation of the terms of the order, and that those orders can usually be challenged only in proceedings, the object of which is the reversal or variation of the order: *R. v. Wilson* (1983), 9 C.C.C. (3d) 97 (S.C.C.) at 117. This last principle is referred to as the rule against collateral attack.

8 Mr. Addario submits that the rule against collateral attack is not absolute: *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 at 109-111 (S.C.C.). He contends that orders which restrain publication of court proceedings by individuals who are not parties to the proceedings to which the order applies are exempt from the collateral attack rule. Mr. Addario also argues that since the lawfulness of the order of Kovacs J. is an essential element of the *actus reus* of the offence with which the appellant is charged, the appellant must be able to contest the validity of the order in defending against the charge. He refers by analogy to other sections of the *Criminal Code* which make the lawfulness of state action an element of a criminal offence (e.g. s. 129, obstructing a police officer).

9 Mr. Addario's final submission assumes that the appellant was entitled, by way of defence to the charge against him, to challenge the correctness of the order made by Kovacs J. He submits that while the order may have been justified on the jurisprudence as it existed when the order was made and when the appellant's trial took place, the subsequent decision of the Supreme Court of Canada in *Dagenais* renders the order invalid. According to this submission, *Dagenais* set out a new approach which substantially narrowed the circumstances in which a non-publication order should be made. Counsel contends that tested against this new approach, the order of Kovacs J. should not have been made and is, therefore, invalid.[1] Mr. Addario submits that if his arguments are correct, the appellant is entitled to an acquittal or at least a new trial where the lawfulness of the order of Kovacs J. can be tested against the criteria announced in *Dagenais*.

IV.

10 This appeal is not about the reviewability of a court order postponing publication of criminal proceedings. Where the prosecution relies on an alleged breach of a court order as a basis for imposing criminal liability, that order is subject to *Charter* review: *Re B.C.G.E.U.* (1988), 44 C.C.C. (3d) 289 at 309-310 (S.C.C.). It is also clear after *Dagenais* that court orders banning or delaying publication in criminal proceedings are open to *Charter* challenge by persons affected by the orders. The issue here is whether that challenge can be made by way of a defence to a criminal charge of disobeying that court order.

11 This appeal is about the rule of law, the foundation on which our concept of ordered liberty is built. The preamble to the *Canadian Charter of Rights and Freedoms* provides:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

12 The rule of law encompasses several interrelated and, in some ways, countervailing principles: E. Colvin, "Criminal Law and the Rule of Law", in P. Fitzgerald ed. *Crime, Justice and Codification: Essays in Commemoration of Jacques Fortin*, (Carswell 1986) at pp. 127-130. It refers to a system of government by laws in which both the governed and the government are subject to and must comply with the law: *Reference re Language Rights Under s. 23 of Manitoba Act, 1870, and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 748-49 S.C.C.). Judicial orders are one manifestation of the law with which the state and the individual must comply. The rule of law, however, does more than demand compliance with the law. To validate this demand, the law must provide individuals with meaningful access to independent courts with the power to enforce the law by granting appropriate and effective remedies to those individuals whose rights have been violated: *Re B.C.G.E.U.*, *supra*, at 298-299; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 195-96: *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 at 250; *Kourtessis v. Minister of National Revenue* (1993), 81 C.C.C. (3d) 266, per La Forest J. at 309-310: P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 1263. This court must give effect to both the compliance and the remedial components of the rule of law in determining whether the appellant is entitled to challenge the

order of Kovacs J. at his trial.

V.

13 The compliance component of the rule of law is manifested in the rule barring collateral attacks on court orders. A judicial order made by a court having jurisdiction to make that order must be obeyed unless set aside in a proceeding taken for that purpose: *R. v. Wilson, supra*, at 117. Referring to the rule in *Litchfield, supra*, Iacobucci J. said at p. 110:

> ... The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal. ...

14 The rule against collateral attack on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order. For example, in *R. v. Reed* (1994), 91 C.C.C. (3d) 481 at 499 (B.C.C.A.), the court held that the accused could not defend against a charge of breaching a term of his probation by arguing that the term was invalid. Similarly, in *R. v. Rent*, [1989] N.S.J. No. 177 (N.S. C.A.) [reported at (1989), 91 N.S.R. (2d) 112 (C.A.)], the court invoked the rule against collateral attack in holding that an accused charged under the predecessor section to s. 127 of the *Criminal Code* could not attack the validity of the restraining order which he was alleged to have disobeyed: see also, *R. v. Dawson* (1995), 100 C.C.C. (3d) 123, per Jones J.A. (for the majority on this point), at pp. 130-131 (N.S.C.A.); further appeal to Supreme Court of Canada dismissed November 21, 1996 without reference to this issue: [1996] S.C.J. No. 113.

15 The rule against collateral attack comes to the forefront in criminal contempt cases where the contempt alleged involves a breach of a pre-existing court order. Courts have consistently refused to permit an accused to challenge the validity of the order underlying the contempt charge except on jurisdictional grounds: *Canadian Transport (U.K.) Ltd. v. Alsbury* (1952), 105 C.C.C. 20 at 44-45, 57-58 (B.C.C.A.), affd. without reference to this point *sub nom. Poje v. British Columbia (Attorney General)* (1953), 105 C.C.C. 311 (S.C.C.); *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 62 C.C.C. (3d) 455 at 468-470 (B.C. C.A.); *MacMillan Bloedel Ltd. v. Simpson* (1994). 89 C.C.C. (3d) 217 at 234 (B.C. C.A.); *R. v. Hunchuk* (1956), 25 C.R. 142 at 143-144 (B.C. C.A.).[2]

16 The effect of these and similar cases is summed up by McLachlin J., speaking for the majority, in *U.N.A. v. Alberta (Attorney General)* (1992), 71 C.C.C. (3d) 225 at 255 (S.C.C.):

> ... The validity of the order is not an issue on the contempt hearing. Unless the order has been set aside for want of jurisdiction, the judge hearing the motion on criminal contempt must accept it as valid. ...

17 Courts in other common law countries take the same position: *Issacs v. Robertson*, [1985] A.C. 97 (P.C.); *Taylor v. Attorney General*, [1975] 2 N.Z.L.R. 675, per Wild C.J. at 680, per Richmond J. at 685-686, per Woodhouse J. (dissenting on other grounds), at p. 689 (C.A.); *Howat v. State of Kansas*, 258 U.S. 181 at 189-90 (1922).

18 The appellant relies on *R. v. Fields* (1986), 28 C.C.C. (3d) 353 (Ont. C.A.) as authority for the proposition that an accused cited for contempt may challenge the validity of the order said to have been violated. Fields was a witness in a criminal prosecution. On cross-examination he refused to answer questions about his political affiliations on the ground that they were irrelevant. The trial judge told Fields that he had to answer the questions or face contempt proceedings. Fields still refused to answer the questions and the thai judge proceeded to convict Fields for contempt committed in the face of the court.

19 Fields appealed his contempt conviction pursuant to s. 10(1) of the *Criminal Code*. The majority (Dubin J.A. and Thorson J.A.) held that the right of appeal in s. 10(1) encompassed the right to challenge the correctness of the trial judge's ruling which Fields had refused to obey. Dubin J.A. said at pp. 358-59:

> ... Since a judge has the jurisdiction at trial to determine the matter of relevancy, the witness at that stage is bound by the order of the judge, and, if he refuses to answer and the rules of procedural fairness are complied with, the witness exposes himself to a conviction and punishment. *If the witness is convicted for refusing to answer the question, the witness has a right of appeal.*
>
> *On an appeal from such a conviction I think that the relevancy of the question does become an issue with respect to the validity of the conviction for contempt.* [Emphasis added.]

20 Thorson J.A. adopted the same approach. In holding that the scope of the appeal included an inquiry into the relevance of the question which the witness had refused to answer, he said at p. 371:

> In my opinion, the view which holds that the irrelevance or impropriety of a question affords no basis for impeaching a contempt conviction for a refusal to answer it goes too far. *Were it to find acceptance, the trial judge's ruling on whether a witness must answer would be absolute and binding, right or wrong, in relation to any conviction of the witness for contempt by reason of his failure to abide by the ruling*. The witness would have no protection afforded to him by the law from being obliged to answer any question put to him which he was directed by the trial judge to answer, no matter how irrelevant, improper or damaging the question put to him by his questioner and no matter how wrong or even capricious or perverse the judge's ruling on the matter. I cannot accept that such an extreme view of the law is compatible with the fairness of our criminal justice system, or with the principles of fundamental justice which are now embodied in our constitution. There must, in my opinion, be room in the system for an objective assessment of the correctness of such a ruling. [Emphasis added.]

21 I do not think that *Fields* departs from the established rule that a court order cannot be collaterally attacked in proceedings alleging a violation of that order. *Fields* involved a direct attack by way of appeal from a finding of contempt and the ruling from which that finding flowed. *Fields* determined that where the order and the finding of contempt for refusal to obey the order were made in the same proceeding by the same judge, the right of appeal granted by s. 10(1) opened both to appellate review. This interpretation of the scope of the right of appeal under s. 10(1) of the *Criminal Code* appears to have been accepted by the majority' in *Dagenais, supra*, at 305-306.

22 *Fields*, and in particular the reasons of Thorson J.A., can also be seen as an example of how remedial concerns must alleviate against the potential injustice caused by an overly strict adherence to the rule against collateral attack. I will return to that aspect of *Fields* later in these reasons.

23 Nor does giving the challenge to the validity of a court order a constitutional flavour open the door to collateral attack on such orders. Even orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose. In *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. Taylor was ordered by the Commission in 1979 to cease playing recorded messages over the telephone which were regarded as likely to expose a person or group to hatred or contempt. Taylor took none of the steps available to him to challenge the order, but instead defied it. He was eventually convicted of contempt. In 1983, the Tribunal made a second similar cease and desist order. Once again, Taylor ignored it, and once again, he was found in contempt. Taylor challenged the contempt findings on several bases, one of which involved a claim that s. 13(1) of the Canadian Human Rights Act. S.C. 1976-77 c. 33 was unconstitutional. That section empowered the Board to make the cease and desist orders which it had made against Taylor. Dickson C.J.C., for the majority, held that s. 13(1) was constitutional and upheld the validity of the tribunal's orders and the contempt findings. Justice McLachlin, for a three-person minority, would have struck down s. 13(1) as unconstitutional. She was, therefore, required to determine the validity of the contempt convictions based on orders dependent upon a statute which she had held to be unconstitutional. She began her analysis by observing at pp. 972-73:

> We were presented with no authority for the proposition that the unconstitutionality of a law upon which a court order is based excuses a refusal to obey the order. Such a proposition appears not to have been advanced in Canada prior to this appeal. In the United States, where it has been advanced, it has been rejected[3]

24 After referring to authorities which clearly established that the validity of the underlying order was not in issue in

criminal contempt proceedings based on a violation of that order, she said at pp. 974-75:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. *This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind, The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.* [Emphasis added.]

25 McLachlin J. would have quashed the Board's orders as unconstitutional, but would have held that the effective date of that quashing was the date on which the judgment of the court was issued. Consequently, the contempt convictions entered prior to the quashing of the orders remained valid. She said at p. 975:

> *... The commission of the offence of contempt does not depend on the validity of the underlying law but on the existence of a court order made by a court having jurisdiction.* I would therefore affirm the appellants' convictions. [Emphasis added.]

26 Justice McLachlin's language was quoted with approval by the majority in *Litchfield, supra*, at p. 110, and by this court in *R. v. Consolidated Maybrun Mines Ltd.* (1996), 105 C.C.C. (3d) 388 at 406, leave to appeal to S.C.C. granted December 5, 1996.

27 Justice McLachlin's refusal to recognize a right to collaterally challenge court orders based on alleged violations of the *Charter* is also consistent with the jurisprudence refusing to equate *Charter* violations with jurisdictional error: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 413 (S.C.C.). In this respect, Canadian case law has taken a very different road than that followed in at least one American jurisdiction where orders made in violation of a constitutional right are equated with orders made without jurisdiction: In *Re Berry* 436 P. 2d 273 at 282-281 (Cal. S.C. 1968); *Welton v. Los Angeles (City)*, 556 P. 2d 1119 at 1124 (Cal. S.C. 1976).

28 The recent decision in *R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.) is also relevant. Sarson was convicted of second degree murder based on the constructive murder provisions in the *Criminal Code*. Several months after his conviction, those provisions were declared unconstitutional. As the appellant no longer had any right of appeal, he challenged his detention by way of *habeas corpus* relying on the subsequent declaration of unconstitutionality. Sopinka J., at pp. 30-31, for a unanimous court on this issue, held that the *habeas corpus* application amounted to an impermissible collateral attack on the conviction even though the conviction rested on a statutory provision which had been subsequently held to be unconstitutional.

29 In my opinion, an allegation that an individual's constitutional rights have been violated by a court order cannot justify the abandonment of the rule against collateral attack. In such cases (and this is a good example), there are usually fundamental and conflicting values to be balanced. It is very much in the community's best interests that those whose values clash settle their competing claims by resort to established judicial procedures and not by preemptive acts by those convinced of the righteousness of their cause. I would, however, add that where constitutional rights are implicated, the court must be particularly concerned about the availabiliy of an effective remedy apart from collateral attack when considering whether an exception should be made to the rule against collateral attack.

VI

30 The rule against collateral attack on court orders will bar the appellant's attempt to challenge the validity of Justice Kovacs' order unless he can show either that the interests underlying the rule are not served by adherence to it in these circumstances, or that the remedial component of the rule of law demands an exception to the rule against collateral attack.

31 The rule against collateral attack on court orders serves to reinforce the compliance component of the rule of law and

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58

EFFECT OF UNCONSTITUTIONAL LAW

58.1 Invalidity of unconstitutional law

What is the effect of a judicial decision that a law is unconstitutional? Section 52(1) of the Constitution Act, 1982 (the supremacy clause) provides that the Constitution of Canada is "the supreme law of Canada", and that "any law that is inconsistent with the provisions of the Constitution" is "of no force or effect". This supremacy clause dates only from 1982, but it states a principle that has always been part of Canadian constitutional law. A law enacted outside the authority granted by the Constitution is ultra vires, invalid, void, a nullity. As Field J. said in the Supreme Court of the United States in 1886: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".[1]

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1 *Norton v. Shelby County* (1886) 118 U.S. 425, 442.

58.5 Res judicata

The doctrine of res judicata stipulates that a judicial decision is binding on the parties to the litigation, so that the same issue may not be re-litigated by the losing party. Once decided by a court of competent jurisdiction, an issue is said to be res judicata. The doctrine of res judicata is needed in order to bring disputes to an end. The doctrine precludes the re-opening of a decided case, even if it later becomes clear that the case was wrongly decided. The doctrine can have the effect of preserving the consequences of an unconstitutional law. After a law has been held to be unconstitutional, prior judicial decisions in which the law was applied remain binding and unreviewable (unless there is still time to appeal).[40]

In *R. v. Vaillancourt* (1987),[41] the Supreme Court of Canada held that the Criminal Code offence of felony-murder was unconstitutional, because it violated the accused's right to fundamental justice under s. 7 of the Charter of Rights. The accused in that case, who had been convicted of the offence at trial, was therefore entitled to be acquitted. But what was to become of all the other persons already serving prison sentences for the non-existent offence of felony-murder?

In *R. v. Thomas* (1990),[42] this question was raised by an accused who had been convicted of felony-murder in 1984 — three years before the Court's ruling in *Vaillancourt* — and who had unsuccessfully appealed to the British Columbia Court of Appeal (where he had not raised any constitutional issue). After the Supreme Court of Canada's ruling in *Vaillancourt*, Mr. Thomas applied to the Supreme Court of Canada for leave to appeal from the affirmation of his conviction by the British Columbia Court of Appeal. The time limit for such an application was 21 days, and Mr. Thomas was three years out of time. However, the Supreme Court of Canada had power to extend the time where there were ''special reasons'' to do so. A three-judge bench of the Supreme Court of Canada refused to extend the time and grant leave to appeal. Sopinka J. held that relief was precluded, because the accused was no longer ''in the judicial system''. An accused would be in the judicial system if there was still time to appeal, but an application for an extension of time should be granted only on ''the criteria that normally apply in such cases''. These criteria required that an intention to appeal be formed within the stipulated time, and that there be an adequate explanation for the delay. The fact that the accused had been convicted under a law subsequently held to be unconstitutional was not a sufficient reason to bring him ''artificially'' into the system.

In *R. v. Thomas*, the accused, although he was unsuccessful because he was out of time to appeal, had chosen the most promising route to review his convic-

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40 *Re Man. Language Rights* [1985] 1 S.C.R. 721, 757 (''*res judicata* would preclude the re-opening of cases decided by the courts on the basis of invalid laws''); Gibson, *The Law of the Charter: General Principles* (1986), 179.

41 [1987] 2 S.C.R. 636.

42 [1990] 1 S.C.R. 713.

tion, that is, a *direct* attack in the form of an appeal. An appeal is not precluded by the doctrine of res judicata. The doctrine of res judicata would be a conclusive answer to a *collateral* attack on the accused's conviction, for example, an application for habeas corpus, an action for a declaration that the accused was illegally in custody, an action for damages for false imprisonment or a defence to a charge of escaping from lawful custody. All such collateral attacks would fail on the ground that the accused was in custody pursuant to the judgment of a court of competent jurisdiction.[43] The fact that the convicting court had made an error of law in applying an unconstitutional statute would not deprive the court of jurisdiction.[44] Only an absence of jurisdiction, rendering a decision a nullity, would expose a judicial decision to collateral attack.[45]

58.6 De facto officers

The de facto officer doctrine protects from collateral attack the act of an officer who has apparent (de facto) authority to act, but who lacks the legal (de jure) authority.[46] The doctrine does not prevent a direct attack on the legality of the officer's title to the position: a direct attack would be a proceeding to remove the officer. Nor does the doctrine protect the officer himself from liability: we have already noticed that the personal liability of an officer who acts without legal authority is a basic tenet of the rule of law.[47] What the doctrine does is to protect third parties, who are not normally in a position to verify the lawfulness of an officer's appointment, and who are therefore entitled to rely on the ostensibly official acts of a person acting as an officer, even though he holds an invalid or non-existent appointment. For example, a seizure of property under a search warrant issued to a person who had not been properly appointed a police constable has been upheld on the ground that the holder of the warrant had performed the functions of a police constable for several years, and held the office de facto.[48] The Court said[49] that "the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons . . . legal and binding".

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43 *Turigan v. Alta.* (1988) 53 D.L.R. (4th) 321 (Alta. C.A.) (person convicted under unconstitutional law cannot recover fine, because fine is *res judicata*).

44 *Ibid.*

45 See generally A. Rubinstein, *Jurisdiction and Illegality* (Clarendon Press, Oxford, 1965), esp. ch. 1.

46 Constantineau, *A Treatise on the De Facto Doctrine* (1910); Rubinstein, note 45, above, 205-208; C.L. Pannam, "Unconstitutional Statutes and De Facto Officers" (1966) 2 Fed. L. Rev. 37; Gibson, note 40, above, 176-178.

47 Note 27, above. *Crown Trust Co. v. The Queen* (1986) 54 O.R. (2d) 79 (Div. Ct.) applies the de facto doctrine to immunize the officer from personal liability. That is wrong.

48 *O'Neil v. A.G. Can.* (1896) 26 S.C.R. 122.

49 *Id.*, 130.

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SUPREME COURT OF CANADA PRACTICE 2016

The Honourable Justice Henry S. Brown,
of the Federal Court of Canada

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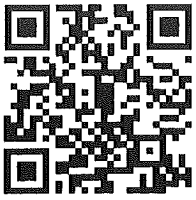

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Commentary

Extensions of Time

Because of the final nature of the Court's jurisdiction, judges rarely refuse necessary extensions of time, though terms may be imposed. In general, a properly-explained, reasonable request for an extension of time will usually be granted. The following principles may be extracted from the practice and the authorities. They all point to the need for careful documentation, particularly if a motion is likely to be contested.

1. A *bona fide* intention to proceed should be formed and communicated to the opposite party within the time allowed: see *Neveu v. Côté*, [1989] 2 S.C.R. 342, 1989 CarswellQue 128, 1989 CarswellQue 128F; *R. v. K.C. Irving Ltd.* (1975), [1976] 2 S.C.R. 366, 1975 CarswellNB 28, 1975 CarswellNB 28F; *Radclyffe v. Rennie* (1964), 49 W.W.R. 187, 1964 CarswellMan 33 (Man. C.A.); *Reaume v. Windsor (City)* (1915), 34 O.L.R. 384 (Ont. C.A.). If the applicant failed to form an intention to proceed within time, an explanation is required. In *Zieba v. A.G. (Que.)* (September 15, 1997) Cory J. dismissed a motion to extend time where the sixth lawyer retained by the applicant refused to handle the case. In *Kapelus v. University of British Columbia* (December 16, 1998) Binnie J. dismissed an extension where the applicant was unwilling to commit to any date by which the leave application could be made and where there was no demonstration of national importance.

2. Once delay is recognized, or if special relief is otherwise required from the Court, counsel must move diligently: *Borowski v. Canada (A.G.)* (December 9, 1987).

3. A proper explanation must be offered. An example of what will not suffice was shown in *Arditti v. Nolan* (November 14, 1996). There, the application for leave to appeal together with an application to extend time was served and filed on October 23, 1996 from the court of appeal's decision of May 30, 1996. During the summer months, time did not run. The only issue is whether an alimony award should be limited to five years, as per the trial judge, or unlimited as to time, as per the court of appeal. The applicant alleged that in his role as a chief executive officer of a company he was too busy to consider seeking leave to this Court. His lawyer was also on holidays for two weeks of the four-month period involved. The application was dismissed. In *R. v. Lindsay* (April 12, 1999) Bastarache J. dismissed an application where there was "no valid reason for the delay" and where the application "has no reasonable chance of success".

4. While the substance of an application for leave or an appeal is for the Court, the merits may be relevant on an extension application. An extension to file a notice of appeal as of right in a criminal case was refused where the applicant failed to make out an arguable case that the dissent involved was a dissent on a question of law: *Wedow v. R.* (April 18, 1984). See also *Robertson v. R.* (December 2, 1982) in which an extension was refused where the applicant "had not shown an arguable case can be made out", and *Pieszkor v. R.* (September 7, 1988) where the application had no merit and the extension was refused. In addition, necessary extensions to apply for leave have been refused where the proposed application lacked merit. In *Gagné v. Lacelle* (May 28, 1996), the application appeared to have "no merit" and was dismissed. In *Imhoff v. R.* (March 29, 1996), Doc. 24543, 1996 CarswellAlta 700 (S.C.C.), the accused wished to raise the same grounds presented to the court of appeal which found no merit in them. The application — for a 13-month extension — was dismissed, Cory J. noting the grounds were "no more meritorious now than they

were then." In *Kapelus v. University of British Columbia* (December 16, 1998) Binnie J. dismissed an extension where the applicant was unwilling to commit to any date by which the leave application could be made and where there was no demonstration of national importance.

5. A respondent may be called upon to show actual prejudice in order to successfully resist an application to extend time. This is especially the situation once an arguable case has been made out, and an explanation given for the delay.

6. Where a time period has been missed through counsel's inadvertence, an affidavit should set out the mistake for the chambers judge. Generally, a party will not be penalized if the delay is the fault of counsel: *Pont Viau (Cité) v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516, 1978 CarswellQue 128, 1978 CarswellQue 128F.

7. Time may be shortened in cases of urgency: cases involving young offenders, especially if incarcerated, or involving medical emergency, or public issues calling for immediate resolution are examples.

8. With respect to applications for leave to appeal, it is not the Court's practice to consider a motion for an extension of time to bring a leave application without the leave application itself also filed. The court considers the motion for extension of time and the application for leave together.

These principles were affirmed by the leave panel in *Roberge v. The Queen*, [2005] 2 S.C.R. 469, 2005 CarswellSask 524, 2005 CarswellSask 525. There, a four month extension in a criminal leave was refused. The Court gave extensive reasons sending a clear signal to counsel:

The power to extend time under special circumstances in s. 59(1) of the Act is a discretionary one. Although the Court has traditionally adopted a generous approach in granting extensions of time, a number of factors guide it in the exercise of its discretion, including:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;

2. Whether counsel moved diligently;

3. Whether a proper explanation for the delay has been offered;

4. The extent of the delay;

5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and

6. The merits of the application for leave to appeal.

The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.

Notwithstanding our sympathy for the difficulties experienced by counsel for the applicant's colleagues, we are all of the view that this is not a case in which an extension of time should be granted. Although the affidavit evidence indicates that the applicant formed a bona fide intention to seek leave to appeal and that intention was communicated to the respondent within the prescribed time, the delay in this case is not adequately explained. The four month delay beyond the 60 days prescribed under the Act is lengthy. The affidavit filed in this case demonstrates, in our view, that much of the delay can be ascribed to a failure to accord necessary priority to this application for leave to appeal. Ultimately, an application for leave to appeal to this Court

must be viewed as a matter of priority that cannot be put off indefinitely until it can be accommodated within counsel's schedule.

An accurate and timeless statement of the guiding philosophy is that of Brett, M.R. who said ". . . I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given": *Manchester Economic Building Society, Re* (1883), 24 Ch. D. 488 (Eng. Ch. Div.) at 497.

It now is the practice to combine an application for an extension with the application for leave in the leave to appeal motion book. Both are then dealt with, without an oral hearing, by the leave panel. See *Notice to the Profession*, January 1996, and rules 48(2) and 49(4). Indeed, Binnie J. refused an extension where it did not accompany the application for leave itself, writing that filing both motions is the "appropriate practice". See *Kapelus v. University of British Columbia* (December 16, 1998).

Traditionally, there is no appeal from the dismissal of a motion to extend time. In *R. v. Hodd* (August 7, 1970) the chambers judge dismissed the Crown's motion to extend time. The Crown then sought and obtained leave to appeal subject to the determination by the Court that it had jurisdiction to hear an appeal (October 6, 1970). Subsequently the appeal was quashed (1970), 1 C.C.C. (2d) 363, 1970 CarswellBC 207 (B.C. C.A.); set aside/quashed (1971), 1971 CarswellBC 147, 2 C.C.C. (2d) 544n (S.C.C.). Similarly, reargument of a motion has been refused even if the formal order had not yet been taken out: *Leon v. Forster* (July 15, 1937). In the same case (October 18, 1937) a motion by way of appeal from the dismissal was dismissed by the full Court.

Some motions judges have reviewed orders made by chambers judges when new material is advanced or oversight alleged, and where the order first made has not yet been signed and entered. See *Macooh v. R.* (December 8, 1992), *Grewal v. Salama Enterprises (1988) Ltd.* (June 22, 1992), and *R. v. Finta* (April 23, 1993). A panel of three judges reviewed a decision by the rota judge refusing to extend time to file an application for leave, when the applicant moved for reconsideration of the original refusal. The three judges dismissed the application for reconsideration, but may have established a precedent: see *Vogel v. Rock* (December 21, 1995). Now, new rule 75 specifically states that there shall be no reconsideration or re-hearing of a motion.

Written reasons are rarely given on motions to extend time. Each case usually turns on its unique facts. However, a handful of cases also address the tests. In *Blundon v. Storm* (1970), 10 D.L.R. (3d) 576, 1970 CarswellNS 64 (N.S. C.A.) the applicant was granted an extension where the lawyer had a mistaken belief as to the date on which time began to run. In *Neveu v. Côté*, [1989] 2 S.C.R. 342, 1989 CarswellQue 128, 1989 CarswellQue 128F, Gonthier J. gave reasons and extended time where the applicant had failed to communicate her intention within the delay period. Pigeon J. extended time to serve a notice of appeal in *University of Saskatchewan v. C.U.P.E., Local 1975*, [1978] 2 S.C.R. 830, 1978 CarswellSask 134, 1978 CarswellSask 134F, noting that "an extension is justified under the circumstances by reason of the principle that, if it can be done without serious prejudice to the other party, relief should be granted in order to prevent serious prejudice to a litigant". The leading case is *Roberge v. The Queen*, [2005] 2 S.C.R. 469, 2005 CarswellSask 524, 2005 CarswellSask 525.

In *R. v. Thomas*, [1990] 1 S.C.R. 713, 1990 CarswellBC 334, 1990 CarswellBC 752 the Court dismissed an application for a three-year extension to seek leave. There an accused was not informed until several years later that the Court was considering an appeal, which raised issues similar to those in his case, when he was

still within time. He could have sought leave then, but did not. The Court declined to find the accused was "still within the system" per *R. v. Wigman*, [1987] 1 S.C.R. 246, 1987 CarswellBC 664, 1987 CarswellBC 698 by extending the time, although it noted that there was no intention to appeal within the time, and that the delay had not been adequately explained in any event.

It is not unusual to extend time in cases of alleged wrongful conviction, particularly where the Crown does not strongly oppose. For example, in *Marquardt v. The Queen* (February 11, 2009), Doc. 33008 (S.C.C.), the applicant was convicted of the second degree murder of her two and a half-year-old son based on the testimony of a forensic pathologist, one Dr. Smith, whose testimony was generally discredited following the Goudge Inquiry in 2008 in Ontario. Her appeal to the court of appeal was dismissed January 22, 1998. After the Goudge Inquiry results, she moved for leave to appeal with a view to having her case remanded back to the court of appeal. Deshamps, J. granted the extension, and leave was subsequently granted April 30, 2009. In *White v. The Queen* (December 3, 2009), Doc. 33330, 2009 CarswellOnt 7589, 2009 CarswellOnt 7590 (S.C.C.), the accused was convicted of sexual assault of a severely disabled person in a residence for adults with developmental disabilities. He did not testify, called no evidence, the jury convicted, and his appeal was dismissed *R. v. White* (April 23, 1996), Doc. CA C21853, 1996 CarswellOnt 1356 (C.A.). He discovered new evidence, and applied for leave to appeal, for a remand of the new evidence motion to the Ontario Court of Appeal, along with a motion to file a lengthy memorandum of argument, and a motion to appoint counsel for these proceedings and any incidental proceedings in the Ontario Court of Appeal. The leave panel granted all applications.

Another lengthy extension was granted in *Gillespie v. R.* (February 7, 1994). The accused was convicted of second degree murder in 1984 and his appeal was dismissed in February 1988. Starting within 30 days of that judgment he began dealing with a series of lawyers, the last of whom was appointed counsel (on consent) in May 1992 but did not file the application for leave until December 1993. After two hearings, the extension was granted on January 7, 1994. The application for leave was dismissed on February 27, 1994.

Inordinate delay is more difficult to excuse. In *Aladdin Industries Inc. v. Canadian Thermos Products Ltd.*, [1974] S.C.R. 845, 1972 CarswellNat 430, 1972 CarswellNat 430F, the appellant delayed proceeding for 18 months after filing a notice of appeal, partly to enable second counsel to be retained and review the extensive record. The delay was held inordinate and not acceptably explained; the motion to extend time was dismissed. The chambers judge refused to extend time where there had been a 16-month delay during which the accused had been attempting to raise funds for an appeal: *Blundon v. R.* (February 20, 1989).

The Court is willing to assist counsel to settle cases and may extend time where the parties have been attempting, *bona fide*, to resolve their differences and have missed or are likely to miss a deadline. The Court has extended time to bring a leave application in order to assist the parties to settle. For example, in *National Bank of Canada v. Claiborne Industries Ltd.*, five extensions were granted on consent (October 12, 1989, November 29, 1989, January 8, 1990, January 26, 1990 and May 2, 1990). The Chief Justice delayed the hearing of an appeal by a year to allow settlement negotiations and ordered a filing timetable to commence at the end of the delay in *Delgamuukw v. R.* (July 11, 1994). And see *Hamilton-Smith et al. v. Janvey* (April 7, 2011), Doc. 33568, where Rothstein J. ordered that an application for leave be held "in abeyance" given pending implementation of a global settlement of this international dispute.

G

Roger Joseph Roberge *Applicant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* ROBERGE

Neutral citation: 2005 SCC 48.

File No.: 30896.

2005: August 18.

Present: McLachlin C.J. and Binnie and Charron JJ.

MOTION FOR AN EXTENSION OF TIME TO APPLY FOR LEAVE TO APPEAL

Practice — Supreme Court of Canada — Motion to extend time to file application for leave to appeal — Factors guiding exercise of Court's discretion to extend time — Motion dismissed.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 254(3).
Supreme Court Act, R.S.C. 1985, c. S-26, ss. 58(1)(*a*), 59(1).

MOTION for an extension of time to apply for leave to appeal. Motion dismissed.

Written submissions by *R. S. Prithipaul*, for the applicant.

