Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

APPLICANT'S BOOK OF AUTHORITIES
(VOLUME I of II)

(in Response to Respondents' Motion to Strike Notice of Application)

Aniz Alani
[redacted]

Applicant

On his own behalf

Department of Justice
Regional Director General's Office
900 – 840 Howe Street
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Solicitor for the Respondent

Jan Brongers and Oliver Pulleyblank
Counsel

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J. Yvon Arseneau *Appellant*;

and

Her Majesty The Queen *Respondent.*

1978: October 13; 1979: March 20.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law — Corrupt practices — Corruption — Bribery — Giving or offering corruptly money — Person bribed, a member of a legislature — Person bribed, also Minister of Tourism — Criminal Code, R.S.C. 1970, c. C-34.

Appellant was a lawyer practising in Campbellton, New Brunswick where he had been in partnership with Charles Van Horne until the latter was elected to the provincial legislature. Van Horne later became Provincial Minister of Tourism and appellant was retained by that department to negotiate for the purchase of some land for the establishment of a provincial park. While so retained appellant indicated to a friend interested in building a motel that he could obtain favours for him from Van Horne but that it would cost $10,000, including legal fees, to obtain Van Horne's approval of having the motel located in the provincial park. This proposal was accepted and over a period of months large sums of money were transferred through the appellant to Van Horne. Appellant was convicted before a judge and jury upon a count that he"... did give or offer corruptly to a person then a member of the legislature of the Province of New Brunswick, to wit: J. Charles Van Horne in his official capacity as member of the legislature and Minister of Tourism ... in relation to the proposed construction of or leasing or purchasing of land for or operation of a motel in or near Sugar Loaf Park in which the Government of New Brunswick had some interest ... contrary to Section 108(1)(*b*) of the Criminal Code of Canada and amendments thereto". The Appeal Division unanimously dismissed the subsequent appeal.

Held (Laskin C.J. and Spence J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ.: There could be little doubt that the appellant offered money to Van Horne, then a member of the legislature of New Brunswick, in respect of acts to

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be done by him in furtherance of plans to construct a motel in the provincial park. The charge as amended alleged that the money was corruptly paid to a member of the legislature who had also become a minister of the Crown and who therefore acted in both capacities. While it was contended that Van Horne was acting only in his "official capacity" as Minister of Tourism and that it was not an offence under s. 108 to pay money to a member of the legislature for something done by him in his official capacity as a minister, such contention would involve the proposition that a member of the legislature, who is also a minister, is to be taken *not* to be acting in his capacity as a member in respect of his acts and decisions in his department. It was however as a member of the legislature that Van Horne was appointed Minister of Tourism and in light of this and the accountability of ministers to, and involvement in, the legislature, the ministerial and legislative functions should not be severed so as to make it an offence under s. 108 to corruptly pay money to him as a member and no offence to pay money to him as a minister.

Appellant also contended that if the charge laid disclosed any offence it was an offence under s. 110(1)(*d*)(i) of which he had already been acquitted. The distinction between the offences was however that the conviction under s. 108(1)(*b*) related to bribery and the count under s. 110(1)(*d*)(i) to "influence peddling". In the circumstances there was no overlapping between the sections or counts so as to make an acquittal under s. 110 inconsistent with the conviction under s. 108. Parliament regarded the s. 108 offence as the more serious and it would be unlikely that Parliament intended that that section was to have no application to bribery of a member of the legislature *qua* minister of the Crown.

Per Laskin C.J. and Spence J. *dissenting*: It is not an offence under s. 108(1)(*b*) to pay a minister of the Crown for use of his influence. The subsection is aimed only at transactions with holders of judicial office, members of Parliament and members of provincial legislatures. Section 110 is concerned with bribery of a minister. The whole intent of the prosecution was that Van Horne, a minister, had been bribed. This was not a case where the member Van Horne was given money to influence the minister Van Horne. The defect was fatal in that the accused was charged with a non-existent offence and the indictment should be quashed. In the

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circumstances it was not necessary to consider faults in the trial itself.

[*Regina v. Bruneau* (1963), 42 C.R. 93; *Martineau v. The Queen*, [1966) S.C.R. 103, 48 C.R. 209 referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, dismissing an appeal from a judgment of a judge and a jury convicting appellant of an undictable offence under s. 108(1)(*b*) of the *Code*. Appeal dismissed, Laskin C.J. and Spence J. dissenting.

Patrick A. A. Ryan, Q.C., and *Jean-Claude Angers, Q.C.*, for the appellant.

Eugene Westhaver, J.-Paul Thériault, Q.C., and *Gabriel Lapointe, Q.C.*, for the respondent.

The judgment of Laskin C.J. and Spence J. was delivered by

SPENCE J. (*dissenting*)—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on February 18, 1977. By that judgment, the said Appeal Division dismissed an appeal by the present appellant from his conviction after a trial by a judge and jury on March 28, 1975, upon a single count.

The accused, the present appellant, had been charged originally under an indictment dated November 13, 1974, laid by the then Attorney General of New Brunswick John B.M. Baxter under the provisions of s. 507(1) of the *Criminal Code*. Mr. Baxter, the then Attorney General of the Province, had not appeared in court to present the indictment and the present appellant had succeeded in an application to have the indictment quashed. Another indictment, dated December 14, 1974, was laid by the Attorney General of the Province who had succeeded Mr. Baxter, a Mr. Paul Creaghan. Mr. Creaghan appeared in court personally and presented the indictment.

The indictment first laid by Mr. Baxter and the second indictment preferred personally by Mr. Creaghan were in exactly the same form. I quote the Creaghan indictment in full:

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CANADA
PROVINCE OF NEW BRUNSWICK

IN THE COUNTY COURT OF NEW BRUNSWICK

BETWEEN:

HER MAJESTY THE QUEEN
and
J. YVON ARSENEAU

J. YVON ARSENEAU stands charged that he:

(1) between June 15th, A.D. 1971 inclusively to July 31st, A.D. 1972 inclusively, at Fredericton, County of York, Province of New Brunswick; Campbellton, County of Restigouche, Province of New Brunswick; and elsewhere in the said Province; did unlawfully conspire together and one with the other with CAMILLE DESCHENES, JEAN-CLAUDE LE BLANC and SUGARLOAF PARK MOTELS LIMITED and others, to commit an indictable offence to wit: to give or to offer corruptly to a person, then a member of the legislature of the said Province of New Brunswick, to wit: J. CHARLES VAN HORNE, money or a valuable consideration, in respect of anything done or omitted or to be done or omitted by the said CHARLES VAN HORNE in his official capacity, for the said J. YVON ARSENEAU or CAMILLE DESCHENES or JEAN-CLAUDE LE BLANC or SUGARLOAF PARK MOTELS LIMITED, in violation of Section 108(1)(*b*) of the Criminal Code of Canada and amendments thereto, contrary to Section 423(1)(*d*) of the said Criminal Code.

(2) between June 15th, A.D. 1971 inclusively to July 31st, A.D. 1972 inclusively, at Campbellton, County of Restigouche, Province of New Brunswick; and elsewhere in the said Province; did give or offer corruptly to a person then a member of the legislature of the Province of New Brunswick, to wit: J. CHARLES VAN HORNE, money or a valuable consideration, in respect of anything done or omitted or to be done or omitted by the said J. CHARLES VAN HORNE in his official capacity, for the said J. YVON ARSENEAU or CAMILLE DESCHENES or JEAN CLAUDE LE BLANC or SUGARLOAF PARK MOTELS LIMITED, contrary to Section 108(1)(*b*) of the Criminal Code of Canada and amendments thereto.

(3) between June 15th, A.D. 1971 inclusively and July 31st, A.D. 1972 inclusively, at Campbellton, County of Restigouche, Province of New Brunswick; and elsewhere in the said Province; having or pretending to have influence with a minister of the government of the said province, to wit: J. CHARLES VAN HORNE, or an

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official of the Department of Tourism of the Province of New Brunswick, did demand, accept or offer or agree to accept for himself or another person a reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act of omission in connection with the transaction of business with or any matter of business relating to the government of the Province of New Brunswick contrary to Section 110(1)(*d*)(i) related to subparagraph (*a*) (iii) of the Criminal Code of Canada and amendments thereto.

DATED this 14th day of December, A.D. 1974, in the Province of New Brunswick.

"Paul S. Creaghan"

PAUL S. CREAGHAN, ATTORNEY GENERAL for the province of New Brunswick

The foregoing indictment is preferred by the Attorney General for the Province of New Brunswick, in accordance with Section 507(3)(*a*) of the Criminal Code of Canada and amendments thereto.

"Paul S. Creaghan"

PAUL S. CREAGHAN, ATTORNEY GENERAL for the Province of New Brunswick

. . .

When the trial finally proceeded, the jury found the accused, the present appellant, not guilty on counts Nos. 1 and 3 aforesaid but guilty on count No. 2, and these reasons are concerned alone with count No. 2.

Amongst the multitude of proceedings taken in reference to the matters involved in this appeal was a demand for particulars delivered to the Crown on behalf of the appellant. That demand required the giving of literally dozens of particulars. One of the demands was known as Question 14 in reference to count No. 2. A search of the papers has failed to reveal the actual words of the question but the answer is set out plainly. In volume 1 at p. 83 of the Appeal Case, the statement made by Crown counsel at the trial is recited as follows:

C) Question number 14 is answered as follows: "as Member of the Legislature and Minister of Tourism for the Province of New Brunswick". These particulars should be inserted in the middle of line

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9 of Count Number Two, after the words "official capacity".

At another point in the proceedings at the commencement of the trial, the learned trial judge stated:

Having so concluded, I am satisfied that both parties are in the same position and that the Indictment contains in its three counts sufficient ingredients to constitute the three offences for which the accused is charged, namely, the offence of conspiracy, the offence of bribery and the offence of influence peddling. I do not see at this time where it would be fitting for me to order further particulars to be included in any of these three counts of the Indictment.

Again, the learned trial judge stated:

I ought to direct a plea at this time. I would ask the Clerk to ask the accused on each one of the counts for a plea. I believe that it would be sufficient to specify count No. 1 as amended, Mr. Ryan would you agree to that?

to which Mr. Ryan assented and the court continued:

I think that the counts have been read on numerous occasions here and the accused is well aware of what they are as amended. The copies of the amendment have been filed and there is no confusion there, is there Mr. Ryan?

Mr. Ryan agreed.

(The underlining is my own.)

The clerk said:

With regard to count No. 2, how do you plead guilty or not guilty?

Mr. Ryan, on behalf of the appellant, replied:

The accused enters no plea, Your Honour.

THE COURT: I again direct the clerk to enter on Count No. 2 a plea of not guilty.

It is to be noted that on this count the count was not read to the accused. On a previous occasion, much earlier in the trial, the three counts had been read and count No. 2 at that time was in the exact form I have quoted at the commencement of these reasons. It is, however, quite apparent from what I have quoted that counsel for the accused was considering a count with the words added from the

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answer to Question 14 in the demand for particulars, i.e., with the words "as member of the Legislature and Minister of Tourism for the Province of New Brunswick" added after the words "J. Charles Van Horne, in his official capacity". This is in accord with the provisions of s. 516 (3)(*c*) of the *Criminal Code*.

Eventually, the trial proper commenced. The jury was chosen and the clerk of the court, in the usual course, required the members of the jury to look at the accused and listen to the counts of the indictment which were presented against him, then read those counts and he read count No. 2 in French in the following words:

> 2) entre le 15 juin A.D., 1971, inclusivement et le 31 juillet A.D., 1972, inclusivement, à Campbellton, comté de Restigouche, province du Nouveau-Brunswick; et ailleurs dans ladite Province; donné ou offert par corruption à une personne, alors membre de la Législature de la province du Nouveau-Brunswick, à savoir: J. Charles Van Horne, de l'argent ou une contrepartie valable à l'égard d'une chose que ledit J. Charles Van Horne, en sa qualité officielle, comme membre de la Législature et ministre du Tourisme de la province du Nouveau-Brunswick, a accomplie ou omise ou à être accomplie ou à être omise pour ledit J. Yvon Arseneau ou Camille Deschenes ou Jean-Claude Leblanc ou Sugarloaf Park Motels Limited, au sujet de la construction ou de la location ou de l'achat de terrains ou de l'exploitation projetés d'un motel par Camille Deschenes ou Sugarloaf Park Motel Limited dans ou près de Sugarloaf Park dans lequel le gouvernement de la province du Nouveau-Brunswick avait un intérêt contrairement à l'article 108(1)(*b*) du code criminel et ses amendements.

(The underlining is my own.)

Amongst the jury chosen to try the case was one Yvon Jean. It would appear that Mr. Jean was elected foreman of the jury and he announced the verdict of the jury in the court. A copy of the indictment in French had been furnished to the jurors and that copy may be perused in the papers filed upon this appeal. Count No. 2 in that French form of the indictment is in exactly the same words as count No. 2 read to the jury by the clerk of the court and which I have recited above. On the French form of the indictment at the end of count No. 2 appears in handwriting the words

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"Yvon Jean No. 2 Coupable". It is, therefore, manifestly apparent that the indictment presented to the jurors as count No. 2 and as to which the accused was found guilty was a count which recited that the accused did give or offer corruptly to a person a "Member of the Legislature of the Province of New Brunswick, to wit, J. Charles Van Horne, money or a valuable consideration, in respect of anything done or omitted or to be done or omitted by the said J. Charles Van Horne in his official capacity as Member of the Legislature and Minister of Tourism for the Province of New Brunswick". The charge, by its very terms, purported to be a charge under s. 108(1)*b*) of the *Criminal Code*. That section provides:

108. (1) Everyone who

. . .

(*b*) gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

That charge, for the present circumstances, may be stated shortly as giving money to a member of a provincial legislature in respect of anything done or omitted in his official capacity, that is, the official capacity as a member of the legislature. The charge which this jury was asked to consider was a charge of giving Van Horne money in respect of something done or omitted in his official capacity as member of the legislature and Minister of Tourism for the Province of New Brunswick.

I have not read the whole of this evidence but all the reasons and all the factums deal only and consistently with the question of whether Van Horne, the Minister of the Crown, was bribed and are quite unconcerned with whether or not Van Horne were a member of the legislature. It was Van Horne's character and capacity as a Minister which provided the only reason why there should be any attempt to bribe him. Indeed, in the reasons

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for judgment given by the Appeal Division of the Province of New Brunswick, there appears this sentence:

> In our view, the money transactions between the Minister, the Appellant and Deschenes, the influence sought by Deschenes and the alleged bribe disclosed in the letter from the Minister all related to his official capacity as Minister of Tourism in interference with the administrative function of the Government. The last ground of appeal does not commend itself to us.

It would not be an offence under s. 108(1)(*b*) to pay a minister of the Crown for use of his influence. The subsection is aimed only at transactions with holders of judicial office, members of Parliament, and members of provincial legislatures. Section 110 of the *Criminal Code* is concerned with bribery of a minister. Another subsection of s. 110 was the subject of count No. 3 upon which the accused was acquitted. But s. 110 (1)*e*) is not cited in count No. 2 and is not related to count No. 2.

In this Court, very considerable argument was made in reference to *Regina v. Bruneau*,[1] a decision of the Court of Appeal for Ontario. In that case, the accused was convicted of corruptly agreeing to accept money for the use of his influence in his official capacity as a member of Parliament in respect of the sale of certain property to the federal government. The charge was laid under s. 100(1)(*a*)(ii) as it then appeared, the counterpart of the present s. 108(1)(*a*), and the question was whether a private member could be convicted of accepting money when it was the function of the executive and not of a private member to authorize the purchase which the briber sought to influence. McLennan J.A. said at p. 97:

> In this case the corrupt agreement was with a constituent of the riding for which the appellant was the member of Parliament; it related to a prospective transaction in land within the constituency between the Government and the constituent; it was the established practice of the Government to consult the local member about such transactions and he was brought into that transaction by the Government by virtue of that practice. In these circumstances he agreed to accept money for the use of his influence to bring about the purchase

[1] (1963), 42 C.R. 93.

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by the Government of land belonging to the person who offered him the money. Although the corrupt agreement was to interfere with the administrative function of Government, in the final analysis that function is subject to the will of Parliament of which the appellant was a member and therefore I am of the opinion that he was acting "in his official capacity" when he made that agreement.

A similar result was reached by the Judicial Committee of the Privy Council under like circumstances in *Attorney General of Ceylon v. De Livra*[2].

There is no such inference in the present case. The appellant Arseneau was not accused of giving the member of the legislature Van Horne money so that he might influence the Minister Van Horne to grant the desired privilege. The whole intent of the prosecution was that the Minister Van Horne had been bribed. I am of the opinion that this is a fatal defect, that the accused was simply charged with an offence which did not exist and that, therefore, the appeal must be allowed. It would be purposeless to permit a new trial upon the same faulty indictment and so I am of the opinion that the indictment simply should be quashed.

Under these circumstances, it is not necessary to deal with the several other grounds of appeal urged on behalf of the appellant. The indictment charging an offence which does not exist makes the trial on the second count a nullity and, therefore, I need not be concerned with faults in the trial.

The judgment of Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick dismissing the appeal of the appellant from his conviction at trial before Judge G. A. Richard of the County Court sitting with a jury, on the second of three counts in an indictment preferred against him at the instance of the Attorney General which count, as will hereafter appear, was amended during the course of the proceedings.

[2] [1962] 3 All E.R. 1066.

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The original indictment has been helpfully reproduced in full in the reasons for judgment of my brother Spence which I have had the benefit of reading, but, as I have indicated, we are only concerned on this appeal with count two as the appellant was acquitted by the jury on the other two counts.

It is desirable in my view, for the sake of clarity, to set out what I regard as the essential averment in the second count of the original indictment which alleges that the appellant

> ... did give or offer corruptly to a person then a member of the legislature of the Province of New Brunswick, to wit: J. CHARLES VAN HORNE, money or a valuable consideration, in repect of anything done or omitted or to be done or omitted by the said J. CHARLES VAN HORNE in his official capacity, for the said J. YVON ARSENEAU or CAMILLE DESCHENES or JEAN CLAUDE LE BLANC or SUGALOAF PARK MOTELS LIMITED, contrary to section 108(1)(*b*) of the Criminal Code of Canada and amendments thereto.

At all times relevant hereto the appellant was a lawyer practising in the City of Campbellton in the Province of New Brunswick where he had been engaged in partnership with Charles Van Horne until the latter was elected to represent the constituency where they both lived in the provincial legislature. In due course the local member became Minister of Tourism in the provincial government and the appellant was retained by that department to negotiate for the purchase of some land for the establishment of a provincial park to be known as Sugarloaf Park. While so retained the appellant had occasion to advise his friend, Camille Deschenes, who was a hotel operator and real estate dealer in the area, that if he was considering the building of a motel he might find the park area a desirable site for the purpose, in which event advantages could probably be obtained for him through the government, such as a long-term renewable lease and other benefits, including the shifting of some government construction equipment and material to the proposed site of the motel. In this connection the appellant indicated to his friend that he could obtain favours for him from his former partner, but that it would cost $10,000, including legal fees, to obtain Van

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Horne's approval of having the motel located in the park complex.

This proposal was readily accepted by Deschenes with the result that over a period of months large sums of money were transferred by Deschenes through the appellant to Vane Horne who was then, as I have said, a sitting member of legislature for the constituency where both Arseneau and Deschenes resided, and who was by that time also the Minister of Tourism. Van Horne's co-operation in this scheme was made manifest by a letter which he wrote to Deschenes on the notepaper of the Office of the Minister of Tourism on December 24, 1971, in the following terms:

> Further to our plans for a lodge at the Sugar Loaf Park, this will confirm you will be given first refusal in connection with the erection and operation of an 80 unit lodge on the park land, to be arranged on long term lease. This is to permit you to complete your plans and arrange financing.

It will have been noted that the appellant was charged with breach of s. 108(1)(*b*) of the *Criminal Code* which reads as follows:

> **108.** (1) Every one who . . .
>
> (*b*) gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,
>
> is guilty of an indictable offence and is liable to imprisonment for fourteen years.

There can, in my opinion, be little doubt, having regard to the facts which I have recited, that the appellant offered money to Van Horne, then a member of the legislature of New Brunswick, in respect of acts to be done by him for the benefit of Camille Deschenes in furtherance of the latter's plans to construct a motel in the provincial park.

The proceedings at trial were, however, characterized by a series of technical and procedural motions made on behalf of the appellant which included a lengthy demand for particulars of each

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count in the indictment. In the case of the second count the record discloses that only 13 particulars were sought, but the answer to the 13th particular read as if it were answering particular No. 14 of the first count in the indictment. The answer so given was, however, treated by all concerned as if the indictment had been amended to conform with it in accordance with s. 516(3)(*c*) of the *Criminal Code* which reads:

(3) Where a particular is delivered pursuant to this section, . . .

(*c*) the trial shall proceed in all respects as if the indictment had been amended to conform with the particular.

The particular in question, which was treated as if it had effected an amendment to count No. 2, read as follows:

Q. What specifically was the official capacity of J. Charles Van Horne?

A. Question number 14 is answered as follows: 'as Member of the Legislature and Minister of Tourism for the Province of New Brunswick'. These particulars should be inserted in the middle of line 9 of Count No. Two, after the words 'official capacity'.

I should have thought that the words "in his official capacity" as they occur in the original count No. 2 referred to Van Horne in his "official capacity" as "a Member of the Legislature of the Province of New Brunswick", particularly having regard to the fact that the appellant is charged with having given or corruptly offered money "to a person then a Member of the Legislature of New Brunswick."

Accordingly, in my view, the amendment to the second count does nothing more than add the words "and Minister of Tourism" to the charge as originally laid so that the count now alleges that the money was corruptly paid to a member of the Legislature who had also become a minister of the Crown and who therefore acted in both capacities.

It was, however, contended on behalf of the appellant that Van Horne was acting throughout the transaction in question in his "official capacity" as Minister of Tourism and that it would be no offence under s. 108 to pay money to a member of

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the Legislature in respect of anything done by him in his official capacity as a minister. This contention appears to me to involve the proposition that a member of the Legislature who is also a minister of the Crown is to be taken *not* to be acting in his official capacity as a member in respect of the acts and decisions which he makes in the administration of the department over which he is temporarily presiding.

In the absence of evidence to the contrary, I am prepared to proceed on the basis that it was as a member of the Legislature that Van Horne was appointed to be Minister of Tourism. This would be in accord with the generally accepted practice in this country whereby ministers are accountable to the elected representatives of the people in Parliament or the Legislature as the case may be, and it is in his capacity as a member of the Legislature that a cabinet minister participates in the process of securing legislative authority for the implementation of the policies which he proposed. In the final analysis, it is as a member and not as a minister that he approves the expenditures which he may have recommended as a minister. In view of the above, I am unable to accept the contention of the appellant that Van Horne's capacity as a member of the Legislature can be so severed from the functions which he performs as Minister of Tourism as to make it an offence under s. 108 to corruptly pay money to him as a member of the Legislature and no offence to corruptly pay money to the same man in his capacity as minister.

There can be little doubt that many of the actions with respect to which money was paid to Van Horne were administrative in character and related to his authority as Minister of Tourism, but I do not think that it can be concluded that he was not also acting as a member of the Legislature of New Brunswick in relation to the favours which were sought and given for the construction of a motel by one of his constituents.

The distinction between legislative and administrative acts by a Member of Parliament is illustrated in the case of *Regina v. Bruneau*[3], where the

[3] (1963), 42 C.R. 93.

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accused was charged with unlawfully and corruptly agreeing to accept money for the use of his influence with the government in his official capacity as a Member of Parliament in relation to a real estate transaction in his constituency, contrary to s. 100(1)(*a*)(ii) of the *Criminal Code*, as it then read.

The defence advanced by the accused was that he was not acting in his official capacity as a Member of Parliament when he agreed to accept money for the purpose of influencing the administrative branch of the government with which, as a Member of Parliament, he had no direct concern. In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal for Ontario, Mr. Justice McLennan had occasion to say, at p. 97:

> Although the corrupt agreement was to interfere with the administrative function of Government, in the final analysis that function is subject to the will of Parliament of which the appellant was a member and therefore I am of opinion that he was acting 'in his official capacity' when he made that agreement.

In the same sense I am satisfied that the money was offered and accepted by Van Horne in the present case in his official capacity as a member of the Legislature notwithstanding that "the corrupt agreement was to interfere with the administrative function of Government".

The appellant also contended that if the charge laid in count No. 2 disclosed any offence it was an offence against s. 110(1)(*d*)(i) which is the offence charged in count No. 3 of which the appellant had been acquitted. It is thus contended that the record discloses inconsistent verdicts and the defence of *autrefois acquit* should be applied.

The essential averment of the third count is that the appellant

> ... having or pretending to have influence with a minister of the government of the said province, to wit: J CHARLES VAN HORNE, or an official of the Department of Tourism of the Province of New Brunswick, did demand, accept or offer or agree to accept for himself or another person a reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act of omission in connection

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with the transaction of business with or any matter of business relating to the government of the Province of New Brunswick . . .

It will be seen that the charge in the second count relates to giving or offering money corruptly to Van Horne, whereas the third count alleges that the appellant did demand, accept or offer or agree to accept a reward or advantage of any kind for himself or another person, and I am satisfied that the words "another person" as used in the context of that section cannot refer to Charles Van Horne or an official of his department.

Count No. 2 under s.108(1)(*b*) relates to the offence of bribery, whereas count No. 3 under s. 110(1)(*d*)(i) is concerned with what is colloquially known as "influence peddling".

The difference between the two sections is further accentuated by the fact that a person convicted of the offence of bribery (s. 108) is liable to imprisonment for fourteen years, whereas one convicted of influence peddling (s. 110) is liable to no more than five years' imprisonment. It is abundantly clear that Parliament regarded s.108 as creating the more serious offence and, bearing this in mind, it is indeed unlikely that Parliament should have at the same time intended that s.108 was to have no application to bribery of a member of the legislature acting in his official capacity as a minister of the Crown.

The distinction between the two offences is also made the subject of the judgment of Fauteux, J., as he then was, speaking for this Court in *Martineau v. The Queen*[4], at p. 218.

With the greatest respect, I can see no overlapping between the two sections or the two counts so as to make an acquittal under count No. 3 inconsistent with a conviction under count No. 2.

For all these reasons, as well as for those expressed in the reasons for judgment of the

[4] [1966] S.C.R. 103, 48 C.R. 209.

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Appeal Division of the Supreme Court of New Brunswick, I would dismiss this appeal.

Appeal dismissed, LASKIN C.J. and SPENCE J. *dissenting.*

Solicitors for the appellant: Patrick A. A. Ryan, Fredericton, and Jean-Claude Angers, Edmunston.

Solicitor for the respondent: Eugene D. Westhaver, Fredericton.

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Supreme Court of Canada
Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312
Date: 1981-04-06

The Attorney General of the Province of Quebec *(Defendant) Appellant;*

and

Peter M. Blaikie, Roland Durand and Yoine Goldstein *(Plaintiffs) Respondents;*

and

The Attorney General of Canada (*Intervenor*) *Respondent;*

and

The Attorney General of Manitoba, the Attorney General of New Brunswick and Georges Forest *Intervenors.*

The Attorney General of the Province of Quebec *(Defendant) Appellant;*

and

Henri Wilfrid Laurier *(Plaintiff) Respondent;*

and

The Attorney General of Canada *(Intervenor) Respondent;*

and

The Attorney General of Manitoba, the Attorney General of New Brunswick and Georges Forest *Intervenors.*

1980: November 26 and 27 (rehearing); 1981: April 6.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law—Application of s. 133 B.N.A. Act to regulations adopted by the government, municipal and school by-laws, regulations of the civil administration and of semi-public agencies and to rules of practice of the courts—Charter of the French Language, R.S.Q. 1977, c. C-11, ss. 7 to 13—B.N.A. Act, ss. 92(8), 93, 129, 133—Supreme Court Rules, rule 61.

Following the dismissal on December 13, 1979 of appellant's appeal from two judgments of the Quebec Court of Appeal, affirming two judgments of the Supe-

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rior Court by which Deschênes C.J.S.C. held *ultra vires* the Legislature of Quebec ss. 7 to 13 of the *Charter of the French Language,* appellant requested a rehearing to obtain a declaration as to the scope of s. 133 of the *B.N.A. Act* regarding delegated legislation. The question presented is as follows: "Does s. 133 of the *British North America Act* apply to regulations or orders of statutory bodies or regulations or by-laws of municipalities and school boards … as distinct from orders in council and ministerial orders or regulations which were in issue in the appeal to this Court and which under the judgment of this Court of December 13, 1979 were held to be within the terms of s. 133?"

Held: Section 133 of the *British North America Act* applies to regulations which constitute delegated legislation and to rules of practice enacted by the courts and quasi-judicial tribunals. It does not apply to municipal or school bodies by-laws.

(1) Regulations enacted by the government: legislative powers delegated by the Legislature to the proper constitutional body, the government of the province, must be viewed as an extension of the legislative power of the Legislature, and accordingly the enactments of the government under such delegation must be considered the enactments of the Legislature for the purposes of s. 133. A large and important part of the laws in force consists of regulations made by the Executive, and the requirements of s. 133 of the *B.N.A. Act* would be truncated should this section be construed so as not to govern such regulations. Regulations enacted by the government to alter regulations made by a subordinate body must also be included in this class.

(2) By-laws of municipal bodies: these are not covered by s. 133. Municipal corporations have been in existence since long before Confederation, and the language of municipal by-laws has been expressly regulated by the Legislature. Since Confederation, the Legislature has never entertained any doubt about its power to regulate this matter. Since the provinces were explicitly given the power to make laws relating to municipal institutions by s. 92(8) of the *B.N.A. Act,* the absence of any reference to them in s. 133 cannot be viewed as an oversight if the intent of the Fathers of Confederation is to be respected. Much the same can be said about regulations of school bodies, especially as in the area of education the safeguards provided by s. 93 are of a religious, not of a linguistic nature. The fact that the municipal by-laws may be subject to the approval or disallowance of the government does not alter their municipal character nor

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the constitutional intent to subtract them from the operation of s. 133.

(3) Other regulations: with regard to the regulations of the civil administration and of semi-public agencies contemplated by the *Charter,* it is the connection between the Legislature and delegated legislation which is the decisive factor in so far as their being subject to s. 133 is concerned, as is the case with government regulations. Whenever these regulations are made subject to the approval of the government, they are assimilated to the enactments of the government and so become subject to s. 133. Regulations which are subject to disallowance by the government are different: they have an independent life of their own and probably are fully effective for the period preceding their disallowance.

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(4) Court rules of practice: they are subject to s. 133. Historically, since 1774, it seems clearly that court rules of practice have been published in both languages, and the draftsmen of the *B.N.A. Act* must have felt that they were subject to s. 133 by necessary intendment, the point being not so much that rules of practice partake of the legislative nature of the *Code of Civil Procedure* of which they are the complement, but by reason of the judicial character of their subject-matter.

Attorney General of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016; *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick,* [1892] A.C. 437; *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell,* [1917] A.C. 62; *Attorney General for Ontario v. Attorney General for Canada,* [1896] A.C. 348; *North Coast Air Services Ltd. v. Canadian Transport Commission,* [1968] S.C.R. 940; *Wilson v. Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202, referred to.

DECLARATION on the scope of s. 133 of the *B.N.A. Act* regarding delegated legislation, following a judgment of this Court of December 13, 1979[1].

Henri Brun, Louis Crête and Odette Laverdière, for the appellant.

A. Ken Twaddle, Q.C., for the intervenor the Attorney General of Manitoba.

A. Brossard, Q.C., for the respondents Peter M. Blaikie et al.

David Wood, for the respondent Henri Wilfrid Laurier.

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Raynold Langlois, James Mabbutt and André Asselin, Q.C., for the respondent the Attorney General of Canada.

Alain J.J. Hogue and M.B. Nepon, for the intervenor Georges Forest.

THE COURT—On December 13, 1979, this Court[2] dismissed appellant's appeal from two judgments of the Quebec Court of Appeal[3] affirming two judgments of the Superior Court whereby Deschênes C.J.S.C., granted to plaintiffs Blaikie, Durand and Goldstein in one case and to plaintiff Laurier in the other a declaration that Chapter III of Title I (ss. 7 to 13) of the *Charter of the French Language,* 1977 (Que.), c. 5, now R.S.Q. 1977, c. C-11, (the *Charter*), was wholly *ultra vires* of the Legislature of Quebec. Deschênes C.J.S.C., held that ss. 7 to 13 of the *Charter* violated s. 133 of the *British North America Act,* 1867, (the *B.N.A. Act*), which

[1] [1979] 2 S.C.R. 1016.
[2] [1979] 2 S.C.R. 1016.
[3] [1978] C.A. 351.

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section he found to be beyond the competence of the Legislature to amend[4]. Section 133 reads:

> **133.** Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

The provisions of the *Charter* declared *ultra vires* include the following:

> **7.** French is the language of the legislature and the courts in Quebec.
>
> **9.** Only the French text of the statutes and regulations is official.

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> **10.** An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration.

"Regulations" is not defined in the *Charter.*

Section 98 and the Annex of the *Charter* read as follows:

> **98.** The various agencies of the civil administration, and the health services and social services, the public utility firms and the professional corporations referred to in this act are listed in the Schedule.

SCHEDULE

A. The civil administration.

1. The Government and the government departments.

2. The government agencies:

Agencies to which the Government or a minister appoints the majority of the members, to which, by law, the officers or employees are appointed or remunerated in accordance with the

[4] [1978] C.S. 37.

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Civil Service Act (1965, 1st session, chapter 14), or at least half of whose capital stock or resources are derived from the consolidated revenue fund except, however, health services and social services, general and vocational colleges and the Université du Québec.

3. The municipal and school bodies:

(*a*) the urban communities:

> The Quebec Urban Community, the Montreal Urban Community and the Outaouais Regional Community, the Quebec Urban Community Transit Commission, the Greater Québec Water Purification Board, the Montreal Urban Community Transit Commission, the Outaouais Regional Community Transit Commission, the Outaouais Development Corporation, the City of Laval Transit Commission and the Montreal South Shore Transit Commission;

(*b*) the municipalities:

> The city, town, village, country and county corporations, whether incorporated under a general law or a special act, and the agencies under the jurisdiction of such corporations which participate in the administration of their territory;

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(*c*) the school bodies:

> The regional school boards, the school boards and the corporations of school trustees governed by the Education Act (Revised Statutes, 1964, chapter 235), the School Council of the island of Montreal.

4. The health services and the social services:

> Establishments within the meaning of the Act respecting health services and social services (1971, chapter 48).

B. *Semipublic agencies*

1. Public utility firms:

> If they are not already government agencies, the telephone, telegraph and cable-delivery companies, the air, ship, autobus and rail transport companies, the companies which produce, transport, distribute or sell gas, water or electricity, and business firms holding authorizations from the Transport Commission.

2. Professional corporations:

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> The professional corporations listed in Schedule I to the Professional Code (1973, chapter 43) under the designation «professional corporations», or established in accordance with that Code.

In holding that s. 133 of the *B.N.A. Act* applied to delegated legislation, Deschênes C.J.S.C., whose reasons for judgment were adopted by the Court of Appeal and by this Court, did not undertake to define the extent of the delegated legislation affected. But in his reasons for judgment, at p. 47, he explicitly mentioned the legislative power delegated by the Legislature to the Lieutenant-Governor in Council.

The subject of delegated legislation was barely touched upon in this Court during the first hearing. Severability was mentioned in general terms but no allusion was made, either in oral or written argument, to the possibility that orders of statutory bodies or by-laws of municipalities and school bodies might be considered as delegated legislation with respect to the application of s. 133. This Court did not attempt to define the expression either. However, at p. 1021 of its reasons, it indicated that it was concerned solely with the impugned provisions of the *Charter.*

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Appellant applied for a rehearing pursuant to rule 61 of this Court to obtain a pronouncement on the reach of s. 133 of the *B.N.A. Act* with respect to delegated legislation. On March 27, 1980, a rehearing was ordered in the following terms:

> The appellant, the Attorney General of Quebec, having applied for a rehearing to resolve issues said to arise out of certain provisions in Chapter III of Title I of the *Charter of the French Language,* 1977 (Que.) ch. 5, although not raised on the hearing of the appeal, and the respondents Blaikie, Durand and Goldstein consenting as do the intervenors the Attorney General of Canada and the Attorney General of New Brunswick, and the respondent Laurier and the intervenors the Attorney General of Manitoba and Georges Forest taking no position, it is ordered that a rehearing take place, limited to the following question:
>
> Does s. 133 of the *British North America Act* apply to regulations or orders of statutory bodies or regulations or by-laws of municipalities and school boards (in so far as they come within ss. 9 and 10 of Chapter III of Title I of the *Charter of the French Language*), as distinct from orders in council and ministerial orders or regulations which were in issue in the appeal to this Court and which under the judgment of this Court of December 13, 1979 were held to be within the terms of s. 133?

The Attorney General of New Brunswick did not take part in the rehearing.

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Respondents Blaikie, Durand and Goldstein did not file any factum but their counsel adopted the general position of the Attorney General of Manitoba and, alternatively, the position of the Attorney General of Canada.

In the course of the rehearing, members of the Court were provided with a tentatively exhaustive list of over one hundred provincial boards, councils, committees, commissions, tribunals, courts, corporations and other institutions or bodies and classes of institutions or bodies empowered by provincial statutes to enact regulations, rules, by-laws or other enactments of a legislative nature.

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Given the fact that some of these classes comprise several hundred institutions or bodies, such as town councils, there would appear to be just in the Province of Quebec well over two thousand lawmaking agencies other than the Legislature. These range from the provincial Government itself at one end to municipal councils and school boards at the other, with dozens of boards or other bodies in between.

The phenomenal growth of delegated legislation since 1867 is illustrated by some relatively recent figures: in 1975, 1976 and 1977, a yearly average of over 700 enactments of a legislative nature, other than statutes, have been published in the *Quebec Official Gazette*; these do not include innumerable by-laws enacted by municipal authorities: Gilles Pépin, "Le pouvoir réglementaire et la Charte de la langue française", (1978) 13 R.J.T. 107, at p. 109.

It must be emphasized that regulations or orders in issue in the case at bar are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management.

I Regulations enacted by the Government

Appellant and the Attorney General of Manitoba conceded, properly so in our view, that s. 133 of the *B.N.A. Act* applies to enactments of a legislative nature issued by the Government of the province, including enactments issued by a group of ministers being members of the Government, such as the "Conseil du Trésor" (Treasury Board) (*Financial Administration Act,* R.S.Q. 1977, c. A-6, s. 18) or by a minister.

The provincial executive power is vested in the Queen (*Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*[5]) represented by the Lieutenant-Governor (*B.N.A. Act,* s. 58) whose office is beyond the competence of the Legislature to modify (*B.N.A. Act,* s. 92(1)).

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The Lieutenant-Governor is part and parcel of the Legislature (*B.N.A. Act,* s. 71; *Legislature Act,* R.S.Q. 1977, c. L-1, s. 1). He appoints members of the Executive Council and ministers (*B.N.A. Act,* s. 63; *Executive Power Act,* R.S.Q. 1977, c. E-18, ss. 3 to 5) and these, according to constitutional principles of a customary nature referred to in the preamble of the *B.N.A. Act* as well as in some statutory provisions (*Executive Power Act,* R.S.Q. 1977, c. E-18, ss. 3 to 5, 7, 11(1); *Legislature Act,* R.S.Q. 1977, c. L-1, s. 56(1)), must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch. There is thus a considerable degree of integration between the Legislature and the Government.

The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial legislative agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body.

Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s. 133 of the *B.N.A. Act.*

It is true that the above-mentioned conventions of the Constitution were well-established in 1867 and the delegation of legislative powers to the Executive was not then unknown. But such delegation was used sparingly and almost by way of exception. The exception has now

[5] [1892] A.C. 437.

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become the rule in some matters to the point where a large and important part of the laws in force in the Province

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consists of regulations made by the Executive[6]. The requirements of s. 133 of the *B.N.A. Act* would be truncated, as was said by this Court at p. 1027 of its reasons, should this section be construed so as not to govern such regulations.

Regulations enacted by the Government to alter regulations made by a subordinate body must also be included in this class. This was not conceded by the Attorney General of Quebec. But there is no valid reason for distinguishing such regulations from ordinary Government regulations. (There would appear to be very few regulations of this type under statutes now in force in Quebec.)

II Municipal and school bodies by-laws

It was submitted by the appellant and the Attorney General of Manitoba and, subject to certain reservations, conceded by the Attorney General of

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Canada but not by respondent Laurier and intervenor Forest, that s. 133 of the *B.N.A. Act* does not apply to municipal and school bodies by-laws.

In our opinion, this submission is well founded in history and in law and must be acceded to.

Municipal corporations have been in existence since long before Confederation, with power to make regulations of a local nature. Unlike the language of the Legislature, the language in which these regulations were to be made and published does not appear to have been the

[6] The Acts listed hereunder appear to delegate legislative powers to the Government. The list is illustrative only and is not meant to be exhaustive. All the references are to the R.S.Q. 1977: the *Adoption Act,* c. A-7, s. 41; the *Social Aid Act,* c. A-16, ss. 31 and 32; the *Family Allowances Act,* c. A-17, s. 25; the *Hospital Insurance Act,* c. A-28, s. 8; the *Health Insurance Act,* c. A-29, s. 69; *An Act respecting Insurance,* c. A-32, s. 420; *An Act respecting the Cinema,* c. C-18, s. 86; the *Highway Code,* c. C-24, ss. 7, 53, 57, 78 and 109; the *Petroleum Products Trade Act,* c. C-31, s. 29; the *Extra-Provincial Companies Act,* c. C-46, s. 10; the *Wildlife Conservation Act,* c. C-61, s. 82; the *Real Estate Brokerage Act,* c. C-73, s. 20; the *Public Curatorship Act,* c. C-80, s. 39; *An Act to promote Industrial Development by Means of Fiscal Advantages,* c. D-9, s. 3; the *Land Transfer Duties Act,* c. D-17, s. 47; *An Act respecting Private Education,* c. E-9, s. 68; the *Industrial and Commercial Establishments Act,* c. E-15, s. 44; the *Real Estate Assessment Act,* c. E-16, s. 92; the *Education Act,* c. I-14, ss. 16 and 479; the *Licenses Act,* c. L-3, ss. 5 and 140; the *Mortmain Act,* c. M-l, s. 10; the *Mining Act,* c. M-13, s. 296; the *Parks Act,* c. P-9, s. 9; the *Fire Prevention Act,* c. P-23, s. 4; *An Act respecting Probation and Houses of Detention,* c. P-26, s. 23; the *Public Health Protection Act,* c. P-35, s. 69; the *Consumer Protection Act,* c. P-40, s. 102; the *Public Building Safety Act,* c. S-3, s. 39; *An Act respecting Health Services and Social Services,* c. S-5, s. 173; the *Transport Act,* c. T-12, s. 5; the *Securities Act,* c. V-1, s. 101.

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subject of controversy. But it could not escape being in the minds of the Fathers of Confederation since any linguistic issue was a sensitive one and the language of municipal by-laws in Lower Canada had been expressly regulated by the Legislature before Confederation.

For instance, *An Act to incorporate the Town of Joliette* (1863 (Can.), c. 23, s. 43) provided that by-laws be published only in French (see Claude-Armand Sheppard, *The Law of Languages in Canada,* 1971, 10th Study of the Royal Commission on Bilingualism and Biculturalism, at pp. 229 et reg.).

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More importantly, the first subsection of s. 10 of *An Act respecting Municipalities and Roads in Lower Canada* (C.S.L.C. 1860, c. 24) provided for the publication of by-laws by municipal councils. Subsection 2 of s. 10 read in part as follows:

> **2.** In parishes, the council shall also publish all by-laws, by causing them to be read in the English and French languages, unless the use of either of the said languages be dispensed with, and then in that one of the said languages which should be used …

Section 11 read as follows:

> **11.** The Governor may, by order in council, declare that the publication to be made under this Act of any notice, by-law or resolution, shall be made in one language only, in any municipality the council whereof have shewn that such publication may be so made without detriment to any of the inhabitants thereof; the Provincial Secretary shall cause a copy of every such

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> order in council to be inserted in *The Canada Gazette,* and from the date of such insertion the publication of all such notices, by-laws and resolutions may be legally made in the municipality referred to in such order in council, in that language only which is thereby prescribed.

These provisions were continued by s. 129 of the *B.N.A. Act* and, three years after Confederation, found their way in expanded form into the first *Municipal Code of the Province of Quebec* (1870 (Que.), c. 68) the fifth chapter of which is entitled "Of the Languages to be used in the Council and the Municipal Proceedings" and comprises these four sections:

> **241.** In the sessions of council, whoever has a right to be heard, may use either the French or the English language.

242. The books, records and proceedings of every municipal council are kept, and all certificates of publication or service, and every other document produced or filed in the office of the council, are written in either the French or the English language.

243. In any municipality for which there is no order of the lieutenant-governor in council, in virtue of the tenth section of the consolidated municipal act of Lower Canada or of the following article, the publication of every notice, by-law, resolution or order of the council, by posting, reading aloud or insertion in the newspapers, must be made in the French and English language.

244. The lieutenant-governor by an order in council, upon a petition being made to him to that effect by any municipal council, may declare that the publication of any public notice, by-law, resolution or order of the council, in such municipality, except such as are required to be made in the official Gazette of the province, shall be made thereafter in one language only. Such language is determined by the said order in council.

The resolution under which the petition of the council is made, cannot be adopted until after a public notice to that effect has been given to the inhabitants of the municipality.

A copy of such order by the lieutenant-governor in council, is transmitted without delay to the secretary-treasurer of the municipality to which it applies.

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However, up to this day, under the *Cities and Towns Act,* (R.S.Q. 1977, c. C-19), ss. 335, 345, 353, 362, all by-laws enacted by cities and towns

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must be published in both languages. No exception is contemplated.

Some municipal corporations must have been illegally enacting regulations in one language only for the *Act to Validate the Publication of Certain Municipal Notices* (R.S.Q. 1941, c. 229) was passed to legalize the situation for the period prior to April 11, 1935. (See Claude-Armand Sheppard, *supra,* at p. 233.)

Thus, before as well as immediately after Confederation and later, official bilingualism was not necessarily the rule in practice with respect to municipal by-laws.

Furthermore, the Legislature never entertained any doubt about its power to regulate this matter. It simply assumed jurisdiction and occupied the field unchallenged.

Last but not least, municipal institutions constitute a distinct albeit subordinate order of government at the local level, the administration of which is usually in the hands of locally

elected mayors and members of council. Their growth and the multiplication of their regulations were inherent in their nature and accordingly foreseeable. Since the provinces were explicitly given the power to make laws relating to those institutions in s. 92(8) of the *B.N.A. Act,* the absence of any reference to them in s. 133 cannot possibly be viewed as an oversight. It is a purposeful silence to which effect must be given if the intent of the Fathers of Confederation is to be respected.

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Much the same can be said, *a fortiori,* about school bodies regulations. Education falls under provincial legislative authority subject to the denominational principles stated in s. 93 of the *B.N.A. Act.* It was quite foreseeable that school districts and school bodies would be organized along even more homogeneous linguistic lines than municipal corporations. Yet, the safeguards provided by s. 93 are of a religious, not of a linguistic nature. As was observed by Lord Buckmaster in *Trustees of the Roman Catholic Separate Schools*

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for the City of Ottawa v. Mackell[7], at p. 74.

> … the only section in the British North America Act, 1867, which relates to the use of the English and French languages (s. 133) does not relate to education, and is directed to an entirely different subject-matter.

Since the *B.N.A Act* is explicit on the subject of religious safeguards with respect to education, its silence on the language of school by-laws is also a deliberate one. It is a silence which speaks and it speaks against the application of s. 133 to school by-laws.

In oral argument, counsel for the Attorney General of Canada submitted that municipal by-laws are governed by s. 133 of the *B.N.A. Act* whenever they are made subject either to approval or to disallowance by the Government[8].

In our view, no such extension is warranted.

Municipal by-laws constitute a separate and distinct class of regulations. As we have seen, they are the legislative enactments of a third level of government clearly contemplated by the *B.N.A. Act* and yet not mentioned in s. 133. The fact that they may be subject to the control or

[7] [1917] A.C. 62.
[8] Some by-laws are subject to the approval of the Government which may take the form of an authorization and a great many if not all of them to disallowance: *Municipal Code*, arts. 388, 389b; *Cities and Towns Act,* R.S.Q. 1977, c. C-19, arts. 358, 409.

supervision of the Government by way of required approval or potential disallowance does not alter their municipal character nor the constitutional intent to subtract them from the operation of s. 133.

Counsel for respondent Laurier and intervenor Forest expressed reservations as to the appropriateness of a judgment couched in general terms in a case where municipal corporations are not represented and when cases concerning some of them might be pending before lower courts.

This comes close to submitting that we ought not to have ordered a rehearing. But as is noted in the order itself, neither respondent Laurier nor

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intervenor Forest objected to the rehearing. Furthermore, it is not unusual for a constitutional case pending before a lower court to be overriden by a judgment of this Court.

Counsel for respondent Laurier further represented that several aspects of the issue relating to municipal by-laws could not adequately be dealt with in this hearing. Thus, it was conceivable that some municipal charters did not find their source in post-Confederation provincial legislation. It was also arguable, in his submission, that language rights had ceased to be a merely local or provincial matter and, to paraphrase Lord Watson L.C., in *Attorney General for Ontario v. Attorney General for Canada*[9], at p. 364, had attained such dimensions as to become a matter of national concern lying outside the purview of s. 92 of the *B.N.A. Act.* It was contended that the question whether the Legislature could validly impose the majority language of the Province upon the inhabitants of a municipality speaking another language might have to be reconsidered in that light.

It should be observed in this regard that the Court is solely concerned with the applicability of s. 133 of the *B.N.A. Act* to regulations passed pursuant to a delegation of legislative power by the Legislature of Quebec. The Court refrains from expressing any view as to other issues which might relate to language rights and arise in future cases.

III Other regulations

[9] [1896] A.C. 348.

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This residual class includes all regulations of the civil administration and of semi-public agencies contemplated by the *Charter* other than government, municipal and school bodies regulations. However, this class does not include court rules of practice which will be separately dealt with later.

Appellant's counsel submitted that none of the regulations comprised in this class is governed by s. 133 of the *B.N.A. Act.* It was contended that the

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main reason why the reach of s. 133 had been extended by interpretation to cover regulations was the risk that the provisions of the section be circumvented by the use of regulations: this was the only reason which suggested a distinction between various classes of regulations; it could apply solely to regulations enacted by the Government since only the Government could possibly form the intent to circumvent s. 133 and exercise sufficient control or influence over the Legislature to carry it out.

In our opinion, this test is not the correct one.

The positions of the Attorney General of Canada and the Attorney General of Manitoba were practically the same on this issue. According to their submissions, regulations passed by agencies of the Government were subject to s. 133 of the *B.N.A. Act;* the correct test was the extent to which boards and other law-making bodies were controlled by the Government so that they could be said to be responsible through it to the Legislature. On the other hand, s. 133 did not govern the regulations of autonomous law-making agencies such as professional corporations. However, counsel for the Attorney General of Canada contended that even these were governed by s. 133 as long as they were subject to approval or disallowance by the Government.

Under the test proposed by the Attorney General of Canada and the Attorney General of Manitoba, the application of s. 133 would depend on the facts and circumstances of each case. In our view, this test is not the right one either. It is also most impractical. The residual class of regulations under consideration includes rules made by a large number of boards and other law-making agencies so diverse as to have little in common except their power to enact delegated legislation.

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The number of members of such boards and bodies varies from one to more than two dozen. These members may be appointed by the Government with or without consultation of some other institution. They may be elected. The membership may also be partly elected and partly appointed.

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Some members but not necessarily all must sometime be chosen from limited groups including the judiciary. Appointments may be made during pleasure or for a fixed term. Salaries are fixed by the Legislature or by the Government if they come from the consolidated revenue fund, but they may come from other sources. The Government may or may not be given a power of supervision including the power to put a subordinate body under trusteeship in certain circumstances.

The Government may also be in a position to exercise some influence over subordinate agencies through the power of the purse. Given its overall control of the Legislature, it might be held responsible for practically every agency which, according to public opinion, may be thought not to be functioning properly. The responsibility of the Government is a matter of degree and varies infinitely and minutely from case to case. It cannot, without causing hopeless confusion and uncertainty, be retained as a criterion for our purposes.

In order to determine the proper test, one must keep two sets of considerations in mind.

First, the proliferation of these other regulations was at least as unforeseeable as that of Government regulations which, unlike municipal and school board by-laws could not have been originally intended to escape the operation of s. 133 of the *B.N.A. Act.*

Second, while the ordinary meaning of the words "Acts … of the Legislature" in s. 133 must be departed from to prevent the requirements of the section from being frustrated, it cannot be stretched beyond what is necessary to accomplish this purpose.

Inadequate as they may be, the two tests suggested by counsel for the Attorney General of Quebec, the Attorney General of Canada and the Attorney General of Manitoba nevertheless point in the right direction in that they both emphasize some connexion between the

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Legislature and delegated legislation, apart from the delegation itself. This connexion is the decisive factor in so far as

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the subjection of Government regulations to s. 133 of the *B.N.A. Act* is concerned. There is no reason to select a different element with respect to other regulations. It is because in our constitutional system the enactments of the Government should be assimilated with the enactments of the Legislature that they are governed by s. 133. Other regulations must in our opinion be viewed in the same light when they can also properly be said to be the enactments of the Government.

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This happens whenever these other regulations are made subject to the approval of the Government.

The particular form of words used in this respect by various statutes matters little. Whether it be provided that some regulations "shall have no force and effect until approved and sanctioned by the Lieutenant-Governor in Council" or "shall not be carried into execution until approved by the Lieutenant-Governor in Council" or "shall not have force and effect until confirmed by the Lieutenant-Governor in Council", they can be assimilated with the enactments of the Government and therefore of the Legislature as long as positive action of the Government is required to breathe life into them. Without such approval or confirmation, they are a nullity (*North Coast Air Services Ltd. v. Canadian Transport Commission*[10]) or at least inoperative. The Government does legislate in approving them in the same way as one house legislates in a bicameral legislature when it passes a bill already passed by the other house, or the Lieutenant-Governor when he assents to a bill passed by the house of the now unicameral Legislature.

Regulations which are subject to disallowance by the Government are different. They have an independent life of their own. Their disallowance is a contingency. And even when they are disallowed, they probably are fully effective for the period

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[10] [1968] S.C.R. 940.

preceding their disallowance. (See, by analogy, the effect of disallowance on provincial legislation under a similarly worded enactment: *Wilson v. Esquimalt and Nanaimo Ry. Co.*[11]).

Under the statutes now in force in Quebec, regulations which are subject to the approval of the Government and therefore to s. 133 of the *B.N.A. Act* seem to be almost as numerous as those of the Government itself[12].

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IV Court rules of practice

The status of English and French in Quebec courts under s. 133 of the *B.N.A. Act* exhibits a continuous practice going back almost to the beginning of the British rule. Since 1774, either French or English was used in court and in court proceedings and court processes[13]. (However, a 1785 Ordinance provided for the serving of writs of summons in the language of the defendant in all suits of £10 or less and in some suits over £10 (1785, 25 Geo. III, c. 2). It was repealed in 1801 (1801, 41 Geo. III, c. 7)).

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The use of the French language did not go unchallenged. It was recognized by a four judge Court of King's Bench in *Rex v. Talon* (this is an 1812 case the report of which comes from the private archives of one of the judges: Maréchal Nantel, "La langue française au Palais", (1945) 5 R. du B. 201, at pp. 203-4) but there are single judge's decisions to the contrary (*Hamel v. Joseph,* an 1827 case reported in 1847-48, 3 R. de L. 400; Maréchal Nantel, *supra,* at p. 205). The use of the English language was taken for granted.

Although French ceased to be recognized as an official statutory language from 1840 to 1846 under s. 41 of the *Union Act, 1840* (1840 (U.K.), c. 35), it continued to be used in court on the same footing as English, as appears from the reported cases of the period, such as can be found in the Revue de Législation et de Jurisprudence.

[11] [1922] 1 A.C. 202.

[12] They would appear to include regulations made by the following bodies the list of which is illustrative only and is not meant to be exhaustive. All the references are to the R.S.Q. 1977: Bureau established within professional corporations, *Professional Code,* c. C-26, s. 95; the Board of the Caisse de dépôt et placement du Québec, *An Act respecting the Caisse de dépôt et placement du Québec,* c. C-2, s. 13; the Catholic Committee and Protestant Committee of the Conseil supérieur de l'éducation, *An Act respecting the Conseil supérieur de l'éducation,* c. C-60, ss. 22, 23; Parity Committees, *An Act respecting Collective Agreement Decrees,* c. D-2, s. 19; the Commission des accidents du travail, *Workmen's Compensation Act,* c. A-3, s. 72; the Commission de police du Québec, *Police Act,* c. P-13, ss. 18 and 19; the Commission des services juridiques, *Legal Aid Act,* c. A-14, s. 80; the Institut québécois du cinéma, *An Act respecting the Cinema,* c. C-18, ss. 68 and 69; the Office de la construction du Québec, *An Act respecting Labour Relations in the Construction Industry,* c. R-20, ss. 80 and 82; the Office des autoroutes du Québec, *Autoroutes Act,* c. A-34, s. 23; the Office du Crédit agricole, *Farm Credit Act,* c. C-75, s. 13; the Régie de l'assurance-dépôts du Québec, *Deposit Insurance Act,* c. A-26, ss. 43 to 45.

[13] French would appear to have been used very little if at all as the language of the courts prior to 1774: Herbert Marx, "Language Rights in the Canadian Constitution", (1967) 2 R.J.T. 239 at pp. 245, 270.

A 1793 Ordinance denied Quebec courts the legislative power which French courts or *"parlements"* did exercise in decisions called *"arrêts de règlement"* (1793, 34 Geo. lll, c. 6, s. 8), but some Quebec courts were empowered to adopt rules of practice from 1785 and 1787 (1785, 25 Geo. lll, c. 2; 1787, 27 Geo. lll, c. 4; see A.A. Bruneau J.S.C., "De la limite des pouvoirs des juges et des tribunaux", (1924) 2 R. du D. 289), starting with the Court of Appeal

> to regulate, effectuate and accelerate the proceedings in all causes of appeal, for the advancement of justice, and to prevent unnecessary delays and expense in the same.

From that early period to the present time, rules of practice appear to have been published in both languages except, oddly, the latest rules of the Court of Appeal, dated June 2, 1978, the English version of which is still unavailable.

When the *B.N.A. Act* came into force on July 1, 1867, the first Quebec *Code of Civil Procedure* had just been proclaimed three days previously, on June 28, 1867 (*An Act respecting the Code of*

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Civil Procedure of Lower Canada, 1866 (Can.), c. 25). Article 29 provided for the making by the judges of the Superior Court of

> any rules of practice that may be necessary for regulating proceedings … in causes and matters before them … and all matters of procedure not regulated by the Code …

Article 1177 granted a similar power to the Court of Queen's Bench. This Code was continued in force under s. 129 of the *B.N.A. Act* and replaced by another in 1897 (*An Act respecting the Code of Civil Procedure of the Province of Quebec,* 1897 (Que.), c. 48) and still another in 1965 (1965 (Que.), c. 80). The latest Code provides for the enactment of rules of practice by each court: Article 47.

Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act.* Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

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The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters,* November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

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Furthermore, and as was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.

We accordingly reach the conclusion that, given the nature of their subject-matter, rules of court stand apart and are governed by s. 133 of the *B.N.A. Act.*

What was not contemplated in 1867 was the multiplication of non-curial adjudicative agencies. At p. 1029 of its reasons for judgment, this Court has already held that it could not ignore this modern development on overly-technical grounds and refuse to extend to proceedings before quasi-judicial tribunals the constitutional guarantee of the right to use either French or English by those subject to their jurisdiction. It would be equally overly-technical to hold that the rules of practice made by such tribunals should remain beyond the reach of s. 133 because their subject-matter is quasi-judicial in nature, rather than judicial.

V Conclusion

The constitutional question on the rehearing is answered as follows:

Section 133 of the *British North America Act* applies to regulations enacted by the Government of Quebec, a minister or a group of ministers and to regulations of the civil administration and of semi-public agencies contemplated by the *Charter of the French Language* which, to come into force, are subject to the approval of that Government, a minister or a group of ministers. Such regulations are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management.

Section 133 also applies to rules of practice enacted by courts and quasi-judicial tribunals.

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Section 133 does not apply to municipal or school bodies by-laws even when subject to the approval of the Government, a minister or a group of ministers.

No costs were asked for on the rehearing and there should be no order as to costs.

Judgment accordingly.

Solicitors for the appellant: Bilodeau, Flynn, Boissonneault & Roy, Montreal; Jean K. Samson, Quebec; Henri Brun, Quebec.

Solicitors for the respondents Blaikie, Durand and Goldstein: Chait, Salomon, Gelber, Reis, Bronstein, Litvack, Echenberg & Lipper, Montreal; Johnston, Heenan & Blaikie, Montreal; André Brossard, Montreal.

Solicitors for the respondent Laurier: Wood & Aaron, Montreal.

Solicitors for the respondent the Attorney General of Canada: Langlois, Drouin, Roy, Fréchette & Gaudreau, Montreal; James Mabbut, Ottawa.

Solicitor for the intervenor the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg.

Solicitor for the intervenor the Attorney General of New Brunswick: Gordon F. Gregory, Fredericton.

Solicitors for the intervenor Forest: Hogues, Nepon & Sharp, Winnipeg.

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

- and -

Attorney General of Ontario *Appellant/Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

and

Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère

Procureur général du Canada *Appelant/Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

- et -

Procureur général de l'Ontario *Appelant/Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Québec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secrétariat du Programme commun des Nations Unies sur le VIH/sida, Association des libertés civiles de la Colombie-Britannique, Alliance évangélique du Canada, Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Association canadienne des centres contre les agressions à caractère sexuel, Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle,

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sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Alliance des chrétiens en droit, Ligue catholique des droits de l'homme, REAL Women of Canada, David Asper Centre for Constitutional Rights, Institut Simone de Beauvoir, AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution et Aboriginal Legal Services of Toronto Inc. *Intervenants*

Indexed as: Canada (Attorney General) *v.* Bedford

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.*

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : Canada (Procureur général) *c.* Bedford

2013 CSC 72

N° du greffe : 34788.

2013 : 13 juin; 2013 : 20 décembre*.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to security of person — Freedom of expression — Criminal law — Prostitution — Common bawdy-house — Living on avails of prostitution — Communicating in public for purposes of prostitution — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Prostitutes alleging impugned provisions violate s. 7 security of the person rights by preventing implementation of safety measures that could protect them from violent clients — Prostitutes also alleging prohibition on communicating in public for purposes of prostitution infringes freedom of expression guarantee — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1), 210, 212(1)(j), 213(1)(c).

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

Droit constitutionnel — Charte des droits — Droit à la sécurité de la personne — Liberté d'expression — Droit criminel — Prostitution — Maisons de débauche — Proxénétisme — Communiquer en public à des fins de prostitution — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — Allégation selon laquelle ces dispositions portent atteinte au droit à la sécurité de la personne garanti à l'art. 7 en empêchant les prostituées de prendre des mesures susceptibles de les protéger contre la violence de certains clients — Allégation supplémentaire suivant laquelle l'interdiction de communiquer en public à des fins de prostitution porte atteinte à la liberté d'expression garantie aux prostituées — Charte canadienne des droits et libertés, art. 1, 2b), 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 197(1), 210, 212(1)j), 213(1)c).

* A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

* Un jugement a été rendu le 17 janvier 2014, modifiant le par. 164 des deux versions des motifs. Les modifications ont été incorporées dans les présents motifs.

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Courts — Decisions — Stare decisis — Standard of review — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Under what circumstances application judge could revisit conclusions of Supreme Court of Canada in Prostitution Reference which upheld bawdy-house and communicating prohibitions — Degree of deference owed to application judge's findings on social and legislative facts.

B, L and S, current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*: s. 210 makes it an offence to keep or be in a bawdy-house; s. 212(1)(*j*) prohibits living on the avails of prostitution; and, s. 213(1)(*c*) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, by preventing them from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence. B, L and S also alleged that s. 213(1)(*c*) infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

The Ontario Superior Court of Justice granted the application, declaring, without suspension, that each of the impugned *Criminal Code* provisions violated the *Charter* and could not be saved by s. 1. The Ontario Court of Appeal agreed s. 210 was unconstitutional and struck the word "prostitution" from the definition of "common bawdy-house" as it applies to s. 210, however it suspended the declaration of invalidity for 12 months. The court declared that s. 212(1)(*j*) was an unjustifiable violation of s. 7, ordering the reading in of words to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation". It further held the communicating prohibition under s. 213(1)(*c*) did not violate either s. 2(*b*) or s. 7. The Attorneys General appeal from the declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. B, L and S cross-appeal on the constitutionality of s. 213(1)(*c*) and in respect of the s. 210 remedy.

Tribunaux — Décisions — Stare decisis — Norme de contrôle — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — À quelles conditions un juge de première instance peut-il réexaminer les conclusions de la Cour suprême du Canada dans le Renvoi sur la prostitution selon lesquelles les interdictions visant les maisons de débauche et la communication sont valides? — Degré de déférence que commandent les conclusions du juge de première instance sur des faits sociaux ou législatifs.

B, L et S — trois prostituées ou ex-prostituées — ont sollicité un jugement déclarant que trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, qui criminalisent diverses activités liées à la prostitution, portent atteinte au droit que leur garantit l'art. 7 de la *Charte* : l'art. 210 crée l'acte criminel de tenir une maison de débauche ou de s'y trouver; l'al. 212(1)*j*) interdit de vivre des produits de la prostitution d'autrui; l'al. 213(1)*c*) interdit la communication en public à des fins de prostitution. Elles font valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées en ce qu'elles les empêchent de prendre certaines mesures de protection contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

La Cour supérieure de justice de l'Ontario a fait droit à la demande et déclaré, sans effet suspensif, que chacune des dispositions contestées du *Code criminel* porte atteinte à un droit ou à une liberté garantis par la *Charte* et ne peut être sauvegardée par application de l'article premier. La Cour d'appel de l'Ontario a convenu de l'inconstitutionnalité de l'art. 210 et radié le mot « prostitution » de la définition de « maison de débauche » applicable à cette disposition, mais elle a suspendu l'effet de la déclaration d'invalidité pendant 12 mois. Elle a statué que l'al. 212(1)*j*) constitue une atteinte injustifiable au droit garanti à l'art. 7 et ordonné d'interpréter la disposition de manière que l'interdiction vise seulement les personnes qui vivent de la prostitution d'autrui « dans des situations d'exploitation », comme si ces mots y étaient employés. Elle a par ailleurs estimé que l'interdiction de communiquer prévue à l'al. 213(1)*c*) n'est attentatoire ni à la liberté garantie par l'al. 2*b*), ni au droit que consacre l'art. 7. Les procureurs généraux se pourvoient contre la déclaration d'inconstitutionnalité de l'art. 210 et de l'al. 212(1)*j*) du *Code*. B, L et S se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise pour remédier à l'inconstitutionnalité de l'art. 210.

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Held: The appeals should be dismissed and the cross-appeal allowed. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year.

The three impugned provisions, primarily concerned with preventing public nuisance as well as the exploitation of prostitutes, do not pass *Charter* muster: they infringe the s. 7 rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. It is not necessary to determine whether this Court should depart from or revisit its conclusion in the *Prostitution Reference* that s. 213(1)(*c*) does not violate s. 2(*b*) since it is possible to resolve this case entirely on s. 7 grounds.

The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. In this case, the application judge was entitled to rule on the new legal issues of whether the laws in question violated the security of the person interests under s. 7, as the majority decision of this Court in the *Prostitution Reference* was based on the s. 7 physical liberty interest alone. Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years. The application judge was not, however, entitled to decide the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference* and was binding on her.

The application judge's findings on social and legislative facts are entitled to deference. The standard of review for findings of fact — whether adjudicative,

Arrêt : Les pourvois sont rejetés, et le pourvoi incident est accueilli. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) du *Code criminel* sont déclarés incompatibles avec la *Charte*. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement. L'effet de la déclaration d'invalidité est suspendu pendant un an.

Les trois dispositions contestées, qui visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées, ne résistent pas au contrôle constitutionnel. Elles portent atteinte au droit à la sécurité de la personne que l'art. 7 garantit aux prostituées, et ce, d'une manière non conforme aux principes de justice fondamentale. Point n'est besoin de déterminer si notre Cour devrait rompre avec la conclusion qu'elle a tirée dans le *Renvoi sur la prostitution*, à savoir que l'al. 213(1)*c*) ne porte pas atteinte à la liberté garantie à l'al. 2*b*), ou la réexaminer, puisqu'il est possible de trancher en l'espèce sur le fondement du seul art. 7.

La règle du *stare decisis* issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. Une juridiction inférieure ne peut toutefois pas faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit d'en justifier le réexamen. Les conditions sont réunies lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. En l'espèce, la juge de première instance pouvait trancher la question nouvelle de savoir si les dispositions en cause portent atteinte ou non au droit à la sécurité de la personne garanti à l'art. 7 car, dans le *Renvoi sur la prostitution*, les juges majoritaires de la Cour statuent uniquement en fonction du droit à la liberté physique de la personne garanti par l'art. 7. Qui plus est, dans le *Renvoi sur la prostitution*, les principes de justice fondamentale sont examinés sous l'angle de l'imprécision de la criminalisation indirecte et de l'acceptabilité de celle-ci. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années. La juge de première instance n'était cependant pas admise à trancher la question de savoir si la disposition sur la communication constitue une limitation justifiée de la liberté d'expression. Notre Cour s'était prononcée sur ce point dans le *Renvoi sur la prostitution*, et la juge était liée par cette décision.

Les conclusions tirées en première instance sur des faits sociaux ou législatifs commandent la déférence. La norme de contrôle applicable aux conclusions de fait —

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social, or legislative — remains palpable and overriding error.

The impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7. The proper standard of causation is a flexible "sufficient causal connection" standard, as correctly adopted by the application judge. The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

The applicants have also established that the deprivation of their security of the person is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning our constitutional order. This case concerns the basic values against arbitrariness (where there is *no connection* between the effect and the object of the law), overbreadth (where the law goes too far and interferes with *some* conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently

qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

Les dispositions contestées ont un effet préjudiciable sur la sécurité des prostituées et mettent donc en jeu le droit garanti à l'art. 7. La norme qui convient est celle du « lien de causalité suffisant », appliquée avec souplesse, celle retenue à juste titre par la juge de première instance. Les interdictions augmentent tous les risques auxquels s'exposent les demanderesses lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. Elles ne font pas qu'encadrer la pratique de la prostitution. Elles franchissent un pas supplémentaire déterminant par l'imposition de conditions *dangereuses* à la pratique de la prostitution : elles empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection. Le lien de causalité n'est pas rendu inexistant par les actes de tiers (clients et proxénètes) ou le prétendu choix des intéressées de se prostituer. Bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution (ou qui a un jour fait ce choix), de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. De plus, le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées ne change rien. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

Les demanderesses ont également établi que l'atteinte à leur droit à la sécurité n'est pas conforme aux principes de justice fondamentale, lesquels sont censés intégrer les valeurs fondamentales qui sous-tendent notre ordre constitutionnel. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire (*absence de lien* entre l'effet de la loi et son objet), à la portée excessive (la disposition va trop loin et empiète sur *quelque* comportement sans lien avec son objectif) et à la disproportion totale (l'effet de la disposition est totalement disproportionné à l'objectif de l'État). Il s'agit de trois notions distinctes, mais la portée excessive est liée au caractère arbitraire en ce que l'absence de lien entre l'effet de la disposition et son objectif est commune aux deux. Les trois notions supposent de comparer l'atteinte aux droits qui découle de la loi avec l'objectif de la loi, et non avec son efficacité; elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi ou qui en pâtit. L'analyse se veut qualitative, et non quantitative. La question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement

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bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work

mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

Si l'on applique ces notions aux dispositions contestées, l'effet préjudiciable de l'interdiction des maisons de débauche (art. 210) sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif de prévenir les nuisances publiques. Les préjudices subis par les prostituées selon les juridictions inférieures (p. ex. le fait de ne pouvoir travailler dans un lieu fixe, sûr et situé à l'intérieur, ni avoir recours à un refuge sûr) sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer les nuisances, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. L'interdiction faite à l'al. 212(1)*j*) de vivre des produits de la prostitution d'autrui vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés. Or, la disposition vise toute personne qui vit des produits de la prostitution d'autrui sans établir de distinction entre celui qui exploite une prostituée et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. *Certains* actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent ainsi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive. L'alinéa 213(1)*c*), qui interdit la communication, vise non pas à éliminer la prostitution dans la rue comme telle, mais bien à sortir la prostitution de la rue et à la soustraire au regard du public afin d'empêcher les nuisances susceptibles d'en découler. Son effet préjudiciable sur le droit à la sécurité et à la vie des prostituées de la rue, du fait que ces dernières sont empêchées de communiquer avec leurs clients éventuels afin de déterminer s'ils sont intoxiqués ou enclins à la violence, est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

Même si les procureurs généraux ne prétendent pas sérieusement que, si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier, certaines des thèses qu'ils défendent en fonction de l'art. 7 sont reprises à juste titre à cette étape de l'analyse. En particulier, ils tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation. Or, la disposition vise non seulement

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with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

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le chauffeur ou le garde du corps, qui peut en réalité être un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur son effet qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie. Les dispositions contestées ne sont pas sauvegardées par application de l'article premier.

La conclusion que les dispositions contestées portent atteinte à des droits garantis par la *Charte* ne dépouille pas le législateur du pouvoir de décider des lieux et des modalités de la prostitution, à condition qu'il exerce ce pouvoir sans porter atteinte aux droits constitutionnels des prostituées. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel. Au vu de l'ensemble des intérêts en jeu, il convient de suspendre l'effet de la déclaration d'invalidité pendant un an.

Jurisprudence

Arrêts mentionnés : *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458; *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *R. c. Pierce* (1982), 37 O.R. (2d) 721; *R. c. Worthington* (1972), 10 C.C.C. (2d) 311; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Grilo* (1991), 2 O.R. (3d) 514; *R. c. Barrow* (2001), 54 O.R. (3d) 417; *R. c. Head* (1987), 59 C.R. (3d) 80; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Nouveau-Brunswick (Ministre de la Santé et des Services*

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(3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

Michael H. Morris, *Nancy Dennison* and *Gail Sinclair*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

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Written submissions only by *Michael A. Feder* and *Tammy Shoranick*, for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS.

Brent B. Olthuis, *Megan Vis-Dunbar* and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

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Jonathan A. Shime, *Megan Schwartzentruber* and *Renée Lang*, for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario.

Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of

2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Pourvois rejetés et pourvoi incident accueilli.

Michael H. Morris, *Nancy Dennison* et *Gail Sinclair*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* et *Megan Stephens*, pour l'appelant/intimé au pourvoi incident le procureur général de l'Ontario.

Alan N. Young, *Marlys A. Edwardh* et *Daniel Sheppard*, pour les intimées/appelantes au pourvoi incident.

Sylvain Leboeuf et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

Katrina E. Pacey, *Joseph J. Arvay*, *c.r.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* et *M. Kathleen Kinch*, pour les intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society.

Argumentation écrite seulement par *Michael A. Feder* et *Tammy Shoranick*, pour l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida.

Brent B. Olthuis, *Megan Vis-Dunbar* et *Michael Sobkin*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Georgialee A. Lang et *Donald Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Jonathan A. Shime, *Megan Schwartzentruber* et *Renée Lang*, pour les intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario.

Janine Benedet et *Fay Faraday*, pour les intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association

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Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* and *Amanda C. McLachlan*, for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada.

Joseph J. Arvay, *Q.C.*, and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Walid Hijazi, for the intervener the Simone de Beauvoir Institute.

Gwendoline Allison, for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution.

Christa Big Canoe and *Emily R. Hill*, for the intervener Aboriginal Legal Services of Toronto Inc.

des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* et *Amanda C. McLachlan*, pour les intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada.

Joseph J. Arvay, *c.r.*, et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Walid Hijazi, pour l'intervenant l'Institut Simone de Beauvoir.

Gwendoline Allison, pour l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution.

Christa Big Canoe et *Emily R. Hill*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

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The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

[2] These appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

I. The Case

[3] Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

[4] The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1)(*j*) makes it an offence to live on the avails of another's prostitution. Section 213(1)(*c*) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Au Canada, offrir ses services sexuels contre de l'argent n'est pas un crime. Par contre, tenir une maison de débauche, vivre des produits de la prostitution d'autrui ou communiquer avec quelqu'un en public en vue d'un acte de prostitution constituent des actes criminels. On fait valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées et qu'elles sont de ce fait inconstitutionnelles.

[2] Les pourvois et le pourvoi incident ne visent pas à déterminer si la prostitution doit être légale ou non, mais bien si les dispositions adoptées par le législateur fédéral pour encadrer sa pratique résistent au contrôle constitutionnel. Je conclus qu'elles n'y résistent pas. Je suis donc d'avis de les invalider avec effet suspensif et de renvoyer la question au législateur afin qu'il redéfinisse les modalités de cet encadrement.

I. Le dossier

[3] Les demanderesses — trois prostituées ou exprostituées — ont sollicité un jugement qui déclare inconstitutionnelles trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46.

[4] Les trois dispositions contestées criminalisent diverses activités liées à la prostitution. Elles visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées. Suivant l'art. 210, est coupable d'une infraction quiconque, selon le cas, habite une maison de débauche, est trouvé, sans excuse légitime, dans une maison de débauche ou, en qualité de propriétaire, locateur, occupant ou locataire d'un local, en permet sciemment l'utilisation comme maison de débauche. L'alinéa 212(1)*j*) dispose qu'est coupable d'un acte criminel quiconque vit des produits de la prostitution d'autrui. L'alinéa 213(1)*c*) crée l'infraction d'arrêter ou de tenter d'arrêter une personne ou de communiquer ou de tenter de communiquer avec elle dans un endroit public dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre.

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[5] However, prostitution itself is not illegal. It is not against the law to exchange sex for money. Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and "out-calls" — where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

[6] The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violent clients. The applicants also allege that s. 213(1)(*c*) infringes s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

[7] The backgrounds of the three applicants as revealed in their evidence were reviewed in the application judge's decision (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford was born in Collingwood, Ontario, in 1959, and as of 2010 had 14 years of experience working as a prostitute in various Canadian cities. She worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford had a difficult childhood and adolescence during which she was subjected to various types of abuse. She also encountered brutal violence throughout her career — largely, she stated, while working on the street. In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that safety of an indoor location can vary. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house, for which she has paid a number of fines and served 15 months in jail.

[5] Or, la prostitution n'est pas elle-même illégale. Échanger des services sexuels contre de l'argent n'est pas contraire à la loi. Le régime actuel ne permet que deux types de prostitution : celle qui se pratique dans la rue et celle qui est « itinérante », où la prostituée se déplace pour aller à la rencontre de son client dans un endroit convenu, chez lui par exemple. Cette limitation témoigne d'un choix de politique générale du législateur. Il est loisible à ce dernier de limiter les modalités et les lieux d'exercice de la prostitution à condition qu'il le fasse sans porter atteinte aux droits constitutionnels des prostituées.

[6] Les demanderesses soutiennent que les dispositions portent toutes trois atteinte au droit garanti à l'art. 7 de la *Charte canadienne de droits et libertés* en ce qu'elles empêchent les prostituées de prendre certaines mesures pour se prémunir contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à une liberté garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

[7] Dans sa décision, la juge de première instance relate l'histoire personnelle de chacune des trois demanderesses à partir de leurs témoignages (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford est née en 1959 à Collingwood, en Ontario. En 2010, elle se prostituait depuis 14 ans et avait travaillé dans différentes villes canadiennes. Elle a été tour à tour prostituée dans la rue, employée de salon de massage, escorte, propriétaire et directrice d'une agence d'escortes, puis dominatrice. Elle a connu une enfance et une adolescence difficiles pendant lesquelles elle a subi divers types de violence. Elle a également été victime d'actes de violence pendant ses années de prostitution, surtout, a-t-elle expliqué, lorsqu'elle travaillait dans la rue. Elle en conclut que la prostitution pratiquée à l'intérieur est moins risquée que la prostitution dans la rue, même si elle reconnaît que la sécurité à l'intérieur peut varier d'un lieu à l'autre. M[me] Bedford a été déclarée coupable d'avoir tenu et habité une maison de débauche, deux infractions qui lui ont valu des amendes et une peine d'emprisonnement de 15 mois.

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[9] When she ran an escort service in the 1980s, Ms. Bedford instituted various safety measures, including: ensuring someone else was on location during in-calls, except during appointments with well-known clients; ensuring that women were taken to and from out-call appointments by a boyfriend, husband, or professional driver; if an appointment was at a hotel, calling the hotel to verify the client's name and hotel room number; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying that credit card numbers matched the names of clients. She claimed she was not aware of any incidents of violence by the clientele towards her employees during that time. At some point in the 1990s, Ms. Bedford ran the Bondage Bungalow, where she offered dominatrix services. She also instituted various safety measures at this establishment, and claimed she only experienced one incident of "real violence" (application decision, at para. 30).

[10] Ms. Bedford is not currently working in prostitution but asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

[11] Amy Lebovitch was born in Montréal in 1979. She comes from a stable background and attended both CEGEP and university. She currently works as a prostitute and has done so since approximately 1997 in various cities in Canada. She worked first as a street prostitute, then as an escort, and later in a fetish house. Ms. Lebovitch considers herself lucky that she was never subjected to violence during her years working on the streets. She moved off the streets to work at the escort agency after seeing other women's injuries and hearing stories of the violence suffered by other street prostitutes. Ms. Lebovitch maintains that she felt safer in an indoor location; she attributed remaining safety issues mainly to poor management. Ms. Lebovitch experienced one notable instance of violence, which

[9] Lorsqu'elle dirigeait un service d'escortes dans les années 1980, Mme Bedford prenait diverses mesures de sécurité, dont les suivantes. Assurer la présence sur place d'une autre personne lors de la visite d'un nouveau client; faire en sorte que la prostituée soit amenée au lieu de rendez-vous, puis en soit ramenée par son petit ami, son mari ou un chauffeur; appeler l'hôtel où le rendez-vous est donné pour vérifier le nom du client et le numéro de sa chambre; composer le numéro de téléphone du client pour s'assurer que c'était le bon lorsque la rencontre avait lieu chez le client; refuser tout rendez-vous à un client qui semblait intoxiqué; s'assurer que le numéro de carte de crédit correspondait au nom du client. Pour autant qu'elle sache, aucune de ses employées n'a été victime d'actes de violence de la part de clients pendant cette période. À un certain moment au cours des années 1990, Mme Bedford a ouvert le « Bondage Bungalow » où elle a offert des services de dominatrice. Elle y a également pris des mesures de sécurité et n'a connu qu'un seul incident de [TRADUCTION] « violence véritable » (décision de première instance, par. 30).

[10] Pour l'heure, Mme Bedford ne se livre pas à la prostitution. Elle aimerait reprendre ses activités de dominatrice dans un lieu sûr, à l'intérieur, mais elle craint d'engager alors sa responsabilité criminelle. Elle ajoute ne pas vouloir non plus que ses collaborateurs s'exposent à des accusations de proxénétisme.

[11] Née en 1979 à Montréal, Amy Lebovitch a grandi dans une famille stable et a fréquenté le cégep et l'université. Elle se livre actuellement à la prostitution. Elle a commencé vers 1997 et a travaillé dans plusieurs villes du Canada. Elle s'est d'abord prostituée dans la rue, puis comme escorte et, enfin, dans une maison fétichiste. Elle s'estime chanceuse de n'avoir jamais été victime de violence au cours des années où elle a travaillé dans la rue. Elle a quitté ce milieu pour devenir escorte après avoir vu les blessures infligées à d'autres prostituées de la rue et avoir entendu le récit des actes de violence commis à leur endroit. Mme Lebovitch soutient qu'elle se sent davantage en sécurité lorsqu'elle se livre à la prostitution à l'intérieur. Selon elle, les incidents qui s'y produisent malgré tout sont

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she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

[12] Presently, Ms. Lebovitch primarily works independently out of her home, where she takes various safety precautions, including: making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; getting referrals from regular clients; and calling a third party — her "safe call" — when the client arrives and before he leaves. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She says that the fear of criminal charges has caused her to work on the street on occasion. She is also concerned that her partner will be charged with living on the avails of prostitution. She has never been charged with a criminal offence of any kind. Ms. Lebovitch volunteers as the spokesperson for Sex Professionals of Canada ("SPOC"), and she also records information from women calling to report "bad dates" — incidents that ended in violence or theft. Ms. Lebovitch stated that she enjoys her job and does not plan to leave it in the foreseeable future.

[13] Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street

essentiellement attribuables à une mauvaise gestion. Elle n'a connu qu'un seul cas de violence digne de mention, qu'elle n'a toutefois pas dénoncé de crainte d'attirer l'attention de la police sur ses activités et d'être accusée au criminel.

[12] À l'heure actuelle, Mme Lebovitch se prostitue essentiellement chez elle, de manière autonome. Elle prend diverses précautions, dont s'assurer que le numéro de téléphone du client n'est pas masqué, refuser un client qui semble ivre, intoxiqué ou par ailleurs rebutant, s'enquérir au départ des attentes du client, lui demander son nom au complet et vérifier son identité à l'assistance annuaire, obtenir des références d'un client fiable et appeler un tiers — son « ange gardien » — à l'arrivée du client et peu avant qu'il ne parte. Mme Lebovitch craint d'être accusée et déclarée coupable de tenir une maison de débauche et que sa demeure soit confisquée en conséquence. Elle affirme que la peur d'être accusée au criminel l'a parfois amenée à travailler dans la rue. Elle craint également que son conjoint ne soit accusé de proxénétisme. Elle n'a jamais fait l'objet d'accusations au pénal. Elle est porte-parole bénévole de l'organisme Sex Professionals of Canada (« SPOC ») et consigne par ailleurs les incidents que lui signalent des prostituées victimes de violence ou de vol de la part de clients. Mme Lebovitch dit aimer son travail et n'entend pas en changer dans un avenir prévisible.

[13] Née en 1958 à Moncton, au Nouveau-Brunswick, Valerie Scott est actuellement directrice administrative de SPOC. Elle ne travaille plus comme prostituée, mais elle l'a fait, à l'intérieur, chez elle ou dans des chambres d'hôtel, dans la rue et dans des salons de massage. Elle a aussi dirigé une petite agence d'escortes. Elle n'a jamais été accusée de la moindre infraction criminelle. Lorsqu'elle travaillait chez elle, elle soumettait tout nouveau client à une évaluation préalable lors d'une rencontre dans un lieu public. Elle n'a alors jamais eu d'ennuis graves. Vers 1984, les craintes accrues suscitées par le VIH/SIDA l'ont amenée à travailler dans la rue car les clients qu'elle recevait chez elle se croyaient dispensés du port du condom. Dans la rue, elle a été l'objet de menaces de violence ainsi que d'agressions verbales et physiques. Elle fait

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prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

[14] Ms. Scott worked as an activist and, among other things, advocated against Bill C-49 (which included the current communicating provision). Ms. Scott stated that following the enactment of the communicating law, the Canadian Organization for the Rights of Prostitutes ("CORP") began receiving calls from women working in prostitution about the increased enforcement of the laws and the prevalence of bad dates. In response, Ms. Scott was involved in setting up a drop-in and phone centre for prostitutes in Toronto; within the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrest. In 2000, Ms. Scott formed SPOC to revitalize and continue the work previously done by CORP. As the executive director of this organization, she testified before a Parliamentary Subcommittee on Solicitation Laws in 2005. Over the years, Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution. If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

[15] The three applicants applied pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the provisions restricting prostitution are unconstitutional. The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many

état de certaines précautions que les prostituées de la rue prenaient avant l'adoption des dispositions interdisant la communication, dont le travail à deux ou à trois ou la prise ostensible du numéro de plaque du client par une autre prostituée afin que ce dernier sache qu'on pouvait le retracer si les choses tournaient mal.

[14] Mme Scott a été militante. Elle a notamment fait campagne contre le projet de loi C-49 (dont est issue la disposition actuelle interdisant la communication). Elle dit qu'après l'interdiction de la communication, la Canadian Organization for the Rights of Prostitutes (« CORP ») a commencé à recevoir des appels de prostituées qui constataient une répression policière accrue et un plus grand nombre d'incidents avec des clients. C'est pourquoi elle a participé à la mise sur pied à Toronto d'un centre d'aide aux prostituées dont les services étaient offerts sur place et au téléphone. Dès la première année, Mme Scott s'est entretenue avec environ 250 prostituées dont les principaux sujets de préoccupation étaient la violence des clients et les conséquences juridiques d'une arrestation. En 2000, elle a créé SPOC afin de donner une nouvelle impulsion au travail entrepris par la CORP. C'est à titre de directrice administrative de cet organisme qu'elle a témoigné en 2005 devant le Sous-comité parlementaire de l'examen des lois sur le racolage. Au fil des ans, elle se serait entretenue avec environ 1 500 femmes qui se livrent à la prostitution. Si les appelantes ont gain de cause, Mme Scott aimerait se mettre à son compte et offrir des services de prostitution à l'intérieur. Elle reconnaît qu'un client peut se révéler dangereux tant à l'intérieur qu'à l'extérieur, mais elle prendrait des précautions, comme la vérification de l'identité du client, la présence d'une autre personne à proximité qui puisse intervenir au besoin lors d'un rendez-vous et l'embauche d'un garde du corps.

[15] Les trois demanderesses ont demandé, sur le fondement de l'al. 14.05(3)g.1) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, que les dispositions qui limitent la prostitution soient déclarées inconstitutionnelles. Le dossier de preuve compte plus de 25 000 pages et 88 volumes. La preuve par affidavit s'accompagne d'une foule d'études, de rapports, d'articles de journaux, d'extraits de textes

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other documents. Some of the affiants were cross-examined.

II. Legislation

[16] The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Criminal Code

197. (1) In this Part,

. . .

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

de loi et des Débats de la Chambre des communes, et de nombreux autres documents. Certains déposants ont été contre-interrogés.

II. Dispositions législatives

[16] Les dispositions législatives applicables sont les suivantes :

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints 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.

2. Chacun a les libertés fondamentales suivantes :

. . .

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Code criminel

197. (1) Les définitions qui suivent s'appliquent à la présente partie.

. . .

« maison de débauche » Local qui, selon le cas :

a) est tenu ou occupé;

b) est fréquenté par une ou plusieurs personnes,

à des fins de prostitution ou pour la pratique d'actes d'indécence.

210. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

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(*a*) is an inmate of a common bawdy-house,

(*b*) is found, without lawful excuse, in a common bawdy-house, or

(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212. (1) Every one who

. . .

(*j*) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

213. (1) Every person who in a public place or in any place open to public view

. . .

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

(3) Lorsqu'une personne est déclarée coupable d'une infraction visée au paragraphe (1), le tribunal fait signifier un avis de la déclaration de culpabilité au propriétaire ou locateur du lieu à l'égard duquel la personne est déclarée coupable, ou à son agent, et l'avis doit contenir une déclaration portant qu'il est signifié selon le présent article.

(4) Lorsqu'une personne à laquelle un avis est signifié en vertu du paragraphe (3) n'exerce pas immédiatement tout droit qu'elle peut avoir de résilier la location ou de mettre fin au droit d'occupation que possède la personne ainsi déclarée coupable, et que, par la suite, un individu est déclaré coupable d'une infraction visée au paragraphe (1) à l'égard du même local, la personne à qui l'avis a été signifié est censée avoir commis une infraction visée au paragraphe (1), à moins qu'elle ne prouve qu'elle a pris toutes les mesures raisonnables pour empêcher le renouvellement de l'infraction.

212. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

. . .

j) vit entièrement ou en partie des produits de la prostitution d'une autre personne.

213. (1) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, dans un endroit soit public soit situé à la vue du public et dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre :

. . .

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(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

III. Prior Decisions

A. *Ontario Superior Court of Justice (Himel J.)*

[17] The application judge, Himel J., concluded that the applicants had private interest standing to challenge the provisions. She held that the decision of this Court upholding the bawdy-house and communicating law in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), did not prevent her from reviewing their constitutionality because: (1) s. 7 jurisprudence has evolved considerably since 1990; in particular, the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the *Prostitution Reference*; (2) the evidentiary record before her was much richer, based on research not available in 1990; (3) the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid; and (4) the type of expression at issue differed from that considered in the *Prostitution Reference*.

[18] In considering the legislative scheme as it exists and the evidence before her, Himel J. found that each of the impugned laws deprived the applicants and others like them of their liberty (by reason of potential imprisonment) and their security of the person (because they increased the risk of injury). The increased risk of violence created by the laws constituted a "sufficient" cause, engaging the security of the person protected by s. 7. She stated:

With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes

c) soit arrête ou tente d'arrêter une personne ou, de quelque manière que ce soit, communique ou tente de communiquer avec elle.

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (la juge Himel)*

[17] En première instance, la juge Himel conclut que les demanderesses ont qualité pour agir dans l'intérêt privé et contester les dispositions. Elle estime que le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (« *Renvoi sur la prostitution* »), dans lequel notre Cour confirme la validité des dispositions sur les maisons de débauche et la communication à des fins de prostitution, ne l'empêche pas d'examiner leur constitutionnalité, car (1) la jurisprudence relative à l'art. 7 a beaucoup évolué depuis 1990 et, plus particulièrement, les notions de caractère arbitraire, de portée excessive et de disproportion totale n'étaient pas encore bien arrêtées, de sorte qu'elles n'avaient pas été invoquées ou examinées dans cette affaire, (2) le dossier de preuve est beaucoup plus étoffé et repose sur les résultats de recherches qui n'étaient pas disponibles en 1990, (3) les données sociales, politiques et économiques qui sous-tendent le *Renvoi sur la prostitution* ne sont peut-être plus valables et (4) l'expression considérée en l'espèce diffère de celle examinée dans le *Renvoi sur la prostitution*.

[18] Après examen du régime législatif existant et de la preuve offerte, la juge Himel conclut que les dispositions contestées portent toutes trois atteinte au droit à la liberté (en raison du risque d'emprisonnement) et à la sécurité (en raison du risque accru de préjudice) des demanderesses et d'autres personnes dans la même situation. Le risque accru de violence créé par les dispositions « suffit » pour mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7. Elle déclare :

[TRADUCTION] À l'égard de l'art. 210, les preuves indiquent que travailler à l'intérieur est la façon la plus

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who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. [paras. 361-62]

[19] Himel J. concluded that the deprivation of security thus established was not in accordance with the principles of fundamental justice, notably the requirements that laws not infringe security of the person in a way that is arbitrary, overbroad or grossly disproportionate.

[20] Himel J. found the bawdy-house provision (s. 210) overbroad because it extended to virtually any place and allowed for convictions that were unrelated to the objective of preventing community nuisance. And the harms it inflicted were grossly disproportionate to the few nuisance complaints received. The effect of preventing prostitutes from working in-call at a regular indoor location was to force them to choose between their liberty interest (obeying the law) and their personal security.

[21] Himel J. found the prohibition against living on the avails of prostitution (s. 212(1)(*j*)) arbitrary, overbroad and grossly disproportionate. While targeting exploitation by pimps, the provision

sécuritaire de vendre des services à caractère sexuel. Pourtant, les prostituées qui tentent d'accroître leur niveau de sécurité en travaillant à l'intérieur sont passibles d'une sanction pénale. Relativement à l'al. 212(1)*j*), la prostitution, y compris le travail légal « itinérant », pourrait être plus sécuritaire si la prostituée avait le droit d'embaucher un adjoint ou un garde du corps. Pourtant, de telles relations de travail sont illégales en raison de la disposition interdisant de vivre des produits de la prostitution. En dernier lieu, l'al. 213(1)*c*) interdit aux prostituées de la rue, qui sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence, de présélectionner les clients à l'étape initiale, et cruciale, de la transaction possible, les exposant ainsi à un risque accru de violence.

En conclusion, ces trois dispositions empêchent les prostituées de prendre des précautions, certaines extrêmement rudimentaires, qui pourraient réduire le risque de violence à leur endroit. Les prostituées sont obligées de choisir entre la liberté et la sécurité de leur personne. Ainsi, bien que ce soit le client qui, en fin de compte, fasse subir la violence à la prostituée, je suis d'avis que la loi contribue suffisamment à empêcher qu'une prostituée prenne des mesures qui pourraient réduire le risque d'une telle violence. [par. 361-362]

[19] La juge Himel conclut que la privation du droit à la sécurité qui en résulte n'est pas conforme aux principes de justice fondamentale, dont celui qui empêche le législateur de porter atteinte au droit à la sécurité de la personne par l'adoption d'une disposition arbitraire ou totalement disproportionnée ou dont la portée est trop grande.