Written submissions by *Lane Wiegers*, for the respondent.

The following order was delivered by

THE COURT — The applicant in this matter, Roger Joseph Roberge, seeks leave to appeal from a judgment of the Court of Appeal for Saskatchewan rendered from the Bench on October 19, 2004, allowing the Crown's appeal and ordering a new trial for the applicant on a charge of refusal to comply with a demand made under s. 254(3) of the *Criminal Code*, R.S.C. 1985, c. C-46: (2004), 254 Sask. R. 181, 2004 SKCA 145. The applicant has also applied for an order extending the time within

Roger Joseph Roberge *Demandeur*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ : R. *c.* ROBERGE

Référence neutre : 2005 CSC 48.

N^o^ du greffe : 30896.

2005 : 18 août.

Présents : La juge en chef McLachlin et les juges Binnie et Charron.

REQUÊTE EN PROROGATION DU DÉLAI DE DÉPÔT DE LA DEMANDE D'AUTORISATION D'APPEL

Pratique — Cour suprême du Canada — Requête en prorogation du délai pour déposer la demande d'autorisation d'appel — Facteurs qui guident la Cour dans l'exercice de son pouvoir discrétionnaire de proroger un délai — Requête rejetée.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 254(3).
Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 58(1)*a*), 59(1).

REQUÊTE en prorogation du délai de dépôt de la demande d'autorisation d'appel. Requête rejetée.

Argumentation écrite par *R. S. Prithipaul*, pour le demandeur.

Argumentation écrite par *Lane Wiegers*, pour l'intimée.

Version française de l'ordonnance rendue par

LA COUR — Le demandeur en l'espèce, Roger Joseph Roberge, sollicite l'autorisation d'interjeter appel contre un arrêt de la Cour d'appel de la Saskatchewan rendu à l'audience, le 19 octobre 2004, dans lequel la cour a accueilli l'appel du ministère public et ordonné que le demandeur subisse un nouveau procès relativement à l'accusation de refus d'obtempérer à un ordre donné en vertu du par. 254(3) du *Code criminel*, L.R.C. 1985, ch. C-46 : (2004), 254 Sask. R. 181, 2004 SKCA 145. 1

which to serve and file the application for leave to appeal. The respondent opposes both the application for leave to appeal and the request for an extension of time.

Le demandeur a également sollicité la prorogation du délai imparti pour signifier et déposer sa demande d'autorisation d'appel. L'intimée s'oppose à la fois à la demande d'autorisation d'appel et à la requête de prorogation de délai.

2 Section 58(1)(*a*) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (the "Act"), provides that where leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served and filed within 60 days after the judgment appealed from. In the present case, the delay for filing an application for leave to appeal from the judgment of the Court of Appeal for Saskatchewan expired on December 20, 2004. Nevertheless, the present application for leave to appeal was not filed with the Court until April 19, 2005 — some six months after the judgment of the Court of Appeal for Saskatchewan and four months after the expiry of the time prescribed in s. 58(1)(*a*) of the Act.

L'alinéa 58(1)*a*) de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26 (la « Loi »), prévoit que l'avis d'une demande d'autorisation d'appel, accompagné de tous les documents utiles, doit être signifié et déposé dans les 60 jours suivant la date du jugement porté en appel. En l'espèce, le délai imparti pour déposer une telle demande a expiré le 20 décembre 2004. Or, la demande n'a été déposée auprès de la Cour que le 19 avril 2005, soit quelque six mois après la date de l'arrêt de la Cour d'appel de la Saskatchewan et quatre mois après l'expiration du délai prescrit par l'al. 58(1)*a*) de la Loi.

3 Section 59(1) of the Act provides that, under special circumstances, the Court or a judge may extend the time prescribed by s. 58(1)(*a*). Counsel for the applicant has sworn an affidavit explaining the delay in bringing this leave application.

Le paragraphe 59(1) de la Loi prévoit que, dans des circonstances déterminées, la Cour ou un juge peut proroger le délai prescrit par l'al. 58(1)*a*). L'avocat du demandeur a souscrit un affidavit expliquant le retard à présenter la demande d'autorisation.

4 In his affidavit, counsel for the applicant affirms that he received instructions to proceed with an application for leave to appeal on October 20, 2004. The applicant's intention to seek leave to appeal was initially communicated to Crown counsel by letter dated October 28, 2004. However, he did not file his application for leave to appeal until *April 19*, 2005.

Dans son affidavit, il dit s'être vu confier le mandat de solliciter l'autorisation d'appel le 20 octobre 2004. L'intention du demandeur de solliciter l'autorisation d'appel a d'abord été communiquée à l'avocat du ministère public dans une lettre datée du 28 octobre 2004. Toutefois, la demande d'autorisation n'a été déposée que le *19 avril* 2005.

5 In explaining this delay, counsel for the applicant states that a senior partner at his firm, his father-in-law, was seriously injured in a motorcycle accident on September 26, 2004 and was unable to return to work until December 2004. He subsequently departed on January 4, 2005, for a previously scheduled vacation of about two and one half months. Moreover, another lawyer at the same firm was expecting a child and, shortly after the motorcycle accident, was required by her physician to reduce her

L'avocat du demandeur explique ce délai par le fait qu'un associé principal de son cabinet, son beau-père, a subi des blessures graves lors d'un accident de moto survenu le 26 septembre 2004 et qu'il n'a pu reprendre le travail qu'en décembre 2004. Le 4 janvier 2005, il est reparti pour prendre des vacances déjà prévues de deux mois et demi. De plus, une avocate du même cabinet, qui était enceinte, a dû, sur l'ordre de son médecin, réduire sa charge de travail peu après l'accident de moto.

workload. She subsequently departed on maternity leave on February 15, 2005. As a result of these events, counsel for the applicant and his wife were required to take over the trials originally scheduled for their colleagues as well as manage their own caseloads and oversee the law office. Although he started working on the application for leave to appeal during the Christmas break of 2004, he states that he was only able to complete the written materials in April once his senior partner returned from vacation.

Elle est ensuite partie en congé de maternité le 15 février 2005. Ces faits ont obligé l'avocat du demandeur et son épouse à remplacer leurs collègues dans certains procès, en plus de gérer leur propre charge de travail et de diriger le cabinet. Il affirme que, bien qu'il ait commencé à s'occuper de la demande d'autorisation d'appel pendant le congé de Noël de 2004, il n'a pu compléter la documentation écrite qu'en avril après le retour de vacances de son associé principal.

The power to extend time under special circumstances in s. 59(1) of the Act is a discretionary one. Although the Court has traditionally adopted a generous approach in granting extensions of time, a number of factors guide it in the exercise of its discretion, including:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;
5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
6. The merits of the application for leave to appeal.

The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.

Notwithstanding our sympathy for the difficulties experienced by counsel for the applicant's colleagues, we are all of the view that this is not a case in which an extension of time should be granted.

6 Le paragraphe 59(1) de la Loi confère le pouvoir discrétionnaire de proroger un délai dans des circonstances déterminées. Bien qu'elle ait traditionnellement adopté une approche libérale en la matière, la Cour tient compte d'un certain nombre de facteurs dans l'exercice de ce pouvoir discrétionnaire, dont :

1. la question de savoir si le demandeur avait véritablement l'intention de demander l'autorisation d'appel et s'il a fait part de cette intention à la partie adverse dans le délai prescrit;
2. la question de savoir si l'avocat a présenté la demande de manière diligente;
3. la question de savoir si le retard a fait l'objet d'une explication satisfaisante;
4. la longueur du retard;
5. la question de savoir si la décision d'accorder ou de refuser la prorogation de délai causera un préjudice indu à l'une ou l'autre des parties;
6. le bien-fondé de la demande d'autorisation d'appel.

En définitive, il faut toujours se demander si, eu égard aux circonstances et compte tenu des facteurs susmentionnés, la prorogation de délai s'impose pour que justice soit rendue.

7 Tout en comprenant les difficultés auxquelles se sont heurtés les collègues de l'avocat du demandeur, nous sommes tous d'avis qu'il n'y a pas lieu de proroger le délai en l'espèce. La preuve par

Although the affidavit evidence indicates that the applicant formed a *bona fide* intention to seek leave to appeal and that intention was communicated to the respondent within the prescribed time, the delay in this case is not adequately explained. The four-month delay beyond the 60 days prescribed under the Act is lengthy. The affidavit filed in this case demonstrates, in our view, that much of the delay can be ascribed to a failure to accord necessary priority to this application for leave to appeal. Ultimately, an application for leave to appeal to this Court must be viewed as a matter of priority that cannot be put off indefinitely until it can be accommodated within counsel's schedule.

8 For these reasons, the application for an extension of time is dismissed.

Motion dismissed.

Solicitors for the applicant: Gunn & Prithipaul, Edmonton.

Solicitor for the respondent: Saskatchewan Justice, Regina.

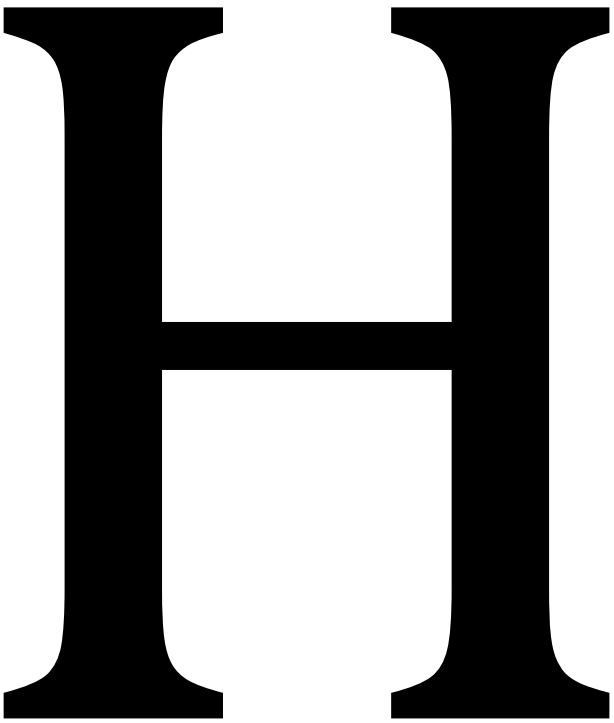
affidavit indique que le demandeur avait véritablement l'intention de demander l'autorisation d'appel et qu'il a fait part de cette intention à l'intimée dans le délai prescrit, mais le retard accusé en l'espèce n'a pas fait l'objet d'une explication satisfaisante. Les quatre mois écoulés après l'expiration du délai de 60 jours prescrit par la Loi représentent une longue période. Nous estimons que l'affidavit déposé en l'espèce démontre qu'une bonne partie du retard est attribuable à l'omission de donner la priorité voulue à la demande d'autorisation d'appel. En fin de compte, la présentation d'une telle demande à notre Cour doit être considérée comme une démarche prioritaire que l'avocat ne peut pas reporter indéfiniment jusqu'à ce que son horaire lui permette de l'effectuer.

Pour ces motifs, la requête de prorogation de délai est rejetée.

Requête rejetée.

Procureurs du demandeur : Gunn & Prithipaul, Edmonton.

Procureur de l'intimée : Justice Saskatchewan, Regina.



1999 CarswellNat 252
Federal Court of Canada — Trial Division

Ahani v. R.

1999 CarswellNat 252, 1999 CarswellNat 4596, [1999] F.C.J. No. 212, 163 F.T.R. 296

Mansour Ahani, Plaintiff and Her Majesty The Queen, The Minister of Citizenship & Immigration, Defendants

Rothstein J.

Heard: February 9, 1999
Oral reasons: February 11, 1999
Docket: T-1767-98

Counsel: *Ms Barbara Jackman*, for the Plaintiff.
Mr. Donald MacIntosh and *Mr. Sudabeh Mashkuri*, for the Defendant.

Subject: Civil Practice and Procedure; Constitutional; Immigration

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

IX Pleadings
IX.2 Statement of claim
IX.2.f Striking out for absence of reasonable cause of action
IX.2.f.ix Miscellaneous

Immigration and citizenship

I Constitutional issues
I.3 Charter of Rights and Freedoms
I.3.b Visitors and immigrants
I.3.b.ii Convention refugees

Headnote

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General

Aliens, immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — Visitors and immigrants — Convention refugees

1999 CarswellNat 252, 1999 CarswellNat 4596, [1999] F.C.J. No. 212, 163 F.T.R. 296

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Cases considered by *Rothstein J.*:

Ahani v. R., *(*sub nom. *Ahani v. Canada)* 100 F.T.R. 261, *(*sub nom. *Ahani v. Canada)* 32 C.R.R. (2d) 95, *(*sub nom. *Ahani v. Canada)* [1995] 3 F.C. 669 (Fed. T.D.) — referred to

Ahani v. R. (1996), *(*sub nom. *Ahani v. Canada)* 201 N.R. 233, *(*sub nom. *Ahani v. Canada)* 37 C.R.R. (2d) 181, *(*sub nom. *Ahani v. Canada)* 119 F.T.R. 80 (note) (Fed. C.A.) — referred to

Ahani v. R. (1997), *(*sub nom. *Ahani v. Canada)* 44 C.R.R. (2d) 376 (note), *(*sub nom. *Ahani v. Canada)* 223 N.R. 72 (note) (S.C.C.) — referred to

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Hoystead v. Commissioner of Taxation (1925), [1926] A.C. 155, [1925] All E.R. Rep. 56, [1926] 1 W.W.R. 286 (Australia P.C.) — considered

Maynard v. Maynard (1950), [1951] S.C.R. 346, [1951] 1 D.L.R. 241 (S.C.C.) — referred to

Singh v. R. (1996), 37 Imm. L.R. (2d) 140, *(*sub nom. *Singh v. Canada (Minister of Citizenship & Immigration))* 123 F.T.R. 241 (Fed. T.D.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act,
s. 7 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11
s. 52(1) — referred to

Immigration Act, R.S.C. 1985, c. I-2
s. 19(1) — referred to

s. 19(1)(e)(iii) [en. 1992, c. 49, s. 11(2)] — referred to

s. 19(1)(e)(iv)(C) [en. 1992, c. 49, s. 11(2)] — referred to

s. 19(1)(f)(ii) [en. 1992, c. 49, s. 11(2)] — referred to

s. 19(1)(f)(iii)(B) [en. 1992, c. 49, s. 11(2)] — referred to

s. 19(1)(g) — referred to

s. 40.1 [en. R.S.C. 1985, c. 29 (4th Supp.), s. 4(1)] — referred to

s. 40.1(1) [rep. & sub. 1992, c. 49, s. 31] — referred to

s. 40.1(6) [en. R.S.C. 1985, c. 29 (4th Supp.), s. 4(1)] — considered

s. 53(1)(b) [rep. & sub. 1992, c. 49, s. 43(1)] — considered

s. 53(1)(d) [en. 1995, c. 15, s. 12] — referred to

MOTION to strike portions of plaintiff's statement of claim.

***Rothstein J.*:**

1 The defendants move to strike portions of the plaintiff's statement of claim in which he seeks a declaration that certain provisions of the *Immigration Act*, R.S.C. 1985, c. I-2, are of no force and effect under subsection 52(1) of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. The defendants first move to strike paragraph 2 of the statement of claim which claims that the anti-terrorism provisions of the *Immigration Act*, paragraphs 19(1)(*e*)(*iii*), 19(1)(*e*)(*iv*)(*C*), 19(1)(*f*)(*ii*), 19(1)(*f*)(*iii*)(*B*) and 19(1)(*g*) are of no force and effect.

Facts

2 The plaintiff entered Canada on October 14, 1991 and claimed Convention refugee status. On December 31, 1991 he was found to have a credible basis for his claim. On April 1, 1992 the Immigration and Refugee Board determined that he was a Convention refugee. On June 9 and June 15, 1993 the Solicitor General of Canada and the Minister of Employment and Immigration, respectively, certified under subsection 40.1(1) of the *Immigration Act*, that they were of the opinion, based on a security intelligence report received and considered by them, that the plaintiff was inadmissible to Canada as being a person described in the anti-terrorism provisions of the *Immigration Act*, namely paragraphs 19(1)(*e*)(*iii*), 19(1)(*e*)(*iv*)(*C*), 19(1)(*f*)(*ii*), 19(1)(*f*)(*iii*)(*B*) and 19(1)(*g*). On June 17 and 18, 1993 the certificate was filed with an immigration officer and with this Court. The plaintiff was served with a copy of the certificate and taken into custody and has remained in custody since that date.

3 As a result of the section 40.1 proceedings brought against him, the plaintiff, on December 24, 1993, commenced an action in this Court challenging the constitutional validity of section 40.1 based on section 7 of the Charter. That Charter challenge was decided by McGillis J. in *Ahani v. R.*, [1995] 3 F.C. 669 (Fed. T.D.). McGillis J. found the procedures under section 40.1 to be constitutionally valid. Her decision was upheld by the Federal Court of Appeal (1996), 201 N.R. 233 (Fed. C.A.). Leave to appeal to the Supreme Court of Canada was dismissed (1997), 223 N.R. 72 (note) (S.C.C.).

4 Subsequently, the proceedings under section 40.1 concluded on April 17, 1998 with Denault J., the designated judge, finding that the Minister's certificate was reasonable. The Minister then proceeded under paragraph 53(1)(*b*) of the *Immigration Act* as the next step in the process of deporting the applicant.

5 Paragraph 53(1)(*b*) provides:

> **53**. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(*a*), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
>
> . . . . .
>
> (*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

6 The Minister issued her opinion that the plaintiff constituted a danger to the security of Canada on August 12, 1998.

7 This action was commenced on September 9, 1998 challenging the constitutional validity of the anti-terrorism provisions of subsection 19(1) and paragraph 53(1)(*d*) of the *Immigration Act*.

Analysis

8 The defendants concede that the plaintiff may bring the present action to challenge the constitutional validity of paragraph 53(1)(*d*). However, they say, amongst other reasons, that the plaintiff elected to challenge the validity of section 40.1 in his 1993 action, that section 40.1 incorporates by reference the anti-terrorism provisions of subsection 19(1) of the *Immigration Act* and the plaintiff is now estopped from commencing a new action challenging the anti-terrorism provisions. The defendants rely on *Singh v. R.* (1996), 123 F.T.R. 241 (Fed. T.D.). *Singh* is a decision of Muldoon J. of this Court who found that it is an abuse of the process to "litigate by instalments". At paragraph 9 of *Singh* , Muldoon J. cites *Maynard v. Maynard* (1950), [1951] S.C.R. 346 (S.C.C.) in which the Supreme Court of Canada adopted a passage from *Green v. Weatherill*, [1929] 2 Ch. 213 (Eng. Ch. Div.), at pp. 221-222:

> ...the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

9 Muldoon J. then refers to a passage in the *Maynard* case in which the Supreme Court adopted the following passage from *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.) at p. 170:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

10 I think the dicta cited is applicable to the case at bar. The plaintiff, in 1993, brought a Charter challenge against section 40.1. Section 40.1 incorporates by reference the anti-terrorism provisions of subsection 19(1) which the plaintiff in this action now seeks to challenge. As such, the anti-terrorism provisions of subsection 19(1) are integral and form part of the statutory scheme in section 40.1. There is no reason the plaintiff could not have included the challenge to the subsection 19(1)

provisions when he commenced his 1993 action. In fact, in the Notice of Constitutional Question pertaining to the 1993 action, the plaintiff describes his challenge as "a plenary constitutional question directed at section 40.1". The authorities cited with approval in *Singh* by Muldoon J. are dispositive on this issue. The plaintiff could have brought the same issues before the Court in his 1993 action that he seeks to advance in this action. His is estopped from doing so. The matter is *res judicata*.

11 For the Court to acquiesce in the challenge to the anti-terrorism provisions of subsection 19(1) in this action would be to permit an abuse of the process. Indeed, in *Ahani* , McGillis J. makes reference to evidence that was tendered by the Crown and cross-examined by the plaintiff relative to terrorism, the very subject matter of the provisions the plaintiff seeks to challenge in this action. The plaintiff, as the cases cited clearly indicate, cannot litigate by instalments.

12 Plaintiff's counsel says the plaintiff was entitled to await the decision of the designated judge under section 40.1 before bringing his Charter challenge to the anti-terrorism provisions of subsection 19(1). In doing so, the plaintiff is treating the challenge to the anti-terrorism provisions as an appeal of the section 40.1 decision of the designated judge. However, the *Immigration Act* is clear that no appeal lies from a decision of a designated judge under section 40.1. Subsection 40.1(6) provides:

> **40.1** (6) A determination under paragraph (4)(*d*) is not subject to appeal or review by any court.

13 That is not to say that in appropriate circumstances, an action for a declaration of constitutional invalidity of provisions of the *Immigration Act* is precluded. It is only to say that in this case, when the plaintiff elected to bring an action for a declaration of constitutional invalidity in 1993, he could not hold back some of his arguments on the grounds he was awaiting a decision under section 40.1. Once he elected to challenge section 40.1, which incorporates the anti-terrorism provisions of subsection 19(1), he was obliged to bring forward all relevant arguments. He failed to do so at his own peril.

14 The plaintiff says there is a difference between procedural and substantive Charter challenges. Again, the plaintiff appears to treat the present action as an appeal of the decision of the designated judge under section 40.1. Once the plaintiff commenced his Charter challenge to section 40.1, he was required to raise all arguments, whether as to procedure or as to substance, and whether to an express provision in section 40.1 or to provisions of subsection 19(1) incorporated by reference therein.

15 The plaintiff says that because the *Immigration Act* consists of a number of procedural steps in the process to deport a Convention refugee, that the plaintiff is justified in proceeding by instalments as well. However, the succession of procedural steps provided in the *Immigration Act* are for the benefit of those, like the plaintiff, who the government wishes to deport. It is quite appropriate for an affected person to await the government invoking a particular step in the process before challenging that legislative provision. However, it is not appropriate to attempt to revive old issues pertaining to a previous step by attempting to incorporate them in a challenge of subsequent proceedings. If that were permitted there would be no end to litigation. An affected person could select one provision for challenge and then if unsuccessful, proceed to challenge another in succession. That is clearly an abuse of the process and, if permitted, would bring the administration of justice into disrepute.

16 The defendants' motion to strike paragraph 2 of the plaintiff's statement of claim challenging paragraphs 19(1)(*e*)(*iii*), 19(1)(*e*)(*iv*)(*C*), 19(1)(*f*)(*ii*), 19(1)(*f*)(*iii*)(*B*) and 19(1)(*g*) of the *Immigration Act* is granted, and that portion of the statement of claim is struck out.

17 The defendants then move to strike the last sentence of paragraph 9 of the statement of claim. Plaintiff's counsel says the reason for including it goes to whether the Minister exercised her discretion under paragraph 53(1)(*b*) within constitutional bounds. That is not a subject matter of this action but rather, is to be dealt with in a judicial review which the applicant has brought in respect of the Minister's order under paragraph 53(1)(*b*) of the *Immigration Act*. Because it is irrelevant to these proceedings, the motion is granted with respect to the last sentence of paragraph 9 and it is struck out.

18 With the consent of the plaintiff, the defendants' motion with respect to paragraph 13(iv) is granted and the words "unduly broad" are struck out.

19 The defendants' motion with respect to the plaintiff's claim for general and particular damages is adjourned to permit the plaintiff to submit to the Court a proposed amended statement of claim with allegations supporting the claim for damages, having regard to *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347 (S.C.C.). The proposed amended statement of claim shall be submitted to the Court and served on the defendant on or before Monday, February 15, 1999 and the argument shall take place by way of conference call at a time to be fixed by the Court.

Order accordingly.

I

2016 BCCA 367
British Columbia Court of Appeal

M. (L.) v. British Columbia (Director of Child, Family and Community Services)

2016 CarswellBC 2514, 2016 BCCA 367, [2016] B.C.W.L.D. 6369, [2016] B.C.W.L.D. 6419, [2016] B.C.W.L.D. 6428, [2016] B.C.W.L.D. 6437, [2016] B.C.W.L.D. 6534, [2016] B.C.W.L.D. 6586, [2016] B.C.W.L.D. 6587, [2016] B.C.W.L.D. 6588, [2016] B.C.W.L.D. 6589, [2016] W.D.F.L. 5284, [2016] W.D.F.L. 5298, [2016] W.D.F.L. 5350, [2016] W.D.F.L. 5390, [2016] W.D.F.L. 5391, [2016] W.D.F.L. 5397, [2016] W.D.F.L. 5399, [2017] 3 W.W.R. 245, 269 A.C.W.S. (3d) 716, 402 D.L.R. (4th) 706, 6 Admin. L.R. (6th) 51, 79 R.F.L. (7th) 257, 89 B.C.L.R. (5th) 362

L.M. and R.B. (Appellants/Petitioners) and The Director of Child, Family and Community Services (Respondent/Respondent)

L.M. and R.B. (Appellants/Petitioners) and The Director of Child, Family and Community Services and Director of Adoptions and the Public Guardian and Trustee as Litigation Guardian of S.S. (Respondents/Respondents)

Saunders, Kirkpatrick, Bennett, Goepel, Savage JJ.A.

Heard: June 8, 2016
Judgment: September 13, 2016
Docket: Vancouver CA43296, CA43470

Proceedings: affirming *M. (L.) v. British Columbia (Director of Child, Family and Community Services)* (2015), 2015 BCSC 2261, 2015 CarswellBC 4006, 74 R.F.L. (7th) 80, Macintosh J. (B.C. S.C.); and affirming *S. (S.) (Litigation guardian of) v. British Columbia (Director of Child, Family and Community Services)* (2016), 2016 BCSC 275, 78 R.F.L. (7th) 226, 2016 CarswellBC 558, 2 Admin. L.R. (6th) 333, Choi J. (B.C. S.C.)

Counsel: J. Hittrich, B. McIvor, M. Dunnaway, for Appellants
L. Greathead, K. Webber, for Respondents, Director of Child, Family and Community Services and Director of Adoptions
T. Dickson, J. Arvay, Q.C., for Respondent, Public Guardian and Trustee as Litigation Guardian of S.S.

Subject: Civil Practice and Procedure; Constitutional; Contracts; Family; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Constitutional law

XIV Procedure in constitutional challenges
XIV.5 Miscellaneous

Family law

XIII Adoption
XIII.6 Miscellaneous

Family law

XV Children in need of protection
XV.1 General principles

by specific reference to her in s. 4(2) of the *Adoption Act*, demonstrates that the legislature intended the Director to have full control over these matters such that there is no role for the exercise of *parens patriae* jurisdiction to effect the adoption of S.S. by the appellants.

40 On this view of the legislation, it is plain that the petition in front of Mr. Justice Macintosh for orders in respect to adoption in British Columbia sought relief beyond the powers of the court and he was correct to dismiss those aspects of the petition.

41 The appellants also challenge the dismissal by Mr. Justice Macintosh of their claim for other relief, including judicial review of the decision of the Director to have S.S. adopted by non-aboriginal individuals in Ontario. I consider this claim mischaracterized the decision of the Director; with respect, the decision is not approving an adoption in Ontario but rather is a decision made under the *Child, Family and Community Service Act* allowing a child to be put in care in another province.

42 The provisions of the *Adoption Act* are not engaged by the decision of the Director at this stage.

43 L.M. and R.B. relied upon *M. (A.A.A.) v. British Columbia (Director of Adoption)*, 2016 BCSC 842 (B.C. S.C.), in which Madam Justice Young held that the Director's interprovincial adoption placement of a child in Alberta was *ultra vires* the geographic limits of her authority under the *Adoption Act*, and extended the reach of the *Act* beyond geographic limits of the province's legislative competence. *M. (A.A.A.)*, in my view, is not applicable to the circumstance before us because this case concerns a placement outside of British Columbia under the *Child, Family and Community Service Act*, not a placement under the *Adoption Act*. Accordingly, I do not address the respondents' submissions that *M. (A.A.A.)* was wrongly decided.

44 Last, L.M. and R.B. challenge the Director's consideration of S.S.'s Métis heritage and say that inadequate attention was given to this circumstance by Mr. Justice Macintosh. It is true he did not explore this aspect at length. However, this complaint could apply only to the Director's decision under the *Child, Family and Community Service Act* to place the child in Ontario, and that decision was not the subject of the petition.

45 As can be seen by these reasons, there has been considerable criticism by L.M. and R.B. of the Director's decision to place S.S. with the Ontario couple concerning the best interests of S.S. Those are matters that are properly for judicial review, in my view, in the context of the applicable statutory framework, and are not part of the first petition described in para. 7 above. Accordingly, I decline to comment on those matters.

46 For these reasons, I would dismiss the appeal in respect to the order of Mr. Justice Macintosh.

Appeal CA43470

47 L.M. and R.B. also appeal from the order of Madam Justice Choi dismissing the second petition on the grounds of *res judicata*. The appellants contend that Madam Justice Choi erred in failing to recognize that the second petition claimed relief under the *Charter* that was only made necessary by the decision of Mr. Justice Macintosh.

48 I would not accede to this submission.

49 Constitutional arguments do not attract an exception to the general approach brought to *res judicata*: *Tsawwassen Indian Band v. Delta* (1997), 37 B.C.L.R. (3d) 276 (B.C. C.A.) at paras. 66-71, (1997), 149 D.L.R. (4th) 672 (B.C. C.A.), and on that general approach Madam Justice Choi was correct, in my view, for two reasons. First, the second petition is based on substantially the same facts as the first petition. Second, the *Charter* argument could have been raised in the proceedings before Mr. Justice Macintosh, as it should have been within the appellants' contemplation that he may dismiss the petition, thus raising these potential *Charter* issues.

50 I would say further that this court is not in a position to decide the *Charter* arguments raised given the absence of an evidentiary record sufficient for determination of those issues.

51 In my view, this appeal must be dismissed.

J

Most Negative Treatment: Distinguished
Most Recent Distinguished: Prophet River First Nation v. Canada (Attorney General) | 2017 FCA 15, 2017 CarswellNat 106 | (F.C.A., Jan 23, 2017)

1989 CarswellNat 193
Supreme Court of Canada

Slaight Communications Inc. v. Davidson

1989 CarswellNat 193, 1989 CarswellNat 695, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 15 A.C.W.S. (3d) 132, 26 C.C.E.L. 85, 40 C.R.R. 100, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183, J.E. 89-775, EYB 1989-67228

SLAIGHT COMMUNICATIONS INC. v. DAVIDSON

Dickson C.J.C., Beetz, Lamer, Wilson, Le Dain, * La Forest and L'Heureux-Dubé JJ.

Heard: October 8, 1987
Judgment: May 4, 1989
Docket: No. 19412

Counsel: *Brian A. Grosman, Q.C.* and *John Martin*, for appellant.
Morris Cooper and *Fern Weinper*, for respondent.

Subject: Employment; Constitutional; Public

APPEAL from a judgment of the Federal Court of Appeal [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45] dismissing appellant's application pursuant to s. 28 of the *Federal Court Act* to set aside an order made by an adjudicator under s. 61.5(9)(c) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

***Dickson C.J.C.* (*Wilson, La Forest and L'Heureux-Dubé* concurring):**

I

1 The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant Slaight Communications Inc., operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, as en. S.C. 1977-78, c. 27, s. 21, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, "our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

2 Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

> In Ms. Stitt's letter to Labour Canada of February 27, 1984 ... she specified that the 'major complaint' was Mr. Davidson's failure to achieve 'monthly sales budgets since October of 1983.' To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

> From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: 'If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more.' By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of 'the real reason for dismissal,' but there was no response.

He concluded:

> An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

3 Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his employ; and
>
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

4 He ordered payment of $46,628.96 plus interest and legal costs of $2,500. He made a further order, which is central to this appeal, reading:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
>
> (2) That his sales 'budget' or quota for 1981 was $248,000, of which he achieved 97.3 per cent;
>
> (3) That his sales 'budget' or quota for 1982 was $343,500, of which he achieved 100.3 per cent;
>
> (4) That his sales 'budget' or quota for 1983 was $402,200, of which he achieved 114.2 per cent;
>
> (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.
>
> I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

5 An appeal by the employer to the Federal Court of Appeal was dismissed [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45 , Urie and Mahoney JJ., Marceau J. dissenting].

6 The question to be decided by this Court is whether para. (c) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (c), it will be recalled, reads:

> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

7 Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

8 Two constitutional questions were stated in this appeal as follows:

> 1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II — The Relationship Between Administrative Law Review And Review Under The Charter

9 I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order) I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense, but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

10 I agree with Mahoney J. of the Federal Court of Appeal [[1985] 1 F.C., at 260-261] that:

> The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

11 The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476 at 494-495, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289) in the realm of value inquiry the Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure

such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada*, at p. 296 [[1984] 1 S.C.R.]:

> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

85 Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H.W.R. Wade, in his text titled *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) says the following at p. 336:

> For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised *reasonably* and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.

(My emphasis.)

86 This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *C.U.P.E., Local 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, and *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 inter alia. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard* [[1984] 2 S.C.R., at 494-495]:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
>
> Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, 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.
>
> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

87 In the case at Bar, I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent, except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

88 Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available

under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at Bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

89 It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

90 The fact that the *Charter* applies to the order made by the adjudicator in the case at Bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Prof. Peter Hogg when he wrote in his text titled *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 671:

> The references in s. 32 to the 'Parliament' and a 'legislature' make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

91 Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

92 It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

93 First, there are two important principles that must be borne in mind:

1. An administrative tribunal may not exceed the jurisdiction it has by statute; and

2. It must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

94 The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

(a) It is then necessary to subject the *legislation* to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

(a) It is then necessary to subject the *order* made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

(b) If it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction.

(c) If it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

95 There is no doubt in the case at Bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

96 However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

97 To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

98 The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Prophet River First Nation v. Canada (Attorney General) | 2017 CAF 15, 2017 FCA 15, 2017 CarswellNat 106, 2017 CarswellNat 1489, 6 C.E.L.R. (4th) 169, 274 A.C.W.S. (3d) 776 | (F.C.A., Jan 23, 2017)

1989 CarswellNat 695
Cour Suprême du Canada

Slaight Communications Inc. c. Davidson

1989 CarswellNat 193, 1989 CarswellNat 695, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 15 A.C.W.S. (3d) 132, 26 C.C.E.L. 85, 40 C.R.R. 100, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183, J.E. 89-775, EYB 1989-67228

Slaight Communications Incorporated (exploitée sous le nom de station de radio Q107 FM), Appelante v. Ron Davidson, Intimé

Le juge en chef Dickson et les juges Beetz, Lamer, Wilson, Le Dain* , La Forest et L'Heureux-Dubé.

Jugement: 8 octobre 1987
Jugement: 4 mai 1989
Dossier: 19412

Procédures: En appel de la cour d'appel fédérale

Avocat: *Brian A. Grosman, c.r.* , et *John Martin* , pour l'appelante.
Morris Cooper et *Fern Weinper* , pour l'intimé.

Sujet: Constitutional; Employment; Public

Classifications d'Abridgment connexes
Pour toutes les classifications du Canadian Abridgment pertinentes, reportez-vous au plus haut niveau de cause dans l'historique.

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.iv Provisions requiring disclosure of information

Labour and employment law

II Employment law
II.6 Termination and dismissal
II.6.a Termination of employment by employer
II.6.a.iii Procedure on dismissal
II.6.a.iii.F Miscellaneous

Labour and employment law

II Employment law

1. Les dispositions de l'ordonnance de l'arbitre, rendue conformément au par. 61.5(9) du *Code canadien du travail* , S.R.C. 1970, chap. L-1 et ses modifications, par lesquelles on a ordonné à la requérante de fournir à l'intimé une lettre de recommandation à contenu spécifié assortie de l'obligation supplémentaire de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé en envoyant ou en remettant une copie de la lettre de recommandation, violent-t-elles ou nient-elles les droits et libertés garantis par l'al. 2*b*) de la *Charte canadienne des droits et libertés* ?

2. Si les dispositions de l'ordonnance de l'arbitre violent ou nient les droits et libertés garantis par l'al. 2*b*) de la *Charte canadienne des droits et libertés* , sont-elles justifiées par l'article premier de la *Charte* et donc compatibles avec la *Loi constitutionnelle de 1982* ?

II Le rapport entre le contrôle en matière de droit administratif et l'examen fondé sur la Charte.

9 J'ai pris connaissance de l'opinion exprimée par le juge Lamer et je suis parfaitement d'accord avec son analyse de l'applicabilité de la *Charte* au processus décisionnel administratif. Je suis également d'accord avec sa conclusion que l'ordonnance positive rendue par l'arbitre Joliffe (celle de rédiger une lettre de recommandation à contenu spécifié et de la remettre à l'intimé) viole l'al. 2*b*) de la *Charte* , mais qu'elle est sauvegardée par l'article premier. Toutefois, pour ce qui est de l'ordonnance négative (celle de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé à la station Q107 en envoyant la lettre de recommandation visée par l'ordonnance positive), je me vois, en toute déférence, dans l'obligation d'exprimer mon désaccord avec la conclusion du juge Lamer selon laquelle elle est manifeste ment déraisonnable, ce qui pare à la nécessité d'examiner la *Charte* . De plus, j'estime non seulement que l'ordonnance négative est raisonnable au sens du droit administratif, mais aussi qu'elle est raisonnable et que sa justification peut se démontrer au sens de l'article premier de la *Charte* .

10 Je souscris aux propos tenus par le juge Mahoney de la Cour d'appel fédérale dans l'arrêt précité, aux pp. 260 et 261:

Le fait d'ordonner l'envoi d'une lettre de recommandation portant uniquement sur des faits et d'empêcher que son effet ne soit sapé, éventualité manifestement prévisible dans les circonstances révélées par la preuve, me semble être un redressement équitable et non punitif. Il s'agit d'un redressement approprié accordé à l'employé lésé et qui ne porte d'aucune façon préjudice à l'employeur. À mon avis, l'alinéa 61.5(9)*c*) autorisait l'ordonnance.

11 Le rapport précis entre la norme traditionnelle de contrôle, en droit administratif, du caractère déraisonnable manifeste et la nouvelle norme constitutionnelle de contrôle va se dégager de la jurisprudence à venir. Néanmoins, il y a lieu de faire quelques commentaires. Une proposition minimale semblerait être que la norme préliminaire de contrôle que représente le caractère déraisonnable en droit administratif ne devrait pas imposer au gouvernement une norme plus exigeante que ne le ferait l'examen fondé sur la *Charte* . Certes, il importe de maintenir la norme du caractère déraisonnable manifeste pour les questions non touchées par la *Charte* , telles que le contrôle des conclusions de fait (voir *Blanchard c. Control Data Canada Ltée*, [1984] 2 R.C.S. 476 , aux pp. 494 et 495); mais, en matière d'examen des valeurs, les tribunaux devraient recourir à cette norme seulement dans les cas les plus évidents où une décision ne saurait être justifiée en vertu de l'article premier de la *Charte* . Par opposition à l'article premier, le caractère déraisonnable manifeste repose, dans une large mesure, sur des valeurs ambiguës et non établies et n'a pas le même degré de structure et de subtilité d'analyse. À mon avis, si le juge Lamer avait procédé à un examen fondé sur l'article premier, son excellente analyse des valeurs opposées dans le contexte de l'ordonnance positive aurait été également applicable à l'ordonnance négative qu'il a plutôt jugée manifestement déraisonnable.

12 Je conviens avec le juge Lamer que l'ordonnance en l'espèce diffère considérablement de celle en cause dans l'arrêt *Banque Nationale du Canada c. Union internationale des employés de commerce*, [1984] 1 R.C.S. 269 , et que, par conséquent, la conclusion du juge Beetz selon laquelle la lettre en cause dans l'affaire *Banque Nationale* était manifestement déraisonnable ne s'applique pas aux faits de l'espèce. La condamnation dans l'arrêt *Banque Nationale* visait surtout le fait « que l'on contraigne quiconque à professer des opinions peut-être différentes des siennes » (le juge Beetz, à la p. 296), fait qui a été aggravé par une large diffusion de la lettre à tous les employés et au personnel de direction de la banque. Tel n'est pas le

> d'une conclusion déraisonnable, mais la référence à l'erreur elle-même l'est tout autant. En effet, si toutes les erreurs n'aboutissent pas à des déterminations déraisonnables, toute détermination déraisonnable résulte d'une erreur (de droit, de fait, et d'une combinaison des deux, peu importe) qui, elle, est déraisonnable.
>
> En conclusion, une détermination déraisonnable, quelle qu'en soit la source, porte atteinte à la juridiction du tribunal.

84 En l'espèce, je suis d'avis que l'arbitre n'était pas autorisé, aux termes de l'al. 61.5(9)*c*), à ordonner à l'employeur de ne répondre à une demande de renseignements relative à l'intimé que par l'envoi de la lettre de références contenant le texte précité puisqu'une telle ordonnance est manifestement déraisonnable. Quoique l'arbitre avait clairement juridiction pour rendre une ordonnance qu'il jugeait équitable et appropriée, il a perdu cette juridiction en rendant une décision manifestement déraisonnable.

85 L'appelante prétend également que l'al. 61.5(9)*c*) ne permettait pas à l'arbitre de rendre une telle ordonnance puisque cet alinéa n'indique pas clairement que l'arbitre peut utiliser un remède qui diffère des remèdes habituellement disponibles en vertu des règles de droit commun dans des circonstances similaires. Le principe à la base de cet argument est celui selon lequel le législateur n'est pas censé, à défaut de disposition claire au contraire, avoir l'intention de modifier les règles de droit commun pré-existantes. Il n'est pas nécessaire de me prononcer sur la justesse de ce principe puisqu'en l'espèce je suis d'avis que le législateur, en édictant l'al. *c*), a clairement indiqué son intention de conférer à l'arbitre des pouvoirs plus larges que ceux qui lui sont habituellement dévolus, dans des circonstances similaires, par les règles de droit commun.

86 Il reste maintenant à soumettre au contrôle de la *Charte canadienne des droits et libertés* cette partie de l'ordonnance que nous avons jugée non déraisonnable eu égard aux principes de droit administratif. Le fait que cette partie de l'ordonnance relative à l'envoi de la lettre de références ne soit pas déraisonnable au sens du droit administratif ne signifie pas, en effet, qu'elle est nécessairement conciliable avec la *Charte* .

87 Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire *tous* ses pouvoirs de la loi. La Constitution étant la loi suprême du pays et rendant inopérantes les dispositions incompatibles de toute autre règle de droit, il est impossible d'interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte* à moins, bien sûr, que ce pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. Une telle interprétation nous obligerait en effet, à défaut de pouvoir justifier cette disposition législative aux termes de l'article premier, à la déclarer inopérante. Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte* , elle ne doit pa par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante. Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte* . En conséquence, un arbitre exerçant des pouvoirs délégués n'a pas le pouvoir de rendre une ordonnance entraînant une violation de la *Charte* et il excède sa juridiction s'il le fait. Le professeur Hogg a très bien exprimé cette idée lorsqu'il a écrit dans son volume intitulé *Constitutional Law of Canada* (2e éd. 1985), à la p. 671:

> [TRADUCTION] La mention du « Parlement » et d'une « législature » à l'art. 32 montre clairement que la Charte agit comme une limite aux pouvoirs de ces organes législatifs. Tout texte de loi adopté par le Parlement ou une législature, qui est incompatible avec la Charte excédera les pouvoirs (sera *ultra vires*) de l'organisme qui l'a adopté et sera invalide. Il s'ensuit que tout organisme qui exerce un pouvoir statutaire, par exemple le gouverneur en conseil, le lieutenant-gouverneur en conseil, les ministres, les fonctionnaires, les municipalités, les commissions scolaires, les universités, les tribunaux administratifs, les officiers de police, est également lié par la Charte. Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administrati ves ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

88 Il faut donc interpréter l'al. 61.5(9)*c*) comme conférant à l'arbitre le pouvoir de requérir l'employeur de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier sous réserve toutefois que cette ordonnance, si elle restreint un droit ou une liberté protégés, ne les restreigne que dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Ce n'est en effet que si la restriction apportée à un droit ou à une liberté n'est pas contenue dans des limites qui soient raisonnables et justifiables que l'on peut parler de violation de la *Charte* . La *Charte* ne garantit pas d'une façon absolue les droits et les libertés qu'elle énonce. Elle garantit plutôt le droit de ne pas voir ces droits ou ces libertés restreints autrement que par une règle de droit dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Rien ne s'oppose donc à ce que l'on impute au Parlement, lorsque les termes qu'il emploie le laissent croire, l'intention de restreindre un droit ou une liberté énoncés dans la *Charte* ou de permettre qu'un droit ou une liberté protégés soient restreints.

89 Il me semble utile de décrire la démarche qui doit être effectuée afin de déterminer la validité d'une ordonnance prononcée par un tribunal administratif de la façon suivante.

90 Il faut tout d'abord garder en vue l'existence de deux principes importants:

— un tribunal administratif ne peut excéder la compétence qui lui est dévolue par la loi; et

— il faut présumer qu'un texte législatif attribuant une discrétion imprécise ne confère pas le pouvoir de violer la *Charte* à moins que ce pouvoir ne soit expressément conféré ou qu'il le soit par implication nécessaire.

91 L'application de ces deux principes à l'exercice d'une discrétion nous mène alors à l'une ou l'autre des situations suivantes:

1. L'ordonnance contestée a été rendue en vertu d'un texte qui confère expressément ou par implication nécessaire le pouvoir de porter atteinte à un droit protégé.

— Il faut alors soumettre le *texte législatif* au test énoncé à l'article premier en vérifiant s'il constitue une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Le texte législatif en vertu duquel le tribunal administratif a prononcé l'ordonnance contestée confère une discrétion imprécise et ne prévoit, ni expressément, ni par implication nécessaire, le pouvoir de limiter les droits garantis par la *Charte* .

— Il faut alors soumettre *l'ordonnace* prononcée au test énoncé à l'article premier en vérifiant si elle constitue une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique;

— si elle n'est pas ainsi justifiée le tribunal administratif a nécessairement commis un excès de juridiction;

— si au contraire elle est ainsi justifiée alors le tribunal administratif a agi à l'intérieur de sa juridiction.

92 En l'espèce la partie de l'ordonnance relative à la remise d'une lettre de références apporte, à mon avis, une restriction à la liberté d'expression. On ne peut nier, en effet, que la liberté d'expression comporte nécessairement le droit de ne rien dire ou encore le droit de ne pas dire certaines choses. Le silence est en soi une forme d'expression qui peut, dans certaines circonstances, exprimer quelque chose plus clairement que des mots ne pourraient le faire. L'ordonnance enjoignant à l'appelante de remettre à l'intimé une lettre comportant certaines données objectives restreint, selon moi, incontestablement la liberté d'expression de l'appelante.

93 Cette restriction provient toutefois d'une règle de droit et, de ce fait, peut être justifiée aux termes de l'article premier. L'arbitre tire en effet tous ses pouvoirs de la loi et il ne peut faire plus que ce que la loi lui permet. C'est la disposition législative attributrice de discrétion qui restreint le droit ou la liberté puisque c'est elle qui autorise le détenteur de ladite discrétion à rendre une ordonnance ayant pour effet d'apporter des limites aux droits et libertés énoncés dans la *Charte* . L'ordonnance prononcée par l'arbitre n'est que l'exercice de la discrétion qui lui est accordée par la loi.

94 Pour déterminer si cette restriction est contenue dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, il faut donc évaluer si l'utilisation qui fut faite de la discrétion a pour effet de contenir la restriction dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Si la réponse est positive nous devons conclure que l'arbitre avait le pouvoir de rendre une telle ordonnance puisqu'il était autorisé à rendre une ordonnance restreignant un droit ou une liberté énoncés à la *Charte* dans des limites qui soient raisonnables et justifiables. Si la réponse est au contraire négative il faut alors conclure que l'arbitre a excédé sa juridiction puisque le Parlement ne lui a pas délégué le pouvoir de violer la *Charte* . Ayant excédé sa juridiction sa décision est donc nulle et sans effet.

95 Le test qui doit être appliqué dans le cadre de cette évaluation a été énoncé principalement par mon collègue le juge en chef Dickson dans l'affaire *R. c. Oakes*, [1986] 1 R.C.S. 103 . Selon ce test, il faut, dans un premier temps, que l'objectif poursuivi par la mesure contestée soit suffisamment important pour justifier la restriction d'un droit ou d'une liberté garantis par la *Charte* . Dans un second temps, la partie qui demande le maintien de cette restriction doit démontrer que les moyens choisis pour atteindre cet objectif sont raisonnables et justifiables. Pour ce faire, il doit y avoir application d'une espèce de critère de proportionnalité comportant trois éléments distincts: les mesures contestées doivent être équitables et non arbitraires, être soigneusement conçues pour atteindre l'objectif poursuivi et avoir un lien rationnel avec celui-ci. Le moyen choisi doit de plus être de nature à restreindre le moins possible le droit ou la liberté et ses effets doivent finalement être proportionnels avec l'objectif poursuivi.

96 En l'espèce je suis d'avis que l'objectif poursuivi par l'ordonnance rendue est suffisamment important pour justifier une certaine restriction à la liberté d'expression. L'ordonnance vise nettement, comme l'exige le Code et comme je l'ai indiqué plus haut, à contrecarrer les effets du congédiement jugé injuste par l'arbitre ou, à tout le moins, à y remédier. Un tel objectif est à mon avis suffisamment important pour justifier une restriction à un droit un une liberté énoncés dans la *Charte* . Il me semble en effet important que le législateur prévoie certains mécanismes destinés à rétablir l'équilibre dans la relation existant entre un employeur et son employé de façon à éviter que ce dernier puisse être soumis à l'arbitraire du premier. Ces propos ne doivent pas être interprétés comme signifiant qu'à mon avis tous les employeurs tentent nécessairement d'abuser de leur positin. On ne peut nier toutefois que certains employés sont dans une situation particulièrement vulnérable à l'égard de leur employeur et que les forces en présence sont habituellement inégales. Des mécanismes destinés à contrecarrer les effets d'une mesure illégale prise par l'employeur ou à y remédier me semblent donc justifiés dans un tel contexte. Il faut d'ailleurs noter que dans ces circonstances la restriction aux droits ou aux libertés n'est effectivement approtée qu'après que l'acte posé par l'employeur a été jugé illégal par un arbitre et que dans le but de remédier aux effets de cet acte jugé illégal.

97 Une ordonnance enjoignant à l'employeur de remettre à l'intimé une lettre de références contenant des faits objectifs me semble également raisonnable et justifiable dans ces circonstances. Elle possède en effet les trois caractéristiques nécessaires pour que le critère de proportionnalité soit rencontré. Comme je l'ai déjà mentionné, la lettre de références vise à corriger l'impression donnée par le fait du congédiement en indiquant clairement que ce congédiement fut jugé injuste par un arbitre et en indiquant clairement certaines données « objectives » et non contestées relatives à la prestation de travail fournie par l'intimé. Une ordonnance de réintégration n'est pas toujours souhaitable alors qu'une ordonnance de compensation n'est pas toujours suffisante pour remédier aux effets d'un congédiement injuste. Il est possible en effet qu'un congédiement ait des conséquences très négatives, dans certains cas, sur les chances de l'ex-employé de se trouver un nouvel emploi. Une telle ordonnance me semble donc parfois le seul moyen d'atteindre l'objectif poursuivi qui est de contrecarrer ou de remédier aux effets du congédiement. Elle a certainement un lien très rationnel avec celui-ci puisque dans certains cas elle est la seule mesure susceptible de remédier efficacement aux effets du congédiement. Elle se limite de plus à exiger de l'employeur l'expression de faits « objectifs » qui, en l'espèce, ne sont pas contestés et ne requiert aucunement, de sa part, l'expression d'une opinion quelconque puisque la partie de l'ordonnance relative à l'interdiction de répondre à une demande de renseignements concernant l'intimé autrement que par la remise de cette lettre a été jugée déraisonnable et, partant, à l'extérieur de la juridiction conférée à l'arbitre. Il est en effet permis à l'employeur, si l'on écarte cette partie déjà jugée déraisonnable, d'indiquer, par exemple, qu'il lui fut ordonné de rédiger cette lettre et que de ce fait elle ne contient pas

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2014 ONSC 5274
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 11369, 2014 ONSC 5274, 244 A.C.W.S. (3d) 10

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Newbould J.

Heard: July 25, 2014
Judgment: September 11, 2014
Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Graham Smith, for Monitor and Canadian Debtors
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Tracy Wynne, for EMEA Debtors
Kenneth Kraft, for Wilmington Trust, National Association
Richard Swan, Gavin Finlayson, Kevin Zych, for Ad Hoc Group of Bondholders
Shayne Kukulowicz, for US Unsecured Creditors' Committee
John D. Marshall, for Law Debenture Trust Company of New York
Brett Harrison, for Bank of New York Mellon
Andrew Gray, Scott Bomhof, for US Debtors

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.i Relationship between Act and Bankruptcy and Insolvency Act

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Relationship between Act and Bankruptcy and Insolvency Act

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

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s. 11(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

Winding-up Act, R.S.C. 1970, c. W-10
Generally — referred to

CLAIM by bondholders for post-filing interest against an insolvent estate under *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

> (a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> (b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161 (Ont. C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (Ont. C.A.) at para. 25, per Blair J.A. and *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 (Ont. S.C.J. [Commercial List]), Blair J. (as he then was) stated the

following:

> **20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:
>
> > I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 647, per Sir G. M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

> 25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks*, *supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

> 26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Savin, Re* [(1872), 7 Ch. App. 760 (Eng. Ch. Div.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

> 19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit

post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

> **22** This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view....
>
> **23** Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

Can the interest stops rule apply in a CCAA proceeding?

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process,

or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

> I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 77:

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing dealing with the property of insolvent companies. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

> Because the CCAA is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. (para. 23)
>
> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation. (para. 24)
>
> Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If

> creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. (para. 47)
>
> Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes... (para. 54)
>
> The CCAA and BIA are related and no gap exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy. (para. 78)

32 In *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.), a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in *Century Services* in para 23 referred to above. She then stated:

> In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Stelco Inc., Re*, 2007 ONCA 483, 32 B.L.R. (4th) 77 (Ont. C.A.) is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada*.

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

> **96** Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US$1.6 billion out of a total world-wide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a

court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **65** I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> **67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
>
> **68** In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

56 In *AbitibiBowater Inc., Re*, 2009 QCCS 6461 (C.S. Que.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
>
> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

> [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

Claim dismissed.

2015 ONCA 681
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259 A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015
Judgment: October 13, 2015
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193 (Ont. S.C.J. [Commercial List])

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Kenneth T. Rosenberg, Ari N. Kaplan, for Respondent, Canadian Creditors' Committee
Tracy Wynne, for Joint Administrators (EMEA)
Scott A. Bomhof, Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

The group of companies were subject to proceedings under the Companies' Creditors Arrangement Act (CCAA). The appellants were an ad hoc group of bondholders holding crossover bonds, which were unsecured bonds that were issued or guaranteed by the Canadian entities of the companies. The indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations. Other claimants, including

pensioners and former employees, did not have a provision for interest on amounts owing. The holders of the crossover bonds filed claims for principal and pre-filing interest in the amount of US$4.092 billion. They also claimed they were entitled to post-filing interest and related claims under the terms of the crossover bonds of approximately US$1.6 billion.

In the context of a joint allocation trial, the CCAA judge found that the common law "interest stops rule" applied in the context of the CCAA. The CCAA judge found that the holders of the crossover bond claims were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, namely, above and beyond US$4.092 billion. The crossover bondholders appealed.

Held: The appeal was dismissed.

Per Rouleau J.A. (Simmons and Gillese JJ.A. concurring): The pari passu principle provided that the assets of an insolvent debtor were to be distributed amongst classes of creditors rateably and equally as those assets were found at the date of insolvency. The pari passu principle was the foremost principle in insolvency law. The pari passu principle was grounded in the need to treat all creditors fairly and to ensure an orderly distribution of assets. A necessary corollary of the pari passu principle was the interest stops rule. The interest stops rule was a fundamental tenant of insolvency law. Absent the interest stops rule, the fair and orderly distribution sought by the pari passu principle could not be achieved. The main purposes behind the interest stops rule were fairness to creditors and to achieve the orderly administration of an insolvent debtor's estate. The interest stops rule had been consistently applied in bankruptcy and winding-up proceedings.

There were differences between the CCAA and other insolvency schemes. However, the same principles supporting the conclusion that the interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate, applied with equal force to CCAA proceedings. The CCAA was an integrated insolvency regime, which included the Bankruptcy and Insolvency Act (Act). In keeping with the idea of harmonization, as the interest stops rule applied upon bankruptcy under the Act, it should also apply in CCAA proceedings unless the rule was ousted by the CCAA, which it was not. If the interest stops rule did not apply in CCAA proceedings then the creditors who did not have a contractual right to post-filing interest would have skewed incentives against reorganization under the CCAA. Such creditors would have an incentive to proceed under the Act or the Winding-up and Restructuring Act where the interest stops rule applied to prevent creditors who had a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. The CCAA created conditions for preserving the status quo and if post filing interest was available to only one set of creditors then the status quo was not preserved.

If the interest stops rule did not to apply CCAA proceedings then the key objective of the CCAA, to facilitate the restructuring of corporations through flexibility and creativity, might be undermined due to the uneven entitlement to interest that might be created. Creditors who had an entitlement to post-filing interest might be less motivated to compromise. The ability to find a compromise acceptable to all creditors would be more challenging if the amount of a creditor's legal entitlement was constantly shifting as post-interest accrued. The principle of fairness supported the application of the interest stops rule. The interest stops rule was not contrary to established CCAA practice and it did not prevent a CCAA plan from providing for post-filing interest. There were rational reasons for adopting the interest stops rule in the CCAA context.

The interest stops rule did not preclude the payment of post-filing interest under a plan of compromise or arrangement. Nothing in the CCAA judge's reasons prevented the bondholders from seeking and obtaining post-filing interest through a negotiated plan.

Table of Authorities

Cases considered by *Paul Rouleau J.A.*:

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APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014 CarswellOnt

17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies' Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts beyond outstanding principal debt and pre-petition interest.

***Paul Rouleau J.A.*:**

A. Overview

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

> 1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> 2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops

rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. Background

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors[1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application." The issue was "whether the rule should apply to this CCAA proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)."

D. Issues on Appeal

17 The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. Analysis

(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

20 The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in CCAA proceedings?

(i) Origin and scope of the interest stops rule

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J.[2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are

> some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

> That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
>
> . . . . .
>
> Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in CCAA proceedings?

30 The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in

that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

(i) Canada 3000

Background and lower court decisions

52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter- Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A- 2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

Supreme Court's decision

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

> While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), Binnie J. warned, at para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
>
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on

bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) Stelco

Background and motion judge's decision

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter- creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;
>
> [Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against Stelco?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment at para. 35 of

his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

***Janet Simmons J.A.*:**
I agree

***E.E. Gillese J.A.*:**

I agree

Appeal dismissed.

Footnotes

[1] There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

[2] As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.

[3] The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

2016 CarswellOnt 7202
Supreme Court of Canada

Ad Hoc Group of Bondholders v. Nortel Networks Corp.

2016 CarswellOnt 7202, 2016 CarswellOnt 7203, 42 C.B.R. (6th) 3

Ad Hoc Group of Bondholders v. Ernst & Young Inc. in its capacity as Monitor, Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Superintendent of Financial Services as Administrator of the Pension Guarantee Fund, Wilmington Trust, National Association, Law Debenture Trust Company of New York, Bank of New York Mellon, Nortel Networks Inc., Canadian Creditors Committee, Joint Administrators of Nortel Networks UK Limited, Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited

McLachlin C.J.C., Moldaver, Gascon JJ.

Judgment: May 5, 2016
Docket: 36778

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 32 C.B.R. (6th) 21, 340 O.A.C. 234, 127 O.R. (3d) 641, 2015 CarswellOnt 15461, 2015 ONCA 681, 391 D.L.R. (4th) 283, E.E. Gillese J.A., Janet Simmons J.A., Paul Rouleau J.A. (Ont. C.A.); affirming *Nortel Networks Corp., Re* (2014), 2014 CarswellOnt 17193, 2014 ONSC 4777, 121 O.R. (3d) 228, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Applicants were ad hoc group of owners of unsecured crossover bonds either issued or guaranteed by certain Canadian entities of companies — Related indentures provided for continuing accrual of interest until payment, at contractually specified rates, and for other post-filing payment obligations in form of make-whole provisions and trustee fees — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and post-filing interest under terms of crossover bonds — Superior Court of Justice held that "interest stops rule" developed in context of insolvency law applied to CCAA proceedings and that applicants were not legally entitled to amounts claims above and beyond outstanding principle debt and pre-petition interest — Court of Appeal dismissed appeal — Applicants sought leave to appeal — Application dismissed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Applicants were ad hoc group of owners of unsecured crossover bonds either issued or guaranteed by certain Canadian entities of companies — Related indentures provided for continuing accrual of interest until payment, at contractually specified rates, and for other post-filing payment obligations in form of make-whole provisions and trustee fees — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and post-filing interest under terms of crossover bonds — Superior Court of Justice held that "interest stops rule" developed in context of insolvency law applied to CCAA proceedings and that applicants were not legally entitled to amounts claims above and beyond outstanding principle debt and pre-petition interest — Court of Appeal dismissed appeal — Applicants sought leave to appeal — Application dismissed.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

APPLICATION for leave to appeal judgment reported at *Nortel Networks Corp., Re* (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.), dismissing applicant's appeal.

***Per curiam*:**

1 The motions of the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited to be added as respondents and for an extension of time to serve and file the response to the application for leave to appeal are granted. The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C59703, 2015 ONCA 681, dated October 13, 2015, is dismissed with costs.

Application dismissed.

End of Document

L

The Brant County Board of Education and the Attorney General for Ontario *Appellants*

v.

Carol Eaton and Clayton Eaton *Respondents*

and

The Attorney General of Quebec, the Attorney General of British Columbia, the Canadian Foundation for Children, Youth and the Law, the Learning Disabilities Association of Ontario, the Ontario Public School Boards' Association, the Down Syndrome Association of Ontario, the Council of Canadians with Disabilities, the Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living, People First of Canada, the Easter Seal Society, and the Commission des droits de la personne et des droits de la jeunesse *Interveners*

INDEXED AS: EATON *v.* BRANT COUNTY BOARD OF EDUCATION

File No.: 24668.

1996: October 8; 1996: October 9.

Reasons delivered: February 6, 1997.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Equality rights — Physical disability — Child with physical disabilities identified as being an "exceptional pupil" — Child placed in neighbourhood school on trial basis — Child's best interests later determined to be placement in special education class — Whether placement in special education class and process of doing so absent

Le Conseil scolaire du comté de Brant et le procureur général de l'Ontario *Appelants*

c.

Carol Eaton et Clayton Eaton *Intimés*

et

Le procureur général du Québec, le procureur général de la Colombie-Britannique, la Canadian Foundation for Children, Youth and the Law, la Learning Disabilities Association of Ontario, l'Association des conseils scolaires publics de l'Ontario, l'Association Syndrome Down de l'Ontario, le Conseil des Canadiens avec déficiences, la Confédération des organismes de personnes handicapées du Québec, l'Association canadienne pour l'intégration communautaire, Les personnes d'abord du Canada, la Société du timbre de Pâques et la Commission des droits de la personne et des droits de la jeunesse *Intervenants*

RÉPERTORIÉ: EATON *c.* CONSEIL SCOLAIRE DU COMTÉ DE BRANT

N° du greffe: 24668.

1996: 8 octobre; 1996: 9 octobre.

Motifs déposés: 6 février 1997.

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

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

Droit constitutionnel — Charte des droits — Droits à l'égalité — Déficience physique — Enfant atteinte de déficiences physiques et identifiée comme étant une «élève en difficulté» — Enfant placée à l'essai dans une école de son voisinage — Décision prise par la suite qu'il serait dans l'intérêt de l'enfant de la placer dans une classe pour élèves en difficulté — Le placement

Court of Appeal the respondents expressly disavowed any intention of attacking the Act or the Regulations. The Attorney General for Ontario relied on the respondents' position in the courts below and made no submissions on the constitutionality of the Act and had no opportunity to adduce evidence or make submissions to support the Act under s. 1 of the *Charter*. I am satisfied that the Attorney General for Ontario was prejudiced by the absence of notice.

46 In the order of the Chief Justice of this Court dated February 13, 1996, he stated:

> The Court of Appeal *proprio motu* found that s. 8 of the Act was a restriction to s. 15 of the *Charter* and proceeded to salvage the section by reading certain words into it. This initiative as regards s. 15 was not taken as regards s. 7.
>
> As the law as it now stands has been amended through reading in, in order to salvage the restriction to s. 15, it is for this reason and this reason only that I will state the following constitutional questions:
>
> 1. Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

47 The order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them. The fact that constitutional questions are stated does not oblige the Court to deal with them.