[20] À son avis, la disposition sur les maisons de débauche (l'art. 210) a une portée trop grande en ce qu'elle vise pratiquement tout lieu et réprime des actes qui n'ont rien à voir avec l'objectif d'empêcher les nuisances publiques. De plus, le préjudice infligé est totalement disproportionné compte tenu du nombre peu élevé de plaintes pour nuisance. Empêcher les prostituées de se livrer à la prostitution dans un lieu établi, situé à l'intérieur, les contraint à renoncer à leur liberté (par l'observation de la loi) ou à leur sécurité personnelle.

[21] La juge Himel estime que l'interdiction du proxénétisme (l'al. 212(1)*j*)) est arbitraire et totalement disproportionnée, et que sa portée est trop grande. Même si elle est censée réprimer

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encompasses virtually anyone who provides services to prostitutes. Prostitutes are forced to work alone, increasing the risk of harm, or work with people prepared to break the law. It increases reliance on pimps, and is therefore arbitrary. It catches non-exploitative relationships, and is therefore overbroad. And it creates the risk of severe violence from pimps and exploiters, making it grossly disproportionate.

[22] Finally, Himel J. found the prohibition on communicating for the purposes of prostitution (s. 213(1)(*c*)) violates the principle against gross disproportionality. By preventing prostitutes from screening clients — an essential tool for enhancing their safety — it endangers them out of all proportion to the small social benefit it provides. It also infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*.

[23] Himel J. found that the infringement of the s. 7 and s. 2(*b*) rights imposed by the laws could not be justified under s. 1 of the *Charter*.

[24] In the result, Himel J. declared the communicating and living on the avails offences unconstitutional, without suspension, and rectified the bawdy-house prohibition by striking the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210.

B. *Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.)*

[25] The majority of the Court of Appeal, *per* Doherty, Rosenberg and Feldman J.J.A. (with whom the minority *per* MacPherson J.A. concurred on these issues), agreed with the application judge that the bawdy-house and living on the avails provisions were unconstitutional on the basis that they

l'exploitation par le proxénète, la disposition vise pratiquement toute personne qui offre des services à une prostituée. Celle-ci est obligée soit de travailler seule, ce qui augmente le risque auquel elle s'expose, soit de travailler avec des gens qui sont disposés à contrevenir à la loi. L'interdiction accroît la dépendance des prostituées envers les souteneurs, ce qui la rend arbitraire. Elle s'applique à des rapports exempts d'exploitation, de sorte que sa portée est trop grande. Enfin, elle crée un risque de violence grave de la part des proxénètes et des exploiteurs, d'où son caractère totalement disproportionné.

[22] Enfin, la juge Himel statue que l'interdiction de communiquer en vue de se livrer à la prostitution (l'al. 213(1)*c*)) va à l'encontre du principe de la proportionnalité. Parce qu'elle empêche les prostituées de jauger leurs clients — une mesure essentielle à l'accroissement de leur sécurité —, l'interdiction les expose à un danger disproportionné au faible avantage social obtenu. Elle porte par ailleurs atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte*.

[23] La juge Himel opine que l'atteinte au droit et à la liberté garantis à l'art. 7 et à l'al. 2*b*) qui découle des dispositions en cause ne peut se justifier en vertu de l'article premier de la *Charte.*

[24] Elle déclare donc inconstitutionnelles, sans effet suspensif, les dispositions créant les infractions de communication aux fins de prostitution et de proxénétisme, et elle modifie l'interdiction de tenir une maison de débauche par la suppression du mot « prostitution » dans la définition de « maison de débauche » figurant au par. 197(1) pour les besoins de l'art. 210.

B. *Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk)*

[25] Les juges majoritaires de la Cour d'appel (les juges Doherty, Rosenberg et Feldman, avec l'accord des juges minoritaires sur ces points exprimé par le juge MacPherson) conviennent avec la juge de première instance que les dispositions sur les maisons de débauche et le proxénétisme sont

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engaged the security of the person in a way that was not in accordance with the principles of fundamental justice (2012 ONCA 186, 109 O.R. (3d) 1). In particular, the majority found as follows.

[26] The prohibition on bawdy-houses was overbroad and had an impact on security that was grossly disproportionate to any benefit conferred. The court agreed that the word "prostitution" should be struck from the definition of "common bawdy-house". However, it suspended the declaration of invalidity for 12 months.

[27] The prohibition on living on the avails was not arbitrary, as the application judge found, but was overbroad and grossly disproportionate in its effects. However, instead of striking the provision out, the court narrowed the provision by reading in "in circumstances of exploitation" (para. 267).

[28] The majority of the Court of Appeal found the prohibition on communicating in public for the purpose of prostitution was constitutional. While it engaged security of the person, it did so in accordance with the principles of fundamental justice. The provision aims to combat nuisance-related problems caused by street solicitation. It is not arbitrary; it has been effective in protecting residential neighbourhoods from the targeted harms. Nor is it overbroad or grossly disproportionate. In finding the provision grossly disproportionate, the application judge erred by understating the objective in a way that did not reflect the evidence, and by overemphasizing the impact of the provision on prostitutes' security of the person. The evidence did not establish that inability to communicate with customers contributed to the harm experienced by prostitutes to a degree that made the impact grossly disproportionate to the benefits. The majority also found that it was bound by the *Prostitution Reference*: thus, this provision violated s. 2(*b*) of the *Charter*, but was justified under s. 1 of the *Charter*.

inconstitutionnelles parce qu'elles portent atteinte à la sécurité de la personne d'une manière non conforme aux principes de justice fondamentale (2012 ONCA 186, 109 O.R. (3d) 1). Ils concluent notamment ce qui suit.

[26] Selon eux, l'interdiction des maisons de débauche a une portée trop grande et un effet sur le droit à la sécurité qui est totalement disproportionné à l'avantage obtenu. Ils conviennent de supprimer le mot « prostitution » dans la définition de « maison de débauche », mais suspendent l'effet de l'invalidation pendant 12 mois.

[27] Ils opinent que l'interdiction du proxénétisme n'est pas arbitraire, contrairement à ce qu'affirme la juge de première instance, mais que sa portée est trop grande et qu'elle est totalement disproportionnée par ses effets. Toutefois, au lieu d'invalider la disposition, ils en restreignent la portée en l'interprétant largement comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés (par. 267).

[28] Les juges majoritaires de la Cour d'appel concluent que l'interdiction de communiquer en public à des fins de prostitution est constitutionnelle. Même si elle porte atteinte à la sécurité de la personne, elle est conforme aux principes de justice fondamentale. La disposition vise à empêcher les nuisances causées par le racolage, et elle n'est pas arbitraire. Elle a permis d'assurer la quiétude des quartiers résidentiels. Sa portée n'est pas trop grande et elle n'est pas totalement disproportionnée. Pour arriver à la conclusion que la disposition est totalement disproportionnée, la juge de première instance a eu tort de sous-estimer l'objectif sans égard à la preuve et d'accorder trop d'importance aux répercussions sur le droit à la sécurité des prostituées. La preuve ne démontrait pas que l'impossibilité de communiquer avec des clients contribuait aux ennuis des prostituées au point d'avoir un effet totalement disproportionné à l'avantage obtenu. Les juges majoritaires s'estiment également liés par le *Renvoi sur la prostitution* et ils concluent que la disposition porte atteinte à la liberté garantie à l'al. 2*b*) de la *Charte*, mais que cette atteinte est justifiée au regard de l'article premier de la *Charte*.

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[29] The minority, *per* MacPherson J.A. (dissenting only on this one issue), would have struck down the communicating prohibition under ss. 7 and 1 of the *Charter* as grossly disproportionate to the legislative objective of combatting social nuisance. The minority found that: (1) its effects were equally or more serious than the other provision; (2) the application judge correctly stated the objective of the provision; (3) the record supported the conclusion that screening is an essential tool for safety; (4) beyond screening, the provision adversely impacts safety by forcing prostitutes to work in isolated and dangerous areas; (5) the provision impacts the most vulnerable class of prostitutes, street workers, raising s. 15 equality concerns; (6) the recent decision of this Court in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, supports the conclusion that the provision violates s. 7; and (7) the compounding effect of legislation that drives prostitutes onto the streets and then denies them the ability to evaluate prospective clients supports unconstitutionality. This conclusion made it unnecessary for the minority to consider s. 2(*b*) of the *Charter*.

[30] In the course of arriving at its conclusions, the majority of the Court of Appeal made a number of ancillary observations of importance.

[31] In considering the doctrine of *stare decisis* and whether the application judge was bound by the *Prostitution Reference*, the court adopted a narrow view of when a trial judge can reconsider previous decisions of the Supreme Court of Canada on the basis of changes in the social, economic or political landscapes: the trial judge cannot change the law, but is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. Reasons that justify a court departing from its own prior decisions cannot justify a lower court revisiting binding authority. This applies to

[29] Sous la plume du juge MacPherson, les juges minoritaires (dissidents sur ce seul point) auraient invalidé l'interdiction de communiquer à des fins de prostitution sur le fondement de l'art. 7 et de l'article premier de la *Charte* au motif qu'elle est totalement disproportionnée à l'objectif législatif de réprimer la nuisance sociale. Selon eux, (1) ses répercussions sont aussi graves, sinon plus, que celles des autres dispositions, (2) la juge de première instance a correctement énoncé l'objectif de la disposition, (3) le dossier permettait de conclure que l'évaluation du client est essentielle à la sécurité des prostituées, (4) la disposition empêche non seulement cette évaluation, mais nuit à la sécurité des prostituées en les obligeant à travailler dans des endroits isolés et dangereux, (5) la disposition a des répercussions sur les prostituées les plus vulnérables, celles de la rue, ce qui compromet le droit à l'égalité garanti à l'art. 15, (6) notre récent arrêt *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134 appuie la conclusion d'atteinte au droit garanti à l'art. 7 et (7) l'effet combiné de mesures législatives ayant pour effet d'obliger les prostituées à exercer leurs activités dans la rue tout en les empêchant de jauger leurs clients éventuels va également dans le sens de l'inconstitutionnalité. Cette conclusion des juges minoritaires les dispense d'examiner l'al. 2*b*) de la *Charte*.

[30] Pour en arriver à leurs conclusions, les juges majoritaires formulent accessoirement un certain nombre d'observations importantes.

[31] En ce qui concerne la règle du *stare decisis* et la question de savoir si la juge était liée par le *Renvoi sur la prostitution*, la Cour d'appel interprète strictement les conditions auxquelles un juge de première instance peut réexaminer une décision antérieure de notre Cour au regard de mutations sociales, économiques ou politiques. Le juge ne peut modifier le droit établi. Il doit s'en tenir à des conclusions sur les faits et la crédibilité afin de constituer le dossier de preuve à partir duquel notre Cour pourra ensuite se prononcer. Les motifs pour lesquels un tribunal peut s'écarter de ses propres décisions antérieures ne sauraient permettre à une

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determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras. 75-76).

[32] On the standard of causation required to engage s. 7, the Court of Appeal held that the traditional causation analysis is inappropriate where it is legislation, and not the actions of a government official, that is said to have interfered with a s. 7 interest. Rather, the judge should conduct a practical, pragmatic analysis to determine what the legislation prohibits or requires, its impact on the persons affected, and whether this amounts to an interference with protected rights (paras. 107-9).

[33] On the issue of deference to findings of fact of the application judge, the Court of Appeal held that findings on social and legislative facts are not entitled to appellate deference, while findings on the credibility of affiants and the objectivity of expert witnesses attract deference (paras. 128-31).

[34] Regarding the purpose of the laws, the court rejected the Attorney General of Ontario's submission that there was an overarching legislative objective to eradicate, or at least discourage, prostitution. Rather, the purpose of each of the laws must be independently ascertained with reference to its unique historical context (paras. 165-70).

[35] On the principles of fundamental justice, the Court of Appeal held that arbitrariness, overbreadth, and gross disproportionality each use a different filter to examine the connection between the law and the legislative objective. Arbitrariness is the absence of any link between the objective of the law and its negative impact on security of the person. Overbreadth addresses the situation where the law imposes limits on security of the person that go beyond what is required to achieve its objective. Gross disproportionality describes the case where the effects of the impugned law are so extreme that they cannot be justified by its object (paras. 143-49).

juridiction inférieure de remettre en question un arrêt qui la lie. Ce principe vaut lorsqu'il s'agit de déterminer ce qui constitue une limite raisonnable à l'exercice d'un droit au sens de l'article premier de la *Charte* (par. 75-76).

[32] S'agissant de la causalité requise pour emporter l'application de l'art. 7, la Cour d'appel explique que l'analyse traditionnelle ne convient pas lorsque ce sont les dispositions d'une loi, et non les actes d'un fonctionnaire, qui auraient porté atteinte à un droit garanti par l'art. 7. Il faut plutôt recourir à une analyse factuelle et pragmatique pour déterminer ce que les dispositions interdisent ou prescrivent, quelles sont leurs répercussions sur les intéressés et s'il en résulte une atteinte à un droit garanti (par. 107-109).

[33] En ce qui concerne la déférence qui s'impose à l'égard des conclusions de fait tirées en première instance, la Cour d'appel opine que les conclusions sur des faits sociaux ou législatifs ne commandent pas la déférence de la juridiction d'appel, tandis que celles sur la crédibilité des déposants et l'objectivité des témoins experts la commandent (par. 128-131).

[34] S'agissant de l'objet des dispositions, la Cour d'appel rejette la prétention du procureur général de l'Ontario suivant laquelle leur objectif primordial est de supprimer la prostitution ou, du moins, de la décourager. À son avis, il faut plutôt cerner l'objet de chacune des dispositions séparément, dans son propre contexte historique (par. 165-170).

[35] Quant aux principes de justice fondamentale, la Cour d'appel statue que le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné appellent des examens sous des angles différents du lien entre la disposition contestée et l'objectif législatif. Le caractère arbitraire s'entend de l'absence de rapport entre l'objectif de la loi et ses effets préjudiciables sur la sécurité de la personne. Une disposition a une portée trop grande lorsqu'elle limite le droit à la sécurité de la personne plus qu'il n'est nécessaire pour atteindre son objectif. Une disposition est par ailleurs totalement disproportionnée lorsque ses répercussions sont si extrêmes qu'elles ne peuvent être justifiées par son objet (par. 143-149).

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IV. Discussion

[36] The appellant Attorneys General appeal from the Court of Appeal's declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. The respondents cross-appeal on the issue of the constitutionality of s. 213(1)(*c*), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

[37] Before turning to the *Charter* arguments before us, I will first discuss two preliminary issues: (1) whether the 1990 decision in the *Prostitution Reference*, upholding the bawdy-house and communication prohibitions, is binding on trial judges and this Court; and (2) the degree of deference to be accorded to the application judge's findings on social and legislative facts.

A. *Preliminary Issues*

(1) Revisiting the *Prostitution Reference*

[38] Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.

[39] The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.

[40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on

IV. Analyse

[36] Les procureurs généraux appelants se pourvoient contre le jugement de la Cour d'appel qui déclare inconstitutionnels l'art. 210 et l'al. 212(1)*j*) du *Code*. Les intimées se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise par la Cour d'appel pour remédier à l'inconstitutionnalité de l'art. 210.

[37] Avant de passer aux moyens fondés sur la *Charte*, j'examine d'abord deux questions préliminaires. Premièrement, les juges de première instance et notre Cour sont-ils liés par le *Renvoi sur la prostitution* de 1990, qui confirme la validité des dispositions interdisant les maisons de débauche et la communication à des fins de prostitution? Deuxièmement, quel degré de déférence commandent les conclusions tirées en première instance sur des faits sociaux ou législatifs?

A. *Questions préliminaires*

(1) Réexamen du *Renvoi sur la prostitution*

[38] La notion de certitude du droit exige que les tribunaux suivent et appliquent les précédents qui font autorité. C'est d'ailleurs l'assise fondamentale de la common law.

[39] La question de savoir à quelles conditions il est possible de s'écarter d'un précédent, le cas échéant, se présente de deux manières. Elle se pose premièrement du point de vue « hiérarchique ». À quelles conditions une juridiction inférieure peut-elle, le cas échéant, s'écarter du précédent établi par une juridiction supérieure? Elle se pose deuxièmement du point de vue « collégial ». À quelles conditions une juridiction comme notre Cour peut-elle, le cas échéant, s'écarter de ses propres précédents?

[40] Dans la présente affaire, le précédent correspond à l'avis consultatif de la Cour dans le *Renvoi sur la prostitution* de 1990, qui confirme la constitutionnalité des interdictions faites par deux des

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bawdy-houses and communicating — two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(*b*) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(*b*), it was a justifiable limit under s. 1 of the *Charter*. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168, at p. 175).

trois dispositions contestées en l'espèce de tenir une maison de débauche et communiquer à des fins de prostitution. Dans ce renvoi, la Cour devait décider si les dispositions portaient atteinte au droit ou à la liberté garantis à l'art. 7 ou à l'al. 2*b*) de la *Charte* et, dans l'affirmative, si cette limite était justifiée par application de l'article premier. Elle conclut que ni l'une ni l'autre des dispositions ne sont incompatibles avec l'art. 7 et que, même si l'interdiction de communiquer à des fins de prostitution porte atteinte à une liberté garantie à l'al. 2*b*), il s'agit d'une limite justifiable suivant l'article premier de la *Charte*. Bien que les avis consultatifs puissent ne pas être juridiquement contraignants, dans les faits, il sont suivis (G. Rubin, « The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law » (1960), 6 *R.D. McGill* 168, p. 175).

[41] The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(*b*) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (para. 76).

[41] La juge de première instance dit pouvoir réexaminer les conclusions tirées dans le *Renvoi sur la prostitution* parce que les questions de droit soulevées relativement à l'art. 7 sont différentes étant donné l'évolution du droit dans le domaine, que le dossier de preuve est plus étoffé et fait état de résultats de recherches qui n'étaient pas disponibles en 1990, que les données sociales, politiques et économiques sous-jacentes ne sont plus valables et que l'expression alors en cause (commerciale) diffère de celle considérée dans la présente affaire (celle qui contribue à la sécurité). La Cour d'appel exprime son désaccord au sujet de l'al. 2*b*) et explique que le tribunal de première instance invité à rompre avec un précédent en raison de nouveaux éléments de preuve ou de nouvelles données sociales, politiques ou économiques peut tirer des conclusions de fait susceptibles d'être examinées ensuite par une juridiction supérieure, mais ne peut les appliquer pour arriver à une solution différente de celle retenue dans le précédent (par. 76).

[42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence

[42] À mon avis, le juge du procès peut se pencher puis se prononcer sur une prétention d'ordre constitutionnel qui n'a pas été invoquée dans l'affaire antérieure; il s'agit alors d'une nouvelle question de droit. De même, le sujet peut être réexaminé lorsque de nouvelles questions de droit sont soulevées par suite d'une évolution importante du droit ou qu'une

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that fundamentally shifts the parameters of the debate.

[43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).

[44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[45] It follows that the application judge in this case was entitled to rule on whether the laws in question violated the security of the person interests under s. 7 of the *Charter*. In the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone. Only Lamer J., writing for himself, touched on security of the person — and then, only in the context of economic interests. Contrary to the submission of the Attorney General of Canada, whether the s. 7 interest at issue is economic liberty or security of the person is *not* "a distinction without a difference" (A.F., at para. 94). The rights protected by s. 7 are "independent interests, each of which must be given independent significance by the Court" (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 52). Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness,

modification de la situation ou de la preuve change radicalement la donne.

[43] L'intervenant David Asper Centre for Constitutional Rights fait valoir que la règle du *stare decisis* propre à la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. À son avis, une juridiction inférieure ne doit pas s'en tenir au rôle de [TRADUCTION] « simple exécutant » qui constitue un dossier et tire des conclusions sans se livrer à l'analyse du droit (m.i., par. 25).

[44] Je partage cet avis. Mais comme le signale aussi l'intervenant, la juridiction inférieure ne peut faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit de justifier le réexamen d'un précédent. Rappelons que, selon moi, le réexamen est justifié lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. Cette approche met en balance les impératifs que sont le caractère définitif et la stabilité avec la reconnaissance du fait qu'une juridiction inférieure doit pouvoir exercer pleinement sa fonction lorsqu'elle est aux prises avec une situation où il convient de revoir un précédent.

[45] Il s'ensuit que, en l'espèce, la juge pouvait trancher la question de savoir si les dispositions en cause respectaient ou non le droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Dans le *Renvoi sur la prostitution*, les juges majoritaires statuent uniquement en fonction du droit à la liberté physique de la personne garanti à l'art. 7. Seul le juge Lamer, qui s'exprime en son nom personnel, aborde la question de la sécurité de la personne, et ce, dans le seul contexte des droits économiques. Contrairement à ce que prétend le procureur général du Canada, le fait que le droit en cause garanti par l'art. 7 soit celui à la liberté économique ou à la sécurité de la personne *n'*est *pas* [TRADUCTION] « une distinction sans importance » (m.a., par. 94). Les droits garantis à l'art. 7 sont des « intérêts indépendants auxquels la Cour doit respectivement donner un sens indépendant » (*R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 52). Qui plus est, dans le *Renvoi sur la prostitution*, la Cour a examiné les

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overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years.

[46] These considerations do not apply to the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue, nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.

[47] This brings me to the question of whether this Court should depart from its previous decision on the s. 2(*b*) aspect of this case. At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27). In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(*b*) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.

(2) Deference to the Application Judge's Findings on Social and Legislative Facts

[48] The Court of Appeal held that the application judge's findings on social and legislative facts — that is, facts about society at large, established by complex social science evidence — were not entitled to deference. With respect, I cannot agree. As this Court stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.

principes de justice fondamentale sous l'angle de l'imprécision de la criminalisation indirecte et de son acceptabilité. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années.

[46] Ces considérations sont étrangères à la question — tranchée dans le *Renvoi sur la prostitution* — de savoir si la disposition qui interdit la communication constitue une limitation justifiée de la liberté d'expression. Qualifier différemment l'expression à laquelle il aurait été porté atteinte en l'espèce ne fait pas naître une nouvelle question de droit, et ni une preuve actualisée, ni l'évolution des mentalités et des points de vue n'équivalent à une modification de la situation ou de la preuve qui change radicalement la donne.

[47] Passons à la question de savoir si, en l'espèce, notre Cour doit rompre ou non avec une décision antérieure concernant l'application de l'al. 2*b*). Il nous faut essentiellement mettre en balance deux éléments : la justesse et la certitude (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 27). Dans le présent dossier, toutefois, il n'est pas nécessaire de déterminer si notre Cour peut rompre avec la conclusion qu'elle a tirée sur l'application de l'al. 2*b*) dans le *Renvoi sur la prostitution* puisqu'il est possible de trancher sur le fondement du seul art. 7.

(2) Déférence envers les conclusions tirées en première instance sur des faits sociaux ou législatifs

[48] La Cour d'appel se dit d'avis que les conclusions de la juge sur des faits sociaux ou législatifs — qui intéressent la société en général et qui sont établis au moyen d'une preuve complexe relevant des sciences sociales — ne commandent pas la déférence. Je ne puis malheureusement souscrire à son opinion. Comme le dit notre Cour dans *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, une cour d'appel doit se garder de modifier les conclusions de fait tirées en première instance, sauf erreur manifeste et dominante.

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[49] When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.

[50] There are two important practical reasons not to depart from the usual standard of review simply because social or legislative facts are at issue.

[51] First, to do so would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error — which is what an appeal is — it makes more sense to have counsel point out alleged errors in the trial judge's conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge's conclusions.

[52] Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of

[49] Le juge saisi d'éléments de preuve portant sur des faits sociaux ou législatifs a l'obligation de les examiner et de les soupeser en vue de tirer les conclusions de fait nécessaires pour trancher le litige. Il lui incombe de constituer le dossier sur lequel reposeront les appels subséquents. Sauf erreur d'appréciation susceptible de contrôle, la juridiction d'appel doit se garder de modifier les conclusions de première instance sur des faits sociaux ou législatifs. Ce partage des tâches est fondamental dans notre système de justice. Le juge du procès se prononce sur les faits, puis les juridictions d'appel contrôlent sa décision pour déterminer si elle est fondée en droit ou si elle est entachée d'une erreur de fait manifeste et dominante. La règle vaut pour les faits sociaux ou législatifs tout autant que pour les conclusions sur les faits qui sont à l'origine du litige.

[50] Deux raisons importantes d'ordre pratique militent contre la mise au rancart de la norme de contrôle habituelle seulement parce que des faits sociaux ou législatifs sont en cause.

[51] En premier lieu, la juridiction d'appel devrait alors reprendre le travail parfois long et fastidieux qui consiste à examiner tous les éléments et à concilier les divergences entre les experts, les études et les résultats de recherches. Une nouvelle formation de juges devrait passer des heures, voire des semaines, à prendre connaissance de la preuve et à l'analyser. Et les avocats des parties devraient examiner la preuve avec ces juges une fois de plus afin que ces derniers puissent tirer leurs propres conclusions. Il en résulterait une augmentation du coût et de la durée de la procédure judiciaire. Lorsqu'il s'agit de rechercher une erreur éventuelle — ce qui est le propre d'un appel —, il est plus sensé de demander aux avocats de signaler toute erreur qui entacherait les conclusions tirées de la preuve en première instance, de sorte que la juridiction d'appel n'ait qu'à décider si l'erreur vicie les conclusions.

[52] En second lieu, les faits sociaux ou législatifs peuvent s'entremêler avec les faits en litige — les faits de l'espèce — et avec les questions liées à la crédibilité des experts. Appliquer une norme de contrôle aux faits en litige ainsi qu'à la crédibilité

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affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

[53] As the Attorney General of Canada points out, this Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, suggested that legislative fact findings are owed less deference. However, the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras 26-28; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 68). The assessment of expert evidence relies heavily on the trial judge (*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at paras. 62-96). This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence (*Inquiry into Pediatric Forensic Pathology in Ontario: Report*, vol. 3, *Policy and Recommendations* (2008)). The distinction between adjudicative and legislative facts can no longer justify gradations of deference.

[54] This case illustrates the problem. The application judge arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records. The Court of Appeal conceded that it must accord deference to her findings of adjudicative facts and the credibility of affiants and experts, but said it owes no deference to findings on social and legislative facts. The task

des déposants et des témoins experts et en appliquer une autre aux faits sociaux ou législatifs (comme le propose la Cour d'appel) revient à demander l'impossible aux juridictions d'appel. Démêler les différentes sources de ces conclusions et les soumettre à des normes de contrôle différentes compliqueraient immensément la tâche de la juridiction d'appel.

[53] Le procureur général du Canada souligne que, dans l'arrêt *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, notre Cour affirme que les conclusions relatives aux faits législatifs commandent un degré de déférence moins élevé. Or, le recours à des éléments de preuve relevant des sciences sociales dans les affaires portant sur l'application de la *Charte* a beaucoup évolué depuis cet arrêt. Dans les années qui ont suivi, notre Cour a dit préférer que de tels éléments de preuve soient présentés par des témoins experts (*R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 26-28; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 68). L'appréciation du témoignage d'un expert relève au premier chef du juge du procès (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 62-96), surtout depuis le rapport établi en Ontario par le juge Goudge qui met en évidence le rôle du juge du procès dans la prévention des erreurs judiciaires imputables aux témoignages d'experts déficients (*Commission d'enquête sur la médecine légale pédiatrique en Ontario : Rapport*, vol. 3, *Politique et recommandations* (2008)). La distinction entre les faits en litige et les faits législatifs ne peut plus justifier des degrés différents de déférence.

[54] La présente affaire constitue un bon exemple. La juge de première instance tire ses propres conclusions concernant l'effet des dispositions contestées sur le droit à la sécurité de la personne garanti à l'art. 7 à partir du témoignage des demanderesses, des déposants et des experts, ainsi que de la preuve documentaire constituée d'études, de rapports de comités d'experts et de documents parlementaires. La Cour d'appel concède qu'elle doit déférer aux conclusions de la juge sur les faits en litige ainsi que sur la crédibilité des déposants

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of applying different standards of review when the evidence is intertwined would be daunting.

[55] It is suggested that no deference is required on social and legislative facts because appellate courts are in as good a position to evaluate such evidence as trial judges. If this were so, adjudicative facts presented only in affidavit form would similarly be owed less deference. Yet this Court has been clear that, absent express statutory instruction, there is no middling standard of review for findings of fact (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401). Furthermore, this view does not meet the concerns of duplication of effort and the intertwining of such evidence with other kinds of evidence. Nor does it address the point that the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence.

[56] For these reasons, I am of the view that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

B. *Section 7 Analysis*

[57] In the discussion that follows, I first consider whether the applicants have established that the impugned laws impose limits on security of the person, thus engaging s. 7. I then examine the argument of the appellant Attorneys General that the laws do not cause the alleged harms. I go on to consider whether any limits on security of the person are in accordance with the principles of fundamental justice.

et des experts, mais elle refuse de faire preuve de déférence à l'endroit de ses conclusions sur des faits sociaux ou législatifs. Appliquer des normes de contrôle différentes à des éléments de preuve entremêlés représenterait une tâche colossale.

[55] On laisse entendre qu'il n'y a pas lieu de déférer aux conclusions sur des faits sociaux ou législatifs, car une juridiction d'appel est aussi bien placée qu'un juge de première instance pour les apprécier. Si tel était le cas, un fait en litige établi uniquement au moyen d'un affidavit aurait donc droit à un degré de déférence moindre. Or, notre Cour précise qu'à défaut d'un libellé exprès en ce sens, aucune norme de contrôle intermédiaire ne s'applique aux conclusions de fait (*H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401). De plus, ce n'est pas de nature à apaiser la crainte d'un dédoublement de l'examen et d'un entremêlement de tels éléments de preuve avec d'autres. C'est méconnaître également la fonction d'une juridiction d'appel, qui ne consiste pas à examiner la preuve globalement, mais à s'en tenir aux conclusions que le juge de première instance a tirées à partir de la preuve.

[56] Pour ces motifs, je suis d'avis qu'il ne convient pas d'appliquer aux faits sociaux ou législatifs une norme de contrôle non déférente. La norme de contrôle applicable aux conclusions de fait — qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

B. *Analyse fondée sur l'art. 7*

[57] Dans l'analyse qui suit, j'examine d'abord si les demanderesses ont démontré que les dispositions en cause restreignent le droit à la sécurité de la personne et mettent ainsi en jeu l'art. 7. Je me penche ensuite sur la thèse des procureurs généraux appelants selon laquelle les dispositions n'ont pas l'effet attentatoire allégué. Je poursuis en me demandant si la limite apportée le cas échéant au droit à la sécurité de la personne est conforme aux principes de justice fondamentale.

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(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[1]

[59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

[60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

1 The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

(1) Le droit à la sécurité de la personne est-il en jeu?

[58] L'article 7 dispose que l'État ne peut porter atteinte au droit de quiconque à la vie, à la liberté et à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. Il faut dès lors se demander si les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des demanderesses ou limitent ce droit, de sorte qu'elles tombent sous le coup de l'art. 7 de la *Charte* ou mettent celui-ci en jeu[1].

[59] En l'espèce, les demanderesses soutiennent que l'interdiction des maisons de débauche, du proxénétisme et de la communication en public à des fins de prostitution augmente les risques auxquels elles s'exposent lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. La juge de première instance conclut que la preuve va dans ce sens, et la Cour d'appel lui donne raison.

[60] Pour les motifs qui suivent, je suis du même avis. Le législateur ne se contente pas d'encadrer la pratique de la prostitution. Il franchit un pas supplémentaire déterminant qui l'amène à imposer des conditions *dangereuses* à la pratique de la prostitution : les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus.

1 L'accent est mis sur la sécurité de la personne, non sur la liberté, pour trois raisons. Premièrement, le *Renvoi sur la prostitution* établit que les dispositions relatives à la communication et aux maisons de débauche mettent en jeu le droit à la liberté et il fait autorité sur ce point. Le moyen fondé sur le droit à la sécurité de la personne est nouveau et justifie amplement le réexamen du renvoi par la juge de première instance. Deuxièmement, on ne saurait dire avec certitude que le droit à la liberté des demanderesses est mis en jeu par la disposition relative au proxénétisme; les demanderesses disent en fait craindre l'application de la disposition à leurs employés ou à leurs proches. Enfin, il me semble que les demanderesses prétendent essentiellement dans les faits non pas que l'*inobservation* de la loi porte atteinte à leur droit à la liberté, mais plutôt que son *respect* porte atteinte à leur droit à la sécurité.

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(a) *Sections 197 and 210: Keeping a Common Bawdy-House*

[61] It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any "place" that is "kept or occupied" or "resorted to" for the purpose of prostitution (ss. 197 and 210(1) of the *Code*). The reach of these provisions is broad. "Place" includes any defined space, even if unenclosed and used only temporarily (s. 197(1) of the *Code*; *R. v. Pierce* (1982), 37 O.R. (2d) 721 (C.A.)). And by definition, it applies even if resorted to by only one person (s. 197(1); *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.)).

[62] The practical effect of s. 210 is to confine lawful prostitution to two categories: street prostitution and out-calls (application decision, at para. 385). In-calls, where the john comes to the prostitute's residence, are prohibited. Out-calls, where the prostitute goes out and meets the client at a designated location, such as the client's home, are allowed. Working on the street is also permitted, though the practice of street prostitution is significantly limited by the prohibition on communicating in public (s. 213(1)(*c*)).

[63] The application judge found, on a balance of probabilities, that the safest form of prostitution is working independently from a fixed location (para. 300). She concluded that indoor work is far less dangerous than street prostitution — a finding that the evidence amply supports. She also concluded that out-call work is not as safe as in-call work, particularly under the current regime where prostitutes are precluded by virtue of the living on the avails provision from hiring a driver or security guard. Since the bawdy-house provision makes the safety-enhancing method of in-call prostitution illegal, the application judge concluded that the bawdy-house prohibition materially increased the risk prostitutes face under the present regime. I agree.

a) *Articles 197 et 210 : Tenue d'une maison de débauche*

[61] Offrir ses services sexuels contre de l'argent ne constitue pas une infraction. Toutefois, la disposition relative aux maisons de débauche dispose qu'est coupable d'un acte criminel quiconque tient une maison de débauche dans un « local » qui est « tenu ou occupé » ou « employé » à des fins de prostitution (art. 197 et par. 210(1) du *Code*). Sa portée est grande. On entend par « local » ou « endroit » tout lieu défini, même s'il n'est pas enclos et n'est employé que temporairement (par. 197(1) du *Code*; *R. c. Pierce* (1982), 37 O.R. (2d) 721 (C.A.)). De plus, il y a « local » ou « endroit » au sens de cette définition même lorsque le lieu est utilisé par une seule personne (par. 197(1); *R. c. Worthington* (1972), 10 C.C.C. (2d) 311 (C.A. Ont.)).

[62] Dans les faits, l'art. 210 limite à deux les modalités d'exercice d'une activité légale : la prostitution dans la rue et la prostitution « itinérante » (décision de première instance, par. 385). La prostitution pratiquée chez soi, où la prostituée reçoit ses clients chez elle, est interdite. La prostitution itinérante, où la prostituée rejoint le client dans un lieu convenu, telle la résidence de ce dernier, est permise. Il en est de même de la prostitution dans la rue, bien que celle-ci soit considérablement limitée par l'interdiction de communiquer en public (al. 213(1)*c*)).

[63] La juge de première instance conclut, selon la prépondérance des probabilités, que la forme de prostitution la plus sûre est celle qui se pratique de façon autonome dans un même lieu (par. 300). Elle ajoute que travailler à l'intérieur est beaucoup moins dangereux que travailler dans la rue, une conclusion amplement étayée par la preuve. Toujours selon elle, il est moins sûr d'offrir ses services chez autrui de manière itinérante, surtout sous le régime actuel, l'interdiction du proxénétisme empêchant l'embauche d'un chauffeur ou d'un garde de sécurité. Étant donné que la disposition sur les maisons de débauche rend illégale la pratique plus sûre qu'est la prostitution chez soi, la juge opine que l'interdiction augmente sensiblement le risque auquel s'exposent actuellement les prostituées. Je suis de cet avis.

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[64] First, the prohibition prevents prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations, especially given the current prohibition on hiring drivers or security guards. This, in turn, prevents prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards and audio room monitoring, which would reduce risks (application decision, at para. 421). Second, it interferes with provision of health checks and preventive health measures. Finally — a point developed in argument before us — the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients. In Vancouver, for example, "Grandma's House" was established to support street workers in the Downtown Eastside, at about the same time as fears were growing that a serial killer was prowling the streets — fears which materialized in the notorious Robert Pickton. Street prostitutes — who the application judge found are largely the most vulnerable class of prostitutes, and who face an alarming amount of violence (para. 361) — were able to bring clients to Grandma's House. However, charges were laid under s. 210, and although the charges were eventually stayed — four years after they were laid — Grandma's House was shut down (supplementary affidavit of Dr. John Lowman, May 6, 2009, J.A.R., vol. 20, at p. 5744). For some prostitutes, particularly those who are destitute, safe houses such as Grandma's House may be critical. For these people, the ability to work in brothels or hire security, even if those activities were lawful, may be illusory.

[65] I conclude, therefore, that the bawdy-house provision negatively impacts the security of

[64] Premièrement, l'interdiction empêche les prostituées de travailler dans un lieu fixe, situé à l'intérieur, ce qui est plus sûr que de travailler dans la rue ou d'aller à la rencontre des différents clients, d'autant plus que l'interdiction actuelle empêche l'embauche d'un chauffeur ou d'un garde de sécurité. L'interdiction les empêche également de se constituer une clientèle et de prendre des précautions chez elles en embauchant par exemple un réceptionniste, un assistant ou un garde du corps et en installant des dispositifs de surveillance audio, de manière à réduire le risque couru (décision de première instance, par. 421). Deuxièmement, elle empêche les prostituées de faire certaines vérifications sur l'état de santé des clients et de prendre des mesures sanitaires préventives. Enfin, lors de la plaidoirie devant notre Cour, on a fait valoir que l'interdiction de tenir une maison de débauche empêche l'existence d'endroits sûrs où les prostituées peuvent emmener les clients recrutés dans la rue. À Vancouver, par exemple, la « Grandma's House » a été créée pour venir en aide aux prostituées du Downtown Eastside à peu près à la même époque où les craintes allaient croissant quant à la possibilité qu'un tueur en série sévisse dans le quartier (des craintes que les actes imputés au tristement célèbre Robert Pickton ont justifiées). Les prostituées de la rue — qui, selon la juge de première instance, sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence (par. 361) — pouvaient se rendre à la Grandma's House en compagnie de leurs clients. Toutefois, le refuge a fait l'objet d'accusations fondées sur l'art. 210, et même s'il y a eu arrêt des procédures quatre ans après, la Grandma's House a finalement fermé ses portes (affidavit complémentaire du D[r] John Lowman en date du 6 mai 2009, d.c.d., vol. 20, p. 5744). L'existence d'un établissement sûr comme Grandma's House peut être indispensable à certaines prostituées, en particulier celles qui sont démunies. Pour elles, la possibilité de travailler dans un bordel ou d'embaucher un garde de sécurité peut se révéler illusoire même s'il s'agit d'activités légales.

[65] Je conclus donc que la disposition sur les maisons de débauche a un effet préjudiciable sur

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the person of prostitutes and engages s. 7 of the *Charter*.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

[66] Section 212(1)(*j*) criminalizes living on the avails of prostitution of another person, wholly or in part. While targeting parasitic relationships (*R. v. Downey*, [1992] 2 S.C.R. 10), it has a broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute (*R. v. Grilo* (1991), 2 O.R. (3d) 514 (C.A.); *R. v. Barrow* (2001), 54 O.R. (3d) 417 (C.A.)). In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The application judge found that by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person (para. 361). As such, she found that the law engages s. 7 of the *Charter*.

[67] The evidence amply supports the judge's conclusion. Hiring drivers, receptionists, and bodyguards, could increase prostitutes' safety (application decision, at para. 421), but the law prevents them from doing so. Accordingly, I conclude that s. 212(1)(*j*) negatively impacts security of the person and engages s. 7.

(c) *Section 213(1)(c): Communicating in a Public Place*

[68] Section 213(1)(*c*) prohibits communicating or attempting to communicate for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute, in a public place or a place open to public view. The provision extends to conduct short of verbal communication by prohibiting stopping or attempting to stop any person for those purposes (*R. v. Head* (1987), 59 C.R. (3d) 80 (B.C.C.A.)).

le droit à la sécurité des prostituées et met en jeu l'art. 7 de la *Charte*.

b) *Alinéa 212(1)j) : Proxénétisme*

[66] L'alinéa 212(1)*j*) criminalise le proxénétisme, c'est-à-dire le fait de vivre entièrement ou en partie des produits de la prostitution d'une autre personne. Bien qu'il vise le parasitisme (*R. c. Downey*, [1992] 2 R.C.S. 10), sa portée est grande. Suivant son interprétation par les tribunaux, commet un acte criminel quiconque fournit un service à une prostituée parce qu'elle est une prostituée (*R. c. Grilo* (1991), 2 O.R. (3d) 514 (C.A.); *R. c. Barrow* (2001), 54 O.R. (3d) 417 (C.A.)). Dans les faits, il empêche la prostituée d'engager un garde du corps, un chauffeur ou un réceptionniste. La juge de première instance conclut qu'en niant aux prostituées le droit de prendre de telles mesures susceptibles d'accroître leur sécurité, la disposition fait obstacle à la réduction des risques auxquels elles s'exposent et a un effet préjudiciable sur la sécurité de leur personne (par. 361). Elle statue donc que la disposition met en jeu l'art. 7 de la *Charte*.

[67] La preuve appuie amplement sa conclusion. L'embauche d'un chauffeur, d'un réceptionniste ou d'un garde du corps pourrait accroître la sécurité des prostituées (décision de première instance, par. 421), mais la loi y fait obstacle. Je conclus donc que l'al. 212(1)*j*) a un effet préjudiciable sur la sécurité de la personne et met en jeu l'art. 7 de la *Charte*.

c) *Alinéa 213(1)c) : Communication en public*

[68] L'alinéa 213(1)*c*) interdit de communiquer ou de tenter de communiquer avec une personne en vue de se livrer à la prostitution ou d'obtenir les services sexuels d'une prostituée dans un endroit public ou situé à la vue du public. La disposition vise non seulement la communication verbale, mais aussi le fait d'arrêter ou de tenter d'arrêter une personne à ces fins (*R. c. Head* (1987), 59 C.R. (3d) 80 (C.A.C.-B.)).

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[69] The application judge found that face-to-face communication is an "essential tool" in enhancing street prostitutes' safety (para. 432). Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face (paras. 301 and 421). This conclusion, based on the evidence before her, sufficed to engage security of the person under s. 7.

[70] The application judge also found that the communicating law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers, to more isolated areas, thereby making them more vulnerable (paras. 331 and 502).

[71] On the evidence accepted by the application judge, the law prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

[72] I conclude that the evidence supports the application judge's conclusion that s. 213(1)(*c*) impacts security of the person and engages s. 7.

(2) A Closer Look at Causation

[73] For the reasons discussed above, the application judge concluded — and I agree — that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than

[69] La juge de première instance conclut que la communication entre les intéressés est [TRADUCTION] « essentielle » à l'accroissement de la sécurité des prostituées de la rue (par. 432). Cette communication, que la loi interdit, permet aux prostituées de jauger leurs clients éventuels afin d'écarter ceux qui sont intoxiqués et qui pourraient être enclins à la violence, ce qui serait de nature à réduire les risques auxquels elles s'exposent (par. 301 et 421). Cette conclusion fondée sur la preuve offerte suffit à mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7.

[70] La juge estime en outre que l'interdiction de la communication a eu pour effet de faire migrer les prostituées vers des lieux isolés et peu familiers où elles ne peuvent compter sur l'appui de leurs amis et de leurs clients habituels, ce qui les a rendues plus vulnérables (par. 331 et 502).

[71] Suivant les éléments admis en preuve au procès, la loi interdit une communication qui permettrait aux prostituées de la rue d'accroître leur sécurité. En interdisant la communication en public à des fins de prostitution, la loi empêche les prostituées d'évaluer leurs clients éventuels, ainsi que de convenir de l'utilisation du condom ou d'un lieu sûr. Elle accroît ainsi sensiblement le risque couru.

[72] Je conclus que la preuve appuie la conclusion de la juge de première instance selon laquelle l'al. 213(1)*c*) a une incidence sur la sécurité de la personne et met en jeu l'art. 7.

(2) Examen approfondi du lien de causalité

[73] Pour les motifs examinés précédemment, la juge de première instance conclut — et je conviens avec elle — que les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des prostituées et mettent donc en jeu ce droit. Les procureurs généraux appelants soutiennent toutefois que l'art. 7 ne s'applique pas faute d'un lien de causalité suffisant entre les dispositions et les risques auxquels s'exposent les prostituées. D'abord, ils avancent que les juridictions inférieures ont eu tort de soumettre le lien de causalité à une norme

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the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) *The Nature of the Required Causal Connection*

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at paras. 64-68; A.G. of Ontario factum, at paras. 12-17).

[75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and applied in a number of subsequent cases (see, e.g., *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3), it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).

[76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I

atténuée. Ils prétendent ensuite que le préjudice couru par les demanderesses tient à leur choix de se livrer à la prostitution et non à la loi. On ne saurait faire droit à ces prétentions.

a) *Nature du lien de causalité requis*

[74] Nous sommes appelés à considérer trois normes de causalité possibles : (1) celle fondée sur un « lien de causalité suffisant » retenue par la juge de première instance (par. 287-288), (2) celle, générale, fondée sur l'« effet » adoptée par la Cour d'appel (par. 108-109) et (3) celle fondée sur un lien de causalité « actif, prévisible et direct » préconisée par les procureurs généraux appelants (mémoire du p.g. du Canada, par. 65; mémoire du p.g. de l'Ontario, par. 14-15).

[75] Je suis d'avis que la norme du « lien de causalité suffisant » est celle qui convient. Sa souplesse permet l'adaptation aux circonstances propres à chaque espèce. Adoptée dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, et appliquée dans plusieurs affaires subséquentes (voir, p. ex., *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3), elle postule l'existence d'« un lien de causalité suffisant entre [l'effet] imputable à l'État et le préjudice subi par [le demandeur] » pour que l'art. 7 entre en jeu (*Blencoe*, par. 60 (je souligne)).

[76] La norme du lien de causalité suffisant n'exige pas que la mesure législative ou autre reprochée à l'État soit l'unique ou la principale cause du préjudice subi par le demandeur, et il y est satisfait par déduction raisonnable, suivant la prépondérance des probabilités (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 21). L'exigence d'un lien de causalité suffisant tient compte du contexte et s'attache à l'existence d'un lien réel, et non hypothétique. Considérée sous cet angle, la norme du lien de causalité suffisant correspond essentiellement à celle qu'applique la Cour d'appel en l'espèce. Bien que je ne convienne

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do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

[77] The Attorney General of Canada argues for a higher standard. The prejudice to the claimant's security interest, he argues, must be active, foreseeable, and a "necessary link" (factum, at paras. 62 and 65). He relies on this Court's statement in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (cited by way of contrast in *Blencoe*, at para. 69), that "[i]n the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights." He also relies on the Court's statement in *Suresh*, at para. 54, that "[a]t least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice". These statements establish that a causal connection is made out when the state action is a foreseeable and necessary cause of the prejudice. They do not, however, establish that this is the only way a causal connection engaging s. 7 of the *Charter* can be demonstrated.

[78] Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.

pas avec elle que l'exigence d'un lien de causalité ne permet pas de déterminer si la loi — par opposition aux actes de représentants de l'État — met en jeu le droit à la sécurité de la personne garanti à l'art. 7, la démarche [TRADUCTION] « pratique et pragmatique » (par. 108) qui la sous-tend s'inspire de celle suivie, par exemple, dans *Blencoe* et *Khadr*.

[77] Le procureur général du Canada préconise une norme plus stricte. Il fait valoir que l'atteinte au droit à la sécurité des demanderesses doit être active et prévisible et qu'un [TRADUCTION] « lien nécessaire » est requis (mémoire, par. 62 et 65). Il cite à l'appui les motifs de notre Cour dans *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519 (cités à des fins de comparaison dans l'arrêt *Blencoe*, par. 69), suivant lesquels : « N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à Mme Rodriguez par l'art. 7. » Il invoque par ailleurs l'arrêt *Suresh*, par. 54 : « À tout le moins, dans les cas où la participation du Canada est un préalable nécessaire à l'atteinte et où cette atteinte est une conséquence parfaitement prévisible de la participation canadienne, le gouvernement ne saurait être libéré de son obligation de respecter les principes de justice fondamentale . . . » Ces énoncés établissent qu'il y a lien de causalité lorsque l'acte de l'État est prévisible et qu'il est la cause nécessaire du préjudice, mais pas qu'il s'agit du seul moyen de démontrer l'existence d'un lien de causalité qui met en jeu l'art. 7 de la *Charte*.

[78] Enfin, sur le plan pratique, l'existence d'un lien de causalité suffisant constitue un critère juste et fonctionnel pour déterminer si l'art. 7 de la *Charte* est en jeu. Elle ouvre la voie à l'application du droit garanti à l'art. 7, et il incombe au demandeur de la démontrer. Une fois ce lien établi, l'analyse ne prend pas fin pour autant, car le demandeur doit prouver l'atteinte à la sécurité de sa personne et la non-conformité de cette atteinte aux principes de justice fondamentale. De simples hypothèses ne sauraient établir le lien de causalité, mais placer la barre trop haut risque de faire obstacle à des demandes fondées. Le lien doit être suffisant eu égard au contexte considéré.

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(b) *Is the Causal Connection Negated by Choice or the Role of Third Parties?*

[79] The Attorneys General of Canada and Ontario argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice — and not the law — is the real cause of their injury.

[80] The Attorneys General contend that Parliament is entitled to regulate prostitution as it sees fit. Anyone who chooses to sell sex for money must accept these conditions. If the conditions imposed by the law prejudice their security, it is their choice to engage in the activity, not the law, that is the cause.

[81] What the applicants seek, the Attorneys General assert, is a constitutional right to engage in risky commercial activities. Thus the Attorney General of Ontario describes the s. 7 claim in this case as a "veiled assertion of a positive right to vocational safety" (factum, at para. 25).

[82] The Attorneys General rely on this Court's decision in *Malmo-Levine*, which upheld the constitutionality of the prohibition of possession of marijuana on the basis that the recreational use of marijuana was a "lifestyle choice" and that lifestyle choices were not constitutionally protected (para. 185).

[83] The Attorneys General buttress this argument by asserting that if this Court accepts that these laws can be viewed as causing prejudice to the applicants' security, then many other laws that leave open the choice to engage in risky activities by only partially or indirectly regulating those activities will be rendered unconstitutional.

b) *Le lien de causalité est-il rendu inexistant par le choix de se prostituer ou les actes de tiers?*

[79] Le procureur général du Canada et celui de l'Ontario soutiennent que les prostituées font le choix de se livrer à une activité intrinsèquement risquée. Elles peuvent se soustraire à la fois aux risques inhérents à la prostitution et à tout risque supplémentaire causé par la loi en choisissant simplement de ne pas se livrer à cette activité. Selon eux, c'est le choix de la prostitution — et non la loi — qui est la cause véritable du préjudice.

[80] Les procureurs généraux prétendent que le législateur peut réglementer la prostitution selon ce qu'il juge opportun. La personne qui décide d'offrir ses services sexuels contre de l'argent doit accepter les règles établies, et lorsque celles-ci portent atteinte à sa sécurité, elle doit s'en prendre à son choix de se livrer à cette activité, non à la loi.

[81] Ils ajoutent que les demanderesses revendiquent le droit constitutionnel de se livrer à une activité commerciale risquée. Le procureur général de l'Ontario voit d'ailleurs dans l'allégation fondée sur l'art. 7 la [TRADUCTION] « revendication à mots couverts du droit à la sécurité professionnelle » (mémoire, par. 25).

[82] Les procureurs généraux invoquent l'arrêt *Malmo-Levine* dans lequel notre Cour confirme la constitutionnalité de l'interdiction de posséder de la marihuana au motif que sa consommation à des fins récréatives constitue un « choix de mode de vie », un choix que ne protège pas la Constitution (par. 185).

[83] Pour étayer leur thèse, les procureurs généraux font valoir que si notre Cour reconnaît que les dispositions en cause peuvent porter atteinte à la sécurité des demanderesses, de nombreuses autres dispositions qui permettent de se livrer ou non à une activité risquée en réglementant celle-ci partiellement ou indirectement deviendront du coup inconstitutionnelles.

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[84] Finally, in a variant on the argument that the impugned laws are not the cause of the applicants' alleged loss of security, the Attorneys General argue that the source of the harm is third parties — the johns who use and abuse prostitutes and the pimps who exploit them.

[85] For the following reasons, I cannot accept the argument that it is not the law, but rather prostitutes' choice and third parties, that cause the risks complained of in this case.

[86] First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol. 2, at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).

[87] Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in

[84] Enfin, ils recourent à une variante de la prétention suivant laquelle les dispositions contestées ne sont pas la cause de l'atteinte alléguée à la sécurité des demanderesses, à savoir que le préjudice est imputable à des tiers, en l'occurrence les hommes qui ont recours aux services des prostituées et qui maltraitent celles-ci, ainsi que les proxénètes qui les exploitent.

[85] Pour les motifs qui suivent, je ne puis convenir que ce n'est pas la loi, mais plutôt le choix de se prostituer et les actes de tiers qui sont à l'origine des risques dénoncés en l'espèce.

[86] Premièrement, bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution — ou qui fait ce choix à un moment de sa vie —, de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. M[me] Bedford déclare s'être d'abord prostituée [TRADUCTION] « afin de faire assez d'argent pour au moins [s]e nourrir » (contre-interrogatoire de M[me] Bedford, d.c.d., vol. 2, p. 92). Comme le dit la juge de première instance, les prostituées de la rue forment, à quelques exceptions près, une population particulièrement marginalisée (par. 458 et 472). Que ce soit à cause du désespoir financier, de la toxicomanie, de la maladie mentale ou de la contrainte exercée par un proxénète, elles n'ont souvent guère d'autre choix que de vendre leur corps contre de l'argent. Dans les faits, même si elles peuvent conserver un certain pouvoir minimal de choisir — [TRADUCTION] « un choix limité » selon le procureur général (transcription, p. 22) —, on ne peut dire qu'elles « choisissent » véritablement une activité commerciale risquée (voir *PHS*, par. 97-101).

[87] Deuxièmement, à supposer même que des personnes choisissent librement de se livrer à la prostitution, il faut se rappeler que cette activité — l'échange de services sexuels contre de l'argent — n'est pas illégale. La question qui se pose sur le plan de la causalité est celle de savoir si les dispositions contestées accroissent le risque couru par la personne qui se prostitue. On peut faire une analogie avec la disposition qui interdirait aux cyclistes le

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making that activity riskier. The challenged laws relating to prostitution are no different.

[88] Nor is it accurate to say that the claim in this case is a veiled assertion of a positive right to vocational safety. The applicants are not asking the government to put into place measures making prostitution safe. Rather, they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death.

[89] It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

[90] The government's call for deference in addressing the problems associated with prostitution has no role at this stage of the analysis. Calls for deference cannot insulate legislation that creates serious harmful effects from the charge that they negatively impact security of the person under s. 7 of the *Charter*. The question of deference arises under the principles of fundamental justice, not at the early stage of considering whether a person's life, liberty, or security of the person is infringed.

[91] Finally, recognizing that laws with serious harmful effects may engage security of the person does not mean that a host of other criminal laws will be invalidated. Trivial impingements on security of the person do not engage s. 7 (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 59). As already discussed, the applicant must show that the impugned law is sufficiently connected to the prejudice suffered before s. 7 is engaged. And even if s. 7 is found to be engaged, the applicant must

port du casque. Malgré le choix des cyclistes d'utiliser leurs bicyclettes, il demeurerait que c'est la disposition qui rendrait l'activité plus risquée. Il en va de même des dispositions contestées sur la prostitution.

[88] Il n'est pas non plus exact d'affirmer que la demande formulée en l'espèce revient à revendiquer à mots couverts le droit à la sécurité professionnelle. L'objectif des demanderesses n'est pas que l'État adopte des mesures qui fassent de la prostitution une activité sûre, mais plutôt que notre Cour invalide des dispositions qui accroissent le risque de maladie, de violence et de décès.

[89] Le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées n'y change rien. Les dispositions contestées privent des personnes qui se livrent à une activité risquée, mais légale, des moyens nécessaires à leur protection contre le risque couru. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

[90] Le respect auquel nous exhorte l'État quant aux décisions qu'il prend pour contrer les problèmes liés à la prostitution n'est pas pertinent à ce stade de l'analyse. Il ne saurait faire obstacle à l'allégation qu'une mesure législative a de graves effets préjudiciables et porte atteinte au droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Cette considération vaut lorsqu'il s'agit de savoir s'il y a conformité aux principes de justice fondamentale, et non pour déterminer au préalable s'il y a atteinte au droit à la vie, à la liberté ou à la sécurité de la personne de l'intéressé.

[91] Enfin, reconnaître qu'une disposition gravement préjudiciable peut mettre en jeu le droit à la sécurité de la personne n'emportera pas l'invalidation d'une foule d'autres dispositions criminelles. L'atteinte anodine à ce droit ne met pas en jeu l'art. 7 (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 59). Rappelons que le demandeur doit démontrer l'existence d'un lien suffisant entre la disposition contestée et le préjudice subi pour que s'applique l'art. 7. Et même si l'on conclut que

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then show that the deprivation of security is not in accordance with the principles of fundamental justice.

[92] For all these reasons, I reject the arguments of the Attorneys General that the cause of the harm is not the impugned laws, but rather the actions of third parties and the prostitutes' choice to engage in prostitution. As I concluded above, the laws engage s. 7 of the *Charter*. That conclusion remains undisturbed.

(3) Principles of Fundamental Justice

(a) *The Applicable Norms*

[93] I have concluded that the impugned laws deprive prostitutes of security of the person, engaging s. 7. The remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached.

[94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 512).

[95] The principles of fundamental justice have significantly evolved since the birth of the *Charter*. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the *Motor Vehicle Reference*, this Court held otherwise:

> . . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated

l'art. 7 s'applique, le demandeur doit démontrer que l'atteinte à sa sécurité n'est pas conforme aux principes de justice fondamentale.

[92] Pour tous ces motifs, je rejette la prétention des procureurs généraux selon laquelle le préjudice allégué n'est pas attribuable aux dispositions contestées, mais bien aux actes de tiers et au choix de se prostituer. J'estime toujours que les dispositions en cause font intervenir l'art. 7 de la *Charte*.

(3) Principes de justice fondamentale

a) *Normes applicables*

[93] J'arrive à la conclusion que les dispositions contestées portent atteinte au droit à la sécurité de la personne des prostituées et qu'elles mettent ainsi en jeu l'art. 7. Reste donc à savoir si, au regard de l'art. 7, cette atteinte est conforme ou non aux principes de justice fondamentale. Dans l'affirmative, il n'y a pas d'atteinte au droit garanti à l'art. 7.

[94] Les principes de justice fondamentale définissent les conditions minimales auxquelles doit satisfaire la loi qui a un effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne. Selon le juge Lamer, « [l]'expression "principes de justice fondamentale" constitue non pas un droit, mais un modificatif du droit de ne pas se voir porter atteinte à sa vie, à sa liberté et à la sécurité de sa personne; son rôle est d'établir les paramètres de ce droit » (*Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486 (« *Renvoi sur la MVA* »), p. 512).

[95] Les « principes de justice fondamentale » ont beaucoup évolué depuis l'adoption de la *Charte*. Au départ, on les réduisait aux principes de justice naturelle qui définissent l'équité procédurale. Dans le *Renvoi sur la MVA*, notre Cour en a jugé autrement :

> . . . il serait erroné d'interpréter l'expression « justice fondamentale » comme synonyme de justice naturelle [. . .] Ce faire aurait pour conséquence de dépouiller les intérêts protégés de tout leur sens ou presque et de laisser le « droit » à la vie, à la liberté et à la sécurité de la

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state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

[96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

[98] Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 133, *per* McLachlin C.J. and Major J.).

personne dans un état d'atrophie déplorable. Un tel résultat serait incompatible avec le style affirmatif et général dans lequel ces droits sont énoncés et également incompatible avec le point de vue que cette Cour a adopté, en ce qui concerne l'interprétation des droits garantis par la *Charte*, dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357 (le juge Estey), et dans l'arrêt *Hunter c. Southam Inc.*, précité. [p. 501-502]

[96] Dans le *Renvoi sur la MVA*, la Cour reconnaît que les principes de justice fondamentale s'entendent des valeurs fondamentales qui sous-tendent notre ordre constitutionnel. L'analyse fondée sur l'art. 7 s'attache à débusquer les dispositions législatives intrinsèquement mauvaises, celles qui privent du droit à la vie, à la liberté ou à la sécurité de la personne au mépris des valeurs fondamentales que sont censés intégrer les principes de justice fondamentale et dont la jurisprudence a défini la teneur au fil des ans. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire, à la portée excessive et à la disproportion totale.

[97] Les notions d'arbitraire, de portée excessive et de disproportion totale ont connu une évolution endogène au fur et à mesure que les tribunaux ont été saisis d'allégations nouvelles fondées sur la *Charte*.

[98] On a qualifié d'« arbitraire » la disposition dont l'effet n'avait aucun lien avec son objet. Dans l'affaire *Morgentaler*, l'accusé contestait les dispositions du *Code criminel* qui exigeaient qu'un avortement soit approuvé par le comité de l'avortement thérapeutique d'un hôpital agréé. L'objet des dispositions était de protéger la santé des femmes. Or, selon les juges majoritaires de la Cour, l'exigence que tout avortement thérapeutique soit pratiqué dans un hôpital agréé ne contribuait pas à la réalisation de cet objectif et causait en fait des délais nuisibles à la santé des femmes. Par conséquent, les dispositions portaient atteinte aux valeurs fondamentales en ce que leur effet allait en fait à l'encontre de leur objectif. Le juge Beetz a alors parlé d'« iniquité manifeste » (*Morgentaler*, p. 120), et la Cour y a vu ensuite un « caractère arbitraire » (voir *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, par. 133, la juge en chef McLachlin et le juge Major).

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[99] In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

[100] Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

[101] Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective. In *R. v. Heywood*, [1994] 3 S.C.R. 761, the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law applied to offenders who did not constitute a danger to children, and insofar as it applied to parks where children were unlikely to be present, it was unrelated to its objective.

[102] In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the challenged provisions of the

[99] Dans *Chaoulli*, le demandeur contestait des dispositions québécoises qui interdisaient de souscrire une assurance maladie privée pour l'obtention de services offerts dans le réseau public. Les dispositions en cause avaient pour objet la protection du système de santé public et le maintien de ses ressources. Sur la foi de la preuve concernant la situation dans d'autres pays, les juges majoritaires concluent qu'assurance maladie privée et système de santé public peuvent coexister. Trois d'entre eux jugent l'interdiction « arbitraire » vu l'absence, selon les faits mis en preuve, d'un lien réel entre l'effet de la loi et son objectif.

[100] Plus récemment, dans *PHS*, notre Cour a jugé arbitraire le refus du ministre de prolonger l'exemption dont bénéficiait un centre d'injection supervisée relativement à l'application des dispositions sur la possession de drogue. Ces dispositions avaient pour objet la protection de la santé et de la sécurité publiques, et les services fournis par le centre d'injection supervisée contribuaient en fait à l'atteinte de cet objectif. L'effet du refus de prolonger l'exemption — à savoir empêcher le fonctionnement du centre d'injection supervisée — allait à l'encontre des objectifs des dispositions relatives à la possession de drogue.

[101] Une disposition peut aussi violer nos valeurs fondamentales du fait de ce que les tribunaux appellent la « portée excessive », c'est-à-dire lorsqu'elle va trop loin et empiète sur un comportement sans lien avec son objectif. Dans *R. c. Heywood*, [1994] 3 R.C.S. 761, l'accusé contestait une disposition sur le vagabondage qui interdisait aux délinquants reconnus coupables de l'une des infractions énumérées de « flâner » dans les parcs publics. Les juges majoritaires de la Cour concluent que la portée de la disposition, dont l'objet était de protéger les enfants contre les prédateurs sexuels, est trop grande; la disposition n'a pas de lien avec son objectif dans la mesure où elle s'applique à des délinquants qui ne présentent pas un danger pour les enfants et à des parcs qui ne sont pas susceptibles d'être fréquentés par des enfants.

[102] Dans *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489, les dispositions contestées du *Code*

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Criminal Code prevented an accused who was found unfit to stand trial from receiving an absolute discharge, and subjected the accused to indefinite appearances before a review board. The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para. 41). The Court found that insofar as the law applied to permanently unfit accused, who would never become fit to stand trial, the objective did "not apply" and therefore the law was overbroad (paras. 42-43).

[103] Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state's objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: ". . . the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action" (para. 175).

[104] In *PHS*, this Court found that the Minister's refusal to exempt the safe injection site from drug possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.

[105] The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these

criminel empêchaient l'accusé jugé inapte à subir son procès de bénéficier d'une libération inconditionnelle et l'obligeaient à comparaître périodiquement devant une commission d'examen pendant une période indéfinie. Les dispositions avaient pour objet « de fournir à l'accusé un traitement ou une évaluation continus afin de le rendre éventuellement apte à subir son procès » (par. 41). Selon la Cour, dans la mesure où les dispositions s'appliquaient malgré l'inaptitude permanente de l'accusé — qui ne deviendrait jamais apte à subir son procès —, leur objectif « ne s'appliqu[ait] pas » et leur portée était donc excessive (par. 42-43).

[103] La disposition dont l'effet est totalement disproportionné à l'objectif de l'État viole aussi nos valeurs fondamentales. Dans *Malmo-Levine*, l'accusé contestait l'interdiction de posséder de la marihuana au motif que ses effets étaient totalement disproportionnés à son objectif. La Cour reconnaît qu'une disposition aux effets totalement disproportionnés viole nos normes fondamentales, mais elle conclut que tel n'est pas le cas en l'espèce : « . . . les effets sur les accusés des dispositions actuelles, y compris la possibilité d'emprisonnement, n'excèdent pas la vaste latitude que la Constitution accorde au Parlement » (par. 175).

[104] Dans l'arrêt *PHS*, notre Cour conclut que le refus du ministre de soustraire le centre d'injection supervisée à l'application des dispositions sur la possession de drogue n'est pas conforme aux principes de justice fondamentale parce que le refus de services de santé et l'augmentation du risque de décès et de maladie chez les consommateurs de drogues injectables sont totalement disproportionnés aux objectifs des dispositions sur la possession de drogue, à savoir la santé et la sécurité publiques.

[105] L'enseignement primordial de la jurisprudence veut qu'une disposition aille à l'encontre de nos valeurs fondamentales lorsque les moyens mis en œuvre par l'État pour atteindre son objectif comportent une faille fondamentale en ce qu'ils sont arbitraires ou ont une portée trop générale, ou encore, ont des effets totalement disproportionnés à l'objectif législatif. Il n'est pas conforme

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norms is not in accordance with the principles of fundamental justice.

[106] As these principles have developed in the jurisprudence, they have not always been applied consistently. The Court of Appeal below pointed to the confusion that has been caused by the "commingling" of arbitrariness, overbreadth, and gross disproportionality (paras. 143-51). This Court itself recently noted the conflation of the principles of overbreadth and gross disproportionality (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 38-40; see also *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, at para. 72). In short, courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways.

[107] Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:

> The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.

("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted))

aux principes de justice fondamentale de priver un citoyen du droit à la vie, à la liberté ou à la sécurité de sa personne au moyen d'une disposition ainsi irrégulière.

[106] Au fil de l'évolution jurisprudentielle, ces principes n'ont pas toujours été appliqués uniformément. En l'espèce, la Cour d'appel signale la confusion créée par l'[TRADUCTION] « amalgame » du caractère arbitraire, de la portée excessive et de la disproportion totale (par. 143-151). Notre Cour relevait elle-même récemment que l'on confond portée excessive et disproportion totale (*R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555, par. 38-40; voir également *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, par. 72). Ainsi, les tribunaux ont employé les mêmes mots — caractère arbitraire, portée excessive et disproportion totale — avec quelques variantes pour explorer les différentes manières dont une disposition législative peut aller à l'encontre de nos valeurs fondamentales.

[107] Bien qu'il y ait un chevauchement important entre le caractère arbitraire, la portée excessive et la disproportion totale, et que plus d'une de ces trois notions puissent bel et bien s'appliquer à une disposition, il demeure que les trois correspondent à des principes distincts qui découlent de ce que Hamish Stewart appelle un [TRADUCTION] « manque de logique fonctionnelle », à savoir que la disposition « n'est pas suffisamment liée à son objectif ou, dans un certain sens, qu'elle va trop loin pour l'atteindre » (*Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 151). Peter Hogg explique :

> [TRADUCTION] Les principes liés à la portée excessive, à la disproportion et au caractère arbitraire visent tous au fond à pallier ce que Hamish Stewart appelle un « manque de logique fonctionnelle », en ce sens que le tribunal reconnaît l'objectif législatif, mais examine le moyen choisi pour l'atteindre. Si ce moyen ne permet pas logiquement d'atteindre l'objectif, la disposition est dysfonctionnelle eu égard à son propre objectif.

(« The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195, p. 209 (renvoi omis))

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[108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[110] Against this background, it may be useful to elaborate on arbitrariness, overbreadth and gross disproportionality.

[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to

[108] La jurisprudence relative au caractère arbitraire, à la portée excessive et à la disproportion totale s'attache à deux failles. La première est l'absence de lien entre l'atteinte aux droits et l'objectif de la disposition — lorsque l'atteinte au droit à la vie, à la liberté ou à la sécurité de la personne n'a aucun lien avec l'objet de la loi. Ce sont alors les principes liés au caractère arbitraire et à la portée excessive (l'absence de lien entre l'objet de la disposition et l'atteinte au droit garanti par l'art. 7) qui sont en cause.

[109] La seconde faille se présente lorsqu'une disposition prive une personne du droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière totalement disproportionnée à son objectif. L'incidence sur le droit garanti à l'art. 7 a un lien avec l'objet, mais elle est si importante qu'elle viole nos normes fondamentales.

[110] Dans ce contexte, il peut être utile de développer les notions de caractère arbitraire, de portée excessive et de disproportion totale.

[111] Déterminer qu'une disposition est arbitraire ou non exige qu'on se demande s'il existe un lien direct entre son objet et l'effet allégué sur l'intéressé, s'il y a un certain rapport entre les deux. Il doit exister un lien rationnel entre l'objet de la mesure qui cause l'atteinte au droit garanti à l'art. 7 et la limite apportée au droit à la vie, à la liberté ou à la sécurité de la personne (Stewart, p. 136). La disposition qui limite ce droit selon des modalités qui n'ont *aucun lien* avec son objet empiète arbitrairement sur ce droit. Ainsi, dans *Chaoulli*, la Cour juge les dispositions arbitraires parce qu'interdire l'assurance maladie privée n'a aucun rapport avec l'objectif de protéger le système de santé public.

[112] Il y a portée excessive lorsqu'une disposition s'applique si largement qu'elle vise *certains* actes qui n'ont aucun lien avec son objet. La disposition est alors *en partie* arbitraire. Essentiellement, la situation en cause est celle où il n'existe aucun lien rationnel entre les objets de la disposition et *certains* de ses effets, mais pas tous. Par exemple, dans *Demers*, le texte législatif en cause exigeait

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attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.

[113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

[114] It has been suggested that overbreadth is not truly a distinct principle of fundamental justice. The case law has sometimes said that overbreadth straddles both arbitrariness and gross disproportionality. Thus, in *Heywood*, Cory J. stated: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (p. 793).

[115] And in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, the companion case to *Malmo-Levine*, Gonthier and Binnie JJ. explained:

> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out [in *Heywood*], related to arbitrariness. [Emphasis deleted; para. 38.]

[116] In part this debate is semantic. The law has not developed by strict labels, but on a case-by-case

que l'accusé inapte comparaisse périodiquement devant la commission d'examen. Il n'était dissocié de son objet que dans la mesure où il s'appliquait à un accusé inapte en permanence; ses effets étaient liés à l'objet dans le cas de l'accusé temporairement inapte.

[113] L'application de la notion de portée excessive permet au tribunal de reconnaître qu'une disposition est rationnelle sous certains rapports, mais que sa portée est trop grande sous d'autres. Malgré la prise en compte de la portée globale de la disposition, l'examen demeure axé sur l'intéressé et sur la question de savoir si l'effet sur ce dernier a un lien rationnel avec l'objet. Par exemple, lorsqu'une disposition est rédigée de manière générale et vise des comportements qui n'ont aucun lien avec son objet afin de faciliter son application, il n'y a pas non plus de lien entre l'objet de la disposition et son effet sur l'*intéressé*. Faciliter l'application pourrait justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[114] On a fait valoir que la portée excessive ne correspond pas vraiment à un principe distinct de justice fondamentale. Il appert de certains arrêts que la portée excessive empiète à la fois sur le caractère arbitraire et sur la disproportion totale. Dans *Heywood*, le juge Cory affirme par exemple ce qui suit : « Lorsqu'une loi a une portée excessive, il s'ensuit qu'elle est arbitraire ou disproportionnée dans certaines de ses applications » (p. 793).

[115] Dans *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735, l'arrêt connexe à *Malmo-Levine*, les juges Gonthier et Binnie expliquent :

> Dans ce contexte, la portée excessive s'attache aux atteintes potentielles à la justice fondamentale lorsque l'effet préjudiciable d'une mesure législative sur les personnes qu'elle touche est [totalement] disproportionné [. . .] à l'intérêt général que le texte de loi tente de protéger. À cet égard, comme l'a souligné le juge Cory [dans *Heywood*], la portée excessive est liée au caractère arbitraire. [Italiques omis; par. 38.]

[116] Le débat est en partie sémantique. Le droit a évolué non par le recours à des étiquettes

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basis, as courts identified laws that were inherently bad because they violated our basic values.

[117] Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

[118] An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233-34).

[119] As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It

strictes, mais d'une décision à l'autre, lorsque les tribunaux ont jugé des dispositions intrinsèquement mauvaises parce qu'elles violaient nos valeurs fondamentales.

[117] Avant de passer au point suivant, toutefois, il peut être utile de voir dans la portée excessive un principe distinct de justice fondamentale lié au caractère arbitraire, l'*absence de lien* entre les effets d'une disposition et son objectif étant commune aux deux. La portée excessive permet seulement au tribunal de reconnaître l'absence de lien lorsqu'une disposition va trop loin en faisant tomber sous le coup de son application un comportement qui n'a aucun rapport avec son objectif.

[118] Une question accessoire, qui touche à la fois le caractère arbitraire et la portée excessive, concerne l'ampleur que doit revêtir l'absence de correspondance entre l'objectif de la disposition attentatoire et ses effets. On s'est demandé si une disposition était arbitraire ou avait une portée trop grande lorsque ses effets étaient *incompatibles* avec son objectif ou si, de manière générale, elle était arbitraire ou avait une portée trop grande lorsque ses effets *n'étaient pas nécessaires* à la réalisation de son objectif (voir, p. ex., *Chaoulli*, par. 233-234).

[119] Rappelons qu'il s'agit fondamentalement de déterminer si la disposition en cause est intrinsèquement mauvaise du fait de l'*absence de lien*, en tout ou en partie, entre ses effets et son objet. Satisfaire à cette norme n'est pas chose aisée. Comme dans l'affaire *Morgentaler*, la preuve peut démontrer que l'effet compromet en fait la réalisation de l'objectif et qu'il est donc « incompatible » avec celui-ci. Il peut aussi ressortir de la preuve, comme dans *Chaoulli*, qu'il n'y a tout simplement pas de lien entre l'effet et l'objectif, de sorte que l'effet « n'est pas nécessaire ». Peu importe la manière dont le juge qualifie cette absence de lien, la question demeure au fond de savoir si la preuve établit que la disposition viole des normes fondamentales du fait de l'*absence de lien* entre son effet et son objet. Il faut statuer en fonction du dossier et de la preuve offerte.

[120] La disproportion totale s'attache à d'autres éléments que ceux considérés pour le caractère

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targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[121] Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:

> In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]

[122] Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.

[123] All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The

arbitraire et la portée excessive. Elle vise la seconde faille fondamentale, à savoir le fait que les effets de la disposition sur la vie, la liberté ou la sécurité de la personne sont si totalement disproportionnés à ses objectifs qu'ils ne peuvent avoir d'assise rationnelle. La règle qui exclut la disproportion totale ne s'applique que dans les cas extrêmes où la gravité de l'atteinte est sans rapport aucun avec l'objectif de la mesure. Pour illustrer cette idée, prenons l'hypothèse d'une loi qui, dans le but d'assurer la propreté des rues, infligerait une peine d'emprisonnement à perpétuité à quiconque cracherait sur le trottoir. Le lien entre les répercussions draconiennes et l'objet doit déborder complètement le cadre des normes reconnues dans notre société libre et démocratique.

[121] L'analyse de la disproportion totale au regard de l'art. 7 de la *Charte ne* tient *pas* compte des avantages de la loi pour la société. Elle met en balance l'effet préjudiciable sur l'intéressé avec l'objet de la loi, et *non* avec l'avantage que la société peut retirer de la loi. Comme le dit notre Cour dans *Malmo-Levine* :

> Dans les faits, le juge Braidwood a procédé à la pondération des effets bénéfiques et des effets préjudiciables de la Loi. En toute déférence, nous estimons qu'une telle démarche relève davantage de l'application de l'article premier. Il s'agit là de préjudices sociaux et économiques qui n'ont généralement pas leur place dans l'analyse fondée sur l'art. 7. [par. 181]

[122] Il peut y avoir disproportion totale indépendamment du nombre de personnes touchées; un effet totalement disproportionné sur une seule personne suffit.

[123] Les trois notions — le caractère arbitraire, la portée excessive et la disproportion totale — supposent la comparaison de l'atteinte aux droits causée par la loi avec l'objectif de la loi, et non avec son efficacité. Autrement dit, elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi. Elles ne tiennent pas compte des avantages accessoires pour la population en général. De plus, aucune ne requiert la détermination du

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analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

(b) *The Relationship Between Section 7 and Section 1*

[124] This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

[125] Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

[126] As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's

pourcentage de la population qui est touchée par un effet préjudiciable. L'analyse est qualitative et non quantitative. La question à se poser dans le cadre de l'analyse fondée sur l'art. 7 est celle de savoir si une disposition législative intrinsèquement mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

b) *Interaction entre l'art. 7 et l'article premier*

[124] Notre Cour a déjà établi des parallèles entre les règles qui interdisent le caractère arbitraire, la portée excessive ou la disproportion totale au regard de l'art. 7 et les éléments de l'analyse, fondée sur l'article premier, de la justification d'une disposition qui porte atteinte à un droit garanti par la *Charte*. Ces parallèles ne doivent pas permettre d'occulter les différences cruciales entre ces deux articles.

[125] L'article 7 et l'article premier appellent des questions différentes. Pour les besoins de l'art. 7, l'effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne est-il conforme aux principes de justice fondamentale? En ce qui concerne le caractère arbitraire, la portée excessive et la disproportion totale, il faut se demander si, de prime d'abord, l'objet de la disposition présente un lien avec ses effets et si l'effet préjudiciable est proportionné à cet objet. Pour les besoins de l'article premier, il faut plutôt se demander si l'effet préjudiciable sur les droits des personnes est proportionné à l'objectif urgent et réel de défense de l'intérêt public. La justification fondée sur l'objectif public prédominant constitue l'axe central de l'application de l'article premier, mais elle ne joue aucun rôle dans l'analyse fondée sur l'art. 7, qui se soucie seulement de savoir si la disposition contestée porte atteinte à un droit individuel.

[126] En raison des considérations différentes qui président à leur application, l'art. 7 et l'article premier opèrent différemment. Suivant l'article premier, il incombe à l'État de démontrer que

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rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

la disposition attentatoire peut être justifiée par l'objectif du législateur. Parce que la question est celle de savoir si l'intérêt public général justifie l'atteinte aux droits individuels, l'objectif doit être urgent et réel. Le volet de l'analyse fondée sur l'article premier qui porte sur l'existence d'un « lien rationnel » consiste à déterminer si, pour le législateur, la disposition représente un moyen rationnel d'atteindre son objectif. Le volet relatif à l'« atteinte minimale » établit si le législateur aurait pu concevoir une disposition moins attentatoire; il s'intéresse aux solutions de rechange raisonnables qui s'offrent au législateur. À l'étape finale de l'analyse fondée sur l'article premier, le tribunal soupèse l'effet préjudiciable de la disposition sur les droits des personnes et son effet bénéfique sur la réalisation de son objectif dans l'intérêt public supérieur. L'effet est apprécié sur les plans qualitatif et quantitatif. À la différence d'un demandeur individuel, l'État est bien placé pour présenter une preuve relevant des sciences humaines ainsi que le témoignage d'experts qui justifient les répercussions d'une disposition sur l'ensemble de la société.

[127] By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

[127] En revanche, l'art. 7 oblige le demandeur à démontrer que la disposition porte atteinte à son droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière qui est sans lien avec l'objet de la disposition ou qui est totalement disproportionnée à celui-ci. La détermination de l'objet s'attache à sa nature et non à son efficacité. La détermination de l'effet sur le droit à la vie, à la liberté ou à la sécurité de la personne n'est pas quantitative, mais qualitative. On ne se demande donc pas combien de personnes subissent un effet préjudiciable. Il suffit d'un effet arbitraire, excessif ou totalement disproportionné sur une seule personne pour établir l'atteinte à un droit garanti à l'art. 7. Obliger la personne qui invoque l'art. 7 à démontrer l'efficacité de la loi par opposition à ses conséquences néfastes sur l'ensemble de la société revient à lui imposer le même fardeau que celui qui incombe à l'État pour l'application de l'article premier, ce qui ne saurait être acceptable.

[128] In brief, although the concepts under s. 7 and s. 1 are rooted in similar concerns, they are analytically distinct.

[128] En résumé, bien que l'art. 7 et l'article premier fassent intervenir des notions qui s'originent de préoccupations semblables, ils commandent des analyses distinctes.

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[129] It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter* (*Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

(4) Do the Impugned Laws Respect the Principles of Fundamental Justice?

(a) *Section 210: The Bawdy-House Prohibition*

(i) The Object of the Provision

[130] The bawdy-house provision has remained essentially unchanged since it was moved to Part V of the *Criminal Code*, "Disorderly Houses, Gaming and Betting", in the 1953-54 *Code* revision (c. 51, s. 182). In *Rockert v. The Queen*, [1978] 2 S.C.R. 704, Estey J. found "little, if any, doubt" in the authorities that the disorderly house provisions were not directed at the mischief of betting, gaming and prostitution *per se*, but rather at the harm to the community in which such activities were carried on in a notorious and habitual manner (p. 712). This objective can be traced back to the common law origins of the bawdy-house provisions (see, e.g., E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, first published 1644), at pp. 205-6).

[131] The appellant Attorneys General argue that the object of this provision, considered alone and in conjunction with the other prohibitions, is to

[129] On a affirmé que la disposition qui violait un droit garanti à l'art. 7 avait peu de chances d'être justifiée en vertu de l'article premier de la *Charte* (*Renvoi sur la MVA*, p. 518). L'importance des droits fondamentaux protégés par l'art. 7 appuie cette remarque. Néanmoins, la jurisprudence reconnaît par ailleurs qu'il peut se présenter des situations dans lesquelles l'article premier a un rôle à jouer (voir, p. ex., l'arrêt *Malmo-Levine*, par. 96-98). On ne peut écarter la possibilité que l'État soit en mesure de démontrer que l'atteinte à un droit garanti à l'art. 7 est justifiée en vertu de l'article premier de la *Charte*, selon l'importance de l'objectif législatif et la nature de l'atteinte à un droit garanti par l'art. 7.

(4) Les dispositions législatives contestées respectent-elles les principes de justice fondamentale?

a) *Article 210 : Interdiction des maisons de débauche*

(i) Objet de la disposition

[130] La disposition relative aux maisons de débauche est demeurée pour l'essentiel inchangée depuis qu'elle figure à la partie V du *Code criminel* intitulée « Maisons de désordre, jeux et paris » par suite de la révision de 1953-1954 (ch. 51, art. 182). Dans l'arrêt *Rockert c. La Reine*, [1978] 2 R.C.S. 704, le juge Estey se dit d'avis que la jurisprudence « ne permet plus de douter » que le méfait visé par ces infractions n'est pas le pari, le jeu et la prostitution en soi, mais plutôt le préjudice porté aux intérêts de la collectivité dans laquelle ces activités s'exercent d'une manière notoire et habituelle (p. 712). On peut faire remonter cet objectif à la common law qui est à l'origine des dispositions sur les maisons de débauche (voir, p. ex., E. Coke, *The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, publié pour la première fois en 1644), p. 205-206).

[131] Les procureurs généraux appelants soutiennent que, seule ou de concert avec les autres, cette interdiction vise à décourager la prostitution. Le

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deter prostitution. The record does not support this contention; on the contrary, it is clear from the legislative record that the purpose of the prohibition is to prevent community harms in the nature of nuisance.

[132] There is no evidence to support a reappraisal of this purpose by Parliament. The doctrine against shifting objectives does not permit a new object to be introduced at this point (*R. v. Zundel*, [1992] 2 S.C.R. 731). On its face, the provision is only directed at in-call prostitution, and so cannot be said to aim at deterring prostitution generally. To find that it operates with the other *Criminal Code* provisions to deter prostitution generally is also unwarranted, given their piecemeal evolution and patchwork construction, which leaves out-calls and prostitution itself untouched. I therefore agree with the lower courts that the objectives of the bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety.

(ii) Compliance With the Principles of Fundamental Justice

[133] The courts below considered whether the bawdy-house prohibition is overbroad, or grossly disproportionate.

[134] I agree with them that the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. I therefore find it unnecessary to decide whether the prohibition is overbroad insofar as it applies to a single prostitute operating out of her own home (C.A., at para. 204). The application judge found on the evidence that moving to a bawdy-house would improve prostitutes' safety by providing the "safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate" (para. 427). Balancing this against the evidence demonstrating

dossier n'appuie pas leur prétention; au contraire, il ressort du dossier législatif que l'interdiction a pour objet de faire obstacle au préjudice apparenté à la nuisance qui est infligé à la collectivité.

[132] Nul élément de preuve ne justifie la remise en cause de cet objectif. Le principe qui fait obstacle au changement d'objet ne permet pas de conclure maintenant à l'existence d'un nouvel objectif (*R. c. Zundel*, [1992] 2 R.C.S. 731). À première vue, la disposition ne vise que la prostitution pratiquée chez soi, de sorte qu'elle ne saurait viser à décourager la prostitution en général. Il n'y a pas lieu non plus de conclure qu'elle a pour effet, avec les autres dispositions du *Code criminel*, de décourager la prostitution en général, étant donné le caractère parcellaire de l'adoption et de l'évolution des dispositions qui a permis à la prostitution pratiquée chez autrui et à la prostitution comme telle d'échapper à la répression. Je conviens donc avec les juridictions inférieures que l'objectif de la disposition sur les maisons de débauche est de lutter contre les troubles de voisinage et de protéger la santé et la sécurité publiques.

(ii) Conformité aux principes de justice fondamentale

[133] Les juridictions inférieures se demandent si l'interdiction des maisons de débauche a une portée trop grande ou si elle est totalement disproportionnée.

[134] Je conviens avec elles que l'effet préjudiciable de l'interdiction sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif. J'estime donc inutile de me prononcer sur sa portée excessive dans le cas de la prostituée qui travaille seule chez elle (C.A., par. 204). La juge de première instance conclut de la preuve que dispenser leurs services dans une maison de débauche accroîtrait la sécurité des prostituées en les faisant bénéficier [TRADUCTION] « de l'avantage sécuritaire de la proximité d'autres personnes, de la familiarisation avec les lieux, d'un personnel chargé de leur sécurité, de la télésurveillance en circuit fermé et de toute autre mesure que permet un lieu permanent

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that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

[135] The Court of Appeal acknowledged that empirical evidence on the subject is difficult to gather, since almost all the studies focus on street prostitution. However, it concluded that the evidence supported the application judge's findings on gross disproportionality — in particular, the evidence of the high homicide rate among prostitutes, with the overwhelming number of victims being street prostitutes. The Court of Appeal agreed that moving indoors amounts to a "basic safety precaution" for prostitutes, one which the bawdy-house provision makes illegal (paras. 206-7).

[136] In my view, this conclusion was not in error. The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

(i) The Object of the Provision

[137] This Court has held, *per* Cory J. for the majority in *Downey*, that the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage:

It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section

situé à l'intérieur » (par. 427). Après avoir mis en balance ces éléments avec la preuve selon laquelle « rares sont les plaintes pour nuisance déposées contre un établissement où se pratique la prostitution » (*ibid.*), elle conclut que l'effet préjudiciable de la disposition est totalement disproportionné à son objectif.

[135] La Cour d'appel reconnaît qu'il est difficile de recueillir des données empiriques sur le sujet étant donné que la plupart des études s'intéressent surtout à la prostitution dans la rue. Elle conclut toutefois que la preuve étaye les conclusions de la juge sur la disproportion totale, en particulier en ce qui concerne le nombre élevé de meurtres de prostituées, en très grande majorité des prostituées travaillant dans la rue. Elle convient que travailler à l'intérieur constitue une [TRADUCTION] « précaution élémentaire » que la disposition sur les maisons de débauche rend illégale pour les prostituées (par. 206-207).

[136] À mon avis, cette conclusion n'est pas erronée. Les préjudices relevés par les juridictions inférieures sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer la nuisance, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. La disposition qui empêche une prostituée de la rue de recourir à un refuge sûr comme Grandma's House alors qu'un tueur en série est soupçonné de sévir dans les rues est une disposition qui a perdu de vue son objectif.

b) *Alinéa 212(1)j) : Proxénétisme*

(i) Objet de la disposition

[137] Dans l'arrêt *Downey*, les juges majoritaires de la Cour (sous la plume du juge Cory) concluent que l'al. 212(1)*j*) vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés :

On peut constater que la majorité des infractions mentionnées à l'art. 195 visent le proxénète qui entraîne ou encourage une personne à s'adonner à la prostitution

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195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [p. 32]

[138] The Attorneys General of Canada and Ontario argue that the true objective of s. 212(1)(*j*) is to target the commercialization of prostitution, and to promote the values of dignity and equality. This characterization of the objective does not accord with *Downey*, and is not supported by the legislative record. It must be rejected.

(ii) Compliance With the Principles of Fundamental Justice

[139] The courts below concluded that the living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. The courts below also concluded that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.

[140] I agree with the courts below that the living on the avails provision is overbroad.

[141] The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors, for instance (*Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute (*Grilo*). These refinements render the prohibition narrower than its words might suggest.

[142] The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law's objective. The law punishes

ou la harcèle à cette fin. L'alinéa 195(1)*j*) [aujourd'hui remplacé par l'al. 212(1)*j*)] vise particulièrement ceux qui ont un intérêt financier dans les revenus d'un prostitué. On estime à juste titre, je crois, que la cible visée par l'al. 195(1)*j*) est la personne qui vit en parasite du revenu d'un prostitué, qu'on appelle communément et fort à propos le souteneur. [p. 32]

[138] Le procureur général du Canada et celui de l'Ontario soutiennent que le véritable objectif de l'al. 212(1)*j*) est de réprimer la commercialisation de la prostitution et de promouvoir les valeurs que sont la dignité et l'égalité. Leur prétention est contraire à l'arrêt *Downey* et n'est pas étayée par le dossier législatif. Elle doit donc être écartée.

(ii) Conformité avec les principes de justice fondamentale

[139] Les juridictions inférieures estiment que la portée de la disposition sur le proxénétisme est excessive en ce que sont ciblés des rapports dénués d'exploitation qui n'ont aucun lien avec l'objet de la disposition. Elles opinent en outre que l'effet préjudiciable de la disposition sur la sécurité des prostituées est totalement disproportionné à l'objectif de les protéger.

[140] Je conviens avec elles que la disposition sur le proxénétisme a une portée excessive.

[141] Les tribunaux n'ont appliqué la disposition qu'à la personne qui offre un service ou un bien à une prostituée parce qu'elle est une prostituée, ce qui exclut, par exemple, l'épicier ou le médecin (*Shaw c. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). Ils ont également statué que, dans le cas d'une personne habitant avec une prostituée, l'exploitation devait être prouvée afin qu'un conjoint de fait légitime ne puisse être inquiété (*Grilo*). Leur démarche a pour effet de limiter la portée que l'interdiction pourrait avoir si l'on s'en tenait strictement à son libellé.

[142] La question qui se pose en l'espèce est celle de savoir si la disposition va néanmoins trop loin et porte ainsi atteinte au droit à la sécurité des demanderesses selon des modalités qui sont étrangères

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everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

[143] The appellant Attorneys General argue that the line between an exploitative pimp and a prostitute's legitimate driver, manager or bodyguard, blurs in the real world. A relationship that begins on a non-exploitative footing may become exploitative over time. If the provision were tailored more narrowly — for example, by reading in "in circumstances of exploitation" as the Court of Appeal did — evidentiary difficulties may lead to exploiters escaping liability. Relationships of exploitation often involve intimidation and manipulation of the kind that make it very difficult for a prostitute to testify. For these reasons, the Attorneys General argue, the provision must be drawn broadly in order to effectively capture those it targets.

[144] This argument is more appropriately addressed under the s. 1 analysis. As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.

[145] Having found that the prohibition on living on the avails of prostitution is overbroad, I find it unnecessary to consider whether it is also grossly disproportionate to its object of protecting prostitutes from exploitative relationships.

à l'objectif poursuivi. Est sanctionné quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée (tel le proxénète contrôlant et violent) et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. Certains actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent aussi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive.

[143] Les procureurs généraux appelants font valoir que, dans la réalité, la ligne de démarcation entre le proxénète qui exploite une prostituée et le chauffeur, le gérant ou le garde du corps d'une prostituée est floue. Une relation qui n'est empreinte d'aucune exploitation au départ peut le devenir avec le temps. Si le libellé de la disposition était circonscrit davantage — par exemple en considérant que les mots « dans des situations d'exploitation » y sont employés, comme le préconise la Cour d'appel —, un exploiteur pourrait échapper à l'application de la loi du seul fait que sa responsabilité serait difficile à établir. L'exploitation comporte souvent manipulation et intimidation, ce qui rend très difficile l'obtention du témoignage d'une prostituée. Les procureurs généraux font donc valoir que la disposition doit avoir une grande portée afin de réprimer les actes qui sont censés l'être.

[144] Cette considération a davantage sa place dans l'analyse fondée sur l'article premier. Je le répète, une disposition a une portée excessive au regard de l'art. 7 lorsqu'elle s'applique à un comportement qui est sans rapport avec son objet; l'utilité pratique sur le plan de l'application est l'une des considérations que le gouvernement peut invoquer pour justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[145] Vu ma conclusion que la disposition sur le proxénétisme a une portée excessive, il me paraît inutile de déterminer si elle est aussi totalement disproportionnée à son objectif de protéger les prostituées contre l'exploitation.

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(c) *Section 213(1)(c): Communicating in Public for the Purposes of Prostitution*

(i) The Object of the Provision

[146] The object of the communicating provision was explained by Dickson C.J. in the *Prostitution Reference*:

> Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. [pp. 1134-35]

[147] It is clear from these reasons that the purpose of the communicating provision is not to eliminate street prostitution for its own sake, but to take prostitution "off the streets and out of public view" in order to prevent the nuisances that street prostitution can cause. The *Prostitution Reference* belies the argument of the Attorneys General that

c) *Alinéa 213(1)c) : Communiquer en public à des fins de prostitution*

(i) Objet de la disposition

[146] Dans le *Renvoi sur la prostitution*, le juge en chef Dickson explique l'objet de la disposition sur la communication :

> Comme le juge Wilson, je suis d'avis de qualifier l'objectif législatif de l'al. 195.1(1)*c*) [aujourd'hui remplacé par l'al. 213(1)*c*)] de la façon suivante : la disposition vise la sollicitation dans les endroits publics et, à cette fin, tente de supprimer les diverses formes de nuisances sociales qui découlent de l'étalage en public de la vente de services sexuels. Mon collègue le juge Lamer conclut que l'al. 195.1(1)*c*) vise en réalité à empêcher que de jeunes personnes vraisemblablement vulnérables soient exposées à la prostitution, à la violence, aux drogues et au crime qui l'accompagnent et à éliminer l'oppression et la sujétion économique que la prostitution, et particulièrement la sollicitation de rue, représentent pour les femmes. Je ne partage pas l'opinion que l'objectif législatif puisse être qualifié de façon aussi large. En interdisant la vente de services sexuels dans les endroits publics, la loi ne tente pas, à tout le moins directement, de traiter le problème de l'exploitation, de la dégradation et de la subordination des femmes, qui font partie de la réalité quotidienne de la prostitution. À mon avis, la loi vise plutôt à empêcher que la sollicitation en vue de se livrer à la prostitution se fasse dans les rues et sous les regards du public.
>
> La disposition du *Code criminel* contestée en l'espèce répond clairement aux préoccupations des propriétaires de maison, des commerces et des habitants des secteurs urbains. La sollicitation en public aux fins de la prostitution est intimement associée à l'encombrement des rues ainsi qu'au bruit, au harcèlement verbal de ceux qui n'y participent pas et à divers effets généralement néfastes sur les passants et les spectateurs, particulièrement les enfants. [p. 1134-1135]

[147] Il s'ensuit clairement que la disposition sur la communication vise non pas à éliminer la prostitution dans la rue comme telle, mais bien « à sortir la prostitution de la rue et à la soustraire au regard du public » afin d'empêcher les nuisances susceptibles d'en découler. Le *Renvoi sur la prostitution* contredit la thèse des procureurs généraux selon laquelle

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Parliament's overall objective in these provisions is to deter prostitution.

(ii) Compliance With the Principles of Fundamental Justice

[148] The application judge concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets. This was based on evidence that she found established that the ability to screen clients was an "essential tool" to avoiding violent or drunken clients (application decision, at para. 432).

[149] The majority of the Court of Appeal found that the application judge erred in her analysis of gross disproportionality by attaching too little importance to the objective of s. 213(1)(*c*), and by incorrectly finding on the evidence that face-to-face communication with a prospective customer is essential to enhancing prostitutes' safety (paras. 306 and 310).

[150] In my view, the Court of Appeal majority's reasoning on this question is problematic, largely for the reasons set out by MacPherson J.A., dissenting in part. Four aspects of the majority's analysis are particularly troubling.

[151] First, in concluding that the application judge accorded too little weight to the legislative objective of s. 213(1)(*c*), the majority of the Court of Appeal criticized her characterization of the object of the provision as targeting "noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby" (C.A., at para. 306). But the application judge's conclusion was in concert with the object of s. 213(1)(*c*) established by Dickson C.J. in the *Prostitution Reference*, which the majority of the Court of Appeal endorsed earlier in their reasons (para. 286).

[152] Compounding this error, the majority of the Court of Appeal inflated the objective of the prohibition on public communication by referring to "drug possession, drug trafficking, public

l'objectif général de la disposition serait de décourager la prostitution.

(ii) Conformité aux principes de justice fondamentale

[148] La juge de première instance conclut que le préjudice causé par l'interdiction de communiquer en public est totalement disproportionné à l'objet de la disposition, à savoir mettre fin à la nuisance que constitue la prostitution dans la rue. Elle s'appuie sur des éléments de preuve qui, à son avis, démontrent que la possibilité de jauger les clients est [TRADUCTION] « essentielle » à la détection de ceux qui sont violents ou ivres (décision de première instance, par. 432).

[149] Les juges majoritaires de la Cour d'appel opinent que, dans son analyse de la proportionnalité, la juge de première instance commet l'erreur d'accorder trop peu d'importance à l'objectif de l'al. 213(1)*c*) et de conclure, à partir de la preuve, que la possibilité d'une communication entre les intéressés est essentielle à la sécurité des prostituées (par. 306 et 310).

[150] À mon avis, le raisonnement des juges majoritaires de la Cour d'appel sur ce point pose problème, en grande partie pour les motifs qu'invoque le juge MacPherson, dissident en partie. Leur analyse est problématique sous quatre rapports.

[151] Premièrement, pour conclure que la juge accorde trop peu d'importance à l'objectif de l'al. 213(1)*c*), les juges majoritaires de la Cour d'appel lui reprochent d'affirmer que la disposition vise [TRADUCTION] « le bruit, l'encombrement des rues et la possibilité que l'exercice de la prostitution gêne ceux qui se trouvent dans les lieux environnants » (C.A., par. 306). Or, la conclusion de la juge s'accorde avec l'objet de l'al. 213(1)*c*) reconnu par le juge en chef Dickson dans le *Renvoi sur la prostitution* et auquel les juges majoritaires souscrivent par ailleurs dans leurs motifs (par. 286).

[152] Pour ajouter à cette erreur, les juges majoritaires accroissent la portée de l'objectif de l'interdiction de la communication en public en mentionnant [TRADUCTION] « la possession de drogue, le

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intoxication, and organized crime" (para. 307), even though Dickson C.J. explicitly *excluded* the exposure of "related violence, drugs and crime" to vulnerable young people from the objectives of s. 213(1)(*c*). At most, the provision's effect on these other issues is an ancillary benefit — and, as such, it should not play into the gross disproportionality analysis, which weighs the actual objective of the provision against its negative impact on the individual's life, liberty and security of the person.

[153] The three remaining concerns with the majority's reasoning relate to the other side of the balance: the assessment of the impact of the provision.

[154] First, the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. It found that the application judge's conclusion that face-to-face communication is essential to enhancing prostitutes' safety was based only on "anecdotal evidence . . . informed by her own common sense" (para. 311). This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion (paras. 348-50).

[155] Second, the majority ignored the law's effect of displacing prostitutes to more secluded, less secure locations. The application judge highlighted this displacement (at para. 331), citing the evidence found in the report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws (*The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (2006)) on the effects of s. 213(1)(*c*). The majority's conclusion that the application judge did not have a proper basis to

trafic de stupéfiants, l'intoxication publique et le crime organisé » (par. 307). Pourtant, dans le *Renvoi sur la prostitution*, le juge en chef Dickson *écarte* explicitement des objectifs de l'al. 213(1)*c*) le fait d'empêcher que de jeunes personnes vulnérables soient exposées « à la prostitution, à la violence, aux drogues et au crime » qui accompagnent la prostitution. Tout au plus, l'effet de cette disposition sur ces autres aspects ne constitue qu'un avantage accessoire, de sorte qu'il ne devrait pas être pris en compte lorsque, dans le cadre de l'analyse de la proportionnalité, on soupèse l'objectif réel de la disposition et son effet préjudiciable sur le droit à la vie, à la liberté et à la sécurité de la personne.

[153] Les trois autres failles du raisonnement de la majorité touchent l'autre plateau de la balance, soit l'effet de la disposition.

[154] Premièrement, les juges majoritaires de la Cour d'appel substituent à tort leur appréciation de la preuve à celle de la juge de première instance. Ils concluent que cette dernière se fonde sur [TRADUCTION] « des preuves anecdotiques [. . .] éclairées par son propre bon sens » (par. 311) pour conclure que la communication des intéressés est essentielle à la sécurité accrue des prostituées. Leur erreur est imputable à celle, mentionnée précédemment, de déférer trop peu aux conclusions de la juge sur des faits sociaux ou législatifs. Au nom des juges minoritaires, le juge MacPherson rétorque à juste titre que la preuve sur ce point est constituée à la fois de témoignages de prostituées et de témoignages d'experts, et qu'elle étaye solidement la conclusion tirée en première instance (par. 348-350).

[155] Deuxièmement, les juges majoritaires font fi des conséquences que la disposition a eues sur les prostituées en les faisant migrer vers des lieux isolés et moins sûrs. La juge de première instance met cette migration en évidence (par. 331) et cite les éléments de preuve tirés du rapport du Sous-comité de l'examen des lois sur le racolage du Comité permanent de la justice et des droits de la personne de la Chambre des communes (*Le défi du changement : Étude des lois pénales en matière de prostitution au Canada* (2006)) sur les effets de l'application de

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conclude that face-to-face communication enhances safety may be explained in part by their failure to consider the impact of the provision on displacement.

[156] Related to this is the uncontested fact that the communication ban prevents street workers from bargaining for conditions that would materially reduce their risk, such as condom use and the use of safe houses.

[157] Finally, the majority of the Court of Appeal majority, in rejecting the application judge's conclusions, relied on its own speculative assessment of the impact of s. 213(1)(*c*):

> While it is fair to say that a street prostitute might be able to avoid a "bad date" by negotiating details such as payment, services to be performed and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk. [para. 312]

[158] It is certainly conceivable, as this passage suggests, that some street prostitutes would not refuse a client even if communication revealed potential danger. It is also conceivable that the danger may not be perfectly predicted in advance. However, that does not negate the application judge's finding that communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.

[159] In sum, the Court of Appeal wrongly attributed errors in reasoning to the application judge and made a number of errors in considering gross disproportionality. I would restore the application

l'al. 213(1)*c*). La conclusion des juges majoritaires suivant laquelle la juge ne disposait pas d'éléments suffisants pour conclure que la communication entre les intéressés accroît la sécurité des prostituées peut s'expliquer en partie par leur omission de tenir compte de l'effet de la disposition sur la migration des prostituées.

[156] À cela s'ajoute le fait incontesté que l'interdiction de communiquer à des fins de prostitution empêche les prostituées de la rue de négocier des conditions susceptibles de réduire sensiblement le risque auquel elles s'exposent, telle l'utilisation du condom ou d'un lieu sûr.

[157] Enfin, les juges majoritaires de la Cour d'appel s'appuient sur leur propre appréciation spéculative des répercussions de l'al. 213(1)*c*) pour écarter les conclusions tirées en première instance :

> [TRADUCTION] Bien qu'il soit juste de dire qu'une prostituée de la rue pourrait éviter les incidents malheureux en négociant à l'avance des modalités comme le paiement, les services à rendre et l'utilisation d'un condom, il est également possible que le client jugé acceptable à ce stade préalable devienne ensuite violent lorsque la prestation est en cours. Il est également possible que la prostituée décide d'aller de l'avant malgré le danger pressenti, soit parce que son jugement est altéré par la drogue ou l'alcool, soit parce qu'elle a tellement besoin d'argent qu'elle se sent obligée de courir le risque. [par. 312]

[158] Même si on peut assurément concevoir, comme l'indique cet extrait, qu'une prostituée de la rue ne refuse pas un client même lorsque la communication révèle l'existence d'un risque, il est également concevable que le risque ne puisse être totalement prévisible. Pour autant, la conclusion de la juge selon laquelle la communication entre les intéressés est essentielle à la réduction du risque demeure valable. L'appréciation est qualitative, non quantitative. À supposer que l'évaluation préalable ait pu empêcher une seule femme de monter à bord de la voiture de Robert Pickton, la gravité des effets préjudiciables est démontrée.

[159] En somme, la Cour d'appel relève à tort des erreurs dans le raisonnement de la juge de première instance et elle en commet plusieurs au chapitre de la proportionnalité. Je suis d'avis de rétablir la

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judge's conclusion that s. 213(1)(*c*) is grossly disproportionate. The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

C. *Do the Prohibitions Against Communicating in Public Violate Section 2(b) of the Charter?*

[160] Having concluded that the impugned laws violate s. 7, it is unnecessary to consider this question.

D. *Are the Infringements Justified Under Section 1 of the Charter?*

[161] The appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1 of the *Charter*. Only the Attorney General of Canada addressed this in his factum, and then, only briefly. I therefore find it unnecessary to engage in a full s. 1 analysis for each of the impugned provisions. However, some of their arguments under s. 7 of the *Charter* are properly addressed at this stage of the analysis.

[162] In particular, the Attorneys General attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

conclusion de la juge selon laquelle l'al. 213(1)*c*) est totalement disproportionné. L'effet préjudiciable de cette disposition sur le droit à la sécurité et à la vie des prostituées de la rue est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

C. *Les interdictions de communiquer en public portent-elles atteinte à une liberté garantie à l'al. 2b) de la Charte?*

[160] Comme je conclus que les dispositions contestées violent le droit garanti à l'art. 7, point n'est besoin de se prononcer à cet égard.

D. *Les atteintes sont-elles justifiées suivant l'article premier de la Charte?*

[161] Les procureurs généraux appelants ne prétendent pas sérieusement que si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier de la *Charte*. Seul le procureur général du Canada aborde le sujet dans son mémoire, et ce, brièvement. Il m'apparaît donc inutile de me livrer à une analyse exhaustive au regard de l'article premier pour chacune des dispositions attaquées. Par contre, certaines des thèses qu'ils défendent en fonction de l'art. 7 de la *Charte* sont reprises à juste titre à cette étape de l'analyse.

[162] En particulier, les procureurs généraux tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation, lesquelles peuvent être difficiles à cerner. Or, la disposition vise non seulement le chauffeur ou le garde du corps, qui peut être en fait un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur l'effet préjudiciable qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie.

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[163] The Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the *Charter*.

V. Result and Remedy

[164] I would dismiss the appeals and allow the cross-appeal. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only.

[165] I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.

[166] This raises the question of whether the declaration of invalidity should be suspended and if so, for how long.

[167] On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated.

[163] Les procureurs généraux n'invoquent pas d'éléments distincts de ceux examinés au regard de l'art. 7. Je conclus donc que les dispositions contestées ne sont pas sauvegardées par application de l'article premier de la *Charte*.

V. Dispositif et réparation

[164] Je suis d'avis de rejeter les pourvois et d'accueillir le pourvoi incident. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) sont déclarés incompatibles avec la *Charte canadienne des droits et libertés* et sont par conséquent invalidés. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement.

[165] Je conclus que, considérée isolément, chacune des dispositions contestées comporte des failles constitutionnelles qui portent atteinte à la *Charte*. Il ne s'ensuit pas que le législateur ne peut décider des lieux et des modalités de la prostitution. L'interdiction de tenir une maison de débauche, celle de s'adonner au proxénétisme et celle de communiquer aux fins de prostitution s'entremêlent. Chacune a une incidence sur l'autre. Atténuer l'une d'elles — par exemple en permettant aux prostituées de retenir les services de préposés à leur sécurité — peut influer sur la constitutionnalité de l'autre, comme celle des nuisances associées à la tenue d'une maison de débauche. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel.

[166] La question se pose alors de savoir s'il doit y avoir invalidation avec effet suspensif et, dans l'affirmative, quelle doit être la durée de cet effet.

[167] L'invalidité avec effet immédiat ferait en sorte que la prostitution échappe à toute réglementation le temps que le législateur trouve une solution au problème épineux et délicat de l'encadrement de la prostitution. La question revêt un intérêt public considérable, et peu de pays s'abstiennent de toute

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Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

[168] On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension — risks which violate their constitutional right to security of the person.

[169] The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.

Appeals dismissed and cross-appeal allowed.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society: Pivot Legal Society, Vancouver; Arvay Finlay,

réglementation en la matière. Il peut y avoir controverse quant à savoir si l'invalidité avec effet immédiat présenterait un danger pour le public ou compromettrait la primauté du droit (les facteurs favorables à la suspension invoqués dans *Schachter c. Canada*, [1992] 2 R.C.S. 679). Cependant, il est clair que passer carrément de la situation où la prostitution est réglementée à la situation où elle ne le serait pas du tout susciterait de vives inquiétudes chez de nombreux Canadiens.

[168] Par contre, laisser s'appliquer dans leur forme actuelle l'interdiction des maisons de débauche, celle du proxénétisme et celle de la communication en public aux fins de prostitution exposerait les prostituées à un risque accru durant la suspension, un risque qui porte atteinte à leur droit constitutionnel à la sécurité de la personne.

[169] Il n'est pas facile de choisir entre l'invalidation avec effet suspensif ou immédiat. L'une et l'autre des mesures comportent des inconvénients. Toutefois, au vu de l'ensemble des intérêts en jeu, je conclus à la nécessité de suspendre l'effet de la déclaration d'invalidité pendant un an.

Pourvois rejetés et pourvoi incident accueilli.

Procureur de l'appelant/intimé au pourvoi incident le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'appelant/intimé au pourvoi incident le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs des intimées/appelantes au pourvoi incident : Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureurs des intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society : Pivot Legal Society, Vancouver; Arvay Finlay, Vancouver;

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Vancouver; Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Solicitors for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Hunter Litigation Chambers, Vancouver.

Solicitor for the intervener the Evangelical Fellowship of Canada: Evangelical Fellowship of Canada, Ottawa.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario: Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitors for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society: University of British Columbia, Vancouver; Fay Faraday, Toronto.

Solicitors for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada: Bennett Jones, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the Simone de Beauvoir Institute: Desrosiers, Joncas, Massicotte, Montréal.

Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Procureurs de l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Hunter Litigation Chambers, Vancouver.

Procureur de l'intervenante l'Alliance évangélique du Canada : Alliance évangélique du Canada, Ottawa.

Procureurs des intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario : Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society : University of British Columbia, Vancouver; Fay Faraday, Toronto.

Procureurs des intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada : Bennett Jones, Toronto.

Procureurs de l'intervenant David Asper Centre for Constitutional Rights : Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Procureurs de l'intervenant l'Institut Simone de Beauvoir : Desrosiers, Joncas, Massicotte, Montréal.

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Solicitors for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution: Foy Allison Law Group, West Vancouver.

Solicitor for the intervener Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Procureurs de l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution : Foy Allison Law Group, West Vancouver.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Inc., Toronto.

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Attorney General of Canada *Appellant*

v.

TeleZone Inc. *Respondent*

Indexed as: Canada (Attorney General) *v.* TeleZone Inc.

2010 SCC 62

File No.: 33041.

2010: January 20, 21; 2010: December 23.

Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Provincial superior courts — Action brought against federal Crown in Ontario Superior Court of Justice seeking damages for breach of contract, negligence and unjust enrichment arising from decision rejecting application for telecommunications licence — Whether plaintiff entitled to proceed by way of action in Ontario Superior Court of Justice without first proceeding by way of judicial review in Federal Court — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18; Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21.

In 1995, Industry Canada issued a call for personal communication services licence applications, and released the policy statement within which potential service providers could shape their applications. The statement provided that Industry Canada would grant up to six licences on the basis of criteria it set out. T submitted an application, but when Industry Canada announced its decision, there were only four successful applicants and T was not among them. T filed an action against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment, and sought compensation for claimed losses of $250 million. It claimed that it was an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Since its application satisfied all the criteria, it says, Industry Canada must have considered other undisclosed factors

Procureur général du Canada *Appelant*

c.

TeleZone Inc. *Intimée*

Répertorié : Canada (Procureur général) *c.* TeleZone Inc.

2010 CSC 62

Nº du greffe : 33041.

2010 : 20, 21 janvier; 2010 : 23 décembre.

Présents : Les juges Binnie, LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell.

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

Tribunaux — Compétence — Cours supérieures provinciales — Action en dommages-intérêts intentée contre la Couronne fédérale devant la Cour supérieure de justice de l'Ontario pour inexécution de contrat, négligence et enrichissement injustifié à la suite du rejet d'une demande de licence de télécommunications — La demanderesse a-t-elle le droit d'intenter une action en Cour supérieure de justice de l'Ontario sans engager d'abord une procédure de contrôle judiciaire devant la Cour fédérale? — Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 17, 18; Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, ch. C-50, art. 21.

En 1995, Industrie Canada a lancé une invitation à soumettre des demandes de licences de services de communications personnelles et a publié l'énoncé de politique devant servir de cadre aux demandes des fournisseurs potentiels. L'énoncé indiquait qu'Industrie Canada délivrerait jusqu'à six licences en fonction des critères qu'elle avait définis. T a soumis une demande, mais seules quatre demandes ont été retenues par Industrie Canada et celle de T n'en faisait pas partie. T a intenté une action contre la Couronne fédérale devant la Cour supérieure de justice de l'Ontario pour inexécution de contrat, négligence et enrichissement injustifié, réclamant des dommages-intérêts pour les pertes de 250 millions de dollars qu'elle affirme avoir subies. Elle a allégué que l'énoncé de politique comportait la condition expresse ou implicite qu'Industrie Canada délivrerait moins de six licences uniquement si moins de six demandes répondaient aux critères. Puisque, aux dires de T, sa

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when it rejected T's application. The Attorney General of Canada, relying on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, challenged the jurisdiction of the Superior Court on the ground that the claim constituted a collateral attack on the decision, which is barred by the grant to the Federal Court, by s. 18 of the *Federal Courts Act*, of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Superior Court dismissed the objection on the ground that it was not plain and obvious that the claim would fail. The Court of Appeal upheld the decision, holding that *Grenier* was wrongly decided. In that court's view s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown, and s. 18 of the *Federal Courts Act* did not remove relief by way of an award of damages from the jurisdiction of superior courts.

Held: The appeal should be dismissed.

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The Court's approach should be practical and pragmatic with that objective in mind. Acceptance of *Grenier* would tend to undermine the effectiveness of the *Federal Courts Act* reforms of the early 1990s by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite Parliament's promise to give plaintiffs a choice of forum and to make provincial superior courts available to litigants "in all cases in which relief is claimed against the [federal] Crown" except as otherwise provided.

Apart from constitutional limitations, none of which are relevant here, Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. However, any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language. Nothing in the *Federal Courts Act* satisfies this test. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes the Attorney General's argument. The grant of exclusive jurisdiction

demande satisfaisait à tous les critères, Industrie Canada a dû appliquer d'autres facteurs, non communiqués, pour la rejeter. Se fondant sur *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287, le procureur général du Canada a contesté la compétence de la Cour supérieure de justice au motif que la demande était une contestation indirecte de la décision, ce qui est interdit compte tenu de la compétence exclusive accordée à la Cour fédérale par l'art. 18 de la *Loi sur les Cours fédérales* (« *LCF* ») en matière de contrôle judiciaire des décisions de tout office fédéral. La Cour supérieure a rejeté cette objection parce que la demande n'était pas manifestement vouée à l'échec. La Cour d'appel a maintenu la décision, estimant que l'arrêt *Grenier* est incorrect. Selon elle, l'art. 17 de la *LCF* et l'art. 21 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* confèrent aux cours supérieures et à la Cour fédérale une compétence concurrente à l'égard des demandes de réparation contre la Couronne, et l'art. 18 de la *LCF* n'a pas soustrait l'action en dommages-intérêts de la compétence des cours supérieures.

Arrêt : Le pourvoi est rejeté.

Le pourvoi porte essentiellement sur l'accès à la justice. Les personnes qui prétendent avoir subi un préjudice attribuable à une mesure administrative doivent pouvoir exercer les recours autorisés par la loi au moyen de procédures réduisant au minimum les frais et complexités inutiles. La Cour doit adopter une approche pratique et pragmatique en gardant cet objectif à l'esprit. Appliquer *Grenier* tendrait à miner l'efficacité des réformes mises en place par la *LCF* au début des années 1990, en maintenant l'exclusivité juridictionnelle de la Cour fédérale à l'égard d'un élément fondamental de nombreux recours instruits devant les cours provinciales, en dépit de la promesse du législateur de donner au demandeur le choix du tribunal et de permettre aux parties l'accès aux cours supérieures provinciales, « dans les cas de demande de réparation contre la Couronne » fédérale, sauf disposition contraire.

Sous réserve de restrictions constitutionnelles, dont aucune n'est pertinente en l'espèce, le législateur peut transférer un pouvoir appartenant aux cours supérieures à d'autres organismes juridictionnels, comme la Cour fédérale. Cependant, la compétence des cours supérieures provinciales ne peut être amoindrie (en faveur de la Cour fédérale ou d'un autre tribunal) que si une disposition législative claire le prévoit expressément. Aucune disposition de la *LCF* ne répond à ce critère. L'octroi explicite aux cours supérieures provinciales d'une compétence concurrente en matière de demandes de réparation contre la Couronne, à l'art. 17 de cette loi (et à l'art. 21 de la *Loi sur la responsabilité civile de l'État et le*

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to judicially review federal decision makers in s. 18 is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". This reservation or subtraction is expressed in s. 18 of the *Federal Courts Act* in terms of particular remedies. All the remedies listed are traditional administrative law remedies and do not include awards of damages. If a claimant seeks compensation, he or she cannot get it on judicial review, but must file an action.

The *Federal Courts Act* contains other internal evidence that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*. Section 18.1(2) imposes a 30-day limitation for judicial review applications. A 30-day cut off for a damages claimant would be unrealistic, as the facts necessary to ground a civil cause of action may not emerge until after 30 days have passed, and the claimant may not be in a position to apply for judicial review within the limitation period. While the 30-day limit can be extended, the extension is discretionary and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. Moreover, the grant of judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. Further, s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the lawfulness of administrative decisions could be assessed by the provincial superior court in the course of adjudicating a claim for damages.

The *Grenier* approach cannot be justified by the rule against collateral attacks. T's claim is not an attempt to invalidate or render inoperative the Minister's decision; rather, the decision and the financial losses allegedly consequent to it constitute the very foundation of the damages claim. In any event, given the statutory grant of concurrent jurisdiction in s. 17 of the *Federal Courts*

contentieux administratif) réfute directement l'argument du procureur général. Il faut voir l'attribution de la compétence exclusive en matière de contrôle judiciaire des décisions de l'administration fédérale à l'art. 18 comme une réserve ou une exception à l'attribution d'une compétence concurrente plus générale à l'art. 17 « dans les cas de demande de réparation contre la Couronne » fédérale. Cette réserve ou exception est énoncée à l'art. 18 de la *LCF* sous forme de recours particuliers. Tous les recours énumérés sont des recours classiques du droit administratif, et l'octroi de dommages-intérêts n'en fait pas partie. L'indemnisation n'est pas possible dans le cadre d'une procédure de contrôle judiciaire; mais seulement dans le cadre d'une action.

D'autres éléments intrinsèques de la *LCF* indiquent que le législateur ne peut avoir eu l'intention de faire du contrôle judiciaire une épreuve préliminaire comme le laisse entrevoir l'arrêt *Grenier*. Le paragraphe 18.1(2) fixe un délai de 30 jours pour la présentation d'une demande de contrôle judiciaire. Il ne serait pas réaliste qu'une action en dommages-intérêts se prescrive par 30 jours, vu que les faits nécessaires pour fonder un recours civil peuvent fort bien n'être connus qu'après 30 jours et qu'il se pourrait qu'un demandeur ne soit pas en mesure de déposer sa demande de contrôle judiciaire dans le délai fixé. Il est possible de proroger le délai de 30 jours, mais il s'agit là d'une décision discrétionnaire, et l'issue d'une action civile intentée devant une cour supérieure serait ainsi subordonnée au pouvoir discrétionnaire d'un juge de la Cour fédérale statuant sur une demande de prorogation de délai en fonction de considérations de droit public et non de facteurs propres aux dommages-intérêts de droit civil. En outre, les décisions en matière de contrôle judiciaire sont de nature discrétionnaire, et une demande de contrôle judiciaire peut être rejetée même lorsque le demandeur a établi l'existence de motifs qui justifieraient l'intervention de la cour. Cette approche ne concorde pas avec le paradigme de l'action en dommages-intérêts de la common law, suivant lequel la preuve des éléments de la demande entraîne normalement l'indemnisation. De plus, l'art. 8 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, qui codifie la défense de pouvoir d'origine législative, prouve que le législateur prévoyait que la cour supérieure provinciale pourrait se prononcer sur la légalité de décisions administratives dans le cadre d'une action en dommages-intérêts.

La règle interdisant les contestations indirectes ne peut justifier l'approche proposée dans *Grenier*. T ne se sert pas de sa demande pour faire invalider ou déclarer inopérante la décision du ministre; elle fait plutôt de la décision et des pertes pécuniaires qui en auraient résulté les assises mêmes de sa demande de dommages-intérêts. Quoi qu'il en soit, le législateur a spécifié, en attribuant

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Act, Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of a claim and this includes any attack on the validity of the Minister's decision where this issue is essential to the cause of action and where adjudicating the matter is a necessary step in disposing of the claim. While the doctrine of collateral attack may be raised by the Crown in the provincial superior court as a defence, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Similarly, while it may be open to the Crown, by way of defence, to argue that the government decision maker was acting under statutory authority which precludes compensation for consequent losses, this is not a matter of jurisdiction and can be dealt with as well by the provincial superior court as by the Federal Court.

It is true that the provincial superior courts and the Federal Court have a residual discretion to stay a damages claim if, in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. However, where a plaintiff's pleading alleges the elements of a private cause of action, the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that could be pursued on judicial review. If the plaintiff has pleaded a valid cause of action for damages, he or she should generally be allowed to pursue it.

Here, T's claim as pleaded is dominated by private law considerations. It is not attempting to nullify or set aside the decision to issue licences. Nor does it seek to deprive the decision of any legal effect. T's causes of action in contract, tort and equity are predicated on the finality of that decision excluding it from participation in the telecommunications market. The Ontario Superior Court of Justice has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating T's claim.

Cases Cited

Overruled: *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205;

une compétence concurrente à l'art. 17 de la *LCF*, que les cours supérieures provinciales disposent de la compétence concurrente voulue pour trancher une demande dans son intégralité, y compris pour décider de la validité d'une décision du ministre, lorsque cette question est un élément essentiel de la cause d'action et qu'il faut la trancher pour statuer sur la demande. La Couronne peut invoquer la doctrine de la contestation indirecte en défense devant la cour supérieure provinciale, mais la possibilité de recourir à ce moyen de défense ne peut étayer la thèse de l'incompétence de la cour supérieure provinciale. De même, bien que la Couronne puisse faire valoir, en défense, que le décideur public exerçait un pouvoir d'origine législative qui exclut l'indemnisation des pertes pouvant en résulter, cette question n'a pas trait à la compétence et peut être tranchée aussi bien par la cour supérieure d'une province que par la Cour fédérale.

Les cours supérieures provinciales et la Cour fédérale disposent du pouvoir discrétionnaire résiduel de suspendre une action en dommages-intérêts lorsqu'il s'agit essentiellement d'une demande de contrôle judiciaire et qu'elle n'a que superficiellement l'apparence d'un recours délictuel de droit privé. Toutefois, lorsque le demandeur allègue les éléments d'une cause d'action en droit privé dans son argumentation, la cour supérieure provinciale ne doit généralement pas décliner compétence au motif que l'action s'apparente à un recours qui doit être instruit comme une demande de contrôle judiciaire. Si le demandeur a plaidé une cause d'action valide en dommages-intérêts, il devrait généralement être admis à exercer son recours à ce titre.

Tel qu'il a été présenté, le recours de T met principalement en jeu des questions de droit privé. T ne cherche pas à obtenir l'annulation de la décision de délivrer les licences. Elle ne cherche pas non plus à priver la décision de ses effets juridiques. Ses causes d'action contractuelles, délictuelles et en equity sont fondées sur le caractère définitif de cette décision qui l'écarte du marché des télécommunications. La Cour supérieure de justice de l'Ontario a compétence sur les parties et sur l'objet du litige, et elle a le pouvoir d'accorder des dommages-intérêts. Aucune disposition de la *LCF* n'empêche la Cour supérieure de l'Ontario de statuer sur la demande.

Jurisprudence

Arrêt renversé : *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287; **arrêts mentionnés :** *Canada (Procureur général) c. McArthur*, 2010 CSC 63, [2010] 3 R.C.S. 626; *Little Sisters Book and Art Emporium c. Canada (Commissaire des Douanes et du Revenu)*, 2007 CSC 2, [2007] 1 R.C.S. 38; *La Reine du chef du Canada c. Saskatchewan Wheat Pool*,

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Agricultural Research Institute of Ontario v. Campbell-High (2002), 58 O.R. (3d) 321, leave to appeal refused, [2003] 1 S.C.R. vii; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568, rev'd 2010 SCC 64, [2010] 3 S.C.R. 639; *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, leave to appeal refused, [2009] 3 S.C.R. vii; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Pringle v. Fraser*, [1972] S.C.R. 821; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 41 C.R. (3d) 262; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Sutherland v. Canada*

[1983] 1 R.C.S. 205; *Agricultural Research Institute of Ontario c. Campbell-High* (2002), 58 O.R. (3d) 321, autorisation d'appel refusée, [2003] 1 R.C.S. vii; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339; *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537; *Edwards c. Barreau du Haut-Canada*, 2001 CSC 80, [2001] 3 R.C.S. 562; *Holland c. Saskatchewan*, 2008 CSC 42, [2008] 2 R.C.S. 551; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *Hinton c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2008 CAF 215, [2009] 1 R.C.F. 476; *Parrish & Heimbecker Ltd. c. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)*, 2008 CAF 362, [2009] 3 R.C.F. 568, inf. par 2010 CSC 64, [2010] 3 R.C.S. 639; *Donovan c. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone c. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. c. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. c. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379; *Leroux c. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93; *Genge c. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. c. Canada (Ministre des Travaux publics et Services gouvernementaux)*, [1995] 2 C.F. 694; *Irving Shipbuilding Inc. c. Canada (Procureur général)*, 2009 CAF 116 (CanLII), autorisation d'appel refusée, [2009] 3 R.C.S. vii; *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860; *R. c. Al Klippert Ltd.*, [1998] 1 R.C.S. 737; *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437; *Pringle c. Fraser*, [1972] R.C.S. 821; *Canada (Commission des droits de la personne) c. Canadian Liberty Net*, [1998] 1 R.C.S. 626; *Peacock c. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Morgentaler* (1984), 41 C.R. (3d) 262; *R. c. Rahey*, [1987] 1 R.C.S. 588; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; *Tock c. St. John's Metropolitan*

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19, 303 D.L.R. (4th) 626, 245 O.A.C. 91, 86 Admin L.R. (4th) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, affirming a decision of Morawetz J. (2007), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Appeal dismissed.

Christopher M. Rupar, *Alain Préfontaine* and *Bernard Letarte*, for the appellant.

Peter F. C. Howard, *Patrick J. Monahan, Eliot N. Kolers* and *Nicholas McHaffie*, for the respondent.

The judgment of the Court was delivered by

[1] Binnie J. — TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of $250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

[2] The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister's decision. TeleZone's claim, he says, constitutes an impermissible collateral attack on the Minister's order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals — *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18. The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, hence the "*Grenier* principle".

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Laskin, Borins et Feldman), 2008 ONCA 892, 94 O.R. (3d) 19, 303 D.L.R. (4th) 626, 245 O.A.C. 91, 86 Admin L.R. (4th) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, qui a confirmé une décision du juge Morawetz (2007), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Pourvoi rejeté.

Christopher M. Rupar, *Alain Préfontaine* et *Bernard Letarte*, pour l'appelant.

Peter F. C. Howard, *Patrick J. Monahan*, *Eliot N. Kolers* et *Nicholas McHaffie*, pour l'intimée.

Version française du jugement de la Cour rendu par

[1] Le juge Binnie — TeleZone Inc. prétend avoir été lésée par la décision du ministre d'Industrie Canada de rejeter sa demande de licence de fourniture de services de télécommunications. TeleZone réclame des dommages-intérêts contre la Couronne fédérale devant la Cour supérieure de justice de l'Ontario pour les pertes de 250 millions de dollars qu'elle affirme avoir subies. Elle invoque l'inexécution de contrat et la négligence et, subsidiairement, l'enrichissement injustifié afférent aux sommes inutilement consacrées à la demande de licence.

[2] Le procureur général conteste la compétence de la Cour supérieure d'instruire la demande d'indemnisation, affirmant que sa compétence est subordonnée à l'obtention par TeleZone d'une ordonnance de la Cour fédérale du Canada annulant la décision du ministre. Il soutient que la demande de TeleZone sert à contester indirectement la décision du ministre, ce qui est interdit compte tenu de la compétence *exclusive* accordée à la Cour fédérale en matière de contrôle judiciaire des décisions de tout « office fédéral » — *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7, art. 18 (« *LCF* »). Le procureur général s'appuie à cet égard sur une série d'arrêts de la Cour d'appel fédérale et, plus particulièrement, sur le principe établi dans *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287.

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[3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the *Federal Courts Act*.

[4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

[3] La définition d'un « office fédéral » figurant dans la *LCF* est très large : « Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale » (art. 2) — cette définition exclut certains décideurs, notamment les juges de la Cour canadienne de l'impôt, mais ces exceptions ne sont pas pertinentes en l'espèce. Les décideurs fédéraux visés vont du Premier ministre et des organismes les plus importants jusqu'au garde-frontière et au douanier locaux, et englobent tous ceux qui se situent entre ces deux extrêmes. Le principe établi dans *Grenier* immuniserait la Couronne contre l'obligation de verser des dommages-intérêts de droit privé par suite d'une décision administrative illégale de l'une de ces personnes ou entités, à moins que le demandeur lésé ne passe d'abord par la Cour fédérale. Quand le législateur a édicté les dispositions de la *LCF* relatives au contrôle judiciaire, il n'entendait manifestement pas créer un tel goulot d'étranglement.

[4] Le principe énoncé dans *Grenier* irait à l'encontre de l'art. 17 de la *LCF*, qui confère aux cours supérieures provinciales une compétence concurrente « dans les cas de demande de réparation contre la Couronne », et de l'art. 21 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. 1985, ch. C-50, qui a le même effet à l'égard des actions en responsabilité délictuelle. Dans certaines actions en dommages-intérêts intentées contre la Couronne fédérale (mais non dans toutes), la question de la « légalité » de la décision administrative censée avoir causé la perte est primordiale. L'arrêt *Grenier* nierait aux cours supérieures provinciales la compétence nécessaire pour examiner cette question fondamentale lorsqu'un demandeur s'adresse à elles pour obtenir des dommages-intérêts. Si l'on adoptait le principe formulé dans cet arrêt, la compétence de ces cours ne serait plus concurrente, mais subordonnée et conditionnelle. Elle deviendrait en effet subordonnée à la décision de la Cour fédérale sur la demande de contrôle judiciaire et conditionnelle à l'exercice de son pouvoir discrétionnaire en faveur du demandeur.

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[5] The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

[6] In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 88 O.R. (3d) 173) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

I. Facts

[7] The alleged faults of the Minister of Industry Canada in dealing with the application under the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone's allegations as capable of proof.

[8] TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal

[5] C'est à bon droit, à mon avis, que la Cour d'appel de l'Ontario a rejeté l'argumentation du procureur général. J'estime que l'arrêt *Grenier* procède d'une perception exagérée de la portée juridique de l'attribution de la compétence en matière de contrôle judiciaire à la Cour fédérale, à l'art. 18 de la *LCF*, qu'il faut voir comme une réserve ou une exception à la compétence concurrente plus générale que lui confère l'art. 17 « dans les cas de demande de réparation contre la Couronne » fédérale. Les arguments du procureur général n'étant pas étayés par les termes exprès de l'art. 18, ils relèvent nécessairement de l'inférence. Or, il est bien établi que les inférences ne suffisent pas pour écarter la compétence des cours supérieures provinciales.

[6] En l'espèce, la Cour supérieure de l'Ontario a compétence à l'égard des parties, de l'objet du litige et des réparations demandées par TeleZone. Cette compétence emporte le pouvoir de statuer sur toutes les questions de droit et de fait nécessaires à l'octroi ou au refus des réparations demandées, à moins que le texte de loi ne l'écarte. Or, la *LCF* n'écarte pas en termes clairs et directs la compétence des cours supérieures provinciales pour statuer sur ces demandes en common law et en equity, y compris sur la question de l'« illégalité » des décisions administratives. La Cour supérieure a donc compétence pour instruire l'affaire. C'est la conclusion à laquelle sont parvenues la Cour supérieure de l'Ontario ((2007), 88 O.R. (3d) 173) et la Cour d'appel de l'Ontario (2008 ONCA 892, 94 O.R. (3d) 19). Je souscris à cette conclusion. Je suis d'avis de rejeter le pourvoi.

I. Faits

[7] La déclaration modifiée décrit les fautes que le ministre d'Industrie Canada aurait commises dans le traitement de la demande de licence sous le régime de la *Loi sur la radiocommunication*, L.R.C. 1985, ch. R-2. Il faut supposer, pour les besoins du présent pourvoi, que ces allégations peuvent être prouvées.

[8] TeleZone a été constituée en 1992, avec comme but ultime l'obtention d'une licence de

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communication services ("PCS") — essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a licence to provide personal cordless telephone service. Between 1993 and 1995, TeleZone alleges that it kept Industry Canada appraised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

[9] In June 1995, Industry Canada issued a call for PCS licence applications (the "Call"), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the "Policy Statement"). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

[10] Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

[11] In September 1995, TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately $20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

fourniture de services de communications personnelles (« SCP ») — essentiellement un réseau de téléphonie cellulaire. En décembre 1992, elle a franchi une étape préliminaire en obtenant une licence de fourniture de services de téléphonie sans fil. TeleZone affirme qu'entre 1993 et 1995 elle a tenu Industrie Canada au courant des efforts qu'elle déployait pour réunir le capital et acquérir l'expérience nécessaire à la fourniture de SCP. Elle soutient qu'Industrie Canada l'a encouragée à persévérer.

[9] Au mois de juin 1995, Industrie Canada a lancé une invitation à soumettre des demandes de licences de SCP et a publié un énoncé de politique décrivant la politique et la procédure qui devaient servir de cadre aux demandes des fournisseurs potentiels. L'énoncé de politique indiquait qu'Industrie Canada délivrerait jusqu'à six licences en fonction des critères qu'elle avait définis. Selon TeleZone, Industrie Canada disait avoir pour politique générale de favoriser la délivrance d'un nombre maximal de licences afin de stimuler la concurrence et de donner un plus grand choix aux consommateurs. TeleZone a agi en fonction de cette politique.

[10] L'article 9.1 de l'invitation créait un processus de demande en trois étapes : (1) la déclaration d'intérêt des fournisseurs potentiels; (2) la présentation de demandes détaillées par les fournisseurs potentiels, (3) l'annonce des candidatures retenues et l'octroi des licences de SCP par Industrie Canada. Les articles 9.4 à 9.5.6 établissaient les critères d'évaluation applicables. Dans l'invitation, Industrie Canada ne s'était pas expressément réservé le droit d'examiner d'autres facteurs. TeleZone soutient qu'Industrie Canada ne pouvait prendre en compte d'autres critères que ceux qui étaient énoncés dans l'invitation.

[11] Au mois de septembre 1995, TeleZone a soumis sa demande détaillée de licence de SCP, dont la préparation lui aurait coûté environ 20 millions de dollars. Industrie Canada a rendu publique sa décision au sujet des licences de SCP en décembre 1995. Seules quatre demandes avaient été retenues. Celle de TeleZone n'en faisait pas partie.

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[12] The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says, the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

[13] On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

[14] In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

II. Judicial History

A. *Ontario Superior Court of Justice (Morawetz J.) (2007), 88 O.R. (3d) 173*

[15] On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial

[12] Dans sa déclaration modifiée, TeleZone allègue que l'énoncé de politique comportait une condition expresse ou implicite portant qu'Industrie Canada délivrerait moins de six licences uniquement si moins de six demandes répondaient aux critères (par. 12). Elle affirme que sa demande satisfaisait à tous les critères énumérés dans l'invitation. Elle soutient, en conséquence, que le ministre a dû appliquer d'autres facteurs pour rejeter sa demande (par. 17). Ces autres facteurs n'ont pas été communiqués à TeleZone.

[13] TeleZone fonde le volet contractuel de sa cause sur l'existence d'un contrat (le « Contrat A »), né du processus d'appel d'offres, qui obligeait Industrie Canada à se conformer à l'invitation et à l'énoncé de politique et à traiter tous les demandeurs de licence avec équité et bonne foi dans l'attribution des licences de SCP (m.i., par. 133). Elle prétend que la Couronne a contrevenu au Contrat A (1) en octroyant moins de licences que le nombre annoncé, (2) en ne s'en tenant pas aux exigences formulées dans l'invitation, notamment aux critères qui y étaient énumérés (par. 134), et (3) en manquant à son obligation de diligence et à son obligation d'agir de bonne foi (par. 135).

[14] Dans sa déclaration modifiée, TeleZone ne conteste pas la décision du ministre concernant l'octroi des licences; elle ne cherche pas à obtenir de licence ni à faire retirer leur licence aux candidats retenus. Elle réclame simplement des dommages-intérêts. Elle soutient en conséquence que la question de la validité des licences octroyées aux autres demandeurs ne se pose pas puisque deux autres licences de SCP pouvaient encore être délivrées aux termes de l'invitation et de l'énoncé de politique et qu'elle conteste seulement la conduite de la Couronne à son endroit (par. 136).

II. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario (le juge Morawetz) (2007), 88 O.R. (3d) 173*

[15] Le procureur général a présenté une requête préliminaire visant le rejet de l'action de TeleZone pour défaut de compétence, soutenant que cette dernière devait obtenir l'annulation de la décision

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review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

B. *Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19*

[16] Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

III. Relevant Enactments

[17] *Constitution Act, 1867*

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Federal Courts Act, R.S.C. 1985, c. F-7

2. (1) . . .

"federal board, commission or other tribunal" means any body, person or persons having, exercising or

du ministre par voie de contrôle judiciaire devant la Cour fédérale avant d'intenter un recours civil contre la Couronne. TeleZone a répliqué que son recours repose sur des causes d'action distinctes de celles d'une demande de contrôle judiciaire. Elle ne cherche pas à faire annuler les licences; elle cherche à obtenir des dommages-intérêts pour négligence, inexécution de contrat ou enrichissement injustifié. Le juge Morawetz a rejeté la requête, estimant que l'action de TeleZone devant la Cour supérieure n'était pas manifestement vouée à l'échec.

B. *Cour d'appel de l'Ontario (les juges Laskin, Borins et Feldman), 2008 ONCA 892, 94 O.R. (3d) 19*

[16] Dans un jugement unanime, le juge Borins a conclu que l'art. 17 de la *LCF* et l'art. 21 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* confèrent aux cours supérieures et à la Cour fédérale une compétence concurrente à l'égard des demandes de réparation contre la Couronne. Compte tenu de sa compétence générale et inhérente, la Cour supérieure de l'Ontario connaît de toutes les causes d'action, à moins qu'une disposition législative ou une convention d'arbitrage ne prévoie le contraire. L'article 18 de la *LCF* a soustrait les brefs de prérogative et recours extraordinaires qui y sont énumérés à la compétence des cours supérieures (par. 94). Puisque le recours entrepris par TeleZone (action en dommages-intérêts) n'est pas énuméré à l'art. 18, le juge Borins est arrivé à la conclusion que la Cour supérieure demeure compétente. L'appel a été rejeté.

III. Dispositions pertinentes

[17] *Loi constitutionnelle de 1867*

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7

2. (1) . . .

« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de

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purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

17. (1) [Relief against the Crown] Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

(2) [Cases] Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

. . .

(*b*) the claim arises out of a contract entered into by or on behalf of the Crown;

. . .

(*d*) the claim is for damages under the *Crown Liability and Proceedings Act*.

(5) [Relief in favour of Crown or against officer] The Federal Court has concurrent original jurisdiction

. . .

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

18. (1) [Extraordinary remedies, federal tribunals] Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief

personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

17. (1) [Réparation contre la Couronne] Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

(2) [Motifs] Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :

. . .

b) un contrat conclu par ou pour la Couronne;

. . .

d) une demande en dommages-intérêts formée au titre de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

(5) [Actions en réparation] Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

. . .

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

18. (1) [Recours extraordinaires : offices fédéraux] Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute

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contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) [Remedies to be obtained on application] The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) [Application for judicial review] An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) [Time limitation] An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) [Powers of Federal Court] On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.4 (1) [Hearings in summary way] Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) [Exception] The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

. . .

(3) [Exercice des recours] Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

18.1 (1) [Demande de contrôle judiciaire] Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) [Délai de présentation] Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) [Pouvoirs de la Cour fédérale] Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

18.4 (1) [Procédure sommaire d'audition] Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

(2) [Exception] Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

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Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

3. [Liability] The Crown is liable for the damages for which, if it were a person, it would be liable

(*a*) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. (1) [Concurrent jurisdiction of provincial court] In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

IV. Analysis

[18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, ch. C-50

3. [Responsabilité] En matière de responsabilité, l'État est assimilé à une personne pour :

a) dans la province de Québec :

(i) le dommage causé par la faute de ses préposés,

(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

b) dans les autres provinces :

(i) les délits civils commis par ses préposés,

(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

8. [Sauvegarde de la prérogative et des pouvoirs de l'État] Les articles 3 à 7 n'ont pas pour effet d'engager la responsabilité de l'État pour tout fait — acte ou omission — commis dans l'exercice d'un pouvoir qui, sans ces articles, s'exercerait au titre de la prérogative royale ou d'une disposition législative, et notamment pour les faits commis dans l'exercice d'un pouvoir dévolu à l'État, en temps de paix ou de guerre, pour la défense du Canada, l'instruction des Forces canadiennes ou le maintien de leur efficacité.

21. (1) [Compétence concurrente des tribunaux provinciaux] Dans les cas de réclamation visant l'État pour lesquels la Cour fédérale n'a pas compétence exclusive, a compétence concurrente en la matière la cour supérieure de la province où survient la cause d'action.

IV. Analyse

[18] C'est essentiellement l'accès à la justice qui est en cause en l'espèce. Les personnes qui prétendent avoir subi un préjudice attribuable à une mesure administrative doivent pouvoir exercer les recours autorisés par la loi au moyen de procédures réduisant au minimum les frais et complexités inutiles. Notre Cour doit aborder cette question d'un point de vue pratique et pragmatique en gardant cet objectif à l'esprit.

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[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[20] The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a "collateral attack" prohibited by "inferences" derived from s. 18 of the *Federal Courts Act*. His argument, in a nutshell, is:

> Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court.

(A.G. Factum,[1] at para. 4)

[21] The Attorney General accepts that judicial review is not required "for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal" (para. 29). However, the detour is required for claims that engage, directly or indirectly, the "validity and unlawfulness" of such decisions (para. 2). "Lawfulness" is a broad term. The Attorney General uses "invalid" and "unlawful" conjunctively (e.g., at para. 49). He seems to use the term "unlawful" to cover virtually any government order that could lay the basis for a finding of fault

[1] The Attorney General's principal argument was filed in the companion case of *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, and references herein are to that factum unless otherwise noted.

[19] Le demandeur qui veut obtenir l'annulation d'une décision de l'administration fédérale doit procéder par voie de contrôle judiciaire, comme le précise l'arrêt *Grenier*. Par contre, s'il ne s'oppose pas à ce que la décision continue de s'appliquer, mais cherche plutôt à se faire indemniser des pertes qu'il dit avoir subies (comme en l'espèce), il n'existe aucune raison logique de lui imposer l'étape supplémentaire d'un détour devant la Cour fédérale pour le contrôle judiciaire de la décision (entreprise pouvant parfois se révéler coûteuse en soi), alors que ce n'est pas le recours qui lui convient. L'accès à la justice exige que le demandeur puisse exercer directement le recours qu'il a choisi et, autant que possible, sans détours procéduraux.

[20] Selon le procureur général, il est nécessaire de passer par la Cour fédérale parce que l'action en dommages-intérêts constitue une « contestation indirecte » interdite « implicitement » par l'art. 18 de la *LCF*. En bref, voici son argument :

> [TRADUCTION] On ne saurait permettre qu'il soit possible de contourner la volonté du législateur que le contrôle des décisions administratives fédérales soit réservé à la Cour fédérale en demandant simplement des dommages-intérêts ou une autre forme de réparation qui ne peut être obtenue par voie de contrôle judiciaire devant cette cour.

(Mémoire du P.G.[1], par. 4)

[21] Le procureur général reconnaît que le contrôle judiciaire ne s'impose pas [TRADUCTION] « dans toutes les affaires intéressant de quelque façon une décision ou la conduite d'un office fédéral » (par. 29), mais il affirme que ce détour est nécessaire lorsque la demande met directement ou indirectement en cause la « validité et l'illégalité » d'une telle décision (par. 2). La notion de « légalité » est très large. Le procureur général utilise les termes « invalide » et « illégal » de façon conjonctive (voir, p. ex., le par. 49). Il semble qualifier d'illégale presque toute décision de l'administration fédérale pouvant mener à la

[1] L'argumentation principale du procureur général a été présentée dans l'affaire connexe *Canada (Procureur général) c. McArthur*, 2010 CSC 63, [2010] 3 R.C.S. 626, et, à moins d'indication contraire, je renvoie dans les présents motifs au mémoire soumis dans cette affaire.

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in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a "physical task or activity" negligently, or breaching a duty to warn (Factum, at para. 50).

[22] The Attorney General's concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with "convenience" and "a choice of forum" in the provincial courts (see statement of the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414, reproduced below, at para. 58).

[23] I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

conclusion qu'il y a eu faute au sens du droit privé, mais il exclut les actes bureaucratiques comme la fourniture de renseignements erronés, la négligence dans l'accomplissement « d'une tâche ou d'une activité physique » ou le manquement à une obligation d'avertissement (mémoire, par. 50).

[22] Le procureur général craint de voir resurgir partout au Canada le spectre de l'incohérence et de l'incertitude auxquelles la *LCF* visait à remédier si différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale, ou de décisions connexes, pouvaient être instruits par divers juges de différentes cours supérieures. Il s'agit là cependant d'une préoccupation dont le législateur a sûrement tenu compte lorsqu'il a conféré aux cours supérieures une compétence concurrente dans les cas de demande de réparation contre la Couronne fédérale. Il ne fait aucun doute que la juxtaposition des articles 17 et 18 de la *LCF* entraîne un certain chevauchement de l'objet des recours dans le cadre desquels l'administration fédérale doit rendre compte de ses décisions. Ce chevauchement est indissociable d'un régime législatif qui donne aux demandeurs le « choix » de s'adresser à une cour provinciale, si c'est le tribunal qui leur « convient le mieux » (voir la déclaration du ministre de la Justice devant le Parlement, *Débats de la Chambre des communes*, 2e sess., 34e lég., 1er novembre 1989, p. 5414, reproduite ci-dessous, au par. 58).

[23] Je ne crois pas que le respect de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la *LCF*, exige une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent directement ou indirectement en cause la validité ou la légalité d'une décision fédérale. Seul un texte législatif clair et explicite pourrait l'exiger. Or, à mon avis, ni la *LCF* ni la *Loi sur la responsabilité civile de l'État et le contentieux administratif* n'ont cet effet. Non seulement elles ne comportent aucune disposition en ce sens, mais les inférences raisonnables que l'on peut tirer de ces deux lois et, plus particulièrement, de l'octroi aux cours supérieures provinciales d'une compétence concurrente dans les cas de demande de réparation contre la Couronne mènent à la conclusion opposée.

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A. *The Nature of Judicial Review*

[24] The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

[25] Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

[26] The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the

A. *La nature du contrôle judiciaire*

[24] Le procureur général souligne avec raison [TRADUCTION] « les différences substantielles entre les principes de droit public et les principes de droit privé » (mémoire, par. 6). Le contrôle judiciaire s'intéresse à la légalité, à la raisonnabilité et à l'équité du processus suivi et des mesures prises par l'administration publique. Il est conçu pour assurer la primauté du droit et le respect de la Constitution. Son but premier est le bon gouvernement. Ces objectifs publics se distinguent fondamentalement de ceux qui sous-tendent les instances en matière contractuelle et délictuelle ou les causes d'action régies par le *Code civil du Québec*, L.R.Q., c. C-1991, et les recours qui leur sont associés, lesquels visent principalement à redresser un tort privé au moyen d'une indemnité ou d'une autre réparation.

[25] Toutes les décisions invalides de l'administration publique ne causent pas de préjudice financier à des parties privées. Tous les préjudices financiers *effectivement* subis ne donnent pas ouverture à un recours de droit privé. Les fonctions judiciaires et législatives subordonnées n'engagent généralement pas la responsabilité civile de l'État. Ce qui est en jeu ici, en pratique, ce sont les décisions du pouvoir exécutif, rendues par les ministres et les fonctionnaires, qui causent un préjudice justifiable ou non par la défense de pouvoir d'origine législative.

[26] Le contrôle judiciaire a pour objet d'annuler les décisions invalides de l'administration publique — ou d'obliger l'administration publique à agir ou à ne pas agir — au moyen d'un processus expéditif. Par exemple, une librairie aura davantage intérêt à ce que les autorités douanières autorisent l'entrée au Canada d'ouvrages étrangers visés par des allégations non fondées d'obscénité qu'à toucher une indemnité pour la perte de profits négligeable afférente à chaque ouvrage refusé (*Little Sisters Book and Art Emporium c. Canada (Commissaire des Douanes et du Revenu)*, 2007 CSC 2, [2007] 1 R.C.S. 38). C'est pourquoi l'art. 18.1 de la *LCF* prévoit une procédure sommaire assortie d'un délai de 30 jours. Il n'y a pas de communication préalable de la preuve, hormis celle fournie par les affidavits et le contre-interrogatoire de leur auteur. Le juge

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litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[28] Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in

des requêtes n'entend pas de témoins. Le contrôle judiciaire ne permet pas d'obtenir des dommages-intérêts. Ce recours convient au demandeur qui veut attaquer directement et rapidement la mesure (ou l'inaction) dont il se plaint. Par contre, celui qui réclame des dommages-intérêts n'est souvent pas en mesure d'établir dans un délai de 30 jours la nature ou l'importance du préjudice subi et doit pouvoir bénéficier d'une enquête préalable pour recueillir la preuve du bien-fondé de son recours ou constater qu'il ne peut l'établir.

[27] Il faut donc se demander quel intérêt pratique il y a, pour la partie qui demande une indemnité plutôt que l'annulation d'une décision de l'administration publique, à suivre la procédure faisant appel à deux juridictions décrite dans *Grenier*. Une demande de contrôle judiciaire ne serait, par exemple, d'aucune utilité pratique pour TeleZone. Le principal fondement de son recours est l'inexécution d'un présumé contrat issu d'un appel d'offres. Cependant, elle ne recherche plus l'exécution du contrat (ou l'obtention de la licence de SCP); elle veut être indemnisée des coûts substantiels qu'elle a engagés inutilement et des profits qu'elle a perdus. Le procureur général ne fait pas valoir que le contrat issu d'un appel d'offres (s'il a pris naissance) était *ultra vires* ni qu'un pouvoir d'origine législative justifie l'inexécution alléguée (si celle-ci est avérée). Il soutient plutôt que la demande de TeleZone conteste indirectement la décision, prise par le ministre sous le régime de la *Loi sur la radiocommunication*, de ne pas lui accorder de licence de SCP. Dans le cas de TeleZone, le contrôle judiciaire de la décision du ministre ne réparerait pas le préjudice qu'elle dit avoir subi et ne pourrait vraisemblablement guère donner de résultat, si ce n'est un allongement des délais et une augmentation des coûts.

[28] TeleZone invoque aussi la négligence. La responsabilité délictuelle procède bien sûr d'un acte fautif, et non de la nullité. Comme la Cour l'a clairement établi il y a longtemps, dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, p. 222-225, il n'est ni nécessaire ni suffisant, pour fonder un recours de droit privé, qu'il y ait eu contravention à la loi. La contravention n'est pas nécessaire, car une décision tout à fait valide

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contract (*Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii) or tort (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201).

[29] Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

[30] In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

[31] The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some

de l'administration publique peut néanmoins engager sa responsabilité contractuelle (*Agricultural Research Institute of Ontario c. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), autorisation d'appel refusée, [2003] 1 R.C.S. vii) ou délictuelle (*Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201).

[29] Une irrégularité dans l'exercice d'un pouvoir d'origine législative ne suffit pas non plus. De nombreuses pertes causées par des décisions de l'administration publique ne génèrent aucune cause d'action reconnue en droit. Comme le signale avec justesse le procureur général : [TRADUCTION] « Même une déclaration de nullité ou d'invalidité d'une décision discrétionnaire d'un office fédéral ne crée pas en soi une cause d'action en responsabilité délictuelle ou en responsabilité civile selon le régime québécois de droit civil » (mémoire, par. 28).

[30] Par ailleurs, la juge Charron a écrit, dans *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339 : « Lorsqu'un procureur de la Couronne agit avec malveillance au mépris des obligations découlant de sa charge, l'accusé qui en subit un préjudice dispose d'un recours au civil. Cependant, le délit civil de poursuites abusives ne donne pas lieu à un contrôle judiciaire rétrospectif de l'exercice du pouvoir discrétionnaire du ministère public » (par. 7 (je souligne)). H. Woolf, J. Lowell et A. Le Sueur soulignent, dans *De Smith's Judicial Review* (6e éd. 2007), que [TRADUCTION] « [l]'illégalité (au sens qu'elle revêt en matière de contrôle judiciaire) et la négligence sont deux concepts distincts » (p. 924-925). Autrement dit, bien que la responsabilité délictuelle de la Couronne et la validité d'une décision administrative sous-jacente puissent faire intervenir des considérations qui se recoupent, elles soulèvent des questions justiciables distinctes.

[31] Souvent, la principale difficulté que la partie lésée par une décision prise en application de la loi doit surmonter pour être indemnisée par l'administration publique ne tient pas aux aspects de droit public de la décision, mais au fardeau qui lui incombe d'invoquer une cause d'action valable de droit privé et de réfuter des moyens de défense spéciaux comme la défense de pouvoir d'origine législative. Dans *Cooper c. Hobart*, 2001 CSC 79,

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claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.

[32] The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

B. *The Grenier Case*

[33] The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

[34] *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded $5,000 in compensatory and exemplary damages.

[35] On appeal, the Attorney General objected that the inmate should have sought judicial review

[2001] 3 R.C.S. 537, par exemple, certains investisseurs alléguaient que la conduite du registrateur des courtiers en hypothèques avait compté pour beaucoup dans les pertes qu'ils avaient subies, mais la Cour a jugé que le lien de proximité entre le registrateur et ces investisseurs n'était pas suffisamment étroit pour donner naissance à une obligation de diligence. Voir également *Edwards c. Barreau du Haut-Canada*, 2001 CSC 80, [2001] 3 R.C.S. 562; *Holland c. Saskatchewan*, 2008 CSC 42, [2008] 2 R.C.S. 551, par. 8.

[32] L'adoption de la *Loi sur la Cour fédérale*, S.C. 1970-71-72, ch. 1, et les modifications qui y ont été apportées en 1990 visaient à accroître la responsabilité de l'administration publique ainsi qu'à promouvoir l'accès à la justice. Il faut donc en interpréter le libellé de façon à promouvoir ces objets. À mon humble avis, la démarche suivie dans *Grenier* ne le permet pas, comme nous le verrons maintenant.

B. *L'affaire Grenier*

[33] La portée de l'arrêt *Grenier* va peut-être plus loin que ne l'entendait la cour qui l'a rendu.

[34] L'affaire *Grenier* ne portait pas sur un conflit entre la Cour fédérale et une cour supérieure provinciale. Il s'agissait de déterminer quelle voie de droit devant la Cour fédérale elle-même devait emprunter un détenu d'un pénitencier fédéral qui prétendait avoir subi un préjudice du fait de son placement en isolement préventif pendant 14 jours sous le régime de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20. Le détenu n'avait pas demandé le contrôle judiciaire de la décision du directeur de l'établissement. Il avait plutôt attendu trois ans avant d'intenter une action en dommages-intérêts contre l'administration fédérale en vertu de l'art. 17 de la *LCF*. En première instance, la décision de le placer en isolement préventif a été jugée arbitraire. Il a obtenu des dommages-intérêts compensatoires et exemplaires s'élevant à 5 000 $.

[35] En appel, le procureur général a fait valoir que le détenu aurait dû demander le contrôle judiciaire

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of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to enter the wrong one. He knocked on s. 17 whereas he should have gone through s. 18. The Federal Court of Appeal agreed, taking the view that "Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review" (para. 24 (emphasis added)). The court reasoned that even within the same court, the s. 17 action for damages constituted an impermissible collateral attack on the decision of the prison authority (paras. 32-33) because the trial court "had to review the lawfulness of the institutional head's decision . . . and set it aside" (para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court's view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[36] Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. "[A] decision of a federal agency, such as the one by the institutional head in this case", the court reasoned, "retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated" (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the s. 17 damages action.

[37] More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier*'s "separate silos" approach. In *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476, the court allowed an application for judicial review to be converted into an action for damages which was

de son isolement préventif en application de l'art. 18 de la Loi avant d'intenter son recours en dommages-intérêts en vertu de l'art. 17. Elle a soutenu, essentiellement, que la *LCF* offrait plusieurs avenues procédurales, mais que le détenu n'avait pas emprunté la bonne voie en s'engageant dans celle prévue à l'art. 17 plutôt qu'à l'art. 18. La Cour d'appel fédérale lui a donné raison, signalant que « le Parlement a confié à une seule cour, la Cour fédérale, l'exercice du contrôle de la légalité des décisions des organismes fédéraux. Ce contrôle doit s'exercer et s'exerce, aux termes de l'article 18, seulement par la présentation d'une demande de contrôle judiciaire » (par. 24 (je souligne)). La Cour d'appel a jugé que l'action en dommages-intérêts fondée sur l'art. 17, même si elle était intentée devant le même tribunal, n'en constituait pas moins une contestation indirecte interdite de la décision de l'autorité carcérale (par. 32-33), parce que le tribunal de première instance « devait contrôler la légalité de la décision du directeur [. . .] et l'annuler » (par. 34), ce qui ne pouvait se faire qu'en application de l'art. 18 de la *LCF*. Elle a estimé qu'il fallait empêcher l'érosion de la compétence de la Cour fédérale en matière de contrôle judiciaire et de la procédure particulière établie à son égard par le législateur. Selon l'arrêt *Grenier*, une telle conclusion était compatible avec *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706.

[36] Toujours suivant l'arrêt *Grenier*, il était sans conséquence que l'isolement préventif ait pris fin depuis longtemps. « [U]ne décision d'un organisme fédéral, comme celle en l'espèce du directeur, conserve sa force et son autorité légales, demeure juridiquement opérante et produit des effets légaux tant qu'elle n'a pas été invalidée » (par. 19). En conséquence, même après avoir cessé de produire ses effets, la mesure carcérale fournissait toujours une défense complète à l'action en dommages-intérêts fondée sur l'art. 17.

[37] Récemment, l'enthousiasme de la Cour d'appel fédérale elle-même à l'égard du « cloisonnement » établi dans *Grenier* a semblé s'estomper. Dans *Hinton c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2008 CAF 215, [2009] 1 R.C.F. 476, elle a permis qu'une demande de contrôle judiciaire soit convertie en action en dommages-intérêts, aussi

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also certified as a class action, Sexton J.A. commenting that "[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review" (para. 50).

[38] More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568 (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that "the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis" (para. 41).

[39] At the same time, some provincial courts have accepted the *Grenier* approach: see, e.g., *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244. Most provincial courts, however, have either not followed *Grenier* or distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1, at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379, at para. 24; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123, at para. 54; see also *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93, at para. 43; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182, at para. 34.

C. *The Attorney General's Expansive View of the Grenier Decision*

[40] According to the Attorney General, *Grenier* denied the *jurisdiction* of either the Federal Court or a provincial superior court to proceed to adjudicate a damages claim without first passing through

autorisée à titre de recours collectif. Le juge Sexton a fait le commentaire suivant : « Parfois, comme en l'espèce, il peut s'avérer trop lourd d'intenter une action distincte en dommages-intérêts, concurremment ou subséquemment à une demande de contrôle judiciaire » (par. 50).

[38] Plus récemment encore, dans l'arrêt *Parrish & Heimbecker Ltd. c. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)*, 2008 CAF 362, [2009] 3 R.C.F. 568 (dont l'appel a été instruit par notre Cour concurremment avec le présent pourvoi), la juge Sharlow, dissidente, a exprimé l'opinion que « [l]e principe établi dans l'arrêt *Grenier* a [. . .] été élaboré sans tenir compte de certains des aspects du régime législatif applicable au contentieux fédéral de l'État [dont la *Loi sur la responsabilité civile de l'État et le contentieux administratif*], ce qui, à mon avis, soulève des doutes au sujet de l'analyse de l'arrêt *Grenier* » (par. 41).

[39] Pour leur part, certaines cours provinciales ont adopté le raisonnement formulé dans *Grenier* : voir, notamment, *Donovan c. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone c. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244. La plupart des cours provinciales ne l'ont toutefois pas suivi ou ont conclu que des distinctions s'imposaient : voir, notamment, *River Valley Poultry Farm Ltd. c. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1, par. 30; *Los Angeles Salad Co. c. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379, par. 24; *Leroux c. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123, par. 54; voir aussi *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93, par. 43; *Genge c. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182, par. 34.

C. *La conception large de l'arrêt Grenier invoquée par le procureur général*

[40] Suivant le procureur général, l'arrêt *Grenier* confirme que, lorsque la « légalité » d'une décision ou ordonnance administrative est en cause, ni la Cour fédérale ni une cour supérieure provinciale

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the "unique" judicial review procedure set out in s. 18 of the *Federal Courts Act* if the "lawfulness" of an administrative decision or order is in issue. The Attorney General uses the expression "invalidity or lawfulness" which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, at pp. 703-6, where the Federal Court of Appeal concluded that the exercise by a Minister of a statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii. However, in this Court's decision in *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

[41] Moreover, I do not think the Attorney General's position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737. Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence "would encourage conduct contrary to the [regulatory] Act's objectives and would tend to undermine its effectiveness" (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court's view of the statute under which an order is made "and must be answered in light of the legislature's intention as to the appropriate forum" for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my

n'ont *compétence* pour instruire une action en dommages-intérêts sans contrôle judiciaire préalable au moyen de la procédure « particulière » établie à l'art. 18 de la *LCF*. Le procureur général emploie l'expression [TRADUCTION] « invalidité ou légalité » et signale que celle-ci peut s'étendre même aux recours contractuels. Il cite l'arrêt *Gestion Complexe Cousineau (1989) Inc. c. Canada (Ministre des Travaux publics et Services gouvernementaux)*, [1995] 2 C.F. 694, p. 703-706, dans lequel la Cour d'appel fédérale a jugé que l'exercice par un ministre du pouvoir légal de lancer un appel d'offres et de conclure des marchés concernant la location de biens-fonds par la Couronne peut faire l'objet d'un contrôle judiciaire. Voir aussi *Irving Shipbuilding Inc. c. Canada (Procureur général)*, 2009 CAF 116 (CanLII), par. 21-25, autorisation d'appel refusée, [2009] 3 R.C.S. vii. Toutefois, dans l'arrêt *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860, qui portait lui aussi sur un appel d'offres, notre Cour a rejeté la demande, en définitive, mais elle n'a pas indiqué qu'un recours en dommages-intérêts contre la Couronne devait être précédé d'un contrôle judiciaire.

[41] De plus, je ne pense pas que *Consolidated Maybrun* ou le pourvoi connexe *R. c. Al Klippert Ltd.*, [1998] 1 R.C.S. 737, appuient la position du procureur général. Ces affaires soulevaient la question très étroite de savoir si une personne accusée au criminel de ne pas s'être conformée à une ordonnance administrative pouvait, en défense, contester la validité de l'ordonnance bien qu'elle ne se fût pas prévalue de la procédure d'appel prévue par la loi sous le régime de laquelle l'ordonnance avait été rendue. Dans les deux cas, la Cour a conclu, après un examen minutieux de la loi de nature réglementaire en vertu de laquelle l'ordonnance avait été rendue, qu'autoriser une telle défense « encouragerait un comportement contraire aux objectifs de la Loi [de nature réglementaire] et tendrait à miner son efficacité » (*Consolidated Maybrun*, par. 60). Ces arrêts établissent en conséquence une position assez nuancée quant à savoir si une contestation indirecte est possible ou non. La réponse à cette question dépend largement de l'analyse que fait le tribunal de la loi dont découle la décision et exige qu'on recherche « l'intention législative quant au

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respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that "would tend to undermine [the] effectiveness" of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally "appropriate forum" for resolving in an efficient way financial claims against the federal Crown.

D. *The Jurisdiction of the Provincial Superior Courts*

[42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

[43] The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

[44] The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority

forum approprié » pour le règlement du différend (*Consolidated Maybrun*, par. 52). À mon avis, étant donné les considérations de principe susmentionnées, c'est l'adoption de l'approche retenue dans *Grenier* qui [TRADUCTION] « tendrait à miner [l']efficacité » des réformes mises en place par la *LCF*, qui visaient notamment à ce qu'une cour supérieure provinciale devienne tout autant un « forum approprié » pour le règlement efficace des réclamations pécuniaires contre la Couronne fédérale.

D. *La compétence des cours supérieures provinciales*

[42] À ce stade de l'analyse, il faut se rappeler que la compétence des cours supérieures provinciales ne peut être amoindrie (en faveur de la Cour fédérale ou d'un autre tribunal) que si une disposition législative claire le prévoit expressément. « [L]a dévolution d'une compétence exclusive à un tribunal créé par loi et la perte corrélative de cette compétence par les cours supérieures provinciales [. . .] doit être énoncée expressément en termes clairs dans la loi » : *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437, par. 46; voir aussi *Pringle c. Fraser*, [1972] R.C.S. 821, p. 826; *Canada (Commission des droits de la personne) c. Canadian Liberty Net*, [1998] 1 R.C.S. 626, par. 38. Dans son argumentation, le procureur général accorde trop d'importance à ce qu'il perçoit comme les inférences négatives qu'il faut tirer de l'art. 18.

[43] La formule souvent répétée en common law veut que [TRADUCTION] « rien n'est censé échapper à la compétence d'une cour supérieure sauf ce qui paraît en être spécialement exclu et, inversement, rien n'est censé relever de la compétence d'une cour d'instance inférieure sauf ce qui est expressément déclaré en relever » : *Peacock c. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, p. 87-88. À l'opposé, la compétence de la Cour fédérale est purement d'origine législative.

[44] Le terme « compétence » désigne simplement l'ensemble des attributions qui permettent à un tribunal judiciaire ou administratif de rendre des ordonnances ou jugements susceptibles

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extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *Mills v. The Queen*, [1986] 1 S.C.R. 863, *per* McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at p. 271, and *per* Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the Superior Court's authority to award damages. The dispute centres on subject matter jurisdiction.

[45] It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

[46] Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd.* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64, [2010] 3 S.C.R. 639), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court

d'exécution. Un tribunal judiciaire est compétent s'il possède « une compétence *ratione personae* et *ratione materiae* [. . .] et s'il détient en outre le pouvoir de rendre l'ordonnance sollicitée » : *Mills c. La Reine*, [1986] 1 R.C.S. 863, le juge McIntyre, p. 960 — citant le juge Brooke dans *R. c. Morgentaler* (1984), 41 C.R. (3d) 262, p. 271 — et le juge Lamer, dissident, p. 890; voir aussi *R. c. Rahey*, [1987] 1 R.C.S. 588, p. 603; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575, par. 15; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765. Le procureur général ne nie pas que la Cour supérieure a compétence *ratione personae* à l'égard des parties ni qu'elle a le pouvoir d'octroyer des dommages-intérêts. Le litige porte sur la compétence relative à l'objet du litige.

[45] Il est vrai que, sous réserve de restrictions constitutionnelles (voir, p. ex., *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, et d'arrêts relatifs à l'art. 96 de la *Loi constitutionnelle de 1867*, non pertinents en l'espèce), le législateur peut transférer un pouvoir appartenant aux cours supérieures à d'autres organismes juridictionnels, comme la Cour fédérale. Il l'a fait, notamment, en matière de contrôle judiciaire des décisions de l'administration fédérale : *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147, p. 154. C'est toutefois au procureur général qu'il incombe de démontrer qu'une disposition législative claire, explicite et non équivoque a opéré un tel transfert juridictionnel et d'en établir la portée.

[46] Rien dans la *LCF* ne lui permet de faire cette démonstration. En effet, comme il en a été fait mention, l'octroi explicite aux cours supérieures provinciales d'une compétence concurrente en matière de demandes de réparation contre la Couronne, à l'art. 17 (ainsi qu'à l'art. 21 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*), réfute directement l'hypothèse d'un transfert. Comme la juge Sharlow, dissidente, l'a signalé dans *Parrish & Heimbecker Ltd.* (appel accueilli et jugement rendu concurremment avec le présent arrêt, 2010 CSC 64, [2010] 3 R.C.S. 639), l'art. 8 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, qui codifie la défense de

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in the course of adjudicating a claim for damages (para. 39).

E. *Claimed "Inferences" From Section 18 of the Federal Courts Act*

[47] An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

[48] The Attorney General argues that a "remedies" oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in "a rigid, formalistic and literal interpretation" of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General's argument.

(i) The Parliamentary Context

[49] The Parliamentary debates in 1971 took place in the context of the enormous growth of

pouvoir d'origine législative, prouve que le législateur prévoyait que la cour supérieure provinciale saisie d'une action en dommages-intérêts se prononcerait sur la légalité de la décision dans le cadre de cette action (par. 39).

E. *Les « inférences » proposées à partir de l'art. 18 de la Loi sur les Cours fédérales*

[47] Une demande de contrôle judiciaire présentée en vertu de la *LCF* combine l'allégation qu'un office fédéral n'a pas respecté les principes fondamentaux du droit public et la revendication de l'une des réparations énumérées au par. 18(1). La compétence exclusive de la cour fédérale se limite à cette procédure. Comme notre Cour l'a récemment signalé dans *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, « [l]a *Loi sur les Cours fédérales* résulte de la décision prise par le législateur en 1971 de retirer aux cours supérieures des provinces leur compétence en matière de brefs de prérogative, jugements déclaratoires et injonctions visant des offices fédéraux » (par. 34). L'article 18 *n*'interdit *pas* qu'un litige sur la légalité de l'exercice d'un pouvoir d'origine législative soit tranché lors d'un procès tenu en vertu de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* devant la cour supérieure provinciale ou en vertu de l'art. 17 de la *LCF* elle-même.

[48] Selon le procureur général, un raisonnement axé sur les « recours », semblable à la position retenue par la Cour d'appel de l'Ontario en l'espèce, entraîne [TRADUCTION] « une interprétation rigide, formaliste et littérale » de l'art. 18 (mémoire, par. 66) et n'accorde pas assez d'importance au contexte et, plus particulièrement, à l'intention du législateur. Je suis d'accord qu'il est indispensable de tenir compte du contexte et de l'intention du législateur pour bien interpréter l'art. 18, mais je ne pense pas qu'une méthode d'interprétation large et contextuelle serve l'argumentation du procureur général.

(i) Le contexte parlementaire

[49] En 1971, le contexte entourant les débats parlementaires était marqué par la multiplication des

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federal regulatory regimes, the perceived need for a "national perspective" on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court's supervisory jurisdiction over federal decision makers.

[50] The Minister of Justice in 1970 emphasized that Parliament's concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

> This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. . . . It is for this reason . . . that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

(*House of Commons Debates*, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also A.G. Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of "federal board, commission or other tribunal" goes well beyond what are usually thought of as "boards and commissions" and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to

régimes de réglementation fédérale, le sentiment qu'une [TRADUCTION] « perspective nationale » s'imposait en matière de contrôle judiciaire et des préoccupations concernant le manque d'uniformité dans l'exercice du pouvoir de surveillance des différentes cours supérieures provinciales du pays sur les offices fédéraux (voir D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), par. 2:4100). Le législateur a donc transformé radicalement l'ancienne Cour de l'Échiquier pour créer la Cour fédérale et il a établi une nouvelle procédure, qui a conféré à la Cour fédérale son pouvoir de surveillance sur les décideurs fédéraux.

[50] En 1970, le ministre de la Justice a souligné que la question qui préoccupait le législateur était celle de la surveillance (non de l'indemnisation) et qu'il s'inquiétait plus particulièrement de la fragmentation du contrôle judiciaire exercé sur les organismes juridictionnels fédéraux. Ainsi, une décision importante de l'Office national de l'énergie, p. ex., aurait pu être jugée valide et confirmée par la cour supérieure d'une province, mais annulée par une cour supérieure d'une autre province :

> Cette surveillance multiple [par les cours provinciales], en l'absence d'uniformité dans la jurisprudence et son application, peut nuire sérieusement non seulement aux offices et commissions eux-mêmes, mais aussi à ceux qui comparaissent devant eux. [. . .] Pour cette raison [. . .] on a jugé que ce pouvoir de surveillance ne devait être conféré qu'à une seule cour dont la juridiction est d'ordre national, comme celle des offices, commissions et tribunaux fédéraux eux-mêmes. Le bill est donc destiné à établir sur une base unique et uniforme le pouvoir de surveillance exercé sur les commissions et offices fédéraux et à les placer sur le même pied sous ce rapport que les commissions et offices provinciaux.

(*Débats de la Chambre des communes*, 2e sess., 28e lég., 25 mars 1970, p. 5470-5471; voir aussi le mémoire du P.G., au par. 79; *Khosa*, par. 34.)

Toutefois, la définition extrêmement large d'« office fédéral » figurant à l'art. 2 dépasse largement l'idée qu'on se fait généralement de ce concept, et sa très vaste portée a provoqué plus tard (peut-être de façon involontaire) la controverse en cause dans *Grenier* sur la façon de traiter le chevauchement de l'objet

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prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

[51] The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[52] All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

du contrôle judiciaire et de l'instruction des demandes d'indemnisation en common law fondées sur la faute. L'octroi d'une compétence concurrente à l'art. 17 n'écarte pas la possibilité de jugements contradictoires, mais le législateur a accepté de composer avec ce risque au nom d'un meilleur accès à la justice.

(ii) Le libellé de la loi

[51] L'attribution de la compétence *exclusive* en matière de contrôle judiciaire des décisions de l'administration fédérale figure à l'art. 18 de la *LCF*, et elle est énoncée sous forme de recours particuliers :

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

. . .

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[52] Tous les recours énumérés à l'al. 18(1)*a*) sont des recours classiques du droit administratif, y compris les quatre brefs de prérogative — *certiorari*, *mandamus*, prohibition et *quo warranto* — et les demandes d'injonction et de jugement déclaratoire en droit administratif. L'article 18 ne prévoit pas l'octroi de dommages-intérêts. L'indemnisation n'est pas possible dans le cadre d'une procédure de contrôle judiciaire. De même, on ne peut, dans le cadre d'une action en dommages-intérêts, demander par surcroît un jugement déclaratoire ou une injonction visant à empêcher la mise en œuvre d'une décision administrative prétendument illégale. Pareille demande est du ressort de la Cour fédérale.

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(iii) Reading the Act as a Whole

[53] There is much internal evidence in ss. 18 and 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier.*

[54] As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure — but not a damages action. TeleZone's action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

[55] The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable "between subject and subject" in the province where the claim arose, or six years in respect of a "cause of action arising otherwise than in a province".

(iii) Interprétation de la loi dans son ensemble

[53] Beaucoup d'éléments intrinsèques des art. 18 et 18.1 de la *LCF* indiquent que le législateur ne peut avoir eu l'intention de faire du contrôle judiciaire une épreuve préliminaire comme le laisse entrevoir l'arrêt *Grenier.*

[54] Comme je l'ai mentionné, le délai de 30 jours applicable à la présentation des demandes de contrôle judiciaire sous le régime du par. 18.1(2) de la *LCF* constitue l'un de ces éléments. Un délai aussi court convient à une procédure sommaire et expéditive de contrôle judiciaire, mais non à une action en dommages-intérêts. Le délai de prescription applicable à l'action de TeleZone en Ontario est de six ans. Il ne serait pas réaliste qu'une action en dommages-intérêts se prescrive par 30 jours. Il se pourrait qu'un demandeur ne soit pas en mesure de déposer sa demande de contrôle judiciaire dans un tel délai. Les faits nécessaires pour fonder un recours civil peuvent fort bien n'être connus qu'après 30 jours.

[55] Un juge de la Cour fédérale peut proroger par ordonnance le délai de 30 jours (par. 18.1(2)), mais il s'agit là d'une décision discrétionnaire, et l'issue d'une action civile intentée devant une cour supérieure serait ainsi subordonnée au pouvoir discrétionnaire d'un juge de la Cour fédérale statuant sur une demande de prorogation de délai en fonction de considérations de droit public et non de facteurs propres aux dommages-intérêts de droit civil. Concrètement, l'argument tiré de l'arrêt *Grenier* mènerait à l'application d'un délai de prescription discrétionnaire (fixé par la Cour fédérale) aux actions en dommages-intérêts contre la Couronne (intentées devant une cour supérieure provinciale), un résultat qui, à mon avis, ne peut correspondre à l'intention du législateur. Indépendamment de toute autre considération, ce résultat contrecarrerait l'art. 39 de la *LCF* selon lequel, règle générale, les instances introduites contre la Couronne devant la Cour fédérale sont assujetties aux règles de prescription régissant « les rapports entre particuliers » dans la province où le fait générateur de l'instance s'est produit ou se prescrivent par six ans à compter du fait générateur « lorsque celui-ci n'est pas survenu dans une province ».

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[56] As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention:

> . . . the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case". [para. 36]

See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 592-93; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, "the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals" (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the *Federal Courts Act*

[57] The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

> **17.** (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

The grant of jurisdiction is thus framed in terms of relief, i.e.,"all cases in which relief is claimed" except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature*

[56] Notre Cour a récemment confirmé, dans *Khosa*, la nature discrétionnaire des décisions en matière de contrôle judiciaire et indiqué qu'une demande de contrôle peut être rejetée même lorsque le demandeur a établi l'existence de motifs qui justifieraient l'intervention de la cour :

> . . . l'art. 18.1 énonce en termes généraux les motifs qui autorisent la Cour à prendre une mesure, sans lui en imposer l'obligation. La question de savoir si la cour devrait exercer son pouvoir discrétionnaire d'accorder réparation dépendra de son appréciation des rôles respectifs des cours de justice et des organismes administratifs ainsi que des « circonstances de chaque cas ». [par. 36]

Voir aussi *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 592-593; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 372. Cette approche ne concorde pas avec le paradigme de l'action en dommages-intérêts de la common law, suivant lequel la preuve des éléments de la demande entraîne normalement l'indemnisation. En matière de contrôle judiciaire, [TRADUCTION] « la nature discrétionnaire du pouvoir de surveillance des tribunaux témoigne du fait que, contrairement au droit privé, il n'est pas et n'a jamais été axé exclusivement sur la défense des droits des particuliers » (Brown et Evans, par. 3:1100).

(iv) Les modifications apportées à la *Loi sur les Cours fédérales* en 1990

[57] La version actuelle de l'art. 17 de la *LCF*, qui n'est entré en vigueur que le 1er février 1992, permet d'intenter des poursuites civiles contre la Couronne fédérale devant les cours supérieures provinciales. Par souci de commodité, j'en reproduis les termes essentiels :

> **17.** (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

La compétence accordée est donc axée sur la réparation, c.-à-d. qu'elle est attribuée « dans les cas de demande de réparation », sauf disposition contraire. Le paragraphe 18(1) constitue une disposition contraire en ce qui concerne les formes de réparations qui y sont énumérées. Selon le par. 18(3), les

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of judicial review "may be obtained only on an application for judicial review made under section 18.1". The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

[58] As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

[W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.

. . .

Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.

Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in

recours de la nature d'un contrôle judiciaire » sont exercés par présentation d'une demande de contrôle judiciaire ». La *LCF* ne prévoit aucune autre exclusion qui limiterait la portée de l'art. 17, et on n'a porté à notre attention aucune autre loi fédérale qui aurait cet effet.

[58] Voici ce que le ministre de la Justice a déclaré en 1989 devant le comité législatif chargé de l'examen du projet de loi C-38 qui est à l'origine, notamment, de la version actuelle de l'art. 17 :

[N]ous avons inséré, dans ce projet de loi, une disposition permettant également aux tribunaux judiciaires des provinces d'instruire des litiges ordinaires, de common law et de droit civil, visant à obtenir réparation de la Couronne. Ces litiges relèvent actuellement de la compétence exclusive de la Cour fédérale. Cette disposition reconnaît que la Cour fédérale ne possède pas de connaissances spécialisées en matière de contrats et en matière d'actes délictuels. [Le Ministre a ensuite décrit les problèmes pratiques d'ordre juridictionnel ou procédural posés par l'exclusivité juridictionnelle de la Cour fédérale sur les autorités fédérales.]

(*Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-38*, nº 1, 2e sess., 34e lég., 23 novembre 1989, p. 14-15)

Lors de la deuxième lecture du projet de loi, le ministre a souligné de nouveau que les modifications visaient à permettre à un demandeur de poursuivre la Couronne fédérale soit devant une cour supérieure provinciale, soit devant la Cour fédérale :

Par exemple, une poursuite fondée sur le bris d'un contrat d'achat de marchandises ou sur des blessures causées à un automobiliste par la négligence au volant d'un préposé de la Couronne devrait pouvoir être intentée devant le tribunal qui convient le mieux au demandeur. Actuellement, seule la Cour fédérale peut entendre de telles actions. Or, elle n'est pas aussi accessible que les cours provinciales.

. . .

De plus, citoyens et avocats connaissent mieux les cours provinciales, y compris leurs règles de pratique et leur personnel.

Il est donc évident que souvent la Cour fédérale n'est pas le tribunal qui convient le mieux aux parties privées.

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mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added.]

(*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

[59] The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a "choice of forum" and to make available relief in the provincial superior courts that may be more "familiar" to litigants.

F. *The Doctrine of Collateral Attack*

[60] The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible "collateral attack" on the Minister's decision. The Court has described a collateral attack as

> an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

(*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599)

[61] The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

> The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

C'est pourquoi le gouvernement propose que les cours provinciales et la Cour fédérale se partagent la compétence relative à ce type d'actions. Ceci donnerait généralement au demandeur le choix du tribunal. [Je souligne.]

(*Débats de la Chambre des communes*, 2e sess., 34e lég., 1er novembre 1989, p. 5414)

[59] S'il était retenu, l'argument du procureur général compromettrait l'objet et le but des modifications de 1990, en maintenant l'exclusivité juridictionnelle de la Cour fédérale à l'égard d'un élément fondamental de nombreux recours instruits devant les cours provinciales, en dépit de la promesse de donner au demandeur « le choix du tribunal » et de permettre aux parties l'accès aux cours supérieures provinciales que, vraisemblablement, elles « connaissent mieux ».

F. *La règle relative à la contestation indirecte*

[60] Selon le procureur général, permettre à TeleZone de faire trancher sa demande par la cour supérieure provinciale sans contrôle judiciaire préalable, c'est autoriser la « contestation indirecte » de la décision du ministre, ce qui est interdit. Notre Cour a décrit une contestation indirecte 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.

(*Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599)

[61] Il s'agit d'une règle d'origine jurisprudentielle (qui doit donc céder le pas à un texte de loi contraire) fondée sur des considérations générales ayant trait à l'administration de la justice, comme l'explique l'arrêt *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, au par. 72 :

> La règle interdisant les contestations indirectes a pour objet fondamental de « maintenir la primauté du droit et [de] préserver la considération dont jouit l'administration de la justice » (*R. c. Litchfield*, [1993] 4 R.C.S. 333, p. 349). On estime que l'intégrité du système de justice serait compromise si une partie pouvait échapper aux conséquences d'une ordonnance prononcée contre elle en s'adressant à un autre tribunal. La règle vise donc à empêcher une partie de contourner les effets d'une décision prononcée contre elle. [Je souligne.]

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[62] In *R. v. Litchfield*, [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

[63] I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was "invalid or unlawful".

[64] Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply. [Emphasis added; para. 71.]

[62] Dans *R. c. Litchfield*, [1993] 4 R.C.S. 333, l'affaire criminelle mentionnée dans *Garland*, notre Cour a refusé d'appliquer la règle interdisant les contestations indirectes. Dans *Garland*, il s'agissait d'un recours collectif contre une société gazière dans lequel les demandeurs invoquaient l'enrichissement sans cause pour réclamer la restitution de pénalités pour paiement tardif approuvées par la Commission de l'énergie de l'Ontario (« Commission »). La société gazière a fait valoir en défense que la demande de restitution constituait une contestation indirecte de la décision de la Commission. Ce moyen de défense a été rejeté.

[63] Trois motifs m'amènent à rejeter l'argument du procureur général concernant la contestation indirecte. Premièrement, comme l'a souligné le juge Borins dans son savant jugement, le procureur général peut invoquer la doctrine de la contestation indirecte en défense devant la cour supérieure provinciale, s'il le juge opportun compte tenu des circonstances. La possibilité de recourir à ce moyen de défense ne peut cependant étayer la thèse de l'incompétence de la cour supérieure provinciale. Elle ne justifie pas non plus l'intervention de la Cour fédérale dans toutes les demandes de dommages-intérêts fondées sur la prétention que la décision de l'administration publique à l'origine de la perte était « nulle ou illégale ».

[64] Deuxièmement, TeleZone ne cherche pas à « échapper aux conséquences d'une ordonnance [du ministre] prononcée contre elle » (*Garland*, par. 72). Au contraire, elle fait de la décision du ministre et des pertes pécuniaires qui en auraient résulté les assises mêmes de sa demande de dommages-intérêts. C'est la conclusion qui a été tirée dans *Garland*, où le juge Iacobucci a déclaré, au nom de notre Cour :

> Simplement en la lisant, on constate que la règle interdisant les contestations indirectes ne s'applique pas en l'espèce parce que l'action de l'appelant a pour objet précis non pas d'invalider ou de rendre inopérantes les ordonnances de la Commission, mais plutôt de recouvrer les sommes que l'intimée a perçues illégalement à la suite de ces ordonnances. Par conséquent, la règle interdisant les contestations indirectes ne s'applique pas. [Je souligne; par. 71.]

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[65] Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was "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" (para. 34).

[66] Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

> The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based. . . . [Emphasis added.]

(D. J. Mullan, "Administrative Law Update — 2008-2009", prepared for the Continuing Legal Education conference, *Administrative Law Conference—2009*, October 2009, at p. 1.1.22.)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of

[65] De même, dans *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, la juge Arbour a refusé d'appliquer la règle interdisant les contestations indirectes. Dans cette affaire découlant de l'arbitrage d'un grief, le SCFP contestait les faits à l'origine de la déclaration de culpabilité d'un de ses membres pour agression sexuelle. La juge Arbour a dit de l'argument du syndicat qu'il s'agissait « 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 » (par. 34).

[66] Troisièmement, l'argument du procureur général n'est pas fondé même si, comme le professeur David Mullan, on attribue une portée étendue à la règle interdisant les contestations indirectes :

> [TRADUCTION] Pour établir la cause d'action [dans *Garland*], il fallait démontrer l'invalidité de l'ordonnance de la Commission sur laquelle le service public s'appuyait pour percevoir des intérêts. Il n'y aurait pas eu de cause d'action si l'ordonnance avait été valide. Il s'agissait à tous égards d'une contestation indirecte des ordonnances de la Commission. La contestation indirecte ne consiste pas et n'a jamais consisté seulement, à s'opposer à l'exécution d'une ordonnance. Elle est aussi en cause dans des cas où le demandeur dans un recours civil visant l'obtention d'une réparation pécuniaire ou autre doit attaquer une loi ou une ordonnance que le défendeur invoque pour justifier les mesures sur lesquelles le demandeur fonde son recours. . . [Je souligne.]

(D. J. Mullan, « Administrative Law Update — 2008-2009 », préparé pour la Continuing Legal Education conference, *Administrative Law Conference—2009*, octobre 2009, p. 1.1.22.)

Selon le professeur Mullan, la Cour aurait dû emprunter, dans *Garland*, la voie la plus rationnelle, à son avis, en appliquant les facteurs énoncés par la juge L'Heureux-Dubé dans *Consolidated Maybrun* pour déterminer si la contestation indirecte d'une ordonnance administrative est interdite ou peut être autorisée. Ces facteurs sont : (1) les termes de la loi dont découle le pouvoir de rendre l'ordonnance; (2) l'objectif de la loi; (3) l'existence d'un droit d'appel; (4) la nature de la contestation indirecte eu égard à l'expertise du tribunal et à sa raison d'être (notamment, à la question de savoir si « le législateur a

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the collateral attack in light of the tribunal's expertise and *raison d'être* (including whether "the legislature intended to confer jurisdiction to hear and determine the question raised"); and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

[67] Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be "implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based", the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's "need to attack a law or order" is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

[68] In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

G. *The Defence of Statutory Authority*

[69] It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

voulu donner juridiction pour entendre et trancher la question soulevée »); (5) la sanction imposable pour défaut d'avoir respecté l'ordonnance (par. 45, 50, 51 et 62). Les cours de justice ont aussi appliqué ces facteurs en matière civile : voir, de façon générale, K. Horsman et G. Morley, dir., *Government Liability : Law and Practice* (feuilles mobiles), p. 11-9.

[67] Une règle jurisprudentielle cède forcément le pas à un texte de loi contraire. Si l'on admet, pour reprendre les propos tenus par le professeur Mullan à la p. 1.1.22, que la règle interdisant les contestations indirectes peut être [TRADUCTION] « en cause dans des cas où le demandeur dans un recours civil visant l'obtention d'une réparation pécuniaire ou autre doit attaquer une loi ou une ordonnance que le défendeur invoque pour justifier les mesures sur lesquelles le demandeur fonde son recours », l'attribution d'une compétence concurrente à l'art. 17 contredit elle aussi l'argument du procureur général. Il en est ainsi parce qu'il est essentiel pour le demandeur d'« attaquer une loi ou une ordonnance » pour établir sa cause d'action, et qu'il faut statuer sur cette allégation (même si elle est faite en réplique) pour rendre une décision sur la demande. Le législateur a spécifié que les cours supérieures provinciales disposent de la compétence concurrente voulue pour trancher pareille demande dans son intégralité, et pas seulement en partie.