48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not

d'appel, les intimés ont expressément nié toute intention de contester la Loi ou le Règlement. Le procureur général de l'Ontario s'est fié à la position adoptée par les intimés devant les juridictions inférieures et n'a donc présenté aucune observation sur la constitutionnalité de la Loi ni n'a eu l'occasion de produire des éléments de preuve ou de présenter des observations à l'appui de la Loi en vertu de l'article premier de la *Charte*. Je suis convaincu que l'absence d'avis a causé un préjudice au procureur général de l'Ontario.

Dans l'ordonnance rendue par le Juge en chef de notre Cour le 13 février 1996, il est déclaré:

> La Cour d'appel, agissant de sa propre initiative, a conclu que l'art. 8 de la Loi apportait une restriction à l'art. 15 de la *Charte* et a entrepris de le sauver en considérant qu'il incluait des mots qui n'y figuraient pas. Cette démarche relative à l'art. 15 n'a pas été faite concernant l'art. 7.
>
> C'est seulement parce que la Loi, dans son état actuel, a été modifiée au moyen d'une interprétation large visant à sauver la restriction apportée à l'art. 15 que je vais formuler les questions constitutionnelles suivantes:
>
> 1. Le paragraphe 8(3) de la *Loi sur l'éducation*, L.R.O. 1990, ch. E.2, et ses modifications, et l'art. 6 du *Règlement 305* de la *Loi sur l'éducation* portent-ils atteinte aux droits à l'égalité que le par. 15(1) de la *Charte canadienne des droits et libertés* garantit à Emily Eaton?
>
> 2. Si la réponse à la première question est affirmative, le par. 8(3) de la *Loi sur l'éducation* et l'art. 6 du *Règlement 305* de la *Loi sur l'éducation* sont-ils justifiés en tant que limite raisonnable au sens de l'article premier de la *Charte*?

L'ordonnance formulant les questions constitutionnelles ne visait pas à déterminer si la décision de la Cour d'appel de les soulever était valide en l'absence d'avis ou si notre Cour les examinerait. Le fait que des questions constitutionnelles soient formulées n'oblige pas la Cour à les examiner.

L'objectif de l'art. 109 est évident. Dans notre démocratie constitutionnelle, ce sont les représentants élus du peuple qui adoptent les lois. Bien que les tribunaux aient reçu le pouvoir de déclarer invalides les lois qui contreviennent à la *Charte* et

saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

qui ne sont pas sauvegardées en vertu de l'article premier, c'est un pouvoir qui ne doit être exercé qu'après que le gouvernement a vraiment eu l'occasion d'en soutenir la validité. Annuler par défaut une disposition législative adoptée par le Parlement ou une législature causerait une injustice grave non seulement aux représentants élus qui l'ont adoptée mais également au peuple. En outre, devant notre Cour, qui a la responsabilité ultime de déterminer si une loi contestée est inconstitutionnelle, il est important que, pour rendre cette décision, nous disposions d'un dossier qui résulte d'un examen en profondeur des questions constitutionnelles soulevées devant les cours ou le tribunal dont les jugements sont portés en appel.

While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

49 Bien que notre Cour n'ait pas encore abordé la question de l'effet juridique de l'absence d'avis, d'autres tribunaux l'ont fait. Les résultats sont contradictoires. Une première tendance favorise l'opinion selon laquelle, en l'absence d'avis, la décision est *ipso facto* invalide, tandis qu'une autre tendance soutient qu'en l'absence d'avis, une décision est annulable sur preuve de l'existence d'un préjudice.

In *D.N. v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383, the Court of Appeal considered a situation in which the trial judge, on his own motion, set aside provisions of the *Family Services Act*, S.N.B. 1980, c. F-2.2, as contrary to the *Charter*. There had been no notice under s. 22 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, as required. The Court of Appeal held, at p. 388, that "the wording of s. 22(3) leaves no doubt that notice is mandatory. For this reason, the trial judge ought not to have decided the case on a *Charter* issue raised on his own initiative without notice to the Attorneys General".

50 Dans l'arrêt *D.N. c. New Brunswick (Minister of Health & Community Services)* (1992), 127 R.N.-B. (2e) 383, la Cour d'appel a examiné un cas où le juge de première instance a, de sa propre initiative, annulé les dispositions de la *Loi sur les services à la famille*, L.N.-B. 1980, ch. F-2.2, parce qu'elles contrevenaient à la *Charte*. L'avis prévu à l'art. 22 de la *Loi sur l'organisation judiciaire*, L.R.N.-B. 1973, ch. J-2, n'avait pas été donné. La Cour d'appel a jugé, à la p. 388, que, [TRADUCTION] «vu le libellé du par. 22(3), il ne fait aucun doute que la signification des avis est obligatoire. Pour ce motif, le juge de première instance n'aurait pas dû invoquer la *Charte* de sa propre initiative pour rendre sa décision, sans d'abord donner un avis aux procureurs généraux».

However, in *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385, a majority of the Ontario Court of Appeal came to a different conclusion, Arbour J.A. dissenting. Grange J.A. considered an argument that, pursuant to *D.N. v. New Brunswick (Minister*

51 Toutefois, dans l'arrêt *Ontario (Workers' Compensation Board) c. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385, la Cour d'appel de l'Ontario, à la majorité, a abouti à une conclusion différente, le juge Arbour ayant inscrit sa dissidence. Le juge Grange a examiné un argument selon lequel,

SUPREME COURT OF CANADA

CITATION: Ernst *v.* Alberta Energy Regulator, 2017 SCC 1

APPEAL HEARD: January 12, 2016
JUDGMENT RENDERED: January 13, 2017
DOCKET: 36167

BETWEEN:

Jessica Ernst
Appellant

and

Alberta Energy Regulator
Respondent

- and -

Attorney General of Quebec, Canadian Civil Liberties Association, British Columbia Civil Liberties Association and David Asper Centre for Constitutional Rights
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 60)	Cromwell J. (Karakatsanis, Wagner and Gascon JJ. concurring)
REASONS CONCURRING IN THE RESULT: (paras. 61 to 130)	Abella J.
JOINT DISSENTING REASONS: (paras. 131 to 192)	McLachlin C.J. and Moldaver and Brown JJ. (Côté J. concurring)

> Canadian *Charter of Rights and Freedoms*. To the extent that s. 43 of the ERCA is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect. (Underlining added; footnotes omitted.)

[95] The Attorney General of Alberta intervened, arguing that because proper notice had not been given under s. 24 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2, he had been precluded from adducing evidence under s. 1. The Court of Appeal summarized his argument as follows:

> The Minister of Justice and Solicitor General of Alberta intervened on the appeal arguing that proper notice had not been given (under s. 24 of the *Judicature Act*, RSA 2000, c. J-2) of the constitutional challenge to s. 43 of the *Energy Resources Conservation Act*. The Minister of Justice took the position that the appellant was attempting to raise a new argument on appeal, and that Alberta had been denied the opportunity to call evidence on the topic.

[96] The Court of Appeal dismissed the appeal.

[97] On appeal to this Court, Ms. Ernst reformulated her claim to add a challenge to the constitutional validity of s. 43.

Analysis

[98] All the provinces have statutes that require notice to be given to the Attorney General of that province in any proceeding where the constitutionality of a statute is in issue. Most provinces require that notice be given to the Attorney General

of Canada as well. In Alberta, this requirement is found in s. 24 of Alberta's *Judicature Act*:

> **24(1)** If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.
>
> **(2)** When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.
>
> **(3)** The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.
>
> **(4)** The Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.

[99] Notice requirements serve a "vital purpose" when constitutional questions arise in litigation. They ensure "that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation" (*Guindon v. Canada*, [2015] 3 S.C.R. 3, at para. 19; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 58-59; *R. v. Aberdeen* (2006), 384 A.R. 395 (C.A.); *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at paras. 160-62; *R. v. Lilgert* (2014), 16 C.R. (7th) 346 (B.C.C.A.), at paras. 7-22).

[100] In Alberta, the Court of Appeal has emphasized that it requires strict adherence to the notice provisions regarding constitutional questions found in the *Judicature Act* (*Aberdeen*; *Broddy v. Alberta (Director of Vital Statistics)* (1982), 142 D.L.R. (3d) 151 (Alta. C.A.), at para. 41; *Seweryn v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2016 ABCA 239, at paras. 3-5 (CanLII); *R. v. Redhead* (2006), 384 A.R. 206 (C.A.), at paras. 46-47). In *Aberdeen*, the Crown appealed a determination made as to the constitutionality of the retrospective application of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, on the ground that proper notice under the *Judicature Act* was not given to the Attorneys General of Alberta and Canada. The Court of Appeal allowed the appeal in language of relevance to our case:

> The requirement of notice is to ensure that governments have a full opportunity to support the constitutional validity of their legislation, or to defend their action or inaction, and to ensure that courts have an adequate evidentiary record in constitutional cases. The notice requirements depend on whether a constitutional remedy is sought and whether the remedy falls under s. 52(1) of the *Constitution Act*, 1982 or ss. 24(1) or 24(2) of the *Charter*.
>
> That raises the question, what is the nature of the constitutional remedy sought here? The respondents submit that the remedy being sought is under s. 24(1) of the *Charter* and therefore the notice is not required. We disagree. The nature of the relief sought is essentially a s. 52(1) remedy. We find the reasoning adopted by the court in *R. v. Murrins (D.)* (2002), 201 N.S.R. (2d) 288 [C.A.], persuasive. In *Murrins*, supra, the court considered the retrospective application of a DNA order in the face of the same s. 11(i) *Charter* argument as is made before us. The court held that if the retrospective application of a DNA order resulted in a *Charter* infringement of Murrins' rights, it would violate the s. 11(i) *Charter* right of every offender who is subject to such an application and who committed the designated offence prior to its enactment. Thus, the issue was not simply whether Murrins' right under

> s. 11(i) *Charter* was infringed, but whether the provision was constitutionally valid.
>
> That logic applies with equal force to the appeals before us. Despite the attempt by defence counsel to characterize the issue as a s. 24(1) *Charter* remedy, it is in effect a s. 52(1) *Charter* remedy that challenges the constitutional validity of the retrospective application of [the *Sex Offender Information Registration Act*, S.C. 2004, c. 10].
>
> The argument that de facto notice was received is not supported by the evidence. The practical effect of the absence of notice was addressed in *Eaton v. Board of Education of Brant County*, [1997] 1 S.C.R. 241, where the court favoured the view that in the absence of notice, the decision is ipso facto invalid. Were we in error on the approach to be taken, the record itself establishes prejudice to the Crown: no one appeared for the federal Crown and hence it had no opportunity to make submissions or to supplement the record. Secondly, there was no opportunity to put forward an evidentiary record in support of a s. 1 *Charter* argument on the part of either Attorney General.
>
> (*Aberdeen*, at paras. 12-15, per Paperny J.A.)

[101] This approach is precisely the route Ms. Ernst took almost a decade after the Alberta Court of Appeal impugned it, arguing that her claim was a s. 24(1) *Charter* remedy and that notice was therefore not required. As in *Aberdeen*, hers is a veiled s. 52 *Charter* claim.

[102] The Alberta Court of Appeal's censure was echoed by this Court in *Guindon*. In *Guindon*, this Court concluded that a new constitutional question ought not be answered at this level unless the state of the record, the fairness to all parties, the importance of having the issue resolved by this Court, the question's suitability for decision, and the broader interests of the administration of justice demand it. *Guindon* emphasized that the "test for whether new issues should be considered is a

stringent one", and the discretion to hear new issues "should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties".

[103] The threshold for the exceptional exercise of this Court's discretion to answer a new constitutional question, articulated most recently in *Guindon* but also in full view in this Court's prior decision in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, is nowhere in sight in this case.

[104] As the prior jurisprudence confirms, the fact that, at the request of a party, the Chief Justice has framed a constitutional question, does not obligate the Court to answer it if it would be inappropriate to do so (*Bell ExpressVu Limited Partnership*, at para. 59; *Eaton*, at para. 47).

[105] The Attorney General of Alberta and the Board both explicitly articulated their concerns objecting to the improper notice and the raising of new constitutional questions on appeal. The Board raised the matter before this Court in its response to Ms. Ernst's motion to state a constitutional question. The Attorney General of Alberta raised the notice issue at the Alberta Court of Appeal, and his materials were attached in the Board's response materials as well.

[106] While those concerns were raised before *Guindon* was released, they were nevertheless based on Alberta's and this Court's analogous jurisprudence. The

COUR SUPRÊME DU CANADA

RÉFÉRENCE : Ernst *c.* Alberta Energy Regulator, 2017 CSC 1

APPEL ENTENDU : 12 janvier 2016
JUGEMENT RENDU : 13 janvier 2017
DOSSIER : 36167

ENTRE :

Jessica Ernst
Appelante

et

Alberta Energy Regulator
Intimé

- et -

Procureure générale du Québec, Association canadienne des libertés civiles, Association des libertés civiles de la Colombie-Britannique et David Asper Centre for Constitutional Rights
Intervenants

TRADUCTION FRANÇAISE OFFICIELLE

CORAM : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown

MOTIFS DE JUGEMENT : (par. 1 à 60)	Le juge Cromwell (avec l'accord des juges Karakatsanis, Wagner et Gascon)
MOTIFS CONCORDANTS QUANT AU RÉSULTAT : (par. 61 à 130)	La juge Abella
MOTIFS CONJOINTS DISSIDENTS : (par. 131 à 192)	La juge en chef McLachlin et les juges Moldaver et Brown (avec l'accord de la juge Côté)

NOTE : Ce document fera l'objet de retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts de la Cour suprême du Canada*.

> *Act*, RSA 2000, c. J-2) n'avait pas été régulièrement donné pour contester la constitutionnalité de l'art. 43 de l'*Energy Resources Conservation Act*. Le ministre de la Justice s'est dit d'avis que l'appelante tentait de présenter un nouvel argument en appel et que l'Alberta s'était vu refuser la possibilité de produire des éléments de preuve à ce sujet.

[96] La Cour d'appel a rejeté l'appel.

[97] Dans le cadre du pourvoi formé devant notre Cour, M^me^ Ernst a reformulé sa demande pour y contester également la constitutionnalité de l'art. 43.

Analyse

[98] On trouve dans toutes les provinces des lois exigeant qu'un avis soit donné au procureur général de la province dans toute instance où la constitutionnalité d'une loi est en cause. La plupart des provinces exigent que cet avis soit également donné au procureur général du Canada. En Alberta, on trouve cette exigence à l'art. 24 de la *Judicature Act* :

> [TRADUCTION]
>
> **24(1)** Le texte de loi du Parlement du Canada ou de la législature de l'Alberta dont la validité constitutionnelle est mise en cause dans une instance judiciaire ne peut être invalidé que si un préavis écrit de quatorze jours a été donné au procureur général du Canada et au ministre de la Justice et solliciteur général de l'Alberta.
>
> **(2)** Lorsque, dans une instance judiciaire, l'applicabilité d'un texte de loi du Parlement du Canada ou de la législature de l'Alberta à une question est soulevée, aucune décision ne peut être prise tant qu'un préavis écrit de quatorze jours n'a pas été donné au procureur général du Canada et au ministre de la Justice et solliciteur général de l'Alberta.

> **(3)** L'avis doit préciser le texte de loi ou la partie du texte en question et fournir des éléments suffisamment détaillés de l'argumentation proposée.
>
> **(4)** Le procureur général du Canada et le ministre de la Justice et solliciteur général de l'Alberta peuvent, de plein droit, se faire entendre, en personne ou par l'entremise d'un avocat, même si Sa Majesté n'est pas partie à l'instance.

[99] L'obligation de donner avis a un « objectif fondamental » lorsque des questions constitutionnelles sont soulevées dans le cadre d'un procès, en l'occurrence « celui de faire en sorte que le tribunal se prononce sur la validité de la disposition à partir d'un dossier de preuve complet et que l'État ait vraiment l'occasion de soutenir la validité de la disposition » (*Guindon c. Canada*, [2015] 3 R.C.S. 3, par. 19; voir aussi *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, par. 58 et 59; *R. c. Aberdeen* (2006), 384 A.R. 395 (C.A.); *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (C.A. Ont.), par. 160 à 162; *R. c. Lilgert* (2014), 16 C.R. (7th) 346 (C.A. C.-B.), par. 7 à 22).

[100] En Alberta, la Cour d'appel a insisté sur la nécessité de respecter rigoureusement les dispositions relatives aux avis en matière de questions constitutionnelles qui figurent dans la *Judicature Act* (*Aberdeen*; *Broddy c. Alberta (Director of Vital Statistics)* (1982), 142 D.L.R. (3d) 151 (C.A. Alb.), par. 41; *Seweryn c. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2016 ABCA 239, par. 3 à 5 (CanLII); *R. c. Redhead* (2006), 384 A.R. 206 (C.A.), par. 46 et 47). Dans l'affaire *Aberdeen*, Sa Majesté avait interjeté appel d'une décision portant sur la constitutionnalité de l'application rétroactive de la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels*, L.C. 2004, c. 10, au motif que l'avis

prévu par la *Judicature Act* n'avait pas été régulièrement donné aux procureurs généraux de l'Alberta et du Canada. La Cour d'appel a accueilli l'appel en tenant des propos qui présentent un intérêt en l'espèce :

> [TRADUCTION]
>
> L'obligation de donner avis vise, d'une part, à garantir que l'État a la possibilité voulue de soutenir la constitutionnalité de ses lois ou de défendre son action ou son inaction et, d'autre part, à veiller à ce que les tribunaux disposent d'un dossier de preuve suffisant lorsqu'ils sont saisis d'une affaire constitutionnelle. Les exigences en matière d'avis s'appliquent si la réparation demandée est d'ordre constitutionnel et si elle relève du par. 52(1) de la *Loi constitutionnelle de 1982* ou des par. 24(1) ou 24(2) de la *Charte*.
>
> D'où la question de savoir quelle est la nature de la réparation constitutionnelle réclamée en l'espèce. Les intimés affirment que la réparation est fondée sur le par. 24(1) de la *Charte* et qu'aucun avis n'est donc requis. Nous ne sommes pas d'accord avec eux sur ce point. Il s'agit essentiellement d'une réparation de la nature de celles qui sont prévues au par. 52(1). Nous estimons que le raisonnement suivi par la cour dans l'arrêt *R. c. Murrins (D.)* (2002), 201 N.S.R. (2d) 288 (C.A.), est convaincant. Dans l'arrêt *Murrins*, précité, la cour s'est penchée sur l'application rétroactive d'une ordonnance de prélèvement génétique dans une affaire où était invoqué le même argument tiré de l'al. 11*i*) de la *Charte* que celui qui nous est soumis en l'espèce. La cour a statué que si l'application rétroactive de l'ordonnance de prélèvement génétique donnait lieu à une violation des droits de M. Murrins, elle violerait le droit garanti par l'al. 11*i*) de la *Charte* à tout contrevenant faisant l'objet d'une telle requête qui aurait commis l'infraction désignée avant son adoption. Il ne s'agissait donc pas simplement de savoir si le droit garanti à M. Murrins par l'al. 11*i*) de la *Charte* avait été violé, mais aussi de savoir si cette disposition était constitutionnelle.
>
> Cette logique s'applique avec autant de vigueur dans les appels dont nous sommes saisis. Malgré les tentatives qu'a faites l'avocat de la défense pour qualifier la question de recours fondé sur le par. 24(1) de la *Charte*, il s'agit en réalité d'une demande de réparation fondée sur le par. 52(1) pour violation de la *Charte* et de contestation de la constitutionnalité de l'application rétroactive de [la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels*, L.C., 2004, c. 10].

> La preuve n'appuie pas l'argument suivant lequel il y a eu un avis *de facto*. La Cour suprême du Canada s'est penchée sur l'effet juridique concret de l'absence d'avis dans *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, où elle était favorable à l'opinion selon laquelle, en l'absence d'avis, la décision est *ipso facto* invalide. Si nous faisons erreur quant à l'approche à adopter, le dossier lui-même démontre le préjudice subi par Sa Majesté : personne n'a comparu au nom de la Couronne fédérale, qui n'a donc pas eu la possibilité de faire valoir son point de vue ou d'étoffer le dossier. En second lieu, aucun des deux procureurs généraux n'a eu l'occasion de soumettre un dossier de preuve à l'appui d'un moyen tiré de l'article premier de la *Charte*.
>
> (*Aberdeen*, par. 12 à 15, la juge Paperny)

[101] C'est précisément la démarche qu'a adoptée M^me^ Ernst presque une décennie après son rejet par la Cour d'appel de l'Alberta, en soutenant que sa demande était fondée sur le par. 24(1) de la *Charte* et qu'elle n'avait donc pas à donner d'avis. Tout comme dans l'affaire *Aberdeen*, sa demande se fonde à mots couverts sur l'art. 52.

[102] Notre Cour a repris à son compte dans *Guindon* la censure de la Cour d'appel de l'Alberta. Dans cet arrêt, notre Cour a en effet conclu qu'elle ne devait pas répondre à une nouvelle question constitutionnelle à cette étape à moins que la teneur du dossier, l'équité envers toutes les parties, l'importance que la question soit résolue par la Cour, le fait que la question se prête à une décision et les intérêts de l'administration de la justice en général ne l'exigent. Dans l'arrêt *Guindon*, notre Cour a souligné que le « critère applicable pour décider de l'opportunité d'examiner une question nouvelle est strict » et que la Cour ne devait exercer le pouvoir discrétionnaire qui lui permettait d'examiner une question nouvelle « qu'à titre

exceptionnel et jamais sans que le plaideur ne démontre que les parties n'en subiront pas un préjudice ».

[103] On ne trouve en l'espèce pas la moindre allusion au seuil qui permettrait à notre Cour d'exercer de façon exceptionnelle son pouvoir discrétionnaire pour répondre à une nouvelle question constitutionnelle. Ce seuil a été formulé tout récemment dans *Guindon*, et ce, en toute connaissance de l'arrêt antérieur *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241.

[104] Tel que le confirme la jurisprudence, le fait que la Juge en chef a formulé une question constitutionnelle à la demande d'une partie n'oblige pas la Cour à y répondre s'il serait inopportun de le faire (*Bell ExpressVu Limited Partnership*, par. 59, *Eaton*, par. 47).

[105] Le procureur général de l'Alberta et l'Office ont tous deux explicitement fait part de leurs préoccupations en s'opposant à l'avis irrégulier et à l'évocation de nouvelles questions constitutionnelles en appel. L'Office a soulevé la question devant notre Cour en réponse à la requête de M^{me} Ernst en formulation d'une question constitutionnelle. Le procureur général de l'Alberta a pour sa part soulevé la question de l'avis en Cour d'appel de l'Alberta et ses documents accompagnaient également ceux déposés par l'Office à l'appui de sa réponse.

[106] Bien que ces préoccupations aient été exprimées avant le prononcé de l'arrêt *Guindon*, elles reposaient néanmoins sur la jurisprudence analogue de

N

Julie Guindon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Chartered Professional Accountants Canada and Canadian Constitution Foundation *Interveners*

Julie Guindon *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureure générale du Québec, Comptables professionnels agréés du Canada et Canadian Constitution Foundation *Intervenants*

Indexed as: Guindon *v.* Canada

2015 SCC 41

File No.: 35519.

2014: December 5; 2015: July 31.

Present: Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Répertorié : Guindon *c.* Canada

2015 CSC 41

N° du greffe : 35519.

2014 : 5 décembre; 2015 : 31 juillet.

Présents : Les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Income tax — Penalty for misrepresentation — Individual assessed for penalties under s. 163.2 of Income Tax Act, which imposes monetary penalties on every person who makes false statement that could be used by another person for purpose of Act — Whether proceeding under s. 163.2 is criminal in nature or leads to imposition of true penal consequences — Whether individual assessed for penalties is person "charged with an offence" within meaning of s. 11 of Canadian Charter of Rights and Freedoms — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2.

Constitutional law — Courts — Procedure — Notice of constitutional question given to attorneys general in this Court but not in courts below — Whether this Court should exercise its discretion to address merits of constitutional issue —Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 19.2.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Impôt sur le revenu — Pénalité pour faux énoncé — Cotisation établie à l'égard d'un particulier suivant l'art. 163.2 de la Loi de l'impôt sur le revenu, lequel rend passible d'une sanction pécuniaire toute personne qui fait un faux énoncé qu'un tiers pourrait utiliser dans le cadre de l'application de la Loi — La procédure qui découle de cet article est-elle de nature criminelle ou entraîne-t-elle de véritables conséquences pénales? — La personne qui se voit infliger une pénalité est-elle « inculpée » au sens de l'art. 11 de la Charte canadienne des droits et libertés? — Loi de l'impôt sur le revenu, L.R.C. 1985, c. 1 (5e suppl.), art. 163.2.

Droit constitutionnel — Tribunaux — Procédure — Avis de question constitutionnelle donné aux procureurs généraux dans l'instance devant la Cour, mais non dans les instances précédentes — Y a-t-il lieu que la Cour exerce le pouvoir discrétionnaire qui lui permet de connaître de la question constitutionnelle sur le fond? — Loi sur la Cour canadienne de l'impôt, L.R.C. 1985, c. T-2, art. 19.2.

could be decided even in the absence of notice. He wrote:

> It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, [the notice requirement] was not complied with and the Attorney General was seriously prejudiced by the absence of notice. [Emphasis added; para. 54.]

[18] Justices Abella and Wagner do not explain how a notice provision like the one in issue here can be mandatory, as they say that it is, and yet also be subject to exceptions that have no basis in the statutory language. In our respectful view, *Eaton* does not support our colleagues' approach.

[19] Before turning to the other points, we should be clear what the issue is and what it is not. The issue is *not* whether this Court (or for that matter the courts below) can proceed to adjudicate a constitutional question without notice ever having been given to the attorneys general. Notice requirements serve a vital purpose in ensuring that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation: see *Eaton*, at para. 48. Notice has now been given in this case. The question is one of whether this Court should address the matter now that notice has been given, not whether this Court or any other can proceed in the absence of notice: see, e.g., *Morine v. Parker (L & J) Equipment Inc.*, 2001 NSCA 53, 193 N.S.R. (2d) 51; *Mohr v. North American Life Assurance Co.*, [1941] 1 D.L.R. 427 (Sask. C.A.); *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.).

[20] The principles that must be applied here are essentially those that govern whether this is a suitable

possibilité de statuer sur la question constitutionnelle malgré l'absence d'avis. Voici ce qu'il écrit :

> Il n'est toutefois pas nécessaire d'exprimer une opinion définitive sur ces questions, car je suis convaincu que, selon l'une ou l'autre tendance de la jurisprudence, la décision de la Cour d'appel n'est pas valide. Aucun avis ou quelque équivalent n'a été donné en l'espèce et, en fait, le procureur général et les tribunaux n'avaient aucune raison de croire que la Loi était contestée. Manifestement, [la disposition exigeant l'avis] n'a pas été respecté[e] et le procureur général a subi un préjudice grave en raison de l'absence d'avis. [Nous soulignons; par. 54.]

[18] Les juges Abella et Wagner ne précisent pas en quoi une disposition prévoyant un avis comme celle considérée en l'espèce peut être obligatoire — ce qu'ils soutiennent — et faire pourtant l'objet d'exceptions qui ne se fondent sur aucun libellé législatif. À notre humble avis, l'arrêt *Eaton* n'étaye pas leur point de vue.

[19] Avant de passer aux autres points, il y a lieu de préciser quelle est au juste la question en litige. Il *ne* s'agit *pas* de savoir si notre Cour (ou même une juridiction inférieure) peut aller de l'avant et trancher une question constitutionnelle sans qu'un avis n'ait jamais été donné aux procureurs généraux. L'obligation de donner avis a un objectif fondamental, celui de faire en sorte que le tribunal se prononce sur la validité de la disposition à partir d'un dossier de preuve complet et que l'État ait vraiment l'occasion de soutenir la validité de la disposition (voir *Eaton*, par. 48). Un avis a été donné dans le cadre du présent pourvoi. La question qui se pose est celle de savoir si notre Cour devrait ou non examiner les questions constitutionnelles maintenant qu'un avis a été donné, non celle de savoir si notre Cour ou une autre juridiction peut les examiner en l'absence d'un avis (voir p. ex. *Morine c. Parker (L & J) Equipment Inc.*, 2001 NSCA 53, 193 N.S.R. (2d) 51; *Mohr c. North American Life Assurance Co.*, [1941] 1 D.L.R. 427 (C.A. Sask.); *Citation Industries Ltd. c. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (C.A.C.-B.)).

[20] Les principes qui doivent dès lors être appliqués sont essentiellement les mêmes que lorsqu'il

case to hear a constitutional issue that is properly before the court for the first time on appeal. The issue is "new" in the sense that the constitutional issue, by virtue of the absence of notice, was not properly raised before either of the courts below. Whether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.

[21] The Court has many times affirmed that it may, in appropriate circumstances, allow parties to raise on appeal an argument, even a new constitutional argument, that was not raised, or was not properly raised in the courts below: see, e.g., *R. v. Brown*, [1993] 2 S.C.R. 918; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The Court has even done so of its own motion, as we shall see.

[22] The test for whether new issues should be considered is a stringent one. As Binnie J. put it in *Sylvan Lake*, "The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice": para. 33. While this Court can hear and decide new issues, this discretion is not exercised routinely or lightly.

[23] New constitutional issues engage additional concerns beyond those that are considered in relation to new issues generally. In the case of a constitutional issue properly raised in this Court for the

s'agit de savoir si une affaire se prête ou non à l'examen d'une question constitutionnelle dont la cour est régulièrement saisie pour la première fois en appel. La question est « nouvelle » du fait que, à défaut d'un avis, elle n'a pas été régulièrement soulevée devant l'une ou l'autre des juridictions inférieures. Examiner puis trancher une question constitutionnelle qui n'a pas été régulièrement soulevée dans le cadre des instances antérieures relève du pouvoir discrétionnaire de la Cour, compte tenu de l'ensemble des circonstances, dont la teneur du dossier, l'équité envers toutes les parties, l'importance que la question soit résolue par la Cour, le fait que l'affaire se prête ou non à une décision et les intérêts de l'administration de la justice en général.

[21] La Cour a maintes fois affirmé qu'elle peut, lorsque les circonstances s'y prêtent, autoriser les parties à soulever dans le cadre d'un pourvoi un argument qui n'a pas été régulièrement soulevé, ni même du tout soulevé, devant les juridictions inférieures, y compris un nouvel argument d'ordre constitutionnel (voir p. ex. *R. c. Brown*, [1993] 2 R.C.S. 918; *Corporation professionnelle des médecins du Québec c. Thibault*, [1988] 1 R.C.S. 1033; *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 CSC 19, [2002] 1 R.C.S. 678). La Cour l'a même fait de sa propre initiative. Nous y reviendrons.

[22] Le critère applicable pour décider de l'opportunité d'examiner une question nouvelle est strict. Comme le précise le juge Binnie dans l'arrêt *Sylvan Lake*, « [i]l est loisible à la Cour, dans le cadre d'un pourvoi, d'examiner une nouvelle question de droit dans les cas où elle peut le faire sans qu'il en résulte de préjudice d'ordre procédural pour la partie adverse et où son refus de le faire risquerait d'entraîner une injustice » (par. 33). La Cour peut certes examiner puis trancher une question nouvelle, mais elle ne doit pas exercer de manière automatique ou inconsidérée le pouvoir discrétionnaire qui le lui permet.

[23] La question nouvelle qui est d'ordre constitutionnel suscite des interrogations supplémentaires. Lorsqu'une question constitutionnelle est régulièrement soulevée pour la première fois devant notre

first time, the special role of the attorneys general in constitutional litigation — reflected in the notice provisions — and the unique role of this Court as the final court of appeal for Canada must also be carefully considered. The Court must be sure that no attorney general has been denied the opportunity to address the constitutional question and that it is appropriate for decision by this Court. The burden is on the appellant to persuade the Court that, in light of all of the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

[24] There are many examples of the Court's practice reflecting this approach both before and after *Eaton*.

[25] The Court has adjudicated a constitutional issue despite notice not having been served at the court of first instance. For example, in *Bank of Montreal v. Hall* (1985), 46 Sask. R. 182, the Saskatchewan Court of Queen's Bench found that

> the question as to the constitutional validity of s. 178(3) of the [*Banks and Banking Law Revision Act, 1980*, S.C. 1980-81-82-83, c. 40], and the question as to whether the relevant provisions of [*The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16] are *ultra vires* insofar as they might purport to affect chartered banks, are not questions which have been properly brought into issue in this case. [para. 12]

On appeal to this Court, despite the lack of notice of this constitutional question before the Court of Queen's Bench, this Court stated constitutional questions and decided the constitutionality of s. 178(3) of the *Banks and Banking Law Revision Act, 1980* and the related provisions of *The Limitation of Civil Rights Act*: [1990] 1 S.C.R. 121, at pp.152-53.