[68] En résumé, je partage l'opinion du juge Borins que la règle interdisant les contestations indirectes ne peut justifier l'approche proposée dans *Grenier.*

G. *La défense de pouvoir d'origine législative*

[69] La Couronne pourrait également faire valoir, en défense à une action en dommages-intérêts, que la décision administrative procède de l'exercice d'un pouvoir d'origine législative qui exclut l'indemnisation des pertes pouvant en résulter. Il s'agit là encore d'une question qui a trait à la défense, non à la compétence. Tout demandeur peut se voir opposer ce moyen. L'administration publique prend continuellement des décisions discrétionnaires qui causent des pertes à des particuliers ou à des entreprises sans qu'il en résulte une cause d'action reconnue en droit.

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[70] In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

[71] However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), that there may be "alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance" (p. 1226). Reference should also be made to the qualifying observation of what is "practically impossible" made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

[70] Dans un cas de nuisance, par exemple, un propriétaire capable d'établir tous les éléments d'une action pour nuisance en common law pourrait quand même être débouté s'il est établi que l'administration publique avait le pouvoir d'agir comme elle l'a fait et que les dommages indirects subis par le demandeur sont le résultat inévitable de l'exercice de ce pouvoir. Voir, notamment, P. W. Hogg et P. J. Monahan, *Liability of the Crown* (3e éd. 2000), p. 139, et Horsman et Morley, p. 6-41.

[71] Comme on l'a vu, toutefois, la défense de « pouvoir d'origine législative » ne fournira pas toujours une défense complète à une action en dommages-intérêts. Dans certains cas, l'issue peut dépendre de la question de savoir si la loi autorise explicitement ou implicitement le fait générateur de dommages. Dans *Tock c. St. John's Metropolitan Area Board*, [1989] 2 R.C.S. 1181, le juge Sopinka a précisé, en mentionnant les propos du vicomte Dunedin dans *City of Manchester c. Farnworth*, [1930] A.C. 171 (H.L.), qu'il peut exister un « autre moyen d'exécuter l'ouvrage [qui aurait permis d'éviter la perte]. Le simple fait qu'un moyen soit considérablement moins onéreux ne sera pas retenu. S'il n'existe qu'un seul moyen réalisable sur le plan pratique, il faut établir qu'il était pratiquement impossible d'éviter la nuisance » (p. 1226). Il convient également de signaler la nuance apportée par le vicomte Dunedin au sujet de ce qui est « pratiquement impossible », citée par le juge Sopinka, à la p. 1224 :

> [TRADUCTION] Le fardeau d'établir que le résultat est inévitable incombe à ceux qui désirent se dégager de leur responsabilité à l'égard de la nuisance, mais le critère du caractère inévitable de la nuisance n'est pas ce qui est théoriquement possible mais ce qui est possible suivant l'état des connaissances scientifiques à l'époque, compte tenu également d'une saine appréciation, qu'on ne peut pas définir de façon précise, de la possibilité pratique de réalisation étant donné la situation et le coût. [Je souligne.]

Notre Cour était divisée au sujet de cette nuance, également citée par la juge Wilson à la p. 1213 de l'arrêt *Tock*, mais il n'y a pas lieu que nous nous y arrêtions en l'espèce. La question du pouvoir d'origine législative n'a pas d'incidence sur la compétence des cours supérieures provinciales. C'est la seule conclusion nécessaire en l'espèce.

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[72] It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

> Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute . . . .

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts: see, e.g., *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212.

[73] I give an example. In *Ryan v. Victoria (City)*, the "inevitable result" defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that "[s]tatutory authority provides, at best, a narrow defence to nuisance" (para. 54), and rejected it on the facts of the case.

[74] For present purposes, we need go no further than to repeat that "statutory authority" is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under s. 17) finds that the government has a good

[72] Il suffit de dire que la Couronne peut toujours se prévaloir de la défense de pouvoir d'origine législative : voir, p. ex., l'art. 8 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* :

> Les articles 3 à 7 n'ont pas pour effet d'engager la responsabilité de l'État pour tout fait — acte ou omission — commis dans l'exercice d'un pouvoir qui, sans ces articles, s'exercerait au titre de la prérogative royale ou d'une disposition législative . . .

Les cours supérieures provinciales interprètent et appliquent régulièrement ce moyen de défense : voir, p. ex., *Sutherland c. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, autorisation d'appel refusée, [2003] 1 R.C.S. xi (*sub nom. Jones c. Attorney General of Canada*); *Lake c. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman c. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco c. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (C.S.J. Ont.); *Landry c. Moncton (Ville)*, 2008 NBCA 32, 329 R.N.-B. (2e) 212.

[73] À titre exemple, dans l'affaire *Ryan c. Victoria (Ville)*, la Cour devait statuer sur la défense du « résultat inévitable » dans une action en dommages-intérêts intentée à la suite de travaux de voirie. M. Ryan poursuivait la municipalité et une société de chemin de fer en raison de blessures qu'il avait subies en traversant une voie ferrée à moto dans une zone urbaine. La roue avant de la moto s'était coincée dans l'ornière adjacente aux rails, dont la largeur approchait la valeur maximale permise par la réglementation. La défenderesse a invoqué un pouvoir d'origine législative. Rédigeant le jugement unanime de la Cour, le juge Major a fait remarquer que « [l]'autorisation du législateur fournit, au mieux, un moyen de défense limité contre la nuisance » (par. 54), et a rejeté ce moyen de défense compte tenu des faits en cause.

[74] Pour les besoins de la présente analyse, il nous suffit de réitérer que l'argument du « pouvoir d'origine législative » a trait à la défense, non à la compétence. Si la cour supérieure provinciale (ou la Cour fédérale, sous le régime de l'art. 17) conclut

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defence based on statutory authority, it will simply dismiss the claimant's action.

H. *The Concern About "Artful Pleading"*

[75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

[76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

[77] In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:

. . . where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action

que l'administration publique est fondée à se réclamer d'un pouvoir d'origine législative, elle rejettera tout simplement l'action du demandeur.

H. *La question du « plaideur habile »*

[75] Le procureur général soutient que, si l'argument de TeleZone est retenu, les cours supérieures provinciales pourraient de nouveau procéder au contrôle judiciaire des décisions de l'administration fédérale, sous le couvert d'actions en dommages-intérêts. Selon ce point de vue, la façon dont un « plaideur habile » formulera sa demande lui permettra de choisir le tribunal qu'il préfère. Bien sûr, les « plaideurs habiles » existent, et ils formuleront la demande de la manière qui sert le mieux les intérêts de leurs clients. Néanmoins, quelle que soit leur habileté, elle ne leur permettra jamais d'obtenir, dans le cadre d'une action en dommages-intérêts, l'annulation ou l'exécution forcée de l'ordonnance administrative à laquelle le demandeur attribue son préjudice. Les cours supérieures provinciales ne peuvent pas accorder ce type de réparation. Comme en l'espèce, le demandeur doit (s'il a gain de cause) se contenter d'une indemnité et se résigner à ce que l'ordonnance continue d'avoir effet.

[76] Je pense que, lorsque le demandeur allègue les éléments d'une cause d'action en droit privé dans son argumentation devant une cour supérieure provinciale, celle-ci ne doit généralement pas décliner compétence au motif que l'action s'apparente à un recours qui doit être instruit comme une demande de contrôle judiciaire. Si le demandeur a une cause d'action valide en dommages-intérêts, il est normalement admis à exercer son recours à ce titre.

[77] Au Royaume-Uni, la Chambre des lords a exprimé une position semblable dans *Roy c. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, le lord Bridge, aux p. 628-629 :

[TRADUCTION] . . . lorsqu'une partie revendique un droit existant qui relève du droit privé, en demande ou en défense, le fait que l'existence et la portée de ce droit privé puissent soulever accessoirement une question de droit public ne l'empêche pas plus de faire reconnaître son droit en engageant une action par bref d'assignation

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commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy*, *per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

[78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

I. *Application to the Facts*

[79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive

ou par assignation introductive d'instance, que de le faire valoir en défense.

Il s'avère généralement, ici comme au Royaume-Uni, que le demandeur n'a pas à déposer une demande de contrôle judiciaire si son action met légitimement en jeu des droits privés. Suivant les sources anglaises, comme les sources canadiennes, on se préoccupe particulièrement du fait que le contrôle judiciaire ne soit possible que sur autorisation spéciale, qu'il soit assorti d'un court délai de prescription ou que la réparation possible dans le cadre d'un contrôle judiciaire soit de nature discrétionnaire (*Roy*, le lord Lowry, p. 654). Voir aussi P. P. Craig, *Administrative Law* (6e éd. 2008), p. 869. Ces considérations font écho à celles que nous avons examinées en rejetant la démarche proposée dans *Grenier.*

[78] J'apporterais cependant la réserve mineure suivante. Les cours supérieures provinciales conservent toujours, en raison de leur compétence inhérente (tout comme la Cour fédérale en vertu du par. 50(1) de la *LCF*), le pouvoir discrétionnaire résiduel de suspendre une action en dommages-intérêts au motif qu'il s'agit essentiellement d'une demande de contrôle judiciaire qui n'a que superficiellement l'apparence d'un recours délictuel de droit privé. Règle générale, la question fondamentale consiste toujours à savoir si le demandeur a plaidé une cause d'action valable donnant ouverture à des dommages-intérêts de droit privé. Dans l'affirmative, il devrait généralement être admis à exercer son recours.

I. *Application aux faits*

[79] TeleZone ne cherche pas à obtenir l'annulation de la décision du ministre. Elle soutient que le ministre a manqué à ses obligations contractuelles et en equity ou à une obligation de diligence en ne lui délivrant pas de licence. Telezone ne soutient pas que la décision du ministre devrait être invalidée. Au contraire, ses causes d'action contractuelles, délictuelles et en equity sont fondées sur le caractère définitif de cette décision qui l'écarte du marché des télécommunications, lui causant ainsi une perte financière (selon ses dires). Elle ne cherche pas non plus à priver la décision du ministre de

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the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

[80] To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

V. Disposition

[81] The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Stikeman Elliott, Toronto.

ses effets juridiques. Elle ne conteste pas les licences délivrées à ses concurrents. Elle ne cherche pas à défaire ce qui a été fait. Elle se plaint de ce qui *n*'a *pas* été fait, soit d'un manquement aux obligations contractuelles, en equity et de diligence qu'Industrie Canada aurait eues envers Telezone.

[80] Dans la mesure où le recours de TeleZone peut être qualifié de contestation indirecte de l'arrêté du ministre (parce qu'il n'incluait pas TeleZone), j'estime, pour les motifs que j'ai exposés, que la compétence concurrente conférée aux cours supérieures provinciales en matière de recours contre la Couronne empêche de conclure, comme le procureur général nous y invite, que le législateur avait l'intention d'imposer le détour par la Cour fédérale préconisé dans *Grenier*. Tel qu'il a été présenté, le recours de TeleZone met principalement en jeu des questions de droit privé. Dans une affaire différente, reposant sur d'autres faits, le procureur général pourra invoquer le moyen de défense de la « contestation indirecte », et la cour supérieure statuera sur ce moyen.

V. Dispositif

[81] La Cour supérieure de l'Ontario a compétence sur les parties et sur l'objet du litige, et elle a le pouvoir d'accorder des dommages-intérêts. Aucune disposition de la *LCF* n'empêche la Cour supérieure de l'Ontario de statuer sur la demande. Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureur de l'appelant : Procureur général du Canada, Ottawa.

Procureurs de l'intimée : Stikeman Elliott, Toronto.

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Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police *Appellants*

v.

Omar Ahmed Khadr *Respondent*

and

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad *Interveners*

Premier ministre du Canada, ministre des Affaires étrangères, directeur du Service canadien du renseignement de sécurité et commissaire de la Gendarmerie royale du Canada *Appelants*

c.

Omar Ahmed Khadr *Intimé*

et

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Coalition canadienne pour les droits des enfants, Justice for Children and Youth, Association des libertés civiles de la Colombie-Britannique, Criminal Lawyers' Association (Ontario), Association du Barreau canadien, Avocats sans frontières Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Association canadienne des libertés civiles et National Council for the Protection of Canadians Abroad *Intervenants*

INDEXED AS: CANADA (PRIME MINISTER) *v.* KHADR

2010 SCC 3

File No.: 33289.

2009: November 13; 2010: January 29.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

RÉPERTORIÉ : CANADA (PREMIER MINISTRE) *c.* KHADR

2010 CSC 3

N° du greffe : 33289.

2009 : 13 novembre; 2010 : 29 janvier.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Application — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu

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detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms — Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation

par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Le processus en place à Guantanamo à l'époque violait-il les obligations internationales du Canada en matière de droits de la personne? — La Charte canadienne des droits et libertés s'applique-t-elle à la conduite de responsables canadiens qui auraient violé les droits constitutionnels du détenu?

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Justice fondamentale — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — La conduite des responsables canadiens a-t-elle porté atteinte aux droits du détenu à la liberté et à la sécurité de sa personne? — Si oui, l'atteinte était-elle compatible avec les principes de justice fondamentale?— Charte canadienne des droits et libertés, art. 7.

Droit constitutionnel — Charte des droits — Réparation — Demande de rapatriement — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Violation des droits du détenu à la liberté et à la sécurité de sa personne garantis par la Charte canadienne des droits et libertés — Sollicitation par le détenu d'une ordonnance intimant au Canada de demander son rapatriement — La réparation demandée est-elle juste et convenable eu égard aux circonstances? — Charte canadienne des droits et libertés, art. 24(1).

Tribunaux — Compétence — Prérogative royale en matière de relations internationales — Pouvoir des tribunaux d'examiner les questions relatives aux affaires étrangères et d'intervenir à leur égard pour s'assurer de la constitutionnalité de l'action de l'exécutif.

K, un Canadien, est détenu à Guantanamo par les autorités militaires américaines depuis 2002. Il était alors mineur. En 2004, il a été accusé de crimes de guerre, mais le procès qu'il doit subir aux États-Unis est toujours pendant. En 2003, des agents des services de renseignements du SCRS et du MAECI ont interrogé K sur des sujets liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En 2004, un responsable du MAECI a interrogé K une nouvelle fois, en sachant que les autorités

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technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Canada (Justice) v. Khadr* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the

américaines l'avaient soumis à une technique de privation de sommeil connue sous le nom de « programme grand voyageur », dans le but d'amoindrir sa résistance lors des interrogatoires. En 2008, dans *Canada (Justice) c. Khadr* (« *Khadr 2008* »), la Cour a conclu que le régime en place à Guantanamo constituait une violation manifeste des obligations internationales du Canada en matière de droits de la personne et, se fondant sur l'art. 7 de la *Charte canadienne des droits et libertés*, a ordonné au gouvernement canadien de communiquer à K les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI, ce qui fut fait. Après que K eut demandé à plusieurs reprises que le gouvernement canadien sollicite son rapatriement, le premier ministre a annoncé sa décision de ne pas le faire. K a alors présenté, à la Cour fédérale, une demande de contrôle judiciaire faisant valoir que la décision violait les droits qui lui sont garantis par l'art. 7 de la *Charte*. La Cour fédérale a conclu que, dans les circonstances particulières de l'espèce, le Canada avait l'obligation de protéger K en application de l'art. 7 de la *Charte* et a ordonné au gouvernement de demander son rapatriement. La Cour d'appel fédérale a confirmé l'ordonnance, mais a affirmé que l'atteinte à l'art. 7 découlait de l'interrogatoire mené en 2004 auquel on avait procédé en sachant que K avait été soumis au « programme grand voyageur ».

Arrêt : Le pourvoi est accueilli en partie.

Le Canada a activement participé à un processus contraire aux obligations internationales qui lui incombent en matière de droits de la personne et a contribué à la détention continue de K, de telle sorte qu'il a porté atteinte aux droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte*, et ce, de manière incompatible avec les principes de justice fondamentale. S'il est vrai que la procédure à laquelle est soumis K a changé, la demande qu'il formule repose sur la série de faits déjà examinée dans *Khadr 2008*. Comme la Cour l'a conclu dans cet arrêt, la *Charte* s'applique à la participation de responsables canadiens à un régime jugé ultérieurement en violation de droits fondamentaux protégés par le droit international. Il existe un lien suffisant entre la participation du gouvernement au processus illégal et l'atteinte à la liberté et à la sécurité de K. Même si les États-Unis sont la source première de l'atteinte, il est raisonnable de déduire de la preuve non contredite portée à notre connaissance que les déclarations recueillies par des responsables canadiens contribuent à la détention continue de K. L'atteinte aux droits de K à la liberté et à la sécurité de sa personne n'est pas compatible avec les principes de justice fondamentale. Interroger un adolescent détenu sans qu'il ait pu consulter un avocat pour lui soutirer des déclarations

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fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K — an order that Canada request his repatriation — is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re*

relatives à des accusations criminelles sérieuses, tout en sachant qu'il a été privé de sommeil et que les fruits des interrogatoires seraient communiqués aux procureurs américains, contrevient aux normes canadiennes les plus élémentaires quant aux traitements à accorder aux suspects adolescents détenus.

K a droit à une réparation en vertu du par. 24(1) de la *Charte*. La réparation demandée par K — une ordonnance intimant au Canada de demander son rapatriement — est suffisamment liée à la violation de la *Charte* survenue en 2003 et 2004 parce que les incidences de cette violation persistent jusqu'à présent et pourraient influer sur son procès lorsqu'il sera finalement tenu. Bien que le gouvernement doive disposer d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative en matière de relations étrangères, l'exécutif n'est pas à l'abri du contrôle constitutionnel. Les tribunaux ont compétence, et sont tenus d'exercer cette compétence, pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la *Charte* ou à d'autres normes constitutionnelles. Lorsque cela s'avère nécessaire, les tribunaux ont aussi compétence pour donner à la branche exécutive du gouvernement des directives spécifiques. En l'espèce, le juge de première instance s'est fondé sur des considérations erronées en ordonnant au gouvernement de demander le rapatriement de K, compte tenu de la responsabilité constitutionnelle de l'exécutif de prendre les décisions concernant les affaires étrangères et du dossier qui n'est pas suffisamment probant. La réparation appropriée, en l'espèce, consiste à déclarer que les droits de K garantis par la *Charte* ont été violés, et à laisser au gouvernement le soin de décider de quelle manière il convient de répondre à la lumière de l'information dont il dispose actuellement, de sa responsabilité en matière d'affaires étrangères et de la *Charte*.

Jurisprudence

Arrêts appliqués : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125; *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3; **arrêts mentionnés :** *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292; *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462; *Rasul c. Bush*, 542 U.S. 466 (2004); *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene c. Bush*, 128 S. Ct. 2229 (2008); *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *United States of America c. Jawad*, commission militaire, 24 septembre 2008, en ligne : www.defense.gov/news/Ruling%20D-008.pdf; *R. c. Collins*, [1987]

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B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

Statutes and Regulations Cited

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Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, s. 10.
Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.
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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Evans and Sharlow JJ.A.), 2009 FCA 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] F.C.J. No. 893 (QL), 2009 CarswellNat 2364, affirming a decision of O'Reilly J., 2009 FC 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] F.C.J. No. 462 (QL), 2009 CarswellNat 1206. Appeal allowed in part.

Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

1 R.C.S. 265; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] R.C.S. 269; *Black c. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441; *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Kaunda c. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *R. c. Gamble*, [1988] 2 R.C.S. 595.

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POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Evans et Sharlow), 2009 CAF 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] A.C.F. n° 893 (QL), 2009 CarswellNat 2699, qui a confirmé une décision du juge O'Reilly, 2009 CF 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] A.C.F. n° 462 (QL), 2009 CarswellNat 1472. Pourvoi accueilli en partie.

Robert J. Frater, *Doreen C. Mueller* et *Jeffrey G. Johnston*, pour les appelants.

Nathan J. Whitling et *Dennis Edney*, pour l'intimé.

Sacha R. Paul, *Vanessa Gruben* et *Michael Bossin*, pour l'intervenante Amnesty International (Canadian Section, English Branch).

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John Norris, *Brydie Bethell* and *Audrey Macklin*, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha Mackinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudhry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

John Norris, *Brydie Bethell* et *Audrey Macklin*, pour les intervenants Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program et David Asper Centre for Constitutional Rights.

Emily Chan et *Martha Mackinnon*, pour les intervenants la Coalition canadienne pour les droits des enfants et Justice for Children and Youth.

Sujit Choudhry et *Joseph J. Arvay*, *c.r.*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Brian H. Greenspan, pour l'intervenante Criminal Lawyers' Association (Ontario).

Lorne Waldman et *Jacqueline Swaisland*, pour l'intervenante l'Association du Barreau canadien.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* et *Fannie Lafontaine*, pour les intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* et *Jessica Orkin*, pour l'intervenante l'Association canadienne des libertés civiles.

Dean Peroff, *Chris MacLeod* et *H. Scott Fairley*, pour l'intervenant National Council for the Protection of Canadians Abroad.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Omar Khadr, un citoyen canadien, est détenu à Guantanamo (Cuba) par le gouvernement des États-Unis depuis plus de sept ans. Le premier ministre voudrait que la Cour infirme la décision par laquelle la Cour d'appel fédérale a ordonné au gouvernement canadien de demander aux États-Unis le rapatriement de M. Khadr au Canada.

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[2] For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

[3] Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

[4] On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

[5] In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him

[2] Pour les motifs exposés ci-après, nous estimons, à l'instar des juridictions inférieures, que les droits garantis à M. Khadr par l'art. 7 de la *Charte canadienne des droits et libertés* ont été violés. Nous arrivons toutefois à la conclusion que l'ordre donné par les tribunaux d'instances inférieures au gouvernement de demander le renvoi de M. Khadr au Canada ne constitue pas la réparation convenable de cette violation visée au par. 24(1) de la *Charte*. Conformément à la séparation des pouvoirs et à la réticence légitime des tribunaux à intervenir dans les questions relatives aux affaires étrangères, la réparation appropriée consiste à prononcer, en faveur de M. Khadr, un jugement déclaratoire confirmant la violation des droits qui lui sont garantis par la *Charte*, tout en laissant au gouvernement une certaine latitude pour décider de la manière dont il convient de répondre. Nous sommes donc d'avis d'accueillir le pourvoi en partie.

II. Le contexte

[3] M. Khadr était âgé de 15 ans lorsqu'il a été fait prisonnier par les forces américaines en Afghanistan, le 27 juillet 2002. Il lui est reproché d'avoir lancé une grenade qui a tué un soldat américain, lors du combat au cours duquel il a été capturé. Trois mois plus tard environ, il a été transféré aux installations militaires américaines à Guantanamo et placé dans un centre de détention pour adultes.

[4] Le 7 septembre 2004, M. Khadr a été traduit devant un tribunal d'examen du statut de combattant (*Combatant Status Review Tribunal*) qui a confirmé une décision antérieure selon laquelle il était un [TRADUCTION] « combattant ennemi ». Par la suite, il a été accusé de crimes de guerre et détenu en vue de la tenue d'un procès devant une commission militaire. Par suite de nombreux reports et obstacles de nature procédurale, ce procès est toujours pendant.

[5] En février et en septembre 2003, des agents du Service canadien du renseignement de sécurité (« SCRS ») et des membres de la Direction du renseignement extérieur du ministère des Affaires étrangères et du Commerce international (« MAECI ») ont interrogé M. Khadr sur des sujets

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and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En mars 2004, un responsable du MAECI a interrogé M. Khadr une nouvelle fois, en sachant que les autorités américaines l'avaient soumis à une technique de privation de sommeil, connue sous le nom de « programme grand voyageur » (*frequent flyer program*), dans le but d'amoindrir sa résistance lors des interrogatoires. Durant cet interrogatoire, M. Khadr a refusé de répondre aux questions. En 2005, le juge von Finckenstein, de la Cour fédérale, interdisait par une injonction provisoire aux agents du SCRS et aux fonctionnaires du MAECI d'interroger M. Khadr de nouveau, « pour empêcher une éventuelle injustice grave » : *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505, par. 46. En 2008, notre Cour, se fondant sur l'art. 7 de la *Charte*, ordonnait au gouvernement canadien de communiquer à M. Khadr les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI à Guantanamo : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125 (« *Khadr 2008* »).

[6] Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report of Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

[6] M. Khadr a demandé à plusieurs reprises que le gouvernement du Canada sollicite auprès des États-Unis son rapatriement au Canada : en mars 2005, lors d'une visite de responsables consulaires canadiens; le 15 décembre 2005, lorsqu'il a été indiqué dans un rapport sur le bien-être de M. Khadr que [TRADUCTION] « [ce dernier] veut que son gouvernement le ramène au pays » (*Rapport quant à une visite relative au bien-être*, pièce « L », jointe à l'affidavit de Sean Robertson, 15 décembre 2005 (D.C., vol. IV, p. 534)); et dans une demande écrite officielle présentée par l'intermédiaire de son avocat le 28 juillet 2008.

[7] The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

[7] Le 10 juillet 2008, lors d'une conférence de presse, le premier ministre a annoncé sa décision de ne pas demander le rapatriement de M. Khadr. À une question que lui a posée une journaliste en français pour savoir si le gouvernement allait demander le rapatriement, il a répondu ceci :

[TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these

La réponse c'est non. Comme je l'ai dit, l'ancien gouvernement et notre gouvernement, avec l'avis du ministère de la Justice, ont considéré toutes ces questions-là et la

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issues and the situation remains the same. . . . We keep on looking for [assurances] of good treatment of Mr. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, at 3'3", referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32).)

[8] On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

[10] The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many

situation reste la même. [. . .] Nous continuons à chercher des assurances de bon traitement de M. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, à 3 min. 3 sec., auquel renvoie l'affidavit d'April Bedard, 8 août 2008 (D.C., vol. II, p. 131-132).)

[8] Le 8 août 2008, M. Khadr a présenté, à la Cour fédérale, une demande de contrôle judiciaire à l'égard de [TRADUCTION] « la décision et [de] la politique inchangée » (Avis de demande de l'intimé, 8 août 2008 (D.C., vol. II, p. 113)) du gouvernement de ne pas demander son rapatriement. Cette décision et cette politique violaient, selon lui, les droits qui lui sont garantis par l'art. 7 de la *Charte*, dont voici le texte :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[9] Après avoir passé en revue l'historique de la détention de M. Khadr et les principes applicables du droit canadien et du droit international, le juge O'Reilly a conclu que, dans les circonstances particulières de l'espèce, le Canada avait « l'obligation de protéger » M. Khadr (2009 CF 405, [2009] A.C.F. nº 462 (QL)). Il a jugé que « [l]e refus constant du Canada de solliciter le rapatriement de M. Khadr est contraire à un principe de justice fondamental et porte atteinte aux droits que l'article 7 de la *Charte* lui garantit » (par. 92). En outre, il a conclu que « [p]our atténuer l'effet de cette atteinte, le Canada [devait] demander le plus tôt possible aux États-Unis de rapatrier M. Khadr » (par. 92).

[10] Les juges majoritaires de la Cour d'appel fédérale (les juges Evans et Sharlow) ont confirmé l'ordonnance du juge O'Reilly, tout en définissant cependant de façon plus étroite l'atteinte à l'art. 7. Ils ont jugé que cette atteinte découlait de l'interrogatoire de mars 2004 auquel on avait procédé en sachant que M. Khadr avait été soumis au « programme grand voyageur » qui, selon les juges majoritaires, constituait un traitement cruel et abusif contraire aux principes de justice fondamentale : 2009 CAF 246, [2009] A.C.F. nº 893 (QL).

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steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

[11] Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

[12] Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

3. If so, does the deprivation accord with the principles of fundamental justice?

Le juge Nadon, dissident, a rappelé les nombreuses mesures que le gouvernement avait prises en faveur de M. Khadr. Il est arrivé à la conclusion que puisque la Constitution conférait à la branche exécutive du gouvernement la compétence en matière d'affaires étrangères, la réparation souhaitée allait au-delà de ce que les tribunaux avaient le pouvoir d'octroyer.

III. Les questions en litige

[11] M. Khadr soutient que le gouvernement a violé les droits que lui garantit l'art. 7 de la *Charte* et que la réparation convenable consiste à ordonner au gouvernement de demander aux États-Unis son rapatriement au Canada.

[12] M. Khadr ne prétend pas que le gouvernement est tenu de demander le rapatriement de tous les citoyens canadiens détenus à l'étranger dans des circonstances suspectes. Il soutient plutôt que la conduite du gouvernement du Canada à l'égard de sa détention à Guantanamo par les autorités militaires américaines, et en particulier la collaboration du Canada avec le gouvernement américain en 2003 et 2004, a porté atteinte aux droits qui lui sont garantis par la *Charte*. Il exige en outre, à titre de réparation, que le gouvernement demande maintenant son rapatriement au Canada. Les questions soulevées par cette demande peuvent être résumées de la façon suivante :

A. Y a-t-il eu violation de l'art. 7 de la *Charte*?

1. La *Charte* s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

2. Si tel est le cas, la conduite du gouvernement canadien porte-t-elle atteinte aux droits de M. Khadr à la vie, à la liberté ou à la sécurité de sa personne?

3. Si tel est le cas, cette atteinte est-elle compatible avec les principes de justice fondamentale?

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B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

[13] We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

[14] As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

[15] The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

[16] This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United

B. La réparation demandée est-elle convenable et juste eu égard à toutes les circonstances?

[13] Nous étudierons chacune de ces questions successivement.

A. *Y a-t-il eu violation de l'art. 7 de la Charte?*

1. La *Charte* canadienne s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

[14] De manière générale, les Canadiens qui sont à l'étranger sont assujettis au droit du pays où ils se trouvent et ne peuvent pas se prévaloir des droits que leur garantit la *Charte*. Le droit international coutumier et le principe de la courtoisie entre les nations s'opposent, en règle générale, à l'application de la *Charte* aux actions des responsables canadiens en mission à l'étranger : *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 48, le juge LeBel citant *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462, par. 123. La jurisprudence prévoit une exception dans le cas d'une participation canadienne à des activités d'un État étranger ou de ses représentants qui sont contraires aux obligations internationales du Canada ou aux normes relatives aux droits fondamentaux de la personne : *Hape*, par. 52, le juge LeBel; *Khadr 2008*, par. 18.

[15] La question dont nous sommes saisis est donc celle de savoir si la règle excluant l'application extraterritoriale de la *Charte* empêche son application aux actions de responsables canadiens à Guantanamo.

[16] Statuant sur cette question dans *Khadr 2008*, la Cour a conclu que la *Charte* s'appliquait aux actions des responsables canadiens en mission à Guantanamo qui avaient transmis aux autorités américaines le fruit de leurs interrogatoires avec M. Khadr. La Cour a conclu, au par. 26, que « les principes du droit international et de la courtoisie entre les nations qui, dans d'autres circonstances, pourraient soustraire à l'application de la *Charte* les actes des responsables canadiens en mission à l'étranger ne s'appliquent pas à l'assistance fournie en l'espèce

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States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24; *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

[17] We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

[18] Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

aux autorités américaines à Guantanamo », étant donné les arrêts de la Cour suprême des États-Unis selon lesquels le régime de commission militaire alors en vigueur constituait une atteinte manifeste aux droits fondamentaux de la personne reconnus en droit international : *Khadr 2008*, par. 24; voir *Rasul c. Bush*, 542 U.S. 466 (2004), et *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006). Selon les principes de justice fondamentale, les responsables canadiens qui avaient interrogé M. Khadr étaient donc tenus de lui révéler la teneur des déclarations qu'il leur avait faites. Le gouvernement canadien s'est conformé à l'ordonnance de la Cour.

[17] Nous constatons que le régime dans le cadre duquel M. Khadr est actuellement détenu a été modifié de façon notable au cours des dernières années. Le Congrès américain a adopté des lois et les tribunaux ont rendu des décisions visant à harmoniser les procédures militaires de Guantanamo avec le droit international. (La *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, interdit de soumettre les détenus à des traitements inhumains et exige que les interrogatoires soient menés en conformité avec le manuel de service de l'armée. Avec la *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, le législateur a tenté de légaliser le régime de Guantanamo après l'arrêt rendu par la Cour suprême des États-Unis dans l'affaire *Hamdan c. Rumsfeld*. Or, le 12 juin 2008, cette même cour a déclaré — dans *Boumediene c. Bush*, 128 S. Ct. 2229 (2008) — que les détenus de Guantanamo ont le droit constitutionnel de faire contrôler la légalité de leur détention par voie d'*habeas corpus*, et a annulé les dispositions de la *Military Commissions Act of 2006* qui avaient suspendu ce droit.)

[18] S'il est vrai que la procédure à laquelle est soumis M. Khadr a changé, la demande qu'il formule repose sur la série de faits survenus à Guantanamo — les interrogatoires et la communication d'éléments de preuve ayant eu lieu en 2003 et 2004 — que nous avons déjà examinée dans *Khadr 2008*. Nous sommes convaincus que les arguments sur lesquels nous nous sommes fondés dans cet arrêt pour conclure à l'application de la *Charte* aux actions de responsables canadiens à Guantanamo valent également pour la présente affaire.

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2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

[19] The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

[20] The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative

2. La conduite du gouvernement canadien porte-t-elle atteinte aux droits de M. Khadr à la vie, à la liberté ou à la sécurité de sa personne?

[19] Les États-Unis détiennent M. Khadr en vue de lui faire subir un procès pour des accusations de crimes de guerre. Ils sont donc la source première de la privation de sa liberté et de la sécurité de sa personne. Toutefois, la demande de M. Khadr repose sur l'allégation selon laquelle le Canada a lui aussi contribué à l'atteinte passée et présente à sa liberté. Pour qu'il soit satisfait aux exigences de l'art. 7, il doit exister — comme l'a indiqué la Cour dans *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3 — un « lien causal suffisant entre la participation de notre gouvernement et l'atteinte [à la liberté et à la sécurité de la personne] qui survient en bout de ligne » (par. 54).

[20] Le dossier indique que les interrogatoires menés par le SCRS et le MAECI ont fourni des éléments de preuve importants au sujet des accusations dont M. Khadr fait l'objet. Durant les interrogatoires menés en février et septembre 2003, des agents du SCRS ont interrogé M. Khadr à plusieurs reprises sur les faits essentiels en cause dans le cadre de la poursuite intentée contre lui. Ils lui ont en outre soutiré des déclarations potentiellement inculpatoires dans le cadre des instances introduites contre lui aux États-Unis (Document du SCRS, pièce « U », jointe à l'affidavit du Lt. Comm. William Kuebler, 7 novembre 2003 (D.C., vol. II, p. 280); Résumé de l'interrogatoire, pièce « AA », jointe à l'affidavit du Lt. Comm. William Kuebler, 24 février 2003 (D.C., vol. III, p. 289); Résumé de l'interrogatoire, pièce « BB », jointe à l'affidavit du Lt. Comm. William Kuebler, 17 février 2003 (D.C., vol. III, p. 292); Résumé de l'interrogatoire, pièce « DD », jointe à l'affidavit du Lt. Comm. William Kuebler, 20 avril 2004 (D.C., vol. III, p. 296)). Dans un rapport du Comité de surveillance des activités de renseignement de sécurité intitulé *Le rôle du SCRS dans l'affaire Omar Khadr* (8 juillet 2009), il est mentionné en outre que, selon le SCRS, les interrogatoires de M. Khadr ont été « très fructueu[x], comme le montrent les

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Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States of America v. Jawad*, Military Commission, September 24, 2008, D-008 Ruling on Defense Motion to Dismiss — Torture of the Detainee (online: http://www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

renseignements secrets de qualité » qu'il a fournis (p. 14). Ces déclarations ont été communiquées aux autorités américaines et ont été résumées dans des rapports d'enquête américains (Rapport d'enquête, pièce « AA », jointe à l'affidavit du Lt. Comm. William Kuebler, 24 février 2003 (D.C., vol. III, p. 289 ff.)). Suivant les règles de preuve assouplies établies par la *Military Commissions Act of 2006* des États-Unis, les déclarations faites par M. Khadr aux responsables canadiens pourraient être admissibles dans le cadre des procédures intentées contre lui, en dépit des circonstances abusives dans lesquelles elles ont été obtenues : voir *United States of America c. Jawad*, commission militaire, 24 septembre 2008, Décision D-008 sur la requête en rejet présentée par la défense — Torture du détenu (en ligne : http://www.defense.gov/news/Ruling%20D-008.pdf). Les interrogatoires dont il a été question précédemment ont également préparé l'interrogatoire du mois de mars 2004 lors duquel un représentant du MAECI, sachant que M. Khadr avait été soumis au « programme grand voyageur » pour amoindrir sa résistance lors des interrogatoires, l'a néanmoins interrogé (Résumé de l'interrogatoire, pièce « DD », jointe à l'affidavit du Lt. Comm. William Kuebler, 20 avril 2004 (D.C., vol. III, p. 296)).

[21] An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

[21] Celui qui sollicite une réparation fondée sur la *Charte* doit prouver la violation de celle-ci selon la prépondérance des probabilités (*R. c. Collins*, [1987] 1 R.C.S. 265, p. 277). Il est raisonnable de déduire de la preuve non contredite portée à notre connaissance que les déclarations recueillies par des responsables canadiens contribuent à la détention continue de M. Khadr, et ont ainsi une incidence sur ses droits à la liberté et à la sécurité. En l'absence d'éléments de preuve contraires (ou de dénégation réfutant cette inférence), nous concluons sur la foi du dossier dont nous sommes saisis que la participation active du Canada à un régime, illégal à l'époque, a contribué et continue de contribuer à la détention actuelle de M. Khadr, laquelle est l'objet de la demande sur laquelle nous sommes appelés à statuer. Le lien causal exigé par *Suresh* entre la conduite du Canada et la privation de la liberté et de la sécurité de la personne est établi.

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3. Does the Deprivation Accord With the Principles of Fundamental Justice?

[22] We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

[23] The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

(1) It must be a legal principle.

(2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

(3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[24] We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus*. It was also known that Mr. Khadr was 16 years old at the time

3. L'atteinte est-elle compatible avec les principes de justice fondamentale?

[22] Nous avons conclu à l'existence d'un lien suffisant entre la conduite du gouvernement canadien et la privation de la liberté et de la sécurité de sa personne subie par M. Khadr. Cela ne suffit cependant pas à établir une atteinte aux droits de ce dernier garantis par l'art. 7 de la *Charte*. En effet, pour prouver l'existence d'une atteinte, M. Khadr doit démontrer que la privation en question n'est pas compatible avec les principes de justice fondamentale.

[23] Les principes de justice fondamentale « se trouvent dans les préceptes fondamentaux de notre système juridique » : *Renvoi : Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 503. Tirés de l'expérience et de la jurisprudence canadiennes, ils prennent en compte les obligations et les valeurs du Canada exprimées dans les diverses sources du droit international en matière de droits de la personne auxquelles le Canada est tenu de se conformer. Dans *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3, par. 46, la Cour a réitéré, dans les termes suivants (sous la plume de la juge Abella qui a rédigé les motifs des juges majoritaires), les critères selon lesquels on peut confirmer l'existence d'un nouveau principe de justice fondamentale :

(1) Il doit s'agir d'un principe juridique.

(2) Il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice.

(3) Ce principe doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne.

[24] Nous concluons que la conduite du Canada relative à la poursuite engagée contre M. Khadr a porté atteinte aux principes de justice fondamentale. Réexaminons brièvement cette conduite. Les déclarations recueillies par le SCRS et le MAECI ont été obtenues au moyen de la participation à un régime dont on savait à l'époque qu'il avait nié à des détenus le droit de contester la légalité de leur détention par voie d'*habeas corpus*. On savait

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and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hooper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

[25] This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth,

également que M. Khadr était alors âgé de 16 ans et qu'il n'avait pas pu consulter un avocat ou tout autre adulte qui aurait eu son intérêt à cœur. Comme l'a déclaré la Cour dans *Khadr 2008*, la participation du Canada à la procédure illégale engagée à Guantanamo contrevenait manifestement aux obligations internationales du Canada (*Khadr 2008*, par. 23-25; *Hamdan c. Rumsfeld*). En menant leurs interrogatoires, les agents du SCRS étaient ceux qui décidaient des questions posées et du sujet traité (Transcription du contre-interrogatoire relatif à l'affidavit de M. Hooper, pièce « GG », jointe à l'affidavit du Lt. Comm. William Kuebler, 2 mars 2005 (D.C., vol. III, p. 313, p. 22)). Les responsables canadiens savaient aussi que les autorités américaines auraient un accès illimité à la teneur des interrogatoires grâce aux enregistrements audio et vidéo qui en étaient faits, puisque les responsables canadiens n'ont pas cherché à en restreindre l'usage (*Le rôle du SCRS dans l'affaire Omar Khadr*, p. 12-13). Les interrogatoires visaient à recueillir des renseignements secrets et non pas à faire progresser une enquête criminelle. Même si, dans certains contextes, il peut exister d'importantes différences entre les interrogatoires menés en vue de colliger des renseignements secrets et ceux menés dans le cadre d'enquêtes criminelles, en l'espèce, ces différences perdent leur importance. Les responsables canadiens ont interrogé M. Khadr sur des sujets qui pourraient avoir permis de recueillir des éléments de preuve importants pour les procédures criminelles intentées contre lui, dans des circonstances où ces responsables savaient que M. Khadr était détenu pour une période indéterminée, qu'il était un adolescent et qu'il était seul durant les interrogatoires. En outre, l'interrogatoire mené en mars 2004 — au cours duquel M. Khadr a refusé de répondre aux questions — s'est déroulé alors qu'on savait que celui-ci avait été soumis à trois semaines de privation planifiée de sommeil, une mesure décrite par la commission militaire américaine dans *Jawad* comme visant à [TRADUCTION] « rendre [les détenus] plus dociles et à venir à bout de leur résistance à l'interrogatoire » (par. 4).

[25] Ces faits établissent la participation du Canada à une conduite étatique violant les principes de justice fondamentale. Le fait d'avoir interrogé un

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to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

[26] We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter.*

B. *Is the Remedy Sought Appropriate and Just in All the Circumstances?*

[27] In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

[28] The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

[29] First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation

adolescent, pour lui soutirer des déclarations relatives aux accusations criminelles les plus sérieuses qui soient, alors qu'il était détenu dans ces conditions et qu'il ne pouvait pas consulter un avocat et même si l'on savait que les fruits des interrogatoires seraient communiqués aux procureurs américains, contrevient aux normes canadiennes les plus élémentaires quant aux traitements à accorder aux suspects adolescents détenus.

[26] Nous concluons que M. Khadr a établi que le Canada a enfreint les droits qui lui sont garantis par l'art. 7 de la *Charte.*

B. *La réparation demandée est-elle convenable et juste eu égard à toutes les circonstances?*

[27] Dans une instance antérieure (*Khadr 2008*), M. Khadr a obtenu, à titre de réparation, la communication de l'information recueillie contre lui par des responsables canadiens à la faveur d'interrogatoires ayant eu lieu à Guantanamo. Dans le présent pourvoi, il s'agit de savoir si la violation de l'art. 7 de la *Charte* permet à M. Khadr d'obtenir la réparation consistant en une ordonnance intimant au Canada de demander aux États-Unis son renvoi au Canada. Deux questions se posent à ce stade : (1) Existe-t-il un lien causal suffisant entre la violation et la réparation demandée? (2) Le fait que la réparation sollicitée touche la prérogative royale en matière d'affaires étrangères fait-il obstacle à cette réparation?

[28] Le juge de première instance a conclu qu'il pouvait accorder la réparation demandée. La Cour d'appel fédérale a estimé qu'il n'avait pas abusé de son pouvoir discrétionnaire en matière de réparation. Étant donné notre réponse à la seconde des questions énoncées précédemment, nous arrivons à la conclusion que, sur la foi du dossier dont nous sommes saisis, le juge de première instance a commis une erreur dans l'exercice de son pouvoir discrétionnaire en accordant la réparation demandée.

[29] Premièrement, la réparation demandée a-t-elle un lien suffisant avec la violation? Nous avons conclu que le gouvernement canadien a violé les droits garantis à M. Khadr par l'art. 7, en raison

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in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the remedy now being sought — an order that the Canadian government ask the United States to return Mr. Khadr to Canada — is appropriate and just in the circumstances.

[30] An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

de sa participation, en 2003 et 2004, au régime militaire de Guantanamo, alors illégal. La question qui se pose à cette étape de l'analyse est celle de savoir si la réparation maintenant demandée — soit une ordonnance intimant au gouvernement canadien de demander aux États-Unis le renvoi de M. Khadr au Canada — est convenable et juste eu égard aux circonstances.

[30] Une réparation convenable et juste est « celle qui permet de défendre utilement les droits et libertés du demandeur » : *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 55. Ainsi, M. Khadr doit tout d'abord réussir à établir l'existence d'un lien suffisant entre les violations de l'art. 7 survenues en 2003 et 2004 et l'ordonnance sollicitée dans le cadre de la demande de contrôle judiciaire qu'il a formulée. Selon nous, l'existence d'un lien suffisant est établie par le fait que les incidences de ces violations persistent jusqu'à présent. Les droits de M. Khadr garantis par la *Charte* ont été violés lorsque des responsables canadiens ont contribué à sa détention par les interrogatoires qu'ils ont menés à Guantanamo, tout en sachant qu'il était un adolescent, qu'il n'avait alors pas accès à un avocat ou à un recours en *habeas corpus* et qu'au moment où s'est déroulé l'interrogatoire du mois de mars 2004, il avait été soumis à des traitements inappropriés par les autorités américaines. Comme l'information recueillie par les responsables canadiens lors de leurs interrogatoires pourrait être utilisée dans le cadre des procédures américaines engagées contre M. Khadr, on ne peut pas dire que les effets des violations ont cessé. Ils se poursuivent à ce jour. Comme nous l'avons indiqué, il est possible que l'information obtenue par les responsables canadiens et transmise aux autorités militaires américaines fasse partie du dossier en vertu duquel il est actuellement détenu. La preuve dont nous disposons donne à penser que l'information en question était pertinente et utile. Les parties n'ont pas suggéré qu'elle ne fait pas partie du dossier colligé contre M. Khadr ou qu'elle ne sera pas produite lorsque son procès sera finalement tenu. Nous concluons donc que la violation des droits garantis à M. Khadr par l'art. 7 de la *Charte* est toujours en cours et que la réparation sollicitée pourrait défendre ces droits.

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[31] The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

[32] We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

[33] Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

[34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study*

[31] Les actions à l'origine des violations de la *Charte* invoquées dans le présent pourvoi appartiennent au passé. Mais leurs effets sur la liberté et la sécurité de M. Khadr persistent à ce jour et pourraient avoir des répercussions à l'avenir. Les effets des violations se perpétuent ainsi dans le présent. Lorsque des actions passées violent des libertés actuelles, une réparation actuelle peut être requise.

[32] Nous concluons que le lien nécessaire entre les violations de l'art. 7 et la réparation demandée a été établi aux fins de la présente demande de contrôle judiciaire.

[33] Deuxièmement, le fait que la réparation demandée touche la prérogative royale en matière d'affaires étrangères fait-il obstacle à cette réparation? L'existence d'un lien entre la réparation et la violation n'est pas le seul facteur à prendre en considération. Comme l'énonce l'arrêt *Doucet-Boudreau*, la réparation convenable et juste est celle qui, en outre, « fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle » (par. 56) et doit être une réparation « judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d'un tribunal » (par. 57). Le gouvernement fait valoir que la Constitution du Canada ne confère pas aux tribunaux le pouvoir d'exiger de la branche exécutive du gouvernement qu'elle fasse quoi que ce soit dans le domaine de la politique étrangère. Selon lui, la décision de ne pas demander le rapatriement de M. Khadr relève directement de la prérogative de la Couronne de conduire les relations internationales, prérogative qui comprend le droit de parler librement avec un État étranger de toutes ces questions : P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 1-19.

[34] La prérogative royale est [TRADUCTION] « le résidu du pouvoir discrétionnaire ou arbitraire dont la Couronne est légalement investie à tout moment » : *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] R.C.S. 269, p. 272, le juge en chef Duff, citant A. V Dicey,

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of the Law of the Constitution (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

[35] The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

[36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

[37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions

Introduction to the Study of the Law of the Constitution (8e éd. 1915), p. 420. Il s'agit d'une source limitée de pouvoir administratif ne découlant pas de la législation, que confère la common law à la Couronne : Hogg, p. 1-17.

[35] La prérogative royale en matière d'affaires étrangères n'a pas été supplantée par l'art. 10 de la *Loi sur le ministère des Affaires étrangères et du Commerce international*, L.R.C. 1985, ch. E-22, et continue d'être exercée par le gouvernement fédéral. Elle comprend le pouvoir de faire des observations à un gouvernement étranger : *Black c. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (C.A. Ont.). Nous sommes donc d'accord avec la conclusion implicite du juge O'Reilly (par. 39, 40 et 49) selon laquelle la décision de ne pas demander le rapatriement de M. Khadr a été prise dans l'exercice de la prérogative en matière de relations étrangères.

[36] Lorsqu'il exerce les pouvoirs que lui confère la common law en vertu de la prérogative royale, l'exécutif n'est toutefois pas à l'abri du contrôle constitutionnel : *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441. Certes, il revient à l'exécutif, et non aux tribunaux, de décider si et comment il exercera ses pouvoirs; mais les tribunaux ont indéniablement compétence pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la *Charte* (*Operation Dismantle*) ou à d'autres normes constitutionnelles (*Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539) — ils sont d'ailleurs tenus d'exercer cette compétence.

[37] Le pouvoir restreint dont jouissent les tribunaux pour contrôler la constitutionnalité de l'exercice de la prérogative royale tient au fait que, dans une démocratie constitutionnelle, tout pouvoir gouvernemental doit être exercé en conformité avec la Constitution. Cela dit, le contrôle judiciaire de l'exercice de la prérogative sur le plan de sa constitutionnalité demeure tributaire du fait que la branche exécutive du gouvernement est responsable des décisions relevant de ce pouvoir, et que

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within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

[38] Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

[39] Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of

l'exécutif est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles. Il faut que le gouvernement dispose d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative : voir, p. ex., *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 101-102. Il appartient cependant aux tribunaux de fixer les limites légales et constitutionnelles à l'intérieur desquelles ces décisions doivent être prises. Ainsi, lorsqu'un gouvernement refuse de se conformer aux contraintes constitutionnelles, les tribunaux ont le pouvoir de rendre des ordonnances qui garantissent que la prérogative du gouvernement en matière d'affaires étrangères est exercée en conformité avec la Constitution : *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283.

[38] Après avoir conclu que les tribunaux jouissent d'un pouvoir circonscrit pour examiner les questions relatives aux affaires étrangères et intervenir à leur égard — de façon à s'assurer de la constitutionnalité de l'action de l'exécutif — il nous reste une question à trancher : le juge O'Reilly s'est-il fondé sur des considérations erronées en exerçant ce pouvoir dans les circonstances de l'espèce? (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117-118) (Par souci d'équité envers le juge du procès, nous précisons que le gouvernement n'a proposé aucune solution de rechange (motifs du juge du procès, par. 78).) Si sa décision est justifiable au regard du dossier et des principes de droit, la déférence nous oblige à ne pas intervenir. À notre avis, tel n'est toutefois pas le cas.

[39] Nous estimons tout d'abord que la réparation ordonnée par les juridictions d'instances inférieures accorde un poids insuffisant à la responsabilité constitutionnelle de l'exécutif de prendre des décisions concernant les affaires étrangères dans le contexte de circonstances complexes et en fluctuation constante, en tenant compte des intérêts nationaux plus larges du Canada. Pour les motifs suivants, nous concluons que la réparation appropriée consiste, d'une part, à déclarer que, selon le dossier dont la Cour est saisie, le Canada a porté

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current information, its responsibility for foreign affairs, and in conformity with the *Charter.*

atteinte aux droits garantis à M. Khadr par l'art. 7, et, d'autre part, à laisser au gouvernement le soin de décider de quelle manière il convient de répondre au présent arrêt à la lumière de l'information dont il dispose actuellement et de sa responsabilité en matière d'affaires étrangères et ce, en conformité avec la *Charte*.

[40] As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

[40] Comme nous l'avons indiqué, la conduite des affaires étrangères relève de la branche exécutive du gouvernement. Il incombe en revanche aux tribunaux de statuer sur les actions intentées par des individus qui estiment que l'exercice par le gouvernement de ses pouvoirs discrétionnaires a porté ou portera atteinte à leurs droits garantis par la *Charte* : *Operation Dismantle*.

[41] In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

[41] Dans certaines situations, les tribunaux peuvent donner à la branche exécutive du gouvernement des directives spécifiques sur des questions ayant trait à la politique étrangère. À titre d'exemple, la Cour a conclu, dans *Burns*, qu'il serait contraire à l'art. 7 d'extrader un fugitif du Canada sans demander à l'État requérant, et sans obtenir de lui, la garantie que la peine de mort ne sera pas infligée. Elle a dûment pris en compte le fait que la demande et l'obtention de telles assurances relevaient des relations étrangères du Canada. Elle a néanmoins ordonné au gouvernement de les demander.

[42] The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

[42] Les faits particuliers de l'affaire *Burns* justifiaient une réparation de nature plus spécifique. En effet, les fugitifs se trouvaient sous le contrôle des autorités canadiennes. Il était évident que les assurances conféreraient une protection efficace contre une violation éventuelle de la *Charte* : le Canada avait tout à fait le pouvoir de protéger les fugitifs contre une exécution possible. En outre, la Cour a signalé qu'aucun objectif d'intérêt public que servirait l'extradition sans assurances ne serait pas également servi de façon substantielle par une extradition assortie d'assurances; rien n'indiquait non plus que le fait de demander de telles assurances nuirait aux bonnes relations du Canada avec d'autres États : *Burns*, par. 125 et 136.

[43] The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian

[43] La présente affaire est différente de *Burns*. L'intimé n'est pas sous le contrôle du gouvernement

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government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

[44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

[45] Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

[46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence,

canadien; l'efficacité de la réparation proposée est incertaine; et la Cour n'est pas en mesure d'évaluer correctement les conséquences d'une demande de rapatriement sur les relations étrangères du Canada.

[44] Cela nous amène à notre deuxième objection : le caractère inadéquat du dossier. Celui dont nous disposons nous donne une image forcément incomplète de l'ensemble des considérations auxquelles le gouvernement fait actuellement face pour juger de la demande de M. Khadr. Nous ne savons pas quelles négociations ont pu avoir lieu, ou auront lieu, entre les gouvernements des États-Unis et du Canada sur le sort de M. Khadr. Comme l'a observé le juge en chef Chaskalson dans *Kaunda c. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, par. 77 : [TRADUCTION] « Le moment choisi pour présenter des observations, s'il y a lieu d'en présenter, les termes dans lesquels elles devraient être formulées, et les sanctions qui (le cas échéant) devraient suivre si lesdites observations sont rejetées, sont des questions que les tribunaux ne sont pas véritablement en mesure de trancher. » Dans les circonstances, il ne serait donc pas opportun que la Cour donne des directives quant aux mesures diplomatiques qu'il faudrait prendre pour remédier aux violations des droits de l'intimé garantis par la *Charte*.

[45] Bien que M. Khadr soit détenu à Guantanamo depuis plus de sept ans, la situation juridique difficile dans laquelle il se trouve continue d'évoluer. Selon les représentations des avocats lors de l'audition du présent pourvoi, le ministère de la Justice des États-Unis a décidé que M. Khadr sera jugé, comme prévu, par une commission militaire, même si d'autres détenus de Guantanamo subiront plutôt leur procès devant une cour fédérale à New York. On ignore quelle sera l'incidence de ces nouvelles circonstances sur la situation de M. Khadr et sur les négociations qui pourraient être en cours entre les États-Unis et le Canada quant à son possible rapatriement. Ces faits incitent toutefois la Cour à faire preuve de prudence dans l'exercice de son pouvoir de réparation.

[46] En l'espèce, les incertitudes au chapitre de la preuve, les limites de la compétence institutionnelle

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and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

de la Cour et la nécessité de respecter les prérogatives de l'exécutif nous amènent à conclure que la réparation appropriée est de nature déclaratoire. Le jugement déclaratoire d'inconstitutionnalité est un redressement discrétionnaire : *Operation Dismantle*, p. 481, citant *Solosky c. La Reine*, [1980] 1 R.C.S. 821. Notre Cour a reconnu qu'il s'agit d'une « forme efficace et souple de règlement des véritables litiges » : *R. c. Gamble*, [1988] 2 R.C.S. 595, p. 649. Un tribunal peut, à juste titre, prononcer un jugement déclaratoire dans la mesure où il a compétence sur l'objet du litige, où la question dont il est saisi est une question réelle et non pas simplement théorique, et où la personne qui la soulève a véritablement intérêt à la soulever. C'est le cas en l'espèce.

[47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

[47] La solution à la fois prudente pour l'instant et respectueuse des responsabilités de l'exécutif et des tribunaux consiste à ce que la Cour fasse droit en partie à la demande de contrôle judiciaire présentée par M. Khadr et prononce un jugement déclaratoire en sa faveur informant le gouvernement de son opinion sur le dossier dont elle est saisie, opinion qui fournira, pour sa part, à l'exécutif, le cadre juridique en vertu duquel il devra exercer ses fonctions et examiner les mesures qu'il conviendra de prendre à l'égard de M. Khadr, en conformité avec la *Charte*.

IV. Conclusion

IV. Conclusion

[48] The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

[48] Le pourvoi est accueilli en partie. La demande de contrôle judiciaire de M. Khadr est accueillie en partie. La Cour déclare que, compte tenu de la conduite de responsables canadiens lors d'interrogatoires menés en 2003 et 2004, telle qu'elle est établie par la preuve, le Canada a activement participé à un processus contraire aux obligations internationales qui lui incombent en matière de droits de la personne et a contribué à la détention continue de M. Khadr, de telle sorte qu'il a porté atteinte aux droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte* et ce, de manière incompatible avec les principes de justice fondamentale. M. Khadr a droit aux dépens.

Appeal allowed in part with costs to the respondent.

Pourvoi accueilli en partie avec dépens en faveur de l'intimé.

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Solicitor for the appellants: Department of Justice, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): Thompson Dorfman Sweatman, Winnipeg.

Solicitors for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights: John Norris, Brydie Bethell and Audrey Macklin, Toronto.

Solicitor for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth: Justice for Children and Youth Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Lavine, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

Solicitors for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval: McCarthy Tétrault, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitors for the intervener the National Council for the Protection of Canadians Abroad: Theall Group, Toronto; Amsterdam & Peroff, Toronto.

Procureur des appelants : Ministère de la Justice, Ottawa.

Procureurs de l'intimé : Parlee McLaws, Edmonton.

Procureurs de l'intervenante Amnesty International (Canadian Section, English Branch) : Thompson Dorfman Sweatman, Winnipeg.

Procureurs des intervenants Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program et David Asper Centre for Constitutional Rights : John Norris, Brydie Bethell et Audrey Macklin, Toronto.

Procureur des intervenants la Coalition canadienne pour les droits des enfants et Justice for Children and Youth : Justice for Children and Youth Services, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Arvay Finlay, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Greenspan Humphrey Lavine, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Waldman & Associates, Toronto.

Procureurs des intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Marlys Edwardh Barristers Professional Corporation, Toronto.

Procureurs de l'intervenant National Council for the Protection of Canadians Abroad : Theall Group, Toronto; Amsterdam & Peroff, Toronto.

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Duff Conacher and **Democracy Watch** (*Applicants*)

v.

The Prime Minister of Canada, the Governor in Council of Canada, the Governor General of Canada and **the Attorney General of Canada** (*Respondents*)

INDEXED AS: CONACHER V. CANADA (PRIME MINISTER) (F.C.)

Federal Court, Shore J.—Ottawa, September 8 and 17, 2009.

Elections — Judicial review of Prime Minister of Canada's decision advising Governor General of Canada to dissolve Parliament, set election date — Canada Elections Act, s. 56.1, providing fixed election dates — Applicants alleging s. 56.1(2) creating new constitutional convention limiting Prime Minister's discretion to advise Governor General — Act, s. 56.1 not creating new constitutional convention — Explicitly leaving Governor General's discretion to dissolve Parliament untouched — Prime Minister's decision also not violating Canadian Charter of Rights and Freedoms, s. 3 — Application dismissed.

Crown — Prerogatives — Prime Minister of Canada advising Governor General of Canada to dissolve Parliament, set election date — Prime Minister's power to advise Governor General a prerogative as it is discretionary, not based on statutory grant of power, having roots in historical power of Monarch — Exercise of this power not affecting individual rights, expectations — Therefore, not reviewable.

Federal Court Jurisdiction — Prime Minister of Canada advising Governor General of Canada to dissolve Parliament, set election date — Such prerogative powers having to be exercised in accordance with law — Federal Court thus having jurisdiction, pursuant to Federal Courts Act, s. 18.1(4)(f), to consider whether Canada Elections Act, providing for fixed election dates, violated — However, Federal Court not having authority to determine existence of constitutional conventions as such conventions not law — Constitutional convention herein political in nature, outside Federal Court's jurisdiction.

Constitutional Law — Constitutional conventions — Canada Elections Act, s. 56.1, providing for fixed election dates, not creating new constitutional convention prohibiting Prime Minister of Canada from exercising discretion to advise Governor General to dissolve Parliament except in accordance with Act, s. 56.1 or in situation of vote of non-confidence — No evidence of intent to create new convention.

Construction of Statutes — Canada Elections Act, s. 56.1(1), providing for fixed election dates, leaving Governor General's discretion to dissolve Parliament pursuant to Crown prerogative untouched — Request for dissolution following non-confidence vote not violating s. 56.1 — S. 56.1 cannot be interpreted in manner making political issues justiciable.

Constitutional Law — Charter of Rights — Democratic Rights — Canada Elections Act, s. 56.1 providing for fixed election dates — Prime Minister of Canada advising Governor General of Canada to dissolve Parliament, set election date — No legal reasons provided to support submission Prime Minister's decision contravening principles of electoral fairness enshrined in Charter, s. 3.

This was an application for judicial review of a decision of the Prime Minister of Canada dated September 7, 2008 advising the Governor General of Canada to dissolve Parliament and set an election date of October 14, 2008.

Section 56.1 of the *Canada Elections Act* provides for fixed election dates. The applicants alleged that subsection 56.1(2) created a new constitutional convention prohibiting the Prime Minister from exercising his discretion to advise the Governor General to dissolve Parliament except in accordance with subsection 56.1(2) or in a situation of a vote of non-confidence in the House of Commons. The principal issues were (1) whether the Prime Minister's decision was appropriate for a judicial review, (2) whether section 56.1 created a constitutional convention, (3) whether the Prime Minister's decision contravened section 56.1, and (4) whether the Prime Minister's decision contravened section 3 of the Charter.

Held, the application should be dismissed.

(1) The Prime Minister's power to advise the Governor General to dissolve Parliament can be seen as a prerogative because it is discretionary, it is not based on a statutory grant of power and has its roots in the historical power of the Monarch. The justiciability of a prerogative depends on whether its exercise affects individual rights or legitimate expectations. The Prime Minister's advisory power at issue herein was not reviewable because no such rights or expectations were affected. It was a matter of policy reviewable only on Charter grounds. However, because prerogative powers must be exercised in accordance with the law, the Federal Court did have jurisdiction, pursuant to paragraph 18.1(4)(*f*) of the *Federal Courts Act*, to consider whether section 56.1 had been violated. The same could not be said about the Federal Court's jurisdiction to hear arguments concerning the existence of constitutional conventions. While the Federal Court has jurisdiction to consider constitutional issues on applications for judicial review, constitutional conventions are not law. As such, paragraph 18.1(4)(*f*) does not give it the authority to determine their existence. Here, the matter of convention was political in nature and was outside the jurisdiction of the Court.

(2) Section 56.1 did not create a new constitutional convention because the three-question test adopted by the Supreme Court of Canada in *Re: Objection by Quebec to a Resolution to amend the Constitution* for determining the existence of a convention was not met. Particularly, there were no precedents with respect to the existence of a convention from the relevant actors, and those actors (the Prime Minister and the Governor General) clearly did not recognize the existence of such precedent. In addition, there was no evidence of an explicit agreement between the political actors of their intent to create a new convention.

(3) Subsection 56.1(1) explicitly leaves the Governor General's discretion to dissolve Parliament pursuant to Crown prerogative untouched. A request for dissolution following a vote of non-confidence would not violate section 56.1. As a result, the word "must" in subsection 56.1(2) loses some authority. Votes of non-confidence are political in nature and lack legal aspects. It should be left to the Prime Minister to determine when the government has lost the confidence of the House of Commons. This determination should not be turned into a legal issue for the courts to decide. It was not for the Court to interpret section 56.1 in a manner that would make political issues justiciable.

(4) No legal reasons were provided to support the submission that the Prime Minister's decision contravened the principles of electoral fairness enshrined in section 3 of the Charter. Such a finding would have had an enormous impact on parties outside of this application since it would have meant that every election since April 17, 1982, also violated section 3.

STATUTES AND REGULATIONS CITED

Canada Elections Act, S.C. 2000, c. 9, s. 56.1 (as enacted by S.C. 2007, c. 10, s. 1).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 3.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 50, 101.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 41.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2(1) "federal board, commission or other tribunal" (as am. *idem*, s. 15), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27), 57 (as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54).

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CASES CITED

APPLIED:

Black v. Canada (Prime Minister) (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228, 147 O.A.C. 141 (C.A.); *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, (1981), 34 Nfld. & P.E.I.R. 1, 125 D.L.R. (3d) 1, [1981] 6 W.W.R. 1.

CONSIDERED:

Raza v. Canada (Minister of Citizenship and Immigration), [1999] 2 F.C. 185, (1998), 157 F.T.R. 161, 47 Imm. L.R. (2d) 257; *Pelletier v. Canada (Attorney General)*, 2008 FCA 1, [2008] 3 F.C.R. 40, 289 D.L.R. (4th) 77, 69 Admin. L.R. (4th) 192; *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, (1982), 140 D.L.R. (3d) 385, 45 N.R. 317; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418, 154 D.L.R. (4th) 193; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, 227 D.L.R. (4th) 1, 108 C.R.R. (2d) 66; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, 348 A.R. 201, 239 D.L.R. (4th) 193; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, (1993), 118 N.S.R. (2d) 181, 100 D.L.R. (4th) 212.

REFERRED TO:

Friends of the Earth v. Canada (Governor in Council), 2008 FC 1183, [2009] 3 F.C.R. 201, 299 D.L.R. (4th) 583, 93 Admin. L.R. (4th) 18.

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Canada. Parliament. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings*, No. 18 (December 7, 2006), at page 18:145 (Hon. Robert Nicholson).

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APPLICATION for judicial review of a decision of the Prime Minister of Canada advising the Governor General of Canada to dissolve Parliament and set an election date. Application dismissed.

APPEARANCES

Peter M. Rosenthal for applicants.

Robert B. MacKinnon, *Catherine A. Lawrence* and *Agnieszka Zagorska* for respondents.

SOLICITORS OF RECORD

Roach, Schwartz & Associates, Toronto, for applicants.

Deputy Attorney General of Canada for respondents.

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The following are the reasons for judgment and judgment rendered in English by

SHORE J.:

I. Overview

[1] This is an application for judicial review of a decision of the Prime Minister of Canada, dated September 7, 2008. That decision was to advise the Governor General of Canada to dissolve the 39th Parliament and set an election date of October 14, 2008, in accordance with his conventional power.

[2] The applicants have applied for declaratory relief. Specifically, the applicants seek declarations to state:

a. that the Prime Minister's actions contravened section 56.1 [as enacted by S.C. 2007, c. 10, s. 1] of the *Canada Elections Act*, S.C. 2000, c. 9;

b. that the holding of the election on October 14, 2008 infringed the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (Charter);

c. that a constitutional convention exists that prohibits a prime minister from advising the Governor General to dissolve Parliament except in accordance with section 56.1 of the *Canada Elections Act*; and

d. an order that costs be awarded to the applicants or, that no costs be awarded if the application is dismissed.

II. Introduction

[3] It is most important, in considering the separation of powers under constitutional supremacy, that the Charter not be invoked in vain; otherwise, a lack of understanding ensues of, respectively, both the Charter and the separation of powers, giving neither their due, under constitutional supremacy.

[4] If the executive, legislative and judicial branches of government adhere to their respective obligations within their respective lines of demarcation, the result is responsible government. That does not mean that judicial review is not an option if, and when, the Charter is contravened by any single branch of government; however, paralysis would ensue if the Charter would simply be invoked in advocating one political view, advancing a particular interest, over another; that would simply stymie government action that devolves from responsibilities and rights granted through constitutional supremacy.

[5] The Federal Court is enabled to entertain a proceeding and to grant relief by way of federal statute; that is to review decisions of government instances, entities or those which, in and of themselves, constitute federal boards, commissions or other tribunals. Other than through federal statute, the Federal Court may not rule.

[6] The constitutional authority for the Parliament of Canada to have established (what became known as) the Federal Court is found in section 101 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]], and that is "for the better Administration of the Laws of Canada."

[7] In regard to each and every matter submitted in judicial review to the Federal Court, it depends on who acts on what, how and under what authority: in that vein, there exists a balancing act of necessity between judicial interference and judicial abdication.

III. Facts

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[8] The applicant, Democracy Watch, is a non-partisan, not-for-profit organization that advocates democratic reform, voter participation and government accountability. The applicant, Mr. Duff Conacher, President, Coordinator and Director of Democracy Watch, is a participant in this application in such capacities.

[9] In May 2007, Parliament passed Bill C-16 into law. Bill C-16 amended the *Canada Elections Act* to include section 56.1. The Conservative government of the time announced that Bill C-16 was to provide for a system of "fixed election dates" for Canada.

[10] The Governor General possesses the power to dissolve Parliament at his or her discretion pursuant to section 50 of the *Constitution Act, 1867*. Although there are no legal limits to the Governor General's discretion, other than the qualifier that each Parliament cannot last for more than five years, a political limitation exists in the form of a constitutional convention whereby the Governor General will only exercise power to dissolve Parliament when advised to do so by the Prime Minister. The Prime Minister has traditionally had unlimited discretion in regard to this advisory power.

[11] Constitutional conventions are non-legal rules that modify the strict legal rights of political office holders. They emerge through political usage and become political rules once the relevant office holders view them as being obligatory. As a result of their non-legal status, conventions, *per se*, have not been enforced by the courts and no legal sanction exists for their breach.

[12] On September 7, 2008, the Prime Minister advised the Governor General to dissolve Parliament and set a polling date for October 14, 2008. Upon receiving this advice, the Governor General used her power to dissolve Parliament and set the polling date that was requested. The Prime Minister's decision of September 7, 2008 is challenged by the applicants as being in contravention of section 56.1 and forms the basis of this application.

[13] The applicants allege that subsection 56.1(2), with its schedule for fixed election dates, eliminated the convention that the Prime Minister has unlimited discretion when advising the Governor General and replaced it with a new convention that obliges the Prime Minister only to exercise his discretion in accordance with subsection 56.1(2), or in a situation of a vote of non-confidence in the House of Commons. The applicants also allege that the Prime Minister's actions of September 7, 2008 are in contravention of section 56.1. In addition, the applicants allege that the decision to call an election before the time specified in section 56.1(2) has created an unfair election in violation of section 3 of the Charter.

IV. Issues

[14] There are five issues in this application:

(1) Is the Prime Minister's decision appropriate subject-matter for a judicial review?

(2) Did section 56.1 of the *Canada Elections Act* create a constitutional convention whereby the discretion of the Prime Minister, to advise the Governor General to dissolve Parliament, is only to be exercised in accordance with the terms of section 56.1 of the *Canada Elections Act*, unless there has been a prior vote of non-confidence?

(3) Did the Prime Minister's decision of September 7, 2008 contravene section 56.1 of the *Canada Elections Act*?

(4) Did the Prime Minister's decision of September 7, 2008 to advise the Governor General to dissolve Parliament contravene section 3 of the *Canadian Charter of Rights and Freedoms*?

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(5) Is declaratory relief an appropriate remedy in these circumstances?

V. Relevant provisions

[15] Section 56.1 of the *Canada Elections Act* states:

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009

[16] The applicants' submissions also mention section 50 of the *Constitution Act, 1867*, section 3 of the Charter and section 41 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]:

Section 50 of the *Constitution Act, 1867* states:

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Section 3 of the Charter, states:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Section 41 of the *Constitution Act, 1982*, states:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

[17] Paragraph 18.1(4)(*f*) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] and the definition of "federal board, commission or other tribunal" in subsection 2(1) [as am. by S.C. 2002, c. 8, s. 15] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)] are also required:

2. (1) …

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or

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established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*

…

18.1 (1) …

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

…

(*f*) acted in any other way that was contrary to law.

VI. Analysis of the Court of the parties' submissions as to the respective issues (categorized in this manner due to the voluminous respective materials submitted by the parties)

Issue 1: Is the Prime Minister's decision appropriate subject-matter for a judicial review?

[18] The applicants make no submissions on this issue.

[19] The respondents make several submissions as to why the Prime Minister's decision cannot be judicially reviewed. They submit that the applicants must satisfy the Court that the subject of the application is reviewable under section 18.1 of the *Federal Courts Act*, before the applicants are allowed to bring an application for judicial review (respondents' memorandum of fact and law, at paragraph 39).

[20] The respondents also submit that the Prime Minister's advice is not a "decision" within the meaning of section 18.1 of the *Federal Courts Act*. They submit that the decision is the Governor General's to make and that the Prime Minister's advice is not legally binding on the Governor General (respondents' memorandum of fact and law, at paragraph 41).

[21] The respondents submit that because the Governor General exercises Crown prerogative and not statutory authority when he or she dissolves Parliament and calls an election, neither the remedies listed in section 18 [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act* nor the relief listed in section 18.1 are available to the applicants (respondents' memorandum of fact and law, at paragraph 42).

[22] The respondents submit that seeking judicial review of the Prime Minister's advice is essentially seeking judicial review of the Governor General's decision, which is beyond the jurisdiction of section 18.1 (respondents' memorandum of fact and law, at paragraph 43).

[23] The respondents cite the case of *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.), for the proposition that the dissolution of Parliament involves political considerations that are not for the courts to assess (respondents' memorandum of fact and law, at paragraph 45).

[24] The respondents also cite the decision of Justice Robert Barnes in *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 F.C.R. 201, to state that one of the guiding principles of justiciability is that all branches of government must be sensitive to the separation of powers (respondents' memorandum of fact and law, at paragraph 46).

[25] The applicants' claim that the Prime Minister's advice violates section 3 of the Charter is appropriate subject-matter for judicial review. The respondents submit the power to dissolve Parliament is a prerogative (respondents' memorandum of fact and law, at paragraph 43); it has been ruled that prerogative powers are subject to judicial review if the exercise of such powers violates Charter rights. In *Black v. Canada (Prime*

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Minister), above, the Court of Appeal for Ontario held that "[b]y s. 32(1)(a), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim" (at paragraph 46).

[26] At first blush, it appears that the Prime Minister's decision to advise the Governor General is not reviewable because the power to dissolve Parliament is the Governor General's prerogative, not the Prime Minister's; however, the Prime Minister's power can be seen as a prerogative because it is discretionary, it is not based on a statutory grant of power and has its roots in the historical power of the Monarch. Although actual discretion therein lies with the Governor General, the case of *Black v. Canada (Prime Minister)* held that the Prime Minister also has the capacity to exercise prerogative powers (at paragraph 33).

[27] The appellant in *Black v. Canada (Prime Minister)* argued that the Prime Minister did not exercise Crown prerogative by advising the Queen not to bestow an honour on Black, because the final decision was the Queen's. The Court rejected this argument and held "whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr. Black's appointment, he was exercising the prerogative power of the Crown relating to honours" (at paragraph 35). This shows that even advisory decisions can be reviewed as exercises of prerogative.

[28] The Court in *Black v. Canada (Prime Minister)* held that "[t]he exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual" [at paragraph 51].

[29] It is the Court's conclusion that the Prime Minister's advisory power is not, in and of itself, reviewable, because it does not affect the rights or legitimate expectations of an individual and is a matter of high policy that is only reviewable on Charter grounds; however, it stands to reason that prerogative powers must be exercised in accordance with the law and this application asks whether section 56.1 has been violated. It appears that the Federal Court has jurisdiction over this limited issue pursuant to paragraph 18.1(4)(*f*) of the *Federal Courts Act*, if, as the applicants allege, that decision was made in contravention of a federal statute.

[30] There is also an issue about whether the Federal Court has jurisdiction to hear arguments about the existence of constitutional conventions. The Federal Court has jurisdiction to consider constitutional issues on applications for judicial review pursuant to paragraph 18.1(4)(*f*) which permits judicial review if a federal board, commission or other tribunal "acted … contrary to law." The case of *Raza v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 185 (T.D.) held that paragraph 18.1(4)(*f*) allows the Federal Court to consider constitutional arguments even when the tribunal under review may not make constitutional determinations (at paragraph 25).

[31] Paragraph 18.1(4)(*f*) states that a decision may be reviewed if the decision maker acted in a way that was "contrary to law" and because constitutional conventions are not "law", it appears that this section does not give the Federal Court authority to determine their existence. A finding that a decision maker acted contrary to a convention does not necessarily mean that the decision maker acted "contrary to law."

[32] The only precedent to establish the Federal Court's jurisdiction to determine questions of convention is *Pelletier v. Canada (Attorney General)*, 2008 FCA 1, [2008] 3 F.C.R. 40. The Federal Court of Appeal gave a short judgment stating that the respondent's convention argument lacked merit (at paragraphs 18, 20). The respondent's argument was dismissed on the grounds that the respondent would have to serve notice of a constitutional question on the Attorneys General of Canada and the provinces pursuant to section 57 [as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54] of the *Federal Courts Act* before their claim could even be heard (at paragraph 21).

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[33] It is noted that the Federal Court of Appeal, by hearing the convention argument and by invoking section 57, did go further in its assertions than held previously. The Federal Court of Appeal states that the respondent was required to provide notice to the attorneys general because the convention "would have an effect on the validity of the second termination order" (at paragraph 21). This is noteworthy because a finding that a convention was breached would not have an impact on the legality of a termination order because conventions are unenforceable in the courts.

> Issue 2: Did section 56.1 of the *Canada Elections Act* create a constitutional convention whereby the discretion of the Prime Minister, to advise the Governor General to dissolve Parliament, is only to be exercised in accordance with the terms of section 56.1 of the *Canada Elections Act*, unless there has been a prior vote of non-confidence?

[34] Constitutional conventions are non-legal rules that regulate how legal powers are to be exercised. Typically, they emerge based on the manner in which "custom" is used by office holders and can be said to exist once the relevant office holders consider it incumbent to follow such customs. To say that they are non-legal rules means that any remedy for a convention which has been breached lies in the political, and not the legal, arena. In that vein, the Supreme Court of Canada has ruled on the existence of conventions in the cases of *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*) and *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 (*Quebec Veto Reference*) but the Supreme Court of Canada did not give binding judgments in these cases.

[35] Turning to the convention at issue in this case, it is noted that the Prime Minister has traditionally had the discretion to advise the Governor General to dissolve Parliament. The Prime Minister has this discretion due to the conventions of responsible government whereby the executive branch must be responsible to the legislative branch (Peter Hogg, *Constitutional Law of Canada*, 5th edition, Volume 1, at page 277).

[36] The applicants submit that a new constitutional convention was created when Bill C-16 received Royal Assent (applicants' memorandum of fact and law, at paragraph 47). The applicants submit that the new convention limits the discretion of the Prime Minister to advise the Governor General to dissolve Parliament to two situations; first, in accordance with the electoral schedule in subsection 56.1(2), and second, in a situation of a vote of non-confidence in the House of Commons (applicants' memorandum of fact and law, at paragraphs 42, 44, 46).

[37] The applicable test for determining the existence of a convention was adopted by the Supreme Court in the *Patriation Reference*. That test consists of three questions: first, what are the precedents; second, did the actors in the precedents believe that they were bound by a rule; and third, is there a reason for the rule?

[38] The applicants submit that the three-question test has been met in this case. In respect of the first question, the applicants submit that there are numerous precedents to establish the existence of a new convention, such as the support of the leaders of federal political parties for Bill C-16, excerpts from proceedings of Parliament stating that the purpose of Bill C-16 is to establish fixed election dates and the fact that legislation for fixed election dates has been established and followed by the executive branches in several provinces (applicants' memorandum of fact and law, at paragraphs 36, 44).

[39] The applicants' submission in respect of the second question is that the relevant political actors are the leaders of the federal political parties (applicants' memorandum of fact and law, at paragraph 37).

[40] With regard to the final question in the test, the applicants submit that there were several reasons for the creation of a new convention. They submit various excerpts from press releases from the Conservative government of the time, as well as statements to Parliament to the effect that the goals of Bill C-16 were to increase fairness, transparency and predictability in the federal electoral system (applicants' memorandum of fact and law, at paragraphs 36, 46).

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[41] In reply, the respondents submit that there are no precedents to demonstrate the existence of a new convention. The respondents are of the view that the only relevant precedent is the Prime Minister's decision of September 7, 2008, which contradicts the applicants' submission that a new convention has been created (respondents' memorandum of fact and law, at paragraph 27).

[42] The respondents submit that the second question in the test has not been met because the relevant office holders are the Prime Minister and the Governor General. They submit that statements from one or more prime ministers supporting the existence of a new restriction would be necessary to establish a constitutional convention (respondents' memorandum of fact and law, at paragraph 54).

[43] The respondents did not make submissions regarding the third question of the test.

[44] The applicants also submit that there is a second way that a constitutional convention can be created, separate from the Supreme Court's test that recognizes conventions through usage. This second way consists of an explicit agreement by the political actors to the effect that they would behave in certain ways. The applicants submit that Bill C-16 was such an agreement (applicants' memorandum of fact and law, at paragraphs 32, 36). In making this submission, the applicants rely on Andrew Heard's book *Canadian Constitutional Conventions: The Marriage of Law and Politics* [Toronto: Oxford University Press, 1991]. In his book, Heard writes that interpreting conventions as being established only after a precedent occurs is incorrect (applicants' record, Volume III, at page 423). Heard [at page 13] refers to the 1930 Imperial Conference to support this statement. During that Conference, it was agreed that British ministers could no longer advise the monarch on the appointment of governors to the Dominions. According to Heard [at page 13], although there was no precedent for this act, it was evident that the powers of the British ministers were extinct once the agreement was signed (applicants' record, Volume III, at page 423).

[45] Although it is not submitted by the applicants, Peter Hogg acknowledges the concept of creating conventions by explicit agreement in his book *Constitutional Law of Canada*. This method consists of all "relevant officials" agreeing to adopt a certain rule of conduct. If that were to occur, Hogg writes, the rule "may immediately come to be regarded as obligatory" (Hogg, Volume 1, at page 27). It should be noted that Hogg qualifies his statements in footnote 139 where he refers to R. T. E. Latham's 1949 book *The Law and the Commonwealth* [London: Oxford University Press]. In his book, Latham points out that an agreement in the domestic sphere "rarely, if ever" creates a convention, because the relevant actors lack the ability to bind the behaviour of their successors; rather, Latham states that explicit agreements have been known to create conventions in Commonwealth affairs (Hogg, Volume 1, at page 27, footnote 139).

[46] Regardless of which of the two methods is adopted by this Court, whether it is the Supreme Court's test or the explicit agreement method, the applicants have failed to establish the existence of a convention. The three question test fails because there are no precedents in this regard from the relevant actors. It is clear in this case that the relevant actors are the Prime Minister and the Governor General. The applicants' submission that the relevant actors consist of the leaders of the federal political parties does not stand to reason because the leaders of the political parties have no power, be it conventional or legal, to dissolve Parliament. In the *Quebec Veto Reference*, the Supreme Court held [at page 816] that "Recognition by the actors in the precedents is not only an essential element of conventions. In our opinion, it is the most important element since it is the normative one, the formal one which enables us unmistakably to distinguish a constitutional rule from a rule of convenience or from political expediency." It is clear that there has been no such recognition in this case.

[47] The explicit agreement method fails because the intention of the political actors, seen primarily through statements of Cabinet members, has not been explicit. Even if, in fact, it is explicit, it is doubtful that a domestic convention can be initiated solely through the explicit agreement of the parties, recognizing that such agreement has only been acknowledged on an international level within the Commonwealth framework. Also,

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as has been stated, the relevant actors in this convention are the Governor General and the Prime Minister and there are no statements from either of the actors to the effect that a new convention had been created.

Issue 3: Did the Prime Minister's decision of September 7, 2008 contravene section 56.1 of the *Canada Elections Act*?

[48] This is a question of statutory interpretation. The Supreme Court of Canada held that the preferred approach to statutory interpretation is to read the words of an Act in their entire context and "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21).

[49] Section 56.1 has two parts: subsection 56.1(1) leaves the Governor General's power untouched and subsection 56.1(2) states when elections are to be held.

[50] The applicants submit that the objective of section 56.1 is to preclude the calling of "snap elections" by prohibiting prime ministers from requesting dissolution except in accordance with the terms of section 56.1(2) or if there has been a prior vote of non-confidence (applicants' memorandum of fact and law, at paragraph 60). They ask this Court to interpret section 56.1 to include these limitations.

[51] The respondents reply with evidence that shows section 56.1 was never intended to be legally binding on the Prime Minister (respondents' memorandum of fact and law, at paragraphs 14–15). They also submit that amendments to the Office of the Governor General cannot be accomplished by ordinary statute, but require a constitutional amendment under section 41 of the *Constitution Act, 1982*.

[52] The respondents submit the purpose of section 56.1 is to create a "statutory expectation" of a certain date for election, without making the expected election dates legally enforceable (respondents' memorandum of fact and law, at paragraph 38). This submission causes an interpretative problem, namely, if the respondents are correct, why did Parliament use the mandatory word "must" in subsection 56.1(2)? In order to resolve this problem, the Court must examine the section's constitutional and legislative context.

[53] It is important to examine the constitutional context because Canada has a system of constitutional supremacy that lays out the boundaries of Parliament's power. In this case, the constitutional context is that the Governor General has discretion to dissolve Parliament pursuant to Crown prerogative and section 50 of the *Constitution Act, 1867*. Any tampering with this discretion may not be done via an ordinary statute, but requires a constitutional amendment under section 41 of the *Constitution Act, 1982*, which requires unanimous consent of all provincial governments as well as the federal government before a change can be made to the "office of the Governor General". Subsection 56.1(1) explicitly leaves the Governor General's discretion untouched.

[54] The legislative context is reflected in the Hansard record and press releases from the Conservative government of the time. The applicants use Hansard extensively in their submissions to attempt to show the intention of Parliament. The respondents submit that Hansard, alone, should not be used in this context because it could lead to ambiguity in respect of the intention and meaning of the legislation itself (respondents' memorandum of fact and law, at paragraph 33).

[55] The respondents are correct that the Hansard record is ambiguous, especially in respect of the intended effects of section 56.1. For example, the applicants submit a statement from the Prime Minister to the House of Commons that the fixed-date legislation was "modelled on those of the provinces, to set elections every four years and set the next election for October 2009" (applicants' memorandum of fact and law, at paragraph 5 [see also *House of Commons Debates*, No. 029 (May 30, 2006), at page 1722]). This suggests an intention to change the electoral rules. The applicants' memorandum also contains a statement from Minister Rob Nicholson that "by providing that elections are to be held every four years in October, the bill establishes a

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statutory expectation that the relevant political and administrative officers will govern themselves accordingly to accomplish this end—working within the rules and conventions of parliamentary and responsible government" (applicants' memorandum of fact and law, at paragraph 8 [see also Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings*, No. 18 (December 7, 2006), at page 18:145]). This suggests an intention to leave the existing electoral rules unchanged. The respondents also point to other statements of Minister Nicholson, such as "[t]he Governor General's legal power under the Constitution and the exercise of that power on the advice of the Prime Minister are fundamentally and inseparably linked. If one limits the Prime Minister's ability to advise, one risks constraining the Governor General's power in a way that would be unconstitutional" to show that there was never any intention for Bill C-16 to bind the Prime Minister (respondents' memorandum of fact and law, at paragraph 14 [see also Standing Committee on Procedure and House Affaires. *Evidence*, No. 018 (September 26, 2006), at page 2]). It is the Court's conclusion that the Hansard record is ambiguous and does not establish an intention to bind the Prime Minister.

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[56] A quote from Hansard that is not raised by the parties is a statement by Minister Rob Nicholson before the Standing Committee on Procedure and House Affairs. When questioned about whether Bill C-16 would leave the Prime Minister with the power to recommend the dissolution of Parliament at any time before the prescribed date, Minister Nicholson said that Bill C-16 "is crafted in a way that the prerogatives of the Prime Minister to advise the Governor General, and the Governor General's prerogatives, are in no way diminished" [emphasis added] (applicants' record, Volume I, Exhibit "I" to the affidavit of Duff Conacher, at page 90 [see also Standing Committee on Procedure and House Affairs. *Evidence*, No. 18 (September 26, 2006), at page 5]). This statement is another example of the ambiguity of Hansard, if used alone, and the statement demonstrates an intention not to legally bind the Prime Minister's discretion.

[57] The applicants ask this Court to interpret section 56.1 to include a condition that the Prime Minister will not request dissolution unless there has been a prior vote of non-confidence. The applicants submit that Bill C-16 had the purpose of requiring that federal elections be held on specific dates unless there is a prior vote of non-confidence (applicants' memorandum of fact and law, at paragraph 1). The applicants submit statements from Hansard as evidence of this purpose (applicants' memorandum of fact and law, at paragraphs 6–9). It is on Hansard that the applicants hang their case and, as specified, the Hansard record, alone, is ambiguous. The applicants' submissions are not supported by the language of section 56.1. Subsection 56.1(1) states that the Governor General's discretion is not affected by section 56.1. Subsection 56.1(2) states that elections must be held on certain dates and says nothing about votes of non-confidence.

[58] The applicants ask this Court to perform complicated interpretative footwork. One of the problems with their approach is that the text of section 56.1 is silent on votes of non-confidence. Section 56.1 cannot be read as legislating binding dates for elections because, as the respondents point out, the government could fall at any time as a result of a vote of non-confidence (respondents' memorandum of fact and law, at paragraph 38). The applicants agree that a request for dissolution following a vote of non-confidence would not violate section 56.1 (applicants' memorandum of fact and law, at paragraph 60). Based on this agreement, the imperative word "must" in subsection 56.1(2) loses some of its authority. It is the Court's conclusion that, based on this exemption, it would be simpler to interpret section 56.1 as not being binding on the Prime Minister than to interpret it as having two unwritten clauses, the first to bind the Prime Minister to the dates in subsection 56.1(2) and the other to exempt the Prime Minister when a vote of non-confidence, which section 56.1 neither defines nor mentions, occurs.

[59] It is also important that "vote of non-confidence" does not have a firm definition. Hogg writes that there are several ways that a government can lose the confidence of Parliament. He writes that if the House of Commons passes a motion of "no confidence", the government will have lost the confidence of the House. He also writes that "the defeat of the government on any important vote is usually regarded as a withdrawal of confidence" (emphasis added). He also writes that a defeat of the government on a minor matter is not usually considered to be a loss of confidence, but he does not rule out that possibility (Hogg, Volume 1, at page 288). A government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the Prime Minister. If this Court is to interpret section 56.1 in the

manner the applicants suggest, this Court would have to define a "vote of non-confidence" or else leave section 56.1 ambiguous. It is the Court's conclusion that votes of non-confidence are political in nature and lack legal aspects. The determination of when a government has lost the confidence of the House should be left to the Prime Minister and not be turned into a legal issue for the courts to decide.

Issue 4: Did the Prime Minister's decision of September 7, 2008 to advise the Governor General to dissolve Parliament contravene section 3 of the *Canadian Charter of Rights and Freedoms*?

[60] The applicants submit that the Prime Minister's decision contravened the principles of electoral fairness enshrined in section 3 of the Charter. The basis of the applicants' submission is their belief that the Prime Minister's discretion creates an unfair advantage for the Prime Minister's political party. The applicants submit that their interpretation of section 56.1 eliminates that which the applicants perceive as a potential problem in the electoral system and that it was unfair for the Prime Minister not to abide by the terms of that section (applicants' memorandum of fact and law, at paragraph 52).

[61] There are several problems with the applicants' submissions. First, the applicants do not provide any legal reasons to support their submission that the election of 2008 was unfair. The Supreme Court outlined the purpose of section 3 in the case of *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912. In that case, the Court held that the purpose of section 3 is to protect the "right of each citizen to play a meaningful role in the electoral process" (at paragraph 26). The Supreme Court defined a "fair election" in the case of *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 as the right to "meaningfully participate" in the electoral process. The Court held that participation is "meaningful" when a citizen is able to vote in an informed manner (at paragraph 71). The applicants submit that the Prime Minister's discretion "differentiates between political parties" in a way that has an adverse impact on the ability of citizens to play a "meaningful role in the electoral process" (applicants' memorandum of fact and law, at paragraph 50). The respondents reply that there is no evidence that the applicants, or the political parties whose interests they purport to defend, were disadvantaged by the dissolution of Parliament on September 7, 2008 (respondents' memorandum of fact and law, at paragraphs 72, 75 and 76).

[62] Second, a finding that the election of 2008 violated section 3 would have an enormous impact on parties outside of this application. The respondents submit that a finding that the election of 2008 violated section 3 would mean that every federal election since April 17, 1982 also violated section 3 (respondents' memorandum of fact and law, at paragraph 78). Although the applicants try to limit their argument to so-called "snap elections" (elections that are called while the Prime Minister has the confidence of the House of Commons), the Governor General has complete discretion to dissolve Parliament and the Prime Minister has complete discretion to advise the Governor General to dissolve Parliament. Therefore, all Canadian federal elections could be perceived to be "snap elections" because none of them have any legal limitation on when they are to be called.

Issue 5: Is declaratory relief an appropriate remedy in these circumstances?

[63] The applicants request a declaration to state that the election of October 14, 2008 contravened section 56.1.

[64] The applicants also request a declaration to state that the election of 2008 infringed the section 3 right of all Canadians.

[65] In addition, the applicants request this Court to declare that a constitutional convention has been established that prohibits the Prime Minister from advising the Governor General to dissolve Parliament, except when done in accordance with section 56.1 or after the Prime Minister has lost the confidence of the House of Commons (applicants' memorandum of fact and law, at paragraph 70).

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[66] Having explained the Court's jurisdiction, none of the above warrant the Court's declaration.

VII. Court Conclusions as to the Respective Issues

Issue 1: Is the Prime Minister's decision appropriate subject-matter for a judicial review?

[67] Further to the applicants claim that an exercise of prerogative violated section 3 of the Charter and thereby this Court has a duty to determine that claim, exercises of Crown prerogative are subject to judicial review if they violate Charter rights.

[68] The case of *Black v. Canada (Prime Minister)*, above, shows that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. Although some prerogatives are reviewable, the Court must still determine whether a particular prerogative is justiciable. The hallmark of justiciability is whether the exercise of prerogative affects the rights or legitimate expectations of an individual. In the present case, no legal rights or legitimate expectations were affected, other than a claim having been made under the Charter, thus, the Prime Minister's advice is not reviewable. That being said, paragraph 18.1(4)(*f*) of the *Federal Courts Act* gives the Court the power to review, if, in fact, a decision maker acted "contrary to law" which is what the applicants imply in regard to section 56.1 of the *Canada Elections Act*.

[69] In this particular case, at this specific time, based on precedents before this Court, the matter of convention, in this set of circumstances (as analysed above), is political in nature and is outside the jurisdiction of the Court, bearing in mind the separation of powers under constitutional supremacy.

Issue 2: Did section 56.1 of the *Canada Elections Act* create a constitutional convention whereby the discretion of the Prime Minister, to advise the Governor General to dissolve Parliament, is only to be exercised in accordance with the terms of section 56.1 of the *Canada Elections Act*, unless there has been a prior vote of non-confidence?

[70] The Court rejects the applicants' submissions because the three question test has not been met. The Court agrees with the respondents that there are no precedents to establish the existence of a new convention that limits the Prime Minister's discretion to advise the Governor General.

[71] The applicants' attempt to use the "explicit agreement" method fails for two reasons. First, the method has only been used in international agreements within the Commonwealth context. Second, no agreement is evident because the legislative record is ambiguous and section 56.1 does not mention conventions.

[72] A court must exercise extreme caution when deciding whether a convention exists. Although courts have not given legal sanctions when a convention has been breached, the opinions of courts on these matters have historically had enormous repercussions. In this specific case, the applicants' evidence is ambiguous and does not lead the Court to the conclusion that a convention exists.

Issue 3: Did the Prime Minister's decision of September 7, 2008 contravene section 56.1 of the *Canada Elections Act*?

[73] It is vitally important under constitutional supremacy that the separation of powers be respected. Justice McLachlin (as she then was, prior to becoming Chief Justice) writes at page 389 of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other. [Emphasis added.]

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[74] The applicants ask this Court to interpret section 56.1 in a manner that would make political issues justiciable. If their submission that section 56.1 is intended to force the Prime Minister to only request dissolution after a vote of non-confidence is accepted, litigants could take the Prime Minister to court to determine whether or not a government had lost the confidence of the House of Commons. Similarly, a court would be able to force the Prime Minister to dissolve Parliament, effectively dictating to the Governor General to exercise his or her discretion.

[75] It is the Court's conclusion that the applicants' submissions do not demonstrate a proper understanding of the separation of powers. This Court disposes of this matter to ensure that political issues (in time and context) are not made to be legal ones. The remedy for the applicants' contention is not for the Federal Court to decide, but rather one for the count of the ballot box.

Issue 4: Did the Prime Minister's decision of September 7, 2008 to advise the Governor General to dissolve Parliament contravene section 3 of the *Canadian Charter of Rights and Freedoms*?

[76] No evidence was submitted by the applicants to the Court that the 2008 election was "unfair", as based on the factors in *Figueroa* and *Harper*, above. In the case of *Figueroa*, the Supreme Court held that section 3 gives the right to "meaningful participation" in the electoral process (at paragraph 25). Although the applicants allege surprise and disruption prior to the election, it is insufficient to ground a claim on such an issue because, as the respondents submit, there is no evidence that Democracy Watch could not perform its normal functions during the election period (applicants' memorandum of fact and law, at paragraphs 20–22; respondents' memorandum of fact and law, at paragraph 74).

Issue 5: Is declaratory relief an appropriate remedy in these circumstances?

[77] Due to all of the Court's previous reasons on each of the respective issues, no declaration is appropriate.

[78] In light of all the above, the application is denied, however, without costs due to the nature of the proceeding which necessitated that the separation of powers, on the issues in question, be explained for the understanding of the public.

JUDGMENT

THIS COURT ORDERS that the application of the applicants be denied, however, without costs due to the nature of the proceeding which necessitated that the separation of powers, on the issues in question, be explained for the understanding of the public.

2009 FC 920 (CanLII)

Privy Council Appeal No. 121 *of* 1928.

In the matter of a Reference as to the meaning of the word "persons" in Section 24 of The British North America Act, 1867.

Henrietta Muir Edwards and others - - - - *Appellants*

v.

The Attorney-General of Canada and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1929.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD DARLING.
LORD MERRIVALE.
LORD TOMLIN.
SIR LANCELOT SANDERSON.

[*Delivered by the* LORD CHANCELLOR.]

By section 24 of the British North America Act, 1867, it is provided that "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a Member of the Senate and a Senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said province: Emily F. Murphy is a police magistrate in and for the said province; and Irene Parlby is a member of

the Legislative Assembly of the said province and a member of the Executive Council thereof.

On the 29th August, 1927, the appellants petitioned the Governor-General in Council to refer to the Supreme Court certain questions touching the powers of the Governor-General to summon female persons to the Senate, and upon the 19th October, 1927, the Governor-General in Council referred to the Supreme Court the aforesaid question. The case was heard before Chief Justice Anglin, Mr. Justice Duff, Mr. Justice Mignault, Mr. Justice Lamont and Mr. Justice Smith, and upon the 24th April, 1928, the Court answered the question in the negative; the question being understood to be "Are women eligible for appointment to the Senate of Canada."

The Chief Justice, whose judgment was concurred in by Mr. Justice Lamont and Mr. Justice Smith, and substantially by Mr. Justice Mignault, came to this conclusion upon broad lines mainly because of the Common Law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament.

Mr. Justice Duff, on the other hand, did not agree with this view. He came to the conclusion that women are not eligible for appointment to the Senate upon the narrower ground that upon a close examination of the British North America Act of 1867 the word "persons" in section 24 is restricted to members of the male sex. The result therefore of the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate.

Their Lordships are of opinion that the word "persons" in section 24 *does* include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points, viz. :—

(i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases.

(ii) The internal evidence derived from the Act itself.

As the learned Counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points, viz. :—

(i) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in

later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "*Nihil autem neque publicae neque privatae rei, nisi armati, agunt*": Tacitus Germania, C. 13. Yet the tribes did not despise the advice of women. "*Inesse quin etiam sanctum et providum putant, nec aut consilia earum aspernantur aut responsa neglegunt*": Germania C. 8.

The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (A.D. 211) laying it down. "*Feminae ab omnibus officiis civilibus vel publicis remotae sunt*": Dig. 1.16.195.

The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a Writ of Summons to the House of Lords.

Various authorities are cited in the recent case of *Viscountess Rhondda's claim* [1922], 2 A.C. 339 where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of Members of Parliament: Coke, 4 Inst., page 5.

Chorlton v. *Lings* (1868), L.R. 4 C.P. 374; or of Town Councillor: *The Queen* v. *Harrold* (1872), L.R. 7 Q.B. 361; or to be elected members of the County Council: *Beresford Hope* v. *Sandhurst* (1889) 23 Q.B.D. 79.

They were excluded by the common law from taking part in the administration of justice either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy: Coke, 2 Inst. 119, 3 Bl. Comm. 362.

Other instances are referred to in the learned judgment of Mr. Justice Willes in *Chorlton* v. *Lings* (*supra*).

No doubt in the course of centuries there may be found cases of exceptional women and exceptional instances, but as Lord Esher said in *de Souza* v. *Cobden* [1891] 1 Q.B. 687, at page 691, "By the Common Law of England women are not in general deemed capable of exercising public functions, although there are certain exceptional cases where a well recognised custom to the contrary has become established." An instance may be referred to in the case of women being entitled to act as churchwardens and as sextons, the latter being put upon the ground that a sexton's duty was in the nature of a private trust: *Olive* v. *Ingram* (1738)

7 Mod. 263. Also of being appointed as overseer of the poor: *The King* v. *Stubbs* (1788) 2 T.R. 395. The tradition existed till quite modern times: see *Bebb* v. *Law Society* [1914] 1 Ch. 286, where it was held by the Court of Appeal that by inveterate usage women were under a disability by reason of their sex to become attorneys or solicitors.

The passing of Lord Brougham's Act in 1850 does not appear to have greatly affected the current of authority. Section 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided.

The application and purview of that Act came up for consideration in *Chorlton* v. *Lings*, *ubi supra*, where the Court of Common Pleas was required to construe a statute passed in 1861, which conferred the Parliamentary franchise on every man possessing certain qualifications and registered as a voter. The chief question discussed was whether by virtue of Lord Brougham's Act the words " every man " included women. Chief Justice Bovill, having regard to the subject matter of the statute and its general scope and language and to the important and striking nature of the departure from the Common Law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the term " man " and held that the word was intentionally used expressly to designate the male sex. Willes, J., said : " It is not easy to conceive that the framer of that Act when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language."

Great reliance was placed by the respondents to this appeal upon that decision, but in our view it is clearly distinguishable.

The case was decided on the language of the Representation of the People Act, 1867, which provided that " every man " with certain qualifications and " not subject to any legal incapacity " should be entitled to be registered as a voter. Legal incapacity was not defined by the Act and consequently reference was necessary to the Common Law disabilities of women.

A similar result was reached in the case of *Nairn* v. *University of St. Andrews* [1909], A.C. 147, where it was held under section 27 of the Representation of the People (Scotland) Act, 1868, which provided that every person whose name is for the time being on the register of the General Council of such university shall, being of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university, that the word " person " did not include women, but the Lord Chancellor, Lord Loreburn, referred to the position of women at Common Law and pointed out that they were subject to a legal incapacity. Both in this case and in the case of the Viscountess Rhondda the various judgments emphasise the fact that the legislature in dealing with the matter cannot be taken to have departed from the usage of

centuries, or to have employed loose and ambiguous words to carry out a so momentous and fundamental change.

The judgment of the Chief Justice of the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Mr. Justice Duff with regard to them, when he says that section 24 of the British North America Act, 1867, must not be treated as an independent enactment. The Senate, he proceeds, is part of a Parliamentary system, and in order to test the contention based upon this principle that women are excluded from participating in working the Senate or any other institution set up by the Act one is bound to consider the Act as a whole and its bearings on this subject of the exclusion of women from public office and place.

Their Lordships now turn for a moment to the special history of the development of Canadian legislature as bearing upon the matter under discussion.

The Province of Canada was formed by the Union under the Act of Union, 1840, of the two provinces of Upper and Lower Canada respectively, into which the Province of Quebec as originally created by the Royal Proclamation of the 7th October, 1763, and enlarged by the Quebec Act, 1774, had been divided under the Constitutional Act of 1791. In the Province of Quebec from its first establishment in 1763 until 1774, the Government was carried on by the Governor and the Council, composed of four named persons and eight other "*persons*" to be chosen by the Governor from amongst the most considerable of the inhabitants or of other persons of property in our said Province.

The Quebec Act of 1774 entrusted the government of the Province to a Governor and Legislative Council of such "*persons*" resident there, not exceeding 23, nor less than 17, as His Majesty shall be pleased to appoint.

The Constitutional Act of 1791 upon the division of the Province of Quebec into two separate provinces to be called the Provinces of Upper and Lower Canada established for each province a Legislature composed of the three estates of Governor, Legislative Council and Assembly empowered to make laws for the peace, order and good government of the provinces The Legislative Council was to consist of a sufficient number of discreet and proper "persons" not less than 7 for Upper Canada and 15 for Lower Canada.

Under the Act of Union, 1840, these two provinces were reunited so as to constitute one province under the name of the Province of Canada and the Legislative Council was to be composed of such "persons" being not fewer than 20 as Her Majesty shall think fit.

In 1865 the Canadian Legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective.

The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word " persons " is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only.

In Quebec, just as in England, there can be found cases of exceptional women and exceptional instances. For example, in certain districts, namely, at Trois Rivières in 1820 women apparently voted, while in 1828 the Returning Officer in the constituency of the Upper Town of Quebec refused to receive the votes of women.

In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed because the Imperial Government objected to another section in it.

The matter, however, was not left there and in 1849 by a statute of the Province of Canada, 12 Vict. c. 27, s. 46, it was declared and enacted that no woman is or shall be entitled to vote at any Election, whether for any county or riding, city or town, of members to represent the people of this Province in the Legislative Assembly thereof.

The development of the maritime provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council which was both a legislative and an executive body composed of such fitting and discreet " *persons,*" not exceeding 12 in number, as the Governor should nominate. A General Assembly for the Province was called in 1757, and thereafter the legislature consisted of a Governor and Council and General Assembly. In 1838 the Executive Authority was separated from the Legislative Council which became a distinct legislative branch only.

In 1784 a part of the territory of the Province of Nova Scotia was erected into a separate province to be called New Brunswick, and a separate Government was established for the Province consisting of a Governor and Council composed of certain named persons and other persons " to be chosen by you from amongst the most considerable of the inhabitants of or persons of property " but required to be men of good life and of ability suitable to their employment.

In 1832 the Executive Authority was separated and made distinct from the Legislative Council.

In the Province of Nova Scotia there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over 21 years of age and a candidate for election was required to have the qualification which would enable him to vote.

In the Province of New Brunswick by the Provincial Act,

11 Vict. c. 65, s. 17, the Parliamentary franchise was confined to male persons of the full age of 21 years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the assistant Keeper of Public Records of Canada of the list containing the names of the executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex.

Such briefly is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word " person " different considerations arise.

The word is ambiguous and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word " person " could not include females but because at Common Law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

As far back as *Stradling* v. *Morgan* (1560), 1 Plowd. 209, it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute and in *Herron* v. *Rathmines and Rathgar Improvement Commissioners* [1892], A.C. 498, Lord Halsbury said " The subject matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act," but the argument must not be pushed too far and their Lordships are disposed to agree with Farwell, L.J., in *Rex* v. *West Riding of Yorkshire County Council*, [1906] 2 K.B. 676, " although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight " : see Craies Statute Law, Edit. III, p. 118.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman Law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867.

Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, on this part of the case, to adopt the reasonings of Mr. Justice Duff who did not agree with the other members of the Court, for reasons which appear to their Lordships to be strong and cogent. As he says, "Nor am I convinced that the reasoning based upon the 'extraneous circumstances' we are asked to consider (the disabilities of women under the Common Law and the law and practice of Parliament in respect of appointment to public place or office) establishes a rule of interpretation for the British North America Act, by which the construction of powers, legislative and executive, bestowed in general terms is controlled by a presumptive exclusion of women from participating in the working of the institutions set up by the Act."

Their Lordships now turn to the second point, namely,

(ii) the internal evidence derived from the Act itself.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution.

His Majesty the King in Council is the final Court of Appeal from all these communities and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. Canada had its difficulties both at home and with the mother country, but soon discovered that union was strength. Delegates from the three maritime provinces met in Charlottetown on the 1st September, 1864, to discuss proposals for a Maritime Union. A delegation from the Coalition Government of that day proceeded to Charlottetown and placed before the Maritime delegates their schemes for a Union embracing the Canadian Provinces. As a result the Quebec conference assembled on the 10th October, continued in session till the 28th October and framed a number of resolutions. These resolutions as revised by the delegates from the different provinces in London in 1866 were based upon a consideration of the rights of others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen. Upon those resolutions the British North America

Act of 1867 was framed and passed by the Imperial Legislature. The Quebec resolutions dealing with the Legislative Council, viz., Nos. 6-24, even if their Lordships are entitled to look at them, do not shed any light on the subject under discussion. They refer generally to the " members " of the Legislative Council.

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.

> " Like all written constitutions it has been subject to development through usage and convention." (Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55).

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire— to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits. are mistresses in theirs.

> " The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes ; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony." See Clement's Canadian Constitution, ed. 3, page 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas., 46 at p. 50. " The Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *The Attorney General of Manitoba* [1895], A.C. 202 at p. 216, the question is not what may be supposed to have been intended, but what has been said.

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under sections 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government.

Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one either male or female has a right to be summoned to the Senate. The real point at issue is whether the Governor-General has a right to summon women to the Senate.

The Act consists of a number of separate heads.

The preamble states that the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom.

Head No. 2 refers to the Union.

Head No. 3, sections 9 to 16, to the executive power.

It is in section 11 that the word "persons" which is used repeatedly in the Act, occurs for the first time.

It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor-General.

The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not.

In these circumstances the burden is upon those who deny that the word includes women to make out their case.

Head No. 4 (sections 17–21) deals first with the legislative power. Section 17 provides there shall be one Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons. Sections 21–36 deal with the creation, constitution and powers of the Senate. They are the all important sections to consider in the present case and their Lordships return to them after briefly setting out the remaining sections of the Act.

Sections 37–57 deal with the creation, constitution and powers of the House of Commons with special reference to Ontario, Quebec, Nova Scotia and New Brunswick which were the first provinces to come in under the scheme, although power was given under section 146 for other provinces to come in which other provinces have availed themselves of.

Head No. 5 (sections 58–90) deals with the provincial constitutions, and defines both their executive and legislative powers.

Head No. 6 (sections 91–95) deals with the distribution of legislative powers.

Head No. 7 (sections 96–101) deals with the Judicature.

Head No. 8 (section 102–126) deals with revenues, debts, assets and taxation.

Head No. 9 (sections 127–144) deals with miscellaneous provisions.

Head No. 10 (section 145) deals with the intercolonial railway, and

Head No. 11 (sections 146–147) deals with the admission of other colonies.

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that section 21 provides that the Senate shall consist of 72 members who shall be styled senators. The word "member" is not in ordinary English confined to male

persons. Section 24 provides that the Governor-General shall summon qualified persons to the Senate.

As already pointed out, " persons " is not confined to members of the male sex, but what effect does the adjective " qualified " before the word " persons " have.

In their Lordships' view it refers back to the previous section, which contains the qualifications of a Senator. Sub-sections 2 and 3 appear to have given difficulties to the Supreme Court. Sub-section 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen naturalised by an Act of Parliament of Great Britain or of one of the Provincial Legislatures before the Union or of the Parliament of Canada after the Union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible.

The attention of the Chief Justice, however, was not called to the Aliens Act, 1844 (7 and 8 Vict. c. 66). Section 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalised shall be deemed and taken to be herself naturalised and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by Common Law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalised British subject was deemed and taken to be herself naturalised. Accordingly, section 23, sub-section 2, uses language apt to cover the case of those who become British subjects by marriage.

Their Lordships agree with Mr. Justice Duff when he says " I attach no importance to the use of the masculine personal pronoun in section 23, and, indeed, very little importance to the provision in section 23 with regard to nationality " and refer to section 1 of the Interpretation Act, 1889, which in section 1 (2) provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word " persons " as used in section 11 relating to the constitution of the Privy Council for Canada was limited to " male persons " with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor-General as a member of the Privy Council.

Sub-section 3 of section 23 provided that the qualification of a Senator shall be that he is legally and equitably seised of a freehold for his own use and benefit of lands and tenements of a certain value. This section gave some trouble to Mr. Justice Duff who says that subsection points to the exclusion of married women and would have been expressed in a different way if the presence of married women had been contemplated.

Their Lordships think that this difficulty is removed by a consideration of the rights of a woman under the Married Women's

Property Acts. A married woman can possess the property qualification required by this subsection. Apart from statute a married woman could be equitably seized of freehold property for her own use only and by an Act respecting certain separate rights of property of married women consolidated statutes of Upper Canada, cap. 73 sec. 1, it was provided :—

> " Every woman who has married since the 4th May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property . . . in as full and ample a manner as if she continued sole and unmarried . . . ."

Their Lordships do not think it possible to interpret the word " persons " by speculating whether the framer of the British North America Act purposely followed the system of Legislative Councils enacted in the Acts of 1791 and 1840 rather than that which prevailed in the Maritime Province for the model on which the Senate was to be formed, neither do they think that either of these subsections is sufficient to rebut the presumption that the word " persons " includes women. Looking at the sections which deal with the Senate as a whole (sections 21–36) their Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—Are there any other sections in the Act which shed light upon the meaning of the word " persons " ?

Their Lordships think that there are. For example, section 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly and by a proviso it is said that until the Parliament of Canada otherwise provides at any election for a member of the House of Commons for the district of Algoma in addition to persons qualified by the law of the province of Canada to vote every male British subject aged 21 years or upwards being a householder shall have a vote. This section shows a distinction between " persons " and " males." If persons excluded females it would only have been necessary to say every person who is a British subject aged 21 years or upwards shall have a vote.

Again in section 84 referring to Ontario and Quebec a similar proviso is found stating that every male British subject in contradistinction to " person " shall have a vote.

Again in section 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word " person " there must include females as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word " persons " in

section 24 to male persons it would surely have manifested such intention by an express limitation as it has done in sections 41 and 84. The fact that certain qualifications are set out in section 23 is not an argument in favour of further limiting the class, but is an argument to the contrary because it must be presumed that Parliament has set out in section 23 all the qualifications deemed necessary for a Senator and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally with regard to section 33, which provides that if any question arises respecting the qualifications of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by section 1 of the Parliament of Canada Act, 1875, and by section 4 of c. 10 of R.S.C. and their Lordships agree with Mr. Justice Duff when he says, " as yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law."

The history of these sections and their interpretation in Canada is not without interest and significance.

From Confederation to date both the Dominion Parliament and the provincial Legislatures have interpreted the word " persons " in section 41 and 84 of the British North America Act as including female persons and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively, and this interpretation has never been questioned.

From Confederation up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections.

From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the Franchise and to the right to sit as members in both Dominion and Provincial legislative bodies.

At the present time women are entitled to vote and to be candidates :—

(1) At all Dominion elections on the same basis as men.

(2) At all provincial elections save in the Province of Quebec.

From the date of the enactment of the Interpretation Acts in the Province of Canada, Nova Scotia and New Brunswick prior to Confederation and in the Dominion of Canada since Confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote.

Neither is it without interest to record that when upon the 20th May, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage and the amendment

proposed was to leave out the word " man " in order to insert the word " person " instead thereof. See Hansard, 3rd series, vol. 187, col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard

(1) To the object of the Act, viz., to provide a constitution for Canada, a responsible and developing State ;

(2) that the word " person " is ambiguous and may include members of either sex ;

(3) that there are sections in the Act above referred to which show that in some cases the word " person " must include females ;

(4) that in some sections the words " male persons " is expressly used when it is desired to confine the matter in issue to males, and

(5) to the provisions of the Interpretation Act ;

their Lordships have come to the conclusion that the word " persons " in section 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150109

Docket: A-324-13

Citation: 2015 FCA 4

2015 FCA 4 (CanLII)

CORAM: **NADON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

HUPACASATH FIRST NATION

Appellant

and

THE MINISTER OF FOREIGN AFFAIRS CANADA and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Vancouver, British Columbia, on June 10, 2014.

Judgment delivered at Ottawa, Ontario, on January 9, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] In the Federal Court, the appellant, Hupacasath First Nation, alleged that a foreign investment promotion and protection agreement between Canada and the People's Republic of China might affect Aboriginal rights and interests it has asserted over certain lands in British

Columbia. Due to that potential effect, the appellant submitted that, as a matter of law, the Minister of Foreign Affairs Canada and the Attorney General of Canada ("Canada") had to consult with it and, if necessary, accommodate its concerns before causing the agreement to come into force. Canada did not do this and so, the appellants said, Canada failed to fulfil its duty.

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[2] By judgment dated August 26, 2013, the Federal Court (*per* Crampton C.J.) ruled against the appellant: 2013 FC 900. It found that the agreement could not potentially cause harm to the appellant's asserted rights and interests. The Federal Court added that any effect on the appellant's asserted rights and interests was "non-appreciable" and "speculative."

[3] The appellant appeals to this Court.

[4] During oral argument in this Court, an issue arose concerning the jurisdiction of the Federal Courts to entertain this matter. Decisions by Canada to enter into international agreements and treaties are exercises of federal Crown prerogative power. A decision of the Court of Appeal for Ontario suggests that the Federal Courts do not have jurisdiction to review exercises of prerogative power. We invited the parties to provide written submissions on this after the hearing. We have now reviewed and considered those submissions.

[5] In those submissions, Canada also raises a new objection. It says that the appellant's case, directed at an exercise of Crown prerogative power, is not justiciable and should not be heard.

[6] Following oral argument, while this matter was under reserve, the Supreme Court of Canada released its decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. On some Aboriginal law issues, the decision is rather sweeping. So we invited the parties to provide supplementary written submissions on its effect on this appeal. We have now reviewed and considered those submissions too.

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[7] In my view, the Federal Courts system has the jurisdiction to review exercises of federal Crown prerogative power. Accordingly, the Federal Court and this Court have jurisdiction over this matter. I would also reject Canada's submission that the appellant's case is not justiciable.

[8] On the merits of the appeal, I agree with the result and much of the reasoning of the Federal Court. It applied proper legal principles to the evidence before it. The recent case of *Tsilhqot'in Nation* does not alter those legal principles. The Federal Court's overall conclusions – that the appellant had not established a causal relationship between the effects of the foreign investment promotion and protection agreement upon the appellant and its asserted rights and interests and that any effects upon the appellant were "non-appreciable" and "speculative" – were predominantly factual in nature and deserve deference. These conclusions were amply supported by the evidentiary record.

[9] Accordingly, Canada did not have to consult with the appellant before entering into the foreign investment promotion and protection agreement.

[10] Therefore, I would dismiss the appeal with costs.

B. Basic facts

[11] The appellant is a band under the *Indian Act*, R.S.C. 1985, c. I-5. Its 285 members live on two reserves covering roughly 56 acres of land on Vancouver Island. However, it asserts Aboriginal rights, including self-government rights, and title over roughly 573,000 acres of land on Vancouver Island, an area that overlaps with the territory claimed by nine other First Nations.

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[12] On September 9, 2012, Canada announced that it had signed a foreign investment promotion and protection agreement with the People's Republic of China. This agreement is known as the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (hereafter "Agreement"). The Agreement is similar to twenty-four other foreign investment promotion and protection agreements Canada has signed with other nations.

[13] Under the Agreement, Canada and the People's Republic of China must, among other things, treat investors from the other country and their investments in accordance with principles of non-discriminatory treatment and protection from expropriation without compensation. The Agreement implements these principles in the following provisions:

- *Article 4 (Minimum Standard of Treatment).* The host country must treat investments made by the investors of the other country in accordance with the customary international law minimum treatment of aliens.

- Article 5 (Most-Favoured Nation Treatment). The host country must accord investors of the other country, and their investments, treatment that is no less favourable than the treatment the host country accords, in like circumstances, to investors or investments of other countries.

- *Article 8 (Aboriginal Reservation).* Under Article 8(3) and Annex B.8, Canada has the right to provide rights and preferences to Aboriginal peoples that may be inconsistent with certain obligations under the Agreement; the appellant says this narrow exception, applicable only to articles 5-7, does nothing to prevent harm to the rights and interests of Aboriginal peoples.

- *Article 10 (Expropriation).* The host country may only directly or indirectly expropriate an investment of an investor of the other country for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of compensation. Annex B.10 clarifies that good faith and non-discriminatory measures designed and applied to protect legitimate public policy objectives, such as health, safety and the environment, do not constitute indirect expropriation.

- *Article 33 (General Exceptions).* The host country may take measures, including environmental measures, necessary to protect human, animal or plant life or health, provided that the measures are not applied in an arbitrary or unjustifiable manner and are not a disguised restriction on trade or investment.

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[14] In certain circumstances, violations of the Agreement can result in proceedings before an arbitral tribunal: see Part C, articles 19-32. Violations of certain provisions can result in monetary awards against the host country: article 31(2) and see the Federal Court's reasons at paragraphs 87 and 133(h).

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[15] The Agreement does not empower any awards against a sub-national government, such as a First Nations government. Nor does it require a government to change or discontinue a measure that breaches the Agreement. In particular, an arbitral tribunal established under the Agreement cannot stop Canada from fully complying with its obligations to Aboriginal peoples.

[16] Broadly speaking, the appellant says that the Agreement changes the landscape in the sense that it creates incentives for Canada to act in a manner that avoids breaches of the Agreement and resulting monetary awards. This, it says, may cause Canada to act in a manner that injures the appellant and its interests.

[17] On the law set out in cases such as *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the appellant says that Canada became obligated in these circumstances to consult with it and accommodate its rights and interests. Before signing the Agreement and, indeed, before the matter was heard in the Federal Court, Canada did not consult with the appellant. The appellant maintains that had Canada consulted with it, Canada would have had to protect the appellant's rights in the Agreement. But Canada did not.

[18] Before the Federal Court, the parties adduced expert evidence concerning the interpretation and effects of the Agreement. The Federal Court assigned less weight to the expert evidence tendered by the appellant because of impartiality concerns (at paragraphs 37-38) and the presence of "assertions on key issues" that "were baldly stated and unsubstantiated" (at paragraph 42).

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[19] The Federal Court found uncertainty on how arbitral tribunals might interpret the Agreement. But overall, largely based on the expert evidence it preferred – that tendered by Canada – the Federal Court found no conflict, actual or potential, between the provisions of the Agreement on the one hand and the appellant's asserted rights, interests and title on the other (at paragraphs 133, 147-148).

[20] Among other things, it found that the Appellant had not offered sufficient evidence, beyond the speculative, that:

- the appellant would face potential adverse impacts arising from arbitral decisions (at paragraphs 100-105);

- absent article 10, Canada would have been prepared to expropriate land, and particularly land owned by Chinese investors, without compensation in order to settle the appellant's Aboriginal claims (at paragraphs 108-110);

- arbitral tribunals would rule that measures designed to protect or accommodate the appellant's asserted Aboriginal rights contravene article 10 (at paragraphs 106-120);

- Canada would refrain from taking measures to protect the appellant's asserted Aboriginal rights due to a fear of monetary awards made by arbitral tribunals under the Agreement (at paragraph 133(d));

- Canada has not retained sufficient policy flexibility through the exemptions under the Agreement to prevent or avoid potential adverse impacts upon the appellant's asserted Aboriginal rights (at paragraphs 121-131);

- any existing measures, including any enacted by the appellant, might contravene or conflict with any of the obligations under the Agreement (at paragraph 133(f)).

[21] In reaching these conclusions, the Federal Court drew in part upon Canada's experience under the twenty-four other similar foreign investment promotion and protection agreements it has entered into, particularly the *North American Free Trade Agreement*: at paragraph 133(a). The Federal Court concluded that the appellant had not shown that Canada's experience under the Agreement would be different: at paragraph 133(c).

[22] Overall, the Federal Court concluded that Canada did not fall under a duty to consult the appellant because the alleged potential adverse impacts on its asserted interests were "non-

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appreciable" and "speculative" and the appellant had not established the required causal link between the Agreement and those alleged impacts: at paragraphs 3, 147 and 148.

C. Analysis

(1) The matter under review and the nature of the jurisdictional issue

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[23] The matter under review is the coming into effect of the Agreement. This, the appellant says, will happen without consultation with it, thereby violating its rights.

[24] How does this Agreement come into effect? The parties agree that this happens in two steps.

[25] First, the Governor in Council passes an order in council authorizing the Minister of Foreign Affairs to take the actions necessary to have the Agreement come into effect. At the time of the appellant's judicial review, this had not been done.

[26] Second, the Agreement comes into effect when the Minister signs an instrument of ratification and Canada delivers it to the People's Republic of China, confirming that all of Canada's internal legal procedures for bringing the Agreement into effect have been met. See Hugh M. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery 2006) at pages 120-121.

[27] This process is reflected in section 35 of the Agreement. It provides that the parties will notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of the Agreement.

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[28] While this matter was under reserve, the parties advised us that Canada has now taken the above steps and the Agreement is now in effect. This development does not affect our analysis of the issues in this appeal.

[29] In the Federal Court, the appellant primarily sought two forms of relief. First, it sought a declaration that "Canada is required to engage in a process of consultation and accommodation with First Nations, including the appellant, prior to taking steps which will bind Canada under the [Agreement]." Second, it sought an order restraining the Minister or any other official from taking steps to bring the Agreement into effect.

[30] Unlike the present case, in cases seeking review of orders or decisions made under legislation, this Court indisputably has jurisdiction. Under section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, this Court can review the actions of federal boards, commissions or other tribunals. The Governor in Council is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act* – it is exercising "jurisdiction or powers conferred by or under an Act of Parliament …".

[31] In this case, however, the Governor in Council's power to make the order is not conferred by or under an Act of Parliament. What is the source of its power?

[32] The Governor in Council's power to make the order comes from the Crown's prerogative powers. These are the Crown's remaining inherent or historical powers as the common law has shaped them: Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at pages 19-20. Looking at it another way, prerogative powers are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": A.V. Dicey, *Law of the Constitution*, 10th ed. (1959) at page 424.

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[33] The conduct of foreign affairs is one area where the Crown holds some prerogative powers. These include the power to enter into treaties and international agreements. Properly understood then, to bring the Agreement into effect, the Crown, acting through the Governor in Council, uses its prerogative power to make an order instructing the Minister of Foreign Affairs to issue an instrument of ratification. In turn, the Minister of Foreign Affairs complies with that order.

[34] In principle, exercises of pure Crown prerogative, such as the Governor in Council's exercise of power in this case, can be judicially reviewed: *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.). However, in Canada, in the case of the federal Crown prerogative, the question is where that review can take place. Do the Federal Courts have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative? If not, provincial superior courts have that power by default because of their inherent jurisdiction.

[35] The only appellate authority in Canada on this question is *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.). And that authority suggests that the Federal Courts do not have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative. If *Black* is still good law, the appellant should not have gone to the Federal Courts to restrain or challenge the Governor in Council's exercise of pure Crown prerogative – here, its power to sign the Agreement and cause it to come into effect.

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(2) Analysis of the jurisdictional issue

[36] In their memoranda of fact and law submitted prior to this appeal, the parties did not address the jurisdiction of the Federal Courts to entertain this matter. Both assumed that the Federal Courts had jurisdiction.

[37] In response to questioning at the hearing of this appeal, both agreed that the Federal Courts had jurisdiction. However, both, understandably, were not fully prepared to address the authority of *Black*, a case neither had cited in its memorandum.

[38] Regardless of the parties' agreement that this Court has jurisdiction, this Court cannot proceed unless it is persuaded that it has jurisdiction. Therefore, at the hearing of this appeal, we heard full argument on the merits of the appeal but we also asked the parties to make further written submissions on the issue of jurisdiction.

[39] The parties have done so, and the Court has received and considered the parties submissions. The Court thanks the parties for their thorough, helpful submissions.

[40] As evident from the preliminary discussion, above, the jurisdiction of this Court turns upon two provisions of the *Federal Courts Act*, subsections 2(1) and 18.1(3). Subsection 18.1(3) provides as follows:

18.1. (3) On an application for judicial review, the Federal Court may	**18.1.** (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut.
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[41] As can be seen, the Federal Courts can only exercise these powers if they are reviewing a "federal board, commission or other tribunal." Subsection 2(1) defines that term:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une

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Crown… prérogative royale…

[42] Above, I noted that the making of an order by the Governor in Council authorizing the Minister of Foreign Affairs to issue an instrument of ratification is one founded upon the Crown prerogative and nothing else. When federal officials act purely under the federal Crown prerogative and nothing else, are they exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*?

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[43] *Black*, *supra* arose from the British government's nomination of Black, then a Canadian citizen, for a peerage. Acting under the Canadian Crown prerogative relating to the bestowal of honours, the then Prime Minister of Canada advised the Queen to block the peerage, advising that it was against Canadian law. As a result, Black did not become a peer. In the Ontario Superior Court of Justice, Black brought an action for damages against the Prime Minister, alleging that the Prime Minister wrongly interfered with the Queen and blocked his peerage.

[44] In *Black*, all agreed that the Federal Courts and provincial superior courts had concurrent jurisdiction over actions against the federal Crown and its servants: *Federal Courts Act*, *supra*, subsection 17(1). However, Canada, seeking to strike out Black's action, argued that the action was really a review of a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Court Act*. Under subsection 18(1) of the *Federal Court Act*, the Federal Court alone has jurisdiction to conduct such a review. Therefore, said Canada, Black was barred from bringing his proceeding anywhere but the Federal Court.

[45] The Court of Appeal for Ontario disagreed, adopting a purely textual approach to subsection 2(1) of the *Federal Courts Act*. It held (at paragraphs 69-76) that the Prime Minister's actions were an exercise of the pure prerogative power of the Crown relating to honours. In its view, subsection 2(1) does not empower the Federal Courts to review exercises of pure prerogative power. It only authorizes reviews of conduct under an "order made pursuant to a prerogative of the Crown." As there was no order under which the Prime Minister was acting, the Federal Courts could not entertain the matter. Only the Ontario Court system with its inherent jurisdiction could.

[46] Today, on the facts of *Black*, it might not have been necessary for the Court of Appeal for Ontario to consider the definition of "federal board, commission or other tribunal" and define it as narrowly as it did. We now know that in certain circumstances, an action against the federal Crown may be brought in a provincial superior court even where the conduct of a "federal board, commission or other tribunal" is bound up in it in some way: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. Through today's lens, the Ontario Courts may well have had jurisdiction over Black's action even though the conduct of the Prime Minister was very much part of it. I would distinguish *Black* on that basis.

[47] However, it is important to clarify matters of jurisdiction where possible and ensure that the law on such a fundamental point is clear: *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2011] 1 F.C. 143 at paragraphs 62-73. In my view, certain jurisprudential developments have overtaken the reasoning of the Court of Appeal in *Black*. Its conclusion that the Federal Courts cannot review exercises of federal Crown prerogative power can stand no longer.

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[48] The Supreme Court of Canada has emphasized that in interpreting legislative provisions one must look at the text, context and purpose of the provision: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. In a case postdating *Black*, the Supreme Court has emphasized that while the text of the provision may predominate in the analysis, the analysis cannot stop with the text as it did in *Black*. Instead, one must go on to examine the context of that text in the wider statute and its purpose: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

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[49] I begin with the text. I agree that the text of subsection 2(1) of the *Federal Courts Act* can be construed in the manner done by the Court of Appeal in *Black*. However, it can also be construed in a manner that supports the jurisdiction of the Federal Courts to review pure exercises of federal Crown prerogative.

[50] As mentioned above, the issue in this case is whether federal officials exercising a pure prerogative power are exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*. The answer is yes if we construe subsection 2(1) as allowing reviews of powers "conferred…by…a prerogative of the Crown." The rival interpretation of subsection 2(1), adopted in *Black*, is that "by or under" modifies "an order" and so unless an official is acting under an order made under the prerogative, this Court does not have jurisdiction.

[51] Either reading of the text of subsection 2(1) is plausible. So to decide the matter, we must consider the context of subsection 2(1) and its purpose.

[52] Parliament intended to grant to the Federal Courts general administrative, supervisory jurisdiction over all federal decision makers: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paragraph 36; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paragraphs 10-11. Parliament established the Federal Courts under the *Federal Courts Act* to supervise federal administrative decision-makers to ensure consistency across the country: *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 at page 481 (C.A.); *Canada v. Tremblay*, 2004 FCA 172, [2004] 4 F.C. 165 at paragraph 10 (C.A.).

[53] It is true that provincial superior courts have inherent jurisdiction. But, as the Supreme Court has held, "[t]he doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court." Nor does it justify reading "statutes which purport to grant jurisdiction to [the Federal Court]…narrowly so as to protect the jurisdiction of the superior court": *Canadian Liberty Net*, *supra* at paragraphs 32 and 34. The Supreme Court has also emphasized that gaps should not be found in the *Federal Courts Act* unless the "words clearly created them": *Canadian Liberty Net*, *supra* at paragraph 34. Given these authoritative statements from the Supreme Court, unless there are clear words to the contrary, the text of the *Federal Courts Act* must be interpreted to achieve its purposes.

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[54] An interpretation that the Federal Court has the power to review federal exercises of pure prerogative power is consistent with the Parliament's aim to have the Federal Courts review all federal administrative decisions. The contrary interpretation would carve out from the Federal Courts a wide swath of administrative decisions that stem from the federal prerogative, some of which can have large national impact: for a list of the federal prerogative powers, see Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, *supra* at pages 23-24 and S. Payne, "The Royal Prerogative" in M. Sunkin and S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

[55] One must also appreciate the wider context surrounding the nature of the federal Crown prerogative. It can be exercised through a variety of instruments and means: A. Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, Green and Co., 1936) at page 68. The particular language used in section 2 of the *Federal Courts Act* to capture the exercise of the prerogative can be explained as merely an attempt to mirror the way that the prerogative is habitually or commonly understood to be exercised, *i.e.*, by officials acting under an order made under the prerogative. Or it can be interpreted in the manner I have done in paragraph 49, above or in the manner done by the Federal Court in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C. 218.

[56] The contrary interpretation – an interpretation that hives off exercises of federal prerogative power from exercises of powers under orders made by or under the prerogative power – is a technical distinction that serves only to trap the unwary and obstruct access to justice. In *TeleZone*, *supra*, a case postdating *Black*, the Supreme Court underscored (at

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paragraphs 18-19 and 32) the need to interpret these provisions with a view to avoiding these concerns.

[57] In the case at bar, these concerns are very much in play. If the contrary interpretation is adopted, the Governor in Council's making of the order in this case authorizing the Minister to issue the instrument of ratification – a pure exercise of prerogative power – would have to be reviewed in the provincial superior courts. But the Minister's issuance of the instrument of ratification in this case – an exercise of power "by or under an order made under the prerogative" under subsection 2(1) of the *Federal Courts Act* – would have to be reviewed under this Court's exclusive jurisdiction under subsection 18 (1) of the *Federal Courts Act*. There would have to be two separate proceedings in two separate courts, with every potential for unnecessary expense, delay, confusion and inconsistency.

[58] In light of the foregoing, I conclude that the Federal Courts can review exercises of jurisdiction or power rooted solely in the federal Crown prerogative.

(3) The justiciability issue

[59] In the course of its written submissions on this Court's jurisdiction, Canada says that if exercises of pure federal Crown prerogative are potentially reviewable, then this Court still cannot consider them. The subject-matter, being policy-oriented and concerned with foreign relations, is not justiciable, *i.e.*, it is not appropriately reviewable in a court of law.

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[60] In support of this, Canada submits that exercises of pure federal Crown prerogative are reviewable only where Charter rights are in issue. They cite *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraphs 36-37 and *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

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[61] It is true that these cases do stand for the narrow proposition that Charter cases are justiciable regardless of the nature of the government action, be it an exercise of the Crown prerogative or otherwise. But these cases do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable. In fact, as I shall demonstrate, some are.

[62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.

[63] Whether the question before the Court is justiciable bears no relation to the source of the government power: *R. v. Ministry of Defence, ex parte Smith*, [1995] 4 All E.R. 427, aff'd [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.). For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power: *Council of Civil Service Unions, supra*. I agree with the following passage from Lord Roskill's speech in that case (at page 417 A.C.):

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the

> exercise of that power may be challenged on one or more…grounds…. If the executive instead of acting under a statutory power acts under a prerogative power…I am unable to see…that there is any logical reason why the fact that the source of the power is the prerogative and not statute should deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[64] I also agree with the Court of Appeal for Ontario in *Black*, *supra* at paragraph 44 that "the source of the power – statute or prerogative – should not determine whether the action complained of is reviewable."

[65] So what is or is not justiciable?

[66] In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to

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conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally *Operation Dismantle*, *supra* at pages 459-460 and 465; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; *Black*, *supra* at paragraphs 50-51.

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[67] These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraph 28. But the matter is still justiciable.

[68] There are authorities suggesting that executive decisions to sign a treaty, without more, are not justiciable: see, e.g., *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex. P. Everett*, [1989] 1 All E.R. 655 at page 690, [1989] Q.B. 811, cited in *Black*, *supra* at paragraph 52. This makes sense, as the factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers.

[69] But here the gist of the appellant's challenge is different. It alleges that, regardless of the factors prompting the Agreement, the decision of the executive to bring the Agreement into

effect would be unacceptable and indefensible because the appellant has enforceable legal rights to be consulted before that happens. In this case, acceptability and defensibility turns on whether or not the appellant has those legal rights.

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[70] Assessing whether or not legal rights exist on the facts of a case lies at the core of what courts do. Under the constitutional separation of powers, determining this is squarely within our province. Canada's justiciability objection has no merit.

(4) The standard of review in this Court

[71] At the outset, we must assess the true or real nature of the appellant's application: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] DTC 5001 at paragraph 50.

[72] In reality, the appellant's request for a declaration arises in the context of a decision made by the Government of Canada. The Government of Canada decided, implicitly or explicitly in the face of the appellant's stated position, that it could bring the Agreement into effect without consulting with the appellant or other Aboriginal peoples. Through the use of a declaration, the appellant seeks to invalidate that decision. The appellant also seeks an order restraining Canada from taking steps that would bring the Agreement into effect.

[73] I need not consider whether the standard of review of the decision is correctness or reasonableness. If the standard of review is reasonableness, the only acceptable and defensible

outcome available to the Government of Canada in this case is compliance with the law concerning the duty of consultation. The question before us is a binary one. Either there is a duty or there is not, and since Canada did not consult, Canada's decision either stands or falls on that question alone.

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[74] As will be evident from the discussion below, in the course of its reasons, the Federal Court made certain findings heavily suffused by its appreciation of the evidence. In this Court, what standard of review applies to those sorts of findings?

[75] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.

[76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings. In the context of the existence of Aboriginal title, the Supreme Court held to similar effect in *Tsilhqot'in Nation*, *supra* at paragraph 52.

[77] In other words, in this case, absent legal error, deference is owed to the Federal Court's largely factual findings described above in paragraphs 13-15 and 18-22.

[78] However, in this case, nothing turns on this. As is evident from some of the discussion below, had I been in the Federal Court's position I would have made the same factual findings.

(5) Was a duty to consult triggered?

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[79] The parties agree that the Federal Court identified the correct law concerning what triggers the duty to consult and, if necessary, accommodate Aboriginal rights and title which have been asserted but not yet proven. That law is found in *Rio Tinto*, *Mikisew*, and *Haida Nation*, all *supra*.

[80] As mentioned above, while this matter was under reserve the Supreme Court of Canada released *Tsilhqot'in Nation*, *supra*. We asked for further submissions. Having considered those submissions, I conclude that *Tsilhqot'in Nation* has not changed the law concerning when Canada's duty to consult is triggered. Indeed, it confirms that *Rio Tinto*, *Mikisew*, and *Haida*, all *supra*, still set out the correct law on this point: see *Tsilhqot'in Nation* at paragraphs 78, 80 and 89.

[81] Of the three cases, *Rio Tinto* comes later and incorporates the earlier holdings in *Mikisew* and *Haida* concerning the duty to consult. In *Rio Tinto*, the Supreme Court set out specific elements that must be present to trigger the duty to consult. However, it also set out certain aims the duty is meant to fulfil. These aims are best kept front of mind when assessing whether the specific elements are present.

[82] The Supreme Court identified two aims the duty to consult is meant to further. First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, *supra* at paragraph 50. Second is the need to "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown": *Rio Tinto*, *supra* at paragraph 46.

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[83] This last-mentioned idea – that the duty is aimed at preventing a present, real possibility of harm caused by dishonourable conduct that cannot be addressed later – is key:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

(*Haida*, *supra* at paragraph 27.)

[84] Given those aims, the Supreme Court in *Rio Tinto*, *supra* at paragraphs 40-50 has told us three elements must be present for the duty to consult to be triggered:

- a "real or constructive knowledge of [an Aboriginal] claim to the resource or land to which it attaches" (at paragraph 40);

- "Crown conduct or a Crown decision that engages a potential Aboriginal right," meaning conduct even at the level of "strategic, higher level decisions" (at paragraph 44) that "may adversely impact on the claim or right in question" (at paragraph 42) or create a "potential for adverse impact" (at paragraph 44);

- a "possibility that the Crown conduct may affect the Aboriginal claim or right" in the sense of "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (at paragraph 45).

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[85] Both before the Federal Court and in this Court, the central issue was whether the third of these requirements – a causal relationship between the Crown conduct and potential adverse impacts on pending Aboriginal claims or rights – was met. The degree of causal relationship and whether it has been met in this case lies at the core of the debate between the parties.

[86] On this, the parties agree that the Federal Court accurately identified the law concerning the degree or quality of causal relationship that must be present in order to trigger a duty to consult. That law is found, once again, in *Rio Tinto*, *supra* and contains two elements:

- The focus of the analysis must be the effect caused by the Crown conduct on Aboriginal rights or the exercise of rights (at paragraph 46). A general "adverse impact" or an effect caused on matters divorced from rights, such as "a First Nation's future negotiating position," is irrelevant (at paragraphs 46 and 50);

- While a "generous, purposive approach [must] be taken," the effect on rights must be one of "appreciable adverse effect." While "possible" impacts can qualify, those that are "[m]ere[ly] speculative…will not suffice" (at paragraph 46).

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[87] As mentioned, the Federal Court identified and stated all of this law. What the appellant raises in this appeal is whether the Federal Court applied this law correctly to the facts of this case.

[88] On the facts, the Federal Court concluded that the potential adverse effects the Agreement may have upon the appellant's Aboriginal rights are "non-appreciable" and "speculative" and so a duty to consult with the appellant does not arise. Put another way, the appellant had not demonstrated a causal relationship between the Agreement and potential adverse impacts on asserted Aboriginal claims or rights.

[89] As will be evident from the discussion below, in this Court the appellant has not shown any palpable and overriding error in how the Federal Court applied the law to the facts of this case or in its fact-finding. In any event, I agree with the Federal Court's factually suffused conclusions.

[90] In this Court, the appellant submits that the Federal Court's conclusion that the Agreement's effects were "speculative" was primarily based on its view of the content of obligations assumed by Canada under the Agreement. But, the appellant says, that was based on the Federal Court's fundamental misapprehension of the evidence before it about those

obligations. The Federal Court stated that the appellant had failed to lead enough persuasive evidence about the consequences of other foreign investment promotion and protection agreements that would shed light on Canada's obligations under the Agreement. In fact, says the appellant, those other agreements and their consequences were before the Court. The Federal Court's error in overlooking these was a palpable and overriding error.

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[91] The problem with the appellant's submission is that notwithstanding the existence of other agreements, there is no evidence deserving of sufficient weight that these agreements are causing or might cause Canada to make decisions that are contrary to law. In particular, there is no evidence that those agreements are causing Canada to make decisions that do not respect Aboriginal rights.

[92] It bears noting that, as the Federal Court found (at paragraphs 87, 133(f) and 144), the Agreement does not contravene or contradict any domestic law at either the federal or sub-national government level, does not change the way in which the appellant could exercise its rights under a future treaty, or give arbitral tribunals the power to invalidate any measures that may be adopted by the appellant or by Canada in the future to protect the appellant's asserted Aboriginal rights: see also paragraph 20, above. There is no basis to interfere with these factual findings.

[93] The appellant also submits that the Federal Court applied the wrong legal test when it held that the adverse effects identified by the appellant were too "speculative," insignificant and "non-appreciable" to trigger the duty to consult. The appellant suggests that the threshold to

trigger the duty to consult is "very low" – even quite insignificant effects on asserted rights or title can suffice.

[94] The appellant adds that the Federal Court overlooked a "chilling effect" that will arise when the Agreement takes effect. It says that the Agreement inhibits Canada's ability or willingness to take steps to regulate or prevent the use of lands and resources by Chinese investors that are the subject of the appellant's rights and title claims. The appellant suggests that Canada will fear the monetary awards imposed for non-compliance under the Agreement and will exercise its regulatory and other powers less aggressively.

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[95] The appellant adds that the Federal Court wrongly required the appellant to provide actual evidence of a chilling effect as opposed to reliance on "logic and common sense" to make inferences from known facts. The appellant notes that a chilling effect is not susceptible to easy proof.

[96] At the root of this allegation of chilling effect is a speculation that Canada will not want to incur an adverse monetary award so it would likely avoid taking action barred by the Agreement that would prevent infringements of Aboriginal rights. In effect, the speculation is that when push comes to a shove Canada will subordinate Aboriginal rights to its desire to avoid economic penalties under the Agreement.

[97] The appellant calls this logic and common sense. It is actually pure guesswork. We cannot assume that there will be a collision between protecting Aboriginal rights and a monetary

award under the Agreement, nor can we assume that Canada will prioritize the latter over the former; indeed we cannot assume that that will happen even once: *Gitxaala National v. Canada*, 2012 FC 1336, 421 F.T.R. 169 at paragraph 54. We have no idea whether the two will ever clash.

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[98] On the information in this record, it is equally possible to assume that Canada will prioritize the protection of rights over economic penalties. Government priorities can shift over time according to the circumstances, can shift in accordance with the particular decision to be made, and can shift in accordance with popular opinion and electoral results that express that opinion. And sometimes governments affirm rights regardless of the financial cost or public opinion. At this time, we can only guess as to what will happen under the Agreement and what decisions or events will arise, or whether there will ever be any decisions or events requiring response. And, as we shall see, after the Agreement comes into effect, if any actual non-speculative effects on the appellant's rights appear on the horizon and become possible, the appellant will have many opportunities to protect its rights fully and prevent any harm, especially irreversible harm.

[99] Until there is at least a prospect of a decision or event prompted by the Agreement and until we know the nature of that decision or event, we cannot say with any degree of confidence or estimate any possibility that there will be a collision between protecting Aboriginal rights and a monetary award under the Agreement. If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be defined, nor can we even say that anything problematic might ever arise. At this time, all we can

do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. However, the duty to consult is triggered not by imaginings but by tangibilities.

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[100] Indeed, the evidence we do have at this time – evidence of what has happened under other foreign investment promotion and protection agreements – suggests that concerns arising from these agreements have not arisen: see the Federal Court's reasons at paragraphs 133(a), (c) and (d) and paragraph 69 of the main affidavit Canada has adduced. There is no evidence to suggest that these agreements have impaired the ability of any level of government to protect Aboriginal rights and interests, or the rights and interests themselves, whenever the need arises.

[101] Before us, the appellant emphasized that there is a difference between "possibilities" and "speculations" and that while the Supreme Court said the duty to consult does not arise in the case of the latter, it does in the case of the former. The mere possibility of harm is enough.

[102] The appellant is right to draw this distinction to our attention. And in some cases the line between the two might be a fine one. However, the aims behind the recognition of the duty can assist us in drawing the line. To reiterate, they are to protect Aboriginal rights from injury, to protect against irreversible effects and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests: see paragraphs 82-83 above. An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the

speculative side of the line, the side that does not trigger the duty to consult. As the Federal Court found on the facts, this case falls on that side of the line.

[103] Once the Agreement comes into effect, it may be expected to increase Chinese investment into Canada. It may be that some of that new investment finds its way into resource development companies. Might those companies eye resources on Aboriginal lands or lands claimed by Aboriginal peoples for development? Maybe. Or maybe not. We just don't know.

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[104] But what we do know is that upon the concrete possibility of that development and certainly by the time of application for development permits and approvals by those companies from governments and their agencies, Aboriginal peoples will have access, if necessary, to administrative decision-makers and the Courts for protection. That protection may be by way of application for interim or permanent injunctive relief, prohibition, *certiorari* or, if Canada is somehow not involved and should be, *mandamus*. In these ways, an aggrieved party may allege, with evidence in support, among other things that Canada is improperly prioritizing the risk of a monetary award under the Agreement over Aboriginal rights and interests. The jurisprudence of this Court on direct standing to bring a judicial review is liberal enough to fully protect those concerned about non-speculative effects on their legal rights or practical interests: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at paragraphs 57-58.

[105] Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. There is no apprehended, evidence-

based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.

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[106] The appellant further submits that Canada's obligations under the Agreement will last for at least thirty years and cannot be set aside by any government or Canadian court during that period. The Agreement "cannot be undone." That is so, but it adds nothing to the analysis. Until there is a non-speculative impact on rights of the sort I have described above – if there ever is one – a duty to consult simply does not arise.

[107] Next, the appellant says that the Federal Court failed to address one of its arguments. It argued that Canada, by agreeing to be bound by the obligations in the Agreement, has also agreed to ensure that the appellant's exercise of its rights of self-government would be constrained by those same obligations.

[108] I do not accept that Canada has agreed to ensure that the appellant's exercise of whatever rights of self-government it has will be constrained by the provisions of the Agreement. Nothing in the Agreement suggests that, nor is there anything that suggests that result. There is no evidence on this record to suggest any possible impact on rights to self-government.

[109] Again, to the extent that a decision is made or a power is exercised that affects any rights of self-government the appellant has, the appellant will have its legal recourses. Again, a decision in prospect might trigger a duty to consult, but here we have no idea what events or decisions might follow as a result of the Agreement, or even whether any events or decisions might ever be in prospect, let alone whether the appellant's asserted self-government rights might be affected by those events or decisions.

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[110] The appellant submits that the Federal Court wrongly required evidence of the presence of investors on its traditional territory with rights under the Agreement and that measures were being contemplated that would impact on those rights.

[111] I do not read the Federal Court's decision so narrowly. The Federal Court was alive to broader impacts said by the appellant to trigger the duty to consult. Those broader impacts, as I have said above and as the Federal Court has found, are speculative at this time.

[112] In the Federal Court and in this Court, the appellant submitted that the Agreement would prevent Canada from enacting a moratorium on resource development, something that would respect the rights of Aboriginal peoples. But as the Federal Court noted (at paragraph 131), that submission relies on layers of speculations or assumptions, conjectures and guesswork, not evidence. Among other things, there was no evidence that Canada is considering or would ever consider, let alone implement such a moratorium, that such a moratorium might adversely impact a potential Chinese investment in the appellant's territory, that the moratorium would be found

by an arbitral tribunal to contravene the Agreement, and that Canada would not retain sufficient policy flexibility to prevent impacts upon the appellant.

[113] The appellant cites several cases showing that high-level management decisions or structural changes can trigger a duty to consult: *Huu-Ay-Aht First Nation v The Minister of Forests*, 2005 BCSC 697, 33 Admin. L.R. (4th) 123; *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106; *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517, 409 F.T.R. 87; *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280.

[114] I agree that high-level management decisions or structural changes can trigger a duty to consult, but only where the legal test is met. The cases the appellant cites are distinguishable. I agree with the Federal Court's observation (at paragraph 78) that the Crown conduct in those cases "directly concern[ed] the applicant First Nation's claimed territories or the resources situated upon those territories." In each case, there was, in the words of *Rio Tinto, supra* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights." I agree with the Federal Court's assessment that the case before us is different (at paragraph 78):

> They are all distinguishable from the ratification of the [Agreement], because the [Agreement] does not address any specific lands, potential projects involving specific lands, or specific resources. It is simply a broad, national, framework agreement that provides additional legal protections to Chinese investors in Canada, and Canadian investors in China, which parallel the rights provided in several existing investment protection and trade agreements to which Canada is already a party.

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[115] Overall, I believe that at the root of all of the appellant's submissions is its definition of "speculative," a definition that cannot be accepted.

[116] The appellant defines "speculative" as situations where "there is no reasonable basis to conclude that an impact might occur." Applying that definition in this case, the appellant says that there is a reasonable basis for concluding that an impact caused by the Agreement might occur.

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[117] What is missing from the appellant's definition of "speculative" is the idea of assumption, conjecture or guesswork. A conclusion is not speculative when it is reached by way of a chain of reasoning all of whose links are proven facts and inferences, joined together by logic. A conclusion is speculative when it is reached by way of a chain of reasoning where one or more of the links are assumptions, conjectures or guesses or where assumptions, conjectures or guesses are needed to join them.

[118] Assuming the Agreement is successful in achieving its objectives, it is true that there will be more investment in Canada from the People's Republic of China. But more investment in Canada does not necessarily lead to the conclusion that the appellant's Aboriginal rights will be affected. The appellant's case founders on that break in the chain of reasoning, a break that can only be repaired by resort to assumptions, conjectures or guesses. In short, the appellant has failed to show, in the words of *Rio Tinto* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on [its] pending Aboriginal claims or rights" that rises above the speculative.

[119] If the appellant's definition of "speculative" were accepted, then just about every decision or action by governments would trigger the duty to consult. Governments announce high-level policies all the time. For example, often measures are proposed to encourage Canadians and others to invest in Canadian businesses and developments, just like the Agreement before us. Does the duty to consult arise every time the government intends to announce measures of that sort?

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[120] Taken to its extreme, the appellant's position would require the Minister of Finance – before the annual budget speech in the House of Commons, on every measure in it that might possibly affect the investment and development climate – to consult with every First Nation, large or small, whose claimed lands might conceivably or imaginatively be affected, no matter how remotely, no matter how insignificantly. Such a tenuous triggering and aggressive application of the duty to consult would undercut one of its aims, namely respect for "countervailing Crown interests" – in this example, the Crown's interest in workable governance: *Rio Tinto*, *supra* at paragraph 50.

[121] Finally, just before this Court's judgment in this matter was released, the appellant drew to our attention the recent decision of the Federal Court in *Mikisew Cree Nation v. The Governor General in Council et al.*, 2014 FC 1244, a decision not binding upon us. I see no need for further submissions from the parties on this new authority. In *Mikisew*, the Federal Court noted (at paragraph 93) that the possible or "potential existence" of a harm is sufficient to trigger the duty to consult, a legal proposition supported by Supreme Court case law (see paragraph 86, above). On the particular facts of *Mikisew*, the Federal Court found a possible effect that went

beyond the appreciable and the speculative. For the reasons above, and as found by the Federal Court in this case, the appellant has failed to show on the facts a causal link between the Agreement and any possible harm, let alone any harm that rises above the appreciable and speculative.

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[122] Therefore, there are no grounds to set aside the judgment of the Federal Court.

D. Proposed disposition

[123] Therefore, for the foregoing reasons, I would dismiss the appeal with costs. I wish to thank the parties for their helpful submissions.

"David Stratas"

J.A.

“I agree
M. Nadon J.A.”

“I agree
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-324-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE CRAMPTON DATED AUGUST 26, 2013, NO. T-153-13	
STYLE OF CAUSE:	HUPACASATH FIRST NATION v. THE MINISTER OF FOREIGN AFFAIRS CANADA AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 10, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	JANUARY 9, 2015

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2015 FCA 4 (CanLII)

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2015 FCA 4 (CanLII)

Federal Court  Cour fédérale

Date: 20130916

Docket: T-616-12
T-619-12
T-620-12
T-621-12
T-633-12
T-634-12
T-635-12

2013 FC 953 (CanLII)

Citation: 2013 FC 953

Ottawa, Ontario, September 16, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

T-616-12

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2013 FC 953 (CanLII)

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2013 FC 953 (CanLII)

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T-633-12

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T-634-12

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T-635-12

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ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), SUSAN J. EDELMAN (RETURNING OFFICER FOR YUKON), RYAN LEEF, LARRY BAGNELL, KEVIN BARR, JOHN STREICKER

Respondents

2013 FC 953 (CanLII)

REASONS FOR ORDER AND ORDER

[1] The Court issued judgment on May 23, 2013 in files T-619-12, T-620-12, T-621-12, T-633-12, T-634-12 and T-635-12 dismissing applications to annul the results of the 2011 General Election in six ridings won by the respondent Members of Parliament Joyce Bateman, Kelly Block, Lawrence Toet, Jay Aspin, John Duncan and Ryan Leef.

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[2] In addition to dismissing the applications, the Court awarded the respondent Members of Parliament costs for the hearing in an amount to be fixed in accordance with the directions given in the reasons for judgment and awarded the applicants costs for the motions in which they were successful on a solicitor and client basis. The other responding parties were to bear their own costs.

[3] A seventh application, in file T-616-12, was dismissed on October 26, 2012 with costs reserved to the applications judge upon the disposition of the other applications.

[4] In the Reasons for Judgment (2013 FC 525) the Court made the following comments pertaining to the question of costs:

> 259 The right of citizen electors to seek to annul election results that they reasonably believe to be tainted by fraud is, in my view, a matter of high public interest and analogous to *Charter* litigation. A concern that has frequently been raised is that such litigation should not be beyond the reach of the ordinary citizen. The courts have gone so far as to require that a portion of the costs of such cases be paid by the opposing successful parties: *M v H*, [1996] OJ No 2597 (QL) (Ct J (Gen Div)) at paras 17, 30; *Lavigne*, above, at para 106.
>
> 260 I am mindful of the fact that in this instance the applicants have received guarantees of indemnification by a non-governmental organization which has been raising funds for that purpose. But it is also apparent that the respondent MPs are supported by the resources of the party to which they belong, resources which are underwritten by taxpayers.
>
> 261 These proceedings have had partisan overtones from the outset. That was particularly evident in the submissions of the respondent MPs. In reviewing the procedural history and

> the evidence and considering the arguments advanced by the parties at the hearing, it has seemed to me that the applicants sought to achieve and hold the high ground of promoting the integrity of the electoral process while the respondent MPs engaged in trench warfare in an effort to prevent this case from coming to a hearing on the merits.
>
> 262 Despite the obvious public interest in getting to the bottom of the allegations, the CPC made little effort to assist with the investigation at the outset despite early requests. I note that counsel for the CPC was informed while the election was taking place that the calls about polling station changes were improper. While it was begrudgingly conceded during oral argument that what occurred was "absolutely outrageous", the record indicates that the stance taken by the respondent MPs from the outset was to block these proceedings by any means.
>
> 263 The preliminary stages were marked by numerous objections to the evidence adduced by the applicants. The respondent MPs sought to strike the applications on the ground that they were frivolous and vexatious, to have them dismissed as champertous and to require excessive security for costs, in transparent attempts to derail this case.
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> 264 There have been interlocutory decisions made by the case management prothonotaries during the proceedings with related costs awards. The applicants are, in my view, entitled to be awarded costs on each of the pre-hearing motions in which they have been successful on a solicitor and client basis to be paid jointly and severally by the respondent MPs. This applies also to the champerty motion and the motion to exclude the Graves evidence which was brought initially in relation to the Don Valley East application and then deemed to apply to each of the other applications.
>
> 265 Apart from the motion costs, and with the above considerations in mind, I am inclined to order a modest fixed amount for the costs of the hearing. Absent an agreement as to the amount, the respondent MPs may make written submissions limited to ten pages within thirty days of the date of this judgment. The applicants will then have fifteen days in which to respond and the respondent MPs another five days to reply. I will then award a fixed sum in an amount I consider appropriate given the foregoing comments. The other respondents will bear their own costs.

[5] The respondent Members of Parliament submit that they should be awarded compensation in the amount of $120,000 based on the lowest tariff rate, or $60,000 if based on one-half of the lowest tariff rate, for the costs of preparing and filing written submissions, and the cost of two lawyers preparing for one week and attending at court. They also seek disbursements of $235,907.56. The largest part of the claim for disbursements relates to payment for the services of an expert witness, Dr. Ruth Corbin, in the amount of $166,363.79. The bulk of this would have been

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incurred prior to the hearing. Disbursements claimed for the hearing, without further explanation, are $54,202.35. The balance relates to travel and accommodation costs prior to the hearing ($9,134.84), cross examination transcripts ($6,064.71), delivery costs ($112.49) and a driver's license search ($29.38).

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[6] Noting that the applicants have not served any submissions concerning their costs on the motions with respect to which they were successful, the respondent Members of Parliament submit that their costs ought to be awarded and offset against the costs to be awarded to the applicants on a solicitor and client basis for their success on the motions. The Court has no basis at present, apart from the amount of time spent on the motions at the hearing, upon which to determine what those costs may be.

[7] The applicants submit that in making a determination as to costs, access to justice should be the Court's paramount consideration, recognizing the public interest nature of the case and the principle that the ability of citizens to bring such matters before the courts should not be deterred. They ask that the Court consider whether, in light of its findings of fact in this matter and the fundamental constitutional issue at stake, this is an appropriate case for the Court to decline to award any costs. In the alternative, the applicants submit, that should the Court remain inclined to award "a modest fixed amount for the cost of the hearing" the amount should be small and considered modest from the point of view of individual citizens so as not to deter electors from seeking to defend their democratic franchise.

[8] With respect to the quantum of costs proposed by the respondent Members of Parliament, the applicants submit that the amounts claimed are unjustified and inconsistent with the modest fixed amount yardstick. By their calculation, total legal fees under the Column I of Tariff B guidelines would be no more than $7,995. Any award for disbursements should exclude the $54, 202.35 claimed for "hearing costs" and the entire amount claimed as expert witness costs in light of the Court's findings with regard to the nature and presentation of Dr. Corbin's evidence and the lack of any detailed account upon which the reasonableness of the claim could be assessed.

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[9] As stated by Justice Paul Perell of the Ontario Superior Court of Justice in *Incredible Electronics Inc v Canada (Attorney General)*, [2006] 80 OR (3d) 723 [*Incredible Electronics*] at para 63:

> As a matter of general principle, costs compensate the successful litigant for the expense to which he or she has been put by the suit having been improperly resisted or improperly brought: Ryan v. McGregor, [1925] O.J. No. 126, 58 O.L.R. 213 (App. Div.). The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76; Fong v. Chan (1999), 46 O.R. (3d) 330, [1999] O.J. No. 4600 (C.A.); Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464, [1997] O.J. No. 5130 (Gen. Div.); Skidmore v. Blackmore, [1995] B.C.J. No. 305, 122 D.L.R. (4th) 330 (C.A.).

[10] This is not a case in which the applications were improperly brought or where the applicants engaged in inappropriate behaviour in their conduct of the proceedings. In contrast, as noted above, I found that the respondent MPs "engaged in trench warfare in an effort to prevent this case from

coming to a hearing on the merits" and adopted a stance aimed at blocking the applications "by any means". Settlement was not at any time a realistic outcome in light of the nature of the allegations and the evidence that attempts had been made by parties unknown to interfere with the democratic process.

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[11] The Supreme Court has affirmed the importance of access to justice in public interest cases and the duty of the courts to craft costs orders that support and promote this goal. As stated by Justice Lebel for the majority in *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 371, [2003] SCJ No 76 (QL), at para 27, courts should exercise the power to award costs in a manner that:

> …helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[12] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, confers full discretionary power on the Court to determine the amount and allocation of costs. Rule 400(3) provides a list of factors the Court may consider in awarding costs, including: the result of the proceeding; the importance and complexity of the issues, the amount of work involved; whether the public interest in having the proceedings litigated justifies a particular award of costs; and any conduct that tended to unnecessarily lengthen the duration of the proceeding. Rule 400(4) allows the Court to award a lump sum in lieu of, or in addition to, any assessed costs. Rule 400(6)(*c*) provides that the Court's discretion includes the power to "award all or part of costs on a solicitor-and-client basis."

[13] Criteria for determining the circumstances where costs should not be awarded against a person who commences public interest litigation were identified by the Ontario Law Reform

Commission in its *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989):

> a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
> b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
> c) The issues have not been previously determined by a court in a proceeding against the same defendant.
> d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
> e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

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[14] These factors have been approved in a number of Canadian jurisdictions including the Federal Court: see *Harris v Canada*, 2001 FCT 1408 at para 222; *Guide Outfitters Association v British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para 8; *Miller v Boxall*, 2007 SKQB 9 at para 5; *Hastings Park Conservancy v Vancouver (City)*, 2007 BCSC 147 at para 4; *Victoria (City) v Adams*, 2009 BCCA 563 [*Victoria (City)*] at para 185; *R v Griffin*, 2009 ABQB 696 at para 183; *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)* [2011] FCJ No 587 (QL) (TD) at para 3.11, appeal allowed in part but not on the question of costs, 2012 FCA 40 *Georgia Strait Alliance*.

[15] In the *Georgia Strait Alliance* decision, Justice James Russell concluded at paragraph 3.14 that an order for costs on a solicitor and client basis was justified because of the "unjustifiably evasive and obstructive approach" undertaken by the respondents in the case that "unnecessarily lengthened and complicated the proceedings". Similarly, in this matter I concluded that an order for costs on a solicitor and client basis against the respondent Members of Parliament was justified

because of the manner in which they had defended against the applications including the bringing of motions that unnecessarily lengthened and complicated the proceedings.

[16] Adapting the principled approach set out in the Ontario Law Reform Commission report to any case in which the court was being asked to depart from the normal rules as to costs, the British Columbia Court of Appeal distilled the test into four elements at paragraph 188 of *Victoria (City)*, above:

> 1. The case involves matters of public importance that transcend the immediate interests of the named parties, and which [had] not been previously resolved;
> 2. The [claimant] has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
> 3. [The party opposing the claimant] has a superior capacity to bear the cost of the proceeding; and
> 4. The [claimant] has not conducted the litigation in an abusive, vexatious or frivolous manner.

[17] According to Perell J. in *Incredible Electronics*, above, where a litigant is seeking relief from adverse costs liability these factors should be resolved by a single question namely, whether the party is a genuine public interest litigant. Justice Perell stated at paragraph 83:

> In my opinion, in the case at bar, the proposition that public interest litigation requires special treatment should guide the exercise of my discretion. Put differently, in my opinion, the applicants should not be subject to the normal two-way costs regime if they can satisfy the court that they are special interest litigants.

[18] I am satisfied that the applicants in this matter were genuine public interest litigants motivated by a higher purpose. These proceedings fell squarely within the criteria endorsed by in *Harris* and the other decisions cited above. The applications involved issues, the importance of which extended beyond the immediate interests of the parties involved. The applicants had no

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personal, proprietary or pecuniary interest in the outcome that would have justified the proceedings economically. They stood to gain nothing other than the vindication of their electoral rights. The issues had not been previously determined by a court in proceedings against the same defendants and the applicants did not engage in vexatious, frivolous or abusive conduct. This was not a case of unwarranted election challenges. There was a factual foundation, albeit one which I ultimately found fell short of meeting the statutory threshold required to annul the election results in their ridings.

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[19] The question of whether the applicants or the respondent MPs have a clearly superior capacity to bear the costs of the proceedings is a neutral factor in this matter. Much was made of the involvement of a third party organization, the Council of Canadians, in raising funds to indemnify the applicants from an adverse costs award. As I noted, however, at para 260 of the Reasons for Judgment, it was also apparent that the respondent Members of Parliament were supported by the extensive resources of the political party to which they belong - resources which are underwritten by Canadian taxpayers. That argument was not challenged during the hearing nor was anything provided to me in the costs submissions to call it into question.

[20] The respondent Members of Parliament are, therefore, in a position analogous to that of government respondents and defendants who have not been awarded costs in cases where they have been successful in the result. See for example *Harrison v University of British of Columbia*, [1986] BCJ No 2201 (QL), 30 DLR (4th) 206 (SC), additional reasons on costs [1986] BCJ No 1172 (QL), [1987] 2 WWR 378 (SC), rev'd [1988] BCJ No 13 (QL), 21 BCLR (2d) 145 (CA), aff'd [1990] 3 SCR 451, [1990] SCJ No 123 (QL); *Canadian Foundation for Children, Youth and the Law v*

Canada (Attorney General), 2004 SCC 4, [2004] 1 SCR 76; *Sierra Club of Western Canada v British Columbia (Attorney General)*, [1991] BCJ No 2613 (QL), 83 DLR (4th) 708 (SC).

[21] This is not a case such as *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] SCJ No 55 (QL) [*Opitz*], where a losing candidate challenged an election result based on clerical errors in voter registration. In that case, the parties bore their own costs at first instance and on the appeal. Here, the allegations were far more serious, being of electoral fraud. It would be incongruous, in my view, to impose a greater burden upon the applicants who stepped forward to present those allegations, than that considered appropriate in a contest between two candidates in which the challenger had clear personal interests, including an economic interest, in the outcome.

[22] The applicants have argued that to impose any significant measure of costs against them would have a chilling effect on electors who might be the victims of voter fraud in the future. I agree. The fact that a third party has stepped forward to indemnify the applicants in this case can not be counted upon as a solution for any case that might arise again. The respondent Members of Parliament had the financial support of a major political party to conduct an aggressive no holds barred defence against the applications and are not in jeopardy of absorbing the costs themselves. I note also that Parliament has seen fit to fix a modest amount ($1,000) as the security for costs to be paid when an election challenge is filed to discourage nuisance applications.

[23] I do not accept the respondent MPs' contention that a ruling that unsuccessful applicants should be relieved of the obligation to pay costs would clearly increase the "litigation margin", of which the Supreme Court warned in *Opitz*, with a resulting decrease of confidence by the public in

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the finality of elections. The *Canada Elections Act*, LC 2000 c.9 provides a mechanism in s 531(1) for the early dismissal of applications that are "vexatious, frivolous or not made in good faith".

[24] Having considered the matter further, I have reached the conclusion that the "modest fixed amount for the costs of the hearing" that should be awarded the respondent MPs is the amount paid into court for the seven applications, $7,000, plus disbursements of $6,206. I make no award for the other costs incurred by the respondent MPs in preparation for and conduct of the hearing.

[25] In their reply submissions, the respondent MPs noted that it was to be expected that their much higher costs on a lower scale and the applicants' much lower costs on a higher (solicitor client) scale would roughly balance each other. That was the Court's intent. Given the conclusions reached above, there is no longer any need to consider the award of solicitor and client costs to the applicants for their success on the motions.

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ORDER

THIS COURT ORDERS that:

1. the respondent Members of Parliament are awarded costs of $7,000 for the hearing and disbursements of $6,206.

2. the amounts paid into court by the applicants may be released to the respondent Members of Parliament in partial payment of the costs award; and

3. the Court will not determine an amount of costs to be paid on a solicitor and client basis to the applicants for their success on the motions in this matter.

"Richard G. Mosley"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-616-12, T-619-12 (T-620-12, T-621-12, T-633-12, T-634-12, T-635-12)
STYLE OF CAUSE:	LEEANNE BIELLI and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), URMA ELLIS (RETURNING OFFICER FOR DON VALLEY EAST), JOE DANIEL, YASMIN RATANSI, MARY TRANPANI HYNES, AKIL SADIKALI, RYAN KIDD
AND BETWEEN:	SANDRA MCEWING AND BILL KERR and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), JOHANNA GAIL DENESIUK RETURNING OFFICER FOR WINNIPEG SOUTH CENTRE) JOYCE BATEMAN, ANITA NEVILLE, DENNIS LEWYCKY, JOSHUA MCNEIL, LYNDON B. FROESE, MATT HENDERSON
AND BETWEEN	KAY BURKHART and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), DIANNE CELESTINE ZIMMERMAN (RETURNING OFFICER FOR SASKATOON-ROSETOWN-BIGGAR), KELLY BLOCK, LEE REANEY, VICKI STRELIOFF, NETTIE WIEBE

2013 FC 953 (CanLII)

AND BETWEEN JEFF REID

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), LAUREL DUPONT (RETURNING OFFICER FOR ELMWOOD-TRANSCONA), JIM MALOWAY, ILONA NIEMCZYK, LAWRENCE TOET, ELLEN YOUNG

2013 FC 953 (CanLII)

AND BETWEEN KEN FERANCE
AND PEGGY WALSH

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), DIANNE JAMES MALLORY (RETURNING OFFICER FOR NIPISSING-TIMISKAMING), JAY ASPIN, SCOTT EDWARD DALEY, RONA ECKERT, ANTHONY ROTA

AND BETWEEN YVONNE KAFKA

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), ALEXANDER GORDON (RETURNING OFFICER FOR VANCOUVER ISLAND NORTH), JOHN DUNCAN, MIKE HOLLAND, RONNA-RAE LEONARD, SUE MOEN, FRANK MARTIN, JASON DRAPER

AND BETWEEN	THOMAS JOHN PARLEE
	and
	ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), SUSAN J. ELELMAN (RETURNING OFFICER FOR YUKON), RYAN LEEF, LARRY BAGNELL, KEVIN BARR, JOHN STREICKER
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 25, 2013 (costs submissions in writing)
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	September 16, 2013

APPEARANCES:

Steven Shrybman Peter Engelmann Benjamin Piper	FOR THE APPLICANTS
Barbara McIsaac Marc Chenier	FOR THE RESPONDENT (Marc Mayrand, Chief Electoral Officer)
Arthur Hamilton Ted Frankel Jeremy Martin	FOR THE RESPONDENT (Responding Parliamentarians)
W. Thomas Barlow Nick Shkordoff	FOR THE RESPONDENT (Responding Market Group Inc)

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SOLICITORS OF RECORD:

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BORDEN LADNER GERVAIS LLP Ottawa, Ontario	FOR THE RESPONDENT (Marc Mayrand, Chief Electoral Officer)
CASSELS, BROCK & BLACKWELL LLP Toronto, Ontario	FOR THE RESPONDENT (Responding Parliamentarians)
FASKEN MARTINEAU DUMOULIN LLP Toronto, Ontario	FOR THE RESPONDENT (Responding Market Group Inc)

2013 FC 953 (CanLII)

Ontario Public Service Employees' Union, Marie Wilkinson, Edward E. Faulknor and Russell B. Smith *Appellants*

v.

Attorney General for Ontario *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta *Interveners*

INDEXED AS: OPSEU *v.* ONTARIO (ATTORNEY GENERAL)

File No.: 16464.

1986: March 18, 19; 1987: July 29.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Division of powers — Province restricting political activity of provincial civil servants and Crown employees in federal elections — Whether or not restrictions intra vires the province — Constitution Act, 1867, ss. 91, 92(1), (4), (13) — Constitution Act, 1982, s. 45 — The Public Service Act, R.S.O. 1970, c. 386, ss. 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, now R.S.O 1980, c. 418.

The Ontario Public Service Employees' Union is bargaining agent for Government of Ontario employees subject to *The Public Service Act* and each of the individual appellants is a Crown employee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by *The Public Service Act*, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political

* Chouinard J. took no part in the judgment.

Syndicat des employés de la Fonction publique de l'Ontario, Marie Wilkinson, Edward E. Faulknor et Russell B. Smith *Appelants*

c.

Le procureur général de l'Ontario *Intimé*

et

Le procureur général du Canada, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan et le procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ: SEFPO *c.* ONTARIO (PROCUREUR GÉNÉRAL)

N° du greffe: 16464.

1986: 18, 19 mars; 1987: 29 juillet.

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

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

Droit constitutionnel — Partage des pouvoirs — Restriction par une province des activités politiques des fonctionnaires et employés de Sa Majesté dans le cadre d'élections fédérales — Ces restrictions relèvent-elles de la compétence de la province? — Loi constitutionnelle de 1867, art. 91, 92(1), (4), (13) — Loi constitutionnelle de 1982, art. 45 — The Public Service Act, R.S.O. 1970, chap. 386, art. 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, maintenant R.S.O. 1980, chap. 418.

Le Syndicat des employés de la Fonction publique de l'Ontario est l'agent négociateur des employés du gouvernement de l'Ontario qui sont assujettis à *The Public Service Act* et chacun des appelants est un employé de Sa Majesté, un fonctionnaire et un membre du syndicat appelant. Chacun d'eux souhaite exercer des activités politiques présentement interdites par *The Public Service Act*, dont la possibilité de se porter candidat à des élections fédérales sans avoir à prendre un congé à cette fin, celle de faire du démarchage et de solliciter des fonds pour des partis politiques fédéraux et celle de prendre position publiquement sur des questions politi-

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

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activities would subject them to disciplinary measures pursuant to *The Public Service Act*. A motion for an order declaring ss. 12-16 of the Act unconstitutional was heard prior to the coming into force of the *Charter* and proceeded simply on distribution of powers grounds. The motion was denied by Labrosse J. The Court of Appeal affirmed this decision and the underlying rationale that provincial jurisdiction was grounded in s. 92(13) of the *Constitutional Act, 1867*. The three constitutional questions stated before the Supreme Court of Canada dealt with ss. 12-16 of *The Public Service Act*. Were these sections unconstitutional or inoperative in that (1) they purported to restrain provincial civil servants and Crown employees from engaging in certain federal political activity, (2) they contravened ss. 2, 3 and/or 15(1) of the *Charter*, and (3) if so, whether or not they were justified under s. 1 of the *Charter*. Following this Court's decision on a preliminary issue that it would not hear or decide *Charter* issues, the case proceeded on submissions based upon the distribution of legislative powers and argument relying upon certain statements in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

Held: The appeal should be dismissed and the first constitutional question answered in the negative.

Per Beetz, McIntyre, Le Dain and La Forest JJ.: The impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*, and they also relate to the tenure of provincial office within the meaning of s. 92(4). The legislation cannot be constitutionally justified on the sole basis that they are in pith and substance labour relations legislation and therefore a matter of property and civil rights in the province. The impugned provisions are not related to the field of federal elections.

In so far as this legislation can be said to confer rights, individual or collective, upon Ontario residents to have an impartial civil service, such rights are not civil but rather public or political rights. Although the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is

ques fédérales. Les appelants craignent que l'exercice de ces activités politiques n'ait pour effet de les exposer à des mesures disciplinaires conformément à *The Public Service Act*. Une requête visant à obtenir une ordonnance déclarant inconstitutionnels les art. 12 à 16 de la Loi a été entendue avant l'entrée en vigueur de la *Charte* et était fondée simplement sur le partage des pouvoirs. La requête a été rejetée par le juge Labrosse. La Cour d'appel a confirmé cette décision et le raisonnement sous-jacent selon lequel la compétence provinciale reposait sur le par. 92(13). Les trois questions constitutionnelles formulées devant la Cour suprême du Canada portaient sur les art. 12 à 16 de *The Public Service Act*. Ces articles sont-ils inconstitutionnels ou inopérants du fait (1) qu'ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques au niveau fédéral, (2) qu'ils portent atteinte aux art. 2 et 3 ou le par. 15(1) de la *Charte*, et (3) dans l'affirmative, sont-ils justifiés en vertu de l'article premier de la *Charte*? Après que cette Cour eut décidé, relativement à une question préliminaire, qu'elle n'entendrait pas et ne trancherait pas les questions concernant la *Charte*, l'affaire a été entendue en fonction d'arguments fondés sur le partage des pouvoirs législatifs ainsi que d'un argument fondé sur certaines déclarations contenues dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S 455.

Arrêt: Le pourvoi est rejeté et la première question constitutionnelle reçoit une réponse négative.

Les juges Beetz, McIntyre, Le Dain et La Forest: Les dispositions contestées constituent une modification législative ordinaire de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*, et elles ont également trait à la durée des charges provinciales au sens du par. 92(4). Ces dispositions ne peuvent être justifiées du point de vue constitutionnel pour le seul motif qu'elles constituent, de par leur caractère véritable, des dispositions en matière de relations de travail et qu'elles relèvent, par conséquent, de la propriété et des droits civils dans la province. Les dispositions contestées n'ont rien à voir avec le domaine des élections fédérales.

Dans la mesure où on peut dire que cette loi confère aux résidents de l'Ontario des droits, individuels ou collectifs, d'avoir une fonction publique impartiale, ces droits sont non pas civils, mais plutôt publics ou politiques. Bien que la Loi réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique provinciale, un bon nombre de ses dispositions, y compris les dispositions contestées, ne peuvent s'expliquer et se justifier que par

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public employment. They cannot, therefore, be grounded only in s. 92(13) of the *Constitution Act, 1867* but can be fully grounded in s. 92(1) and (4).

The constitution of Ontario is not to be found in a comprehensive, written instrument called a constitution. An enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the offices of Lieutenant-Governor and of the Queen. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. The principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent. The power of constitutional amendment given to the provinces by s. 92(1) does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

The provisions impugned here are constitutional for they bear on the operation of the Ontario Public Service, which is an organ of government, and they impose on its members the duty to abstain from certain political activities in order to implement the principle of impartiality of the public service which is considered as an essential prerequisite of responsible government. It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario.

The impugned provisions are not related to the exclusively federal subject of federal elections. Rather than affecting federal elections *per se*, these provisions create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship.

le fait que l'emploi en question est un emploi public. Elles ne peuvent donc être fondées uniquement sur le par. 92(13) de la *Loi constitutionnelle de 1867*, mais elles peuvent être entièrement fondées sur les par. 92(1) et (4).

La constitution de l'Ontario ne se trouve pas dans un document complet appelé constitution. Une disposition peut généralement être considérée comme une modification de la constitution d'une province lorsqu'elle porte sur le fonctionnement d'un organe du gouvernement de la province, pourvu qu'elle ne soit pas par ailleurs intangible parce qu'indivisiblement liée à la mise en œuvre du principe fédéral ou à une condition fondamentale de l'union et pourvu évidemment qu'elle ne soit pas explicitement ou implicitement exemptée du pouvoir de modification que le par. 92(1) accorde à la province comme, par exemple, les charges de lieutenant-gouverneur et de souverain. Le fait qu'une province puisse validement conférer un effet législatif à une condition préalable d'un gouvernement responsable ne signifie pas nécessairement qu'elle peut faire tout ce qu'il lui plaît du principe du gouvernement responsable lui-même. Ainsi, il n'est pas certain, à tout le moins, qu'une province puisse toucher au pouvoir du lieutenant-gouverneur de dissoudre l'assemblée législative, ou à son pouvoir de nommer et de destituer les ministres, sans toucher de manière inconstitutionnelle à sa charge elle-même. Le principe du gouvernement responsable pourrait, dans la mesure où il est fonction de ces pouvoirs royaux importants, être en grande partie intangible. Le pouvoir de modification constitutionnelle que le par. 92(1) accorde aux provinces ne comprend pas nécessairement le pouvoir de provoquer des bouleversements constitutionnels profonds par l'introduction d'institutions politiques étrangères et incompatibles avec le système canadien.

Les dispositions contestées en l'espèce sont de nature constitutionnelle en ce sens qu'elles portent sur le fonctionnement de la fonction publique de l'Ontario, qui est un organe du gouvernement, et elles imposent à ses membres l'obligation de s'abstenir d'exercer certaines activités politiques afin de mettre en œuvre le principe de l'impartialité de la fonction publique considérée comme une condition essentielle à l'existence d'un gouvernement responsable. On peut dire de la même manière que la fonction publique en Ontario fait partie de l'exécutif du gouvernement de l'Ontario.

Les dispositions contestées n'ont rien à voir avec le chef de compétence fédérale exclusive que sont les élections fédérales. Ces dispositions ne touchent pas aux élections fédérales en soi, elles créent plutôt une incapacité de faire partie de la fonction publique de l'Ontario, portant ainsi atteinte à une relation créée par la province.

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This disability extended to federal elections in order to ensure global political independence for provincial officers. The object of political discourse, the ultimate form of political activity, remains indivisible even in federations with divided jurisdictions. Political activities in the federal field, therefore, had to be included in the impugned provisions to ensure the impartiality of the provincial public service. The alternative would have made the legislation miss its target altogether. The aim of the legislation, far from violating the federal principle, was to reinforce it and to secure the operation of responsible government within a federal framework; its effects on federal political activities were necessarily incidental. The constitutional validity of the impugned provisions may also be supported under s. 92(4) of the *Constitution Act, 1867*, which in any event buttresses the argument already made under s. 92(1).

In a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.

The fundamental right in Canada to participate in certain political activities is not infringed by the impugned legislation; federal and provincial elections are only affected in an incidental way. The basic structure of the Constitution established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. Neither Parliament nor the provincial legislatures may enact legislation which would substantially interfere with the operation of this basic structure. Quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.

Per Dickson C.J.: *The Public Service Act* is directed to the general regulation of the hiring, dismissal, and terms and conditions of employment in the public service and in essence governs the establishment, functions, responsibilities and employment relationships of the Ontario Public Service. Viewed in its entirety, it is easily and explicitly authorized by s. 92(4) of the *Constitution Act, 1867* concerning provincial offices and appointments. The Act, which deals with many of the traditional components of an employer-employee relationship, also falls within the province's property and civil rights power, since labour relations has long been a subject

Cette incapacité s'étend aux élections fédérales en vue d'assurer l'indépendance politique globale des fonctionnaires provinciaux. L'objet du débat politique, la forme ultime d'activité politique, demeure indivisible même dans une fédération qui présente des compétences partagées. Il fallait donc inclure dans les dispositions contestées les activités politiques liées au domaine fédéral pour assurer l'impartialité de la fonction publique provinciale, sinon la mesure législative aurait complètement raté son objectif. Loin de violer le principe fédéral, les dispositions en cause visent à la renforcer et à assurer le fonctionnement d'un gouvernement responsable à l'intérieur d'un régime fédéral; leur effet sur les activités politiques fédérales est nécessairement accessoire. La constitutionnalité des dispositions contestées peut aussi être étayée en vertu du par. 92(4) de la *Loi constitutionnelle de 1867* qui, en tout état de cause, appuie l'argument déjà soumis en vertu du par. 92(1).

Dans une affaire de partage des pouvoirs, lorsqu'on a démontré que le législateur a agi dans les limites de sa compétence, l'établissement de l'équilibre entre des valeurs contradictoires repose sur le jugement politique de ce législateur et ne peut pas être révisé par les tribunaux sans qu'ils examinent la sagesse de la mesure législative.

Les dispositions contestées ne violent pas le droit fondamental, qui existe au Canada, de participer à certaines activités politiques; les élections fédérales et provinciales ne sont touchées que d'une façon accessoire. La structure fondamentale de la Constitution établie par la *Loi constitutionnelle de 1867* envisage l'existence de certaines institutions politiques dont des corps législatifs librement élus aux niveaux fédéral et provincial. Ni le Parlement ni les législatures provinciales ne peuvent légiférer de façon à porter atteinte sensiblement au fonctionnement de cette structure fondamentale. Indépendamment de considérations fondées sur la *Charte*, les corps législatifs dans notre pays doivent se conformer à ces impératifs structurels fondamentaux et ne doivent en aucun cas y passer outre.

Le juge en chef Dickson: *The Public Service Act* a pour objet de réglementer, d'une manière générale, l'embauchage, le congédiement et les conditions de travail dans la fonction publique et elle porte essentiellement sur la création, le rôle et les responsabilités de la fonction publique de l'Ontario, ainsi que sur les relations de travail au sein de cet organisme. Dans son ensemble, elle est explicitement autorisée par le par. 92(4) de la *Loi constitutionnelle de 1867*, concernant les charges provinciales et les nominations. La Loi, qui traite d'un bon nombre d'éléments traditionnels des rapports employeur-employé, relève également de la compétence

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matter generally within provincial jurisdiction under s. 92(13). Constitutional authority granted under s. 92(4) and (13) extends to the specific prohibitions against political activity in ss. 12-16 of the Act. There was no reason, given the Act's validity as a whole under both s. 92(4) and (13), to consider s. 92(1) with the attendant difficulties of assigning a precise content to the concept of "a provincial constitution".

The doctrine of interjurisdictional immunity is not a particularly compelling doctrine given its inconsistency with the basic pith and substance doctrine that a law "in relation to" a provincial matter may validly "affect" a federal matter. Furthermore Parliament, while it can easily enact appropriate laws effecting paramountcy over conflicting provincial laws, has not done so here. The Court, in light of the federal government's intervention in support of the Ontario law and its legislation based on the same constitutional approach adopted by Ontario, should be particularly cautious about invalidating a provincial law.

Appellants argued that the prohibitions were overbroad in that the prohibitions applied to all civil servants without distinguishing between the types of jobs performed and that they covered too wide a range of political activities. Overreach in the sense here used is not arguable in a distribution of powers case.

Appellants also argued, relying on a statement in *Fraser v. Public Service Staff Relations Board*, that Canadian constitutional jurisprudence recognized the existence of certain fundamental political rights and freedoms in the citizens to participate in federal political activities. Freedom of speech and expression is a fundamental animating value in the Canadian constitutional system. No single value, however, no matter how exalted, can bear the full burden of upholding a democratic system of government and some underlying and important values may even conflict. It would be inappropriate to enter into a detailed application of the *Fraser* principles to the facts of the present case because none of the individual appellants has actually been subjected to disciplinary proceedings.

Per Lamer J.: *The Public Service Act* is authorized by s. 92(4) of the *Constitution Act, 1867*; there was no need to consider s. 92(1) or (13).

provinciale en matière de propriété et de droits civils puisque les relations de travail constituent depuis longtemps une matière qui est généralement du ressort des provinces en vertu du par. 92(13). La constitutionnalité en vertu des par. 92(4) et (13) s'applique aux interdictions expresses d'exercer des activités politiques, que l'on trouve aux art. 12 à 16 de la Loi. Étant donné que la Loi dans son ensemble est valide en vertu des par. 92(4) et (13), il n'y a aucune raison d'examiner le par. 92(1) étant donné la difficulté que pose l'attribution d'un sens précis à la notion de «constitution provinciale».

Le principe de l'exclusivité des compétences n'est pas un principe particulièrement impérieux étant donné son incompatibilité avec le principe fondamental du caractère véritable suivant lequel une loi «relative à» une matière provinciale peut régulièrement «toucher» une matière fédérale. En outre, bien que le Parlement puisse facilement adopter des lois appropriées qui l'emporteront sur les lois provinciales incompatibles, il ne l'a pas fait en l'espèce. Étant donné que le gouvernement fédéral est intervenu pour appuyer la loi ontarienne et qu'il a lui-même adopté une loi fondée sur le même point de vue constitutionnel que celui adopté par l'Ontario, le Cour devrait se montrer particulièrement réticente à invalider une loi provinciale.

Les appelants ont soutenu que les interdictions sont de portée trop large étant donné qu'elles s'appliquent à tous les fonctionnaires sans distinguer entre les types d'emplois qu'ils occupent, et qu'elles visent une gamme trop large d'activités politiques. La portée trop large au sens où on l'entend ici n'est pas plaidable dans une affaire ayant trait au partage des pouvoirs.

Invoquant une déclaration contenue dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, les appelants font également valoir que la jurisprudence canadienne en matière constitutionnelle reconnaît l'existence de certains droits et libertés politiques fondamentaux qui permettent aux citoyens de participer aux activités politiques fédérales. La liberté de parole et d'expression représente une valeur fondamentale qui anime le régime constitutionnel canadien. Toutefois, aucune valeur, si noble soit-elle, ne peut à elle seule permettre de soutenir un régime de gouvernement démocratique et il peut même arriver que certaines valeurs fondamentales entrent en conflit. Il ne conviendrait guère de procéder à une application détaillée des principes énoncés dans l'arrêt *Fraser* aux faits de la présente affaire puisqu'aucun des appelants n'a fait l'objet de mesures disciplinaires.

Le juge Lamer: *The Public Service Act* est autorisée par le par. 92(4) de la *Loi constitutionnelle de 1867*; il n'est pas nécessaire d'examiner les par. 92(1) ou (13).

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By Beetz J.

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Overruled: *McKay v. The Queen*, [1965] S.C.R. 798; **referred to**: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada (Manitoba Securities Case)*, [1929] A.C. 260; *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767; *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Attorney General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584; *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

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By Lamer J.

Overruled: *McKay v. The Queen*, [1965] S.C.R. 798.

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Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c. 67.
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Legislative Assembly Act, R.S.O. 1970, c. 240.
Official Languages Act, R.S.C. 1970, c. O-2.
Public Service Act, R.S.O. 1970, c. 386, ss. 2, 3, 10, 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, 23, 24, 26, 27, 28, 28*a*, now R.S.O 1980, c. 418.
Public Service Employment Act, R.S.C. 1970, c. P-32, s. 32.
Representation Act, R.S.O. 1970, c. 413.

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APPEAL from a judgment of the Ontario Court of Appeal (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, dismissing an appeal from a judgment of Labrosse J. (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. Appeal dismissed; the first constitutional question is answered in the negative.

Stephen T. Goudge and *Ian McGilp*, for the appellants.

Blenus Wright and *Carol Creighton*, for the respondent.

Graham R. Garton, for the intervener the Attorney General of Canada.

Réal A. Forest and *Alain Gingras*, for the intervener the Attorney General of Quebec.

William M. Wilson, for the intervener the Attorney General of Nova Scotia.

Citée par le juge Lamer

Arrêt rejeté: *McKay v. The Queen*, [1965] R.C.S. 798.