Cour, il convient en outre de se pencher attentivement sur le rôle particulier dévolu aux procureurs généraux dans le cadre d'un litige constitutionnel — d'où les dispositions en matière d'avis —, ainsi que sur la fonction unique qu'exerce la Cour à titre de cour d'appel de dernier ressort au Canada. La Cour doit être assurée qu'aucun procureur général ne s'est vu privé de la possibilité de s'exprimer sur la question constitutionnelle et que celle-ci se prête à un arrêt de sa part. Il incombe à l'appelant de la convaincre de l'opportunité, au vu de toutes les circonstances, d'examiner puis de trancher la question. L'absence de préjudice n'est pas présumée. La Cour ne doit exercer le pouvoir discrétionnaire qui lui permet d'examiner puis de trancher une question nouvelle qu'à titre exceptionnel et jamais sans que le plaideur ne démontre que les parties n'en subiront pas un préjudice.

[24] De nombreuses décisions de la Cour, tant antérieures que postérieures à l'arrêt *Eaton*, illustrent cette approche.

[25] La Cour a déjà statué sur une question constitutionnelle malgré la non-signification d'un avis en première instance. Par exemple, dans *Bank of Montreal c. Hall* (1985), 46 Sask. R. 182, la Cour du Banc de la Reine de la Saskatchewan avait conclu que

> [TRADUCTION] la question de la validité constitutionnelle du par. 178(3) de la [*Loi de 1980 remaniant la législation bancaire*, L.C. 1980-81-82-83, c. 40] et celle de savoir si les dispositions pertinentes de la loi [*The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16] sont *ultra vires* dans la mesure où elles pourraient viser les banques à charte, n'ont pas été régulièrement soulevées dans la présente affaire. [par. 12]

En appel, notre Cour a formulé des questions constitutionnelles et statué sur la constitutionnalité du par. 178(3) de la *Loi de 1980 remaniant la législation bancaire* et des dispositions connexes contenues dans *The Limitation of Civil Rights Act* même si aucun avis de question constitutionnelle n'avait été signifié en Cour du Banc de la Reine ([1990] 1 R.C.S. 121, p. 152-153).

O

REPORT OF THE COMMITTEE Thursday, November 25, 2010

The Standing Senate Committee on Banking Trade and Commerce

has the honour to present its

SIXTH REPORT

Your Committee, to which was referred Bill S-216, An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans has, in obedience to the Order of Reference of June 17, 2010, examined the said bill and now reports as follows:

Your Committee recommends that this Bill not be proceeded with further in the Senate for the reasons that follow.

Your Committee notes that Bill S-216 attempts to retroactively enhance the priority of claims for unfunded long-term disability liabilities in proceedings commenced pursuant to the Bankruptcy and Insolvency Act before the coming into force of the amendments contained in the bill, which may generate claims that conflict with court-approved settlement agreements already in force, resulting in litigation that would be detrimental to the interests of long-term disability claimants including the former employees of Nortel.

Your Committee believes that Bill S-216 would cause companies to prefer liquidation to restructuring, because it would confer preferred status on claims for unfunded long-term disability liabilities in liquidation proceedings, while conferring super-priority status on similar claims in restructuring proceedings under the Bankruptcy and Insolvency Act; and

Your Committee notes that Bill S-216 would reduce the amount that some creditors would otherwise hope to recover in bankruptcy proceedings, increasing risk for investors and financing costs for bond-issuing companies, which your Committee believes would be detrimental to the currently fragile growth of the Canadian economy.

This report was adopted in committee on the following vote:

YEAS – The Honourable Senators: Ataullajhan, Dickson, Greene, Kochhar, Mockler and Plett (6).

NAYS – The Honourable Senators: Eggleton, Harb, Hervieux-Payette, Moore and Ringuette (5).

Respectfully submitted,

CÉLINE HERVIEUX-PAYETTE, P.C.
Deputy Chair

Industry Canada Industrie Canada

Fresh Start: A Review of Canada's Insolvency Laws

Canada

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Fresh Start: A Review of Canada's Insolvency Laws

Contents

Letter from Minister James Moore

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* require that the Minister of Industry report to Parliament on the provisions and operation of both Acts in 2014. I am pleased to table this report in fulfillment of that responsibility.

The Government of Canada launched a public consultation in May 2014, with the release of a Discussion Paper seeking input on key aspects of Canada's insolvency regime and its administration. The public consultations built on previous research and analysis of economic and insolvency trends by departmental officials, as well as contributions from stakeholders. The results of the review activities are captured in this report.

Insolvency laws are important marketplace framework legislation that have an impact on Canada's competitiveness. An efficient, well-functioning insolvency regime is vital to Canada's continued economic prosperity. Stakeholders told us that Canada's insolvency laws have responded well to the needs of Canadian consumers and businesses, particularly during the recent recession. At the same time, Canada's insolvency laws must evolve to meet the needs of the economy and changes in the global marketplace. Our government is committed to ensuring that Canadian insolvency legislation maintains its status among the most modern regimes in the world.

In tabling this report, I would like to thank the many Canadians who participated in the review. The extensive public feedback in response to the Discussion Paper, including input from insolvency experts, academics, and other stakeholder groups, will inform our work as the review continues in the coming parliamentary session.

The Honourable James Moore
Minister of Industry

Introduction

In 2008, the world experienced one of the deepest economic downturns since the Great Depression. Canada was not spared as we experienced a recession that was felt across Canada, a record number of personal insolvencies and the failure or restructuring of numerous businesses.

Canada's post-2008 performance led G7 countries with the highest level of job creation and one of the best growth rates coming out of the recession. Canada experienced a positive macroeconomic environment, including a low federal government debt-to-gross domestic product ratio, the lowest overall tax rate on new business investment among G7 countries, a sound approach to regulation of financial institutions and a stable, low inflation environment. These factors were reinforced by the Economic Action Plan, which responded to the global crisis by reducing taxes, investing in infrastructure, enhancing skills training, supporting sectoral and regional adjustment and facilitating business lending. Despite lingering turmoil in certain countries, Canada is projected to continue its stable growth as domestic firms reinvest to enhance their competitiveness.

Even in a growing economy, Canadians will face challenges: one of the highest consumer debt-to-income ratios in the G20 and changing demographic trends that are increasingly imposing financial burdens on the "sandwich" generation will test consumers' resilience; and globalization will present new business opportunities but also greater challenges from international competitors.

In this context, Canada's insolvency environment continues to evolve: relationship lending, which was once predominant, is declining; new players, including private equity and distressed debt traders, are presenting unique challenges to corporate restructuring efforts; financial market innovations, such as credit and other derivatives, are shifting parties' interests and incentives; and the growth in cross-border insolvency proceedings is increasing the complexity of cases and bringing new competing interests for scarce resources.

What remains constant is that there will be individuals and businesses who, for various reasons, find themselves overwhelmed by debt. For them, and for the benefit of the economy, an effective insolvency regime is necessary to ensure an

efficient process to settle debts and, where appropriate, provide individuals with a fresh start and businesses with an opportunity for financial rehabilitation.

Canada's insolvency laws are well-regarded internationally and are frequently cited as a model in international insolvency panels, such as the United Nations Commission on International Trade Law (UNCITRAL). While these laws proved robust during the 2008 downturn, it is critical to ensure that they remain responsive to new challenges in the constantly evolving domestic and global economic landscapes. To that end, the *Bankruptcy and Insolvency Act*[1] (BIA) and the *Companies' Creditors Arrangement Act*[2] (CCAA) include a statutory provision that requires their periodic review. This report is a step in the review process.

Canada's Insolvency Framework

Canada's insolvency regime is composed primarily of two Acts, the BIA and the CCAA. The BIA provides the legislative framework to address personal and corporate insolvency. In a bankruptcy, a trustee liquidates the bankrupt's assets and distributes the proceeds in a fair and orderly way among the creditors. Alternatively, the BIA provides procedures for insolvent consumers and businesses to avoid bankruptcy by negotiating an agreement with their creditors to reorganize their financial affairs. This is referred to as a "proposal". The CCAA provides the legislative framework for insolvent companies with more than $5 million in debt to reorganize under court supervision. It enables the insolvent company to seek a court order staying its creditors from taking action against it while it negotiates an arrangement to reorganize its financial affairs. A monitor is appointed by the Court to watch over the restructuring and provide information to the Court and creditors. While corporate restructurings can occur under either Act, the CCAA's court-driven process provides greater flexibility for judges to deal with the specific issues in the cases before them.

> "Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs." [3]

The Superintendent of Bankruptcy (the Superintendent) is part of the administrative framework, overseeing the functioning of the insolvency regime and

ensuring its integrity. The Superintendent has statutory responsibility to supervise the administration of all estates and matters under the BIA, and regulates the trustees who administer consumer and commercial bankruptcies and proposals. The Superintendent also has certain functions under the CCAA, including maintaining a public record of CCAA proceedings and investigating complaints regarding the conduct of monitors. In fulfilling his mandate, the Superintendent sets standards and provides guidance to stakeholders regarding expected conduct through directives, notices, position papers and compliance programs.

I. History

The BIA has its roots in the *Bankruptcy Act* of 1919, which was substantially reformed in 1949. The BIA was further amended in 1992, 1997 and 2008-2009. The CCAA came into force in 1933 but only became a commonly used restructuring statute in the 1980's. It was amended in 1997 and 2009.

The 1992 reforms focussed on maximizing creditor value through reorganization and rehabilitation, improving the equitable distribution to suppliers and employees and improving the administration of the BIA. The 1997 reforms encouraged consumer debtor responsibility, and improved the reorganization provisions and the administration of the Acts, including the introduction of specialized provisions related to securities firms and international insolvencies.

The most recent legislative reforms, which came into force in 2009, had four main objectives: to encourage the restructuring of viable, but financially troubled, companies; to better protect workers' claims for unpaid wages and vacation pay; to make the bankruptcy system fairer and reduce abuse; and, to improve the administration of the system. Best practices that developed under the CCAA were codified in order to enhance certainty in restructuring proceedings. Unpaid wages of up to $2,000 per employee and unremitted pension contribution claims were prioritized ahead of secured creditors and collective agreements were protected. Debtors who had high income-tax debt were denied an automatic discharge from bankruptcy and those with surplus income were required to pay more into their estate and remain in bankruptcy for a longer period of time.

II. Economic Implications

Insolvency legislation is a key component of Canada's marketplace framework legislation that governs commercial relationships for both consumers and businesses. Certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of credit in the Canadian marketplace.[5] This can help attract higher levels of domestic and foreign investment while the fresh start provided by bankruptcy offers a safety net that promotes entrepreneurship.[6] Efficient bankruptcy and insolvency processes help to ensure that debtors' assets can be returned to productive use quickly, improving Canada's overall economic performance.[7] Equitable treatment of stakeholders and transparent processes also help to protect the integrity of the insolvency regime.

"Capital and credit, in their myriad of forms, are the lifeblood of modern commerce." [4]

Although broad economic considerations are important, it is essential to not lose sight of the individuals and businesses affected by these events and who must be dealt with equitably.

III. Objectives of Insolvency Policy

In a dynamic, market-based economy, insolvency is a fact of life. From time to time, individuals and businesses will encounter financial difficulty, as a result of choices made, economic downturns or personal misfortune beyond their control.

"Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the 'haircuts' or even outright losses that bankruptcies trigger." [8]

Countries have traditionally taken different approaches to the social and legal consequences of excessive debt. Canada adopted a "fresh start" policy for consumers, which relieves honest but unfortunate debtors of excessive debts. In recent years, there has been movement internationally towards the fresh start approach, which reduces costs for creditors and the negative social consequences for individuals faced with unmanageable debts.

Within the commercial insolvency sphere, Canada has encouraged the financial rehabilitation of viable, but financially distressed, businesses as that typically increases recoveries for creditors, maintains supplier relationships and protects jobs. Other countries are moving in a similar direction.

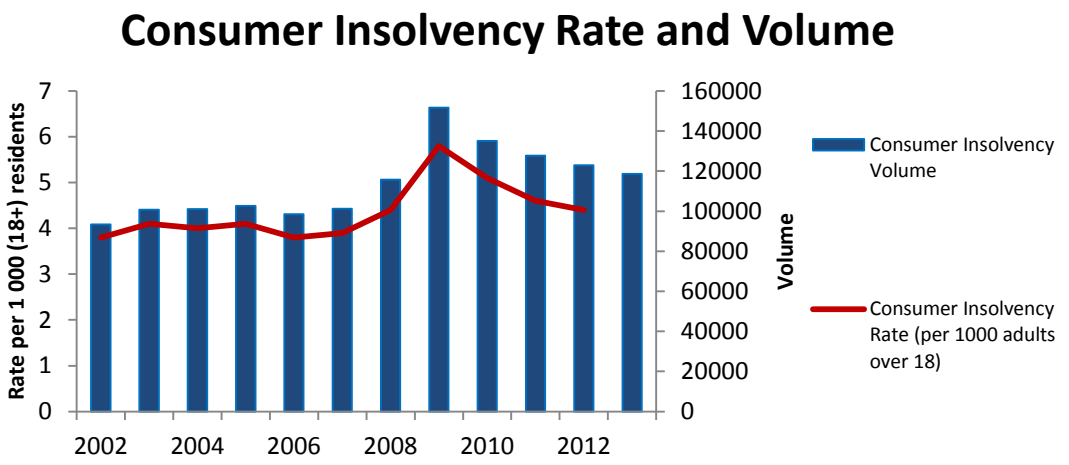
The objectives underlying the BIA and CCAA include minimizing the impact of a debtor's insolvency on all stakeholders by pursuing an equitable distribution of the debtor's assets and, where possible, by rehabilitation of the debtor. This is achieved by legislation that:

- provides certainty to promote economic stability and growth;
- maximizes the value of assets;
- strikes a balance between liquidation and reorganization;
- ensures equitable treatment of similarly situated creditors;
- provides for timely, efficient and impartial resolution of insolvency;
- preserves the insolvency estate to allow equitable distribution to creditors;
- ensures transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and
- recognizes existing creditor rights and establishes clear rules for ranking of priority claims. [9]

Insolvency Trends

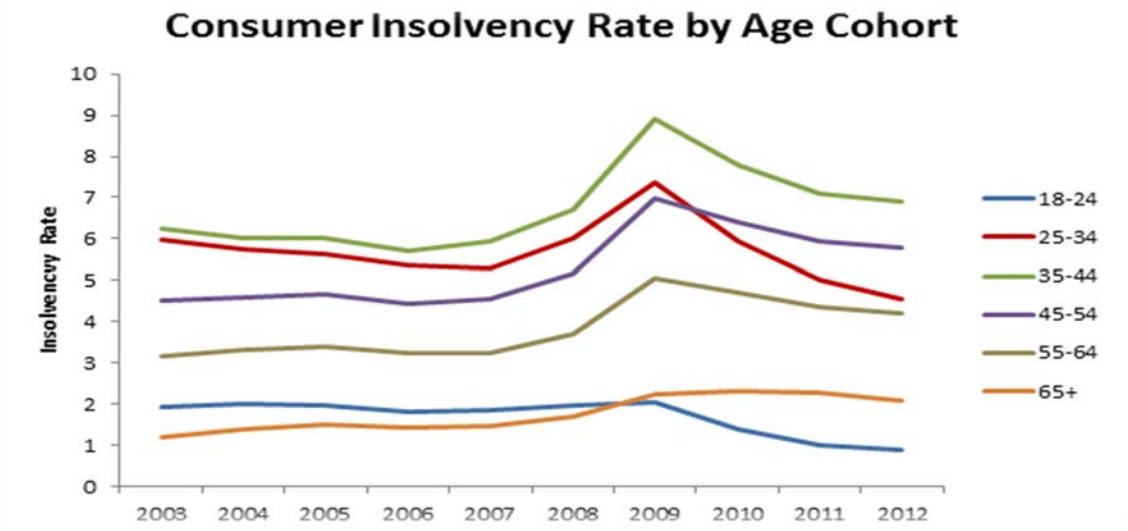
I. Consumer

The Canadian consumer insolvency rate (the number of consumer insolvencies per 1,000 residents aged 18 years or older) has trended higher over the past few decades. This may be due to greater comfort with, and easier access to, consumer credit and reduced stigma related to bankruptcy. While the period of 2002-2007 saw a relatively stable consumer insolvency rate, the 2008 downturn pushed it to a new peak in 2009. Since that time, the rate has trended back towards pre-recession levels.



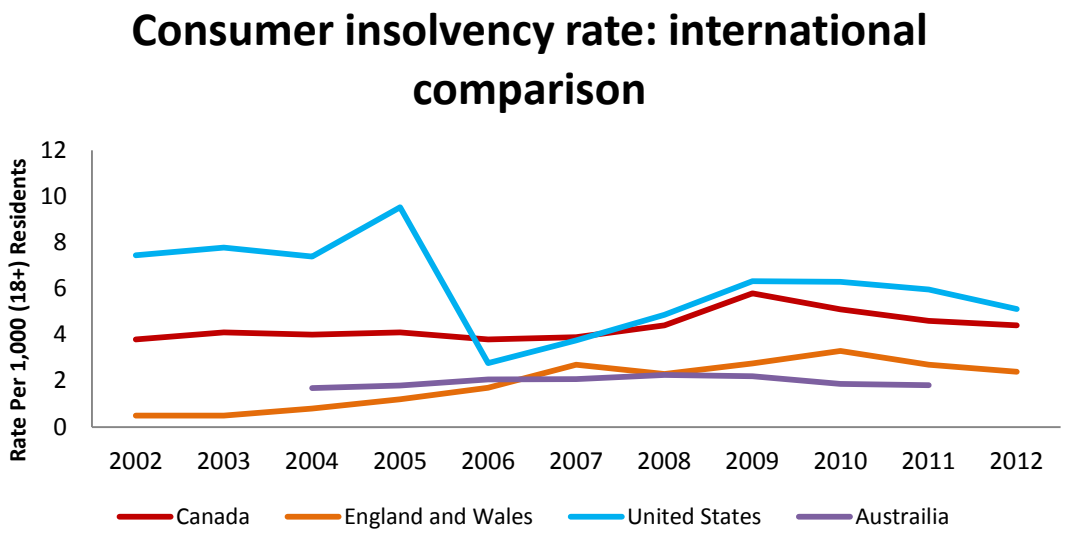
Source: Office of Superintendent of Bankruptcy

The rate of insolvencies is not evenly distributed among Canadians when viewed by age. Those aged 35-54 are at the highest risk of insolvency. Since 2008 two potentially significant trends have appeared. The consumer insolvency rates for Canadians older than 35 are higher than prior to the recession and insolvency rates for Canadians younger than 35 are lower. This could be indicative of delayed transition to financial autonomy by offspring placing greater financial burdens on parents. It is too early to determine whether the trend is an anomaly or indicative of a longer-term change.



Source: Office of Superintendent of Bankruptcy

Internationally, it can be difficult to compare consumer insolvency rates because countries have taken different approaches to the social and legal consequences of excessive debt. Different levels of social stigma related to insolvency may also impact consumer insolvency rates. That being said, Canada's consumer insolvency rate appears high compared to some other developed countries.

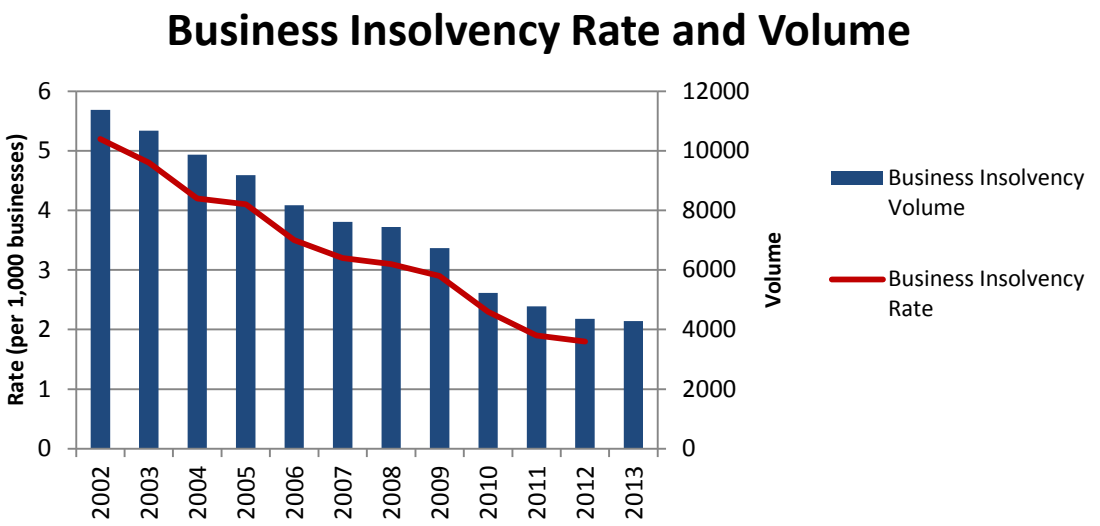


Sources: Statistics Canada, OECD, American Bankruptcy Institute, United Kingdom Office of National Statistics, Australian Bureau of Statistics, with Industry Canada calculations.

This could be a sign that Canada's insolvency regime is readily accessible, providing Canadians overwhelmed by debt with the fresh start they need. Alternatively, it could be a sign that Canadians are not managing their use of credit appropriately. Furthermore, because Canadians have the highest debt-to-income ratio among G7 countries, consumers are more susceptible to economic shocks, such as job loss or other negative life events.

II. Business

In contrast to the consumer insolvency trends, the business insolvency rate (the number of business insolvencies per 1,000 businesses operating in Canada) has fallen nearly 70 percent since 2002.

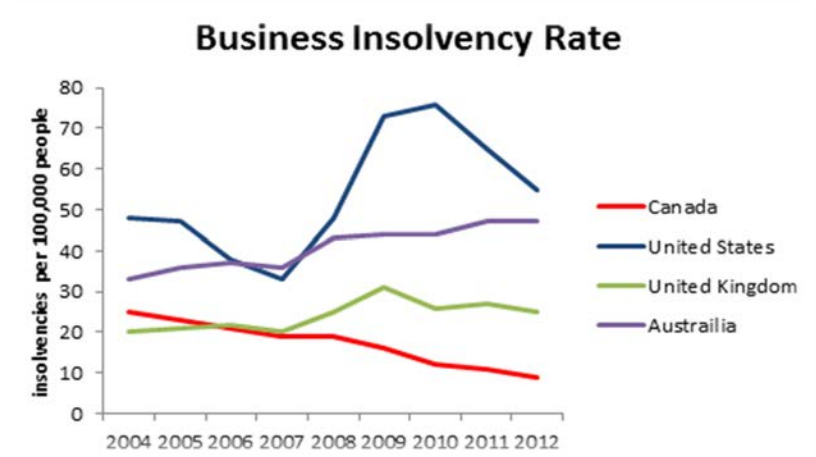


Source: Office of Superintendent of Bankruptcy

It is unclear why the business insolvency rate continues to trend downwards. It may be related to the relatively low cost of credit during the past decade, although other countries experienced low credit cost yet saw their business insolvency rates climb. It could also be attributed to closer monitoring by lenders, resulting in remedial actions before businesses reach the tipping point into insolvency. Finally, the cost of formal insolvency proceedings may have encouraged more private workouts or business closures.

Of note, unlike other periods of economic downturn, the 2008 recession did not result in an increase in the business insolvency volume. This is consistent with anecdotal evidence that suggests lenders were hesitant to trigger defaults post-2008 as there was a very limited market for distressed assets.

Internationally, Canada has a lower per capita business insolvency rate (the number of business insolvencies per 100,000 individuals) than comparable countries. The 2008 downturn resulted in spikes in business insolvencies in both the United States and United Kingdom whereas Canada maintained its downward trend. Australia's business insolvency rate continued to climb throughout the period.



Sources: Trading Economics; OECD; Industry Canada calculations.

Review Process

The 2009 reforms to both the BIA and CCAA require the Minister of Industry to lay before Parliament a report on the provisions and operation of the Acts.[10] Industry Canada has monitored the Canadian insolvency marketplace to identify emerging trends and issues. In early 2013, a systematic environmental scan was initiated in order to gain a comprehensive understanding of how Canada's insolvency laws are functioning. The review included an examination of academic research and expert commentary, of insolvency proceedings and judicial decisions, and of domestic and international economic and insolvency trends. It was complemented by a broad outreach effort to an array of key stakeholders, including insolvency practitioners and academics, industry associations and employee and retiree groups, among others.

In May 2014, Industry Canada launched an on-line public consultation based on a wide-ranging discussion paper (the Discussion Paper) in order to obtain the views of Canadians. More than 70 individuals and organizations made submissions on a variety of issues. Interested stakeholders were also given the opportunity to meet with Industry Canada officials to share their views in person or by teleconference. Annex A provides a list of written submissions received by the Department. The Discussion Paper and submissions may be found at:

http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html

This report fulfills the Minister of Industry's statutory obligation. Pursuant to the BIA and CCAA, this report is to be referred to a Parliamentary committee designated to review it and report back to Parliament within one year or such further time authorized by Parliament.

What Canadians Said

Overall, most stakeholders are generally satisfied that the BIA and CCAA achieve their objectives in an efficient manner. That being said, Industry Canada received submissions regarding a large number of issues that could be addressed to improve the functionality of Canada's insolvency regime. Below are descriptions of several key issues that generated significant stakeholder commentary. The list is not intended to be exhaustive nor is it intended to exclude other issues. Industry Canada intends to continue to examine all matters raised in the public consultations.

I. Consumer Issues

Registered Disability Savings Plans – When an individual becomes bankrupt, the trustee gathers together the bankrupt's assets for distribution to the bankrupt's creditors. The BIA, however, provides that the bankrupt is entitled to keep certain property that is exempt under provincial law and the BIA (e.g. personal belongings, work tools, pension entitlements and funds held in registered retirement savings plans).

Stakeholders expressed a strong preference to see an exemption added to the BIA for registered disability savings plans, which are intended to provide for the financial needs of severely disabled individuals when those who care for them are no longer able to provide support.

Licence Denial Regimes – Provinces are responsible for issuing licences or permitting Canadians to engage in certain activities, such as driving. Some provinces have linked the ability to obtain or renew a licence to the payment of debts owed to the province or other specified entities. While this is within the province's authority in normal circumstances, it creates a conflict with the bankruptcy regime if the provincial legislation permits a creditor to demand

payment outside the insolvency process, instead of inside the process like all the other unsecured creditors.

There was stakeholder consensus that licence denial regimes – to the extent they purport to apply to debts released in bankruptcy – violate the fresh start principle and could have a significant, negative impact on the bankrupt and other creditors. As a result, stakeholders suggested that such regimes should not apply to debts released in bankruptcy.

Family Law and Equalization – Family law and insolvency proceedings often intersect. In recognition of the social importance of family-related obligations, the BIA provides that spousal and child support orders are not releasable in bankruptcy. In a recent case before the Supreme Court of Canada, [11] a spousal claim for an equalization payment against property that was exempt from seizure under provincial law as against other creditors – but not as against a claim for equalization – was defeated. The Court suggested that as a matter of fairness insolvency law should ensure that such claims are protected in the future.

Stakeholders agreed with the Court's assessment that the BIA should expressly protect equalization claims against exempt property held by the bankrupt.

Reaffirmation Agreements – Through bankruptcy proceedings, an individual can have most of his or her debts released. In some cases, however, the bankrupt may wish to "reaffirm" (i.e. reinstate) a debt obligation for specific reasons. For example, anecdotal evidence suggests that car loans are often reaffirmed in order to permit the bankrupt to continue to use a vehicle that is required for work, especially in rural areas. Currently, a bankrupt may reaffirm a debt either through a written contract or by conduct (e.g. by making a payment on the debt following discharge from bankruptcy).

Stakeholders expressed concern that reaffirmation defeats the fresh start principle. There was also concern that bankrupts might not realize the consequences of reaffirmation by conduct. As a result, the majority of stakeholders were supportive of limitations in the BIA on reaffirmation by conduct.

There was no consensus regarding other consumer issues that were identified in the Discussion Paper, including responsible lending, consumer deposits, implementation of a federal exemption list and discharge of student loans.

II. Commercial Issues

Intellectual Property – The knowledge-based economy continues to expand in importance in addition to the manufacturing-based, bricks-and-mortar economy. Stakeholders told us that it is crucial that Canada's insolvency laws respond as effectively to financial distress involving intangible and intellectual property as they do to "hard" assets, such as real estate, equipment and inventory.

On this topic there was substantial consensus that Canada's insolvency laws require significant modernization. It was recognized that amendments implemented in 2009 were a positive first step but that they were not broad enough to address all of the shortfalls. There remain aspects related to intellectual property for which there were calls for change, including modernizing the language related to the existing provisions on copyright and patents and ensuring that all types of intellectual property are recognized and properly treated.

Priorities – Bankruptcy is often described as a "zero-sum game" because there are finite and insufficient assets available to satisfy the bankrupt's debts and liabilities. Changing the ranking according to which creditors are entitled to be paid would impact all creditors. This could, in turn, affect the cost and availability of credit for Canadians. As noted by the Standing Senate Committee on Banking, Trade and Commerce, "…the availability of credit at reasonable cost has implications for the levels of domestic and foreign investment, entrepreneurship and innovations, and personal investment and consumption."[12]

In response to the Discussion Paper, there were calls from employee groups, pensioners, fresh produce sellers, small businesses and tax authorities seeking priority payment on the basis that they experience different vulnerabilities and, therefore, are in need of special protection. It was conveyed that there is a need to consider the unique risks and challenges in different sectors of the economy. On the other hand, lenders and insolvency practitioners suggested caution in considering these types of requests due to the potential impacts on credit cost and availability, particularly for financing of inventory that is related to farming. Some stakeholders recommended that options outside of insolvency should be considered in order to offer more secure protection for socially important claims and to protect the integrity of insolvency proceedings.

Streamlined Proceedings – Insolvency proceedings, particularly corporate restructurings, can be complex, requiring significant time, effort and expertise. As a result, one of the key issues for insolvency law is to put in place efficient processes that permit a quick resolution, while ensuring fairness through necessary checks and balances.

In the CCAA context, most stakeholders supported streamlining measures, such as reducing the need for court approval of interim actions. Better disclosure of professional fees was also raised although there was no consensus on concrete actions that should be taken.

Stakeholders also suggested that the cost of restructuring under existing mechanisms is often too high for small and medium-sized businesses. This would suggest a more streamlined proceeding may be warranted, especially given the importance of small business entrepreneurs in driving the economy.

Cross-border Insolvencies – Globalization continues to transform the world's economy and create new markets and opportunities for Canadian workers and businesses. At the same time, as business becomes more international, the number of cross-border insolvencies has also increased.

Some stakeholders suggested that reforms may be necessary to ensure Canada's insolvency laws keep pace with globalization trends. They pointed to work being undertaken by UNCITRAL's insolvency working group, in which Canada is an active participant. Others, however, cautioned that any potential reforms should take into account the conditions necessary to promote investment in Canada and to protect the legitimate interests of Canadian firms in global markets.

Financial Contracts – Innovation in the financial markets has resulted in continual evolution of products that assist business and investors in managing risks, including credit risk. It is in the intersection of these financial instruments and insolvency law that stakeholders are seeing emerging issues that may require policy responses to ensure that the balance in insolvency proceedings is maintained.

Most stakeholders indicated support for measured disclosure requirements, which would provide greater transparency for other creditors and the courts. There was no consensus regarding possible changes to rebalance the competing interests between those who use these financial products and other insolvency stakeholders.

III. Administrative Issues

Accessibility – The insolvency regime provides Canadians with unmanageable debts a potential for a fresh start. The administration of files is carried out by private sector trustees. This means that the cost of accessing the insolvency system is based, to a certain extent, on market forces. Existing measures, such as the Bankruptcy Assistance Program and agreements to pay trustee fees post-discharge under the BIA, are intended to ensure access to bankruptcy.

Some stakeholders have suggested that there may still be accessibility issues as the cost of a simple bankruptcy, estimated to be as high as $1,500, may be too high for low and no-income individuals. They suggested that new options could be developed to ensure better access to the insolvency regime.

Legislative Structures – Currently, Canada's insolvency regime is implemented by a number of different laws under the mandate of different Ministers: the BIA, CCAA and the *Canada Business Corporations Act* fall under the responsibility of the Minister of Industry; the *Winding-up and Restructuring Act*, which can be used by certain corporations and financial institutions, falls under the shared responsibility of the Ministers of Industry and Finance; the *Canada Transportation Act*, under the Minister of Transport, can be used to resolve the insolvency of certain railway companies; and, the *Farm Debt Mediation Act*, under the Minister of Agriculture and Agri-Food, is available to insolvent Canadian farmers.