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Loi constitutionnelle de 1867, art. 58 à 70, 82 à 87, 91, 92(1), (4), (13).
Loi constitutionnelle de 1982, art. 45.
Loi électorale du Canada, S.C. 1960, chap. 39, art. 71.
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Loi sur l'emploi dans la Fonction publique, S.R.C. 1970, chap. P-32, art. 32.
Loi sur les langues officielles, S.R.C. 1970, chap. O-2.
Public Service Act, R.S.O. 1970, chap. 386, art. 2, 3, 10, 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, 23, 24, 26, 27, 28, 28*a*, maintenant R.S.O 1980, chap. 418.
Representation Act, R.S.O. 1970, chap. 413.

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Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, qui a rejeté l'appel d'un jugement du juge Labrosse (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. Pourvoi rejeté; la première question constitutionnelle reçoit une réponse négative.

Stephen T. Goudge et *Ian McGilp*, pour les appelants.

Blenus Wright et *Carol Creighton*, pour l'intimé.

Graham R. Garton, pour l'intervenant le procureur général du Canada.

Réal A. Forest et *Alain Gingras*, pour l'intervenant le procureur général du Québec.

William M. Wilson, pour l'intervenant le procureur général de la Nouvelle-Écosse.

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Richard C. Speight, for the intervener the Attorney General for New Brunswick.

Joseph J. Arvay, for the intervener the Attorney General of British Columbia.

Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

William Henkel, Q.C., and *Robert J. Normey*, for the intervener the Attorney General for Alberta.

The following are the reasons delivered by

THE CHIEF JUSTICE—This appeal involves an important area of constitutional law, namely, the scope of provincial jurisdiction to regulate certain political activities of provincial civil servants and Crown employees.

I

The Facts

The Ontario Public Service Employees' Union is bargaining agent for approximately 50,000 employees of the Government of Ontario who are subject to *The Public Service Act*, R.S.O. 1970, c. 386, now R.S.O. 1980, c. 418, of that province. Marie Wilkinson is employed by the Ontario Ministry of Community and Social Services as a counsellor at a centre for the care of the mentally retarded. Edward Faulknor is employed by the Ontario Ministry of Revenue as an assessor. Russell Smith is employed by the Ministry of Natural Resources as a laboratory technician.

Each of the individual appellants is a Crown employee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by *The Public Service Act*, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political activi-

Richard C. Speight, pour l'intervenant le procureur général du Nouveau-Brunswick.

Joseph J. Arvay, pour l'intervenant le procureur général de la Colombie-Britannique.

Robert G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

William Henkel, c.r., et *Robert J. Normey*, pour l'intervenant le procureur général de l'Alberta.

Version française des motifs rendus par

LE JUGE EN CHEF—Ce pourvoi touche à un domaine important du droit constitutionnel, savoir celui de la portée de la compétence des provinces pour réglementer certaines activités politiques des fonctionnaires et des employés provinciaux de Sa Majesté.

I

Les faits

Le Syndicat des employés de la Fonction publique de l'Ontario est l'agent négociateur d'environ 50 000 employés du gouvernement de l'Ontario qui sont assujettis à la loi de cette province, dite *The Public Service Act*, R.S.O. 1970, chap. 386, maintenant R.S.O. 1980, chap. 418. Marie Wilkinson est employée par le ministère des Services sociaux et communautaires de l'Ontario en tant que conseillère en réadaptation dans un centre pour déficients mentaux. Edward Faulknor travaille pour le ministère du Revenu de l'Ontario en tant que contrôleur des contributions. Russell Smith occupe le poste de technicien de laboratoire au ministère des Richesses naturelles.

Chacun des appelants est un employé de Sa Majesté, un fonctionnaire et un membre du syndicat appelant. Chacun d'eux souhaite exercer des activités politiques présentement interdites par *The Public Service Act*, dont: la possibilité de se porter candidat à des élections fédérales sans avoir à prendre un congé à cette fin, celle de faire du démarchage et de solliciter des fonds pour des partis politiques fédéraux et celle de prendre position publiquement sur des questions politiques fédérales. Les appelants craignent que l'exercice de ces activités politiques n'ait pour effet de les

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ties would subject them to disciplinary measures pursuant to *The Public Service Act*.

II

The Legislation

The general thrust of the Ontario *Public Service Act* is the regulation of the hiring, dismissal and terms and conditions of employment in the public service. Within this general context there are five provisions which prohibit public servants from engaging in some political activities. These sections read as follows:

12.—(1) Except during a leave of absence granted under subsection 2, a Crown employee shall not,

(*a*) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;

(*b*) solicit funds for a provincial or federal political party or candidate; or

(*c*) associate his position in the service of the Crown with any political activity.

(2) Any Crown employee, other than a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause *u* of subsection 1 of section 29, who proposes to become a candidate in a provincial or federal election shall apply through his minister to the Lieutenant-Governor in Council for leave of absence without pay for a period,

(*a*) not longer than that commencing on the day on which the writ for the election is issued and ending on polling day; and

(*b*) not shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day,

and every such application shall be granted.

(3) Where a Crown employee who is a candidate in a provincial or federal election is elected, he shall forthwith resign his position as a Crown employee.

(4) Where a Crown employee who has resigned under subsection 3,

(*a*) ceases to be an elected political representative within five years of the resignation; and

(*b*) applies for reappointment to his former position or to another position in the service of the Crown

exposer à des mesures disciplinaires conformément à *The Public Service Act*.

II

Les textes législatifs

The Public Service Act de l'Ontario vise, d'une manière générale, à réglementer l'embauchage, le congédiement et les conditions de travail dans la fonction publique. Dans ce contexte général, il y a cinq dispositions qui interdisent aux fonctionnaires d'exercer certaines activités politiques. Ces dispositions sont les suivantes:

[TRADUCTION] **12.**—(1) Nul employé de Sa Majesté ne doit

a) se porter candidat à des élections provinciales ou fédérales ni siéger en tant que député provincial ou fédéral; ni

b) solliciter des fonds pour un parti politique provincial ou fédéral ou pour un candidat; ni

c) relier son poste dans la fonction publique à des activités politiques,

si ce n'est pendant un congé accordé en vertu du paragraphe 2.

(2) Un employé de Sa Majesté, autre qu'un sous-ministre ou tout autre employé dont le poste ou la classification est désigné par voie de règlement pris en vertu de l'alinéa 29(1)*u*), qui se propose de se porter candidat à des élections provinciales ou fédérales doit, par l'intermédiaire de son ministre, adresser au lieutenant-gouverneur en conseil une demande de congé sans traitement

a) pour une durée maximale calculée à partir du jour de la délivrance du bref d'élection jusqu'au jour du scrutin; et

b) pour une durée minimale calculée à partir du jour prévu par la loi pour les mises en candidature jusqu'au jour du scrutin,

et toute demande à cet effet doit être accueillie.

(3) Lorsqu'un employé de Sa Majesté qui s'est porté candidat à des élections provinciales ou fédérales est élu, il doit immédiatement démissionner du poste qu'il occupe comme employé de Sa Majesté.

(4) L'employé de Sa Majesté qui a démissionné en vertu du paragraphe 3,

a) qui cesse d'être un député dans les cinq ans de sa démission; et

b) qui demande, dans les trois mois de la date où il cesse d'être député, d'être réintégré dans son

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for which he is qualified within three months of ceasing to be an elected political representative,

he shall be reappointed to the position upon its next becoming vacant.

(5) Where a Crown employee has been granted leave of absence under subsection 2 and was not elected, or resigned his position under subsection 3 and was reappointed under subsection 4, the period of the leave of absence or resignation shall not be computed in determining the length of his service for any purpose, and the service before and after such period shall be deemed to be continuous for all purposes.

13.—(1) A civil servant shall not during a provincial or federal election canvass on behalf of a candidate in the election.

(2) Notwithstanding subsection 1, a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause *u* of subsection 1 of section 29 shall not at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate.

14. Except during a leave of absence granted under subsection 2 of section 12, a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party.

15. A Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party.

16. A contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal.

Most of these prohibitions are qualified by leave of absence provisions. This case arose because the individual appellants either wanted to take part in some of the prohibited activities after working hours, or sought, and were refused, leaves of absence to engage in them.

III

Procedural History

1. *Supreme Court of Ontario*

A motion brought on behalf of the appellants before Labrosse J. for an order declaring unconstitutional ss. 12, 13, 14, 15 and 16 of *The Public Service Act* was denied: (1979), 24 O.R. (2d) 324,

ancien poste ou d'être nommé à un autre poste dans la fonction publique pour lequel il est qualifié,

doit être réintégré dans son poste ou nommé à un autre dès qu'une vacance survient.

(5) Lorsqu'un employé de Sa Majesté a obtenu un congé en vertu du paragraphe 2 et qu'il ne s'est pas fait élire, ou lorsqu'il a démissionné de son poste en vertu du paragraphe 3 et qu'il a été réintégré dans ses fonctions en vertu du paragraphe 4, la période visée par le congé ou la démission n'est pas incluse dans la détermination de la durée de son ancienneté à quelque fin que ce soit, et la prestation de ses services avant et après cette période est réputée continue à toutes fins.

13.—(1) Nul fonctionnaire ne fera du démarchage pour un candidat à des élections provinciales ou fédérales.

(2) Nonobstant le paragraphe 1, un sous-ministre ou tout autre employé de Sa Majesté, dont le poste ou la classification est désigné par voie de règlement pris en vertu de l'alinéa 29(1)*u*), ne doit à aucun moment faire du démarchage ou travailler activement pour un parti politique provincial ou fédéral ou pour un candidat.

14. Un fonctionnaire ne doit à aucun moment prendre la parole en public ni exprimer des opinions écrites destinées à être diffusées auprès du public sur une question qui fait partie du programme d'un parti politique provincial ou fédéral, si ce n'est pendant un congé accordé en vertu du paragraphe 12(2).

15. Nul employé de Sa Majesté ne doit pendant les heures de travail exercer une activité pour le compte d'un parti politique provincial ou fédéral.

16. Toute contravention aux articles 11, 12, 13, 14 ou 15 est réputée constituer une cause suffisante de renvoi.

La plupart de ces interdictions sont atténuées par des dispositions en matière de congé. Ce litige a pris naissance soit parce que les appelants voulaient participer après les heures de travail à certaines activités prohibées, soit parce qu'ils n'ont pas obtenu les congés demandés pour les exercer.

III

Historique des procédures

1. *La Cour suprême de l'Ontario*

Une requête, présentée au nom des appelants devant le juge Labrosse, en vue d'obtenir une ordonnance déclarant inconstitutionnels les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, a été

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98 D.L.R. (3d) 168. The motion was heard prior to the date on which the *Canadian Charter of Rights and Freedoms* came into force and proceeded simply on distribution of powers grounds. The challenge to the Ontario law was that it could not limit in any way the activities of the appellants in a federal election because jurisdiction over federal elections rested exclusively with Parliament.

The position of the Attorney General for Ontario was that the entire law, including the prohibitions as applied to federal elections, was authorized by s. 92(1), (4) and (13) of the *Constitution Act, 1867* which provide:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

. . .

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

. . .

13. Property and Civil Rights in the Province.

It should be noted that s. 92(1) is now, with some modification of wording but not of substance, s. 45 of the *Constitution Act, 1982.*

At the hearing of the motion, Labrosse J. accepted that the Act, including prohibitions, was essentially a labour relations law and therefore valid under s. 92(13). He noted that the Act provides for the general regulation of the hiring, dismissal, and terms and conditions of employment of the civil service. The impugned sections, therefore, were found to be, in pith and substance, enacted to govern public sector labour relations in the province. In so far as they affected political activities in federal elections, Labrosse J. said they

rejetée: (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. La requête a été entendue avant l'entrée en vigueur de la *Charte canadienne des droits et libertés* et était fondée simplement sur le partage des pouvoirs. On contestait la validité de la loi ontarienne en alléguant que celle-ci ne pouvait d'aucune manière restreindre les activités des appelants lors d'élections fédérales parce que les élections fédérales relevaient de la compétence exclusive du Parlement.

Le procureur général de l'Ontario a fait valoir que la Loi dans son ensemble, y compris les interdictions visant les élections fédérales, était autorisée par les par. 92(1), (4) et (13) de la *Loi constitutionnelle de 1867*, dont voici le texte:

92. Dans chaque province, la législature pourra exclusivement légiférer relativement aux matières entrant dans les catégories de sujets ci-dessous énumérés, à savoir:

1. L'amendement de temps à autre, nonobstant toute disposition contraire énoncée dans le présent acte, de la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur;

. . .

4. la création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux;

. . .

13. la propriété et les droits civils dans la province;

Il est à noter que le par. 92(1) est maintenant devenu, avec certaines modifications sur le plan de la forme, mais non sur celui du fond, l'art. 45 de la *Loi constitutionnelle de 1982.*

Lors de l'audition de la requête, le juge Labrosse a accepté que la Loi, y compris les interdictions, était essentiellement une loi en matière de relations de travail et qu'elle était, par conséquent, valide en vertu du par. 92(13). Il a souligné que la Loi réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique. On a donc conclu que les dispositions attaquées visaient, de par leur caractère véritable, à régir les relations de travail dans le secteur public de la province. D'après le juge Labrosse, si elles touchaient aux activités politiques lors d'élections fédérales, ce n'était qu'accessoirement dans le cadre d'un régime légis-

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did so incidentally, as part of a wider legislative scheme to regulate labour relations.

2. *The Ontario Court of Appeal*

A unanimous three-judge panel of the Ontario Court of Appeal ((1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661) affirmed both Labrosse J.'s decision and the underlying rationale that provincial jurisdiction was grounded in s. 92(13). Although *The Public Service Act* includes restrictions on the federal political activities of employees, MacKinnon A.C.J.O., for the Court, found that the Act was essentially labour relations legislation and the prohibitions were conditions of employment designed to preserve the impartiality of the public service. As such, the Act, including the prohibitions, fell within provincial jurisdiction over property and civil rights.

MacKinnon A.C.J.O. included an overview of the constitutional significance of the political impartiality of the public service which he held to be crucial to the viability of a system of responsible government in Canada. He asserted that the public has a right to an impartial public service. *The Public Service Act* was intended to protect the civil rights of Ontario residents and was accordingly valid in a second sense under s. 92(13) of the *Constitution Act, 1867*.

Finally, although he did not decide the point, because of his conclusions about s. 92(13), MacKinnon A.C.J.O. said there was "considerable force" in the Attorney General's arguments based on s. 92(1) and (4) of the *Constitution Act, 1867*.

3. *The Supreme Court of Canada*

Leave to appeal was granted by this Court. The following are constitutional questions as stated by Laskin C.J. and as revised and supplemented by Dickson C.J.:

1. Are ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386, as amended, unconstitutional insofar as they purport to restrain provincial Civil Ser-

latif plus large destiné à réglementer les relations de travail.

2. *La Cour d'appel de l'Ontario*

Une formation de trois juges de la Cour d'appel de l'Ontario ((1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661) a confirmé à l'unanimité à la fois la décision du juge Labrosse et le raisonnement sous-jacent selon lequel la compétence provinciale reposait sur le par. 92(13). Quoique *The Public Service Act* impose des restrictions aux activités politiques fédérales des employés de Sa Majesté, le juge en chef adjoint MacKinnon a conclu, au nom de la Cour d'appel, que la Loi portait essentiellement sur les relations de travail et que les interdictions étaient des conditions de travail conçues pour assurer l'impartialité de la fonction publique. Dans cette optique, la Loi, y compris les interdictions, relevait de la compétence provinciale en matière de propriété et de droits civils.

Le juge en chef adjoint MacKinnon a donné en outre un aperçu de l'importance constitutionnelle de l'impartialité de la fonction publique sur le plan politique, impartialité qu'il a jugée essentielle à l'existence d'un régime de gouvernement responsable au Canada. Il a affirmé que le public a droit à une fonction publique impartiale. *The Public Service Act* est destinée à protéger les droits civils des résidents de l'Ontario et elle est donc justifiée dans un second sens par le par. 92(13) de la *Loi constitutionnelle de 1867*.

Enfin, bien qu'il n'ait pas tranché ce point en raison de ses conclusions relatives au par. 92(13), le juge en chef adjoint MacKinnon a dit que les arguments du procureur général fondés sur les par. 92(1) et (4) de la *Loi constitutionnelle de 1867* avaient un [TRADUCTION] «poids considérable».

3. *La Cour suprême du Canada*

Le présent pourvoi a été formé avec l'autorisation de cette Cour. Voici les questions constitutionnelles qui ont été formulées par le juge en chef Laskin et qui ont été révisées et complétées par le juge en chef Dickson:

1. Dans la mesure où ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques au

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vants and Crown Employees from engaging in certain federal political activity?

2. Do ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, infringe or deny the rights and freedoms guaranteed by ss. 2, 3 and/or 15(1) of the *Canadian Charter of Rights and Freedoms* insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal and provincial political activity?

3. If ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, infringe or deny ss. 2 and 3, and/or 15(1) of the *Canadian Charter of Rights and Freedoms*, are these sections justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

niveau fédéral, les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, sont-ils inconstitutionnels?

2. Dans la mesure où ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques aux niveaux fédéral et provincial, les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, portent-ils atteinte aux droits et libertés garantis par les art. 2 et 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*?

3. Si les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et ses modifications portent atteinte aux droits et libertés garantis par les art. 2 et 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*, ces articles sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, non incompatibles avec la *Loi constitutionnelle de 1982*?

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At the start of the hearing of the appeal before this Court, a preliminary issue was raised concerning the hearing of argument on *Charter* issues. It was contended by the Attorney General for Ontario, supported by several intervening Attorneys General, that the Court should not address the *Charter* issues because all of the activities in the case were pre-*Charter* and neither of the Ontario courts had heard *Charter* arguments. After argument, the Court decided (Dickson C.J. and Chouinard and Le Dain JJ. dissenting) that the Court would not hear or decide the *Charter* issues. In the result, the case proceeded on submissions based upon the distribution of legislative powers and a hastily constructed argument relying upon certain statements in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

Au début de l'audience en cette Cour, on a soulevé une question préliminaire concernant la présentation d'arguments portant sur des questions relatives à la *Charte*. Le procureur général de l'Ontario, appuyé par plusieurs procureurs généraux intervenants, a soutenu que la Cour ne devrait pas aborder les questions relatives à la *Charte* parce que toutes les activités en cause étaient antérieures à la *Charte* et que ni l'un ni l'autre tribunal ontarien n'avait entendu des arguments fondés sur la *Charte*. Après que ce point eut été débattu, la Cour a décidé (le juge en chef Dickson et les juges Chouinard et Le Dain étant dissidents) qu'elle n'entendrait pas et ne trancherait pas les questions relatives à la *Charte*. En définitive, l'affaire a été entendue en fonction d'arguments fondés sur le partage des pouvoirs législatifs ainsi que d'un argument de dernière minute fondé sur certaines déclarations contenues dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455.

IV

The Distribution of Powers

The first step in any distribution of powers case is to characterize the law in question. This is not the ultimate legal step; it is not to classify the law as coming under one of the heads of s. 91 or s. 92.

IV

Le partage des pouvoirs

La première étape dans n'importe quelle affaire de partage des pouvoirs consiste à qualifier la loi en cause. Ce n'est pas là l'étape juridique ultime; il n'est pas question de classer ladite loi sous l'une

It is simply a preliminary step, namely to identify and describe the dominant features, the essential coverage, of the law. The Act with which we are here concerned is, as mentioned above, directed to the general regulation of the hiring, dismissal, and terms and conditions of employment in the public service. In essence it governs the establishment, functions, responsibilities and employment relationships of the Ontario Public Service.

In light of this description, it can be seen that the Act, viewed in its entirety, is easily and explicitly authorized by s. 92(4) of the *Constitution Act, 1867* which gives the provinces jurisdiction over "the establishment and tenure of provincial offices and the appointment and payment of provincial officers". Additionally, since *The Public Service Act* deals with many of the traditional components of an employer-employee relationship and since labour relations has long been a subject matter generally within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867* (see *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, and many subsequent cases), it follows that *The Public Service Act* is within provincial property and civil rights jurisdiction. Because the Act as a whole is clearly valid under both s. 92(4) and (13), I see no reason to embark upon a consideration of s. 92(1). I am reinforced in this conclusion by the difficulty of assigning a precise content to the concept of "a provincial constitution".

But what of the specific prohibitions against political activity in ss. 12-16 of *The Public Service Act*? Does the constitutional authority for the Act, viewed as a whole, extend to the prohibitions? In light of the overall labour relations thrust of *The Public Service Act* it is reasonable to characterize ss. 12-16 of the Act as being also labour relations provisions. The prohibitions against certain types of political activity are essentially terms and conditions of employment and can be supported, therefore, under s. 92(13). Similarly, these prohibitions

des rubriques de l'art. 91 ou de l'art. 92. Il s'agit simplement d'une étape préliminaire, savoir l'identification et la description des caractéristiques dominantes de la loi en question et de ce qu'elle vise essentiellement. Or, la Loi présentement en cause a pour objet, comme je l'ai déjà mentionné, de réglementer, d'une manière générale, l'embauchage, le congédiement et les conditions de travail dans la fonction publique. Elle porte essentiellement sur la création, le rôle et les responsabilités de la fonction publique de l'Ontario, ainsi que sur les relations de travail au sein de cet organisme.

Compte tenu de cette description, il est facile de constater que la Loi dans son ensemble est explicitement autorisée par le par. 92(4) de la *Loi constitutionnelle de 1867* qui attribue aux provinces la compétence concernant «la création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux». De plus, puisque *The Public Service Act* traite d'un bon nombre d'éléments traditionnels des rapports employeur-employé et puisque les relations de travail constituent depuis longtemps une matière qui est généralement du ressort des provinces en vertu du par. 92(13) de la *Loi constitutionnelle de 1867* (voir *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, et de nombreux arrêts subséquents), il s'ensuit que *The Public Service Act* relève de la compétence provinciale en matière de propriété et de droits civils. Étant donné que la Loi dans son ensemble est nettement valide en vertu des par. 92(4) et (13), je ne vois aucune raison d'entreprendre un examen du par. 92(1). Je suis renforcé dans cette conclusion par la difficulté que pose l'attribution d'un sens précis à la notion de «constitution provinciale».

Mais que dire des interdictions expresses d'exercer des activités politiques, que l'on trouve aux art. 12 à 16 de *The Public Service Act*? La constitutionnalité de la Loi dans son ensemble s'applique-t-elle aux interdictions? Puisque *The Public Service Act* vise globalement les relations de travail, il est raisonnable de qualifier les art. 12 à 16 de la Loi comme étant également des dispositions en matière de relations de travail. Les prohibitions visant certains types d'activités politiques constituent essentiellement des conditions de travail et

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are terms and conditions of public employment. As such, they are clearly enacted in relation to the establishment and tenure of provincial offices and are therefore valid under s. 92(4) of the *Constitution Act, 1867*.

The appellants, as I understand their position, do not really deny these conclusions as a matter of general distribution of powers analysis. They do, however, deny the conclusions on two other bases: first, that the prohibitions against political activity by provincial public servants in federal elections are outside the scope of provincial s. 92 jurisdiction; secondly, that the prohibitions are overbroad. It is to these two arguments that I now turn.

1. *The Appellants' Federalism Arguments*

The crux of the appellants' federalism position is that *The Public Service Act*, admittedly valid in most respects, cannot prohibit the political activities of Ontario public servants in federal elections because:

(1) federal elections are within the exclusive domain of Parliament, and

(2) such a law does not meet the "in the province" limitation on the various heads in s. 92 of the *Constitution Act, 1867*.

The appellants buttress these arguments by reference to the principle of interjurisdictional immunity and to this Court's decision in *McKay v. The Queen*, [1965] S.C.R. 798.

(a) *Interjurisdictional Immunity*

The appellants' first argument is based on the principle of interjurisdictional immunity which posits that legislation enacted by one order of government cannot interfere with, or have an impact on, subject matters under the jurisdiction of the other order of government. The doctrine had its origins in the so-called "company law cases"

peuvent donc être justifiées en vertu du par. 92(13). De même, ces prohibitions sont des conditions de travail dans le secteur public. Il est évident qu'à ce titre elles ont été adoptées relativement à la création et à la durée de charges provinciales et qu'elles sont donc valides en vertu du par. 92(4) de *Loi constitutionnelle de 1867*.

Les appelants, si je comprends bien leur position, ne contestent pas vraiment l'exactitude de ces conclusions sur le plan de l'analyse du partage général des pouvoirs. Ils les repoussent toutefois pour deux autres motifs: premièrement, pour le motif que l'interdiction qui est faite aux fonctionnaires provinciaux d'exercer des activités politiques lors d'élections fédérales outrepasse la compétence que l'art. 92 confère aux provinces; deuxièmement, pour le motif que les interdictions sont de portée trop large. Ce sont ces deux moyens que je vais maintenant aborder.

1. *Les arguments des appelants fondés sur le fédéralisme*

Le point capital de la thèse des appelants fondée sur le fédéralisme est que *The Public Service Act*, dont ils reconnaissent la validité générale, ne peut pas interdire aux fonctionnaires publics de l'Ontario d'exercer des activités politiques lors d'élections fédérales:

(1) parce que les élections fédérales relèvent de la compétence exclusive du Parlement, et

(2) parce qu'une telle loi ne respecte pas la limite dite «dans la province» dont sont assortis les divers chefs de compétence de l'art. 92 de la *Loi constitutionnelle de 1867*.

Les appelants invoquent à l'appui de ces arguments le principe de l'exclusivité des compétences ainsi que l'arrêt de cette Cour *McKay v. The Queen*, [1965] R.C.S. 798.

a) *L'exclusivité des compétences*

Le premier argument des appelants repose sur le principe de l'exclusivité des compétences suivant lequel une loi adoptée par un palier de gouvernement ne saurait empiéter ou avoir des répercussions sur des matières qui relèvent de la compétence de l'autre palier de gouvernement. Ce principe tire son origine de ce qu'on appelle les

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where it was held that provincial laws could not sterilize or impair the status or essential powers of a federally incorporated company. See *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada (Manitoba Securities Case)*, [1929] A.C. 260.

After its initial development in the company cases, the doctrine expanded and had its greatest success in the context of the application of provincial laws to federal works and undertakings. The doctrine came to stand for the proposition that a provincial law could not affect a vital part of the management and operation of a federal undertaking. See, for example, *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767. This formulation of the doctrine is important for two reasons. First, it extended the doctrine into new and important areas. "Federally incorporated companies" is not a particularly large field; "federal works and undertakings" is. Secondly, by using the terminology of "affecting a vital part" rather than the earlier phrasing of "sterilization" or "impairment", the Court perhaps signalled a broader reach for the doctrine.

However, even though the doctrine of interjurisdictional immunity has arguably expanded since its company law origins, it is, in my opinion, not a particularly compelling doctrine. Professor Hogg has offered two strong reasons to doubt its value (*Constitutional Law of Canada* (2nd ed. 1985), at p. 331). The first, doctrinal, reason is:

> The theory behind the results [in the cases in which the doctrine has been applied] appears to be that federal heads of power not only confer power on the federal Parliament, but also operate "defensively" to deny power to the provincial Legislatures. In my view, this theory is inconsistent with the basic pith and substance doctrine–that a law "in relation to" a provincial matter

[TRADUCTION] «affaires en matière de droit des compagnies» dans lesquelles on a conclu que des lois provinciales ne pouvaient venir neutraliser ou diminuer le statut ou les pouvoirs essentiels d'une société à charte fédérale. Voir *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, *Attorney-General for Manitoba v. Attorney-General for Canada (l'affaire des valeurs mobilières du Manitoba)*, [1929] A.C. 260.

Après avoir été formulé dans les affaires de droit des compagnies, le principe a connu un élargissement de sa portée et a remporté son plus grand succès dans le contexte de l'application de lois provinciales relatives aux ouvrages et entreprises de nature fédérale. Le principe en est venu à porter qu'une loi provinciale ne pouvait toucher une partie essentielle de la gestion et de l'exploitation d'une entreprise fédérale. Voir, par exemple, *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] R.C.S. 767. Cette formulation du principe est importante pour deux raisons. D'abord, elle permet d'appliquer le principe à des domaines nouveaux et importants. Le domaine des «sociétés à charte fédérale» n'est pas particulièrement vaste, alors que c'est tout le contraire dans le cas des «ouvrages et entreprises de nature fédérale». Deuxièmement, en employant l'expression «toucher une partie essentielle» plutôt que les termes «neutraliser» ou «diminuer» utilisés antérieurement, la Cour a peut-être reconnu au principe une portée plus large.

Toutefois, bien qu'on puisse prétendre que la portée du principe de l'exclusivité des compétences s'est élargie depuis qu'il est apparu dans le domaine du droit des compagnies, je ne crois pas qu'il s'agisse d'un principe particulièrement impérieux. Le professeur Hogg énonce deux raisons sérieuses de douter de sa valeur (*Constitutional Law of Canada* (2nd ed. 1985), à la p. 331). La première, fondée sur la doctrine, est la suivante:

> [TRADUCTION] La théorie qui sous-tend les résultats [obtenus dans les cas où le principe a été appliqué] semble être que les chefs de compétence fédérale n'ont pas seulement pour effet de conférer des pouvoirs au Parlement, mais ils s'appliquent aussi «défensivement» de manière à refuser ces pouvoirs aux législatures provinciales. À mon avis, cette théorie est incompatible avec

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may validly "affect" a federal matter. And, indeed, for every case asserting an interjurisdictional immunity there are dozens which deny such an immunity by application of the pith and substance doctrine.

The second, policy, reason is:

> From a policy standpoint, the immunity of federal undertakings seems unnecessary, because the federal Parliament can, if it chooses, easily protect undertakings within federal jurisdiction from the operation of provincial laws by enacting appropriate laws which will be paramount over conflicting provincial laws.

I favour both of these arguments of caution about the scope of the interjurisdictional immunity doctrine. The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. See, for example, *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Attorney General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161. In light of these decisions, I am not prepared to extend the doctrine of interjurisdictional immunity into a field—federal elections—which is unrelated to either the company law cases or the federal under-

le principe fondamental du caractère véritable, suivant lequel une loi «relative à» une matière provinciale peut régulièrement «toucher» une matière fédérale. En fait, pour chaque affaire où l'on revendique l'exclusivité des compétences, il y en des douzaines qui, par l'application du principe du caractère véritable, nient l'existence d'une telle exclusivité.

La seconde raison, qui en est une de politique générale, est la suivante:

> [TRADUCTION] Sur le plan de la politique générale, l'exclusivité relative aux entreprises fédérales paraît superflue parce que le législateur fédéral peut, s'il le veut, facilement protéger les entreprises relevant de la compétence fédérale contre l'application de lois provinciales en adoptant des lois appropriées qui auront prépondérance sur les lois provinciales incompatibles.

J'approuve chacun de ces arguments de prudence vis-à-vis de la portée du principe de l'exclusivité des compétences. Historiquement, le droit constitutionnel canadien a permis passablement d'interaction et même de chevauchement en ce qui concerne les pouvoirs fédéraux et provinciaux. Il est vrai que des principes comme celui de l'exclusivité des compétences et celui de l'immunité de Sa Majesté ainsi que des notions comme celle des «compartiments étanches» restreignent l'étendue de cette interaction. Il faut cependant reconnaître que ces principes et notions n'ont pas représenté le courant dominant en matière constitutionnelle; ils ont constitué plutôt un contre-courant opposé à l'effet puissant du principe du caractère véritable et du double aspect et, au cours des dernières années, une façon très limitée d'aborder les questions de conflit et de prépondérance en matière législative. Voir, par exemple, *Walter v. Attorney General of Alberta*, [1969] R.C.S. 383; *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695; *Procureur général du Québec c. Kellogg's Co. of Canada*, [1978] 2 R.C.S. 211; *Construction Montcalm Inc. c. Commission du salaire minimum*, [1979] 1 R.C.S. 754; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161. Compte tenu de ces arrêts, je ne suis pas prêt à appliquer le principe de l'exclusivité des compétences à un domaine, celui des élections fédérales, qui n'a rien à voir avec les affaires en matière de droit des

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takings cases, the two historical roots of the doctrine.

Furthermore, as Professor Hogg implies, the federal Parliament always has a powerful weapon—its own legislation. If Parliament does not approve of the application of a provincial law to a matter within federal jurisdiction it can easily legislate to prevent the unwanted application. In the present case, the *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, deals with permitted and prohibited activities in federal elections. Some of the provisions of that Act relate to various kinds of disqualification from certain political activities. If Parliament wanted to defend against the prohibitions contained in ss. 12-16 of the Ontario *Public Service Act* it could do so. It hasn't. Indeed, it has done the opposite. By prohibiting federal public servants from engaging in certain activities during provincial elections, Parliament has indicated that it shares the approach (and the view on legality) of the Ontario legislature. It may be worth adding that most provincial legislatures have enacted legislation limiting the political activity of public servants in both federal and provincial elections.

I think it is important to note, and attach some significance to, not only the similar federal legislation but also the fact that the federal government intervened in this appeal to support the Ontario law. The distribution of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has

compagnies ni avec celles portant sur les entreprises fédérales, les deux sources historiques du principe.

De plus, comme le laisse entendre le professeur Hogg, le législateur fédéral dispose toujours d'une arme puissante, savoir ses propres lois. Si le Parlement n'approuve pas l'application d'une loi provinciale à une matière qui relève de la compétence fédérale, il peut facilement légiférer pour empêcher cette application non souhaitée. En l'espèce, la *Loi électorale du Canada*, S.R.C. 1970 (1er supp.), chap. 14, porte sur les activités qui sont permises et sur celles qui sont défendues lors d'élections fédérales. Des dispositions de cette loi traitent de différents types d'exclusion de certaines activités politiques. Si le Parlement avait voulu parer aux interdictions imposées aux art. 12 à 16 de *The Public Service Act* de l'Ontario, il aurait pu le faire. Or, il ne l'a pas fait. En réalité, il a fait le contraire. En interdisant aux fonctionnaires fédéraux d'exercer certaines activités pendant des élections provinciales, le Parlement a indiqué qu'il partage l'attitude (ainsi que l'opinion sur ce qui est légal) de la législature de l'Ontario. Il peut valoir la peine d'ajouter que la plupart des législatures provinciales ont adopté des dispositions limitant les activités politiques des fonctionnaires tant dans le cadre d'élections fédérales que dans celui d'élections provinciales.

Selon moi, un point qu'il convient de souligner et auquel il faut attacher une certaine importance est non seulement l'existence d'une loi fédérale semblable, mais aussi le fait que le gouvernement fédéral est intervenu dans ce pourvoi pour appuyer la loi ontarienne. Les dispositions de la *Loi constitutionnelle de 1867* relatives au partage des pouvoirs ne s'adressent pas exclusivement aux gouvernements fédéral et provinciaux. Elles établissent des lignes de démarcation qui intéressent tous les Canadiens et auxquelles ceux-ci peuvent se fier. Par conséquent, le fait que le fédéral et les provinces s'entendent sur une ligne de démarcation précise entre leurs champs de compétence respectifs n'est pas concluant quant à cette ligne de démarcation. J'estime néanmoins que la Cour devrait se montrer particulièrement réticente à invalider une

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enacted legislation based on the same constitutional approach adopted by Ontario.

(b) *McKay v. The Queen*

The appellants, however, support their argument with strong reliance on an important and factually relevant case, *McKay v. The Queen*. In *McKay* the Court held, by a majority of five-four, that a municipal by-law prohibiting the display of signs on residential property was inapplicable to federal election signs. In other words, the Court read down the law so that it would not apply in an impermissible context. The gist of the majority judgment, written by Cartwright J., was that the subject matter of federal elections was within the exclusive jurisdiction of Parliament and that a provincial law could not interfere in any way with this subject matter. He said, at p. 804:

> I cannot think that it was the intention of the Council to so enact or that it was the intention of the Legislature to empower it to do so. Such an enactment would, in my opinion, be *ultra vires* of the provincial legislature. The power of the legislature to enact such a law, if it exists, must be found in s. 92 of the *British North America Act*. It is argued for the respondent that it falls within head 13, "Property and Civil Rights in the Province." Whether or not the right of an elector at a federal election to seek by lawful means to influence his fellow electors to vote for the candidate of his choice is aptly described as a civil right need not be discussed; it is clearly not a civil right in the province. It is a right enjoyed by the elector not as a resident of Ontario but as a citizen of Canada.

The appellants contend that the current appeal raises a virtually identical issue. They say that the Ontario law prohibits certain types of participation in federal elections and that, on the authority of *McKay*, such restrictions are unconstitutional.

loi provinciale lorsque le gouvernement fédéral n'en conteste pas la validité ou, comme c'est le cas en l'espèce, lorsqu'il va même jusqu'à intervenir pour appuyer cette loi et qu'il a lui-même adopté une loi fondée sur le même point de vue constitutionnel que celui adopté par l'Ontario.

b) *McKay v. The Queen*

Toutefois, les appelants s'appuient fortement dans leur argumentation, sur un arrêt important dont les faits sont pertinents en l'espèce. Il s'agit de l'arrêt *McKay v. The Queen*. Dans l'arrêt *McKay*, la Cour a conclu, à la majorité de cinq contre quatre, qu'un règlement municipal interdisant l'installation d'enseignes sur les propriétés résidentielles ne s'appliquait pas aux pancartes placées dans le cadre d'une élection fédérale. En d'autres termes, la Cour a donné à la loi une interprétation atténuée de manière qu'elle ne s'applique pas dans un contexte où son application n'était pas acceptable. Le jugement de la Cour à la majorité, rédigé par le juge Cartwright, porte en substance que les élections fédérales constituent un chef de compétence fédérale exclusive sur lequel une loi provinciale ne peut empiéter d'aucune manière. Le juge Cartwright affirme, à la p. 804:

> [TRADUCTION] Je ne puis croire que le conseil ait voulu légiférer dans ce sens ni que la législature ait eu l'intention de l'habiliter à le faire. À mon avis, un tel texte législatif outrepasserait la compétence de la législature provinciale. Le pouvoir de la législature d'adopter une pareille loi, à supposer qu'il existe, doit se trouver à l'art. 92 de l'*Acte de l'Amérique du Nord britannique*. On soutient pour le compte de l'intimée qu'il se situe sous la rubrique 13, savoir «la propriété et les droits civils dans la province». Il n'est pas nécessaire d'examiner la question de savoir si le droit d'un électeur, lors d'une élection fédérale, de chercher par des moyens légaux à inciter les autres électeurs à voter pour le candidat qu'il a choisi peut à juste titre se décrire comme un droit civil; ce n'est manifestement pas un droit civil dans la province. Il s'agit d'un droit dont jouissent les électeurs non pas en tant que résidents de l'Ontario mais en tant que citoyens canadiens.

Les appelants soutiennent que le présent pourvoi soulève une question quasi identique. Ils affirment que la loi ontarienne interdit certains types de participation à des élections fédérales et que, suivant l'arrêt *MacKay*, ces restrictions sont inconstitutionnelles.

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The respondent seeks to distinguish *McKay* by relying on MacKinnon A.C.J.O.'s judgment in this case in the Court of Appeal at pp. 334-35 (O.R.):

> It is interesting to note that the majority does not say, presumably because the by-law itself was not under attack, what was the pith and substance of the by-law. Further, the Court there was concerned with a *quasi*-criminal offence under the general by-law. In the instant case the Act creates no offence; it is a matter of possible dismissal from the civil service. There was, in other words, an absolute prohibition in the *McKay* case; in the instant case if the individual were not prepared to accept the limitations of employment imposed upon him, he could seek a leave of absence or leave his job. I can only repeat that I view the legislation here under attack as legislation with relation to labour relations in the province and I do not think that the *McKay* case is of assistance on the facts of this case.

The intervener Attorney General of Canada suggests a different line of distinction between *McKay* and this case (paragraph 6 of its factum):

> . . . in *McKay* . . . the effect of the municipal by-law was to proscribe *indiscriminately* the exercise of a right generally enjoyed by citizens of Canada. There was no proper nexus between the purpose of the by-law and its alleged "incidental" effect on property owners. In the present case, however, it is submitted that the special relationship of public servants to government provides the link between control over labour relations and the regulation of partisan political activity. [Emphasis in original.]

With great respect, I am not persuaded by attempts to distinguish *McKay*. First, I fail to see the significance, in a federalism sense, between prohibition and curtailment. The distinction suggested by the Attorney General of Canada is perhaps stronger. The purpose of the by-law in *McKay* was undoubtedly esthetic—to ensure that lawns were not cluttered with signs, especially (one presumes) commercial signs. Federal election signs, which would be erected only every three or four years and only for several weeks, do not really fit within that esthetic purpose. There is, in other words, arguably a lack of a nexus between the

L'intimé essaie de faire une distinction d'avec l'arrêt *MacKay* en invoquant les motifs rédigés en l'espèce par le juge en chef adjoint MacKinnon de la Cour d'appel, aux pp. 334 et 335 (O.R.):

> [TRADUCTION] Il est intéressant de noter que la cour à la majorité ne précise pas, vraisemblablement parce que le règlement lui-même n'était pas contesté, le caractère véritable de celui-ci. De plus, dans cette affaire, la cour se trouvait en présence d'une infraction quasi criminelle prévue par le règlement général. En l'espèce, par contre, la Loi ne crée pas d'infraction; il est plutôt question de la possibilité de renvoi de la fonction publique. Autrement dit, il y avait dans l'affaire *McKay* une prohibition absolue tandis qu'en l'espèce, si la personne n'était pas prête à accepter les restrictions que lui imposait son emploi, elle pouvait demander un congé ou encore démissionner. Je ne peux que répéter que, selon moi, la mesure législative attaquée en l'espèce porte sur les relations de travail dans la province et, compte tenu des faits de la présente affaire, je ne crois pas que l'arrêt *McKay* nous soit d'une quelconque utilité.

L'intervenant le procureur général du Canada propose un fondement différent pour établir une distinction entre l'arrêt *McKay* et la présente affaire (paragraphe 6 de son mémoire):

> [TRADUCTION] . . . dans l'affaire *McKay* [. . .] le règlement municipal avait pour effet de prohiber *indistinctement* l'exercice d'un droit dont jouissent généralement les citoyens du Canada. Il n'existait pas de lien suffisant entre l'objet du règlement et l'effet «secondaire» qu'on lui reprochait d'avoir sur les propriétaires fonciers. En l'espèce, cependant, on prétend que le rapport spécial qui existe entre les fonctionnaires et le gouvernement fournit le lien entre le contrôle des relations de travail et la réglementation des activités reliées à la politique partisane. [En italique dans l'original.]

Avec égards, je trouve peu convaincantes les tentatives de faire une distinction d'avec l'arrêt *McKay*. Tout d'abord, l'importance sur le plan du fédéralisme entre une interdiction et une restriction m'échappe. La distinction que propose le procureur général du Canada a peut-être plus de poids. Le règlement en cause dans l'affaire *McKay* visait incontestablement un but esthétique, soit assurer que les pelouses ne soient pas encombrées d'enseignes, surtout (on le suppose) d'enseignes commerciales. Des pancartes relatives à des élections fédérales, qui ne seraient posées qu'à tous les trois ou quatre ans et pendant quelques semaines

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purpose of the by-law and its application to federal election signs.

Nevertheless, although it is maybe possible logically to distinguish *McKay*, my own view is that it was wrongly decided. I agree with Martland J.'s dissent (for four judges) to the effect that the by-law was in relation to property, that it was of general application and that it could permissibly have an incidental effect on certain activities in a federal election campaign. I also agree with Professor Hogg's critique of *McKay* (pp. 328-29 and 332):

> It must be recalled that the "pith and substance" doctrine, exemplified by *Bank of Toronto v. Lambe*, is that a law which is in relation to a matter within jurisdiction ... is not objectionable just because it affects a matter outside jurisdiction .... Surely, therefore, the minority in *McKay* were right in upholding the impugned by-law, even in its application to federal election signs. Certainly, the majority did not explain why the pith and substance doctrine should not apply. Indeed, less than two years earlier, in the *Oil Chemical Workers* case (1963), the Supreme Court of Canada had decided, by a majority of four to three, that a provincial labour law could validly prohibit union donations to political parties (federal as well as provincial) of funds obtained by compulsory deduction from workers' pay. Obviously, a prohibition of union contribution has a more serious, and more biased, impact on the federal electoral process than a prohibition of residential lawn signs; and yet the prohibition of union contributions was upheld as a valid incident of a labour relations law.
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> . . .
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> ... I welcome the tendency in the latest cases in the Supreme Court of Canada to limit interjurisdictional immunity by liberal application of the pith and substance doctrine. In *A.-G. Que. v. Kellogg's of Canada* (1978), a provincial law prohibiting cartoon-style adver-

seulement, ne relèvent pas vraiment de ce but esthétique. En d'autres termes, on peut prétendre qu'il n'existe pas de lien entre l'objet du règlement et son application aux pancartes installées dans le cadre d'une élection fédérale.

Néanmoins, bien qu'il puisse être logiquement possible de faire une distinction d'avec l'arrêt *McKay*, j'estime personnellement qu'il s'agit d'un arrêt erroné. Je suis d'accord avec les motifs de dissidence du juge Martland (qui s'est exprimé au nom de quatre juges), selon lesquels le règlement portait sur la propriété, avait une application générale et pouvait légitimement avoir un effet secondaire sur certaines activités d'une campagne électorale fédérale. Je suis en outre d'accord avec ce que dit le professeur Hogg dans sa critique de l'arrêt *McKay* (aux pp. 328, 329 et 332):

> [TRADUCTION] Il faut se rappeler que le principe du «caractère véritable», dont la décision *Bank of Toronto v. Lambe* constitue une illustration, veut qu'une loi relative à une matière qui relève de la compétence du législateur [...] ne soit pas critiquable du simple fait qu'elle touche une matière en dehors de la compétence du législateur [...] Il ne fait donc pas de doute que la Cour à la minorité dans l'affaire *McKay* a eu raison de conclure à la validité du règlement attaqué, même dans la mesure où il s'appliquait aux pancartes installées dans le cadre d'élections fédérales. La Cour à la majorité n'a certainement pas expliqué pourquoi le principe du caractère véritable ne devrait pas s'appliquer. En fait, moins de deux ans auparavant, dans l'arrêt *Oil Chemical Workers* (1963), la Cour suprême du Canada avait décidé, à la majorité de quatre contre trois, qu'une loi provinciale en matière de relations de travail pouvait valablement empêcher les syndicats de faire des dons à des partis politiques (tant fédéraux que provinciaux) à même les fonds obtenus par précompte obligatoire sur le salaire des travailleurs. Évidemment, l'interdiction des contributions syndicales a un effet plus grave et plus tendancieux sur le processus électoral fédéral qu'une interdiction d'installer des pancartes sur les pelouses de quartiers résidentiels; et pourtant cette interdiction des contributions syndicales a été jugée un élément accessoire valable d'une loi régissant les relations de travail.
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> . . .
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> ... je me réjouis de la tendance, manifestée dans les arrêts les plus récents de la Cour suprême du Canada, à limiter la portée du principe de l'exclusivité des compétences par une application libérale du principe du caractère véritable. Dans l'arrêt *P.G. Qué. c. Kellogg's of*

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tising directed at children was held to be applicable to advertising on television (a federally-regulated medium). In *Construction Montcalm v. Minimum Wage Commission* (1978), a provincial minimum wage law was held to be applicable to a contractor building a runway for an airport (a federal undertaking) on federal Crown land. In *Four B Manufacturing v. United Garment Workers* (1979), a provincial labour relations law was held to be applicable to a business owned by Indians on an Indian reserve. In each case, Laskin C.J. in dissent asserted immunity from the provincial law, but Martland J. for the majority in *Kellogg's* and Beetz J. for the majority in *Construction Montcalm* and *Four B*, finding that the pith and substance of the law was a matter within provincial jurisdiction (that was not controversial, of course), held that the law could also validly affect the federal matter to which it purported to apply. In the light of these decisions, it seems unlikely that the *McKay* case would be decided the same way today.

I agree with this analysis. As Professor Hogg asserts, *McKay* is difficult to reconcile with the Court's decision in a very similar case, *Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584. Moreover, it does not sit well with a leading decision by the Ontario Court of Appeal in an analogous case, *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819, where it was held that federal jurisdiction over broadcasting supported a federal law regulating radio advertising during both federal and provincial elections. *McKay* is also out of step with the doctrinal path marked out by this Court in such cases as *Attorney General of Quebec v. Kellogg's Co. of Canada*, *supra*, and *Construction Montcalm Inc. v. Minimum Wage Commission*, *supra*. I would overrule *McKay*. Accordingly, the appellants' strong reliance on *McKay* does not bear fruit.

Canada (1978), on a décidé qu'une loi provinciale interdisant la publicité sous forme de dessins animés destinée aux enfants était applicable à la publicité faite à la télévision (un média réglementé par le fédéral). Dans l'arrêt *Construction Montcalm c. Commission du salaire minimum* (1978), une loi provinciale sur le salaire minimum a été jugée applicable à un entrepreneur qui construisait une piste d'atterrissage pour un aéroport (une entreprise fédérale) sur des terres appartenant au gouvernement fédéral. Dans l'arrêt *Four B Manufacturing c. Travailleurs unis du vêtement* (1979), une loi provinciale en matière de relations de travail a été jugée applicable à une entreprise appartenant à des Indiens et située sur une réserve indienne. Dans chaque cas, le juge en chef Laskin a rédigé des motifs de dissidence dans lesquels il affirmait l'existence d'une immunité contre l'application de la loi provinciale, mais le juge Martland, au nom de la cour à la majorité dans l'arrêt *Kellogg's*, et le juge Beetz, au nom de la Cour à la majorité dans les arrêts *Construction Montcalm* et *Four B*, ont conclu que les lois en cause, de par leur caractère véritable, relevaient de la compétence provinciale (ce qui n'était évidemment pas controversé) et ont décidé que lesdites lois pouvaient aussi valablement toucher la matière fédérale à laquelle elles s'appliquaient apparemment. Compte tenu de ces arrêts, il semble peu probable que l'affaire *McKay* serait tranchée de la même façon aujourd'hui.

Je souscris à cette analyse. Comme l'affirme le professeur Hogg, l'arrêt *McKay* est difficilement conciliable avec l'arrêt rendu par cette Cour dans une affaire très semblable, *Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] R.C.S. 584. De plus, il s'accorde mal avec un arrêt de principe rendu par la Cour d'appel de l'Ontario dans une affaire analogue, *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819, où l'on a conclu que la compétence fédérale en matière de radiodiffusion justifiait une loi fédérale réglementant la publicité radiophonique au cours d'élections tant fédérales que provinciales. L'arrêt *McKay* s'écarte en outre de la voie tracée sur le plan des principes par cette Cour dans des arrêts comme *Procureur général du Québec c. Kellogg's Co. of Canada* et *Construction Montcalm Inc. c. Commission du salaire minimum*, précités. Je suis donc d'avis de rejeter l'arrêt *McKay*. Par conséquent, c'est en vain que les appelants ont insisté sur l'arrêt *McKay*.

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2. *Overbreadth*

The appellants also argued that the prohibitions were overbroad for two reasons. First, they apply to all civil servants, or in some instances to all Crown employees, without distinguishing between the types of jobs employees perform. Second, they cover too wide a range of political activities. During argument, counsel was asked whether he could cite any case in which the overbreadth or overreach argument had been given effect in a distribution of powers situation. The answer was in the negative. In my view, overreach in the sense here used is simply not arguable in a distribution of powers case. It might be noted in passing that the judgment of the Ontario Court of Appeal is silent on the overreach point although it was apparently argued in that Court.

V

The *Fraser* Argument

At paragraph 75 of their factum, the appellants argued that:

> ... Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of this country to participate in federal political activities. No province has the power to reduce or to derogate from these rights and freedoms.

This is the entire written argument of the appellants on this point, which is not surprising because the appellants had expected to make their civil liberties arguments in a *Charter* context. Once the Court decided, at the beginning of the oral hearing, not to hear *Charter* arguments, the appellants were forced to ground their civil liberties submission in an alternative approach.

In oral argument, primary reliance was placed upon a passage from this Court's unanimous judgment in *Fraser*, at pp. 462-63:

> ... "freedom of speech" is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution inherited from the United

2. *La portée trop large*

Les appelants ont soutenu également que, pour deux raisons, les interdictions étaient de portée trop large. En premier lieu, elles s'appliquent à tous les fonctionnaires ou, dans certains cas, à tous les employés de Sa Majesté, sans distinguer entre les types d'emplois qu'ils occupent. En second lieu, elles visent une gamme trop large d'activités politiques. Au cours des débats, on a demandé à l'avocat s'il pouvait citer une cause dans laquelle l'argument de la portée trop large avait été retenu relativement au partage des pouvoirs. Il a répondu par la négative. À mon avis, la portée trop large au sens où on l'entend ici n'est simplement pas plaidable dans une affaire ayant trait au partage des pouvoirs. On pourrait faire remarquer en passant que l'arrêt de la Cour d'appel de l'Ontario ne dit rien au sujet de l'argument relatif à la portée trop large, bien que ce point ait apparemment été plaidé devant cette cour.

V

L'argument fondé sur l'arrêt *Fraser*

Au paragraphe 75 de leur mémoire, les appelants font valoir que:

> [TRADUCTION] ... la jurisprudence canadienne en matière constitutionnelle reconnaît l'existence de certains droits et libertés politiques fondamentaux qui permettent aux citoyens de ce pays de participer aux activités politiques fédérales. Aucune province n'a le pouvoir de restreindre ces droits et libertés ni d'y déroger.

Voilà à quoi se réduit toute l'argumentation écrite des appelants sur ce point. Cela n'est guère surprenant puisque les appelants s'étaient attendus à présenter leurs arguments relatifs aux libertés civiles dans le contexte de la *Charte*. Après que la Cour eut décidé, au début des plaidoiries, de ne pas entendre d'arguments fondés sur la *Charte*, les appelants se voyaient dans la nécessité de trouver un autre fondement à l'argumentation relative aux libertés civiles.

Au cours des plaidoiries, on a invoqué principalement un extrait de l'arrêt unanime rendu par cette Cour dans l'affaire *Fraser*, aux pp. 462 et 463:

> ... la «liberté de parole» est une valeur profondément enracinée dans notre système de gouvernement démocratique. Il s'agit d'un principe de notre constitution de

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Kingdom by virtue of the preamble to the *Constitution Act, 1867*.

This principle was recently reaffirmed in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, where McIntyre J., speaking for a unanimous Court, held at p. 584:

> Prior to the adoption of the *Charter*, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status.

Both of these passages manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system.

It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which may sometimes conflict. It is for that reason that the passage in *Fraser* upon which the appellants rely so heavily is followed immediately by these words, at p. 463:

> But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.

The *Fraser* case, which of course raised issues similar to those in the present appeal, stands for the proposition then, that the freedom of expression of public servants is a fundamental value but that certain reasonable abridgements, motivated by other competing values, may validly be authorized by a legislature. The relevant considerations in evaluating the reasonableness of the limitations are set out in *Fraser*.

common law, que nous avons hérité du Royaume-Uni en vertu du préambule de la *Loi constitutionnelle de 1867*.

Ce principe a été confirmé de nouveau récemment dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, où le juge McIntyre, s'exprimant au nom de la Cour à l'unanimité, conclut, à la p. 584:

> Avant l'adoption de la *Charte*, la liberté de parole et d'expression avait été reconnue comme une caractéristique essentielle de la démocratie parlementaire canadienne. En fait, on peut dire que c'est cette Cour qui lui a conféré son statut constitutionnel.

Ces deux passages traduisent une reconnaissance claire que la liberté de parole et d'expression représente une valeur fondamentale qui anime le régime constitutionnel canadien.

Il faut toutefois se rappeler qu'aucune valeur, si noble soit-elle, ne peut à elle seule permettre de soutenir un régime de gouvernement démocratique. À la base de notre régime constitutionnel il y a un certain nombre de valeurs importantes qui contribuent toutes à garantir nos libertés, quoique les façons dont elles le font peuvent parfois entrer en conflit. C'est ce qui explique pourquoi l'extrait de l'arrêt *Fraser* sur lequel les appelants insistent tant est suivi immédiatement des mots suivants, à la p. 463:

> Toutefois, [la liberté de parole n'est pas] une valeur absolue. Il n'y a probablement aucune valeur absolue. Toutes les valeurs importantes doivent être restreintes et évaluées en fonction d'autres valeurs importantes et souvent concurrentes. Ce processus de définition, de restriction et d'évaluation est aussi nécessaire pour ce qui est de la «liberté de parole» en tant que valeur qu'elle l'est pour les autres valeurs.

L'arrêt *Fraser* dans lequel, bien entendu, les questions soulevées étaient analogues à celles posées en l'espèce, établit donc que la liberté d'expression des fonctionnaires constitue une valeur fondamentale, mais que le législateur peut à bon droit autoriser certaines restrictions raisonnables motivées par d'autres valeurs concurrentes. Les facteurs dont il faut tenir compte en évaluant le caractère raisonnable des restrictions sont énoncés dans l'arrêt *Fraser*.

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It would not be appropriate to enter into a detailed application of the *Fraser* principles to the facts of the present case because none of the individual appellants has actually been subjected to disciplinary proceedings. As the respondent and interveners have pointed out, in determining the proper scope of application of the restrictions on political activity contained in *The Public Service Act*, the relevant decision makers, and in particular any grievance arbitrator, must interpret the scope of the Act in light of the principles set out in *Fraser*. For example, *Fraser* establishes that the scope of the restrictions in the Act must be considered in relation to the position and public visibility of the civil servant against whom the restrictions are said to apply.

In sum, it has been determined that *The Public Service Act* in its entirety is a valid exercise of provincial legislative jurisdiction. Furthermore, the Act must be interpreted in light of *Fraser*. I would add only that nothing I have said should be taken to predetermine the relevant analysis in any potential challenge to the Act launched under the *Canadian Charter of Rights and Freedoms*.

VI

Conclusion

The appeal should be dismissed. The first constitutional question should be answered as follows: Sections 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386, as amended, are constitutional in so far as they purport to restrain provincial civil servants and Crown employees from engaging in certain federal political activity. The second and third constitutional questions are not answered.

I would not award costs.

The judgment of Beetz, McIntyre, Le Dain and La Forest JJ. was delivered by

BEETZ J.—The issue has been stated by Laskin C.J. in the following constitutional question:

Il ne conviendrait guère de procéder à une application détaillée des principes énoncés dans l'arrêt *Fraser* aux faits de la présente affaire puisqu'aucun des appelants n'a fait l'objet de mesures disciplinaires. Comme l'ont fait remarquer l'intimé et les intervenants, en déterminant la véritable portée des restrictions que *The Public Service Act* impose relativement aux activités politiques, c'est en fonction des principes énoncés dans l'arrêt *Fraser* que les décideurs concernés, et en particulier tout arbitre d'un grief, doivent interpréter la portée de la Loi. Par exemple, l'arrêt *Fraser* établit que la portée des restrictions imposées par la Loi doit être examinée en fonction du poste et de la visibilité publique du fonctionnaire auquel on dit que les restrictions s'appliquent.

En somme, on a conclu que *The Public Service Act* constitue dans son ensemble un exercice valide de la compétence législative de la province. De plus, la Loi doit être interprétée en fonction de l'arrêt *Fraser*. J'ajouterais simplement que rien de ce que j'ai dit ne devrait être interprété comme déterminant à l'avance l'analyse qu'il conviendra de faire dans toute contestation éventuelle de la Loi, fondée sur la *Charte canadienne des droits et libertés*.

VI

Conclusion

Le pourvoi est rejeté. La première question constitutionnelle doit recevoir la réponse suivante: Les articles 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et ses modifications, sont constitutionnels dans la mesure où ils ont pour effet d'empêcher les fonctionnaires et employés provinciaux de Sa Majesté d'exercer certaines activités politiques au niveau fédéral. Aucune réponse n'est donnée aux deuxième et troisième questions constitutionnelles.

Je suis d'avis de ne pas accorder de dépens.

Version française du jugement des juges Beetz, McIntyre, Le Dain et La Forest rendu par

LE JUGE BEETZ—Le point litigieux a été exposé par le juge en chef Laskin dans la question constitutionnelle suivante:

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Are ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, unconstitutional insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal political activity?

Dans la mesure où ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques au niveau fédéral, les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, sont-ils inconstitutionnels?

I

The Facts

The facts have been described in an agreed statement of facts, a summary of which appears in appellants' factum:

The appellant Ontario Public Service Employees Union is the bargaining agent for approximately 50,000 employees of the government of Ontario, who are subject to the Ontario *Public Service Act*.

The Appellant Marie Wilkinson is employed by the Ontario Ministry of Community and Social Services as a counsellor at a centre for the care of the mentally retarded in Blenheim, Ontario. The Appellant Edward E. Faulknor is employed by the Ministry of Revenue (Ontario) as an Assessor in Hamilton-Wentworth Office. The Appellant Russell B. Smith is employed as a lab technician by the Ministry of Natural Resources.

Each of the individual Appellants is a Crown employee, a civil servant and a member of an appellant union.

Each of the individual Appellants wishes to engage in political activities currently prohibited by the *Public Service Act*, including running for election to Parliament, canvassing and soliciting funds on behalf of political parties, and expressing opinions on political issues.

For purposes of this Appeal, the organization and philosophy of the various political parties both federally and provincially are agreed to be the same.

The political activities in which the individual appellants wished to engage were in connection with the 1979 federal elections. The individual appellants became concerned that the pursuit of such activities would subject them to disciplinary measures pursuant to *The Public Service Act*. By an originating notice of motion, they, together with their union, applied to the Supreme Court of Ontario for an order declaring unconstitutional

I

Les faits

Les faits ont été décrits dans un exposé conjoint des faits dont un résumé figure dans le mémoire des appelants:

[TRADUCTION] L'appelant le Syndicat des employés de la Fonction publique de l'Ontario est l'agent négociateur d'environ 50 000 employés du gouvernement de l'Ontario qui sont assujettis à *The Public Service Act* de l'Ontario.

L'appelante Marie Wilkinson est employée par le ministère des Services sociaux et communautaires de l'Ontario en tant que conseillère en réadaptation dans un centre pour déficients mentaux situé à Blenheim (Ontario). L'appelant Edward E. Faulknor travaille pour le ministère du Revenu de l'Ontario en tant que contrôleur des contributions au bureau de Hamilton-Wentworth. L'appelant Russell B. Smith occupe le poste de technicien de laboratoire au ministère des Richesses naturelles.

Chacun des appelants est un employé de Sa Majesté, un fonctionnaire et un membre du syndicat appelant.

Chacun des appelants souhaite exercer des activités politiques présentement interdites par *The Public Service Act*, dont la possibilité de se porter candidat à des élections fédérales, celle de faire du démarchage et de solliciter des fonds pour des partis politiques et celle de prendre position sur des questions politiques.

Aux fins du présent pourvoi, l'organisation et la philosophie des différents partis politiques tant fédéraux que provinciaux sont reconnues comme étant les mêmes.

Les activités politiques que les appelants souhaitaient exercer avaient trait aux élections fédérales de 1979. Les appelants ont craint que la poursuite de ces activités ne les expose à des mesures disciplinaires prises conformément à *The Public Service Act*. Au moyen d'un avis de requête introductif d'instance, ils ont, de concert avec leur syndicat, demandé à la Cour suprême de l'Ontario de rendre une ordonnance déclarant inconstitutionnels les

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ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, hereinafter referred to as the Act.

II

The Legislation

The impugned sections of the Act provide as follows:

12.—(1) Except during a leave of absence granted under subsection 2, a Crown employee shall not,

(*a*) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;

(*b*) solicit funds for a provincial or federal political party or candidate; or

(*c*) associate his position in the service of the Crown with any political activity.

(2) Any Crown employee, other than a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause *u* of subsection 1 of section 29, who proposes to become a candidate in a provincial or federal election shall apply through his minister to the Lieutenant Governor in Council for leave of absence without pay for a period,

(*a*) not longer than that commencing on the day on which the writ for the election is issued and ending on polling day; and

(*b*) not shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day,

and every such application shall be granted.

(3) Where a Crown employee who is a candidate in a provincial or federal election is elected, he shall forthwith resign his position as a Crown employee.

(4) Where a Crown employee who has resigned under subsection 3,

(*a*) ceases to be an elected political representative within five years of the resignation; and

(*b*) applies for reappointment to his former position or to another position in the service of the Crown for which he is qualified within three months of ceasing to be an elected political representative,

he shall be reappointed to the position upon its next becoming vacant.

art. 12, 13, 14, 15 et 16 de *The Public Service Act*, ci-après appelée la Loi.

II

Les textes législatifs

Les dispositions contestées de la Loi sont ainsi conçues:

[TRADUCTION] **12.**—(1) Nul employé de Sa Majesté ne doit

a) se porter candidat à des élections provinciales ou fédérales ni siéger en tant que député provincial ou fédéral; ni

b) solliciter des fonds pour un parti politique provincial ou fédéral ou pour un candidat; ni

c) relier son poste dans la fonction publique à des activités politiques,

si ce n'est pendant un congé accordé en vertu du paragraphe 2.

(2) Un employé de Sa Majesté, autre qu'un sous-ministre ou tout autre employé dont le poste ou la classification est désigné par voie de règlement pris en vertu de l'alinéa 29(1)*u*), qui se propose de se porter candidat à des élections provinciales ou fédérales doit, par l'intermédiaire de son ministre, adresser au lieutenant-gouverneur en conseil une demande de congé sans traitement

a) pour une durée maximale calculée à partir du jour de la délivrance du bref d'élection jusqu'au jour du scrutin; et

b) pour une durée minimale calculée à partir du jour prévu par la loi pour les mises en candidature jusqu'au jour du scrutin,

et toute demande à cet effet doit être accueillie.

(3) Lorsqu'un employé de Sa Majesté qui s'est porté candidat à des élections provinciales ou fédérales est élu, il doit immédiatement démissionner du poste qu'il occupe comme employé de Sa Majesté.

(4) L'employé de Sa Majesté qui a démissionné en vertu du paragraphe 3,

a) qui cesse d'être un député dans les cinq ans de sa démission; et

b) qui demande, dans les trois mois de la date où il cesse d'être député, d'être réintégré dans son ancien poste ou d'être nommé à un autre poste dans la fonction publique pour lequel il est qualifié,

doit être réintégré dans son poste ou nommé à un autre dès qu'une vacance survient.

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(5) Where a Crown employee has been granted leave of absence under subsection 2 and was not elected, or resigned his position under subsection 3 and was reappointed under subsection 4, the period of the leave of absence or resignation shall not be computed in determining the length of his service for any purpose, and the service before and after such period shall be deemed to be continuous for all purposes.

13.—(1) A civil servant shall not during a provincial or federal election canvass on behalf of a candidate in the election.

(2) Notwithstanding subsection 1, a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause *u* of subsection 1 of section 29 shall not at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate.

14. Except during a leave of absence granted under subsection 2 of section 12, a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party.

15. A Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party.

16. A contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal.

Civil servants and Crown employees are defined in s. 1(*a*) and (*e*) of the Act:

1. . . .

(*a*) "civil servant" means a person appointed to the service of the Crown by the Lieutenant Governor in Council on the certificate of the Commission or by the Commission, and "civil service" has a corresponding meaning;

. . .

(*e*) "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission;

III

Procedural History and Judgments of the Courts Below

The case was heard and decided by the Supreme Court of Ontario (1979), 24 O.R. (2d) 324, 98

(5) Lorsqu'un employé de Sa Majesté a obtenu un congé en vertu du paragraphe 2 et qu'il ne s'est pas fait élire, ou lorsqu'il a démissionné de son poste en vertu du paragraphe 3 et qu'il a été réintégré dans ses fonctions en vertu du paragraphe 4, la période visée par le congé ou la démission n'est pas incluse dans la détermination de la durée de son ancienneté à quelque fin que ce soit, et la prestation de ses services avant et après cette période est réputée continue à toutes fins.

13.—(1) Nul fonctionnaire ne fera du démarchage pour un candidat à des élections provinciales ou fédérales.

(2) Nonobstant le paragraphe 1, un sous-ministre ou tout autre employé de Sa Majesté, dont le poste ou la classification est désigné par voie de règlement pris en vertu de l'alinéa 29(1)*u*), ne doit à aucun moment faire du démarchage ou travailler activement pour un parti politique provincial ou fédéral ou pour un candidat.

14. Un fonctionnaire ne doit à aucun moment prendre la parole en public ni exprimer des opinions écrites destinées à être diffusées auprès du public sur une question qui fait partie du programme d'un parti politique provincial ou fédéral, si ce n'est pendant un congé accordé en vertu du paragraphe 12(2).

15. Nul employé de Sa Majesté ne doit pendant les heures de travail exercer une activité pour le compte d'un parti politique provincial ou fédéral.

16. Toute contravention aux articles 11, 12, 13, 14 ou 15 est réputée constituer une cause suffisante de renvoi.

Les expressions «fonctionnaire» et «employé de Sa Majesté» sont définies aux al. 1*a*) et *e*) de la Loi:

[TRADUCTION] **1.** . . .

a) «fonctionnaire» désigne une personne nommée au service de Sa Majesté par le lieutenant-gouverneur en conseil sur attestation de la Commission ou par la Commission, et «fonction publique» a un sens correspondant;

. . .

e) «employé de Sa Majesté» désigne une personne au service de Sa Majesté ou d'un organisme de Sa Majesté, mais ne comprend pas un employé d'Ontario Hydro ou de la Commission de transport Ontario Northland;

III

L'historique des procédures et les jugements des tribunaux d'instance inférieure

La Cour suprême de l'Ontario (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168, et la Cour d'appel

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D.L.R. (3d) 168, and the Ontario Court of Appeal (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, before the *Canadian Charter of Rights and Freedoms* came into force and it proceeded on grounds related to the distribution of powers between Parliament and the legislatures.

The main challenge to the impugned provisions was that they allegedly relate to federal elections, a field reserved to the exclusive legislative competence of Parliament. It was alternatively submitted that even if the impugned provisions are otherwise valid as relating to a provincial object, they cannot constitutionally be construed so as to extend to or embrace the core of a federal matter such as federal elections.

The Attorney General for Ontario took the position that the impugned provisions were entirely authorized by s. 92(1), (4) and (13) of the *Constitution Act, 1867*:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

. . .

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

. . .

13. Property and Civil Rights in the Province.

In his oral reasons, Labrosse J., who heard and dismissed the application, said he did not reject the submission based on s. 92(1) and (4) but that he found the argument based on s. 92(13) much more persuasive. He said:

The Public Service Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the civil service. The Act is really employer-employee legislation.

de l'Ontario (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, ont entendu et tranché la présente affaire avant l'entrée en vigueur de la *Charte canadienne des droits et libertés*. Cette affaire était fondée sur des moyens relatifs au partage des pouvoirs entre le Parlement et les législatures des provinces.

On reprochait principalement aux dispositions contestées de viser les élections fédérales, un domaine de compétence législative exclusive du Parlement. Subsidiairement, on a fait valoir que, même si ces dispositions étaient par ailleurs valides parce que reliées à un objet provincial, elles ne peuvent être interprétées, sur le plan constitutionnel, de manière à s'appliquer à l'élément central d'une matière fédérale comme les élections fédérales, ni à englober un tel élément.

Le procureur général de l'Ontario a soutenu que les dispositions contestées étaient entièrement autorisées par les par. 92(1), (4) et (13) de la *Loi constitutionnelle de 1867*:

92. Dans chaque province, la législature pourra exclusivement légiférer relativement aux matières entrant dans les catégories de sujets ci-dessous énumérés, à savoir:

1. L'amendement de temps à autre, nonobstant toute disposition contraire énoncée dans le présent acte, de la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur;

. . .

4. la création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux;

. . .

13. la propriété et les droits civils dans la province;

Dans ses motifs oraux, le juge Labrosse qui a entendu et rejeté la requête a affirmé qu'il ne rejetait pas l'argument fondé sur les par. 92(1) et (4), mais qu'il trouvait beaucoup plus convaincant l'argument fondé sur le par. 92(13). Il a dit:

[TRADUCTION] The Public Service Act réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique. Il s'agit vraiment d'une loi sur les relations employeur-employé.

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And he held:

The impugned legislation is in pith and substance labour legislation in relation to conditions of employment to preserve the impartiality of the civil service and therefore constitute property and civil rights in the Province.

Labrosse J. further held, quoting Henry J. in *Re United Glass & Ceramic Workers of North America and Domglas Ltd.* (1978), 19 O.R. (2d) 353, at p. 362, that in so far as the impugned provisions affected the political activities of civil servants in federal elections, they did so "incidentally, as part of a wider legislative scheme to promote labour relations, a valid provincial object".

The Ontario Court of Appeal unanimously affirmed the judgment of Labrosse J. as well as its rationale.

The lamented MacKinnon A.C.J.O., speaking for himself and for Wilson and Goodman JJ.A., reviewed the principles relating to the political impartiality of the public service and underlined their vital relationship to a system of responsible government in Canada. He wrote at p. 330 (O.R.):

If one accepts that the political neutrality or impartiality of Crown servants is a necessary and fundamental doctrine of the Canadian Constitution, adopted from the Constitution of the United Kingdom, there is considerable force in the argument that the legislation here attacked, inasmuch as it simply gives legislative effect to an existing convention, is competent under ss. 92(1) and 92(4) of the *B.N.A. Act*.

However, in answering what Mr. Justice Labrosse described as the real issue, namely whether it is within the competence of the Province to restrict Crown employees and civil servants in federal political activities, I would prefer to rest that answer as he did, on the effect to be given here to s. 92(13) of the *B.N.A. Act*. There is no question but that, under that head of legislative power, the Provinces have jurisdiction over labour relations in the Province.

MacKinnon A.C.J.O. added at p. 331:

Et il a conclu:

[TRADUCTION] La loi contestée est, de par son caractère véritable, une loi ouvrière qui vise les conditions de travail de manière à assurer l'impartialité de la fonction publique, et elle relève donc de la propriété et des droits civils dans la province.

Le juge Labrosse a également conclu, en citant le juge Henry dans la décision *Re United Glass & Ceramic Workers of North America and Domglas Ltd.* (1978), 19 O.R. (2d) 353, à la p. 362, que, dans la mesure où les dispositions contestées touchaient les activités politiques des fonctionnaires lors d'élections fédérales, elles ne le faisaient qu'«accessoirement, dans le cadre d'un régime législatif plus large destiné à promouvoir les relations de travail, ce qui constitue un objet provincial régulier».

La Cour d'appel de l'Ontario a confirmé à l'unanimité la décision du juge Labrosse ainsi que son raisonnement.

Le regretté juge en chef adjoint MacKinnon, s'exprimant en son propre nom et en celui des juges Wilson et Goodman, a passé en revue les principes relatifs à l'impartialité politique de la fonction publique et a souligné leur importance vitale quant à l'existence d'un régime de gouvernement responsable au Canada. Il écrit, à la p. 330 (O.R.):

[TRADUCTION] Si on accepte que la neutralité ou l'impartialité politique des fonctionnaires de Sa Majesté est un précepte nécessaire et fondamental de la Constitution canadienne, inspiré de la Constitution du Royaume-Uni, l'argument portant que la loi contestée en l'espèce, dans la mesure où elle confère un effet législatif à une convention existante, est valide en vertu des par. 92(1) et 92(4) de l'*A.A.N.B.*, a un poids considérable.

Toutefois, en répondant à ce que M. le juge Labrosse a décrit comme étant la vraie question, savoir s'il relève de la compétence de la province de restreindre les activités politiques des employés de Sa Majesté et des fonctionnaires, je préfère fonder cette réponse, comme il l'a fait, sur l'effet à donner ici au par. 92(13) de l'*A.A.N.B.* Il ne fait pas de doute que, en vertu de ce chef de compétence législative, les provinces ont compétence sur les relations de travail dans la province.

Le juge en chef adjoint MacKinnon ajoute, à la p. 331:

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The people of Ontario also have a special interest in the impartiality of its civil service. It can be said, accordingly, that, as well as being legislation with relation to labour relations in the Province, the legislation in question, viewed from another perspective, is also legislation designed to protect the civil rights of Ontario residents generally to have an impartial civil service.

The appeal was accordingly dismissed.

Leave to appeal was granted by this Court on March 2, 1981.

The following are constitutional questions as stated by Laskin C.J. and as revised and supplemented by Dickson C.J.:

1. Are ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, unconstitutional insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal political activity?

2. Do ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, infringe or deny the rights and freedoms guaranteed by ss. 2, 3 and/or 15(1) of the *Canadian Charter of Rights and Freedoms* insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal and provincial political activity?

3. If ss. 12, 13, 14, 15 and 16 of *The Public Service Act*, R.S.O. 1970, c. 386 as amended, infringe or deny ss. 2 and 3, and/or 15(1) of the *Canadian Charter of Rights and Freedoms*, are these sections justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

At the start of the hearing before this Court, the Attorney General for Ontario, supported by several intervening Attorneys General, contended that the Court should not entertain the *Charter* issues because all the political activities in question were pre-*Charter* and neither of the Courts below had heard *Charter* submissions. After argument, the Court decided (Dickson C.J. and Chouinard and Le Dain JJ. dissenting) that the Court would not hear or decide the *Charter* issues.

[TRADUCTION] La population ontarienne a elle aussi un intérêt particulier à ce que sa fonction publique soit impartiale. On peut donc dire que, tout en étant une loi portant sur les relations de travail dans la province, la loi en question, prise sous un autre angle, est également une loi destinée à protéger les droits civils à une fonction publique impartiale qu'ont, de manière générale, les résidents de l'Ontario.

L'appel a donc été rejeté.

L'autorisation de pourvoi devant cette Cour a été accordée le 2 mars 1981.

Voici les questions constitutionnelles qui ont été formulées par le juge en chef Laskin et qui ont été révisées et complétées par le juge en chef Dickson:

1. Dans la mesure où ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques au niveau fédéral, les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, sont-ils inconstitutionnels?

2. Dans la mesure où ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques aux niveaux fédéral et provincial, les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, portent-ils atteinte aux droits et libertés garantis par les art. 2 et 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*?

3. Si les art. 12, 13, 14, 15 et 16 de *The Public Service Act*, R.S.O. 1970, chap. 386 et ses modifications portent atteinte aux droits et libertés garantis par les art. 2 et 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*, ces articles sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, non incompatibles avec la *Loi constitutionnelle de 1982*?

Au début de l'audience en cette Cour, le procureur général de l'Ontario, appuyé par plusieurs procureurs généraux intervenants, a soutenu que la Cour ne devrait pas aborder les questions relatives à la *Charte* parce que toutes les activités politiques en cause étaient antérieures à la *Charte* et que ni l'un ni l'autre tribunal d'instance inférieure n'avait entendu d'arguments fondés sur la *Charte*. Après que ce point eut été débattu, la Cour a décidé (le juge en chef Dickson et les juges Chouinard et Le Dain étant dissidents) qu'elle n'entendrait pas et ne trancherait pas les questions relatives à la *Charte*.

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The case then proceeded on written and oral submissions based upon the distribution of legislative powers and on oral submissions based upon a fundamental rights and freedoms argument derived from certain statements in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

It should also be noted that s. 92(1) of the *Constitution Act, 1867* has now been replaced by s. 45 of the *Constitution Act, 1982*, as qualified by the other provisions of Part V of the latter Act, entitled "Procedure for amending Constitution of Canada". However, the impugned provisions antedate the coming into force of this procedure; their constitutional validity will accordingly be examined in the light of the law in force at the time of their enactment. It may well be thought that the coming into force of the amending procedure has not altered the power of the province to amend its own constitution but I refrain from expressing any view on the matter.

IV

The Distribution of Powers

The submissions made to us by the appellants and the respondent with respect to the distribution of powers were, with some amplification, essentially the same as those presented to the Courts below. They are set out above in summary form.

All the intervening Attorneys General spoke in support of the conclusions sought by the Attorney General for Ontario.

I should state at the outset that I reach the same conclusions as the Courts below. But I reach them for different reasons.

In my respectful opinion, the impugned provisions are not related to the field of federal elections, as is submitted by the appellants. But neither can they be constitutionally justified on the basis, or at least on the sole basis, that they are in pith and substance labour relations legislation and therefore a matter of property and civil rights in the province. I am rather of the view that the impugned provisions are an amendment of the

On a alors présenté des arguments écrits et oraux fondés sur le partage des pouvoirs législatifs ainsi que des plaidoiries fondées sur un moyen relatif aux droits et libertés fondamentaux tiré de certaines déclarations contenues dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455.

Notons également que le par. 92(1) de la *Loi constitutionnelle de 1867* est maintenant remplacé l'art. 45 de la *Loi constitutionnelle de 1982*, dont la portée est restreinte par les autres dispositions de la partie V de cette dernière loi, intitulée «Procédure de modification de la Constitution du Canada». Cependant, les dispositions contestées sont antérieures à l'entrée en vigueur de cette procédure; leur constitutionnalité sera donc examinée en fonction de la loi en vigueur au moment de leur adoption. On peut bien penser que l'entrée en vigueur de la procédure de modification n'a rien changé au pouvoir de la province de modifier sa propre constitution, mais je m'abstiens d'exprimer quelque opinion sur le sujet.

IV

Le partage des pouvoirs

À part quelques ajouts, les arguments que nous ont présentés les appelants et l'intimé au sujet du partage des pouvoirs sont essentiellement les mêmes que ceux présentés devant les tribunaux d'instance inférieure. Je les ai déjà résumés.

Tous les procureurs généraux intervenants ont appuyé les conclusions recherchées par le procureur général de l'Ontario.

Je dois dire dès le départ que je tire les mêmes conclusions que les tribunaux d'instance inférieure, mais pour des motifs différents.

Avec égards, les dispositions contestées n'ont rien à voir avec le domaine des élections fédérales comme le soumettent les appelants. Mais elles ne peuvent pas non plus être justifiées du point de vue constitutionnel pour le motif, ou tout au moins pour le seul motif, qu'elles constituent, de par leur caractère véritable, des dispositions en matière de relations de travail et qu'elles relèvent, par conséquent, de la propriété et des droits civils dans la

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constitution of the province and that they are also related to the tenure of provincial offices.

1. *Property and Civil Rights in the Province*

I begin by saying why I have difficulty in agreeing with the characterization given by the Courts below to the Act as a whole as well as to its impugned provisions.

I start with the proposition advanced by the Court of Appeal that the legislation in question can be viewed as "designed to protect the civil rights of Ontario residents generally to have an impartial civil service". It seems to me that in so far as this legislation can be said to confer rights, individual or collective, upon the Ontario residents to have an impartial civil service, such rights are not civil but rather public or political rights. To quote Professor Hogg, in *Constitutional Law of Canada* (2nd ed. 1985), at p. 454, these rights do not form part of the

> ... body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government.

For much the same reasons, I find it difficult to regard the Act simply as "employer-employee" legislation.

Many of the public servants mostly affected by the impugned provisions are more than mere employees of the Crown. They include all deputy ministers, and, under the regulations referred to in s. 12(2) of the Act, they comprise, for instance, for each ministry including agencies, boards and commissions, public servants such as the assistant deputy minister, the executive director, the executive secretary, the general manager, the branch director as well as full-time heads and full-time members of boards, agencies and commissions. In the Ministry of the Attorney General, to take another example, they comprise positions and classifications such as the following ones: court administrator, crown attorney of Toronto and York, crown law officers 1, 2 and 3, judges of the Small Claims Court, justices of the peace, the

province. Je suis plutôt d'avis que les dispositions attaquées sont une modification de la constitution de la province et qu'elles ont également trait à la durée des charges provinciales.

1. *La propriété et les droits civils dans la province*

Je dois tout d'abord dire pourquoi il m'est difficile d'accepter la façon dont les tribunaux d'instance inférieure ont qualifié la Loi dans son ensemble ainsi que ses dispositions contestées.

Commençons par la proposition formulée par la Cour d'appel portant que la loi en question peut être considérée comme une loi «destinée à protéger les droits civils à une fonction publique impartiale qu'ont, de manière générale, les résidents de l'Ontario.» Il me semble que, dans la mesure où on peut dire que cette loi confère aux résidents de l'Ontario des droits, individuels ou collectifs, d'avoir une fonction publique impartiale, ces droits sont non pas civils, mais plutôt publics ou politiques. Pour citer le professeur Hogg, dans son ouvrage *Constitutional Law of Canada* (2nd ed. 1985), à la p. 454, ces droits ne font pas partie de

> [TRADUCTION] ... l'ensemble des règles de droit privé qui régissent les relations entre citoyens, par opposition au droit qui régit les relations entre les citoyens et les institutions gouvernementales.

Pour à peu près les mêmes raisons, il m'est difficile de considérer la Loi simplement comme une loi sur les relations «employeur-employé».

Plusieurs des fonctionnaires les plus touchés par les dispositions contestées sont plus que de simples employés de Sa Majesté. On compte parmi eux tous les sous-ministres et, en vertu du règlement mentionné au par. 12(2) de la Loi, ce sont, par exemple, pour chaque ministère comprenant des agences, des offices et des commissions, des fonctionnaires comme le sous-ministre adjoint, le directeur exécutif, le secrétaire exécutif, le directeur général, le directeur de section ainsi que les chefs et les membres à plein temps des offices, agences et commissions. Au ministère du Procureur général, pour citer un autre exemple, sont visés notamment les postes et classifications suivants: l'administrateur judiciaire, le substitut du procureur général de Toronto et York, les conseillers juridiques du procureur général de niveaux 1, 2 et 3, les

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local master of the Supreme Court of Ontario, provincial judges, the registrar of boards and commissions, the registrar of the Supreme Court of Ontario. To repeat, these are not mere employees. They are the holders of public office and many of them exercise important powers given to them by law.

The Act accordingly provides, in s. 10, that every civil servant shall subscribe an oath of office and secrecy as well as an oath of allegiance to the sovereign, and that any person or class of persons appointed to the unclassified civil service may be required to subscribe either or both the oaths. The oath of office comprises an undertaking to observe and comply with the laws of Canada and Ontario, which include the impugned provisions and it goes without saying that the subscribing of this oath is not negotiable. A provision of this type is unexpected, to say the least, in an employer-employee legislation or in an act regulating labour relations, but is very much in order in a law relating to the constitution of the province and to the tenure of provincial offices.

I realize that the number of public servants who fall into the above-described categories constitutes but a minority of the public service. However they are more affected than others by the impugned provisions since they cannot be given a leave of absence to carry on political activity; and it seems to me that they cannot be governed by those provisions except under the constitutional authority of some head of power other than property and civil rights.

As for civil servants who do not exercise powers but whose functions are simply advisory, professional or even clerical, they nevertheless hold an office, since they must subscribe what the Act labels an oath of office. They are not merely hired by the Crown but appointed to the service of the Crown by the Lieutenant-Governor in Council on the certificate of the Civil Service Commission and, under the Act, they are given a special and, in

juges de la Cour des petites créances, les juges de paix, le protonotaire local de la Cour suprême de l'Ontario, les juges provinciaux, le greffier des offices et commissions, le greffier de la Cour suprême de l'Ontario. Encore une fois, ce ne sont pas de simples employés. Ils occupent une charge publique et plusieurs d'entre eux exercent des pouvoirs importants que leur confère la loi.

La Loi prévoit donc, à l'art. 10, que chaque fonctionnaire doit prêter un serment d'entrée en fonction et de discrétion ainsi qu'un serment d'allégeance à la souveraine, et que chaque personne ou catégorie de personne nommée à un poste de la fonction publique sans classification peut être requise de prêter l'un ou l'autre des serments ou les deux à la fois. Le serment d'entrée en fonction comprend un engagement à observer et à respecter les lois du Canada et de l'Ontario, ce qui inclut les dispositions contestées, et il va sans dire que la prestation de ce serment n'est pas négociable. Une disposition de ce genre est pour le moins inattendue dans une loi sur les relations employeur-employé ou dans une loi régissant les relations de travail, mais elle est tout à fait de mise dans une loi concernant la constitution de la province et la durée des charges provinciales.

Je suis conscient que les fonctionnaires qui se situent dans les catégories que je viens de décrire ne représentent qu'une minorité dans la fonction publique. Cependant, ils sont plus touchés que d'autres par les dispositions contestées puisqu'ils ne peuvent obtenir un congé pour exercer des activités politiques; et il me semble qu'ils ne peuvent être visés par ces dispositions si ce n'est en vertu de l'autorité constitutionnelle d'un chef de compétence autre que la propriété et les droits civils.

Quant aux fonctionnaires qui n'exercent aucun pouvoir mais qui remplissent simplement des fonctions professionnelles, de consultation ou même de secrétariat, ils occupent néanmoins une charge puisqu'ils doivent prêter ce que la Loi appelle un serment d'entrée en fonction. Ils ne sont pas simplement embauchés par Sa Majesté, ils sont nommés au service de Sa Majesté par le lieutenant-gouverneur en conseil sur attestation de la

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my view, a public status which extends beyond the limits of civil rights.

There remains the category of Crown employees who are not included in the classified service. Their relationship with the Crown may well be governed by the law of contract, whether it be on an individual or on a collective basis, but the obligation to comply with the impugned provisions is not negotiable for them either and does not flow from their contract of employment. It is derived from the Act, a public law of Ontario which imposes this obligation upon them because they are employed in the service of the state.

We are not called upon to characterize the Act as a whole, as opposed to the impugned provisions. Yet it is worth observing that the only sections of the Act which can be considered as straight labour relations provisions are ss. 27, 28 and 28*a* which regulate the collective bargaining of the Ontario Provincial Police Force, a special case. The rest of the Act, a relatively short act comprising 32 sections, contains provisions several of which are not related directly or not related at all to labour relations. Thus, s. 1 is a definition section. Sections 2 and 3 provide for the composition and responsibility of the Civil Service Commission. I have already referred to s. 10 relating to oaths of office, secrecy and allegiance. Section 11 allows political activities in municipal elections at certain conditions, and provided that candidacies, services and activities be not affiliated with or sponsored by provincial or federal political parties. Sections 11, 12, 13, 14, 15 and 16 are the impugned provisions. Sections 23 and 24 provide for delegation of powers by deputy ministers and the Commission. I have already referred also to ss. 26, 27, 28 and 28*a* which relate to the labour relations of the Ontario Provincial Police Force. Finally, s. 29 confers broad regulatory powers to the Commission, subject to the approval of the Lieutenant-Governor in Council. The objects of these regulations comprise classifications for positions including salaries except classifications in which salaries are determined through bargaining pursuant to *The Crown Employees Collective Bargaining Act, 1972*, S.O.

Commission de la fonction publique et ils se voient conférer, en vertu de la Loi, un statut spécial et, à mon avis, public qui va au-delà des limites des droits civils.

Reste la catégorie des employés de Sa Majesté qui n'occupent pas un poste classifié dans la fonction publique. Leurs rapports avec Sa Majesté peuvent bien être régis par le droit des contrats, que ce soit sur une base individuelle ou collective, mais eux non plus ne peuvent négocier l'obligation de se conformer aux dispositions contestées et cette obligation ne découle pas de leur contrat de travail. Elle découle de la Loi, une loi publique de l'Ontario qui leur impose cette obligation parce qu'ils sont au service de l'État.

On ne nous demande pas de qualifier la Loi dans son ensemble, par opposition aux dispositions contestées. Pourtant, il vaut la peine de souligner que les seuls articles de la Loi qui peuvent être considérés comme des dispositions qui portent directement sur les relations de travail sont les art. 27, 28 et l'al. 28*a* qui réglementent la négociation collective de la Sûreté de l'Ontario, un cas spécial. Le reste de la Loi, qui est relativement courte vu qu'elle ne compte que 32 articles, contient des dispositions dont plusieurs ne sont pas directement liées, ou ne sont pas liées du tout, aux relations de travail. Ainsi, l'article 1 est un article de définition. Les articles 2 et 3 prescrivent la composition et les attributions de la Commission de la fonction publique. J'ai déjà parlé de l'art. 10 qui a trait aux serments d'entrée en fonction, de discrétion et d'allégeance. L'article 11 autorise les activités politiques lors d'élections municipales à certaines conditions et pourvu que les candidatures, les services et les activités ne soient pas rattachés à des partis politiques provinciaux ou fédéraux ni parrainés par ceux-ci. Les articles 11, 12, 13, 14, 15 et 16 sont les dispositions contestées. Les articles 23 et 24 prévoient la délégation de pouvoirs par les sous-ministres et la Commission. J'ai également déjà mentionné les art. 26, 27, 28 et l'al. 28*a* qui ont trait aux relations de travail de la Sûreté de l'Ontario. Enfin, l'art. 29 confère de larges pouvoirs de réglementation à la Commission, sous réserve de l'approbation du lieutenant-gouverneur en conseil. Ces règlements portent notamment sur les classifi-

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1972, c. 67, defining overtime work, and the regulation of conduct of public servants, including the imposition of fines, removal from employment and demotion, and the designation of positions or classifications for the purpose of s. 11. Subsection 29(3) provides that a collective agreement prevails where it conflicts with a regulation.

Thus, the Act does contain some elements relating to labour relations, but they are not its chief characteristics as they are for instance in *The Crown Employees Collective Bargaining Act, 1972*.

While it can be said also that the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is public employment. That is why they cannot in my opinion be grounded, or be grounded only in s. 92(13) of the *Constitution Act, 1867*. But they can be fully grounded in s. 92(1) and (4).

2. *The Amendment of the Constitution of the Province*

Section 92(1) of the *Constitution Act, 1867* provides for the process whereby the constitution of the province can be amended. This process is an ordinary law or statute of the provincial legislature. But the *Constitution Act, 1867* nowhere defines the expression "constitution of the province".

The constitution of Ontario, like that of the other provinces and that of the United Kingdom, but unlike that of many states, is not to be found in a comprehensive, written instrument called a constitution. It is partly contained in a variety of statutory provisions. Some of these provisions have been enacted by the Parliament at Westminster, such as ss. 58 to 70 and ss. 82 to 87 of the

cations de poste y compris les traitements à l'exception des classifications dans lesquelles les traitements sont fixés par voie de négociation conformément à *The Crown Employees Collective Bargaining Act, 1972*, S.O. 1972, chap. 67, qui définit le travail en surtemps, et sur la réglementation de la conduite des fonctionnaires, y compris l'imposition d'amendes, le renvoi et la rétrogradation, ainsi que la désignation de postes ou de classifications aux fins l'art. 11. Le paragraphe 29(3) prévoit que la convention collective prévaut lorsqu'elle entre en conflit avec un règlement.

Ainsi, la Loi contient bien des éléments relatifs aux relations de travail, mais ils ne constituent pas ses caractéristiques principales comme c'est le cas par exemple dans *The Crown Employees Collective Bargaining Act, 1972*.

Bien qu'on puisse également dire que la Loi réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique provinciale, un bon nombre de ses dispositions, y compris les dispositions contestées, ne peuvent s'expliquer et se justifier que par le fait que l'emploi en question est un emploi public. C'est pourquoi elles ne peuvent à mon avis être fondées, ou être fondées uniquement, sur le par. 92(13) de la *Loi constitutionnelle de 1867*. Mais elles peuvent être entièrement fondées sur les par. 92(1) et (4).

2. *La modification de la constitution de la province*

Le paragraphe 92(1) de la *Loi constitutionnelle de 1867* prescrit la méthode par laquelle la constitution de la province peut être modifiée. Cette méthode consiste en l'adoption d'une loi ordinaire par la législature provinciale. Toutefois, la *Loi constitutionnelle de 1867* ne définit nulle part l'expression «constitution de la province».

La constitution de l'Ontario, comme celle des autres provinces et du Royaume-Uni, mais contrairement à celle de nombreux États, ne se trouve pas dans un document complet appelé constitution. Elle se trouve en partie dans une variété de dispositions législatives. Certaines de ces dispositions ont été adoptées par le Parlement de Westminster, comme les art. 58 à 70 et 82 à 87 de la *Loi*

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Constitution Act, 1867. Other provisions relating to the constitution of Ontario have been enacted by ordinary statutes of the Legislature of Ontario, for instance *The Legislative Assembly Act*, R.S.O. 1970, c. 240; *The Representation Act*, R.S.O. 1970, c. 413, and *The Executive Council Act*, R.S.O. 1970, c. 153.

Another part of the constitution of Ontario consists of the rules of the common law, developed or recognized over the years by the courts. Many of these common law rules concern the royal prerogative. For instance, they have put the Crown in right of the province in a preferred position as a creditor (*Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437) and with respect to the inheritance of lands for defect of heirs (*Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767).

As was explained in *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 876-78, with respect to the Constitution of Canada—but the same can generally be said of the constitution of Ontario—"those parts which are composed of statutory rules and common law rules are generically referred to as the law of the constitution". In addition, the constitution of Ontario comprises rules of a different nature but of great importance called conventions of the constitution. The most fundamental of these is probably the principle of responsible government which is largely unwritten, although it is implicitly referred to in the preamble of the *Constitution Act, 1867*, and one of its facets is articulated in s. 83 of this Act—possibly spent—which, in Ontario and Quebec, "Until the Legislature of Ontario or of Quebec otherwise provides", puts a restriction on the election of holders of offices other than ministerial offices.

If Ontario were a unitary state, like the United Kingdom, the question whether a given enactment forms part of its constitution or amends its constitution could be resolved in the affirmative by only one relatively simple test: is the enactment consti-

constitutionnelle de 1867. D'autres dispositions relatives à la constitution de l'Ontario ont été adoptées par voie de lois ordinaires de la législature de l'Ontario comme, par exemple, *The Legislative Assembly Act*, R.S.O. 1970, chap. 240, *The Representation Act*, R.S.O. 1970, chap. 413, et *The Executive Council Act*, R.S.O. 1970, chap. 153.

Une autre partie de la constitution de l'Ontario est formée de règles de *common law*, énoncées ou reconnues au cours des ans par les tribunaux. Plusieurs de ces règles de *common law* concernent la prérogative royale. Par exemple, elles ont placé Sa Majesté du chef de la province dans une situation privilégiée en tant que créancière (*Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437) et en ce qui concerne l'héritage de terres à défaut d'héritiers (*Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767).

Comme on l'explique dans le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, aux pp. 876 à 878, au sujet de la Constitution du Canada—mais de façon générale, on peut dire la même chose de la constitution de l'Ontario—«On désigne du terme générique de droit constitutionnel les parties [. . .] qui sont formées de règles législatives et de règles de *common law*». En outre, la constitution de l'Ontario comprend des règles d'une nature différente mais d'une grande importance appelées conventions de la constitution. La plus fondamentale d'entre elles est probablement le principe du gouvernement responsable qui est en grande partie non écrit, bien qu'il soit mentionné implicitement dans le préambule de la *Loi constitutionnelle de 1867* et qu'une de ses facettes soit formulée à l'art. 83 de cette loi, peut-être désuète, qui, en Ontario et au Québec, et «Jusqu'à ce que la Législature de l'Ontario ou du Québec en ordonne autrement», établit une restriction quant à l'élection de titulaires de charges autres que les charges de ministres.

Si l'Ontario était un État unitaire, comme le Royaume-Uni, la question de savoir si une disposition donnée fait partie de sa constitution ou la modifie pourrait recevoir une réponse affirmative par l'application d'un seul critère relativement

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tutional in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1024, does "it [bear] on the operation of an organ of the government of the Province"? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government? In a unitary state without a comprehensive written constitution, this test is the only one available.

Because Ontario, following the British model, is without a comprehensive written constitution, its laws do not qualify as constitutional laws unless they also satisfy first the test as to whether they are constitutional in nature.

This first test, however, even if *prima facie* satisfied, is not determinative of the issue whether an Ontario statute forms part of the constitution of Ontario or is an amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*. The main reason for the insufficiency of the first test is that Ontario is not a unitary state. It is an integral part of a federal one and provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle, are beyond the reach of the amending power bestowed upon the province by s. 92(1). An obvious example is the whole of s. 92 itself. With respect to Ontario, it is in a sense constitutional in nature in so far as it defines the legislative competence of the legislature of this province. But it also sets limits to the legislative competence of Parliament. It lies at the core of the scheme under which legislative competence is distributed in the federation. It forms part of the constitution of the federation considered as a whole rather than of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*. Prior to 1982, that part of the constitution of the federation was

simple: la disposition est-elle de nature constitutionnelle? En d'autres termes, la disposition en question a-t-elle trait, de par son objet, à une branche du gouvernement de l'Ontario ou, pour reprendre les termes de cette Cour dans l'arrêt *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, à la p. 1024, est-ce qu'elle «porte sur le fonctionnement d'un organe du gouvernement de la province»? Détermine-t-elle, par exemple, la composition, les pouvoirs, l'autorité, les privilèges et les fonctions des organes législatif ou exécutif ou de leurs membres? Réglemente-t-elle la corrélation entre deux ou plusieurs branches? Ou établit-elle quelque principe de gouvernement? Dans un État unitaire qui n'a pas de constitution écrite complète, ce critère est le seul applicable.

Parce que l'Ontario, à l'instar du modèle britannique, n'a pas de constitution écrite complète, ses lois ne peuvent être considérées comme des lois constitutionnelles à moins qu'elles ne satisfassent également au critère consistant à déterminer si elles sont de nature constitutionnelle.

Cependant, même si on y a satisfait à première vue, le premier critère n'est pas déterminant quant à la question de savoir si une loi de l'Ontario fait partie de la constitution de l'Ontario ou s'il s'agit d'une modification de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*. La raison principale de l'insuffisance du premier critère est que l'Ontario n'est pas un État unitaire. Elle fait partie intégrante d'un État fédéral et les dispositions relatives à la constitution de l'État fédéral, prises dans leur ensemble, ou essentielles à la mise en œuvre du principe fédéral échappent au pouvoir de modification que le par. 92(1) accorde à la province. L'ensemble de l'art. 92 lui-même en est un exemple évident. À l'égard de l'Ontario, il est en un sens de nature constitutionnelle dans la mesure où il définit la compétence législative de la législature de cette province. Mais il établit également des limites à la compétence législative du Parlement. Il se situe au cœur du régime en vertu duquel la compétence législative est partagée dans la fédération. Il fait partie de la constitution de la fédération considérée dans son ensemble plutôt que de la constitution de l'Ontario, au sens du par. 92(1) de la *Loi constitu-*

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therefore entrenched in the sense that it could only be amended by the Parliament at Westminster, in accordance with constitutional conventions.

Furthermore, other provisions of the *Constitution Act, 1867* could be similarly entrenched and held to be beyond the reach of s. 92(1), not because they were essential to the implementation of the federal principle, but because, for historical reasons, they constituted a fundamental term or condition of the union formed in 1867. Thus, s. 133 of the *Constitution Act, 1867* was held in *Blaikie, supra*, to constitute such a provision and to be a "part of the Constitution of Canada and of Quebec in an indivisible sense" and not a part of the constitution of Quebec within s. 92(1).

To sum up, therefore, and subject to the *caveat* I will mention later, an enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant-Governor and, presumably and *a fortiori*, the office of the Queen who is represented by the Lieutenant-Governor.

The above-described approach seems to me to be consistent with the line followed by this Court in *Blaikie, supra*, where it explicitly declined to adopt a narrower line. It had been held by the Appellate Division of the Alberta Supreme Court in *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304, and by the Quebec Court of Appeal in *Procureur général du Québec c. Blaikie*, [1978] C.A. 351, that s. 92(1) of the *Constitution Act, 1867* should be given a restricted meaning embracing only those provisions included under the number and heading V of the *Constitution Act, 1867*, entitled "Provincial Constitutions". This restrictive inter-

tionnelle de 1867. Avant 1982, cette partie de la constitution de la fédération était donc intangible, en ce sens qu'elle ne pouvait être modifiée que par le Parlement de Westminster conformément à des conventions constitutionnelles.

En outre, d'autres dispositions de la *Loi constitutionnelle de 1867* ont pu de même être intangibles et considérées comme échappant au par. 92(1), non pas parce qu'elles étaient essentielles à la mise en œuvre du principe fédéral, mais parce que, pour des raisons historiques, elles constituaient une condition fondamentale de l'union formée en 1867. Ainsi, dans l'arrêt *Blaikie*, précité, on a conclu que l'art. 133 de la *Loi constitutionnelle de 1867* était une disposition de ce genre et faisait «partie indivisiblement de la constitution du Canada et du Québec» et non pas partie de la constitution du Québec au sens du par. 92(1).

Pour résumer donc, et sous réserve de ce que je mentionnerai plus loin, une disposition peut généralement être considérée comme une modification de la constitution d'une province lorsqu'elle porte sur le fonctionnement d'un organe du gouvernement de la province, pourvu qu'elle ne soit pas par ailleurs intangible parce qu'indivisiblement liée à la mise en œuvre du principe fédéral ou à une condition fondamentale de l'union et pourvu évidemment qu'elle ne soit pas explicitement ou implicitement exemptée du pouvoir de modification que le par. 92(1) accorde à la province, comme par exemple la charge de lieutenant-gouverneur et, probablement et à plus forte raison, la charge de la souveraine qui est représentée par le lieutenant-gouverneur.

Le point de vue que je viens de décrire me semble compatible avec celui adopté par cette Cour dans l'arrêt *Blaikie*, précité, où elle a explicitement refusé d'adopter une attitude plus stricte. La Division d'appel de la Cour suprême de l'Alberta, dans l'arrêt *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304, et la Cour d'appel du Québec, dans l'arrêt *Procureur général du Québec c. Blaikie*, [1978] C.A. 351, ont conclu qu'on devrait prêter au par. 92(1) de la *Loi constitutionnelle de 1867* un sens restreint qui engloberait seulement les dispositions figurant sous la rubrique V de la *Loi constitutionnelle de 1867*, intitulée «Constitu-

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pretation could not be reconciled with *Fielding v. Thomas*, [1896] A.C. 600, where it had been held that the privileges and immunities of members of the Nova Scotia Legislative Assembly, and legislation giving immunity from civil liability in respect of words and conduct in the Assembly, were matters coming within s. 92(1). These matters could not conceivably be included under heading V of the *Constitution Act, 1867*. In *Blaikie*, *supra*, this Court had this to say about the question at pp. 1024-25:

> The fact that *Fielding v. Thomas* concerned matters relating to the Constitution of the Province, in the sense that it bore on the operation of an organ of the government of the Province, does not help to establish the appellant's position as to the unlimited scope of s. 92(1). The latter may, of course, cover such changes as were dealt with in *Fielding v. Thomas* and, also, other matters not expressly covered by the *British North America Act* but implicit in the Constitution of the Province. That does not, however, carry the necessary conclusion that s. 133 is unilaterally amendable. Indeed, the argument goes too far because, as pressed, it would permit amendment of the catalogue of legislative powers in the succeeding catalogue of classes of subjects in s. 92 and this was not suggested. [Emphasis added.]

We must now apply these tests to the provisions impugned in the case at bar.

It is clear to me that those provisions are constitutional in nature in the sense that they bear on the operation of an organ of government in Ontario and that they impose duties on the members of a branch of government in order to implement a principle of government. The organ of government is the Ontario Public Service. The duty is the one imposed upon the members of the public service to abstain from the political activities contemplated by the impugned provisions. The principle of government is the impartiality of the public service considered as an essential prerequisite of responsible government.

In *Fraser*, *supra*, Dickson C.J., speaking for the full Court, stressed "the importance and necessity

tions des provinces». Cette interprétation restreinte ne pouvait être conciliée avec l'arrêt *Fielding v. Thomas*, [1896] A.C. 600, dans lequel on avait jugé que les privilèges et immunités des députés de l'assemblée législative de la Nouvelle-Écosse et les lois accordant l'immunité contre la responsabilité civile pour les paroles et la conduite devant l'Assemblée, étaient des matières visées par le par. 92(1). Ces matières ne pouvaient pas, en principe, être incluses sous la rubrique V de la *Loi constitutionnelle de 1867*. Voici ce que cette Cour affirme à ce sujet dans l'arrêt *Blaikie*, précité, aux pp. 1024 et 1025:

> Le fait que l'arrêt *Fielding v. Thomas* touche à des questions relatives à la constitution de la province, dans la mesure où il porte sur le fonctionnement d'un organe du gouvernement de la province, n'appuie pas la thèse de l'appelant sur la portée illimitée du par. 92(1). Ce dernier peut évidemment viser des changements comme ceux qui font l'objet de l'arrêt *Fielding v. Thomas* ainsi que d'autres matières qui ne sont pas expressément régies par l'*Acte de l'Amérique du Nord britannique* mais font implicitement partie de la constitution de la province. Mais cela ne signifie pas nécessairement que l'art. 133 puisse être modifié unilatéralement. De fait, l'argument va trop loin car, ainsi qu'on l'a fait valoir, il permettrait de modifier la liste des pouvoirs législatifs compris dans l'énumération des catégories de sujets qui figure ensuite à l'art. 92, et l'on n'est pas allé jusqu'à avancer cette prétention. [Je souligne.]

Nous devons maintenant appliquer ces critères aux dispositions contestées en l'espèce.

À mon avis, il est évident que ces dispositions sont de nature constitutionnelle en ce sens qu'elles portent sur le fonctionnement d'un organe du gouvernement en Ontario et qu'elles imposent aux membres d'un organe du gouvernement des obligations pour mettre en œuvre un principe de gouvernement. La fonction publique de l'Ontario est cet organe du gouvernement. L'obligation est celle qui est imposée aux membres de la fonction publique de s'abstenir d'exercer les activités politiques envisagées par les dispositions contestées. Le principe de gouvernement est l'impartialité de la fonction publique considérée comme une condition essentielle à l'existence d'un gouvernement responsable.

Dans l'arrêt *Fraser*, précité, le juge en chef Dickson, s'exprimant au nom de la Cour au com-

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of an impartial and effective public service" at p. 469. He then continued as follows on the same page and on pp. 469-70:

There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.

As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. [The underlining is mine.]

It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario. The ministers and the executive council of Ontario would be powerless and quite incapable of administering the province if they were deprived of the public service and left to their own device. The government of a large modern state is impossible to manage without a relatively large public service which effectively participates in the exercise of political power under the supervision of responsible ministers:

[TRANSLATION] However, while a public servant always remains a citizen he is also a servant of the State. As the holder of a small part of governmental authority and possessor of exceptional prerogatives at common law, the public servant shares in the exercise of power. This is indeed the reason that the State imposes a duty of loyalty and silence on him. Would not allowing public servants to exercise their political freedoms to the fullest risk compromising the action, even the very existence, of established governments, paralyze political control and weaken the confidence of individuals in government, if the public servant were to fail to demonstrate the impartiality of the government?

plet, souligne, à la p. 469, qu'il est «important et nécessaire d'avoir une fonction publique impartiale et efficace». Il ajoute alors, aux pp. 469 et 470:

Il existe au Canada une séparation des pouvoirs entre les trois branches du gouvernement—le législatif, l'exécutif et le judiciaire. En termes généraux, le rôle du judiciaire est, il va sans dire, d'interpréter et d'appliquer la loi; le rôle du législatif est de prendre des décisions et d'énoncer des politiques; le rôle de l'exécutif est d'administrer et d'appliquer ces politiques.

La fonction publique fédérale au Canada fait partie de l'exécutif du gouvernement. À ce titre, sa tâche fondamentale est d'administrer et d'appliquer les politiques. Pour bien accomplir sa tâche, la fonction publique doit employer des personnes qui présentent certaines caractéristiques importantes parmi lesquelles les connaissances, l'équité et l'intégrité.

Comme l'arbitre l'a indiqué, il existe une autre caractéristique qui est la loyauté. En règle générale, les fonctionnaires fédéraux doivent être loyaux envers leur employeur, le gouvernement du Canada. Ils doivent être loyaux envers le gouvernement du Canada et non envers le parti politique au pouvoir. Un fonctionnaire n'est pas tenu de voter pour le parti au pouvoir. Il n'est pas non plus tenu d'endosser publiquement ses politiques. [Je souligne.]

On peut dire de la même manière que la fonction publique en Ontario fait partie de l'exécutif du gouvernement de l'Ontario. Les ministres et le conseil exécutif de l'Ontario seraient impuissants et tout à fait incapables d'administrer la province s'ils étaient privés de la fonction publique et laissés à leurs propres moyens. Il est impossible de gouverner un grand État moderne sans une fonction publique relativement importante qui participe efficacement à l'exercice du pouvoir politique sous la surveillance de ministres responsables:

Cependant, si le fonctionnaire demeure toujours un citoyen il est aussi le serviteur de l'État. Détenteur d'une parcelle de la puissance publique, jouissant de prérogatives exorbitantes du droit commun, le fonctionnaire participe à l'exercice du pouvoir. C'est pour cette raison d'ailleurs que l'État lui impose l'obligation de loyauté et de réserve. Reconnaître au fonctionnaire le plein exercice de ses libertés politiques ne risquerait-il pas de compromettre l'action, voire l'existence même, des gouvernements en place, de paralyser la direction politique de la nation, d'ébranler la confiance des administrés dans l'administration advenant que le fonctionnaire se départisse de l'impartialité dont l'administration doit faire preuve?

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(Patrice Garant, *La fonction publique canadienne et québécoise* (Québec 1973), at pp. 347-48.)

So much for the branch of government which is regulated by the impugned provisions. As for the principles of government which they purport to fulfil, I think that much of what the Ontario Court of Appeal had to say on the matter in the case at bar is apposite. MacKinnon A.C.J.O. wrote:

In Vol. II, Part 2, of *Law and Custom of the Constitution* (1908), Anson wrote at p. 69 that a principal feature of responsible government in colonial Canada was "the permanent tenure of office by the civil servant, and his exclusion from the Legislature". It was clearly the intention of those who framed the *British North America Act, 1867*, that responsible government should continue in Canada when they stated in the preamble to that Act that Canada was to have "a Constitution similar in Principle to that of the United Kingdom".

. . .

The history of the development of the Legislature's control over the civil service and the gradual emancipation of civil service appointment from political patronage is of importance in determining what conventions existed in this connection at the time of Confederation. It helps determine what was imported into Canada in this regard by the words "a Constitution similar in Principle to that of the United Kingdom".

In 1914 the MacDonnell Commission in the United Kingdom, in its report, pointed out that, as part of responsible government, it was necessary to impose upon civil servants some restraint on partisan political activities; this in turn would ensure and promote efficiency of public administration by civil servants. This view was adopted in 1949 by the Masterman Committee in its report on "The Political Activities of Civil Servants".

MacKinnon A.C.J.O. then quoted a passage of the MacDonnell Committee Report including the following one which was also quoted later by Dickson C.J. in *Fraser*, *supra*, at p. 471:

Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed

(Patrice Garant, *La fonction publique canadienne et québécoise* (Québec 1973), aux pp. 347 et 348.)

Voilà en ce qui concerne la branche de gouvernement réglementée par les dispositions contestées. Quant aux principes de gouvernement qu'elles ont pour objet de favoriser, je pense qu'une bonne partie de ce qu'a dit la Cour d'appel de l'Ontario sur le sujet en l'espèce est juste. Le juge en chef adjoint MacKinnon écrit:

[TRADUCTION] Dans le volume II, partie 2 de l'ouvrage *Law and Custom of the Constitution* (1908), Anson écrit à la p. 69 qu'une caractéristique principale du gouvernement responsable dans le Canada colonial était «la permanence du fonctionnaire et son exclusion de la législature». Les rédacteurs de l'*Acte de l'Amérique du Nord britannique de 1867* ont clairement voulu que le gouvernement responsable se perpétue au Canada lorsqu'ils ont affirmé dans le préambule de cette loi que le Canada devait avoir «une constitution semblable dans son principe à celle du Royaume-Uni».

. . .

L'historique de l'évolution du contrôle de la législature sur la fonction publique et de l'affranchissement progressif, du patronage politique, des nominations dans la fonction publique est important pour déterminer quelles conventions existaient à cet égard à l'époque de la Confédération. Cela aide à déterminer ce qu'on a voulu dire au Canada à ce sujet par les mots «une constitution semblable dans son principe à celle du Royaume-Uni».

Au Royaume-Uni en 1914, la commission MacDonnell a souligné dans son rapport que, dans le cadre d'un gouvernement responsable, il était nécessaire d'imposer aux fonctionnaires des restrictions relativement aux activités politiques partisanes; cela permettrait d'assurer et de favoriser l'efficacité de l'administration publique par les fonctionnaires. Le comité Masterman a adopté ce point de vue en 1949 dans son rapport sur «The Political Activities of Civil Servants».

Le juge en chef adjoint MacKinnon cite alors un extrait du rapport du comité MacDonnell, dont le suivant repris plus tard par le juge en chef Dickson dans l'arrêt *Fraser*, précité, à la p. 471:

[TRADUCTION] D'une manière générale, nous croyons que si les restrictions relatives aux activités politiques des fonctionnaires devaient être levées, cela aurait probablement deux conséquences. Le public pourrait cesser de croire, comme nous pensons qu'il le fait maintenant avec raison, en l'impartialité de la fonction publique permanente; et les ministres pourraient cesser de sentir la confiance bien méritée qu'ils possèdent à l'heure

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they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.

If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.

MacKinnon A.C.J.O. continued:

The Masterman Committee, in its summary of conclusions, stated that "the political neutrality of the Civil Service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the Service". A subsequent committee on the subject in the United Kingdom (the Armitage Committee) reported in the same fashion in 1978.

MacKinnon A.C.J.O. then proceeded to make findings which in my view are as crucial as they are unassailable:

Clearly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years. Whether it was honoured fully at that time in practice is irrelevant. The consideration is, as stated earlier, not as to the social desirability of the legislation but rather the fact that historically there was such a convention existing in 1867. It is difficult to take exception to Mr. Justice Labrosse's conclusion that: "Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power" (p. 173 O.R., p. 328 D.L.R.). The impugned provisions seem to do no more than reflect the existing convention.

actuelle dans l'appui loyal et fidèle de leurs fonctionnaires; en fait, ils pourraient être portés à examiner à fond les paroles et les écrits de leurs subordonnés et à choisir pour occuper des postes de confiance, seulement ceux dont ils savent qu'ils partagent les mêmes sympathies politiques.

Si tel était le cas, le système de recrutement par concours public constituerait seulement une barrière fragile contre le népotisme ministériel au cours de toutes les années de service sauf au début; la fonction publique cesserait en fait d'être un organisme impartial, apolitique, capable de loyaux services envers tous les ministres et les partis; le changement aurait rapidement des effets sur l'opinion que le public se fait de la fonction publique et le résultat serait destructif à l'égard de ce qui est sans aucun doute, à l'heure actuelle, l'un des plus grands avantages de notre système administratif et l'une des traditions les plus honorables de notre vie publique.

Le juge en chef adjoint MacKinnon poursuit:

[TRADUCTION] Dans le résumé de ses conclusions, le comité Masterman affirme que «la neutralité politique de la fonction publique est une caractéristique fondamentale du gouvernement démocratique britannique et est essentielle à son fonctionnement efficace. Elle doit être maintenue même au prix d'une certaine perte de liberté politique par certains de ceux qui choisissent d'entrer dans la fonction publique». Un comité ultérieur constitué pour étudier le sujet au Royaume-Uni (le comité Armitage) a conclu de la même façon en 1978.

Le juge en chef MacKinnon a alors tiré des conclusions qui, à mon avis, sont aussi cruciales qu'inattaquables:

[TRADUCTION] De toute évidence il existait une convention de neutralité politique des employés de Sa Majesté à l'époque de la Confédération et le raisonnement à l'appui de cette convention est demeuré le même tout au long des années qui ont suivi. Qu'elle fût complètement respectée à cette époque en pratique est sans importance. Ce qui importe, comme je l'ai déjà dit, ce n'est pas le caractère souhaitable des dispositions de la loi du point de vue social mais plutôt le fait que, historiquement, cette convention existait en 1867. Il est difficile de ne pas approuver la conclusion de M. le juge Labrosse selon laquelle «La confiance du public dans la fonction publique exige sa neutralité politique et son impartialité dans la prestation de ses services, peu importe le parti politique au pouvoir» (p. 173 O.R., p. 328 D.L.R.) Les dispositions contestées semblent ne faire rien de plus que refléter la convention existante.

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I agree with these findings. I would however express the last one in more positive terms: to me, the impugned provisions do not merely seem to reflect the existing convention; they clearly give it the additional force and precision of legislative effect, and they are constitutional provisions by nature and *prima facie* competent under s. 92(1) of the *Constitution Act, 1867*.

I do not think that this *prima facie* conclusion can be altered by the negative parts of the above-described tests.

Far from violating a fundamental term or condition of the union as was the case in *Blaikie, supra*, the impugned provisions give additional legislative effect to one of its basic tenets, the principle of responsible government. In this respect, the impugned provisions bear a closer relationship to those of the federal *Official Languages Act*, R.S.C. 1970, c. O-2, found constitutionally valid by this Court in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182.

I do not think either that the rules introduced by the impugned provisions can be said to be incompatible with the implementation of the federal principle.

I understand that, according to the appellants' first submission, the impugned provisions are related to the exclusively federal subject of federal elections (*Valin v. Langlois* (1879), 3 S.C.R. 1, 5 A.C. 115), and that, according to their alternative submission, even if the impugned provisions are related to a provincial object, they cannot constitutionally extend to the federal subject of federal elections.

I doubt that either of these submissions reaches the level of the federal principle argument. But, be that as it may, I agree with neither of these submissions. I will deal with the second and alternative submissions in a separate chapter.

As for the first submission, I take the view that it should be dismissed for the following reasons.

Je suis d'accord avec ces conclusions. Je formulerais toutefois la dernière en des termes plus positifs: à mon avis, les dispositions contestées ne semblent pas simplement refléter la convention existante; elles lui confèrent clairement la force et la précision additionnelles de l'effet législatif et elles sont de nature constitutionnelle et valides à première vue en vertu du par. 92(1) de la *Loi constitutionnelle de 1867*.

Je ne crois pas que cette conclusion tirée à première vue puisse être modifiée par les parties négatives des critères déjà décrits.

Loin de violer une condition fondamentale de l'union comme c'était le cas dans l'affaire *Blaikie*, précitée, les dispositions contestées confèrent un effet législatif additionnel à l'un de ses préceptes fondamentaux, le principe du gouvernement responsable. À cet égard, les dispositions contestées sont plus rapprochées de celles de la *Loi sur les langues officielles* fédérale, S.R.C. 1970, chap. O-2, que cette Cour a jugées constitutionnelles dans l'arrêt *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182.

Je ne crois pas non plus que l'on puisse dire que les règles introduites par les dispositions contestées sont incompatibles avec la mise en œuvre du principe fédéral.

Si je comprends bien, suivant le premier argument des appelants, les dispositions contestées ont trait au domaine de compétence exclusive fédérale que sont les élections fédérales (*Valin v. Langlois* (1879), 3 R.C.S. 1, 5 A.C. 115) et, suivant leur argument subsidiaire, même si les dispositions contestées ont trait à un objet provincial, elles ne peuvent pas constitutionnellement aller jusqu'à s'appliquer à la matière fédérale que constituent les élections fédérales.

Je doute que l'un ou l'autre de ces arguments atteigne le niveau de l'argument du principe fédéral. Quoi qu'il en soit, je ne suis d'accord avec ni l'un ni l'autre de ces arguments. Je traiterai du second argument, l'argument subsidiaire, dans un chapitre distinct.

Quant au premier argument, je suis d'avis qu'il doit être rejeté pour les motifs suivants. Les dispo-

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The impugned provisions constitute properly framed legislation which in no way affects the validity of federal elections or eligibility to the House of Commons, or qualifications or disqualifications to sit in this House; nor do they make the political activities which they contemplate unlawful; what they do is to create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship; the impugned provisions are not aimed specifically at federal political activity; they are comprehensively aimed at regulating the political activities of Ontario public servants as such, that is as members of the executive branch of government, in order to safeguard their neutrality and impartiality. With all due respect, I can find no merits in the appellants' first submission.

In my opinion, the impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*.

However, let me say one word of caution before I conclude this chapter. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.

But there may be more to it.

In *In re Initiative and Referendum Act*, [1919] A.C. 935, the Judicial Committee invalidated legislative provisions which empowered the electors of Manitoba to legislate directly by way of a referendum procedure. The Judicial Committee found the legislation in question invalid on some-

sitions contestées sont des mesures législatives bien formulées qui ne touchent aucunement ni à la validité des élections fédérales ou à l'éligibilité à la Chambre des communes, ni aux qualifications nécessaires pour siéger en cette chambre ou à l'inhabilité à y siéger; elles ne rendent pas non plus illégales les activités politiques qu'elles envisagent; elles ne font que créer une incapacité de faire partie de la fonction publique de l'Ontario, portant ainsi atteinte à une relation créée par la province; les dispositions contestées ne visent pas spécifiquement les activités politiques fédérales; elles sont globalement destinées à réglementer les activités politiques des fonctionnaires de l'Ontario en tant que tels, c'est-à-dire en tant que membres de l'exécutif du gouvernement, dans le but de préserver leur neutralité et leur impartialité. Avec égards, je ne puis voir aucun bien-fondé dans le premier argument des appelants.

À mon avis, les dispositions contestées constituent une modification législative ordinaire de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*.

Qu'il me soit cependant permis de faire une mise en garde avant de terminer ce chapitre. Le fait qu'une province puisse validement conférer un effet législatif à une condition préalable d'un gouvernement responsable ne signifie pas nécessairement qu'elle peut faire tout ce qui lui plaît du principe du gouvernement responsable lui-même. Ainsi, il n'est pas certain, à tout le moins, qu'une province puisse toucher au pouvoir du lieutenant-gouverneur de dissoudre l'assemblée législative, ou à son pouvoir de nommer et de destituer les ministres, sans toucher de manière inconstitutionnelle à sa charge elle-même. Il se peut fort bien que le principe du gouvernement responsable puisse, dans la mesure où il est fonction de ces pouvoirs royaux importants, être en grande partie intangible.

Mais il y a peut-être plus.

Dans *In re Initiative and Referendum Act*, [1919] A.C. 935, le comité judiciaire a annulé des dispositions législatives qui permettaient aux électeurs du Manitoba de légiférer directement par voie de référendum. Le comité judiciaire a conclu que les dispositions en question étaient nulles pour

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what narrow grounds related to the office of Lieutenant-Governor. The Judicial Committee was undoubtedly conscious of the fact that the technical flaws it found in the legislation could easily be corrected without any effect on the major feature of the legislation. Viscount Haldane, who delivered the reasons of the Judicial Committee, accordingly pronounced a deliberate and important *obiter* at p. 945, reading as follows:

> No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* [9 App. Cas. 117], the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

While this *obiter* is confined to the particular facts of that case, it may stand for the wider proposition that the power of constitutional amendment given to the provinces by s. 92(1) of the *Constitution Act, 1867* does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

3. *The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers*

Section 92(4) of the *Constitution Act, 1867* empowers the province to make laws in relation to "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers". Parliament has been given a corresponding albeit differently described power by s. 91(8) relating to "The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada".

des motifs quelque peu restreints liés à la charge de lieutenant-gouverneur. Le comité judiciaire était sans doute conscient du fait que les vices qu'il a constatés dans les dispositions de la loi pouvaient être facilement corrigés sans aucunement modifier la caractéristique principale de la loi en question. Le vicomte Haldane, qui a rédigé les motifs du comité judiciaire, a donc de propos délibéré formulé une opinion incidente mais importante, à la p. 945:

> [TRADUCTION] Nul doute qu'un organisme jouissant sur les matières qui relèvent de sa compétence, d'un pouvoir de légiférer aussi étendu que celui qui appartient à une législature provinciale au Canada pourrait, tout en préservant l'intégrité de ses propres pouvoirs, se faire aider par des organismes subordonnés. Ceci était le cas lorsque, dans l'affaire *Hodge v. The Queen* [9 App. Cas. 117], il a été décidé que la législature de l'Ontario avait le droit de confier à un bureau de commissaires le pouvoir d'édicter des règlements relatifs aux tavernes; il ne s'ensuit pas toutefois qu'il peut créer et doter de sa propre capacité un nouveau pouvoir législatif non créé par la loi à laquelle il doit sa propre existence. Leurs Seigneuries ne font ici rien d'autre que souligner la gravité des questions constitutionnelles qui se posent à cet égard.

Bien que cette opinion incidente ne vise que les faits particuliers de cette affaire, elle peut étayer la proposition plus générale que le pouvoir de modification constitutionnelle que le par. 92(1) de la *Loi constitutionnelle de 1867* accorde aux provinces ne comprend pas nécessairement le pouvoir de provoquer des bouleversements constitutionnels profonds par l'introduction d'institutions politiques étrangères et incompatibles avec le système canadien.

3. *La création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux*

Le paragraphe 92(4) de la *Loi constitutionnelle de 1867* habilite la province à légiférer concernant «la création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux». Le Parlement s'est vu conférer un pouvoir correspondant, quoique décrit différemment au par. 91(8), concernant «la fixation et le paiement des traitements et allocations des fonctionnaires civils et autres du gouvernement du Canada».

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Neither of these provisions seems to have been the object of much comment, doctrinal or judicial.

In the second edition of *The Law of the Canadian Constitution* (1904), at p. 261, Clement writes that the item covered by s. 92(4) "is the guarantee for the continuance of 'responsible government.'" In *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 247, the Judicial Committee implicitly overruling *Lenoir v. Ritchie* (1879), 3 S.C.R. 575, relied upon s. 92(4), in combination with s. 92(1) and (14), to find *intra vires* an Ontario statute empowering the Lieutenant-Governor to confer precedence by patents upon such members of the bar of the province as he thinks fit to select.

However, what matters much more than the paucity of comment is the fact that the powers bestowed upon Parliament and the legislature by ss. 91(8) and 92(4) of the *Constitution Act, 1867* have been exercised on a large scale without challenge ever since 1867. The lack of challenge does not mean that these powers are either axiomatic or unimportant. If the federal level of government were made entirely dependent upon provincial instrumentalities by the Constitution, Canada would run the risk of becoming but a loose and precarious confederacy. On the other hand, it might become a highly centralized state if the converse situation were to prevail. Furthermore, the rules of responsible government might become hopelessly blurred in such hypothetical cases. Sections 91(8) and 92(4) of the *Constitution Act, 1867* thus constitute provisions of fundamental importance, essential to the federal principle and to responsible government.

The impugned provisions are aimed at federal as well as provincial political activities and constitute a term or condition of tenure of provincial office, enforced by compulsory resignation or dismissal. Their object is to ensure in this respect, not partial virtue, but global political independence for provincial officers. Far from violating the federal principle, their aim is to reinforce it and to secure the operation of responsible government within a federal framework.

Aucune de ces dispositions ne semble avoir fait l'objet de beaucoup de commentaires, ni dans la doctrine ni dans la jurisprudence.

Dans la seconde édition de l'ouvrage intitulé *The Law of the Canadian Constitution* (1904), à la p. 261, Clement écrit que le par. 92(4) vise [TRADUCTION] «à assurer le maintien d'un «gouvernement responsable»». Dans l'arrêt *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 247, le comité judiciaire, rejetant implicitement l'arrêt *Lenoir v. Ritchie* (1879), 3 R.C.S. 575, s'est fondé sur le par. 92(4), pris conjointement avec les par. 92(1) et (14), pour juger constitutionnelle une loi ontarienne qui habilitait le lieutenant-gouverneur à accorder, par lettres patentes, préséance aux membres du barreau de la province qu'il voulait bien désigner.

Toutefois, ce qui importe beaucoup plus que la rareté des commentaires est le fait que les pouvoirs accordés au Parlement et aux législatures par les par. 91(8) et 92(4) de la *Loi constitutionnelle de 1867* ont été largement exercés sans aucune contestation depuis 1867. L'absence de contestation ne signifie pas que ces pouvoirs sont axiomatiques ou sans importance. Si la Constitution faisait entièrement reposer le palier fédéral de gouvernement sur des rouages provinciaux, le Canada courrait le risque de devenir une confédération faible et précaire. Par contre, dans le cas inverse, il pourrait devenir un État très centralisé. En outre, les règles du gouvernement responsable pourraient devenir désespérément floues dans ces cas hypothétiques. Les paragraphes 91(8) et 92(4) de la *Loi constitutionnelle de 1867* sont donc des dispositions d'une importance fondamentale et essentielles au principe fédéral et au gouvernement responsable.

Les dispositions contestées visent les activités politiques tant fédérales que provinciales et constituent une condition de la durée d'une charge provinciale, qui doit être observée sous peine de démission ou destitution obligatoires. Elles ont pour objet d'assurer à cet égard non pas une impartialité incomplète, mais l'indépendance politique globale des fonctionnaires provinciaux. Loin de violer le principe fédéral, elles visent à le renforcer et à assurer le fonctionnement d'un gouvernement responsable à l'intérieur d'un régime fédéral.

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In my opinion, the constitutional validity of the impugned provisions may also be supported under s. 92(4) of the *Constitution Act, 1867* which in any event buttresses the argument already made under s. 92(1).

4. *The McKay Case and Other Related Matters*

The appellants sought to support their main challenge, but more particularly their alternative challenge to the impugned provisions, by relying on several judgments of this Court, among which *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *McKay v. The Queen*, [1965] S.C.R. 798, and *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218.

I propose to discuss only the *McKay* case on which appellants put special reliance.

In *McKay*, the Court held that a municipal by-law prohibiting the display of signs in a residential zone was inapplicable to federal election signs.

Moses and Sarah McKay had been convicted by a Justice of the Peace on a charge of unlawfully maintaining a sign on their premises, contrary to the by-law in question, and fined $25 each. The sign was displayed by the appellants on the railing of a veranda forming part of their residence during the period of a federal election. The sign urged the people to vote for a certain candidate. The by-law forbade all display of signs except those of a type not including the sign displayed by the appellants. The validity of the by-law or of the enabling legislation was not raised, but it was contended by the appellants that, on its true construction, the by-law was not intended to have the effect of forbidding the use of such a sign during the period of an election to Parliament.

On a stated case, the conviction was quashed by a judge of the Supreme Court of Ontario—[1963]

À mon avis, la constitutionnalité des dispositions contestées peut aussi être étayée en vertu du par. 92(4) de la *Loi constitutionnelle de 1867* qui, en tout état de cause, appuie l'argument déjà soumis en vertu du par. 92(1).

4. *L'arrêt McKay et d'autres affaires connexes*

Les appelants cherchent à étayer leur moyen principal, mais plus particulièrement leur moyen subsidiaire dirigé contre les dispositions contestées, en invoquant plusieurs arrêts de cette Cour dont *Reference re Minimum Wage Act of Saskatchewan*, [1948] R.C.S. 248, *Johannesson v. Municipality of West St. Paul*, [1952] 1 R.C.S. 292, *McKay v. The Queen*, [1965] R.C.S. 798, et *Procureur général du Québec et Keable c. Procureur général du Canada*, [1979] 1 R.C.S. 218.

Je me propose d'analyser seulement l'arrêt *McKay* sur lequel les appelants se sont appuyés plus particulièrement.

Dans l'arrêt *McKay*, la Cour a conclu qu'un règlement municipal interdisant l'installation d'enseignes dans un secteur résidentiel ne s'appliquait pas aux pancartes placées dans le cadre d'une élection fédérale.

Un juge de paix avait reconnu Moses et Sarah McKay coupables d'avoir placé illégalement une enseigne sur leur propriété, contrairement au règlement en question, et les avait condamnés à une amende de 25 $ chacun. Les appelants avaient installé la pancarte sur le garde-fou de la galerie qui faisait partie de leur résidence, au cours d'une campagne électorale fédérale. La pancarte incitait les gens à voter pour un certain candidat. Le règlement interdisait toute installation d'enseignes sauf celles d'un type déterminé dont ne faisait pas partie la pancarte posée par les appelants. Les appelants n'ont pas soulevé la question de la validité du règlement ou de la loi habilitante, mais ils ont prétendu que, correctement interprété, le règlement n'avait pas été conçu pour interdire l'utilisation d'une telle pancarte dans le cadre d'une élection au Parlement.

Suite à un exposé de cause, un juge de la Cour suprême de l'Ontario a annulé la déclaration de

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2 O.R. 162—but restored by the Court of Appeal, [1964] 1 O.R. 641.

This Court, by a majority of five to four, allowed the appeal and set aside the conviction.

Cartwright J., as he then was, delivered the reasons of the majority. He took the view that the Justice of the Peace and the Court of Appeal had given effect to the by-law as if it specifically provided that, during an election to Parliament, no owner of property in the particular zone covered by the by-law should display any sign soliciting votes for a candidate at such election. Such an enactment, he held, would be *ultra vires* of the province as being in relation to proceedings at a federal election.

Furthermore, Cartwright J. wrote at p. 804: "A political activity in the federal field which has theretofore been lawful can . . . be prohibited only by Parliament". And, at p. 805, he went on to say that if the by-law was construed as it had been by the Justice of the Peace and the Court of Appeal, "it does not merely affect, it destroys the right of the appellants to engage in a form of political activity in the federal field which has heretofore been possessed and exercised by electors without question". Cartwright J. accordingly concluded that the by-law should be "read down" so that its operation be restricted to matters within the power of the enacting body, which included neither proceedings at a federal election nor the right of federal electors to engage in a lawful form of political activity.

Martland J. delivered the reasons of the minority. He held in essence that the by-law was a law of general application in relation to property. It should apply to the facts of that case because, assuming it had some effect on proceedings at federal elections and on the means of propaganda used by an individual or by a political party during a federal election campaign, such effect was permissible as being incidental and in no way interfer-

culpabilité ([1963], 2 O.R. 162), mais la Cour d'appel l'a rétablie ([1964] 1 O.R. 641).

Cette Cour, à la majorité de cinq contre quatre, a accueilli le pourvoi et annulé la déclaration de culpabilité.

Le juge Cartwright, alors juge puîné, a rédigé les motifs des juges formant la majorité. À son avis, le juge de paix et la Cour d'appel avaient appliqué le règlement comme s'il interdisait spécifiquement, au cours d'une élection au Parlement, à tout propriétaire foncier dans le secteur visé par le règlement d'installer une enseigne invitant les gens à voter pour un candidat à cette élection. Une telle disposition, a-t-il conclu, outrepasserait la compétence de la province pour le motif qu'elle se rapporte à des activités relatives à une élection fédérale.

Le juge Cartwright ajoute à la p. 804: [TRADUCTION] «Une activité politique dans le domaine fédéral qui a jusqu'à maintenant été légale ne peut [. . .] être interdite que par le Parlement». Il poursuit, à la p. 805, en disant que si le règlement était interprété comme l'avaient fait le juge de paix et la Cour d'appel, [TRADUCTION] «il ne [ferait] pas qu'affecter, il anéanti[rait] le droit des appelants d'exercer une forme d'activité politique dans le domaine fédéral, dont les électeurs ont jusqu'à maintenant joui et bénéficié sans contredit». Le juge Cartwright a par conséquent conclu que le règlement devait recevoir [TRADUCTION] «une interprétation atténuée» de manière à ne s'appliquer qu'à des matières qui relèvent de la compétence de l'organisme qui l'a adopté, ce qui ne comprenait ni les activités relatives à une élection fédérale ni le droit des électeurs au niveau fédéral de se livrer à une forme licite d'activité politique.

Le juge Martland a rédigé les motifs des juges formant la minorité. Il a conclu essentiellement que le règlement était une disposition d'application générale relative à la propriété. Il devait s'appliquer aux faits de cette affaire car, en supposant qu'il avait quelque effet sur les activités relatives à une élection fédérale et sur les moyens de propagande utilisés par un individu ou un parti politique au cours d'une campagne électorale fédérale, cet

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ing with the working of parliamentary institutions of Canada.

The appellants submit that *McKay* is determinative of the case at bar. They contend that the two cases raise an almost identical issue, that the impugned provisions prohibit certain types of participation in federal elections and that such prohibitions are unconstitutional on the authority of *McKay*.

Both Labrosse J. and the Ontario Court of Appeal distinguished *McKay* from the case at bar and, respectfully, I think they were right in doing so.

The prohibition in *McKay* was an absolute one, and it was enforced with penal consequences. In his reasons for judgment in *McKay*, Cartwright J. repeatedly emphasized the prohibition aspect of the by-law under consideration in that case. I should add that municipal by-laws of the same nature are in force by the thousand in the cities and towns of Canada, a consideration which, although it was not referred to in *McKay*, may explain the reluctance of the majority to accept the proposition that by-laws of this type affected the proceedings at federal elections in an incidental manner only.

In the case at bar, by contrast, the political activities contemplated by the impugned provisions are not made unlawful. These provisions are in the nature of detailed regulations. Failure to comply with them is a ground for dismissal. No other sanction is prescribed. The public servant who is not prepared to accept them can resign. Nor do I think that such a public servant is thereby deprived of any "right" unless it be thought that he has a right to his office. But at common law, and apart from statute, a civil servant holds office during pleasure. As was correctly put by the respondent in his factum,

> The challenged provisions in effect confer rights and protect the service by making . . . provisions for leaves of absence and by securing a position in the service to those who cease to hold elective office within five years.

effet était acceptable parce qu'il était accessoire et qu'il ne portait atteinte en aucune façon au fonctionnement des institutions parlementaires du Canada.

Les appelants font valoir que l'arrêt *McKay* est déterminant en l'espèce. Ils prétendent que les deux affaires soulèvent une question presque identique, que les dispositions contestées interdisent certains types de participation à des élections fédérales et que ces interdictions sont inconstitutionnelles suivants l'arrêt *McKay*.

Le juge Labrosse et la Cour d'appel de l'Ontario ont tous les deux établi une distinction entre l'affaire *McKay* et la présente espèce et, avec égards, je crois qu'ils ont eu raison de le faire.

Dans l'affaire *McKay*, l'interdiction était absolue et elle était sanctionnée par une peine. Dans les motifs de jugement qu'il a rédigés dans l'affaire *McKay*, le juge Cartwright souligne à maintes reprises l'aspect prohibitif du règlement alors à l'étude. J'ajouterais que des milliers de règlements municipaux de même nature sont en vigueur dans les cités et villes du Canada, ce qui, même si on ne l'a pas mentionné dans l'arrêt *McKay*, peut expliquer l'hésitation de la majorité à accepter la proposition que les règlements de ce type ne touchaient que de façon accessoire aux activités relatives à une élection fédérale.

En l'espèce, par contre, les activités politiques envisagées par les dispositions contestées ne sont pas déclarées illégales. Ces dispositions tiennent de règlements détaillés. Y désobéir constitue un motif de renvoi. Aucune autre sanction n'est prescrite. Le fonctionnaire qui n'est pas disposé à les accepter peut démissionner. Je ne pense pas non plus que ce fonctionnaire soit ainsi privé d'un «droit» à moins qu'on ne croie qu'il a un droit à sa charge. Mais, en *common law*, et indépendamment de la loi écrite, un fonctionnaire détient sa charge à titre amovible. Comme le dit à juste titre l'intimé dans son mémoire,

> [TRADUCTION] Les dispositions contestées confèrent effectivement des droits et protègent la fonction publique en prévoyant [. . .] des congés et en assurant un poste dans la fonction publique à ceux qui cessent d'occuper un poste élu dans les cinq ans.

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Such regulations in my view are quite distinct from a blanket prohibition.

The distinction between prohibition and regulation is admittedly more frequently made in administrative law than in constitutional law. But I believe it is relevant in a case such as the case at bar where what has to be measured is the impact, direct or indirect, of provincial legislation upon a federal area of legislative competence. I am of the view that, whatever effect the impugned provisions may have upon the subject of federal elections and the right of federal electors to engage in political activities, it is an indirect or incidental effect; and the reason is that, far from being in the nature of a prohibition, they are in fact permissive at certain conditions which are imposed as incidents of the status of provincial public servants.

The *McKay* case can be further distinguished by the fact that s. 71 of the *Canada Elections Act*, S.C. 1960, c. 39, provided that "Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher . . . . " It had been submitted by Counsel for the appellants McKay that Parliament had thereby "occupied the field". Cartwright J. did not find it necessary to reach a definite conclusion on this submission but he said he inclined to agree with it and, at p. 805, he commented on s. 71 of the *Canada Elections Act* as follows:

> This indicates that Parliament contemplates that persons other than candidates may post up placards and posters having reference to an election and subjects the practice to a limited form of regulation. The impugned by-law forbids such posting up altogether on residential property, which will often be the only place on which the owner of that property has the right to post up such a placard.

In regulating the posting of placards and posters during a federal election, Parliament had implicitly recognized the right to do so, subject to the regulations. The by-law under consideration in *McKay* deprived the appellants of that right and collided with a paramount provision of the *Canada*

À mon avis, cette réglementation n'a rien d'une prohibition de portée générale.

La distinction entre interdiction et réglementation est certes plus fréquente en droit administratif qu'en droit constitutionnel. Mais je crois qu'elle est pertinente dans une affaire comme celle dont nous sommes saisis, où il faut apprécier les répercussions, directes ou indirectes, d'une loi provinciale sur un champ de compétence législative fédérale. J'estime que, quel que soit l'effet que les dispositions contestées peuvent avoir sur le sujet des élections fédérales et sur le droit des électeurs fédéraux d'exercer des activités politiques, il s'agit d'un effet indirect ou accessoire; et la raison en est que, loin de tenir d'une interdiction, elles accordent en fait une faculté à certaines conditions qui sont imposées comme accessoires au statut de fonctionnaires provinciaux.

On peut établir une autre distinction d'avec l'affaire *McKay* du fait que l'art. 71 de la *Loi électorale du Canada*, S.C. 1960, chap. 39, prévoyait que «Tout imprimé de la nature d'une annonce, d'un prospectus, d'un placard, d'une affiche ou d'une circulaire ayant trait à une élection doit porter le nom et l'adresse de l'imprimeur et de l'éditeur . . . » L'avocat des appelants McKay avait soutenu que le Parlement avait ainsi [TRADUCTION] «occupé le domaine». Le juge Cartwright n'a pas estimé nécessaire de tirer une conclusion définitive sur cet argument, mais il a affirmé qu'il était enclin à l'accepter et, à la p. 805, il a commenté ainsi l'art. 71 de la *Loi électorale du Canada*:

> [TRADUCTION] Cela indique que le Parlement envisage que des personnes autres que les candidats peuvent poser des placards et des affiches ayant trait à une élection et qu'il assujettit cette pratique à une forme limitée de réglementation. Le règlement contesté interdit tout à fait cet affichage sur une propriété résidentielle qui est souvent le seul endroit où le propriétaire a le droit d'apposer un tel placard.

En réglementant l'installation de placards et d'affiches pendant une élection fédérale, le Parlement avait implicitement reconnu le droit de le faire, sous réserve des règlements. Le règlement à l'étude dans l'affaire *McKay* privait les appelants de ce droit et se heurtait à une disposition de la *Loi*

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Elections Act. In the case at bar, it has not been argued that the impugned provisions were in conflict with any federal enactment.

It seems to me also that the provisions which are impugned in the case at bar present distinguishing features which are almost unique in that they form part of an integrated scheme of both orders of government in Canada. Under s. 32 of *Public Service Employment Act*, R.S.C. 1970, c. P-32, federal civil servants are also prevented, except under certain conditions, from engaging into political activities in the provincial as well as in the federal field. And, according to the Ontario Court of Appeal, six other provinces and the two territories have enacted similar legislation. This integrated scheme, considered as a whole, is meant to protect the principle of responsible government which is common to both orders of government. To accept the appellants' submission would mean that the federal legislation is unconstitutional in so far as it is directed at political activities in the provincial field. But so to hold would be to create a constitutional gap which neither level of government would be able to fill since obviously, it is not open to Parliament to determine the terms and conditions under which provincial civil servants hold office in Ontario any more than it is open to Ontario to do the same with respect to federal civil servants. But to leave a constitutional gap impossible to fill even by the joint legislative action of both orders of government violates the principle according to which, under the *Constitution Act, 1867*, the distribution of legislative competences is an exhaustive one.

The fallacy of the appellants' position, this being said with respect, is reflected in the following submission written in their factum:

> It is submitted that control over political activity by civil servants in federal elections is not integral to the provincial objective of maintaining impartiality in the development and application of public policy in Ontario because:
>
> (1) federal and provincial governments have different areas of jurisdiction, and federal and provincial elections raise different political issues.

électorale du Canada qui l'emportait sur lui. On n'a pas fait valoir en l'espèce que les dispositions contestées entraient en conflit avec une disposition fédérale.

Il me semble aussi que les dispositions contestées en l'espèce comportent des traits distinctifs presque uniques en ce sens qu'elles font partie d'un régime intégré de deux ordres de gouvernement au Canada. L'article 32 de la *Loi sur l'emploi dans la Fonction publique*, S.R.C. 1970, chap. P-32, interdit également aux fonctionnaires, sauf dans certaines circonstances, de participer à des activités politiques aussi bien au niveau provincial que fédéral. Selon la Cour d'appel de l'Ontario, six autres provinces et les deux territoires ont adopté des dispositions semblables. Considéré dans son ensemble, ce régime intégré vise à protéger le principe du gouvernement responsable, commun aux deux ordres de gouvernement. Accepter l'argument des appelants signifierait que la mesure législative fédérale est inconstitutionnelle dans la mesure où elle touche aux activités politiques dans le domaine provincial. Mais cette conclusion aurait pour effet de créer une lacune constitutionnelle qu'aucun des deux paliers de gouvernement ne serait capable de combler puisque, évidemment, il n'est pas loisible au Parlement de déterminer les conditions auxquelles les fonctionnaires provinciaux détiennent une charge en Ontario, pas plus que l'Ontario ne peut le faire à l'égard des fonctionnaires fédéraux. Cependant, laisser une lacune constitutionnelle impossible à combler même par l'action législative conjointe des deux ordres de gouvernement viole le principe selon lequel, en vertu de la *Loi constitutionnelle de 1867*, le partage des compétences législatives est exhaustif.

Avec égards, l'erreur dans la position des appelants se reflète dans l'argument suivant qu'ils ont soumis dans leur mémoire:

> [TRADUCTION] Nous soumettons que le contrôle de l'activité politique des fonctionnaires lors d'élections fédérales ne fait pas partie intégrante de l'objectif provincial de maintenir l'impartialité dans l'élaboration et l'application d'une politique générale en Ontario parce que:
>
> (1) les gouvernements fédéral et provincial ont des champs de compétence différents, et les élections fédérales et provinciales soulèvent des questions politiques différentes.

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I have a few comments to make on this submission. First, it does not make allowance for nor respond to the paragraph of the agreed statement of facts according to which the organization and philosophy of the various political parties both federally and provincially are agreed to be the same.

Furthermore, and quite apart from that paragraph of the agreed statement of facts, it seems to me that the submission expresses a point of view totally divorced from the facts of political life in a federation such as Canada, and from certain features of the Canadian Constitution itself.

Under the *Constitution Act, 1867*, some legislative powers are shared by Parliament and the legislatures, as in the case of old age pensions, agriculture and immigration.

Other areas of constitutional competence are closely complementary. Thus the criminal law power is federal and the power over the administration of justice is provincial.

But even the fact that, in many areas, legislative competence is distributed in exclusive terms, does not change the nature of politics and political activity which is essentially to choose between various priorities. Should more of the public funds be spent on the armed forces, an exclusively federal field, or on education, an exclusively provincial one? Such a dilemma could arise in a federal as well as in a provincial election for there is no specific forum for it. The plain fact is that even in a federation with divided jurisdictions, the object of the political discourse, the ultimate form of political activity, remains indivisible.

It follows therefore that if Ontario wanted to ensure the impartiality of its public servants, it had no choice but to include political activities in the federal field in the impugned provisions. The alternative would have made it miss its target altogether. The effect of these provisions on federal politi-

J'ai quelques observations à faire au sujet de cet argument. Premièrement, il ne tient pas compte de l'alinéa de l'exposé conjoint des faits selon lequel l'organisation et la philosophie des différents partis politiques tant fédéraux que provinciaux sont reconnues comme étant les mêmes, et il n'y apporte aucune réponse.

En outre, et indépendamment de cet alinéa de l'exposé conjoint des faits, ce moyen me semble exprimer un point de vue qui ne tient aucun compte des réalités de la vie politique dans une fédération comme le Canada et de certaines caractéristiques de la Constitution canadienne elle-même.

En vertu de la *Loi constitutionnelle de 1867*, le Parlement et les assemblées législatives se partagent certains pouvoirs législatifs comme, par exemple, en matière de pensions de vieillesse, d'agriculture et d'immigration.

D'autres domaines de compétence constitutionnelle sont étroitement complémentaires. Ainsi la compétence en matière de droit criminel est fédérale et la compétence en matière d'administration de la justice est provinciale.

Mais même le fait que, dans de nombreux domaines, la compétence législative soit partagée de manière exclusive ne change pas la nature de la politique et de l'activité politique qui consiste essentiellement à choisir entre diverses priorités. Devrait-on consacrer davantage de fonds publics aux forces armées, un domaine de compétence exclusivement fédérale, ou à l'éducation, un domaine de compétence exclusivement provinciale? Un tel dilemme pourrait surgir aussi bien dans une élection fédérale que dans une élection provinciale car il n'y a pas de tribune spéciale pour traiter cette question. Le fait est que même dans une fédération qui présente des compétences partagées, l'objet du débat politique, la forme ultime d'activité politique, demeure indivisible.

Il en résulte donc que, si l'Ontario voulait assurer l'impartialité de ses fonctionnaires, il devait nécessairement inclure dans les dispositions contestées les activités politiques liées au domaine fédéral, sinon il aurait complètement raté son objectif. L'effet de ces dispositions sur les activités politi-

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cal activities is not only incidental, it is necessarily incidental.

V

The Fundamental Rights and Freedoms Argument

In their factum, the appellants made the following argument:

> . . . Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of this country to participate in federal political activities. No province has the power to reduce or to derogate from these rights and freedoms.

They sought to support this submission by referring *inter alia* to *Reference re Alberta Statutes*, [1938] S.C.R. 100, and *Switzman v. Elbling*, [1957] S.C.R. 285.

Their counsel then launched into an oral argument based upon certain statements made in the unanimous judgment of this Court in *Fraser* and more particularly upon the following passage at pp. 462-63:

> . . . "freedom of speech" is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*.

Counsel also referred to pp. 466-68 of *Fraser* relating to the balance that has to be struck between a federal employee's freedom of expression and the government's desire to maintain an impartial public service and stating the principles which ought to guide the balancing of conflicting values, starting with the proposition that some speech by public servants concerning public issues must be permitted. In the same pages, the factors to be taken into consideration are underlined, including the growth of the public sector, the inadmissibility of a blanket prohibition which would deny fundamental democratic rights to far too many people, the relative position of individual public servant within the service and the like.

ques fédérales n'est pas qu'accessoire, il est nécessairement accessoire.

V

L'argument relatif aux droits et libertés fondamentaux

Les appelants soumettent l'argument suivant dans leur mémoire:

> [TRADUCTION] La jurisprudence constitutionnelle canadienne reconnaît l'existence de certains droits et de certaines libertés politiques fondamentaux pour les citoyens de ce pays de participer aux activités politiques fédérales. Aucune province n'a le pouvoir de réduire ces droits et libertés ou d'y déroger.

Ils ont cité notamment, à l'appui de cet argument, les arrêts *Reference re Alberta Statutes*, [1938] R.C.S. 100, et *Switzman v. Elbling*, [1957] R.C.S. 285.

Leur avocat a ensuite entamé une plaidoirie fondée sur certaines affirmations contenues dans l'arrêt unanime rendu par cette Cour dans l'affaire *Fraser*, et plus particulièrement sur le passage suivant, aux pp. 462 et 463:

> . . . la «liberté de parole» est une valeur profondément enracinée dans notre système de gouvernement démocratique. Il s'agit d'un principe de notre constitution de *common law*, que nous avons hérité du Royaume-Uni en vertu du préambule de la *Loi constitutionnelle de 1867*.

L'avocat a également renvoyé aux pp. 466 à 468 de l'arrêt *Fraser* où l'on traite de l'équilibre qu'il faut établir entre la liberté d'expression d'un employé fédéral et la volonté du gouvernement de maintenir une fonction publique impartiale, et où l'on formule les principes qui devraient servir de guide pour équilibrer des valeurs contradictoires, à commencer par la proposition selon laquelle il est permis aux fonctionnaires de s'exprimer dans une certaine mesure sur des questions d'intérêt public. On souligne dans les mêmes pages les facteurs qui doivent être pris en considération, notamment la croissance du secteur public, l'inadmissibilité d'une interdiction générale qui refuserait à beaucoup trop de personnes l'exercice de droits démocratiques fondamentaux, la position relative du fonctionnaire en tant qu'individu à l'intérieur de la fonction publique, et ainsi de suite.

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Counsel argued that the same kind of free speech is in issue in the *Fraser* case and in the case at bar and he submitted that the impugned provisions do not comply with the principles and guidelines stated in *Fraser*. Counsel argued more particularly that the impugned provisions are overbroad in that they apply to all civil servants, and, in some cases, to all Crown employees without any distinction between the types of jobs they perform. Furthermore, the impugned provisions cover too wide a range of political activities.

It can be seen that this line of argument is tantamount to one based on the *Canadian Charter of Rights and Freedoms*. It constitutes a valiant attempt to go to the validity of the impugned provisions without the help of the *Charter*. I have never heard the overbreadth argument being made in a distribution of powers case except perhaps where colourability was alleged. As for the test relating to the balancing of conflicting values, it is of course highly relevant under s. 1 of the *Charter*, or in a common law or administrative law context such as the *Fraser* case. But in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.

Perhaps the *Fraser* case might have given some ammunition to the appellants if they had been allowed to rely on the *Charter*. I refrain from expressing any view on this point. But one thing is certain: the *Fraser* case had nothing to do with the validity of legislation in a distribution of powers sense, and, in my view, it does not help the appellants.

Perhaps the appellants' strongest argument was the one based on the existence in Canada of certain fundamental rights to participate in certain political activities. For this argument, they relied

L'avocat soutient que c'est le même genre de liberté d'expression qui est en cause dans l'affaire *Fraser* et en l'espèce et il prétend que les dispositions contestées ne sont pas conformes aux principes et aux directives énoncés dans l'arrêt *Fraser*. Il fait valoir plus particulièrement que les dispositions contestées ont une portée trop large du fait qu'elles s'appliquent à tous les fonctionnaires et, dans certains cas, à tous les employés de Sa Majesté sans aucune distinction entre les genres de fonctions qu'ils remplissent. En outre, les dispositions contestées visent un trop large éventail d'activités politiques.

On peut constater que ce genre d'argument équivaut à un argument fondé sur la *Charte canadienne des droits et libertés*. Il constitue une valeureuse tentative de s'attaquer à la validité des dispositions contestées sans l'aide de la *Charte*. Je n'ai jamais entendu parler de l'argument relatif à la portée trop large dans le contexte d'une affaire de partage des pouvoirs sauf peut-être dans des cas où on alléguait qu'il y avait législation déguisée. Quant au critère relatif à l'établissement de l'équilibre entre des valeurs contradictoires, il est évidemment tout à fait pertinent en vertu de l'article premier de la *Charte*, ou dans un contexte de *common law* ou de droit administratif comme dans l'affaire *Fraser*. Mais dans une affaire de partage des pouvoirs, lorsqu'on a démontré que le législateur a agi dans les limites de sa compétence, l'établissement de l'équilibre entre des valeurs contradictoires repose sur le jugement politique de ce législateur et ne peut pas être révisé par les tribunaux sans qu'ils examinent la sagesse de la mesure législative.

L'arrêt *Fraser* aurait peut-être pu apporter de l'eau au moulin des appelants s'ils avaient été autorisés à invoquer la *Charte*. Je m'abstiens d'exprimer quelque opinion sur ce point. Cependant, une chose est certaine: l'affaire *Fraser* n'avait rien à voir avec la validité d'une mesure législative sur le plan du partage des pouvoirs et, à mon avis, elle n'est d'aucun secours aux appelants.

Le meilleur argument des appelants est peut-être celui fondé sur l'existence, au Canada, de droits fondamentaux de participer à certaines activités politiques. À l'appui de cet argument, ils ont

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on such cases as *Reference re Alberta Statutes* and *Switzman v. Elbling*, *supra*.

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, at p. 133, "such institutions derive their efficacy from the free public discussion of affairs . . . ." and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. On the whole, though, I am inclined to the view that the impugned legislation is in essence concerned with the constitution of the province and with regulating the provincial public service and affects federal and provincial elections only in an incidental way.

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them. The present legislation does not go so far as to infringe upon the essential structure of free Parliamentary institutions.

VI

Conclusion

I would answer the first constitutional question in the negative. I would not answer the second and third constitutional questions.

invoqué des arrêts comme *Reference re Alberta Statutes* et *Switzman v. Elbling*, précités.

Dans mon esprit, il ne fait aucun doute que la structure fondamentale de notre Constitution établie par la *Loi constitutionnelle de 1867* envisage l'existence de certaines institutions politiques dont des corps législatifs librement élus aux niveaux fédéral et provincial. Pour reprendre les termes du juge en chef Duff dans *Reference re Alberta Statutes*, à la p. 133, [TRADUCTION] «l'efficacité de ces institutions découle de la libre discussion publique des affaires . . . » et, selon le juge Abbott dans *Switzman v. Elbling*, à la p. 328, ni une législature provinciale ni le Parlement lui-même ne peuvent [TRADUCTION] «abroger ce droit de discussion et de débat». De manière plus générale, je conclus que ni le Parlement ni les législatures provinciales ne peuvent légiférer de façon à porter atteinte sensiblement au fonctionnement de cette structure constitutionnelle fondamentale. Dans l'ensemble, cependant, je suis porté à croire que la mesure législative attaquée se rapporte essentiellement à la constitution de la province et à la réglementation de la fonction publique provinciale, et qu'elle ne touche aux élections fédérales et provinciales que d'une manière accessoire.

Je devrais peut-être ajouter qu'à l'avenir on sera normalement appelé à examiner des questions comme la dernière, en fonction des droits politiques garantis par la *Charte canadienne des droits et libertés* qui, il va sans dire, accorde à ces droits et libertés une protection plus large que celle commandée par les exigences structurelles de la Constitution. Toutefois, il reste qu'il est vrai que, indépendamment des considérations fondées sur la *Charte*, les corps législatifs dans notre pays doivent se conformer à ces impératifs structurels fondamentaux et qu'ils ne doivent en aucun cas y passer outre. La présente mesure législative ne vas pas jusqu'à porter atteinte à la structure fondamentale des institutions parlementaires libres.

VI

Conclusion

Je suis d'avis de répondre à la question constitutionnelle par la négative et de ne pas répondre aux deuxième et troisième questions constitutionnelles.

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I would dismiss the appeal and would not award costs.

The following are the reasons delivered by

LAMER J.—For the reasons given by Dickson C.J. and Beetz J., I agree that *The Public Service Act*, R.S.O. 1970, c. 386, as amended, viewed in its entirety, is authorized by s. 92(4) of the *Constitution Act, 1867*. I therefore need not consider s. 92(13) or (1) of the *Constitution Act, 1867*.

I agree with Dickson C.J. that *McKay v. The Queen*, [1965] S.C.R. 798, was wrongly decided.

As regards the other points in issue and the disposition of this case, I agree with Dickson C.J. and Beetz J.

Appeal dismissed; the first constitutional question is answered in the negative.

Solicitors for the appellants: Gowling & Henderson, Toronto.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: James B. Taylor, Regina.

Solicitor for the intervener the Attorney General for Alberta: Attorney General for Alberta, Edmonton.

Je suis d'avis de rejeter le pourvoi et de ne pas accorder de dépens.

Version française des motifs rendus par

LE JUGE LAMER—Pour les motifs donnés par le juge en chef Dickson et le juge Beetz, je suis d'accord pour dire que *The Public Service Act*, R.S.O. 1970, chap. 386 et modifications, est dans l'ensemble autorisé par le par. 92(4) de la *Loi constitutionnelle de 1867*. Il ne m'est donc pas nécessaire d'examiner les par. 92(13) ou (1) de la *Loi constitutionnelle de 1867*.

Je partage l'avis du juge en chef Dickson selon lequel l'arrêt *McKay v. The Queen*, [1965] R.C.S. 798, est erroné.

Quant aux autres questions en litige et à l'issue du présent pourvoi, je suis d'accord avec le juge en chef Dickson et le juge Beetz.

Pourvoi rejeté; la première question constitutionnelle reçoit une réponse négative.

Procureurs des appelants: Gowling & Henderson, Toronto.

Procureur de l'intimé: Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général du Québec: Procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan: James B. Taylor, Regina.

Procureur de l'intervenant le procureur général de l'Alberta: Procureur général de l'Alberta, Edmonton.

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IN THE MATTER OF Section 55 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, as amended;

AND IN THE MATTER OF a Reference by the Governor in Council concerning certain language rights under Section 23 of the *Manitoba Act, 1870*, and Section 133 of the *Constitution Act, 1867* and set out in Order-in-Council P.C. 1984-1136 dated the 5th day of April 1984

File No.: 18606.

1984: June 11, 12, 13; 1985: June 13.

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

REFERENCE BY THE GOVERNOR IN COUNCIL

Constitutional law — Language guarantees — Manitoba statutes to be enacted, printed and published in both English and French — Whether or not s. 23 of Manitoba Act, 1870 mandatory or directory — Whether or not statutes, current, repealed or spent, valid if constitutional linguistic requirements not met — Extent of force or effect, if any, if statutes invalid — Whether or not Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes valid and of force or effect — Manitoba Act, 1870, R.S.C. 1970, App. II, s. 23 — Constitution Act, 1867, s. 133 — Constitution Act, 1982, s. 52 — An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890 (Man.), c. 14 — Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3.

The Governor General in Council by Order in Council P.C. 1984-1136 dated April 5, 1984, in accordance with s. 55 of the *Supreme Court Act*, referred to this Court four questions. The questions and this Court's answers are:

Question 1—Are the requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* respecting the use of both the English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and

DANS L'AFFAIRE de l'article 55 de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19 et ses modifications;

ET DANS L'AFFAIRE d'un renvoi adressé par le gouverneur en conseil au sujet de certains droits linguistiques garantis par l'article 23 de la *Loi de 1870 sur le Manitoba* et par l'article 133 de la *Loi constitutionnelle de 1867*, tel qu'énoncé dans le décret C.P. 1984-1136 en date du 5 avril 1984

N° du greffe: 18606.

1984: 11, 12, 13 juin; 1985: 13 juin.

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

RENVOI ADRESSÉ PAR LE GOUVERNEUR EN CONSEIL

Droit constitutionnel — Garanties linguistiques — Obligation d'adopter, d'imprimer et de publier en français et en anglais les lois du Manitoba — L'article 23 de la Loi de 1870 sur le Manitoba est-il impératif ou directif? — Les lois actuelles, abrogées ou périmées sont-elles valides si les exigences en matière linguistique n'ont pas été respectées? — Si les lois sont invalides, dans quelle mesure sont-elles opérantes? — La Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs est-elle valide et opérante? — Loi de 1870 sur le Manitoba, S.R.C. 1970, app. II, art. 23 — Loi constitutionnelle de 1867, art. 133 — Loi constitutionnelle de 1982, art. 52 — An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890 (Man.), chap. 14 — Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs, 1980 (Man.), chap. 3.

Le gouverneur général en conseil a, par le décret C.P. 1984-1136 en date du 5 avril 1984, conformément à l'art. 55 de la *Loi sur la Cour suprême*, soumis à cette Cour les questions constitutionnelles suivantes. La Cour répond ainsi à ces questions:

Question n° 1—Les obligations imposées par l'art. 133 de la *Loi constitutionnelle de 1867* et par l'art. 23 de la *Loi de 1870 sur le Manitoba*, relativement à l'usage du français et de l'anglais dans:

a) les archives, procès-verbaux et journaux des chambres du Parlement du Canada et des législatures du Québec et du Manitoba, et

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(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba

mandatory?

Answer— Yes.

Question 2—Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of s. 23 of the *Manitoba Act, 1870*?

Answer— Yes, but, for the reasons given by the Court, the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 3—If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?

Answer— The Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because they are invalid, but, for the reasons given by the Court, the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 4—Are any of the provisions of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, enacted by S.M. 1980, Ch. 3, inconsistent with the provisions of s. 23 of the *Manitoba Act, 1870*, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?

Answer— If *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, enacted by S.M. 1980, Ch. 3, was not enacted, printed and published in

b) les actes du Parlement du Canada et des législatures du Québec et du Manitoba

sont-elles impératives?

Réponse— Oui.

Question nº 2—Est-ce que les dispositions de l'art. 23 de la *Loi de 1870 sur le Manitoba* rendent invalides les lois et les règlements de la province du Manitoba qui n'ont pas été imprimés et publiés en langue anglaise et en langue française?

Réponse— Oui, mais pour les motifs exposés par la Cour, les lois actuelles de la Législature qui sont invalides seront réputées temporairement valides pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 3—Dans l'hypothèse où il a été répondu par l'affirmative à la question nº 2, les textes législatifs qui n'ont pas été imprimés et publiés en langue anglaise et en langue française sont-ils opérants et, dans l'affirmative, dans quelle mesure et à quelles conditions?

Réponse— Les lois de la Législature qui n'ont pas été adoptées, imprimées et publiées en français et en anglais sont inopérantes pour cause d'invalidité mais, pour les motifs exposés par la Cour, les lois actuelles de la Législature seront réputées temporairement opérantes pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 4—Est-ce que l'une ou l'autre des dispositions de la *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, constituant le chapitre 3 des Statuts du Manitoba de 1980, sont incompatibles avec les dispositions de l'art. 23 de la *Loi de 1870 sur le Manitoba* et, dans l'affirmative, est-ce que les dispositions considérées sont, dans la mesure de l'incompatibilité, invalides et inopérantes?

Réponse— Si la *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, promulguée à S.M. 1980, chap. 3, n'a pas été adoptée, imprimée

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both official languages, then it is invalid and of no force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

I

Question 1:

The requirement that both English and French be used in the Records, Journals and Acts of Canada, Quebec and Manitoba, in s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*, is mandatory. The history and language of these sections indicate that the guarantee they entrench must be obeyed.

II

Questions 2 and 3:

The words "Acts of the Legislature" in s. 23 of the *Manitoba Act, 1870* encompass all statutes, regulations, and delegated legislation of the Manitoba Legislature, enacted since 1890, which are covered by this Court's judgments in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, and *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312.

All of the unilingual Acts of the Legislature of Manitoba are, and always have been, invalid and of no force or effect. Section 23 of the *Manitoba Act, 1870* entrenches a mandatory requirement to enact, print and publish all Acts of the Legislature in both official languages and, thus, establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either French or English.

Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.

et publiée dans les deux langues officielles, alors elle est totalement invalide et inopérante.

Si la Loi a été adoptée, imprimée et publiée dans les deux langues officielles, alors les art. 1 à 5 sont invalides et inopérants.

I

Question nº 1:

L'exigence que les deux langues française et anglaise soient utilisées dans les archives, les procès-verbaux, les journaux et les lois du Parlement du Canada et des législatures du Québec et du Manitoba, imposée par l'art. 133 de la *Loi constitutionnelle de 1867* et par l'art. 23 de la *Loi de 1870 sur le Manitoba*, est impérative. Il ressort de l'historique et des termes de ces articles que la garantie qui y est enchâssée doit être observée.

II

Questions nos 2 et 3:

L'expression «actes de la législature», que l'on trouve à l'art. 23 de la *Loi de 1870 sur le Manitoba*, vise toutes les lois, tous les règlements et toute la législation déléguée adoptés par la législature du Manitoba depuis 1890, auxquels s'appliquent les arrêts dans cette Cour *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, et *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312.

Toutes les lois unilingues de la législature du Manitoba sont et ont toujours été invalides et inopérantes. L'article 23 de la *Loi de 1870 sur le Manitoba* enchâsse une exigence impérative d'adopter, d'imprimer et de publier dans les deux langues officielles toutes les lois de la Législature et impose ainsi à la législature du Manitoba une obligation constitutionnelle quant aux modalités et à la forme de l'adoption de ses lois. Cette obligation a pour effet de protéger les droits fondamentaux de tous les Manitobains à l'égalité de l'accès à la loi dans l'une ou l'autre des langues française ou anglaise.

L'article 52 de la *Loi constitutionnelle de 1982* ne modifie pas les principes qui, au cours des années, ont constitué le fondement du contrôle judiciaire. Dans un cas où on n'a pas respecté les modalités et la forme requises en matière constitutionnelle, l'invalidité continue d'être la conséquence de ce non-respect. Le mot «inopérantes» signifie qu'une règle de droit ainsi incompatible avec la Constitution est inopérante pour cause d'invalidité.

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The unilingual enactments of the Manitoba Legislature are inconsistent with s. 23 of the *Manitoba Act, 1870* and are invalid and of no force or effect because the constitutionally required manner and form for their enactment has not been followed.

The Court must declare the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect. This declaration, however, without more, would create a legal vacuum with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. The conclusion that all unilingual Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 is destroyed and the rights, obligations and any other effects arising under these laws are invalid and unenforceable. From the date of this judgment, the Province of Manitoba has an invalid and therefore ineffectual legal system until the Legislature is able to translate, re-enact, print and publish its current laws in both official languages.

The constitutional principle of the rule of law would be violated by these consequences. The principle of rule of law, recognized in the *Constitution Acts* of 1867 and 1982, has always been a fundamental principle of the Canadian constitutional order. The rule of law requires the creation and maintenance of an actual order of positive laws to govern society. Law and order are indispensable elements of civilized life. This Court must recognize both the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the supreme law of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.

There will be a period of time during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*. It is therefore necessary, in order to preserve the rule of law, to deem temporarily valid and effective the Acts of the Manitoba Legislature, which would be currently in force were it not for their constitutional defect. The period of temporary validity will run from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing.

With respect to rights, obligations and any other effects which have purportedly arisen under repealed,

Les textes législatifs adoptés dans une seule langue par la législature du Manitoba sont incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* et ils sont invalides et inopérants pour le motif que les exigences constitutionnelles quant aux modalités et à la forme de leur adoption n'ont pas été respectées.

La Cour se doit de déclarer invalides et inopérantes les lois unilingues de la législature du Manitoba. Cette déclaration, sans plus, créerait un vide juridique suivi du chaos en la matière dans la province du Manitoba. Depuis 1890, la législature du Manitoba a adopté presque toutes ses lois en anglais seulement. La conclusion que toutes les lois unilingues de la législature du Manitoba sont invalides et inopérantes signifie que l'ordre de droit positif qui est censé avoir réglementé les affaires des citoyens du Manitoba depuis 1890 se trouvera détruit et que les droits, obligations et autres effets découlant de ces règles de droit sont invalides et non exécutoires. À compter de la date du présent jugement, le système juridique de la province du Manitoba sera invalide et donc inefficace jusqu'à ce que la Législature soit en mesure de traduire, d'adopter de nouveau, d'imprimer et de publier ses lois actuelles dans les deux langues officielles.

Ces conséquences iraient à l'encontre du principe constitutionnel de la primauté du droit. La primauté du droit, reconnue dans les *Lois constitutionnelles* de 1867 et de 1982, a toujours été un principe fondamental de la structure constitutionnelle canadienne. La primauté du droit exige la création et le maintien d'un ordre réel de droit positif régissant la société. L'ordre public est un élément essentiel de la vie civilisée. Cette Cour se doit de reconnaître à la fois l'inconstitutionnalité des lois unilingues du Manitoba et le devoir de la Législature de se conformer à la loi suprême de notre pays, tout en évitant de créer un vide juridique au Manitoba et en assurant le maintien de la primauté du droit.

Il y aura une période pendant laquelle il ne sera pas possible à la législature du Manitoba de se conformer à l'obligation constitutionnelle qui lui incombe en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba*. Il est donc nécessaire, afin de préserver la primauté du droit, de considérer comme temporairement valides et opérantes les lois de la législature du Manitoba qui, n'était-ce du vice dont elles sont entachées sur le plan constitutionnel, seraient actuellement en vigueur. La période de validité temporaire commencera à courir à compter de la date du présent jugement et prendra fin à l'expiration du délai minimum requis pour traduire, adopter de nouveau, imprimer et publier ces lois.

Quant aux droits, obligations et autres effets qui sont censés avoir découlé des lois unilingues abrogées, péri-

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spent or current unilingual Acts of the Manitoba Legislature, some will be enforceable and forever beyond challenge by the operation of legal doctrines such as the *de facto* doctrine, *res judicata* and mistake of law. Those rights, obligations and other effects not saved by the operation of these doctrines are deemed temporarily to have been, and to continue to be, valid, enforceable and beyond challenge until the expiry of the minimum period necessary for translation, re-enactment, printing and publishing of the Acts of the Legislature of Manitoba under which they arose. At the termination of the minimum period, these rights, obligations and other effects will cease to have temporary validity and enforceability, unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. As a consequence, to ensure the continuing validity and enforceability of rights, obligations and other effects not saved by the *de facto* or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be re-enacted, printed and published, and then again repealed, in both official languages.

Temporary validity, however, will not apply to unilingual Acts of the Legislature passed after the date of this judgment. From the date of judgment, laws not enacted, printed and published in both languages will be invalid and of no force or effect *ab initio*.

The Court, as presently equipped, is unable to determine the period during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty. Following a request for determination from the Attorney General of Canada or the Attorney General of Manitoba, made within one hundred and twenty days of the date of judgment, the Court will set a special hearing, accept submissions from the Attorney General of Canada, the Attorney General of Manitoba as well as the other interveners, and make a determination of the minimum period necessary for translation, re-enactment, printing and publishing of the Acts of the Manitoba Legislature.

III

Question 4:

An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3, is invalid and of no force and effect in its entirety if it was not enacted, printed and published in both official

mées ou actuelles de la législature du Manitoba, certains seront exécutoires et à tout jamais incontestables par application de principes juridiques comme ceux de la validité *de facto*, de la chose jugée et de l'erreur de droit. Les droits, obligations et autres effets non sauvés par l'application de ces principes sont temporairement réputés avoir été valides, exécutoires et incontestables et continuer de l'être jusqu'à l'expiration du délai minimum requis pour traduire, adopter de nouveau, imprimer et publier les lois de la législature du Manitoba dont ils découlent. À l'expiration du délai minimum, ces droits, obligations et autres effets cesseront d'être temporairement valides et exécutoires à moins que les lois dont ils découlent n'aient été traduites, adoptées de nouveau, imprimées et publiées dans les deux langues. En conséquence, afin d'assurer que les droits, obligations et autres effets, qui ne sont pas sauvés par l'application du principe de la validité *de facto* ou d'autres principes, demeurent valides et exécutoires, il se peut qu'il faille adopter de nouveau, imprimer et publier, pour ensuite abroger, dans les deux langues officielles, les lois abrogées ou périmées de la Législature dont ces droits, obligations et autres effets sont censés avoir découlé.

Toutefois, la validité temporaire ne s'appliquera pas aux lois adoptées dans une seule langue par la Législature après la date du présent jugement. À compter de la date du présent jugement, les règles de droit qui ne seront pas adoptées, imprimées et publiées dans les deux langues seront invalides et inopérantes dès le départ.

Compte tenu de la documentation dont elle dispose actuellement, la Cour est incapable de déterminer le délai pendant lequel il serait impossible à la législature du Manitoba de se conformer à son obligation constitutionnelle. Lorsque le procureur général du Canada ou le procureur général du Manitoba lui aura demandé de statuer sur ce point, demande qui devra être faite dans les cent vingt jours de la date du présent jugement, la Cour fixera une audition spéciale, invitera le procureur général du Canada, le procureur général du Manitoba et les autres intervenants à soumettre des mémoires et fixera le délai minimum requis pour traduire, adopter de nouveau, imprimer et publier les lois de la législature du Manitoba.

III

Question nº 4:

La *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1980 (Man.), chap. 3, est totalement invalide et inopérante si elle n'a pas été adoptée, imprimée et publiée dans les deux langues

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languages. In any event, ss. 1 to 5 are invalid and of no force or effect because they violate the rights guaranteed in s. 23 of the *Manitoba Act, 1870*.

Cases Cited

Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, affirming [1978] C.A. 351, 95 D.L.R. (3d) 42, affirming [1978] C.S. 37, 85 D.L.R. (3d) 252; *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, followed; *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195; *Special Reference No. 1 of 1955*, P.L.R. 1956 W.P. 598, considered; *Pellant v. Hebert*, St. Boniface Co. Ct., March 9, 1892, reported at (1981), 12 *R.G.D.* 242; *Bertrand v. Dussault*, St. Boniface Co. Ct., January 30, 1909, reported at 77 D.L.R. (3d) 458; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *R. v. Forest* (1976), 74 D.L.R. (3d) 704; *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393; *Société Asbestos Ltée v. Société nationale de l'amiante*, [1979] C.A. 342; *Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170; *Howard v. Bodington* (1877), 2 P. 203; *R. ex rel. Anderson v. Buchanan* (1909), 44 N.S.R. 112; *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Procureur général du Québec v. Collier*, [1983] C.S. 366; *Procureur général du Québec v. Brunet*, J.E. 83-510, rev'd on other grounds, J.E. 84-62 (S.C.); *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] S.C.R. 71; *Abbé de Fontaine's Case* (1431), Y.B. 9 H. VI, fol. 32; *Scadding v. Lorant* (1851), 3 H.L.C. 418, 10 E.R. 164; *R. v. Slythe* (1827), 6 B. & C. 240, 108 E.R. 441; *Margate Pier Co. v. Hannam* (1819), 3 B. & Ald. 266, 106 E.R. 661; *O'Neil v. Attorney-General of Canada* (1896), 26 S.C.R. 122; *Turtle v. Township of Euphemia* (1900), 31 O.R. 404; *R. v. Gibson* (1896), 29 N.S.R. 4; *R. v. Corporation of Bedford Level* (1805), 6 East 356, 102 E.R. 1323; *Parker v. Kett* (1702), 1 Ld. Raym. 658, 91 E.R. 1338; *Eadie v. Township of Brantford*, [1967] S.C.R. 573; *Texas v. White*, 74 U.S. 700 (1868); *Horn v. Lockhart*, 84 U.S. 570 (1873); *United States v. Insurance Companies*, 89 U.S. 99 (1874); *Baldy v. Hunter*, 171 U.S. 388 (1898); *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645; *Federation of Pakistan v. Tamizuddin Khan*, P.L.R. 1956 W.P. 306; *In re*

officielles. De toute façon, les art. 1 à 5 sont invalides et inopérants pour le motif qu'ils portent atteinte aux droits garantis par l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Jurisprudence

Arrêts suivis: *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, confirmant [1978] C.A. 351, 95 D.L.R. (3d) 42, confirmant [1978] C.S. 37, 85 D.L.R. (3d) 252; *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312; arrêts examinés: *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195; *Special Reference No. 1 of 1955*, P.L.R. 1956 W.P. 598; arrêts mentionnés: *Pellant v. Hebert*, Cour de comté de St-Boniface, le 9 mars 1892, reproduit dans (1981), 12 *R.G.D.* 242; *Bertrand v. Dussault*, Cour de comté de St-Boniface, le 30 janvier 1909, reproduit dans 77 D.L.R. (3d) 458; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *R. v. Forest* (1976), 74 D.L.R. (3d) 704; *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032; *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393; *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342; *Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312; *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182; *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170; *Howard v. Bodington* (1877), 2 P. 203; *R. ex rel. Anderson v. Buchanan* (1909), 44 N.S.R. 112; *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172; *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576; *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Procureur général du Québec c. Collier*, [1983] C.S. 366; *Procureur général du Québec c. Brunet*, J.E. 83-510, infirmé pour d'autres motifs, J.E. 84-62 (C.S.); *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536; *Roncarelli v. Duplessis*, [1959] R.C.S. 121; *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] R.C.S. 71; *Abbé de Fontaine's Case* (1431), Y.B. 9 H. VI, fol. 32; *Scadding v. Lorant* (1851), 3 H.L.C. 418, 10 E.R. 164; *R. v. Slythe* (1827), 6 B. & C. 240, 108 E.R. 441; *Margate Pier Co. v. Hannam* (1819), 3 B. & Ald. 266, 106 E.R. 661; *O'Neil v. Attorney-General of Canada* (1896), 26 R.C.S. 122; *Turtle v. Township of Euphemia* (1900), 31 O.R. 404; *R. v. Gibson* (1896), 29 N.S.R. 4; *R. v. Corporation of Bedford Level* (1805), 6 East 356, 102 E.R. 1323; *Parker v. Kett* (1702), 1 Ld. Raym. 658, 91 E.R. 1338; *Eadie v. Township of Brantford*, [1967] R.C.S. 573; *Texas v. White*, 74 U.S. 700 (1868); *Horn v. Lockhart*, 84 U.S. 570 (1873); *United States v. Insurance Companies*, 89 U.S. 99 (1874); *Baldy v. Hunter*, 171 U.S. 388 (1898); *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645; *Federation of*

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Initiative and Referendum Act, [1919] A.C. 935; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, referred to.

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Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3.
Act to amend an Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1982 (Man.), c. 3, s. 1.
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Constitution Act, 1867, preamble, ss. 55, 57, 90, 92, 92A [en. *Constitution Act, 1982*, s. 50], 93, 95, 133.
Constitution Act, 1982, preamble, ss. 18(1), 41(*a*), 43, 52.
Interpretation Act, 1867 (Can.), 31 Vict., c. 1, s. 6(3).
Interpretation Act, R.S.C. 1970, c. I-23, s. 28 "shall".
Manitoba Act, 1870, R.S.C. 1970, App. II, ss. 2, 14, 17, 23.
Statute of Westminster, 1931 (U.K.), 22 Geo. V, c. 4.
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REFERENCE by the Governor General in Council, pursuant to s. 55 of the *Supreme Court Act*, concerning certain language rights under s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*.

Pierre Genest, Q.C., Edward R. Sojonky, Q.C., and *Peter W. Hogg, Q.C.*, for the Attorney General of Canada.

Joseph Eliot Magnet, for the Société franco-manitobaine.

Gérald-A. Beaudoin, Q.C., for the Fédération des francophones hors Québec.

Jean-K. Samson et *André Binette*, for the Attorney General of Quebec.

Vaughan L. Baird, Q.C., for Roger Bilodeau.

Stephen A. Scott and *Warren J. Newman*, for Alliance Québec.

Walter J. Roustan, for the Freedom of Choice Movement.

A. Kerr Twaddle, Q.C., and *William S. Gange*, for the Attorney General of Manitoba.

D. C. H. McCaffrey, Q.C., Colin J. Gillespie and *J. F. Reeh Taylor, Q.C.*, for Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz and Patricia Maltman.

The following is the judgment delivered by

THE COURT

I

The Reference

This Reference combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity. The proceedings were initiated by Order in Council, P.C. 1984-1136 dated April 5, 1984, pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1970, c. S-19. The Order in Council reads:

WHEREAS the Minister of Justice reports;

1. That it is important to resolve as expeditiously as possible legal issues relating to certain language rights

RENVOI adressé par le gouverneur général en conseil, conformément à l'art. 55 de la *Loi sur la Cour suprême*, au sujet de certains droits linguistiques garantis par l'art. 23 de la *Loi de 1870 sur le Manitoba* et par l'art. 133 de la *Loi constitutionnelle de 1867*.

Pierre Genest, c.r., Edward R. Sojonky, c.r., et *Peter W. Hogg, c.r.*, pour le procureur général du Canada.

Joseph Eliot Magnet, pour la Société franco-manitobaine.

Gérald-A. Beaudoin, c.r., pour la Fédération des francophones hors Québec.

Jean-K. Samson et *André Binette*, pour le procureur général du Québec.

Vaughan L. Baird, c.r., pour Roger Bilodeau.

Stephen A. Scott et *Warren J. Newman*, pour Alliance Québec.

Walter J. Roustan,, pour le Mouvement de la liberté de choix.

A. Kerr Twaddle, c.r., et *William S. Gange*, pour le procureur général du Manitoba.

D. C. H. McCaffrey, c.r., Colin J. Gillespie et *J. F. Reeh Taylor, c.r.*, pour Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz et Patricia Maltman.

Version française du jugement rendu par

LA COUR

I

Le renvoi

Le présent renvoi allie des questions juridiques et constitutionnelles des plus subtiles et complexes à des questions politiques très délicates. Les procédures ont été engagées par le décret C.P. 1984-1136 en date du 5 avril 1984, conformément à l'art. 55 de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19. Ce décret dispose:

Vu que le ministre de la Justice estime:

1. Qu'il importe de trancher dans les meilleurs délais possibles divers problèmes juridiques que soulèvent cer-

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under section 23 of the Manitoba Act, 1870 and section 133 of the Constitution Act, 1867.

2. That in order that such legal issues be addressed without delay, it is considered necessary that the opinion of the Supreme Court of Canada be obtained in relation to the following questions, namely:

Question #1

Are the requirements of section 133 of the Constitution Act, 1867 and of section 23 of the Manitoba Act, 1870 respecting the use of both the English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and

(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba

mandatory?

Question #2

Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of section 23 of the Manitoba Act, 1870?

Question #3

If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?

Question #4

Are any of the provisions of An Act Respecting the Operation of section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, inconsistent with the provisions of section 23 of the Manitoba Act, 1870, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Justice, pursuant to section 55 of the Supreme Court Act, is pleased hereby to refer the questions immediately above set forth to the Supreme Court of Canada for hearing and consideration.

An order of this Court dated April 10, 1984 directed that the Attorney General of Canada have carriage of the Reference. Leave to intervene

tains droits linguistiques garantis par l'article 23 de la Loi de 1870 sur le Manitoba et par l'article 133 de la Loi constitutionnelle de 1867.

2. Qu'il importe, pour régler rapidement les problèmes juridiques en question, d'obtenir l'avis de la Cour suprême du Canada sur les questions suivantes:

Question nº 1

Les obligations imposées par l'article 133 de la Loi constitutionnelle de 1867 et par l'article 23 de la Loi de 1870 sur le Manitoba, relativement à l'usage du français et de l'anglais dans:

a) les archives, procès-verbaux et journaux des chambres du Parlement du Canada et des législatures du Québec et du Manitoba, et

b) les actes du Parlement du Canada et des législatures du Québec et du Manitoba

sont-elles impératives?

Question nº 2

Est-ce que les dispositions de l'article 23 de la Loi de 1870 sur le Manitoba rendent invalides les lois et les règlements de la province du Manitoba qui n'ont pas été imprimés et publiés en langue anglaise et en langue française?

Question nº 3

Dans l'hypothèse où il a été répondu par l'affirmative à la question nº 2, les textes législatifs qui n'ont pas été imprimés et publiés en langue anglaise et en langue française sont-ils opérants et, dans l'affirmative, dans quelle mesure et à quelles conditions?

Question nº 4

Est-ce que l'une ou l'autre des dispositions de la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs, constituant le chapitre 3 des Statuts du Manitoba de 1980, sont incompatibles avec les dispositions de l'article 23 de la Loi de 1870 sur le Manitoba et, dans l'affirmative, est-ce que les dispositions considérées sont, dans la mesure de l'incompatibilité, invalides et inopérantes?

À ces causes, sur avis conforme du ministre de la Justice et en vertu de l'article 55 de la Loi sur la Cour suprême, il plaît à Son Excellence le Gouverneur général en conseil de soumettre à la Cour suprême du Canada, pour audition et pour examen, les questions énoncées ci-dessus.

Par ordonnance en date du 10 avril 1984, cette Cour a confié au procureur général du Canada la charge du renvoi. Ont été autorisés à intervenir: les

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was granted to: the Attorneys General of the Provinces of Manitoba and Quebec; Société franco-manitobaine; Alliance Québec, Alliance for Language Communities in Quebec (formerly Positive Action Committee); Fédération des francophones hors Québec; the Freedom of Choice Movement; Roger Joseph Albert Bilodeau; Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz, and Patricia Maltman, residents of Manitoba and persons interested in the questions before the Court.

Section 23 of the *Manitoba Act, 1870* provides:

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

The provisions of s. 133 of the *Constitution Act, 1867* are virtually identical to those of s. 23 of the *Manitoba Act, 1870*. Section 133 provides:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec be printed and published in both those Languages.

procureurs généraux des provinces du Manitoba et de Québec; la Société franco-manitobaine; Alliance Québec, l'Alliance pour les communautés linguistiques au Québec (autrefois Positive Action Committee); la Fédération des francophones hors Québec; le Mouvement de la liberté de choix; Roger Joseph Albert Bilodeau; Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz et Patricia Maltman, résidents du Manitoba et personnes intéressées aux questions soumises à la Cour.

L'article 23 de la *Loi de 1870 sur le Manitoba* dispose:

23. L'usage de la langue française ou de la langue anglaise sera facultatif dans les débats des Chambres de la législature; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par devant les tribunaux ou émanant des tribunaux du Canada, qui sont établis sous l'autorité de la *Loi constitutionnelle de 1867*, et par devant tous les tribunaux ou émanant des tribunaux de la province, il pourra être également fait usage, à faculté, de l'une ou l'autre de ces langues. Les actes de la législature seront imprimés et publiés dans ces deux langues.

Les dispositions de l'art. 133 de la *Loi constitutionnelle de 1867* sont pratiquement identiques à celles de l'art. 23 de la *Loi de 1870 sur le Manitoba*. L'article 133 dispose:

133. Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité du présent acte, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

Les actes du parlement du Canada et de la législature de Québec devront être imprimés et publiés dans ces deux langues.

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II

Manitoba's Language Legislation

Section 23 of the *Manitoba Act, 1870* was the culmination of many years of co-existence and struggle between the English, the French, and the Metis in Red River Colony, the predecessor to the present day Province of Manitoba. Though the region was originally claimed by the English Hudson's Bay Company in 1670 under its Royal Charter, for much of its pre-confederation history, Red River Colony was inhabited by anglophones and francophones in roughly equal proportions. On November 19, 1869 the Hudson's Bay Company issued a deed of surrender to transfer the North-West Territories, which included the Red River Colony, to Canada. The transfer of title took effect on July 15, 1870.