While there was little consensus as to concrete action, many stakeholders expressed support for rationalization of the current legislative structure.

Modernization – The BIA was last comprehensively reformed in 1949, with significant amendments being made on several occasions since 1992. Some stakeholders suggested that a comprehensive review of the BIA may be warranted in order to remove outdated concepts and provisions. Other stakeholders suggested that the role and powers of the Superintendent could be enhanced.

Stakeholders also raised a number of issues that are tangential to insolvency law policy, including taxation issues, the operation of the Wage Earner Protection Program, and regulation of pensions. These matters could impact on the

effectiveness and efficiency of the insolvency regime and could be considered in the context of the review.

Conclusion

The 2008 economic downturn led many developed economies into a deep recession. Canada's experience was better than most as a result of positive actions taken to address the downturn yet, still, a significant number of Canadians suffered personal insolvency and major firms failed. The BIA and CCAA were up to the challenge and played their part by providing individuals with the needed fresh start and offering viable but financially troubled firms the opportunity to restructure.

That being said, stakeholders have been clear in expressing the need for the BIA and CCAA to be reviewed and updated periodically due to the evolving insolvency environment. As key marketplace framework legislation, the BIA and CCAA play an important role in Canada's economic performance. They also affect the lives and livelihoods of hundreds of thousands of Canadians every year. It is imperative that legislation of this significance is reviewed and updated to ensure it continues to meet its objectives.

This report and the review that supported it is one important step towards that goal. A parliamentary committee review and report stage will occur next. During this time, Industry Canada will continue to reach out to stakeholders, including academics and insolvency experts, and conduct further study and analysis. Decisions regarding any potential reforms will be made following the parliamentary committee report stage.

Endnotes

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
3. *Century Services Inc.* v. *Canada (Attorney-General)*, 210 SCC 60 (CanLii), [2010] 3 S.C.R. 379 at paragraph 18.
4. The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (Revised), 2005.
5. The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (2001).
6. Armour, John and Cumming, Doug, *Bankruptcy Law and Entrepreneurship*, ECGI Working Paper Series in Law (2008).
7. Succurro, Marianna, *Bankruptcy Systems and Economic Performance Across Countries: Empirical Evidence*, Working Paper, Department of Economics and Statistics, University of Calabria, (2008).
8. *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 at paragraph 19.
9. R. J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law Book, 2009) at page 4 (referring to the UNCITRAL Legislative Guide on Insolvency Law at page 14).
10. BIA section 285; CCAA section 63.
11. *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605.
12. Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce; November 2003.

ANNEX A – STAKEHOLDER SUBMISSIONS

Air Canada Pionairs
American Frozen Food Institute, Virginia
Anne Clark-Stewart
Assuris, Ontario
Barb Sabathil
Benoit Mario Papillon, Université du Québec Trois-Rivières
BC Produce Marketing Association
Bruce Leonard, Esq., Ontario
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bankers Association
The Canadian Bar Association
Canadian Bond Investors Association
Canadian Federation of Agriculture
Canadian Federation of Independent Business
Canadian Federation of Pensioners
Canadian Institute of Actuaries
Canadian Life and Health Insurance Association Inc.
Carol Martin
Cavendish Farms, New Brunswick
Consumers Council of Canada
Credit Union Central of Canada
Dennis A. Fege
Doug Querns
EarthFresh Foods, Ontario
Edward Song
Fresh Produce Alliance, Ontario
Fresh Produce Association of the Americas, Arizona
Frozen Potato Products Institute, Virginia
Gail Clark
Government of Alberta
Healthy Trends Produce LLC, Arizona
Holland Marsh Growers' Association, Ontario
Hoyes Michalos and Associates Inc., Ontario
Hugh C. Stewart
Iain Ramsay, Kent Law School, United Kingdom
Insolvency Institute of Canada
Insurance Corporation of British Columbia
International Insolvency Institute
International Swaps and Derivatives Association, Inc., New York
IPR Fresh, Arizona
James Callon (former Superintendent of Bankruptcy), Ontario
Jean-Daniel Breton, CPA, CA, FCIRP, Québec

Jerry Hockin
Kaliroy Premium Greenhouse Tomatoes, Arizona
Ken Rowan & Associates Inc., Ontario
L&M Companies, Inc., Ontario
Laurie Gescheke
Leo Wynberg, CA, CIRP
Marion Evans
Melinda Long
Nishaben Patel
The Ontario Produce Marketing Association
The Oppenheimer Group, British Columbia
Paddon & Yorke Inc., Ontario
Planned Lifetime Advocacy Network, British Columbia
Prince Edward Island Potato Board
Roderick J. Wood, University of Saskatchewan and
F.R. (Dick) Matthews, Q.C., University of Alberta
Rumanek & Company Ltd.
Sam Babe, J.D., M.B.A., Ontario
Sandia Distributors Inc., Arizona
SCRG, a Sears Canada retirees association, Ontario
Sheila Maxwell
TMX Group Limited
Unifor, Ontario
United States Department of Agriculture
United States Fresh Fruit and Vegetable Trade Associations
WaudWare Incorporated, Ontario

Second Report

Standing Committee on Industry, Science and Technology (INDU)
42nd Parliament, 1st Session

Study
Review of the Government of Canada report entitled “Fresh Start: A Review of Canada’s Insolvency Laws”

Review of the Government of Canada report entitled “Fresh Start: A Review of Canada’s Insolvency Laws”

In accordance with its mandate under Standing Order 108(2), your Committee has considered the Report of Industry Canada on the provisions and operation of the Act, pursuant to the Bankruptcy and Insolvency Act, R.S. 1985, c. B-3, sbs. 285(1) and Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, which was tabled in the House of Commons on Tuesday, October 21, 2014 during the 2nd Session of the 41st Parliament.

The Committee has concurred in the findings of the Report.

A copy of the relevant *Minutes of Proceedings* (Meeting No. 34) is tabled.

Respectfully submitted,

DAN RUIMY
Chair

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

House of Commons Debates

VOLUME 148 • NUMBER 126 • 1st SESSION • 42nd PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Monday, December 12, 2016

Speaker: The Honourable Geoff Regan

The environment minister did not attempt to answer my Question No. 575 and the questions I have raised therein, even in the slightest. I have in my possession the purported response received from that department. I also posed questions to the Departments of Finance and ESDC, and they did not respond.

Let me just highlight the questions that were asked in writing and submitted in proper format: How would the carbon tax impact family budgets? How many people would a carbon tax push below the low income cut-off line? By how much would it increase the market basket measure of goods, a measure used by Statistics Canada to determine the affordability of common household goods? How would it impact people in each province? How would it impact grocery bills? How would it impact electricity bills?

The environment minister provided nothing more than vague talking points in her response. What little substance the minister did provide is concerning. She said:

> Any impacts on business and consumers will be modest....

A carbon tax is a big deal. The Canadian Taxpayers Federation says that the costs will be approximately $1,028 per person, or $4,112 for a family of four. Does that sound modest to the House? Does the government expect Canadians who live on fixed incomes to find an extra $1,000 per person to pay for this costly new government scheme?

Professor Nicholas Rivers has said that the carbon tax would add 11 cents a litre to the price of gasoline, 10% to electricity, and 15% to natural gas.

I could go on with—

The Speaker: Order. I think the member is going on and it is getting into debate. I would like him to stick to the point of order, if he would, please.

Hon. Pierre Poilievre: Mr. Speaker, if I could just conclude by saying that the questions I was asking were not in search of opinions or talking points from any particular political party, but for specific numbers.

Presumably any government that is proposing to implement a tax of this size, this magnitude, and with these consequences would have calculated the actual costs and impacts on Canadian families. That information, I am sure, exists within the Government of Canada. It will have been documented and it will have been provided to ministers before such a policy could ever have been considered, and certainly before Treasury Board would ever approve it.

Given that it must exist, it must be provided to Canadians. That is why I asked for the government to do so through the very specific use of Order Paper questions, to which the government is bound by parliamentary tradition as old as this country to respond.

It has not responded, and therefore it falls to you, Mr. Speaker, as the presiding officer of the House to ensure that the Standing Orders are upheld, that the questions are answered, and that Canadians get all of the facts before they have to pay the costs that the government will impose upon them.

The Speaker: I thank the hon. member for Carleton for raising his point of order. I will take it under consideration and come back to the House.

ROUTINE PROCEEDINGS

● (1510)

[*English*]

CONTROLLED DRUGS AND SUBSTANCES ACT

Hon. Jane Philpott (Minister of Health, Lib.) moved for leave to introduce Bill C-37, An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts.

(Motions deemed adopted, bill read the first time and printed)

* * *

[*Translation*]

COMMITTEES OF THE HOUSE

AGRICULTURE AND AGRI-FOOD

Mr. Pat Finnigan (Miramichi—Grand Lake, Lib.): Mr. Speaker, I have the honour to present, in both official languages, the fourth report of the Standing Committee on Agriculture and Agri-Food in relation to its study of genetically modified animals for human consumption.

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this report.

[*English*]

INDUSTRY, SCIENCE AND TECHNOLOGY

Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.): Mr. Speaker, I have the honour to present, in both official languages, the second report of the Standing Committee on Industry, Science and Technology entitled, "Review of the Government of Canada report entitled 'Fresh Start: A Review of Canada's Insolvency Laws'".

HEALTH

Mr. Bill Casey (Cumberland—Colchester, Lib.): Mr. Speaker, I have the honour to present, in both official languages, the sixth report of the Standing Committee on Health entitled, "Report and Recommendations on the Opioid Crisis in Canada".

Pursuant to Standing Order 109, the committee requests that the government table a response to this report.

We are pleased and excited that all members of the committee were involved with this report and made contributions to it.

ACCESS TO INFORMATION, PRIVACY AND ETHICS

Mr. Blaine Calkins (Red Deer—Lacombe, CPC): Mr. Speaker, I have the honour to present, in both official languages, the fourth report of the Standing Committee on Access to Information, Privacy and Ethics entitled, "Protecting the Privacy of Canadians: Review of the Privacy Act".

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this report.

P

David Albert Siemens, Eloisa Ester Siemens and Sie-Cor Properties Inc. o/a The Winkler Inn *Appellants*

v.

The Attorney General of Manitoba and the Government of Manitoba *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Alberta, 292129 Alberta Ltd., operating as The Empress Hotel, 484906 Alberta Ltd., operating as Lacombe Motor Inn, Leto Steak & Seafood House Ltd., Neubro Holdings Inc., operating as Lacombe Hotel, Wayne Neufeld, 324195 Alberta Ltd., operating as K.C.'s Steak & Pizza, and Katerina Kadoglou *Interveners*

David Albert Siemens, Eloisa Ester Siemens et Sie-Cor Properties Inc., faisant affaire sous la dénomination The Winkler Inn *Appelants*

c.

Procureur général du Manitoba et Gouvernement du Manitoba *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Nouveau-Brunswick, procureur général de l'Alberta, 292129 Alberta Ltd., faisant affaire sous la dénomination The Empress Hotel, 484906 Alberta Ltd., faisant affaire sous la dénomination Lacombe Motor Inn, Leto Steak & Seafood House Ltd., Neubro Holdings Inc., faisant affaire sous la dénomination Lacombe Hotel, Wayne Neufeld, 324195 Alberta Ltd., faisant affaire sous la dénomination K.C.'s Steak & Pizza, et Katerina Kadoglou *Intervenants*

INDEXED AS: SIEMENS *v.* MANITOBA (ATTORNEY GENERAL)

Neutral citation: 2003 SCC 3.

File No.: 28416.

Hearing and judgment: October 31, 2002.

Reasons delivered: January 30, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

RÉPERTORIÉ : SIEMENS *c.* MANITOBA (PROCUREUR GÉNÉRAL)

Référence neutre : 2003 CSC 3.

N^{o} du greffe : 28416.

Audition et jugement : 31 octobre 2002.

Motifs déposés : 30 janvier 2003.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law — Distribution of legislative powers — Criminal law — Property and civil rights — Matters of local or private nature — Gaming — Province enacting local option legislation enabling municipalities to hold binding plebiscites on prohibition of video lottery terminals in their communities — Whether legislation and section deeming non-binding plebiscite to be binding

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit constitutionnel — Partage des compétences législatives — Droit criminel — Propriété et droits civils — Matières d'une nature locale ou privée — Jeu — Province adoptant une loi sur les options locales autorisant les municipalités à tenir des référendums décisionnels relativement à l'interdiction des appareils de loterie vidéo sur leur territoire — La loi et l'article

referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. . . . In my view, though a referendum is undoubtedly a platform for expression, s. 2(*b*) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [Emphasis in original.]

loi et c'est celle-ci qui régit les conditions auxquelles est soumis le droit d'y participer. [. . .] À mon avis, bien qu'un référendum soit assurément une tribune pour favoriser l'expression, l'al. 2*b*) de la *Charte* n'impose à aucun gouvernement, provincial ou fédéral, une obligation positive de consulter les citoyens par le recours à cette méthode particulière qu'est un référendum. Il ne confère pas, non plus, à l'ensemble des citoyens le droit d'exprimer leur opinion dans le cadre d'un référendum. Le gouvernement n'a aucune obligation constitutionnelle d'offrir cette tribune pour favoriser l'expression à qui que ce soit, et encore moins à tous. Le référendum en tant que tribune pour favoriser l'expression relève, selon moi, de la politique législative et non du droit constitutionnel. [Souligné dans l'original.]

A municipal plebiscite, like a referendum, is a creation of legislation. In the present case, any right to vote in a plebiscite must be found within the language of the *VLT Act*. It alone defines the terms and qualifications for voting. Accordingly, the appellants cannot complain that the *VLT Act*, itself, denied them the right to vote in a VLT plebiscite.

Comme tout autre référendum, un référendum municipal est une création de la loi. Dans la présente affaire, tout droit de voter à un référendum doit être prévu par la *Loi sur les ALV*. Elle seule définit les conditions et modalités de l'exercice du droit de vote. Les appelants ne peuvent donc pas se plaindre que la *Loi sur les ALV*, elle-même, les prive du droit de voter à un référendum sur les ALV.

43 A *caveat* was added in *Haig* that, once the government decides to extend referendum voting rights, it must do so in a fashion that is consistent with other sections of the *Charter*. However, as the appellants submitted that they had been denied referendum voting rights on a discriminatory basis, their claim should be assessed under s. 15(1), of which more will be said below.

Dans l'arrêt *Haig*, notre Cour a fait la mise en garde suivante : lorsque le gouvernement décide d'accorder le droit de voter à un référendum, il doit le faire d'une manière conforme aux autres dispositions de la *Charte*. Toutefois, comme les appelants ont soutenu qu'ils s'étaient vu refuser de façon discriminatoire le droit de voter, leur argument doit être examiné au regard du par. 15(1), sur lequel je reviendrai plus loin.

44 Finally, it is worth noting that the *VLT Act* does not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. They have not been disenfranchised from VLT plebiscites. Like all other residents of Manitoba, they are free to initiate a plebiscite under the Act to either reinstate or remove VLTs from their municipality.

Enfin, il importe de souligner que la *Loi sur les ALV* n'empêche pas les résidants de Winkler de voter sur la question des ALV lors d'un autre référendum. Ils ne sont pas privés du droit de voter à un référendum portant sur les ALV. Comme tous les autres résidants du Manitoba, il leur est loisible d'organiser, conformément à la Loi, un référendum visant à permettre à nouveau les ALV dans la municipalité ou à les en retirer.

E. *The Claim under Section 7 of the Charter*

E. *L'argument fondé sur l'art. 7 de la Charte*

45 The appellants also submitted that s. 16 of the *VLT Act* violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of

Les appelants ont également soutenu que l'art. 16 de la *Loi sur les ALV* porte atteinte au droit d'exercer un métier licite que leur garantit l'art. 7 de la *Charte*. Ils ont ajouté que cette disposition restreint leur

movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:

> . . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

> The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.

droit de circuler librement en les empêchant d'exercer le métier de leur choix à un endroit particulier, à savoir la ville de Winkler. Toutefois, un bref examen de la jurisprudence de notre Cour relative à la *Charte* révèle clairement que les droits invoqués par les appelants ne sont pas visés par l'art. 7. Le droit à la vie, à la liberté et à la sécurité de la personne englobe les choix fondamentaux qu'une personne peut faire dans sa vie, et non des intérêts purement économiques. Comme le juge La Forest l'a expliqué dans l'arrêt *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 66 :

> . . . l'autonomie protégée par le droit à la liberté garanti par l'art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou d'essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l'essence même de ce que signifie la jouissance de la dignité et de l'indépendance individuelles.

Plus récemment, dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, notre Cour a conclu que la stigmatisation dont M. Blencoe a été victime, en attendant l'instruction de la plainte en matière de droits de la personne qui avait été déposée contre lui et qui l'avait empêché d'exercer son métier de politicien, ne faisait pas intervenir les droits garantis à l'art. 7. Voir les motifs du juge Bastarache, au par. 86 :

> . . . le préjudice subi par l'intimé en l'espèce se limite essentiellement à ses difficultés personnelles. Il est « inapte au travail » de politicien, sa famille et lui ont changé de lieu de résidence deux fois, il a épuisé ses ressources financières et il a souffert tant physiquement que psychologiquement. Cependant, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des choix essentiels dans leur vie. Accepter que le préjudice subi par l'intimé en l'espèce équivaut à une atteinte de l'État au droit qu'il a à la sécurité de sa personne serait forcer le sens de ce droit.

46 Dans la présente affaire, le droit que les appelants auraient d'exploiter des ALV dans leurs établissements ne saurait être qualifié de choix fondamental dans leur vie. Il représente simplement un intérêt économique. La capacité d'une personne de générer un revenu d'entreprise par le moyen de son choix n'est pas un droit garanti par l'art. 7 de la *Charte*.

F. *The Claim under Section 15(1) of the Charter*

47 The appellants argued that their rights under s. 15(1) of the *Charter* were violated by s. 16 of the *VLT Act*. This claim should be analyzed in accordance with the three-pronged test summarized by Iacobucci J. in *Law*, *supra*, at para. 88:

(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;

(B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

(C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The appellants submitted that part (A) of the test was met because s. 16 of the *VLT Act* distinguished between residents of Winkler and all other residents of Manitoba. They further argued that this distinction was based on the analogous ground of residence, and was discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs.

48 There is no merit in this ground of appeal. First, although s. 16 of the *VLT Act* clearly makes a distinction between Winkler and other municipalities, it is implausible that residence in Winkler constitutes an analogous ground of discrimination. Residence was rejected as an analogous ground in both *Haig*, *supra*, and *R. v. Turpin*, [1989] 1 S.C.R. 1296. Further, the majority in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, clearly stated that the analogous ground recognized in that case was "Aboriginality-residence", and that "no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground" (para. 15). In rejecting the claimant's s. 15 argument in *Haig*, the majority explained, at p. 1044, why residence is an unlikely analogous ground:

F. *L'argument fondé sur le par. 15(1) de la Charte*

Les appelants ont soutenu que l'art. 16 de la *Loi sur les ALV* portait atteinte aux droits que leur garantit le par. 15(1) de la *Charte*. Cet argument doit être analysé en fonction du critère à trois volets résumé par le juge Iacobucci dans l'arrêt *Law*, précité, par. 88 :

(A) La loi a-t-elle pour objet ou pour effet d'imposer une différence de traitement entre le demandeur et d'autres personnes?

(B) La différence de traitement est-elle fondée sur un ou plusieurs des motifs énumérés ou des motifs analogues?

(C) La loi en question a-t-elle un objet ou un effet discriminatoires au sens de la garantie d'égalité?

Les appelants ont fait valoir que le volet (A) du critère était respecté en raison de la distinction que l'art. 16 de la *Loi sur les ALV* établissait entre les résidants de Winkler et tous les autres résidants du Manitoba. Ils ont ajouté que cette distinction reposait sur le motif analogue du lieu de résidence et qu'elle était discriminatoire étant donné qu'elle leur refusait la possibilité de voter à un référendum décisionnel sur la question des ALV.

Ce moyen d'appel n'est pas bien fondé. Premièrement, bien que l'art. 16 de la *Loi sur les ALV* établisse clairement une distinction entre Winkler et les autres municipalités, il est invraisemblable que le fait de résider à Winkler constitue un motif analogue de discrimination. Notre Cour a refusé de reconnaître le lieu de résidence comme étant un motif analogue tant dans l'arrêt *Haig*, précité, que dans l'arrêt *R. c. Turpin*, [1989] 1 R.C.S. 1296. En outre, dans l'arrêt *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, les juges majoritaires ont clairement affirmé que le motif analogue reconnu dans cette affaire était celui de l'« autochtonité-lieu de résidence » et que « rien de nouveau n'a été établi, en ce sens qu'il n'a pas été jugé que le lieu de résidence constituait, de façon générale, un motif analogue » (par. 15). Dans l'arrêt *Haig*, précité, p. 1044, en rejetant l'argument des demandeurs fondé sur l'art. 15, les juges majoritaires ont expliqué pourquoi il était improbable que le lieu de résidence constitue un motif analogue :

It would require a serious stretch of the imagination to find that persons moving to Quebec less than six months before a referendum date are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. [Emphasis in original.]

Ce serait fantaisiste au plus haut degré de conclure que les personnes qui déménagent au Québec moins de six mois avant la date d'un référendum sont assimilables aux victimes d'une discrimination fondée sur la race, la religion ou le sexe. Les personnes qui s'installent au Québec moins de six mois avant la date d'un référendum ne souffrent ni de stéréotypage ni de préjugés sociaux. Quoique ses membres n'aient pu voter au référendum québécois, le groupe en question n'est pas de ceux qui ont subi des désavantages historiques ou des préjugés politiques. Il ne semble pas s'agir non plus d'un groupe « distinct et séparé ». Sa composition est hautement changeante : des gens s'y ajoutent constamment puis cessent d'en faire partie dès qu'ils satisfont aux exigences posées par le Québec en matière de résidence. [Souligné dans l'original.]

Although the Court in *Haig* left it open for residence to be established as an analogous ground in the appropriate case, I share the trial judge's view here that this is not such a case. Nothing suggests that Winkler residents are historically disadvantaged or that they suffer from any sort of prejudice.

Même si, dans cet arrêt, notre Cour n'a pas écarté la possibilité d'établir que le lieu de résidence constitue un motif analogue dans un cas qui s'y prête, je partage l'avis de la juge de première instance qu'il n'est pas possible de le faire en l'espèce. Rien n'indique que les résidants de Winkler subissent un désavantage historique ou quelque autre forme de préjudice.

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However, putting the appellants' case at its best and assuming that they could establish a distinction based on an analogous ground, the legislation does not discriminate against them in any substantive sense. It is not necessary to proceed through all the contextual factors listed by Iacobucci J. in *Law*, *supra*, because it is clear that the *VLT Act* directly corresponds to the circumstances of Winkler residents. The Town of Winkler was singled out in s. 16 of the *VLT Act* because it was the only municipality to have held a plebiscite on the issue of VLTs. The very purpose of that section was to respect the will of Winkler residents, as expressed in their 1998 plebiscite. Viewed in the context of that plebiscite, I am not convinced that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued or ignored as a member of Canadian society (see *Law*, *supra*, at para. 53). There is no harm to dignity, and no violation of s. 15(1).

Toutefois, en considérant le dossier des appelants sous l'angle le plus favorable et en supposant qu'ils pourraient établir l'existence d'une distinction fondée sur un motif analogue, force est de conclure que la mesure législative en question n'est pas réellement discriminatoire à leur endroit. Il n'est pas nécessaire d'examiner tous les facteurs contextuels énumérés par le juge Iacobucci dans l'arrêt *Law*, précité, puisqu'il est manifeste que la situation des résidants de Winkler correspond exactement au genre de cas prévu par la *Loi sur les ALV*. La mention de cette ville à l'art. 16 de la *Loi sur les ALV* s'explique par le fait qu'elle était la seule municipalité à avoir tenu un référendum sur la question des ALV. L'objet même de cette disposition était de respecter la volonté que les résidants de Winkler avait exprimée lors du référendum de 1998. Au regard de ce référendum, je ne suis pas convaincu qu'un résidant raisonnable de Winkler s'estimerait marginalisé, dévalorisé ou mis de côté en tant que membre de la société canadienne (voir l'arrêt *Law*, précité, par. 53). Il n'y a pas d'atteinte à la dignité ni aucune violation du par. 15(1).

50 It was noted above in the s. 2(*b*) claim that s. 15(1) might be implicated where the opportunity to vote in a plebiscite is extended to some and withheld from others based on a prohibited ground of discrimination. This would be the case if a law prohibited members of a certain race or religion from voting in a plebiscite. However, that is not the case in this appeal. First, as previously noted, the distinction in s. 16 of the *VLT Act* is not based on an analogous ground. Second, the distinction does not affect the qualification and ability of Winkler residents to vote in a VLT plebiscite under the Act. They are free to initiate a plebiscite should they wish to reinstate VLTs in their community. Consequently, although s. 16 makes a distinction for Winkler residents, that distinction has nothing to do with the alleged right to vote.

51 VII. Conclusion and Disposition

These reasons support the October 31, 2002 dismissal of this appeal. The respondents are entitled to costs, and the stated constitutional questions are answered as follows:

(1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: No.

(2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: No.

Comme je l'ai souligné plus haut relativement à l'argument fondé sur l'al. 2*b*), il se pourrait que le par. 15(1) s'applique lorsque la possibilité de voter à un référendum est accordée à certaines personnes et refusée à d'autres pour un motif de discrimination illicite. Ce serait le cas si une loi interdisait à des personnes de voter à un référendum en raison de leur race ou de leur religion. Cependant, cette situation n'existe pas en l'espèce. Premièrement, comme nous l'avons vu, la distinction établie à l'art. 16 de la *Loi sur les ALV* n'est pas fondée sur un motif analogue. Deuxièmement, elle n'a aucune incidence sur l'habilité et l'aptitude des résidants de Winkler à voter à un référendum sur les ALV tenu en application de la Loi. Il leur est loisible d'organiser un référendum s'ils souhaitent permettre à nouveau l'exploitation d'ALV dans leur municipalité. En conséquence, même si l'art. 16 établit une distinction en ce qui concerne les résidants de Winkler, cette distinction n'a rien à voir avec le droit de vote qui existerait.

VII. Conclusion et dispositif

Les présents motifs appuient la décision de rejeter le pourvoi rendue le 31 octobre 2002. Les intimés ont droit aux dépens, et les réponses suivantes sont apportées aux questions constitutionnelles qui ont été formulées :

(1) La *Loi sur les options locales en matière de jeu (appareils de loterie vidéo)*, L.M. 1999, ch. 44, excède-t-elle dans son ensemble la compétence de la législature du Manitoba du fait qu'elle porte sur une matière qui relève de la compétence exclusive du Parlement du Canada en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

Réponse : Non.

(2) Le paragraphe 16(1) de la *Loi sur les options locales en matière de jeu (appareils de loterie vidéo)* excède-t-il la compétence de la législature du Manitoba du fait qu'il porte sur une matière qui relève de la compétence exclusive du Parlement du Canada en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

Réponse : Non.

Q

1997 CarswellQue 883
Supreme Court of Canada

Godbout c. Longueuil (Ville)

1997 CarswellQue 883, 1997 CarswellQue 884, [1997] 3 S.C.R. 844, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, 219 N.R. 1, 43 M.P.L.R. (2d) 1, 47 C.R.R. (2d) 1, 74 A.C.W.S. (3d) 767, 97 C.L.L.C. 210-031, J.E. 97-2082

City of Longueuil, Appellant/Respondent on cross-appeal v. Michèle Godbout, Respondent/Appellant on cross-appeal and The Attorney General of Quebec, Mis en cause

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

Heard: 28 mai 1997
Judgment: 31 octobre 1997
Docket: 24990

Proceedings: affirming (1995), 31 M.P.L.R. (2d) 130 (C.A. Que.)**Proceedings: additional reasons at (November 15, 1995), no. C.A. Montreal 500-09-000549-899 (C.A. Qué.); reversing 48 M.P.L.R. 307 (C.S. Qué.)**

Counsel: *Jean-Jacques Rainville* and *Réjean Rioux*, for the appellant/respondent on cross-appeal.
France Saint-Laurent and *Richard Bertrand*, for the respondent/appellant on cross-appeal.
Isabelle Harnois, for the mis en cause.

Subject: Public; Civil Practice and Procedure; Employment; Constitutional; Human Rights; Municipal

APPEAL from judgment reported at 31 M.P.L.R. (2d) 130, [1995] R.J.Q. 2561 (C.A.), additional reasons at (15 novembre 1995), no C.A. Montréal 500-09-000549-899 (C.A. Qué.), allowing employee's appeal from judgment reported at 48 M.P.L.R. 307, [1989] R.J.Q. 1511, 12 C.H.R.R. D/141 (C.S.), dismissing employee's action for reinstatement and damages.

POURVOI à l'encontre d'un jugement publié à 31 M.P.L.R. (2d) 130, [1995] R.J.Q. 2561 (C.A.), motifs supplémentaires à (15 novembre 1995), no C.A. Montréal 500-09-000549-899 (C.A. Qué.), accueillant le pourvoi d'une employée à l'encontre d'un jugement publié à 48 M.P.L.R. 307, [1989] R.J.Q. 1511, 12 C.H.R.R. D/141 (C.S.), rejetant l'action en réintégration de l'employée assortie de conclusions en dommages-intérêts.

***Major J.* (Lamer C.J.C. and Sopinka J. concurring):**

1 I have read the reasons of my colleagues Justice La Forest and Justice Cory and I agree with Cory J. that the appeal should be dismissed on the basis that the residence requirement imposed by the appellant infringes the respondent's right to privacy under s. 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and is not justified under s. 9.1. This is sufficient to dispose of the appeal. With respect to those of my colleagues who hold the contrary view, I agree with Cory J. that it is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Canadian Charter of Rights and Freedoms* in the absence of submissions from interested parties and I too express no opinion on this issue.

constitutes appropriate medical care for their child (since, in their view, the purview of such a right must be delineated with specific reference to the competing rights of the child to life and security of the person), they did not explicitly question the idea that the right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein the state is, in normal circumstances, precluded from entering. Indeed, at p. 431, they stated:

> We note that La Forest J. holds that "liberty" encompasses the right of parents to have input into the education of their child. *In fact, "liberty" may very well permit parents to choose among equally effective types of medical treatment for their children*, but we do not find it necessary to determine this question in the instant case. We say this because, *assuming without deciding that "liberty" has such a reach*, it certainly does not extend to protect the appellants in the case at bar. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. [Underlining in original; italics added.]

Sopinka J., too, did not explicitly disagree with my understanding of the scope of the liberty interest protected by s. 7. Rather, he took the position that the matter did not need to be addressed in *B. (R.)* since, on the facts, there was no violation of the principles of fundamental justice.

65 I should point out that the view I have expounded regarding the scope of the right to liberty draws considerable support from the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.). In that case, my former colleague succinctly expressed her opinion that the s. 7 liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy. Indeed, at p. 166, she stated:

> [A]n aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in [*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177], is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

Speaking for the plurality, I explicitly endorsed this passage in *B.(R.)*, at pp. 368-69, pointing out that I have long supported the views expressed in it. Indeed, shortly after *Morgentaler* was decided, I stated in *R. v. Beare*, [1988] 2 S.C.R. 387 (S.C.C.), at p. 412, that I had "considerable sympathy" for the proposition that s. 7 includes within it a right to privacy. Moreover, the view that the right to liberty encompasses more than just physical freedom is, as I explained in *B. (R.)*, supported by the vast preponderance of American case law dealing with the subject; see, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (U.S. Sup. Ct. 1923); and *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (U.S. Sup. Ct. 1925).

66 The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of the these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as" private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

67 The soundness of this position can be appreciated most readily, I think, by reflecting upon some of the intensely personal considerations that often inform an individual's decision as to where to live. Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so.

68 Moreover, not only is the choice of residence often *informed* by intimately personal considerations, but that choice may also have a determinative *effect* on the very quality of one's private life. The respondent put this point succinctly in her factum:

> [TRANSLATION]
>
> Residence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development.

To my mind, the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.

69 Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada became a party in 1976. As the respondent informed us, Article 12(1) of that convention reads as follows:

> **Article 12**
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

While subsection (3) of that provision provides that the right at issue can be limited by states for certain stipulated reasons, the fact remains that the right to choose where to reside is itself enshrined as one of the Covenant's fundamental guarantees. Given this Court's previous recognition of the persuasive value of international covenants in defining the scope of the rights guaranteed by the *Charter* (see, e.g., *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.), at p. 348, *per* Dickson C.J. (dissenting), cited with approval in *Slaight, supra*, at pp. 1056-57), I regard Article 12 as strengthening my conclusion that the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.

70 Having made clear why I find the right asserted by the respondent is indeed comprised within the right to liberty, all that remains to be considered as regards s. 7 of the Canadian *Charter* is whether the deprivation of the respondent's

Most Negative Treatment: Distinguished
Most Recent Distinguished: Morrison Estate v. Nova Scotia (Attorney General) | 2011 NSSC 479, 2011 CarswellNS 945, 985 A.P.R. 219, 311 N.S.R. (2d) 219, 211 A.C.W.S. (3d) 509, [2011] N.S.J. No. 697 | (N.S. S.C., Dec 22, 2011)

1997 CarswellQue 884
Cour suprême du Canada

Godbout c. Longueil (Ville)

1997 CarswellQue 883, 1997 CarswellQue 884, [1997] 3 S.C.R. 844, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, 219 N.R. 1, 43 M.P.L.R. (2d) 1, 47 C.R.R. (2d) 1, 74 A.C.W.S. (3d) 767, 97 C.L.L.C. 210-031, J.E. 97-2082

Ville de Longueuil, Appelante/Intimée dans le pourvoi incident c. Michèle Godbout, Intimée/Appelante dans le pourvoi incident et Procureur général du Québec, Mis en cause

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

Audience: 28 mai 1997
Jugement: 31 octobre 1997
Dossier: 24990

Procédures: Affirming (1995), 31 M.P.L.R. (2d) 130 (C.A. Qué.)

Avocat: *Jean-Jacques Rainville* et *Réjean Rioux*, pour l'appelante/intimée dans le pourvoi incident.
France Saint-Laurent et *Richard Bertrand*, pour l'intimée/appelante dans le pourvoi incident.
Isabelle Harnois, pour le mis en cause.

Sujet: Civil Practice and Procedure; Public; Labour; Employment; Constitutional

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Civil practice and procedure

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Civil practice and procedure

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XXIII.13.a General principles

Civil practice and procedure

> de l'enfant à la vie et à la sécurité de sa personne. [Souligné dans l'original; italique ajouté.]

Le juge Sopinka non plus n'a pas expressément écarté ma conception de la portée du droit à la liberté protégé à l'art. 7. Il a plutôt estimé qu'il n'y avait pas lieu de statuer sur ce point dans l'arrêt *B. (R.)* puisque, dans les faits, les principes de justice fondamentale n'avaient pas été enfreints.

65 Il convient de signaler que mon opinion concernant la portée du droit à la liberté trouve un appui considérable dans les motifs exposés par le juge Wilson dans l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30 (C.S.C.). Dans ce pourvoi, mon ancienne collègue a brièvement exprimé l'avis que le droit à la liberté garanti par l'art. 7 ne se limite pas à la liberté physique mais comprend également les notions fondamentales de dignité humaine, d'autonomie individuelle et de vie privée. Dans ses motifs, elle écrit effectivement, à la p. 166:

> [U]n aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh* [*Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177], est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

J'ai explicitement approuvé ce passage aux pp. 368 et 369 des motifs collectifs que j'ai rédigés dans l'arrêt *B. (R.)*, en soulignant que je souscrivais depuis longtemps à l'opinion qui y était exprimée. Dans l'arrêt *R. c. Beare*, [1988] 2 R.C.S. 387 (C.S.C.), rendu peu de temps après l'arrêt *Morgentaler*, j'ai même écrit, à la p. 412, que j'étais « enclin à admettre » la proposition voulant que l'art. 7 englobe le droit à la vie privée. En outre, comme je l'ai expliqué dans l'arrêt *B. (R.)*, la vaste majorité de la jurisprudence américaine sur le sujet appuie l'opinion selon laquelle le droit à la liberté ne s'entend pas que de la liberté physique; voir, par exemple, *Meyer c. Nebraska*, 262 U.S. 390 (1923) et *Pierce c. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925).

66 L'analyse qui précède ne fait que répéter mon opinion générale selon laquelle la protection du droit à la liberté garanti par l'art. 7 de la *Charte* s'étend au droit à une sphère irréductible d'autonomie personnelle où les individus peuvent prendre des décisions intrinsèquement privées sans intervention de l'État. Comme les propos que j'ai tenus dans l'arrêt *B. (R.)* l'indiquent, je n'entends pas par là, je le précise, que cette sphère d'autonomie est vaste au point d'englober toute décision qu'un individu peut prendre dans la conduite de ses affaires. Une telle opinion, en effet, irait à l'encontre du principe fondamental que j'ai formulé au début des présents motifs et dans les motifs de l'arrêt *B. (R.)*, selon lequel nul ne peut, dans une société organisée, prétendre à la garantie de la liberté absolue d'agir comme il lui plaît. J'estime même que cette sphère d'autonomie ne protège pas tout ce qui peut, même vaguement, être qualifié de « privé ». Je suis plutôt d'avis que l'autonomie protégée par le droit à la liberté garanti par l'art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou d'essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l'essence même de ce que signifie la jouissance de la dignité et de l'indépendance invididuelles. Comme je l'ai déjà mentionné, j'ai exprimé, dans l'arrêt *B. (R.)*, l'opinion voulant que les décisions des parents quant aux soins médicaux administrés à leurs enfants appartiennent à cette catégorie limitée de sujets fondamentalement personnels. À mon avis, le choix d'un lieu pour établir sa demeure est, de la même façon, une décison essentiellement privée qui tient de la nature même de l'autonomie personnelle.

67 À mon avis, c'est en examinant quelques-unes des considérations extrêmement personnelles qui déterminent souvent le choix du lieu où une personne décide de vivre que l'on perçoit le mieux le bien-fondé de cette position. Le choix d'un endroit particulier pour établir sa demeure peut dépendre, pour certains, de sa proximité du lieu de travail et, pour d'autres, de sa proximité de la compagne, d'un secteur commercial, d'une institution religieuse qu'ils fréquentent ou d'un centre médical où ils sont traités. De la même façon, des personnes pourront choisir, pour des raisons qui leur tiennent à coeur, de vivre à un endroit parce qu'elles attachent du prix à sa valeur historique ou à ses caractéristiques culturelles; d'aucuns, encore, voudront habiter à proximité de membres de leur famille ou d'amis proches, alors que d'autres pourront fixer leur choix afin de réduire leurs dépenses, de prendre soin de parents malades ou, comme en l'espèce, de poursuivre une relation personnelle. De tels facteurs montrent bien, à mon vis, que le choix du lieu où l'on veut vivre est un acte fondamentalement personnel qui fait intervenir l'essence même des valeurs invidivuelles régissant l'organisation des affaires privées de chacun. Autrement dit, le type de considérations que je viens de mentionner me en évidence la nature essentiellement privée du choix d'un lieu pour établir sa demeure. À mon avis, l'État ne devrait pas être autorisé à s'immiscer dans ce processus décisionnel privé, à moins

R

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

N° du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

Afin de décider si la démarche de l'agent d'immigration respectait les limites imposées par le libellé de la loi et les valeurs du droit administratif, une analyse contextuelle est requise comme l'exige en général l'interprétation des lois: voir *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23. À mon avis, l'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants. Les droits des enfants, et la considération de leurs intérêts, sont des valeurs d'ordre humanitaire centrales dans la société canadienne. Une indication que l'intérêt des enfants est une considération importante dans l'exercice des pouvoirs en matière humanitaire se trouve, par exemple, dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre lui-même.

(a) *The Objectives of the Act*

a) *Les objectifs de la Loi*

68 The objectives of the Act include, in s. 3(*c*):

Un des objectifs de la Loi est notamment, selon l'al. 3*c*):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

Bien que cette disposition traite de l'objectif du Parlement de réunir des citoyens et des résidents permanents avec leurs proches parents de l'étranger, elle permet, à mon avis, en utilisant une interprétation large et libérale des valeurs sous-jacentes à cette loi et à son objet, de présumer que le Parlement estime important également de garder ensemble des citoyens et des résidents permanents avec leurs proches parents qui sont déjà au Canada. L'objectif à l'al. 3*c*) énonce l'obligation d'accorder une grande importance au maintien des enfants en contact avec leurs deux parents, si cela est possible, et au maintien du lien entre les membres d'une proche famille.

(b) *International Law*

b) *Le droit international*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratifi-

Un autre indice de l'importance de tenir compte de l'intérêt des enfants dans une décision d'ordre humanitaire est la ratification par le Canada de la

cation by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assis-

Convention relative aux droits de l'enfant, et la reconnaissance de l'importance des droits des enfants et de l'intérêt supérieur des enfants dans d'autres instruments internationaux ratifiés par le Canada. Les conventions et les traités internationaux ne font pas partie du droit canadien à moins d'être rendus applicables par la loi: *Francis c. The Queen*, [1956] R.C.S. 618, à la p. 621; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, aux pp. 172 et 173. Je suis d'accord avec l'intimé et la Cour d'appel que la Convention n'a pas été mise en vigueur par le Parlement. Ses dispositions n'ont donc aucune application directe au Canada.

70 Les valeurs exprimées dans le droit international des droits de la personne peuvent, toutefois, être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire. Comme le dit R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), à la p. 330:

> [TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

D'autres pays de common law ont aussi mis en relief le rôle important du droit international des droits de la personne dans l'interprétation du droit interne: voir, par exemple, *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), à la p. 266; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361 (C.S. Inde), à la p. 367. Il a également une incidence cruciale sur l'interprétation de l'étendue des droits garantis par la *Charte*: *Slaight Communications*, précité; *R. c. Keegstra*, [1990] 3 R.C.S. 697.

71 Les valeurs et les principes de la Convention reconnaissent l'importance d'être attentif aux droits des enfants et à leur intérêt supérieur dans les décisions qui ont une incidence sur leur avenir. En outre, le préambule, rappelant la *Déclaration universelle des droits de l'homme*, reconnaît que «l'enfance a droit à une aide et à une assistance

tance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

spéciales». D'autres instruments internationaux mettent également l'accent sur la grande valeur à accorder à la protection des enfants, à leurs besoins et à leurs intérêts. La *Déclaration des droits de l'enfant* (1959) de l'Organisation des Nations Unies, dans son préambule, dit que l'enfant «a besoin d'une protection spéciale et de soins spéciaux». Les principes de la Convention et d'autres instruments internationaux accordent une importance spéciale à la protection des enfants et de l'enfance, et à l'attention particulière que méritent leurs intérêts, besoins et droits. Ils aident à démontrer les valeurs qui sont essentielles pour déterminer si la décision en l'espèce constituait un exercice raisonnable du pouvoir en matière humanitaire.

(c) *The Ministerial Guidelines*

c) *Les lignes directrices ministérielles*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

Troisièmement, les directives données par le ministre aux agents d'immigration reconnaissent et révèlent les valeurs et la démarche qui sont décrites ci-dessus et qui sont énoncées dans la Convention. Comme il est dit plus haut, les agents d'immigration sont censés rendre la décision qu'une personne raisonnable rendrait, en portant une attention particulière à des considérations humanitaires comme maintenir des liens entre les membres d'une famille et éviter de renvoyer des gens à des endroits où ils n'ont plus d'attaches. Les directives révèlent ce que le ministre considère comme une décision d'ordre humanitaire, et elles sont très utiles à notre Cour pour décider si les motifs de l'agent Lorenz sont valables. Elles soulignent que le décideur devrait être conscient des considérations humanitaires possibles, devrait tenir compte des difficultés qu'une décision défavorable imposerait au demandeur ou aux membres de sa famille proche, et devrait considérer comme un facteur important les liens entre les membres d'une famille. Les directives sont une indication utile de ce qui constitue une interprétation raisonnable du pouvoir conféré par l'article, et le fait que cette décision était contraire aux directives est d'une grande utilité pour évaluer si la décision constituait un exercice déraisonnable du pouvoir en matière humanitaire.

S

Louise Gosselin *Appellant*

v.

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Alberta, Rights and Democracy (also known as International Centre for Human Rights and Democratic Development), Commission des droits de la personne et des droits de la jeunesse, the National Association of Women and the Law (NAWL), the Charter Committee on Poverty Issues (CCPI) and the Canadian Association of Statutory Human Rights Agencies (CASHRA) *Interveners*

Louise Gosselin *Appelante*

c.

Le procureur général du Québec *Intimé*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, Droits et Démocratie (aussi appelé le Centre international des droits de la personne et du développement démocratique), la Commission des droits de la personne et des droits de la jeunesse, l'Association nationale de la femme et du droit (ANFD), le Comité de la Charte et des questions de pauvreté (CCQP) et l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP) *Intervenants*

INDEXED AS: GOSSELIN *v.* QUEBEC (ATTORNEY GENERAL)

Neutral citation: 2002 SCC 84.

File No.: 27418.

2001: October 29; 2002: December 19.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Equality — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

RÉPERTORIÉ : GOSSELIN *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

Référence neutre : 2002 CSC 84.

N° du greffe : 27418.

2001 : 29 octobre; 2002 : 19 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Égalité — Aide sociale — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à l'égalité? — Charte canadienne des droits et libertés, art. 15 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).

Gwen Brodsky and *Rachel Cox*, for the intervener the National Association of Women and the Law (NAWL).

Vincent Calderhead and *Martha Jackman*, for the intervener the Charter Committee on Poverty Issues (CCPI).

Chantal Masse and *Fred Headon*, for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA).

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook, waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance.

2 In 1984, the Quebec government altered its existing social assistance scheme in an effort to encourage young people to get job training and join the labour force. Under the scheme, which has since been repealed, the base amount payable to welfare recipients under 30 was lower than the base amount payable to those 30 and over. The new feature was that, to receive an amount comparable to that received by older people, recipients under 30 had to participate in a designated work activity or education program.

3 Ms. Gosselin contends that the lower base amount payable to people under 30 violates: (1) s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"), which guarantees equal treatment without discrimination based on grounds

Gwen Brodsky et *Rachel Cox*, pour l'intervenante l'Association nationale de la femme et du droit (ANFD).

Vincent Calderhead et *Martha Jackman*, pour l'intervenant le Comité de la Charte et des questions de pauvreté (CCQP).

Chantal Masse et *Fred Headon*, pour l'intervenante l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP).

Version française du jugement du juge en chef McLachlin et des juges Gonthier, Iacobucci, Major et Binnie rendu par

LE JUGE EN CHEF —

I. Introduction

Louise Gosselin est née en 1959. Elle a vécu une vie difficile, compliquée par des problèmes psychologiques et de dépendance à l'alcool et aux drogues. Elle a tenté de travailler à l'occasion, notamment comme cuisinière, serveuse, vendeuse et aide-infirmière. Cependant, le travail l'épuisait ou la stressait et elle quittait son emploi. Pendant la majeure partie de sa vie adulte, M^me^ Gosselin a reçu de l'aide sociale.

En 1984, le gouvernement du Québec a modifié le régime d'aide sociale en vigueur à l'époque en vue d'encourager les jeunes à obtenir une formation professionnelle et à s'intégrer dans la population active. En vertu de ce régime, abrogé depuis, l'allocation de base payable aux bénéficiaires d'aide sociale de moins de 30 ans était inférieure à celle accordée aux 30 ans et plus. L'élément novateur de ce régime était qu'il obligeait les bénéficiaires de moins de 30 ans à participer à une activité de travail désignée ou à un programme de formation pour recevoir un montant comparable à celui touché par les bénéficiaires plus âgés.

Madame Gosselin soutient que l'allocation de base inférieure payable aux personnes de moins de 30 ans contrevient : (1) au par. 15(1) de la *Charte canadienne des droits et libertés* (la « *Charte canadienne* ») qui garantit l'égalité de traitement sans

including age; (2) s. 7 of the *Canadian Charter*, which prevents the government from depriving individuals of liberty and security except in accordance with the principles of fundamental justice; and (3) s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). She further argues that neither of the alleged *Canadian Charter* violations can be demonstrably justified under s. 1.

On this basis, Ms. Gosselin asks this Court to order the Quebec government to pay the difference between the lower and the higher base amounts to all the people who: (1) lived in Quebec and were between the ages of 18 and 30 at any time from 1985 to 1989; (2) received the lower base amount payable to those under 30; and (3) did not participate in the government programs, for whatever reason. On her submissions, this would mean ordering the government to pay almost $389 million in benefits plus the interest accrued since 1985. Ms. Gosselin claims this remedy on behalf of over 75 000 unnamed class members, none of whom came forward in support of her claim.

In my view, the evidence fails to support Ms. Gosselin's claim on any of the asserted grounds. Accordingly, I would dismiss the appeal.

II. Facts and Decisions

In 1984, in the face of alarming and growing unemployment among young adults, the Quebec legislature made substantial amendments to the *Social Aid Act*, R.S.Q., c. A-16, creating a new scheme — the scheme at issue in this litigation. Section 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, made under the Act continued to cap the base amount of welfare payable to those under 30 at roughly one third of the base amount payable to those 30 and over. However, the 1984 scheme for the first time made it possible for people under 30 to increase their welfare payments,

discrimination fondée notamment sur l'âge; (2) à l'art. 7 de la *Charte canadienne* qui interdit au gouvernement de porter atteinte à la liberté et à la sécurité d'une personne sauf en conformité avec les principes de justice fondamentale; (3) à l'art. 45 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12 (la « *Charte québécoise* »). Elle fait également valoir qu'aucune des violations alléguées de la *Charte canadienne* ne peut se justifier au regard de l'article premier.

4 Sur ce fondement, M^me^ Gosselin demande à notre Cour d'ordonner au gouvernement du Québec de rembourser une somme égale à l'écart entre les allocations de base inférieure et supérieure à toutes les personnes qui : (1) vivaient au Québec et avaient entre 18 et 30 ans à un moment quelconque au cours de la période s'échelonnant de 1985 à 1989; (2) ont touché l'allocation de base inférieure payable aux moins de 30 ans; (3) ne participaient pas aux programmes gouvernementaux, pour quelque raison que ce soit. Selon ses observations, la Cour devrait ainsi ordonner au gouvernement de payer presque 389 millions de dollars en prestations plus les intérêts accumulés depuis 1985. Madame Gosselin sollicite ce redressement pour le compte de plus de 75 000 membres non désignés du groupe, dont aucun ne s'est présenté pour appuyer sa demande.

5 À mon avis, la preuve n'établit le bien-fondé d'aucun des moyens plaidés par M^me^ Gosselin à l'appui de sa demande. Je suis donc d'avis de rejeter le pourvoi.

II. Les faits et les décisions rendues

6 En 1984, devant le taux de chômage alarmant et sans cesse croissant observé chez les jeunes adultes, le législateur québécois a apporté d'importantes modifications à la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, créant un nouveau régime — le régime contesté en l'espèce. L'alinéa 29*a*) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, pris en application de la Loi, maintenait les prestations de base payables aux personnes de moins de 30 ans au tiers environ des prestations de base versées aux 30 ans et plus. Pour la première fois cependant, le nouveau régime permettait aux moins de 30 ans de

is not — but whether the Court ought to apply s. 7 despite this fact.

Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy". Similarly, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human . . . survival". Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: *B.(R.)*, *supra*; *G. (D.F.)*, *supra*.

Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral*

En l'espèce, la question n'est pas de savoir si l'administration de la justice est en jeu — de toute évidence elle ne l'est pas —, mais si, malgré ce fait, la Cour doit appliquer l'art. 7.

80 L'article 7 peut-il être invoqué pour protéger des droits ou intérêts n'ayant aucun rapport avec l'administration de la justice? Cette question n'a encore jamais été résolue. Dans l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 56, le juge en chef Dickson, s'exprimant en son nom et en celui du juge Lamer, a évoqué (sans toutefois trancher la question) la possibilité que le droit à la sécurité de la personne aille plus loin et « protège les intérêts primordiaux de l'autonomie personnelle, tel le droit à la vie privée ». De même, dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 1004, le juge en chef Dickson, s'exprimant au nom de la majorité, n'a pas répondu à la question de savoir si l'art. 7 pouvait être invoqué pour protéger les « droits économiques, fondamentaux à la [. . .] survie [de la personne] ». Dans certaines causes, même si les faits concernaient l'administration de la justice, la Cour a décrit les droits protégés par l'art. 7 sans les rattacher explicitement à l'administration de la justice : *B. (R.)* et *G. (D.F.)*, précités.

81 Même s'il était possible d'interpréter l'art. 7 comme englobant les droits économiques, un autre obstacle surgirait. L'article 7 précise qu'il ne peut être porté atteinte au droit de chacun à la vie, à la liberté et à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. En conséquence, jusqu'à maintenant, rien dans la jurisprudence ne tend à indiquer que l'art. 7 impose à l'État une obligation positive de garantir à chacun la vie, la liberté et la sécurité de sa personne. Au contraire, on a plutôt considéré que l'art. 7 restreint la capacité de l'État de porter atteinte à ces droits. Il n'y a pas d'atteinte de cette nature en l'espèce.

82 Il est possible qu'on juge un jour que l'art. 7 a pour effet de créer des obligations positives. Paraphrasant les paroles célèbres prononcées par lord Sankey dans *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136, on peut affirmer que la *Charte canadienne* est [TRADUCTION] « un arbre susceptible de croître et de se développer à

Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

83 I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

84 In view of my conclusions under s. 15(1) and s. 7 of the *Canadian Charter*, the issue of justification

l'intérieur de ses limites naturelles » : voir *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, p. 180, le juge McLachlin. Ce serait faire erreur que de considérer que le sens de l'art. 7 est figé ou que son contenu a été défini de façon exhaustive dans les arrêts antérieurs. À cet égard, il semble à propos de citer les motifs du juge LeBel dans *Blencoe*, précité, par. 188 :

> Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application.

La question n'est donc pas de savoir si l'on a déjà reconnu — ou si on reconnaîtra un jour — que l'art. 7 crée des droits positifs. Il s'agit plutôt de savoir si les circonstances de la présente affaire justifient une application nouvelle de l'art. 7, selon laquelle il imposerait à l'État l'obligation positive de garantir un niveau de vie adéquat.

J'estime que les circonstances ne justifient pas pareille conclusion. Avec égards pour l'opinion de ma collègue le juge Arbour, je n'estime pas que la preuve est suffisante en l'espèce pour étayer l'interprétation de l'art. 7 qu'elle propose. Je n'écarte pas la possibilité qu'on établisse, dans certaines circonstances particulières, l'existence d'une obligation positive de pourvoir au maintien de la vie, de la liberté et de la sécurité de la personne. Toutefois, tel n'est pas le cas en l'espèce. Le régime contesté comportait des dispositions prévoyant du « travail obligatoire » compensatoire et la preuve n'a pas établi l'existence d'un véritable fardeau. Le cadre factuel très ténu en l'espèce ne saurait étayer l'imposition à l'État d'une lourde obligation positive d'assurer la subsistance des citoyens.

Compte tenu de mes conclusions relatives au par. 15(1) et à l'art. 7 de la *Charte canadienne*, la

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2008 ONCA 538
Ontario Court of Appeal

Flora v. Ontario Health Insurance Plan

2008 CarswellOnt 3879, 2008 ONCA 538, [2008] O.J. No. 2627, 168 A.C.W.S. (3d) 227, 175 C.R.R. (2d) 19, 238 O.A.C. 319, 295 D.L.R. (4th) 309, 76 Admin. L.R. (4th) 132, 91 O.R. (3d) 412

ADOLFO A. FLORA (Appellant) and GENERAL MANAGER, ONTARIO HEALTH INSURANCE PLAN (Respondent)

R. Sharpe, E.A. Cronk, E.E. Gillese JJ.A.

Heard: January 21, 2008
Judgment: July 4, 2008
Docket: CA C47182

Proceedings: affirming *Flora v. Ontario Health Insurance Plan* (2007), 2007 CarswellOnt 103, *(*sub nom. *Flora v. Ontario (Health Insurance Plan, General Manager))* 278 D.L.R. (4th) 45, 219 O.A.C. 142, 83 O.R. (3d) 721, 56 Admin. L.R. (4th) 206 (Ont. Div. Ct.)

Counsel: Mark J. Freiman, John A. Dent for Appellant
Janet E. Minor, Matthew Horner for Respondent

Subject: Public

APPEAL by insured from judgment reported at *Flora v. Ontario Health Insurance Plan* (2007), 2007 CarswellOnt 103, *(*sub nom. *Flora v. Ontario (Health Insurance Plan, General Manager))* 278 D.L.R. (4th) 45, 219 O.A.C. 142, 83 O.R. (3d) 721, 56 Admin. L.R. (4th) 206 (Ont. Div. Ct.) dismissing insured's appeal from decision of Health Services Appeal and Review Board.

***E.A. Cronk J.A.*:**

I. Introduction

1 The appellant, Adolfo A. Flora, was diagnosed with liver cancer in 1999. After consulting several Ontario doctors, he was told that he was not a suitable candidate for a liver transplant and was given approximately six to eight months to live.

2 Mr. Flora explored his overseas treatment options. Eventually, at a cost of about $450,000, he underwent chemoembolization to contain the growth and decrease the size of his existing tumours and a living-related liver transplantation (LRLT), a procedure involving the transfer of part of a living donor's liver to the patient, at a hospital in London, England. Fortunately, these procedures saved Mr. Flora's life.

3 Mr. Flora applied to the Ontario Health Insurance Plan (OHIP) for reimbursement of his medical expenses. When his reimbursement request was rejected by the respondent, the General Manager of OHIP, Mr. Flora sought a review of OHIP's decision before the Health Services Appeal and Review Board. The majority of the Board upheld OHIP's denial of reimbursement on the basis that the treatment received by Mr. Flora in England was not an "insured service" within the meaning of the *Health Insurance Act*, R.S.O. 1990, c. H.6 (the Act) and s. 28.4(2) of R.R.O. 1990, Reg. 552 (the Regulation). Mr. Flora's subsequent appeal to the Divisional Court was dismissed.

> This limitation seeks to balance the overall objective of access to health care on the basis of medical need with the goal of ensuring that funding for out-of-country treatments is only provided to the extent that Ontarians would be entitled to receive funding within Ontario, if the treatment were available here.

89 The Board also recognized this regulatory purpose when it stressed in its reasons that the funding test under s. 28.4(2)(a) is "whether the treatment is generally accepted *in Ontario* as appropriate". [Emphasis in original.]

90 There is simply nothing in the Act or s. 28.4(2) of the Regulation to suggest that the funding criteria established by s. 28.4(2) are different in kind, or are to be applied any differently, where the appropriateness of the treatment in question is supported by international rather than local medical opinion, or where the nature of the treatment is potentially life-saving. To import such notions into the interpretation of s. 28.4(2) would defeat the equality of access to funded health care envisaged by the Act and the Regulation.

91 Thus, the interpretative approach urged by Mr. Flora ignores the Ontario-specific standard reflected in s. 28.4(2), as well as the documentary and oral evidence before the Board from Mr. Flora's own Ontario doctors regarding his eligibility for both types of liver transplants.

Conclusion Regarding Reasonableness

92 I end my analysis of the reasonableness of the Board's decision where I began. Under the formulation of the reasonableness standard articulated in *Dunsmuir*, deference is owed to the Board's decision if it falls within a range of acceptable outcomes that are defensible on the facts and the law and if the justification for the decision is sound, transparent and intelligible. I have no hesitation in concluding that the Board's decision satisfies these requirements. I turn next to Mr. Flora's *Charter* s. 7 claim.

(3) Charter Section 7 Claim

93 Before this court, Mr. Flora renews his claim that s. 28.4(2) of the Regulation offends s. 7 of the *Charter*. He argues that: (i) the denial of his OHIP Application deprived him of access to a life-saving medical treatment, thereby violating his s. 7 rights to life and security of the person; (ii) the state also deprived him of his s. 7 rights by amending, in 1992, a predecessor version of the Regulation that would have provided funding for his LRLT on the basis of medical necessity; (iii) in any event, s. 7 imposes a positive obligation on the state to provide life-saving medical treatments, thus obviating the need for a finding of state action amounting to deprivation; and (iv) finally, s. 28.4(2) does not comport with the principles of fundamental justice. For the reasons that follow, I conclude that Mr. Flora's *Charter* s. 7 claim fails.

94 In *R. v. Beare* (1987), [1988] 2 S.C.R. 387 (S.C.C.), at 401, the Supreme Court of Canada described the requirements for the invocation of s. 7 of the *Charter* in these terms:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to 'life, liberty and security of the person' and secondly, that that deprivation is contrary to the principles of fundamental justice.

See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) at para. 47; *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.) at para. 70; and *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791 (S.C.C.), *per* McLachlin C.J. and Major J. (Bastarache J. concurring) at para. 109.

95 The Divisional Court concluded that Mr. Flora had failed to demonstrate that the Regulation constituted a deprivation by the state of his rights to life or security of the person and that this deficiency was fatal to his *Charter* s. 7 claim. I agree.

96 In *Chaoulli*, *supra* the Supreme Court was concerned with a Quebec health care-related statute that limited access to private health services by removing the ability to contract for private health insurance in respect of those services covered

by provincial public insurance. Chief Justice McLachlin and Major J. held at para. 104: "The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."

97 Chief Justice McLachlin and Major J. also held that the potential denial of timely health care for a condition that is clinically significant to a patient's current or future health engages security of the person under s. 7 of the *Charter* (at paras. 111 and 112). Moreover, "[W]here lack of timely health care can result in death, s. 7 protection of life itself is engaged" (at para. 123). See also the reasons of Binnie and LeBel JJ. at para. 200 and Deschamps J. at paras. 38-40.

98 In *Chaoulli*, the pivotal consideration was the fact that the impugned prohibition on private health insurance "conspired" with excessive costs in Quebec's public health care system to force Quebeckers onto the wait lists that pervaded the public system. It was this connection between the statutory prohibition on private health insurance and the delays in the public system that anchored the *Chaoulli* holding that the wait lists constituted a deprivation of rights protected under s. 7. In other words, the statutory prohibition in issue was directly linked to the harm suffered by Quebeckers who were compelled by the prohibition to rely on the public health care system and to endure the consequences of significant wait lists.

99 A similar link between state action and delays in accessing health care grounds the Supreme Court of Canada's decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.). In that case, the Supreme Court concluded that the s. 7 right to security of the person for women was jeopardized by the mandatory therapeutic abortion committee system established by the *Criminal Code*, which forced women who sought abortions to suffer significant delays in treatment with attendant physical risk and psychological suffering. *Morgentaler* at p. 59 *per* Dickson C.J. and at pp. 105-6 *per* Beetz J., Estey J. concurring.

100 To similar effect is the Supreme Court's decision in *Rodriguez v. British Columbia (Attorney General)* (1993), 107 D.L.R. (4th) 342 (S.C.C.), which holds that governmental interference with a citizen's bodily integrity — such as a criminal law prohibition on assisted suicide — constitutes a deprivation of security of the person under s. 7.

101 These cases are clearly distinguishable from the case at bar. In contrast to the legislative provisions at issue in *Chaoulli*, *Morgentaler* and *Rodriguez*, s. 28.4(2) of the Regulation does not prohibit or impede anyone from seeking medical treatment. Section 28.4(2) neither prescribes nor limits the types of medical services available to Ontarians. Nor does it represent governmental interference with an existing right or other coercive state action. Quite the opposite. Section 28.4(2) provides a defined benefit for out-of-country medical treatment that is not otherwise available to Ontarians — the right to obtain public funding for certain specific out-of-country medical treatments. By not providing funding for *all* out-of-country medical treatments, it does not deprive an individual of the rights protected by s. 7 of the *Charter*.

102 This conclusion is supported by the recent decision of this court in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (Ont. C.A.). In that case, the claimants asserted a violation of s. 7 in the context of the Ontario government's failure to fund intensive behavioural intervention for autistic children over a certain age. Central to the court's rejection of the s. 7 claim in *Wynberg* was its conclusion that the impugned legislation did not create a mandatory requirement that school-age children attend public school; nor did it otherwise compel such attendance. As a result, the claimants were free to pursue intensive behavioural therapy in the private sector and their s. 7 rights were not violated. Similar defects apply here in respect of Mr. Flora's s. 7 claim.

Effect of Regulatory Amendment

103 I would also reject Mr. Flora's claim that the legislature's decision to amend the former version of the Regulation, so as to alter the test for OHIP funding for out-of-country medical services, constitutes a deprivation of rights within the meaning of s. 7.

104 It seems to me that the decision of this count in *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (Ont. C.A.) is a full answer to this claim. In *Ferrel*, Morden A.C.J.O., writing for the court, confirmed that a *Charter* violation cannot be grounded on a mere change in the law. He said (at p. 110): "If there is no constitutional obligation to enact [the legislation at issue] in the first place, I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before [the impugned legislation]." Subsequently, in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2002), 56 O.R. (3d) 505 (Ont. C.A.) at para. 94, this court reiterated this principle, stating: "[I]n the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values." See also *Baier v. Alberta*, [2007] 2 S.C.R. 673 (S.C.C.) at paras. 35-36. I therefore turn next to Mr. Flora's assertion that s. 7 imposes a positive obligation on the state to provide, and therefore to fund, life-saving medical treatments.

Claim of Positive State Obligation

105 The Supreme Court of Canada has expressly left open the question of whether a *positive* right to a minimum level of health care exists under s. 7. In *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.) at paras. 81-83, the court indicated that s. 7 may one day be interpreted to include positive obligations in special circumstances where, at a minimum, the evidentiary record discloses actual hardship.

106 But, to date, the protection afforded by s. 7 of the *Charter* has not been extended to cases — like this one — involving solely economic rights. As this court stated in *Wynberg*, *supra* at para. 220, s. 7 of the *Charter* has been interpreted "only as restricting the state's ability to *deprive* individuals of life, liberty or security of the person". [Emphasis in original.] See also *Melanson v. New Brunswick (Attorney General)* (2007), 280 D.L.R. (4th) 69 (N.B. C.A.).

107 Nor does *Chaoulli* support Mr. Flora's contention that s. 7 imposes positive obligations on the state. Consider again the unequivocal statement by McLachlin C.J. and Major J. at para. 104 of *Chaoulli*: "The *Charter* does not confer a freestanding constitutional right to health care." Moreover, as this court observed in *Wynberg* at para. 222, in *Chaoulli* the claimants did not seek an order requiring the government to fund their private health care or to spend more money on health care: "[O]n the contrary, they sought the right to spend their own money to obtain insurance to pay for private health care services." On the facts here, there was no law restricting Mr. Flora's ability to spend his own money to obtain a LRLT at a private hospital in England. Indeed, that is precisely what he chose to do.

108 In my view, on the current state of s. 7 constitutional jurisprudence, where — as here — the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7. On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.

109 In summary, I agree with the Divisional Court that Mr. Flora failed to establish a deprivation of his rights to life or security of the person under s. 7 of the *Charter*. Moreover, the existing jurisprudence does not permit me to interpret s. 7 as imposing a constitutional obligation on the respondent to fund out-of-country medical treatments beyond those that satisfy the test set out in s. 28.4(2) of the Regulation. In view of these conclusions, it is unnecessary to address Mr. Flora's remaining arguments regarding the conformity of s. 28.4(2) of the Regulation with the principles of fundamental justice.

VI. Disposition

110 Like the Board and the Divisional Court, I am sympathetic to the difficult circumstances and choices that confronted Mr. Flora when his liver cancer was detected. But as compelling as his situation undoubtedly was, the heart of this appeal concerns the reasonableness of the Board's decision that public funds were not available under the Act to finance Mr. Flora's medical treatment in England. For the reasons given, I see no basis on which to interfere with the Board's decision to affirm the denial of OHIP funding in this case.

111 I would dismiss the appeal.

112 The issues raised on this appeal were novel, at least to some extent. Certainly they had implications for the public funding of health care services in Ontario beyond the interests of the involved litigants. These factors tend to support a decision to award no costs of the appeal. However, the parties requested an opportunity to make costs submissions, depending on the disposition of this appeal. Accordingly, if they are unable to agree on costs, and costs are sought by the respondent, the respondent may deliver his brief written costs submissions to the Registrar of this court within fourteen days from the date of these reasons. Mr. Flora shall deliver his brief responding costs submissions to the Registrar within fourteen days thereafter.

***E.E. Gillese J.A.*:**

I agree.

***R. Sharpe J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 Throughout the balance of these reasons, I refer to the majority's decision as the decision of the Board.

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2014 ONCA 852
Ontario Court of Appeal

Tanudjaja v. Canada (Attorney General)

2014 CarswellOnt 16752, 2014 ONCA 852, [2014] O.J. No. 5689, 123 O.R. (3d) 161, 247 A.C.W.S. (3d) 558, 323 C.R.R. (2d) 71, 326 O.A.C. 257, 379 D.L.R. (4th) 467

Jennifer Tanudjaja, Janice Arsenault, Ansat Mahmood, Brian DuBourdieu, Centre for Equality Rights in Accommodation, Appellants and The Attorney General of Canada and the Attorney General of Ontario, Respondents

K. Feldman, G.R. Strathy, G. Pardu JJ.A.

Heard: May 26-27; May 29, 2014
Judgment: December 1, 2014
Docket: CA C57714

Proceedings: affirming *Tanudjaja v. Canada (Attorney General)* (2013), [2013] O.J. No. 4078, 116 O.R. (3d) 574, 2013 ONSC 5410, 2013 CarswellOnt 12551, 293 C.R.R. (2d) 272, Lederer J. (Ont. S.C.J.)

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Cheryl Milne, for Intervener, David Asper Centre for Constitutional Rights
Marie Chen, Jackie Esmonde, for Intervener, coalition of the Income Security and Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance
Vasuda Sinha, Rahool Agarwal, Lauren Posloski, for Intervener, Women's Legal Education and Action Fund
Molly Reynolds, Ryan Lax, for Intervener, coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights
Laurie Letheren, Renée Lang, for Intervener, coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario
Martha Jackman, Benjamin Ries, for Intervener, coalition of the Charter Committee on Poverty, Pivot Legal Society and Justice for Girls

Subject: Civil Practice and Procedure; Constitutional; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.ii Economic, commercial and proprietary rights

Constitutional law

claimants in a manner that does not comply with the *Charter*.

[Emphasis added]

25 In *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.), the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J. and Major J. said:

While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like *all laws*, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*.

[Emphasis added]

26 Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982*, which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" (emphasis in original).

27 In this case, unlike in *PHS Community Services Society* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts.

28 In *Chaoulli*, the Supreme Court found that the legislative prohibition against private insurance contained in the *Hospital Insurance Act*, R.S.Q. c. A-29, engaged the appellants' rights to security of the person and was arbitrary in that no link was established to tie the need for the prohibition to the goal of maintaining quality public health care. That kind of analysis, a comparison between the legislative means and purpose, is impossible in this case.

29 This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

30 There are several aspects of this application, however, that make it unsuitable for *Charter* scrutiny. Here the appellants assert that s. 7 confers a general freestanding right to adequate housing. This is a doubtful proposition in light of *Chaoulli*, where McLachlin C.J. and Major J. made the following unequivocal statement, at para. 104:

The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

31 Further, as this Court noted in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (Ont. C.A.), leave to appeal denied, (2007), [2006] S.C.C.A. No. 441 (S.C.C.), at para. 225:

[I]n *Gosselin, supra, the Supreme Court of Canada rejected an argument that s. 7 of the Charter requires the provision of a minimum level of social assistance adequate to meet basic needs.*

32 Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law

there is no basis to make that comparison.

33 Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

34 Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.

35 I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.

36 The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.

37 Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.). Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.

38 The appellants also argue that the motion judge ought to have refused to hear the respondents' motions to dismiss because the governments did not move to dismiss the application until two years after the application was issued on May 26, 2010, and after the appellants had compiled a voluminous record which was served on the respondents on November 22, 2012. Six months later the respondents advised the appellants that they had reviewed the record, sought instructions, and consulted each other and would respond with motions to strike. The motion judge found that it was not reasonable to require that the motion to strike be brought before the record was served, and that only then would the respondents have an appreciation of the case to meet. Given the size of the record and the significance of the issues raised, the motion judge did not consider that six months was so long as to justify refusal to hear the motions to strike. I see no reason to interfere with this discretionary decision.

39 I would add that although to issue of leave to amend was raised during argument, the appellants did not propose any specific amendment and I cannot conceive of any amendment that would cure the absence of a justiciable issue. None of the parties or interveners thought it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions. The appeal is therefore dismissed, without costs by agreement of the parties.

***G.R. Strathy J.A.*:**
I agree

***K. Feldman J.A.* (dissenting):**

Overview

40 I have had the benefit of reading the reasons of Pardu J.A., but I do not agree with her conclusion that the appeal

2015 CarswellOnt 9613
Supreme Court of Canada

Tanudjaja v. Canada (Attorney General)

2015 CarswellOnt 9613, 2015 CarswellOnt 9614

Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian DuBourdieu and Centre for Equality Rights in Accommodation v. Attorney General of Canada and Attorney General of Ontario

Abella J., Karakatsanis J., Côté J.

Judgment: June 22, 2015
Docket: 36283

Proceedings: Leave to appeal refused, 2014 CarswellOnt 16752, 247 A.C.W.S. (3d) 558, 379 D.L.R. (4th) 467, 326 O.A.C. 257, 123 O.R. (3d) 161, 2014 ONCA 852 (Ont. C.A.); Affirmed, 2013 CarswellOnt 12551, 236 A.C.W.S. (3d) 610, 293 C.R.R. (2d) 272, [2013] O.J. No. 4078, 116 O.R. (3d) 574, 2013 ONSC 5410 (Ont. S.C.J.)

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Constitutional

Headnote

Constitutional law

Per curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C57714, 2014 ONCA 852, dated December 1, 2014, is dismissed without costs.

V

2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee
Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.
Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial

2008 CarswellOnt 5432
Supreme Court of Canada

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 5432, 2008 CarswellOnt 5433, [2008] S.C.C.A. No. 337, 257 O.A.C. 400 (note), 390 N.R. 393 (note)

Jean Coutu Group (PJC) Inc. et al. v. Metcalfe & Mansfield Alternative Investments II Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule "A" to this application et al.

Charron J., Fish J., LeBel J.

Judgment: September 19, 2008
Docket: 32765

Proceedings: Leave to appeal refused, 2008 ONCA 587, 2008 CarswellOnt 4811 (Ont. C.A.); Affirmed, 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: None given

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency

Per Curiam:

1 The motion to expedite the applications for leave to appeal brought by the Respondents on August 27, 2008, is granted. The applications for leave to appeal and other relief sought from the judgment of the Court of Appeal for Ontario, Number C48969 (M36489), 2008 ONCA 587, dated August 18, 2008, are dismissed without costs.

End of Document

W

Robin Susan Eldridge, John Henry Warren and Linda Jane Warren *Appellants*

v.

The Attorney General of British Columbia and the Medical Services Commission *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of Newfoundland, the Women's Legal Education and Action Fund, the Disabled Women's Network Canada, the Charter Committee on Poverty Issues, the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities *Interveners*

INDEXED AS: ELDRIDGE *v.* BRITISH COLUMBIA (ATTORNEY GENERAL)

File No.: 24896.

1997: April 24; 1997: October 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Equality rights — Physical disability — Publicly funded medicare — Medicare not providing for sign language interpreters — Whether, and in what manner, the Charter applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care — Whether not providing for this service under Acts establishing medicare and hospitalization infringing s. 15(1) equality rights of disabled — If so, whether legislation saved under s. 1 — Appropriate remedy if Charter violation found — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Hospital Insurance Act, R.S.B.C. 1979,

Robin Susan Eldridge, John Henry Warren et Linda Jane Warren *Appelants*

c.

Le procureur général de la Colombie-Britannique et la Medical Services Commission *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Manitoba, le procureur général de Terre-Neuve, le Fonds d'action et d'éducation juridiques pour les femmes, le Réseau d'action des femmes handicapées du Canada, le Charter Committee on Poverty Issues, l'Association des sourds du Canada, la Société canadienne de l'ouïe et le Conseil des Canadiens avec déficiences *Intervenants*

RÉPERTORIÉ: ELDRIDGE *c.* COLOMBIE-BRITANNIQUE (PROCUREUR GÉNÉRAL)

N° du greffe: 24896.

1997: 24 avril; 1997: 9 octobre.

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

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

Droit constitutionnel — Charte des droits — Droits à l'égalité — Déficience physique — Soins de santé financés sur les deniers publics — Services d'interprétation gestuelle non couverts par le régime d'assurance-maladie — La Charte s'applique-t-elle à la décision de ne pas fournir des services d'interprétation gestuelle dans le cadre du régime public de soins de santé et, dans l'affirmative, de quelle manière s'y applique-t-elle? — Le fait de ne pas fournir de tels services en vertu de lois établissant des régimes de soins de santé et d'hospitalisation porte-t-il atteinte aux droits à l'égalité garantis par l'art. 15(1) aux personnes handicapées? — Dans l'affirmative, cette atteinte est-elle justifiée con-

gram. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

matière linguistique. De plus, les intimés n'ont produit aucun élément de preuve sur le champ d'application éventuel ou le coût d'un programme d'interprétation médicale pour les entendants. Il est possible que la nature et l'étendue des mesures d'accommodement raisonnables requises pour les entendants en vertu de l'article premier diffèrent de celles requises dans le cas des personnes atteintes de surdité. Par conséquent, toute action relative à la prestation d'un tel programme, qu'elle soit fondée sur l'origine nationale ou la langue en tant que motif analogue, serait examinée selon des paramètres constitutionnels nettement différents de ceux applicables à une action fondée sur la déficience.

90 Further, it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. As I have discussed, it is extremely difficult for many deaf persons to acquire a high level of proficiency in oral languages, whether in spoken or written form. Moreover, it is apparent that the deaf have particular difficulties in obtaining the service of persons in the community who understand sign language. There is no evidentiary basis from which to assess whether non-official language speakers stand in a similar position. So, without wishing to minimize the difficulties faced by hearing persons whose native tongues are neither English nor French, it is by no means clear that the communications barriers they face are analogous to those encountered by deaf persons. As a result, the success of a potential s. 15(1) claim by members of the latter group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

En outre, il est évident que les personnes atteintes de surdité sont dans une situation particulière en ce qui a trait à leur capacité de communiquer avec la population en général. Comme je l'ai dit précédemment, il est extrêmement difficile pour bon nombre de personnes atteintes de surdité de bien maîtriser les langages basés sur l'expression orale, sous leur forme parlée ou écrite. De plus, il est évident que ces personnes éprouvent des difficultés particulières à obtenir les services de concitoyens qui connaissent le langage gestuel. Il n'y a aucune preuve permettant d'apprécier si les personnes qui ne parlent pas l'une ou l'autre des langues officielles sont dans une situation analogue. Aussi, sans vouloir minimiser les difficultés que rencontrent le groupe des entendants dont la langue maternelle n'est ni l'anglais ni le français, il n'est absolument pas évident que les obstacles à la communication qu'ils ont à surmonter sont analogues à ceux qui se dressent devant les personnes atteintes de surdité. En conséquence, il est impossible de prédire quel succès auraient les membres de ce groupe s'ils présentaient une action fondée sur le par. 15(1). Par conséquent, la possibilité qu'une telle action puisse être présentée ne saurait justifier l'atteinte aux droits constitutionnels des personnes atteintes de surdité.

91 The respondents also contend that recognition of the appellants' claim will have a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accom-

Les intimés prétendent également que les effets de la reconnaissance de la prétention des appelants se répercuteront dans l'ensemble du domaine des soins de santé, forçant les gouvernements à dépen-

modating the needs of myriad disadvantaged persons. "Virtually everyone in the health care system who is denied a service", they submit, "will either be medically disadvantaged or could argue that a medical disadvantage will arise from the lack of service." Similarly, in his concurring opinion in the Court of Appeal, Lambert J.A. observed that many of the medical services and products required by the disabled are not publicly funded. In these circumstances, he asserted, governments must have the freedom to allocate scarce health care dollars among various disadvantaged groups.

ser de précieux crédits affectés à la santé pour satisfaire aux besoins d'une myriade de personnes défavorisées. [TRADUCTION] «Pratiquement tout un chacun qui se voit refuser un service dans le cadre du régime des soins de santé», d'affirmer les intimés, «sera défavorisé sur le plan médical ou pourrait prétendre qu'un tel désavantage résultera de l'absence de service.» De même, le juge Lambert, dans son opinion concordante en Cour d'appel, a souligné que bien des services et produits médicaux dont les personnes handicapées ont besoin ne sont pas payés sur les deniers publics. Dans ces circonstances, a-t-il affirmé, les gouvernements doivent être libres de répartir les maigres ressources du système de santé entre les divers groupes défavorisés.

These arguments miss the mark. If effective communication is integrally connected with the provision of health care — a point that Lambert J.A. accepted — then the fact that there are number of medical services that benefit disabled persons that are not covered by medicare is immaterial. The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.

92 Ces arguments manquent la cible. Si des communications efficaces sont une partie intégrante de la prestation des soins de santé — ce qu'a accepté le juge Lambert — alors le fait que bon nombre de services médicaux dont bénéficient les personnes handicapées ne soient pas couverts par l'assurance-maladie n'a aucune importance. Les appelants ne demandent pas au gouvernement de leur fournir un service ou produit distinct, telles des prothèses auditives, qui aidera à atténuer leur désavantage général. Ils ne revendiquent pas un avantage que le gouvernement, en exerçant son pouvoir discrétionnaire d'affecter des ressources pour lutter contre divers problèmes sociaux, a choisi de ne pas fournir. Au contraire, ils ne réclament que l'égalité d'accès à des services qui sont disponibles à tous. Les intimés n'ont présenté aucune preuve que ce type d'accommodement, s'il était étendu à d'autres services gouvernementaux, grèverait de manière excessive le budget de l'État. À mon avis, rejeter la prétention des appelants pour des motifs aussi conjecturaux reviendrait à dépouiller le par. 15(1) de sa promesse d'égalité et à repousser à une date désespérément éloignée la réalisation de l'objectif auquel aspirent les personnes atteintes de surdité, savoir une société sans obstacles.

Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our

93 Sous cet éclairage, il est impossible d'affirmer que la décision du gouvernement de ne pas financer l'interprétation gestuelle «établit [. . .] un équilibre raisonnable entre les revendications sociales

society must address"; see *McKinney*, *supra*, p. 314. It should be recalled that the Ministry of Health decided not to fund the interpretation program even in part. Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected. In this sense, the present case is similar to *Tétreault-Gadoury*, *supra*, where the Court found that the denial of unemployment insurance benefits to persons over 65 violated s. 15(1) and could not be saved under s. 1 of the *Charter*. Writing for the Court, I found that one of the reasons that this denial failed the minimal impairment test was that persons over 65 were not entitled to any benefits. "Even allowing the government a healthy measure of flexibility in legislating in this area", I stated, at p. 47, "the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives set forth above. . . ." That being said, I do not wish to be understood as intimating that the alternative measures I have adverted to would survive s. 1 scrutiny. I refer to them solely for the purpose of demonstrating that the government did not attempt to institute a scheme that would constitute a lesser limitation on deaf persons' rights.

concurrentes auxquelles doit s'attaquer notre société»; voir *McKinney*, précité, p. 314. Il ne faut pas oublier que le ministère de la Santé a décidé de ne pas même financer partiellement le programme d'interprétation. D'autres solutions telles que le financement partiel ou provisoire du programme offert par le Western Institute for the Deaf and Hard of Hearing, ou la mise en place d'un régime obligeant les usagers qui en ont les moyens à payer tout ou partie du coût des interprètes n'ont pas été examinées ou, si elles l'ont été, ont été rejetées. En ce sens, la présente espèce est analogue à l'affaire *Tétreault-Gadoury*, précitée, où la Cour a décidé que le refus des prestations d'assurance-chômage aux personnes de plus de 65 ans portait atteinte au par. 15(1) et n'était pas justifié conformément à l'article premier de la *Charte*. Au nom de la Cour, j'ai conclu qu'une des raisons pour lesquelles ce refus ne satisfaisait pas au critère de l'atteinte minimale était que les personnes de plus de 65 ans n'avaient droit à aucune prestation. «Tout en reconnaissant au gouvernement la possibilité de jouir d'une large souplesse pour légiférer dans ce domaine», ai-je dit, à la p. 47, «je suis d'avis qu'interdire complètement l'accès aux prestations d'assurance-chômage ne constitue pas une méthode acceptable pour atteindre l'un quelconque des objectifs énoncés précédemment. . .» Cela dit, je ne veux pas que mes propos soient interprétés comme une indication que les autres solutions dont j'ai fait état résisteraient à un examen fondé sur l'article premier. Je n'en fais mention que pour montrer que le gouvernement n'a pas essayé d'instaurer un régime qui constituerait une restriction moins grave des droits des personnes atteintes de surdité.

94 In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessa-

Bref, je suis d'avis que le fait de ne pas financer l'interprétation gestuelle n'est pas une «atteinte minimale» au droit des personnes atteintes de surdité à l'égalité de bénéfice de la loi qui leur est garanti par le par. 15(1) indépendamment de toute discrimination fondée sur leur déficience physique. La preuve établit clairement que, en tant que groupe, les personnes atteintes de surdité reçoivent des services médicaux inférieurs à ceux reçus par les entendants. Comme la santé est un aspect central de la qualité de vie de tous les citoyens, la

rily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

prestation de services médicaux de qualité inférieure aux personnes atteintes de surdité réduit nécessairement leur qualité de vie globale. Le gouvernement n'a tout simplement pas démontré que cet état de choses défavorable doit être toléré afin de réaliser l'objectif de limitation des dépenses dans le domaine de la santé. Autrement dit, le gouvernement n'a fait aucun «accommodement raisonnable» pour tenir compte de la déficience des appelants. Pour reprendre la terminologie de la jurisprudence de notre Cour en matière de droits de la personne, il n'a pas pris, à l'égard de leurs besoins, des mesures d'accommodement au point d'en subir des «contraintes excessives»; voir *Simpsons-Sears*, et *Central Alberta Dairy Pool*, précités.

Remedy

I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.

La réparation

95 J'ai conclu que, dans les cas où la présence d'interprètes gestuels est nécessaire à l'efficacité des communications dans la prestation des services médicaux, l'omission de fournir de tels interprètes constitue une violation du par. 15(1) de la *Charte* et n'est pas une limite raisonnable au sens de l'article premier. Aux termes du par. 24(1) de la *Charte*, toute personne victime de violation ou de négation des droits qui lui sont garantis par la *Charte* peut obtenir «la réparation que le tribunal estime convenable et juste eu égard aux circonstances». Dans le présent cas, la réparation convenable et juste consiste à déclarer que cette omission est inconstitutionnelle et à ordonner au gouvernement de la Colombie-Britannique d'appliquer la *Medical and Health Care Services Act* (maintenant la *Medicare Protection Act*) et l'*Hospital Insurance Act* d'une manière compatible avec les exigences du par. 15(1), telles que je les ai exposées.

A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this

96 Le jugement déclaratoire, par opposition à l'injonction, est la réparation convenable en l'espèce parce que le gouvernement dispose d'une myriade de solutions susceptibles de remédier à l'inconstitutionnalité du régime actuel. Il n'appartient pas à notre Cour de lui dicter le moyen à prendre. Même s'il faut supposer que le gouvernement agira rapidement afin de corriger l'inconstitutionnalité du régime actuel et de se conformer à la directive de

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Allan Granovsky *Appellant*

v.

Minister of Employment and Immigration *Respondent*

and

Council of Canadians with Disabilities *Intervener*

INDEXED AS: GRANOVSKY *v.* CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

Neutral citation: 2000 SCC 28.

File No.: 26615.

1999: November 10; 2000: May 18.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Disabled persons — Canada Pension Plan disability pension — Plan providing for accommodation with respect to periods of minimum contribution for permanently disabled persons but not for temporarily disabled persons — Whether Plan infringing right to equality — Canadian Charter of Rights and Freedoms, s. 15(1) — Canada Pension Plan, R.S.C., 1985, c. C-8, s. 44.

The appellant claimed to have suffered an intermittent and degenerative back injury following a work-related accident in 1980. He was assessed to be temporarily totally disabled at that time. Prior to his accident, he had made Canada Pension Plan (CPP) contributions in six of the ten previous years. The appellant was profitably employed from time to time following his accident but maintained that his back condition continued to deteriorate and that the disability became permanent in 1993, at which time he applied for a CPP disability pension. His application was refused by the Minister of Employment and Immigration and refused again by a review tribunal in part because he had only made a CPP contribution in one year of the relevant CPP 10-year contribution period prior to the date of application and thus had what was considered to be an insufficiently recent connection to the work force. He could not bring himself within the

Allan Granovsky *Appelant*

c.

Ministre de l'Emploi et de l'Immigration *Intimé*

et

Conseil des Canadiens avec déficiences *Intervenant*

RÉPERTORIÉ: GRANOVSKY *c.* CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

Référence neutre: 2000 CSC 28.

N° du greffe: 26615.

1999: 10 novembre; 2000: 18 mai.

Présents: Les juges L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Déficience — Pension d'invalidité du Régime de pensions du Canada — Accommodement relatif aux périodes de cotisation minimale prévu par le Régime dans les cas de déficience permanente mais non dans les cas de déficience temporaire — Le Régime porte-t-il atteinte au droit à l'égalité? — Charte canadienne des droits et libertés, art. 15(1) — Régime de pensions du Canada, L.R.C. (1985), ch. C-8, art. 44.

L'appelant a affirmé qu'il souffre de façon intermittente d'une blessure dégénérative au dos depuis qu'il a eu un accident du travail en 1980. À l'époque, il a été déclaré atteint d'une invalidité totale temporaire. Il avait cotisé au Régime de pensions du Canada (RPC) pendant six des dix années ayant précédé son accident. L'appelant a occupé certains emplois rémunérateurs après avoir été victime de son accident, mais il a maintenu que l'état de son dos a continué de se détériorer et que son invalidité est devenue permanente en 1993, année pendant laquelle il a présenté une demande de pension d'invalidité du RPC. Le ministre de l'Emploi et de l'Immigration et ensuite un tribunal de révision ont refusé la demande de l'appelant, en partie parce qu'il n'avait cotisé au RPC que pendant une seule année de la période cotisable de 10 ans pertinente ayant précédé sa demande, de sorte qu'il n'avait pas ce qui était considéré

New Shorter Oxford English Dictionary on Historical Principles, vol. 1. Oxford: Clarendon Press, 1993, "immutable".

Pothier, Dianne. "Miles to Go: Some Personal Reflections on the Social Construction of Disability" (1992), 14 *Dalhousie L.J.* 526.

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Nations Unies. *Décennie des Nations Unies pour les personnes handicapées, 1983-1992: Programme d'action mondial concernant les personnes handicapées.* New York: Nations Unies, 1983.

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Pothier, Dianne. «Miles to Go: Some Personal Reflections on the Social Construction of Disability» (1992), 14 *Dalhousie L.J.* 526.

Trudeau, Pierre Elliott. *Trudeau: l'essentiel de sa pensée politique*. Avec la collaboration de Ron Graham. Montréal: Le Jour, 1998.

APPEAL from a judgment of the Federal Court of Appeal, [1998] 3 F.C. 175, 158 D.L.R. (4th) 411, 225 N.R. 2, 36 C.C.E.L. (2d) 155, 53 C.R.R. (2d) 105, [1998] F.C.J. No. 311 (QL), dismissing an appeal from the Pension Appeals Board. Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1998] 3 C.F. 175, 158 D.L.R. (4th) 411, 225 N.R. 2, 36 C.C.E.L. (2d) 155, 53 C.R.R. (2d) 105, [1998] A.C.F. nº 311 (QL), qui a rejeté un appel de la Commission d'appel des pensions. Pourvoi rejeté.

Bryan P. Schwartz and *Ronald Schmalcel*, for the appellant.

Bryan P. Schwartz et *Ronald Schmalcel*, pour l'appelant.

Edward R. Sojonky, *Q.C.*, and *Catharine Moore*, for the respondent.

Edward R. Sojonky, *c.r.*, et *Catharine Moore*, pour l'intimé.

John F. Rook, *Q.C.*, and *Mark A. Gelowitz*, for the intervener.

John F. Rook, *c.r.*, et *Mark A. Gelowitz*, pour l'intervenant.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

BINNIE J. — On May 27, 1980, at the age of 32, the appellant injured his back at work. Thirteen years later, having been employed irregularly at various jobs in the interim, he applied for a permanent disability pension under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 ("CPP"). The Minister refused the application because over the relevant 10-year period prior to the application, the appellant had failed to make the required CPP contributions in any year except 1988. The appellant argues that it was his disability that prevented him from making all of the required CPP contributions

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LE JUGE BINNIE — Le 27 mai 1980, à l'âge de 32 ans, l'appelant s'est blessé au dos dans l'exercice de ses fonctions. Treize ans plus tard, après avoir occupé différents emplois de façon sporadique, il a présenté une demande de pension d'invalidité permanente en application du *Régime de pensions du Canada*, L.R.C. (1985), ch. C-8 («RPC»). Le Ministre a refusé la demande, car pendant la période pertinente de 10 ans l'ayant précédée, l'appelant n'avait versé les cotisations requises au RPC qu'en 1988. L'appelant fait valoir que c'est l'invalidité, ou déficience, qui l'a empê-

in the relevant 1981-92 contribution period, and that the failure of the CPP to take his disability into account in considering his lack of contribution constitutes discrimination contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

ché de verser au RPC toutes les cotisations requises au cours de la période cotisable pertinente de 1981 à 1992, et que l'omission du RPC de tenir compte de cette déficience constitue de la discrimination au sens du par. 15(1) de la *Charte canadienne des droits et libertés*.

2 The appellant thus raises issues of considerable importance to persons with disabilities and to governments that undertake to design and implement social benefits legislation. The CPP is a self-funded contributory plan. In what circumstances can the *Charter* alleviate against the contribution requirements imposed by Parliament? CPP *retirement* benefits are universal but *disability* benefits are conditional. They are designed to assist persons with disabilities who were recently in the work force by replacing employment income with a disability pension. The appellant does not have any significant recent attachment to the work force; thus he does not have *recent* employment income for which a CPP disability pension *can* be a substitute. Nevertheless, if the time horizon is broadened, he can point to the fact that in the 27-year period between his entry into the work force in 1967 and his application for a disability pension in 1993 he made CPP contributions in each of 10 years, mostly prior to 1980. He should not, he says, be "branded a non-contributor".

L'appelant soulève donc des questions d'une importance considérable pour les personnes ayant une déficience et pour les gouvernements qui entreprennent de concevoir et de mettre en œuvre des mesures législatives en matière d'avantages sociaux. Le RPC est un régime contributif autofinancé. Dans quels cas la *Charte* peut-elle atténuer les exigences en matière de cotisation imposées par le législateur? Les prestations de *retraite* du RPC sont universelles, mais les prestations d'*invalidité* sont conditionnelles. Ces dernières visent à aider les personnes qui ont une déficience et qui étaient récemment sur le marché du travail en remplaçant leur revenu d'emploi par une pension d'invalidité. L'appelant n'a aucun lien significatif récent avec le marché du travail de sorte qu'il ne dispose d'aucun revenu d'emploi *récent susceptible* d'être remplacé par une pension d'invalidité du RPC. Néanmoins, si on remonte plus loin, il peut invoquer le fait qu'au cours de la période de 27 années qui s'est écoulée entre son entrée sur le marché du travail en 1967 et sa demande de pension d'invalidité en 1993, il a cotisé au RPC pendant 10 ans en tout, surtout avant 1980. Il dit qu'il ne devrait pas être [TRADUCTION] «étiqueté comme non-cotisant».

3 The appellant admits that Parliament may, without *Charter* infringement, create a particular type of benefit (a contributory plan) targeted at a particular group of individuals (those recently in the work force) who are disadvantaged with a particular type of disability (severe rather than superficial, permanent rather than temporary), but that Parliament drew the line in the wrong place when it insisted on the same level of contributions from temporarily disabled workers as it does from able-bodied workers. In my view, for the reasons which follow, the CPP as designed and as applied to the appellant does not violate his equality rights. The impugned feature of the CPP disability pension

L'appelant admet que le législateur peut, sans contrevenir à la *Charte*, créer une forme particulière d'avantage (un régime contributif) destinée à un groupe précis de personnes (celles qui étaient récemment sur le marché du travail) qui sont défavorisées en raison d'un type donné de déficience (grave plutôt que superficielle, permanente plutôt que temporaire), mais il prétend que le législateur a tracé la ligne au mauvais endroit en exigeant que les travailleurs ayant une déficience temporaire cotisent autant que les travailleurs physiquement aptes. Pour les motifs qui suivent, je suis d'avis que le RPC, tel qu'il est conçu et tel qu'il s'applique à l'appelant, ne porte pas atteinte à ses

S.C.C. File No. 37562

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

JENNIFER HOLLEY

APPLICANT

-and-

NORTEL NETWORKS CORPORATION ET AL.

RESPONDENTS

BOOK OF AUTHORITIES OF THE MONITOR AND CANADIAN DEBTORS

(Pursuant to Rule 27 of the
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