Between November 19, 1869 and July 15, 1870, the provisional government of Red River Colony attempted to unite the various segments of the Red River colony and drew up a "Bill of Rights" to be used in negotiations with Canada. A Convention of Delegates was elected in January, 1870 to prepare the terms upon which Red River Colony would join the Confederation. The Convention was made up of equal numbers of anglophones and francophones elected from the various French and English parishes.

The final version of the Bill of Rights which was used by the Convention delegates in their negotiations with Ottawa, contained these provisions:

That the English and French languages be common in the Legislature, and in the courts, and that all public documents, as well as all Acts of the Legislature, be published in both languages.

That the Judge of the Superior Court speak the English and French languages.

These clauses were re-drafted by the Crown lawyers in Ottawa and included in a Bill to be introduced in Parliament. The Bill passed through Parliament with no opposition from either side of the House, resulting in s. 23 of the *Manitoba Act, 1870*. In 1871 this Act was entrenched in the

II

Législation du Manitoba en matière linguistique

L'article 23 de la *Loi de 1870 sur le Manitoba* fut l'aboutissement de nombreuses années de coexistence et de luttes entre les Anglais, les Français et les Métis dans la colonie de la rivière Rouge qui est à l'origine de la province actuelle du Manitoba. Même si cette région fut d'abord revendiquée, en 1670, par la Compagnie anglaise de la Baie d'Hudson en vertu de sa charte royale, la colonie de la rivière Rouge fut, pendant une bonne partie de ses années d'existence avant la Confédération, habitée dans des proportions à peu près égales par des anglophones et des francophones. Le 19 novembre 1869, la Compagnie de la Baie d'Hudson transféra au Canada, par un acte de cession, les territoires du Nord-Ouest qui comprenaient la colonie de la rivière Rouge. Le transfert du titre entra en vigueur le 15 juillet 1870.

Entre le 19 novembre 1869 et le 15 juillet 1870, le gouvernement provisoire de la colonie de la rivière Rouge tenta d'unir les divers groupes de la colonie et rédigea une «Liste des droits» qui devait servir dans les négociations avec le Canada. Une convention de délégués choisie en janvier 1870 fut chargée de rédiger les conditions auxquelles la colonie de la rivière Rouge se joindrait à la Confédération. La convention comptait autant d'anglophones que de francophones élus dans les diverses paroisses anglaises et françaises.

La version finale de la Liste des droits qui fut utilisée par la convention de délégués dans leurs négociations avec Ottawa, contenait les dispositions suivantes:

Que les langues française et anglaise soient communes dans la législature et les cours, et que tous les documents publics, ainsi que les actes de la Législature, soient publiés dans les deux langues.

Que le Juge de la Cour Suprême parle le français et l'anglais.

Ces clauses furent remaniées par les conseillers juridiques de Sa Majesté à Ottawa et incluses dans un projet de loi déposé au Parlement. Le projet de loi fut adopté par le Parlement sans opposition ni d'un côté ni de l'autre de la Chambre. Ces clauses sont devenues l'art. 23 de la *Loi de 1870 sur le*

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British North America Act, 1871 (renamed *Constitution Act, 1871* in the *Constitution Act, 1982*, s. 53). The *Manitoba Act, 1870* is now entrenched in the Constitution of Canada by virtue of s. 52(2)(*b*) of the *Constitution Act, 1982.*

In 1890 *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, 1890 (Man.), c. 14 (hereinafter the *Official Language Act, 1890*), was enacted by the Manitoba Legislature. This Act provides:

> **1** Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.
>
> **2** This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to.

Upon enactment of the *Official Language Act, 1890* the Province of Manitoba ceased publication of the French version of Legislative Records, Journals and Acts.

III

Legal Challenges to Manitoba's Language Legislation

The *Official Language Act, 1890* was challenged before the Manitoba courts soon after it was enacted. It was ruled *ultra vires* in 1892 by Judge Prud'homme of the County Court of St. Boniface, who stated: [TRANSLATION] "I am therefore of the view that c. 14, 53 Vict. is *ultra vires* the Legislature of Manitoba and that section 23 of the *Manitoba Act* cannot be changed and even less repealed by the Legislature of that province": *Pellant v. Hebert*, first published in *Le Manitoba* (a French language newspaper), March 9, 1892, reported in (1981), 12 *R.G.D.* 242. This ruling was not followed by the Legislature or the Government of Manitoba. The *Official Language*

Manitoba. En 1871, cette loi fut enchâssée dans l'*Acte de l'Amérique du Nord britannique, 1871* (rebaptisé *Loi constitutionnelle de 1871* dans la *Loi constitutionnelle de 1982*, art. 53). La *Loi de 1870 sur le Manitoba* est maintenant enchâssée dans la Constitution du Canada en vertu de l'al. 52(2)*b*) de la *Loi constitutionnelle de 1982.*

En 1890, *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, 1890 (Man.), chap. 14 (ci-après l'*Official Language Act, 1890*), fut adoptée par la législature du Manitoba. Cette loi prévoyait:

> [TRADUCTION] **1** Nonobstant toute loi ou disposition contraire, seule la langue anglaise sera utilisée dans les archives, procès-verbaux et journaux de l'assemblée législative du Manitoba ainsi que dans toute plaidoirie ou pièce de procédure devant les tribunaux de la province du Manitoba ou émanant de ces tribunaux. Dans l'impression et la publication des lois de la législature du Manitoba, l'usage de la langue anglaise suffira.
>
> **2** La présente loi ne s'appliquera que dans la mesure où elle relève de la compétence législative de la Législature et entrera en vigueur le jour de sa sanction.

Dès l'adoption de l'*Official Language Act, 1890*, la province du Manitoba a cessé de publier les versions françaises des lois ainsi que des archives, procès-verbaux et journaux de l'Assemblée législative.

III

Contestations judiciaires de la législation du Manitoba en matière linguistique

Peu après son adoption, l'*Official Language Act, 1890* fut contestée devant les tribunaux du Manitoba. En 1892, elle était déclarée inconstitutionnelle par le juge Prud'homme de la Cour de comté de St-Boniface, qui a dit: «Je suis donc d'opinion que le c. 14, 53 Vict. est *ultra vires* de la législature du Manitoba et que la clause 23, de l'*Acte de Manitoba*, ne peut pas être changée et encore moins abrogée par la législature de cette province»: *Pellant v. Hebert*, décision publiée à l'origine dans *Le Manitoba* (un quotidien de langue française) le 9 mars 1892 et publiée dans (1981), 12 *R.G.D.* 242. Ce jugement ne fut suivi ni par la législature ni par le gouvernement du Manitoba. L'*Official*

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Act, 1890 remained in successive revisions of the *Statutes of Manitoba*; the Government did not resume bilingual publication of Legislative Records, Journals or Acts.

In 1909, the *Official Language Act, 1890* was again challenged in Manitoba Courts and again ruled unconstitutional: *Bertrand v. Dussault*, January 30, 1909, County Court of St. Boniface (unreported), reproduced in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at pp. 458-62. According to Monnin J.A. in *Re Forest*, *supra*, at p. 458, "This latter decision, not reported, appears to have been unknown or ignored".

In 1976, a third attack was mounted against the *Official Language Act, 1890* and the Act was ruled unconstitutional: *R. v. Forest* (1976), 74 D.L.R. (3d) 704 (Man. Co. Ct.) Nonetheless, the *Official Language Act, 1890* remained on the Manitoba statute books; bilingual enactment, printing and publication of Acts of the Manitoba Legislature was not resumed.

In 1979, the constitutionality of the *Official Language Act, 1890* was tested before this Court. On December 13, 1979, in *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032, this Court, in unanimous reasons, held that the provisions of Manitoba's *Official Language Act, 1890* were in conflict with s. 23 of the *Manitoba Act, 1870* and unconstitutional.

On July 9, 1980, after the decision of this Court in *Forest*, the Legislature of Manitoba enacted *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, 1980 (Man.), c. 3. The validity of this Act is the subject of question 4 of this Reference.

In the fourth session (1980) and the fifth session (1980-1981) of the thirty-first Legislature of Manitoba, the vast majority of the Acts of the Legislature of Manitoba were enacted, printed and published in English only.

Language Act, 1890 est demeurée la même dans les refontes successives des *Statutes of Manitoba*; le gouvernement n'a pas recommencé à publier dans les deux langues les archives, procès-verbaux et journaux de l'Assemblée législative, ni les lois.

En 1909, l'*Official Language Act, 1890* fut contestée de nouveau devant les tribunaux du Manitoba et à nouveau déclarée inconstitutionnelle: *Bertrand v. Dussault*, le 30 janvier 1909, Cour de comté de St-Boniface (non publiée), reproduite dans *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (C.A. Man.), aux pp. 458 à 462. Selon le juge Monnin dans l'arrêt *Re Forest*, précité, à la p. 458, [TRADUCTION] «Cette dernière décision, non publiée, semble être passée inaperçue ou avoir été ignorée».

En 1976, l'*Official Language Act, 1890* fut attaquée pour une troisième fois et déclarée inconstitutionnelle: *R. v. Forest* (1976), 74 D.L.R. (3d) 704 (C. de comté Man.). Néanmoins, l'*Official Language Act, 1890* est restée dans les recueils de lois du Manitoba; l'adoption, l'impression et la publication dans les deux langues des lois de l'assemblée législative du Manitoba n'ont pas été reprises.

En 1979, la question de la constitutionnalité de l'*Official Language Act, 1890* a été soumise à cette Cour. Le 13 décembre 1979, dans l'arrêt *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032, la Cour, dans des motifs unanimes, a déclaré que les dispositions de l'*Official Language Act, 1890* du Manitoba, précitée, étaient incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* et inconstitutionnelles.

Le 9 juillet 1980, après l'arrêt *Forest* de cette Cour, l'assemblée législative du Manitoba a adopté la *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1980 (Man.), chap. 3. La validité de cette loi fait l'objet de la question nº 4 du présent renvoi.

Au cours de la quatrième session (1980) et de la cinquième session (1980-1981) de la trente et unième législature du Manitoba, la majeure partie des lois de la législature du Manitoba ont été adoptées, imprimées et publiées en langue anglaise seulement.

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Since the first session of the thirty-second Legislature of Manitoba (1982), the Acts of the Legislature of Manitoba have been enacted, printed and published in both English and French. However, those Acts that only amend Acts that were enacted, printed and published in English only, and private Acts, have in most instances been enacted in English only.

In *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393, the Manitoba Court of Appeal held that Manitoba's *Highway Traffic Act*, R.S.M. 1970, c. H60, and *The Summary Convictions Act*, R.S.M. 1970, c. S230, although enacted in English only, were valid. This decision is under appeal to this Court*.

On July 4, 1983, the Attorney General of Manitoba introduced into the Legislative Assembly of Manitoba a resolution to initiate a constitutional amendment under s. 43 of the *Constitution Act, 1982*. The purpose of the resolution was to amend the language provisions of the *Manitoba Act, 1870*. The second session of the thirty-second Legislature was prorogued on February 27, 1984, without the resolution having been adopted.

It might also be mentioned that on December 13, 1979, in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), this Court held that the provisions of Quebec's *Charter of the French language* (Bill 101), enacted in 1977, were in conflict with s. 133 of the *Constitution Act, 1867*. The *Charter* purported to provide for the introduction of Bills in the legislature in French only, and for the enactment of statutes in French only. The day after the decision of this Court in *Blaikie No. 1*, the Legislature of Quebec re-enacted in both languages all those Quebec statutes that had been enacted in French only. See: *An Act respecting a judgment rendered in the Supreme Court of Canada on 13 December*

* Judgment in *Bilodeau v. Attorney General of Manitoba* will be delivered at the time of delivery of judgment in *MacDonald v. City of Montreal*.

Depuis la première session de la trente-deuxième législature du Manitoba (1982), les lois de la législature du Manitoba sont adoptées, imprimées et publiées à la fois en langue française et en langue anglaise. Toutefois, les lois qui ne font que modifier les lois adoptées, imprimées et publiées en langue anglaise seulement et les lois d'intérêt privé sont, dans la plupart des cas, adoptées en langue anglaise seulement.

Dans l'arrêt *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393, la Cour d'appel du Manitoba a conclu que *The Highway Traffic Act*, R.S.M. 1970, chap. H60, et *The Summary Convictions Act*, R.S.M. 1970, chap. S230, étaient valides même si elles avaient été adoptées en langue anglaise seulement. Cet arrêt fait présentement l'objet d'un pourvoi devant cette Cour*.

Le 4 juillet 1983, le procureur général du Manitoba a déposé devant l'assemblée législative du Manitoba une résolution visant à introduire une modification constitutionnelle en vertu de l'art. 43 de la *Loi constitutionnelle de 1982*. Cette résolution avait pour objet de modifier les dispositions en matière linguistique contenues dans la *Loi de 1870 sur le Manitoba*. La deuxième session de la trente-deuxième législature du Manitoba a été prorogée le 27 février 1984 sans que cette résolution ait été adoptée.

On pourrait également mentionner que, le 13 décembre 1979, dans l'arrêt *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016 (*Blaikie n° 1*), cette Cour a statué que la *Charte de la langue française* du Québec (Loi 101) adoptée en 1977 était contraire à l'art. 133 de la *Loi constitutionnelle de 1867*. La *Charte* prévoyait le dépôt des projets de loi en langue française seulement à l'Assemblée nationale et l'adoption des lois en langue française seulement. Le lendemain de l'arrêt *Blaikie n° 1* de cette Cour, l'assemblée nationale du Québec a adopté de nouveau dans les deux langues toutes les lois du Québec qui avaient été adoptées en langue française seulement. Voir: *Loi concernant un jugement rendu par la Cour*

* Le jugement dans l'affaire *Bilodeau c. Procureur général du Manitoba* sera rendu en même temps que celui dans l'affaire *MacDonald c. Ville de Montréal*.

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1979 on the language of the legislature and the courts in Québec, 1979 (Que.), c. 61.

The implication of this Court's holdings in *Blaikie No. 1*, *supra*, and *Forest*, *supra*, was that provincial legislation passed in accordance with the *ultra vires* statutes, *i.e.* enacted in one language only, was itself in derogation of the constitutionally entrenched language provisions of the *Constitution Act, 1867* and the *Manitoba Act, 1870*, and therefore invalid. In *Société Asbestos Ltée v. Société nationale de l'amiante*, [1979] C.A. 342, the Quebec Court of Appeal held, in a judgment also rendered December 13, 1979, that this was indeed the consequence of unilingual enactment and struck down two statutes that had not been enacted in English.

In *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*), this Court elaborated its earlier decision in *Blaikie No. 1* by holding that regulations adopted by or subject to the approval of the Government of Quebec and Rules of Court were subject to the requirements of s. 133. However, regulations adopted by subordinate bodies, outside the Government of Quebec, and not subject to the approval of the Government of Quebec, as well as municipal by-laws and school board by-laws, were not subject to the requirements of s. 133.

The Manitoba Court of Appeal, in *Bilodeau*, *supra*, was faced with a similar challenge to unilingually enacted legislation. That Court held that the unilingual legislation of the Manitoba Legislature was not invalid. The majority (*per* Freedman C.J.M.) held that the requirement for bilingual enactment was *directory* rather than *mandatory* and that therefore the consequence of disobedience was not invalidity. Monnin J.A. thought that s. 23 was mandatory but would have applied the doctrine of state necessity (of which more anon) to prevent invalidity.

suprême du Canada le 13 décembre 1979 sur la langue de la législation et de la justice au Québec, 1979 (Qué.), chap. 61.

Il découlait des arrêts de cette Cour *Blaikie n° 1* et *Forest*, précités, que la législation provinciale adoptée conformément à ces lois inconstitutionnelles, c.-à-d. unilingue seulement, constituait elle-même une dérogation aux dispositions en matière linguistique enchâssées dans la *Loi constitutionnelle de 1867* et dans la *Loi de 1870 sur le Manitoba* et était, par conséquent, invalide. Dans l'arrêt *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342, également rendu le 13 décembre 1979, la Cour d'appel du Québec a déclaré que telle était la conséquence de l'adoption unilingue et a annulé deux lois qui n'avaient pas été adoptées en anglais.

Dans l'arrêt *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312 (*Blaikie n° 2*), cette Cour a explicité la décision rendue dans l'arrêt *Blaikie n° 1* en statuant que les exigences de l'art. 133 s'appliquent aux règlements adoptés par le gouvernement du Québec ou soumis à son approbation, et aux règles des tribunaux. Elle a toutefois ajouté que les exigences de l'art. 133 ne s'appliquent pas aux règlements adoptés par des organismes de compétence secondaire non gouvernementaux et non soumis à l'approbation du gouvernement du Québec, ni aux règlements des organismes municipaux ou scolaires.

Dans l'arrêt *Bilodeau*, précité, la Cour d'appel du Manitoba était saisie d'une contestation semblable d'une législation adoptée en une seule langue. Cette cour a décidé que la législation adoptée en une seule langue par la législature du Manitoba n'était pas invalide. Le juge en chef Freedman, au nom de la majorité, a statué que l'exigence de l'adoption dans les deux langues est *directive* plutôt qu'*impérative* et que, par conséquent, y contrevenir n'entraîne pas l'invalidité. Le juge Monnin a pour sa part exprimé l'avis que l'art. 23 est impératif, mais aurait appliqué le principe de l'état de nécessité (sur lequel nous reviendrons) pour ne pas prononcer l'invalidité de la législation.

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IV

Question 1

The Mandatory Nature of s. 133 of the Constitution Act, 1867 and s. 23 of the Manitoba Act, 1870

Question No. 1 of this Reference asks whether the requirements of s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*, respecting the use of both English and French in the Records, Journals and Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, are "mandatory".

The Attorney General of Manitoba responds to this question in his written argument with the plain assertion that:

> Since the decisions of this Court in *Attorney General of Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016 and *Attorney General of Manitoba* v. *Forest*, [1979] 2 S.C.R. 1032 it is beyond dispute that statutes of the Parliament of Canada, of the National Assembly of Quebec and of the Legislature of Manitoba are required to be enacted in both the English and the French languages. The requirement is imperative, rather than permissive, in the sense that the legislative bodies have no option in the matter.

and later:

> Obviously it was intended that the requirement of enactment in both languages be observed. The relevant question is: What is the consequence of non-observance?

The consequence of non-observance will be addressed when questions 2 and 3 are under consideration.

For present purposes, it seems clear that the bilingual record-keeping and the printing and publication requirements of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are mandatory in the sense that they were meant to be obeyed.

Section 23 of the *Manitoba Act, 1870*, provides that both English and French "*shall* be used in the . . . Records and Journals" of the Manitoba Legislature. It further provides that "[t] he Acts of the Legislature *shall* be printed and published in both

IV

Question nº 1

Le caractère impératif de l'art. 133 de la Loi constitutionnelle de 1867 et de l'art. 23 de la Loi de 1870 sur le Manitoba

La question nº 1 du présent renvoi est de savoir si les exigences de l'art. 133 de la *Loi constitutionnelle de 1867* et de l'art. 23 de la *Loi de 1870 sur le Manitoba* portant sur l'usage du français et de l'anglais dans les archives, les procès-verbaux, les journaux et les lois du Parlement du Canada et des législatures du Québec et du Manitoba sont «impératives».

Dans ses observations écrites, le procureur général du Manitoba répond simplement à cette question que:

> [TRADUCTION] Depuis les arrêts de cette Cour *Procureur général du Québec* c. *Blaikie*, [1979] 2 R.C.S. 1016 et *Procureur général du Manitoba* c. *Forest*, [1979] 2 R.C.S. 1032, il est incontestable que les lois du Parlement du Canada, de l'assemblée nationale du Québec et de la législature du Manitoba doivent être adoptées à la fois en langue française et en langue anglaise. Cette exigence est impérative plutôt que facultative, en ce sens que les corps législatifs n'ont pas le choix en la matière.

Et plus loin:

> [TRADUCTION] Manifestement, on voulait que cette exigence de l'adoption dans les deux langues soit observée. La question qui se pose est la suivante: Quelle est la conséquence du défaut de s'y conformer?

La conséquence du défaut de se conformer à cette exigence sera abordée lors de l'examen des questions nºs 2 et 3.

Aux fins des présentes, il semble évident que l'exigence, qu'imposent l'art. 23 de la *Loi de 1870 sur le Manitoba* et l'art. 133 de la *Loi constitutionnelle de 1867*, de rédiger, d'imprimer et de publier dans les deux langues est impérative en ce sens que l'on entendait qu'elle soit respectée.

L'article 23 de la *Loi de 1870 sur le Manitoba* dispose que l'usage du français et de l'anglais «*sera obligatoire*» dans la rédaction des archives, procès-verbaux et journaux de la législature du Manitoba. Il dispose en outre que «[l]es actes de la législature

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those languages". Section 133 of the *Constitution Act, 1867*, is strikingly similar. It provides that both English and French "*shall* be used in the respective Records and Journals" of Parliament and the Legislature of Quebec. It also provides that "[t] he Acts of the Parliament of Canada and the Legislature of Quebec *shall* be printed and published in both those Languages".

As used in its normal grammatical sense, the word "shall" is presumptively imperative. See *Odgers' Construction of Deeds and Statutes* (5th ed. 1967) at p. 377; *The Interpretation Act*, 1867 (Can.), 31 Vict., c. 1, s. 6(3); *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 ("shall is to be construed as imperative"). It is therefore incumbent upon this Court to conclude that Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. See, *e.g. Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312, p. 317 (Alta. S.C.)

There is nothing in the history or the language of s. 23 of the *Manitoba Act, 1870* or s. 133 of the *Constitution Act, 1867* to indicate that "shall" was not used in its normal imperative sense. On the contrary, the evidence points ineluctably to the conclusion that the word "shall" was deliberately and carefully chosen by Parliament for the express purpose of making the bilingual record-keeping and printing and publication requirements of those sections obligatory. In particular, Parliament's use of the presumptively imperative word "shall" twice in s. 23 of the *Manitoba Act, 1870* and twice in s. 133 of the *Constitution Act, 1867* contrasts starkly with its use of the presumptively permissive word "may" twice in the same sections. Section 23 provides that either English or French "*may* be

seront imprimés et publiés dans ces deux langues». L'article 133 de la *Loi constitutionnelle de 1867* lui ressemble d'une manière frappante. Il dispose que «l'usage de ces deux langues [anglaise et française] *sera obligatoire*» dans la rédaction des archives, procès-verbaux et journaux respectifs du Parlement et de la législature du Québec. Il dispose en outre que «[l]es actes du parlement du Canada et de la législature de Québec *devront* être imprimés et publiés dans ces deux langues».

Employé dans son sens grammatical ordinaire, le terme anglais «*shall*» [«doit»] est, par présomption, impératif. Voir *Odgers' Construction of Deeds and Statutes* (5th ed. 1967), à la p. 377; *Acte d'Interprétation*, 1867 (Can.), 31 Vict., chap. 1, par. 6(3); *Loi d'interprétation*, S.R.C. 1970, chap. I-23, art. 28 (« «doit» ou «devra», devant un infinitif, exprime une obligation»). Il incombe donc à cette Cour de conclure que le Parlement, lorsqu'il a employé le terme «*shall*» dans la version anglaise de l'art. 23 de la *Loi de 1870 sur le Manitoba* et de l'art. 133 de la *Loi constitutionnelle de 1867*, voulait que ces articles soient interprétés comme étant impératifs, en ce sens qu'ils doivent être respectés, à moins que cette interprétation du terme «*shall*» ne soit absolument incompatible avec le contexte dans lequel il a été employé et ne rende les articles irrationnels ou vides de sens. Voir, par exemple, *Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312, à la p. 317 (C.S. Alb.)

Rien dans l'historique ou le texte de l'art. 23 de la *Loi de 1870 sur le Manitoba* ou de l'art. 133 de la *Loi constitutionnelle de 1867* n'indique que le mot «*shall*» n'a pas été employé dans son sens impératif ordinaire. Au contraire, la preuve amène inéluctablement à la conclusion que c'est délibérément et avec soin que le Parlement a choisi le terme «*shall*» dans le but exprès de rendre obligatoires les exigences de ces articles relatives à la rédaction, à l'impression et à la publication dans les deux langues. En particulier, le fait que le Parlement emploie deux fois à l'art. 23 de la *Loi de 1870 sur le Manitoba* et deux fois à l'art. 133 de la *Loi constitutionnelle de 1867* le mot «*shall*» qui est, par présomption, impératif, contraste fortement avec l'emploi qu'il fait à deux reprises dans

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used" by anyone in the debates of the Manitoba Legislature and that either language "*may* be used" by anyone in the Manitoba courts. Similarly, s. 133 provides that either English or French "*may* be used" by anyone in the debates of Parliament and the Legislature of Quebec, and in the courts of Canada and Quebec.

The French versions of both sections leave no doubt that the choice of these contrasting terms was deliberate. In the French version of s. 23, "shall" appears as "*sera obligatoire*" and "*seront*", while "may" appears as "*sera facultatif*" and "*pourra être . . . à faculté*". Similarly, in the French version of s. 133, "shall" is expressed as "*sera obligatoire*" at one point, and as "*devront être*" at another, while "may" is expressed as "*sera facultatif*" in the first clause in which it appears and as "*pourra être . . . à faculté*" in the second.

In *Blaikie v. Attorney General of Quebec* (1978), 85 D.L.R. (3d) 252 (Que. S.C.), at p. 260, Deschênes C.J.S.C. had this to say about the may/shall dichotomy in s. 133 of the *Constitution Act, 1867*:

> The Imperial Parliament has passed s. 133 with, from all evidence, extreme care and even the most mildly attentive observer cannot help but be struck by the alternation of the means of expression that are found in considering the use of the two languages: first part, 'Either . . . may'; second part, 'Both . . . shall'; third part, 'Either . . . may'; fourth part, 'Shall . . . both'.
>
> The Court is totally incapable of finding in the second part of s. 133 justification for the alternates or the sequence of the languages that the Attorney-General of Quebec suggests can be read there: this is not one or the other language as a choice, but the two at the same time which must be used in the records and journals of the Legislature.

(Emphasis added.)

See also *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, at pp. 192-93.

ces mêmes articles du mot «*may*» qui, par présomption, exprime une faculté. L'article 23 dispose, dans sa version anglaise, que l'anglais ou le français «*may be used*» [«sera facultatif»] dans les débats de la législature du Manitoba et que l'une ou l'autre de ces langues «*may be used*» [«il pourra être fait . . . usage, à faculté»] devant les tribunaux du Manitoba. De même, l'art. 133 dispose que l'anglais ou le français «*may be used*» [«sera facultatif»] dans les débats du Parlement et de la législature du Québec, ainsi que devant les tribunaux du Canada et du Québec.

Les versions françaises de ces deux articles ne laissent aucun doute que le choix de ces termes distincts était intentionnel. Dans la version française de l'art. 23, «*shall*» est rendu par «sera obligatoire» et «seront», alors que «*may*» est rendu par «sera facultatif» et «pourra être . . . à faculté». De même, dans la version française de l'art. 133, «*shall*» est rendu par «sera obligatoire» à un endroit et par «devront être» à un autre, alors que «*may*» est rendu par «sera facultatif» dans le premier segment de l'article et par «pourra être . . . à faculté» dans le second segment.

Dans *Blaikie c. Procureur général du Québec*, [1978] C.S. 37, à la p. 44, le juge en chef Deschênes de la Cour supérieure dit ce qui suit concernant la dichotomie «*may*» et «*shall*» à l'art. 133 de la *Loi constitutionnelle de 1867*:

> Le Parlement impérial a rédigé l'article 133 avec, de toute évidence, un soin extrême et l'observateur le moindrement attentif ne peut qu'être frappé par l'alternance des modes d'expression qu'on y trouve au sujet de l'emploi des deux langues: Première partie: *Either . . . may*; Deuxième partie: *Both . . . shall*; Troisième partie: *Either . . . may*; Quatrième partie: *Shall . . . both*.
>
> La Cour est tout à fait incapable de trouver dans la deuxième partie de l'article 133 la permission d'alternance ou de succession des langues que le Procureur général du Québec suggère d'y lire: ce n'est pas l'une ou l'autre langue au choix, mais les deux à la fois qui doivent être employées dans les *Records and Journals* de la Législature.

(C'est nous qui soulignons.)

Voir également *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182, aux pp. 192 et 193.

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If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike. The fundamental guarantees contained in the sections in question are constitutionally entrenched and are beyond the power of the provinces of Quebec or Manitoba to amend unilaterally: *Blaikie No. 1*, *supra*; *Attorney General of Manitoba v. Forest*, *supra*. Those guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory.

That this was recognized by the drafters of s. 133, after which s. 23 was modeled, is clear from the former section's legislative history. Early drafts of s. 133 used the permissive word "may". This generated considerable concern and comment during the Confederation Debates, and in the third draft of s. 133 in February 1867 the word "may" was replaced by the word "shall" in the provision regarding the use of both languages in the records and journals of Parliament and the Legislature of Quebec. In the final draft of s. 133 of the *British North America Act, 1867* (as it was then called) the provision for printing and publication of all laws in both languages was added, the word "shall" again being used.

The conclusion seems inescapable that the drafters of the *Constitution Act, 1867* deliberately selected the imperative term "shall" in preference to the permissive term "may" because they intended s. 133's language guarantees to be just that—*guarantees*. And the use by Parliament only three years later of nearly identical language in s. 23 of the *Manitoba Act, 1870* is strong evidence of a similar intendment with regard to the language provisions of that Act. The requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* respecting the use of both English and French in the Records, Journals and Acts of Parliament and the Legislatures of Quebec and Manitoba are "mandatory" in the normally

S'il faut ajouter à la preuve de l'intention du Parlement, il suffit simplement de considérer l'objet de l'art. 23 de la *Loi de 1870 sur le Manitoba* et de l'art. 133 de la *Loi constitutionnelle de 1867*, qui est d'assurer aux francophones et aux anglophones l'accès égal aux corps législatifs, aux lois et aux tribunaux. Les garanties fondamentales contenues dans les articles en question sont enchâssées dans la Constitution et les provinces de Québec et du Manitoba n'ont pas le pouvoir de les modifier unilatéralement: *Blaikie nº 1* et *Procureur général du Manitoba c. Forest*, précités. Si ces garanties n'étaient pas obligatoires, elles seraient vides de sens et leur enchâssement serait futile.

L'historique de l'adoption de l'art. 133, duquel s'inspire l'art. 23, indique clairement que c'est ce qu'ont reconnu ses auteurs. Les premières ébauches du texte anglais de l'art. 133 employaient le terme facultatif «*may*». Cela a suscité beaucoup de préoccupations et de commentaires dans les débats sur la Confédération, et dans la troisième ébauche de l'art. 133, au mois de février 1867, le terme «*may*» a été remplacé par le terme «*shall*» dans la disposition concernant l'usage des deux langues dans les archives, procès-verbaux et journaux du Parlement et de la législature du Québec. Dans la version finale de l'art. 133 de l'*Acte de l'Amérique du Nord britannique, 1867* (comme on l'appelait alors), on a ajouté la disposition relative à l'impression et à la publication de toutes les lois dans les deux langues, en employant là encore le terme «*shall*».

Il semble impossible d'échapper à la conclusion que les auteurs de la *Loi constitutionnelle de 1867* ont choisi délibérément le terme impératif «*shall*» dans la version anglaise, et les termes «sera» et «devront» dans la version française, de préférence aux termes facultatifs «*may*» et «sera facultatif» ou «pourra ... à faculté», parce qu'ils voulaient que les garanties linguistiques de l'art. 133 soient exactement cela, des *garanties*. Et l'emploi par le Parlement, seulement trois ans plus tard, d'un langage presque identique dans l'art. 23 de la *Loi de 1870 sur le Manitoba* établit clairement une intention semblable à l'égard des dispositions en matière linguistique contenues dans cette loi. Les exigences de l'art. 133 de la *Loi constitutionnelle de 1867* et

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accepted sense of that term. That is, they are obligatory. They must be observed.

Nonetheless, it has been argued by the Attorney General of Manitoba that, though the words of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are mandatory in the common grammatical sense, they are only directory in the legal sense and, thus, laws in violation of these provisions will not necessarily be invalid. He states in his factum:

> The Courts have drawn a distinction between requirements which are said to be "directory" and those which are said to be "mandatory". The terminology used has not always been consistent and mandatory requirements have been referred to as "imperative" or "obligatory". Non-compliance with a directory requirement does not result in what was done having no effect whereas if a mandatory requirement is not complied with all of what is done is a nullity.

The Attorney General goes on to argue that the requirements of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, are directory rather than mandatory.

A distinction between statutory provisions that are mandatory in the sense that failure to comply with them will lead to invalidity of the act in question, and directory, in the sense that failure to comply will not necessarily lead to such invalidity, is one that is found in Anglo-Canadian law. The most commonly cited formulation is Sir Arthur Channell's in *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), at pp. 174-75:

> The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at .... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those

de l'art. 23 de la *Loi de 1870 sur le Manitoba* concernant l'usage de l'anglais et du français dans les archives, procès-verbaux et journaux du Parlement et des législatures du Québec et du Manitoba sont «impératives» au sens normalement reconnu de ce terme. Autrement dit, elles sont obligatoires; elles doivent être observées.

Le procureur général du Manitoba a néanmoins fait valoir que, même si les termes de l'art. 23 de la *Loi de 1870 sur le Manitoba* et de l'art. 133 de la *Loi constitutionnelle de 1867* sont impératifs au sens grammatical ordinaire, ils ne sont que directifs au sens juridique et, ainsi, les lois qui contreviennent à ces dispositions ne seront pas nécessairement invalides. Dans son mémoire, il affirme ce qui suit:

> [TRADUCTION] Les tribunaux ont établi une distinction entre les exigences dites «directives» et celles dites «impératives». La terminologie employée n'a pas toujours été uniforme et des exigences impératives ont été qualifiées d'«absolues» ou d'«obligatoires». Le non-respect d'une exigence directive n'entraîne pas la nullité de ce qui a été fait alors que, si une exigence impérative n'est pas respectée, tout ce qui a été fait est nul et sans effet.

Le procureur général fait ensuite valoir que les exigences de l'art. 23 de la *Loi de 1870 sur le Manitoba* et de l'art. 133 de la *Loi constitutionnelle de 1867* sont directives plutôt qu'impératives.

On trouve en droit anglo-canadien une distinction entre les dispositions législatives impératives qui entraînent l'invalidité de l'acte en question si elles ne sont pas respectées, et les dispositions directives qui n'entraînent pas nécessairement l'invalidité si elles ne sont pas respectées. La formulation que l'on cite le plus souvent est celle de sir Arthur Channell dans l'arrêt *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (C.P.), aux pp. 174 et 175:

> [TRADUCTION] La question de savoir si les dispositions d'une loi sont directives ou impératives a très souvent été soulevée dans notre pays, mais on a dit qu'il n'est pas possible d'établir une règle générale et que, dans chaque cas, il faut considérer l'objet de la loi ... Lorsque les dispositions d'une loi se rapportent à l'exécution d'un devoir public et que, dans un cas donné, déclarer nuls et non avenus des actes accomplis par manquement à ce devoir entraînerait pour des personnes qui n'ont aucun

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entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

See also *Howard v. Bodington* (1877), 2 P. 203 at p. 210.

The doctrinal basis of the mandatory/directory distinction is difficult to ascertain. The "serious general inconvenience or injustice" of which Sir Arthur Channell speaks in *Montreal Street Railway Co. v. Normandin*, *supra*, appears to lie at the root of the distinction as it is applied by the courts. In Russel J.'s words (*R. ex rel. Anderson v. Buchanan* (1909), 44 N.S.R. 112 (C.A.), at p. 130):

I do not profess to be able to draw the distinction between what is directory and what is imperative, and I find that I am not alone in suspecting that, under the authorities, a provision may become directory if it is very desirable that compliance with it should not have been omitted, when that same provision would have been held to be imperative if the necessity had not arisen for the opposite ruling.

The temptation is very great, where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favor of the contention that it is mere directory . . . .

There is no authority in Canada for applying the mandatory/directory doctrine to constitutional provisions. It is our belief that the doctrine should not be applied when the constitutionality of legislation is in issue. This was the position of Monnin J.A. of the Manitoba Court of Appeal, dissenting on this point in *Bilodeau*, *supra*, at pp. 405-07:

I see no necessity to import into this argument the notion of directory legislation as opposed to mandatory legislation. Unfortunately, this court raised it in *A.G. Man. v. Forest*, supra, at p. 247, but I am certain that this theory has been put to rest by the two decisions of the Supreme Court of Canada on the matter, especially in *Blaikie*, supra. The Supreme Court of Canada did not call to its assistance such theories, and declared that in

contrôle sur ceux chargés de ce devoir une injustice ou des inconvénients généraux graves, et en même temps n'aiderait pas à atteindre l'objet principal visé par le législateur, on conclut habituellement que ces dispositions ne sont que directives et que leur non-respect, bien qu'il puisse entraîner des sanctions, ne porte pas atteinte à la validité des actes accomplis.

Voir également *Howard v. Bodington* (1877), 2 P. 203, à la p. 210.

Il est difficile de vérifier le fondement doctrinal de la distinction entre ce qui est impératif et ce qui est directif. L'«injustice ou [les] inconvénients généraux graves» dont parle sir Arthur Channell dans l'arrêt *Montreal Street Railway Co. v. Normandin*, précité, semblent servir de fondement à la distinction appliquée par les tribunaux. Comme l'affirme le juge Russel (*R. ex rel. Anderson v. Buchanan* (1909), 44 N.S.R. 112 (C.A.), à la p. 130):

[TRADUCTION] Je ne prétends pas être capable de faire la distinction entre ce qui est directif et ce qui est impératif, et je conclus que je ne suis pas le seul à avoir le sentiment que, selon la jurisprudence, une disposition peut devenir directive s'il est très souhaitable qu'on n'y ait pas dérogé, alors que la même disposition aurait été déclarée impérative s'il n'avait pas été nécessaire de conclure en sens contraire.

Lorsque la conclusion qu'une loi est impérative entraîne des inconvénients graves, on est grandement tenté de faire une exception en faveur de la prétention qu'elle est simplement directive . . .

Nulle jurisprudence canadienne ne permet d'appliquer à des dispositions constitutionnelles la théorie de la distinction entre ce qui est impératif ou directif. Nous sommes d'avis que cette théorie ne doit pas être appliquée lorsque la constitutionnalité d'une loi est en jeu. Il s'agit là de la position adoptée par le juge Monnin de la Cour d'appel du Manitoba, dissident sur ce point dans l'arrêt *Bilodeau*, précité, aux pp. 405 à 407:

[TRADUCTION] Je ne vois pas la nécessité d'introduire dans cet argument la notion de loi directive par opposition à la loi impérative. Malheureusement, cette Cour l'a soulevée dans l'arrêt *A.G. Man. v. Forest*, précité, à la p. 247, mais je suis certain que cette théorie a été écartée par les deux arrêts de la Cour suprême du Canada sur cette question, en particulier l'arrêt *Blaikie*, précité. La Cour suprême du Canada n'a pas fait appel à

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respect to the province of Quebec all statutes must be published in both languages.

. . .

. . . the legislation is clear, and speaks of "shall be used" and "shall be printed". There is nothing of a directory nature in that language. Furthermore, entrenched linguistic rights are by nature mandatory and never directory. If they were directory only, the risk is that they would never be enjoyed or be of any use to those to whom they were addressed. If it were merely directory it would fly in the face of entrenchment, which, but by its very nature, is mandatory. The authorities submitted by counsel on the mandatory or directory nature of legislation has [*sic*] no application to entrenched rights. Violence to the constitution cannot be tolerated.

(Emphasis added.)

The decisions of this Court in *Blaikie No. 1*, *supra*, and *Forest*, *supra*, referred to by Monnin J.A. in the above excerpt are not the only constitutional cases in which the mandatory/directory distinction has not been applied. In *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, for example, the Privy Council did not mention the distinction in ruling that legislation which had not been enacted in compliance with the appropriate constitutional "manner and form" requirements was invalid. Reference could also be made to the numerous decisions of American courts striking down legislation as unconstitutional, without bothering to discuss the mandatory/directory distinction, even though the distinction figures prominently in the American law on statutory construction.

More important than the lack of authority to support the application of the mandatory/directory distinction to constitutional provisions, however, is the harm that would be done to the supremacy of Canada's Constitution if such a vague and expedient principle were used to interpret it. It would do great violence to our Constitution to hold that a provision on its face mandatory, should be labelled directory on the ground that to hold otherwise would lead to inconvenience or even chaos. Where there is no textual indication that a constitutional provision is directory and where the words clearly

ces théories et a déclaré qu'en ce qui concerne la province de Québec toutes les lois doivent être publiées dans les deux langues.

. . .

. . . la loi est claire; elle dit «l'usage . . . sera obligatoire» et «seront imprimés». Il n'y a rien qui soit de nature directive dans ce langage. En outre, des droits linguistiques enchâssés sont par nature impératifs, jamais directifs. S'ils n'étaient que directifs, il y aurait danger que les personnes auxquelles ils s'adressent ne puissent jamais en profiter ou les exercer. Si la loi était directive, elle irait à l'encontre de l'enchâssement qui, de par sa nature même, est impératif. La jurisprudence qu'invoquent les avocats concernant la nature impérative ou directive de la législation ne s'applique pas à des droits enchâssés. Les entorses à la Constitution ne peuvent être tolérées.

(C'est nous qui soulignons.)

Les arrêts de cette Cour *Blaikie n° 1* et *Forest*, précités, que mentionne le juge Monnin dans l'extrait ci-dessus sont pas les seuls arrêts constitutionnels où l'on n'a pas appliqué la distinction entre ce qui est impératif ou directif. Par exemple, dans l'arrêt *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, le Conseil privé n'a pas mentionné cette distinction en décidant qu'une loi qui n'avait pas été adoptée suivant [TRADUCTION] «les modalités et la forme» requises en matière constitutionnelle était invalide. On pourrait également mentionner les nombreuses décisions américaines où on a invalidé des lois pour le motif qu'elles étaient inconstitutionnelles sans se donner la peine d'examiner la distinction entre ce qui est impératif ou directif, même si cette distinction occupe une place importante dans le droit américain relatif à l'interprétation des lois.

Cependant, ce qui est plus important que l'absence de jurisprudence justifiant l'application de la distinction entre ce qui est impératif ou directif aux dispositions constitutionnelles, c'est le tort qui serait causé à la suprématie de la Constitution canadienne si un principe aussi vague était utilisé comme expédient pour l'interpréter. Ce serait une entorse grave à la Constitution que de conclure qu'une disposition en apparence impérative doit être qualifiée de directive pour le motif qu'une conclusion en sens contraire entraînerait des inconvénients ou même le chaos. Lorsqu'il n'y a aucune

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indicate that the provision is mandatory, there is no room for interpreting the provision as directory.

In answer to Question 1, s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are mandatory.

V

Questions 2 and 3

Question 2 asks whether the unilingual statutes and regulations of Manitoba are invalid. Question 3 asks about the force and effect of these statutes and regulations if they are found to be invalid. Before addressing the consequences of the Manitoba Legislature's failure to enact its laws in both French and English, it will be necessary to determine what is encompassed by the words "Acts of the Legislature" in s. 23 of the *Manitoba Act, 1870*.

A) *The Meaning of "Acts of the Legislature"*

The requirements of s. 23 of the *Manitoba Act, 1870* pertain to "Acts of the Legislature". These words are, in all material respects, identical to those found in s. 133 of the *Constitution Act, 1867*. As we have already indicated, in *Blaikie No. 2, supra*, this Court held that s. 133 applied to regulations enacted by the Government of Quebec, a Minister of the Government or a group of Ministers and to regulations of the civil administration and of semi-public agencies which required the approval of that Government, a Minister or group of Ministers for their legal effect. It was emphasized that only those regulations which could properly be called "delegated legislation" fell within the scope of s. 133; rules or directives of internal management did not. It was also held that s. 133 applied to rules of practice enacted by courts and quasi-judicial tribunals, but that it did not apply to the by-laws of municipal bodies or the regulations of school bodies.

Given the similarity of the provisions, the range of application of s. 23 of the *Manitoba Act, 1870*,

indication textuelle qu'une disposition constitutionnelle est directive et lorsqu'il ressort clairement de ses termes qu'elle est impérative, il n'y a pas lieu d'interpréter cette disposition comme étant directive.

En réponse à la question n° 1, l'art. 23 de la *Loi de 1870 sur le Manitoba* et l'art. 133 de la *Loi constitutionnelle de 1867* sont impératifs.

V

Questions n°s 2 et 3

À la question n° 2, on demande si les lois et les règlements unilingues du Manitoba sont invalides. La question n° 3 porte sur le caractère opérant de ces lois et de ces règlements dans l'hypothèse où ils seraient jugés invalides. Avant d'examiner les conséquences de l'omission de la législature du Manitoba d'adopter ses lois à la fois en français et en anglais, il sera nécessaire de déterminer ce que vise l'expression «actes de la législature» que l'on trouve à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

A) *Le sens de l'expression «actes de la législature»*

Les exigences de l'art. 23 de la *Loi de 1870 sur le Manitoba* concernent les «actes de la législature». Cette expression est essentiellement identique à celle qu'emploie l'art. 133 de la *Loi constitutionnelle de 1867*. Comme nous l'avons déjà souligné, dans l'arrêt *Blaikie n° 2*, précité, cette Cour a conclu que l'art. 133 s'applique aux règlements adoptés par le gouvernement du Québec, un ministre ou un groupe de ministres ainsi qu'aux règlements de l'Administration et des organismes parapublics qui, pour entrer en vigueur, nécessitent l'approbation de ce gouvernement, d'un ministre ou d'un groupe de ministres. Cette Cour a souligné que l'art. 133 vise uniquement les règlements qui constituent de la «législation déléguée» proprement dite et non pas les règles ou directives de régie interne. On a également conclu que l'art. 133 s'applique aux règles de pratique adoptées par les tribunaux judiciaires et quasi judiciaires, mais qu'il ne s'applique pas aux règlements d'organismes municipaux ou scolaires.

Vu la similitude de ces dispositions, la portée de l'art. 23 de la *Loi de 1870 sur le Manitoba* doit

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should parallel that of s. 133 of the *Constitution Act, 1867*. All types of subordinate legislation that in Quebec would be subject to s. 133 of the *Constitution Act, 1867*, are, in Manitoba, subject to s. 23 of the *Manitoba Act, 1870*.

In this judgment, all references to "Acts of the Legislature" are intended to encompass all statutes, regulations and delegated legislation of the Manitoba Legislature, enacted since 1890, that are covered by this Court's judgments in *Blaikie No. 1* and *Blaikie No. 2*.

B) *The Consequences of the Manitoba Legislature's Failure to Enact, Print and Publish in both Languages*

Section 23 of the *Manitoba Act, 1870* entrenches a mandatory requirement to enact, print, and publish all Acts of the Legislature in both official languages (see *Blaikie No. 1, supra*). It establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of its legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language.

Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The constitutional entrenchment of a duty on the Manitoba Legislature to enact, print and publish in both French and English in s. 23 of the *Manitoba Act, 1870* confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Fran-

correspondre à celle de l'art. 133 de la *Loi constitutionnelle de 1867*. Toute législation déléguée qui, au Québec, serait assujettie à l'art. 133 de la *Loi constitutionnelle de 1867* est, au Manitoba, assujettie à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Dans les présents motifs, toute mention des «actes de la législature» est destinée à englober toutes les lois, tous les règlements et toute la législation déléguée adoptés par la législature du Manitoba depuis 1890, auxquels s'appliquent les arrêts *Blaikie n° 1* et *Blaikie n° 2* de cette Cour.

B) *Les conséquences de l'omission de la législature du Manitoba de procéder à l'adoption, à l'impression et à la publication dans les deux langues*

L'article 23 de la *Loi de 1870 sur le Manitoba* enchâsse une exigence impérative d'adopter, d'imprimer et de publier dans les deux langues officielles toutes les lois de la Législature (voir l'arrêt *Blaikie n° 1*, précité). Il impose à la législature du Manitoba une obligation constitutionnelle quant aux modalités et à la forme de l'adoption de ses lois. Cette obligation a pour effet de protéger les droits fondamentaux de tous les Manitobains à l'égalité de l'accès à la loi dans l'une ou l'autre des langues française ou anglaise.

L'article 23 de la *Loi de 1870 sur le Manitoba* est une manifestation spécifique du droit général qu'ont les Franco-manitobains de s'exprimer dans leur propre langue. L'importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain. C'est par le langage que nous pouvons former des concepts, structurer et ordonner le monde autour de nous. Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société.

L'enchâssement constitutionnel, à l'art. 23 de la *Loi de 1870 sur le Manitoba*, d'une obligation pour la législature du Manitoba de procéder à l'adoption, à l'impression et à la publication dans les langues française et anglaise a pour effet d'imposer au pouvoir judiciaire la responsabilité de

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co-Manitoban minority. The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

As this Court said in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590:

> A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

(Emphasis added.)

See also *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (the *Patriation Reference*), at pp. 841, 848, 877.

Since April 17, 1982, the mandate of the judiciary to protect the Constitution has been embodied

protéger les droits corrélatifs que possèdent en matière linguistique tous les Manitobains, y compris la minorité franco-manitobaine. C'est au pouvoir judiciaire qu'il incombe d'assurer que le gouvernement observe la Constitution. Nous devons protéger les personnes dont les droits constitutionnels sont violés, quelles que soient ces personnes et quelles que soient les raisons de cette violation.

La Constitution d'un pays est l'expression de la volonté du peuple d'être gouverné conformément à certains principes considérés comme fondamentaux et à certaines prescriptions qui restreignent les pouvoirs du corps législatif et du gouvernement. Elle est, comme le déclare l'art. 52 de la *Loi constitutionnelle de 1982*, la «loi suprême» de notre pays, qui ne peut être modifiée par le processus législatif normal et qui ne tolère aucune loi incompatible avec elle. Il appartient au pouvoir judiciaire d'interpréter et d'appliquer les lois du Canada et de chacune des provinces et il est donc de notre devoir d'assurer que la loi constitutionnelle a préséance.

Comme l'affirme cette Cour dans l'arrêt *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576, à la p. 590:

> On dit qu'un État est souverain et qu'il n'appartient pas aux tribunaux de juger de la raison d'être ni de la sagesse de la volonté expresse du législateur. En tant que déclaration de principe, c'est indubitablement exact, mais dans un État fédéral, le principe général doit céder devant les exigences de la constitution qui définit les limites de la souveraineté et de la suprématie. Les tribunaux ne mettront pas en doute la sagesse des textes législatifs qui, aux termes de la Constitution canadienne, relèvent de la compétence des législatures, mais une des hautes fonctions de cette Cour est de s'assurer que les législatures n'outrepassent pas les limites de leur mandat constitutionnel et n'exercent pas illégalement certains pouvoirs.

(C'est nous qui soulignons.)

Voir également *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753 (ci-après le *Renvoi sur le rapatriement*), aux pp. 841, 848 et 877.

Depuis le 17 avril 1982, le mandat du pouvoir judiciaire de protéger la Constitution est enchâssé

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in s. 52 of the *Constitution Act, 1982*. This section reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Prior to enactment of the *Constitution Act, 1982*, the governing provision was, pursuant to the *Statute of Westminster, 1931*, s. 2 of the *Colonial Laws Validity Act, 1865*, 1865 (U.K.), 28 & 29 Vict., c. 63, which provides:

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(Emphasis added.)

The constitutional jurisprudence, developed under the *Colonial Laws Validity Act, 1865*, was based on the invalidity doctrine. If Parliament or a provincial legislature was *ultra vires* its constitutionally allocated powers in enacting a certain Act, then the repugnancy of that Act with the provisions of the *British North America Act, 1867* would mean that the Act was "absolutely void and inoperative".

Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.

Canadian courts have been unanimous in finding that failure to respect mandatory requirements to enact, print and publish statutes and regulations in both official languages leads to inconsistency

à l'art. 52 de la *Loi constitutionnelle de 1982*, qui se lit ainsi:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Avant l'adoption de la *Loi constitutionnelle de 1982*, la disposition applicable était, conformément au *Statut de Westminster, 1931*, l'art. 2 de la *Loi de 1865 relative à la validité des lois des colonies*, 1865 (R.-U.), 28 & 29 Vict., chap. 63, lequel dispose:

[TRADUCTION] **2.** Toute loi coloniale qui est ou sera de quelque façon incompatible avec les dispositions d'une loi du Parlement applicable à la Colonie d'où provient cette loi, ou incompatible avec une ordonnance ou un règlement adopté en vertu de ladite loi du Parlement, ou ayant dans la Colonie l'effet de ladite loi, doit s'interpréter sous réserve desdits loi, ordonnance ou règlement et sera absolument nulle et inopérante, mais seulement dans la mesure de cette incompatibilité.

(C'est nous qui soulignons.)

La théorie juridique en matière constitutionnelle, établie sous le régime de la *Loi de 1865 relative à la validité des lois des colonies*, était fondée sur le principe de l'invalidité. Si le Parlement ou une législature provinciale outrepassait les pouvoirs que lui conférait la Constitution en adoptant une loi donnée, alors l'incompatibilité de cette loi avec les dispositions de l'*Acte de l'Amérique du Nord britannique, 1867* faisait en sorte que la loi en question était «absolument nulle et inopérante».

L'article 52 de la *Loi constitutionnelle de 1982* ne modifie pas les principes qui, au cours des années, ont constitué le fondement du contrôle judiciaire. Dans un cas où on n'a pas respecté les modalités et la forme requises en matière constitutionnelle, l'invalidité continue d'être la conséquence de ce non-respect. Le mot «inopérantes» signifie qu'une règle de droit ainsi incompatible avec la Constitution est inopérante pour cause d'invalidité.

Les tribunaux canadiens sont unanimes à conclure que l'omission de se conformer aux exigences impératives de l'adoption, de l'impression et de la publication des lois et règlements dans les deux

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and thus invalidity. See, *Société Asbestos Ltée v. Société nationale de l'amiante*, *supra*; *Procureur général du Québec v. Collier*, [1983] C.S. 366; *Procureur général du Québec v. Brunet*, J.E. 83-510, reversed on other grounds, J.E. 84-62 (S.C.) These cases accord with the general principle that failure to comply with constitutional provisions dealing with the manner and form of the enactment of legislation will result in inconsistency and thus invalidity. See *Bribery Commissioner v. Ranasinghe*, *supra*.

In the present case the unilingual enactments of the Manitoba Legislature are inconsistent with s. 23 of the *Manitoba Act, 1870* since the constitutionally required manner and form for their enactment has not been followed. Thus they are invalid and of no force or effect.

C) *The Rule of Law*

1. The Principle

The difficulty with the fact that the unilingual Acts of the Legislature of Manitoba must be declared invalid and of no force or effect is that, without going further, a legal vacuum will be created with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. Thus, to find that the unilingual laws of Manitoba are invalid and of no force or effect would mean that only laws enacted in both French and English *before 1890*, would continue to be valid, and would still be in force even if the law had purportedly been repealed or amended by a post-1890 unilingual statute; matters that were not regulated by laws enacted before 1890 would now be unregulated by law, unless a pre-confederation law or the common law provided a rule.

The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from

langues officielles entraîne l'incompatibilité et ainsi l'invalidité. Voir *Société Asbestos Ltée. c. Société nationale de l'amiante*, précité; *Procureur général du Québec c. Collier*, [1983] C.S. 366; *Procureur général du Québec c. Brunet*, J.E. 83-510, infirmé pour d'autres motifs, J.E. 84-62 (C.S.) Ces affaires s'accordent avec le principe général portant que l'omission d'observer les dispositions constitutionnelles relatives aux modalités et à la forme de l'adoption des lois entraîne l'incompatibilité et ainsi l'invalidité. Voir l'arrêt *Bribery Commissioner v. Ranasinghe*, précité.

En l'espèce, les textes législatifs adoptés dans une seule langue par la législature du Manitoba sont incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* étant donné que les exigences constitutionnelles quant aux modalités et à la forme de leur adoption n'ont pas été respectées. Ils sont donc invalides et inopérants.

C) *La primauté du droit*

1. Le principe

Le problème que pose le fait que les lois unilingues de la législature du Manitoba doivent être déclarées invalides et inopérantes est, sans plus, le vide juridique que cela engendrera et le chaos qui s'ensuivra en la matière dans la province du Manitoba. Depuis 1890, la législature du Manitoba a adopté presque toutes ses lois en anglais seulement. Donc, conclure que les lois unilingues du Manitoba sont invalides et inopérantes signifierait que seules les lois adoptées dans les langues française et anglaise *avant 1890* demeureraient valides et seraient toujours opérantes même si elles sont censées avoir été abrogées ou modifiées par une loi unilingue postérieure à 1890. Les matières qui n'ont pas été abordées par des lois adoptées avant 1890 ne seraient désormais régies par aucune loi à moins qu'une règle ne soit prévue par une loi antérieure à la Confédération ou par la *common law*.

La situation des diverses institutions du gouvernement provincial serait la suivante: les tribunaux administratifs ou judiciaires, les officiers publics, les municipalités, les commissions scolaires, les corps professionnels et tous les autres organismes créés par la loi, dans la mesure où ils doivent leur

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or purport to exercise powers conferred by Manitoba laws enacted since 1890 in English only, would be acting without legal authority.

Questions as to the validity of the present composition of the Manitoba Legislature might also be raised. Under the *Manitoba Act, 1870*, the Legislative Assembly was to be composed of 24 members (s. 14), and voters were to be male and over 21 (s. 17). By laws enacted after 1890 in English only, the size of the Legislative Assembly was increased to 57 members, and all persons, both women and men, over 18 were granted the right to vote: see *Act to amend "The Manitoba Election Act"*, 1916 (Man.), c. 36; *Act to amend "The Election Act"*, 1969 (Man.), 2nd Sess., c. 7; *The Legislative Assembly Act*, R.S.M. 1970, c. L110, s. 4(1). If these laws are invalid and of no force or effect, the present composition of the Manitoba Legislature might be invalid. The invalidity of the post-1890 laws would not touch the existence of the Legislature or its powers since these are matters of federal constitutional law: *Constitution Act, 1867*, ss. 92, 92A, 93, 95; *Manitoba Act, 1870*, s. 2.

Finally, all legal rights, obligations and other effects which have purportedly arisen under all Acts of the Manitoba Legislature since 1890 would be open to challenge to the extent that their validity and enforceability depends upon a regime of unconstitutional unilingual laws.

In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must

existence à des lois du Manitoba adoptées après 1890 en anglais seulement ou sont censés exercer des pouvoirs conférés par ces lois, agiraient illégalement.

On pourrait également mettre en doute la validité de la composition actuelle de la législature du Manitoba. Selon la *Loi de 1870 sur le Manitoba*, l'Assemblée législative devait être composée de 24 membres (art. 14) et avaient droit de vote les personnes du sexe masculin âgées de 21 ans et plus (art. 17). En vertu de lois adoptées après 1890 en anglais seulement, le nombre des membres de l'Assemblée législative a été porté à 57, et toute personne, femme ou homme, âgée d'au moins 18 ans s'est vu accorder le droit de vote: voir *Act to amend «The Manitoba Election Act»*, 1916 (Man.), chap. 36; *Act to amend «The Election Act»*, 1969 (Man.), 2e Sess., chap. 7; *The Legislative Assembly Act*, R.S.M. 1970, chap. L110, par. 4(1). Si ces lois sont invalides et inopérantes, il se pourrait que la composition actuelle de la législature du Manitoba soit invalide. L'invalidité des lois postérieures à 1890 ne porterait pas atteinte à l'existence de la Législature ou à ses pouvoirs puisque ce sont là des questions de droit constitutionnel fédéral: *Loi constitutionnelle de 1867*, art. 92, 92A, 93, 95; *Loi de 1870 sur le Manitoba*, art. 2.

Enfin, tous les droits, obligations et autres effets qui sont censés avoir découlé de toutes les lois adoptées par la législature du Manitoba depuis 1890 seraient susceptibles d'être contestés dans la mesure où leur validité et leur caractère exécutoire dépendent d'un ensemble de lois unilingues inconstitutionnelles.

En l'espèce, déclarer les lois de la législature du Manitoba invalides et inopérantes aurait pour effet, sans plus, de miner le principe de la primauté du droit. La primauté du droit, qui constitue un principe fondamental de notre Constitution, doit signifier au moins deux choses. En premier lieu, que le droit est au-dessus des autorités gouvernementales aussi bien que du simple citoyen et exclut, par conséquent, l'influence de l'arbitraire. En réalité, c'est à cause de la suprématie du droit sur le gouvernement, établie par l'art. 23 de la *Loi de 1870 sur le Manitoba* et l'art. 52 de la *Loi*

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find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies . . . simply the existence of public order." (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43). As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), at p. 577). According to Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89: " . . . the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions".

It is this second aspect of the rule of law that is of concern in the present situation. The conclusion that the Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 will be destroyed and the rights, obligations and other effects arising under these laws will be invalid and unenforceable. As for the future, since it is reasonable to assume that it will be impossible for the Legislature of Manitoba to rectify *instantaneously* the constitutional defect, the Acts of the Manitoba Legislature will be invalid and of no force or effect until they are translated, re-enacted, printed and published in both languages.

Such results would certainly offend the rule of law. As we stated in the *Patriation Reference*, *supra*, at pp. 805-06:

constitutionnelle de 1982, que cette Cour doit conclure que les lois inconstitutionnelles du Manitoba sont invalides et inopérantes.

En second lieu, la primauté du droit exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif. L'ordre public est un élément essentiel de la vie civilisée. [TRADUCTION] «La primauté du droit en ce sens sous-tend . . simplement l'existence de l'ordre public.» (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), à la p. 43.) Comme l'a déjà dit John Locke, [TRADUCTION] «Un gouvernement sans lois est, je suppose, un mystère politique, inconcevable pour l'esprit humain et incompatible avec la société des hommes». (Cité par lord Wilberforce dans *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), à la p. 577.) Selon Wade et Phillips dans *Constitutional and Administrative Law* (9th ed. 1977), à la p. 89: [TRADUCTION] « . . . la primauté du droit exprime la préférence pour l'ordre public dans une société plutôt que pour l'anarchie, la guerre et les luttes incessantes. En ce sens, la primauté du droit est une perception philosophique de la société qui, dans la tradition occidentale, est liée aux notions fondamentales de démocratie».

C'est ce second aspect de la primauté du droit qui est en cause dans la présente situation. La conclusion que les lois de la législature du Manitoba sont invalides et inopérantes signifie que l'ordre de droit positif qui est censé avoir réglementé les affaires des habitants du Manitoba depuis 1890 se trouvera détruit et que les droits, obligations et autres effets découlant de ces règles de droit seront invalides et non exécutoires. Quant à l'avenir, puisqu'il est raisonnable de présumer qu'il sera impossible à la législature du Manitoba de corriger *instantanément* ce vice d'ordre constitutionnel, les lois de la législature du Manitoba seront invalides et inopérantes jusqu'à ce qu'elles aient été traduites, adoptées de nouveau, imprimées et publiées dans les deux langues.

Une telle conséquence serait certainement contraire à la primauté du droit. Comme nous l'avons dit dans le *Renvoi sur le rapatriement*, précité, aux pp. 805 et 806:

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The "rule of law" is a highly textured expression ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.

(Emphasis added.)

Dr. Raz has said: " 'The rule of law' means literally what it says: the rule of the law .... It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it" (*The Authority of Law* (1979), at pp. 212-13). The rule of law simply cannot be fulfilled in a province that has no positive law.

The constitutional status of the rule of law is beyond question. The preamble to the *Constitution Act, 1982* states:

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

(Emphasis added.)

This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (*per* Rand J., *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".

Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be

La «règle de droit» est une expression haute en couleur qui ... communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale.

(C'est nous qui soulignons.)

Monsieur Raz a affirmé: La ««primauté du droit» signifie littéralement ce que l'expression dit: la primauté du droit ... L'expression signifie deux choses: (1) que les gens doivent être régis par le droit et tenus d'y obéir et (2) que le droit doit être de nature à pouvoir servir de guide aux gens» (*The Authority of Law* (1979), aux pp. 212 et 213). Il ne peut y avoir de primauté du droit dans une province qui n'a aucune règle de droit positif.

Le statut constitutionnel de la primauté du droit est incontestable. Le préambule de la *Loi constitutionnelle de 1982* déclare:

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit:

(C'est nous qui soulignons.)

Il y a là reconnaissance explicite que [TRADUCTION] «la primauté du droit [est] un des postulats fondamentaux de notre structure constitutionnelle» (le juge Rand, *Roncarelli v. Duplessis*, [1959] R.C.S. 121, à la p. 142). La primauté du droit a toujours été considérée comme le fondement même de la Constitution anglaise qui caractérise les institutions politiques d'Angleterre depuis l'époque de la conquête normande (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), à la p. 183). Elle devient un postulat de notre propre structure constitutionnelle en raison du préambule de la *Loi constitutionnelle de 1982* et de son inclusion implicite dans le préambule de la *Loi constitutionnelle de 1867*, en vertu des mots «avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni».

En plus de l'inclusion de la primauté du droit dans le préambule des *Lois constitutionnelles* de 1867 et de 1982, le principe est nettement implicite de par la nature même d'une constitution. La Constitution, en tant que loi suprême, doit être interprétée comme un aménagement fonctionnel des relations sociales qui sert de fondement à

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brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.

The Court has in the past inferred constitutional principles from the preambles to the Constitution Acts and the general object and purpose of the Constitution. In the *Patriation Reference*, *supra*, the Court found the federal principle to be inherent in the Constitution in this way. At pages 905-06 the Court said:

> The reason for the rule is the federal principle. Canada is a federal union. The preamble of the *B.N.A. Act* states that
>
> ... the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united ...
>
> The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. We will quote only one, that of Lord Watson in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437, at pp. 441-42:
>
> > The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change to ... (the) constitution

l'existence d'un ordre réel de droit positif. Les fondateurs de notre pays ont certainement voulu, entre autres principes fondamentaux d'édification nationale, que le Canada soit une société où règne l'ordre juridique et dotée d'une structure normative: une société soumise à la primauté du droit. Même s'il ne fait pas l'objet d'une disposition précise, le principe de la primauté du droit est nettement un principe de notre Constitution.

Cette Cour ne peut interpréter la Constitution de façon étroite et littérale. La jurisprudence de la Cour démontre sa volonté de compléter l'analyse textuelle par une interprétation de l'historique, du contexte et de l'objet de notre Constitution dans le but de déterminer l'intention de ses auteurs.

Par le passé, la Cour a dégagé des principes constitutionnels des préambules des lois constitutionnelles et de l'objet général de la Constitution. C'est ainsi que, dans le *Renvoi sur le rapatriement*, précité, la Cour a conclu que le principe fédéral est inhérent à la Constitution. La Cour affirme, aux pp. 905 et 906:

> La raison d'être de la règle est le principe fédéral. Le Canada est une union fédérale. Le préambule de l'*A.A.N.B.* énonce que
>
> ... les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale ...
>
> D'innombrables déclarations judiciaires reconnaissent le caractère fédéral de la constitution canadienne. Nous n'en citerons qu'une, celle de lord Watson dans l'arrêt *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 aux pp. 441 et 442:
>
> > [TRADUCTION] Le but de l'Acte n'était pas de fusionner les provinces en une seule ni de subordonner les gouvernements provinciaux à une autorité centrale, mais de créer un gouvernement fédéral dans lequel elles seraient toutes représentées et auquel serait confiée de façon exclusive l'administration des affaires dans lesquelles elles avaient un intérêt commun, chaque province conservant son indépendance et son autonomie.
>
> Le principe fédéral est irréconciliable avec un état des affaires où l'action unilatérale des autorités fédérales peut entraîner la modification des pouvoirs législatifs provinciaux. Il irait vraiment à l'encontre du principe fédéral qu'«un changement radical de (la) constitution

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(be) taken at the request of a bare majority of the members of the Canadian House of Commons and Senate" (Report of Dominion Provincial Conference, 1931, at p. 3).

Martland and Ritchie JJ. in their dissent stated (at p. 841):

However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.

They went on to discuss a number of the more important decisions rendered by this Court and conclude with the following (at pp. 844-45):

It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the *British North America Acts* or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax (supra)* case at p. 591, that "There are no Canadian constitutional law precedents addressed directly to the present issue . . . ".

(Emphasis added.)

In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*, *supra*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.

2) Application of the Principle of the Rule of Law

It is clear from the above that: (i) the law as stated in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982* requires that the unilingual Acts of the Manitoba Legislature be declared to be invalid and of no force or effect, and

(soit) décidé à la demande d'une simple majorité des membres de la Chambre des communes et du Sénat canadiens» (Compte rendu de la conférence Dominion-provinces de 1931, à la p. 3).

Dans leur opinion dissidente, les juges Martland et Ritchie affirment (à la p. 841):

Toutefois, à l'occasion, cette Cour a eu à examiner des questions pour lesquelles l'*A.A.N.B.* n'offrait aucune réponse. Dans chaque cas, elle a rejeté la revendication de pouvoir qui porterait atteinte aux principes fondamentaux de la Constitution.

Puis ils poursuivent en analysant certains des arrêts les plus importants rendus par cette Cour et concluent de la façon suivante (aux pp. 844 et 845):

On peut noter que dans les cas susmentionnés, les principes et doctrines juridiques élaborés par le judiciaire ont plusieurs points communs. Premièrement, aucun ne figure dans les dispositions expresses des *Actes de l'Amérique du Nord britannique* ni dans d'autres textes constitutionnels. Deuxièmement, on a considéré qu'ils représentent tous des exigences constitutionnelles découlant du caractère fédéral de la Constitution du Canada. Troisièmement, on leur a accordé à tous un plein effet juridique, c'est-à-dire qu'on les a utilisés pour faire annuler des textes de loi. Quatrièmement, ils ont tous été élaborés par le judiciaire pour répondre à une initiative législative particulière à l'égard de laquelle on pourrait dire, comme le fait le juge Dickson dans l'affaire *Amax* (précitée) à la p. 591, que: «La jurisprudence en droit constitutionnel canadien n'a jamais traité directement de cette question . . . ».

(C'est nous qui soulignons.)

En d'autres termes, dans les décisions constitutionnelles, la Cour peut tenir compte des postulats non écrits qui constituent le fondement même de la Constitution du Canada. Dans le cas du *Renvoi sur le rapatriement*, précité, ce postulat non écrit était le principe du fédéralisme. Dans le cas présent, c'est le principe de la primauté du droit.

2) Application du principe de la primauté du droit

Il ressort clairement de ce qui précède que (i) la règle de droit énoncée à l'art. 23 de la *Loi de 1870 sur le Manitoba* et à l'art. 52 de la *Loi constitutionnelle de 1982* exige que les lois unilingues de la législature du Manitoba soient déclarées invalides

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(ii) without more, such a result would violate the rule of law. The task the Court faces is to recognize the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the "supreme law" of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.

A number of the parties and interveners have suggested that the Court declare the unilingual Acts of the Manitoba Legislature to be invalid and of no force or effect and leave it at that, relying on the legislatures to work out a constitutional amendment. This approach because it would rely on a future and uncertain event, would be inappropriate. A declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law. For the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution.

Other solutions suggested by the parties and interveners are equally unsatisfactory. Counsel for the Attorney General of Manitoba argues that the linguistic rights guaranteed by s. 23 of the *Manitoba Act, 1870* can be protected by the Lieutenant-Governor of the province, who can either withhold royal assent to a unilingual bill or reserve the bill for the signification of the Governor General's pleasure: *Constitution Act, 1867*, ss. 55, 57, 90. See also *Manitoba Act, 1870*, s. 2. Though this legal power continues to exist, it has not been exercised in recent years. See, *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] S.C.R. 71.

The fundamental difficulty with the Attorney General of Manitoba's suggestion is that it would make the executive branch of the federal government, rather than the courts, the guarantor of constitutionally entrenched language rights. It should be noted that a decision of a provincial Lieutenant-Governor as to whether to withhold assent or reserve a bill is not reviewable by the courts: *Reference re Disallowance and Reservation*

et inopérantes et que (ii), sans plus, un tel résultat irait à l'encontre de la primauté du droit. La Cour est appelée à reconnaître l'inconstitutionnalité des lois unilingues du Manitoba et le devoir de la Législature de se conformer à la «loi suprême» de notre pays, tout en évitant de créer un vide juridique au Manitoba et tout en assurant le maintien de la primauté du droit.

Un certain nombre de parties et d'intervenants ont proposé que la Cour déclare invalides et inopérantes les lois unilingues de la législature du Manitoba et en reste là, en comptant sur les législatures pour mettre au point une modification constitutionnelle. Parce qu'elle dépend d'un événement futur et incertain, cette solution serait inadéquate. Une déclaration que les lois du Manitoba sont invalides et inopérantes priverait le Manitoba de son ordre sur le plan juridique et causerait un manquement au principe de la primauté du droit. En permettant à une telle situation de survenir et en omettant d'y remédier, cette Cour renoncerait à ses fonctions de protectrice et de gardienne de la Constitution.

Les autres solutions proposées par les parties et les intervenants ne sont pas plus satisfaisantes. L'avocat du procureur général du Manitoba soutient que les droits linguistiques garantis par l'art. 23 de la *Loi de 1870 sur le Manitoba* peuvent être protégés par le lieutenant-gouverneur de la province, qui peut soit refuser la sanction royale à un projet de loi unilingue, soit le réserver pour la signification du bon plaisir du gouverneur général: *Loi constitutionnelle de 1867*, art. 55, 57 et 90. Voir aussi *Loi de 1870 sur le Manitoba*, art. 2. Bien que ce pouvoir légal existe toujours, il n'a pas été exercé au cours des dernières années. Voir *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] R.C.S. 71.

Le problème fondamental que pose la thèse du procureur général du Manitoba est qu'elle ferait de l'organe exécutif du gouvernement fédéral, plutôt que des tribunaux, le garant des droits linguistiques enchâssés dans la Constitution. Il faut souligner que la décision du lieutenant-gouverneur d'une province de refuser la sanction royale ou de réserver un projet de loi n'est pas susceptible de révision par les tribunaux: *Reference*

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of Provincial Legislation, *supra*, at p. 95. The overall effect of implementing the suggestion of the Attorney General of Manitoba would be to insulate the Legislature's failure to comply with s. 23 of the *Manitoba Act, 1870* from judicial review. Such a result would be entirely inconsistent with the judiciary's duty to uphold the Constitution.

Similar considerations would apply to the six Manitoba citizen interveners' contention that the federal power of disallowance in the *Constitution Act, 1867* could be used as an alternative to judicial invalidation. This is not an appropriate alternative solution because it asks the Court to abdicate its responsibility to enforce the dictates of the Constitution.

The only appropriate resolution to this Reference is for the Court to fulfill its duty under s. 52 of the *Constitution Act, 1982* and declare all the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect and then to take such steps as will ensure the rule of law in the Province of Manitoba.

There is no question that it would be impossible for all the Acts of the Manitoba Legislature to be translated, re-enacted, printed and published overnight. There will necessarily be a period of time during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*.

The vexing question, however, is what will be the legal situation in the Province of Manitoba for the duration of this period. The difficulties faced by the Province of Manitoba are two-fold: first, all of the rights, obligations and other effects which have arisen under the repealed, spent and current Acts of the Manitoba Legislature will be open to challenge, since the laws under which they purportedly arise are invalid and of no force or effect; and, second, the Province of Manitoba has an invalid and therefore ineffectual legal system until

re Disallowance and Reservation of Provincial Legislation, précité, à la p. 95. La mise en oeuvre de la proposition du procureur général du Manitoba aurait pour effet global de soustraire au contrôle judiciaire l'omission de la Législature de se conformer à l'art. 23 de la *Loi de 1870 sur le Manitoba*. Un tel résultat serait tout à fait incompatible avec le devoir du pouvoir judiciaire de faire respecter la Constitution.

Des considérations analogues s'appliqueraient à la prétention des six citoyens intervenants du Manitoba selon laquelle le pouvoir fédéral de désaveu prévu dans la *Loi constitutionnelle de 1867* pourrait servir de solution de rechange à l'invalidation judiciaire. Une telle solution de rechange n'est pas appropriée du fait qu'elle exige que la Cour renonce à la responsabilité qui lui incombe de faire respecter la Constitution.

Pour statuer sur le présent renvoi, la Cour ne peut que faire son devoir en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* et déclarer invalides et inopérantes toutes les lois unilingues de la législature du Manitoba et prendre ensuite les mesures nécessaires pour garantir la primauté du droit dans la province du Manitoba.

Il n'y a pas de doute qu'il sera impossible de traduire, d'adopter de nouveau, d'imprimer et de publier toutes les lois de la législature du Manitoba du jour au lendemain. Il y aura nécessairement un intervalle au cours duquel il sera impossible à la législature du Manitoba de se conformer à l'obligation constitutionnelle qui lui incombe en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba*.

La question épineuse qui se pose cependant est de savoir quelle sera la situation juridique de la province du Manitoba durant cet intervalle. Le problème auquel fait face la province du Manitoba est double: en premier lieu, tous les droits, obligations et autres effets découlant des lois abrogées, périmées ou actuelles de la législature du Manitoba seront susceptibles d'être contestés puisque les lois dont ils sont censés découler sont invalides et inopérantes; en second lieu, le système juridique de la province du Manitoba est invalide et donc

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the Legislature is able to translate, re-enact, print and publish its current Acts.

With respect to the first of these problems, it was argued by a number of the parties and interveners that the *de facto* doctrine might be used to uphold the rights, obligations and other effects which have purportedly arisen under the unilingual Acts of the Manitoba Legislature since 1890.

The *de facto* doctrine is defined by Judge Albert Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4 as follows:

> The de facto doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage.

That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):

> Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the

inefficace jusqu'à ce que la Législature soit en mesure de traduire, d'adopter de nouveau, d'imprimer et de publier ses lois actuelles.

Quant à la première de ces difficultés, un certain nombre de parties et d'intervenants ont fait valoir qu'on pourrait recourir au principe de la validité *de facto* pour maintenir les droits, obligations et autres effets qui sont censés avoir découlé des lois unilingues de la législature du Manitoba depuis 1890.

Dans l'ouvrage intitulé *The De Facto Doctrine* (1910), aux pp. 3 et 4, le juge Albert Constantineau définit ainsi le principe de la validité *de facto*:

> [TRADUCTION] Le principe de la validité *de facto* est une règle ou un principe de droit qui, premièrement, justifie la reconnaissance de l'autorité des gouvernements établis et maintenus par des gens qui ont usurpé le pouvoir souverain de l'État et se sont imposés par la force et les armes contre le gouvernement légitime; qui, deuxièmement, reconnaît l'existence, les protégeant d'une contestation indirecte, des corps publics ou privés qui, bien qu'irrégulièrement ou illégalement constitués, sous apparence de légalité, exercent ouvertement les pouvoirs et fonctions des corps régulièrement constitués; et, qui troisièmement, valide les actes officiels des personnes qui, sous apparence de droit ou d'autorité, exercent une charge au sein des gouvernements ou corps précités, ou exercent une charge légitime de quelque nature que ce soit, dans laquelle le public ou des tiers sont intéressés, lorsque l'accomplissement de ces actes officiels est au profit du public ou de tiers et non pour leur propre avantage personnel.

Le juge Constantineau dit clairement que ce principe a pour fondement le principe supérieur de la primauté du droit (aux pp. 5 et 6):

> [TRADUCTION] Ici encore, le principe est nécessaire au maintien de la primauté du droit et à la préservation de la paix et de l'ordre dans la société en général, car toute autre règle susciterait une incertitude et une confusion de nature à anéantir l'ordre et la tranquillité de toute administration civile. D'ailleurs, si un individu ou un groupe d'individus étaient autorisés, selon leur bon plaisir, à contester l'autorité de l'État et des divers fonctionnaires par lesquels il exerce ses nombreux pouvoirs, et à refuser de leur obéir, ou à refuser de reconnaître les corps municipaux et leurs officiers, en raison de leur existence irrégulière ou pour vice de titres, l'insubordi-

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worst kind would be encouraged, which might at any time culminate in anarchy.

The *de facto* doctrine is of ancient and venerable origin. The first reported English case was the *Abbé de Fontaine's Case* (1431), Y.B. 9 H. VI., fol. 32. The doctrine's utility was even recognized by the Romans. See A.M. Honore, "Reflections on Revolutions" (1967), 2 *Irish Jurist* 268 at p. 269. See also, *Scadding v. Lorant* (1851), 3 H.L.C. 418, 10 E.R. 164 (H.L.); *R. v. Slythe* (1827), 6 B. & C. 240, 108 E.R. 441, at p. 444; *Margate Pier Co. v. Hannam* (1819), 3 B. & Ald. 266, 106 E.R. 661, at p. 663.

The *de facto* doctrine has long been accepted in Canada. In *O'Neil v. Attorney-General of Canada* (1896), 26 S.C.R. 122, at p. 130, Chief Justice Strong said: "The rule of law is 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". See also *Turtle v. Township of Euphemia* (1900), 31 O.R. 404; *R. v. Gibson* (1896), 29 N.S.R. 4; see generally cases collected in Constantineau, *supra*, at p. 20, note 35.

There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority. This is consistent with the rationale for the doctrine, *viz.*, that the members of the public with whom the officer dealt relied upon his ostensible status. Simply put, "[a]n officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law". *R. v. Corporation of Bedford Level* (1805), 6 East 356, 102 E.R. 1323 at p. 1328 (*per* Lord Ellenborough C.J.). See also *Parker v. Kett* (1702), 1 Ld. Raym. 658, 91 E.R. 1338, at p. 1340.

The application of the *de facto* doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconnation et le désordre les plus graves seraient encouragés, ce qui, à tout moment, pourrait conduire à l'anarchie.

Le principe de la validité *de facto* est d'origine ancienne et vénérable. *Abbé de Fontaine's Case* (1431), Y.B. 9 H. VI., fol. 32, est le premier précédent anglais rapporté. Même les Romains avaient reconnu l'utilité de ce principe. Voir A.M. Honore, «Reflections on Revolutions» (1967), 2 *Irish Jurist* 268 à la p. 269. Voir également *Scadding v. Lorant* (1851), 3 H.L.C. 418, 10 E.R. 164 (H.L.); *R. v. Slythe* (1827), 6 B. & C. 240, 108 E.R. 441, à la p. 444; *Margate Pier Co. v. Hannam* (1819), 3 B. & Ald. 266, 106 E.R. 661, à la p. 663.

Le principe de la validité *de facto* est accepté depuis longtemps au Canada. Dans l'arrêt *O'Neil v. Attorney-General of Canada* (1896), 26 R.C.S. 122, à la p. 130, le juge en chef Strong affirme: [TRADUCTION] «Suivant la primauté du droit, les actes de celui qui assume l'exercice d'une charge à laquelle il n'a légalement aucun droit sont, à l'égard des tiers, ... légaux et ont force obligatoire». Voir aussi *Turtle v. Township of Euphemia* (1900), 31 O.R. 404, et *R. v. Gibson* (1896), 29 N.S.R. 4; voir en général la jurisprudence rassemblée dans l'ouvrage de Constantineau, précité, à la p. 20, note 35.

Il n'y a qu'une seule vraie condition préalable à l'application de ce principe: l'officier *de facto* doit occuper sa charge sous apparence d'autorité. Cela est conforme à la raison d'être du principe, savoir que les membres du public ayant traité avec l'officier se soient fiés à son statut apparent. Simplement, [TRADUCTION] «[l]'officier *de facto* est celui qui a la réputation d'être l'officier qu'il prétend être, quoiqu'il ne soit pas vraiment officier aux yeux du droit». *R. v. Corporation of Bedford Level* (1805), 6 East 356, 102 E.R. 1323, à la p. 1328 (le juge en chef lord Ellenborough). Voir aussi *Parker v. Kett* (1702), 1 Ld. Raym. 658, 91 E.R. 1338, à la p. 1340.

Le principe de la validité *de facto* n'a toutefois pour effet que de valider les actes posés en vertu d'une autorité invalide: il n'a pas pour effet de valider l'autorité en vertu de laquelle les actes ont été posés. En d'autres termes, le principe ne donne

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stitutional laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.

The *de facto* doctrine will not by itself save all of the rights, obligations and other effects which have purportedly arisen under the repealed and current Acts of the Legislature of Manitoba from 1890 to the date of this judgment. Some of these rights, obligations and other effects did not arise as a consequence of reliance by the public on the acts of officials acting under colour of authority or on the assumed validity of public and private bodies corporate. Furthermore, the *de facto* authority of officials and entities acting under the invalid laws of the Manitoba Legislature will cease on the date of this judgment since all colour of authority ceases on that date. Thus, the *de facto* doctrine only provides a partial solution.

It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. For example, *res judicata* would preclude the re-opening of cases decided by the courts on the basis of invalid laws. And the doctrine of mistake of law might, in some circumstances, preclude recovery of monies paid under invalid laws: see *Eadie v. Township of Brantford*, [1967] S.C.R. 573; *Amax Potash Ltd. v. Government of Saskatchewan*, *supra*. However, as the Attorney General of Canada has stated in his factum, these doctrines are of limited scope and may not cover all of the situations that could be questioned.

pas effet à des lois inconstitutionnelles. Il ne reconnaît et ne donne effet qu'aux attentes justifiées de gens qui se sont fiés aux actes de ceux qui ont appliqué les lois invalides, ainsi qu'à l'existence et au fonctionnement des corps publics ou privés mêmes irrégulièrement ou illégalement constitués. Ainsi, le principe de la validité *de facto* permettra de sauver les droits, obligations et autres effets ayant découlé des actes accomplis, conformément à des lois invalides du Manitoba, par des corps publics ou privés, des tribunaux, des juges, des personnes exerçant des pouvoirs légaux et des officiers publics. Ces droits, obligations et autres effets sont et seront toujours exécutoires et incontestables.

Le principe de la validité *de facto* n'aura pas en soi pour effet de sauver tous les droits et toutes les obligations qui sont censés avoir découlé des lois abrogées et des lois actuelles de la législature du Manitoba entre 1890 et la date du présent jugement. Un bon nombre de ces droits, obligations et autres effets ne doivent pas leur existence au fait que le public s'est fié aux actes d'officiers qui agissaient avec l'apparence d'autorité ou à la validité présumée de corps publics ou privés. De plus, l'autorité *de facto* des officiers et des entités qui agissent en vertu des lois invalides de la législature du Manitoba prendra fin à la date du présent jugement étant donné que toute apparence d'autorité cessera d'exister à cette date. Donc, le principe de la validité *de facto* ne fournit qu'une solution partielle.

Il faut souligner qu'il existe d'autres principes qui pourraient permettre de remédier aux conséquences de l'invalidité des lois du Manitoba. Par exemple, le principe de la chose jugée empêcherait de rouvrir les dossiers sur lesquels les tribunaux ont statué en fonction de lois invalides. Et le principe de l'erreur de droit pourrait, dans certaines circonstances, empêcher le recouvrement de sommes versées en vertu de lois invalides: voir *Eadie v. Township of Brantford*, [1967] R.C.S. 573, et *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, précité. Toutefois, comme le procureur général du Canada l'a déclaré dans son mémoire, ces principes ont une portée restreinte et ne peuvent s'appliquer à toutes les situations qui pourraient être contestées.

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The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the *de facto* or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.

Nor will the constitutional guarantee of rule of law tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty. Since this temporary validation will include the legislation under which the Manitoba Legislature is presently constituted, it will be legally able to re-enact, print and publish its laws in conformity with the dictates of the Constitution once they have been translated.

Analogous support for the measures proposed can be found in cases which have arisen under the doctrine of state necessity. Necessity in the context of governmental action provides a justification for otherwise illegal conduct of a government during a public emergency. In order to ensure rule of law, the Courts will recognize as valid the constitutionally invalid Acts of the Legislature. According to Professor Stavsky, "The Doctrine of State Necessity in Pakistan" (1983), 16 *Cornell Int. L.J.* 341,

La seule solution qui permet de préserver les droits, obligations et autres effets qui découlent des lois invalides de la législature du Manitoba et qui ne sont pas sauvés par l'application du principe de la validité *de facto* ou d'autres principes consiste à déclarer que, pour maintenir la primauté du droit, ces droits, obligations et autres effets sont et continueront d'être opérants tout comme s'ils avaient découlé de textes législatifs valides, pendant la période durant laquelle il sera impossible au Manitoba de se conformer à l'obligation constitutionnelle qui lui incombe en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba*. La province du Manitoba ferait face au chaos et à l'anarchie si les droits, obligations et autres effets juridiques sur lesquels se sont fondés les Manitobains depuis 1890 pouvaient soudainement être contestés. La garantie constitutionnelle de la primauté du droit ne tolérera pas un tel chaos ou une telle anarchie.

La garantie constitutionnelle de la primauté du droit ne permettra pas non plus que la province du Manitoba se trouve désormais sans système juridique valide et efficace. Il sera donc nécessaire de considérer les lois unilingues de la législature du Manitoba qui, n'était-ce de leur vice sur le plan constitutionnel, seraient actuellement en vigueur, comme temporairement valides et opérantes pour la période durant laquelle il sera impossible à la législature du Manitoba de se conformer à son obligation constitutionnelle. Étant donné que cette validation temporaire visera également la loi en vertu de laquelle la législature du Manitoba est actuellement constituée, cette dernière sera légalement en mesure d'adopter de nouveau, d'imprimer et de publier ses lois conformément aux prescriptions de la Constitution, dès qu'elles auront été traduites.

On peut trouver une justification analogue pour les mesures proposées dans les affaires découlant du principe de l'état de nécessité. La nécessité dans le contexte de l'action gouvernementale permet de justifier une conduite par ailleurs illégale adoptée par un gouvernement dans une situation d'urgence. Pour assurer la primauté du droit, les tribunaux reconnaîtront comme valides les lois inconstitutionnelles de la Législature. D'après le professeur Stavsky, dans «The Doctrine of State Necessity in

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at p. 344: "If narrowly and carefully applied, *the doctrine constitutes an affirmation of the rule of law*" (Emphasis added.)

The courts have applied the doctrine of necessity in a variety of circumstances. A number of cases have involved challenges to the laws of an illegal and insurrectionary government. In the aftermath of the American Civil War, the question arose as to the validity of laws passed by the Confederate States. The courts in addressing this question were primarily concerned with ensuring that the rule of law be upheld. The principle which emerges from these cases can be summarized as follows: During a period of insurrection, when territory is under the control and dominance of an unlawful, hostile government and it is therefore impossible for the lawful authorities to legislate for the peace and good order of the area, the laws passed by the usurping government which are necessary to the maintenance of organized society and which are not in themselves unconstitutional will be given force and effect: see *Texas v. White*, 74 U.S. 700 (1868); *Horn v. Lockhart*, 84 U.S. 570 (1873); *United States v. Insurance Companies*, 89 U.S. 99 (1874); *Baldy v. Hunter*, 171 U.S. 388 (1898).

The general principles and concerns which underlie these cases are best stated by Mr. Justice Field in *Horn v. Lockhart*, *supra*, at pp. 580-81:

> We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they

Pakistan» (1983), *16 Cornell Int.L.J.* 341, à la p. 344: [TRADUCTION] «Lorsqu'il est strictement et soigneusement appliqué, *ce principe constitue une affirmation de la primauté du droit*». (Les italiques sont de nous.)

Les tribunaux ont appliqué le principe de l'état de nécessité dans diverses circonstances. Un certain nombre d'affaires mettaient en cause des attaques contre les lois d'un gouvernement illégal et insurrectionnel. Au lendemain de la guerre de Sécession aux États-Unis, la question de la validité des lois adoptées par les États confédérés s'est posée. Les tribunaux saisis de la question se sont surtout souciés d'assurer le maintien de la primauté du droit. Le principe qui se dégage de cette jurisprudence peut se résumer ainsi: au cours d'une période d'insurrection, alors que le territoire se trouve sous le contrôle et la domination d'un gouvernement illégal et hostile, et qu'il est, par conséquent, impossible pour les autorités légitimes de légiférer pour la paix et l'ordre de la région, les lois adoptées par le gouvernement usurpateur qui sont nécessaires au maintien d'une société organisée et qui ne sont pas en soi inconstitutionnelles seront déclarées valides: voir *Texas v. White*, 74 U.S. 700 (1868), *Horn v. Lockhart*, 84 U.S. 570 (1873), *United States v. Insurance Companies*, 89 U.S. 99 (1874) et *Baldy v. Hunter*, 171 U.S. 388 (1898).

Le meilleur exposé des principes généraux et des préoccupations qui sous-tendent cette jurisprudence est donné par le juge Field, dans l'arrêt *Horn v. Lockhart*, précité, aux pp. 580 et 581:

> [TRADUCTION] Nous reconnaissons que les actes posés par les divers États en leur capacité individuelle, et ceux de leurs différents organes de gouvernement, exécutif, judiciaire et législatif, au cours de la guerre, dans la mesure où ils n'ont pas porté atteinte ou ne tendaient pas à porter atteinte à la suprématie de l'Autorité nationale ou aux droits légitimes que possèdent les citoyens en vertu de la Constitution, doivent généralement être considérés comme valides et ayant force obligatoire. L'existence d'un état d'insurrection et de guerre n'a pas dissous les liens de la société ni fait disparaître le gouvernement civil ou encore l'application régulière des lois. L'ordre devait être préservé, les règlements de police maintenus, le crime réprimé, la propriété protégée, les contrats exécutés, les mariages célébrés, les successions réglées et le transfert et la dévolution de la propriété régis aussi minutieusement qu'en temps de

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were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution.

The doctrine of necessity was also applied with respect to an insurrectionary government in *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 (P.C.) This case dealt with the efficacy of official acts of the Smith *régime* shortly after Southern Rhodesia's unilateral declaration of independence from Britain in 1965. Lord Reid, writing for the majority, canvassed the American authorities discussed above, but found them distinguishable on the ground that in this case, Parliament had specifically provided that it would have legislative authority for the territory of Southern Rhodesia (in the *Southern Rhodesia Act* and Order in Council of 1965), and it thereby followed that there was no "legal vacuum" necessitating recognition by the courts of the laws purportedly enacted by the insurrectionary Smith government.

Lord Pearce dissented from the majority view. He saw no merit in the distinction drawn by the majority, noting that while the lawful government had *formally* asserted its authority, it was in no position, *as a practical matter*, to actually govern. In his view, the American cases presented "a helpful analogy" and, in reliance on them, he formulated the "state necessity doctrine" as follows, at p. 732:

> I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts, with certain limitations namely (*a*) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (*b*) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (*c*) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, *i.e.*, (*c*),

paix. Personne que l'on sache ne met sérieusement en doute la validité des actes judiciaires ou législatifs qui dans les États insurgés touchent les matières de ce genre lorsque, sur le plan de leur objet ou de leur mode d'exécution, ils ne sont pas hostiles à l'autorité du gouvernement national et ne portent pas atteinte aux droits garantis aux citoyens par la Constitution.

Le principe de l'état de nécessité a aussi été appliqué, à l'égard d'un gouvernement insurrectionnel, dans l'arrêt *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 (C.P.) Cette affaire portait sur la validité des actes officiels du régime Smith, peu après que la Rhodésie du Sud eut proclamé unilatéralement son indépendance vis-à-vis de la Grande-Bretagne, en 1965. Lord Reid, s'exprimant au nom de la majorité, a examiné à fond la jurisprudence américaine que je viens d'analyser, mais a trouvé qu'elle pouvait faire l'objet d'une distinction fondée sur le fait qu'en l'espèce le Parlement avait spécifiquement prévu qu'il détiendrait l'autorité législative sur le territoire de la Rhodésie du Sud (dans la *Southern Rhodesia Act* et dans un décret de 1965); il s'ensuivait qu'il n'existait pas de «vide juridique» nécessitant la reconnaissance judiciaire des lois prétendument adoptées par le gouvernement insurrectionnel de Smith.

Lord Pearce n'a pas partagé cette opinion de la majorité. Il ne voyait aucun fondement dans la distinction faite par la majorité, faisant remarquer que, bien que le gouvernement légitime ait *formellement* affirmé son autorité, il n'était pas, *en pratique*, en mesure de gouverner réellement. Selon lui, la jurisprudence américaine offrait [TRADUCTION] «une analogie utile» et, s'appuyant sur elle, il a formulé ainsi le «principe de l'état de nécessité», à la p. 732:

> [TRADUCTION] Je reconnais l'existence du principe selon lequel les actes de ceux qui exercent effectivement et illégalement le pouvoir peuvent être reconnus valides ou être sanctionnés par les tribunaux, sous certaines réserves, savoir *a*) dans la mesure où ils visent à assurer la bonne administration habituelle de l'État et qu'ils sont raisonnablement nécessaires à cette fin, *b*) dans la mesure où ils ne portent pas atteinte aux droits garantis aux citoyens par la Constitution légitime (1961) et *c*) dans la mesure où ils n'ont pas pour but de renforcer et en fait ne renforcent pas directement l'usurpation, ni ne sont contraires à la politique du souverain légitime.

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is tantamount to a test of public policy.

Again, it is clear that the reasons for applying the state necessity doctrine pertain to a concern with the rule of law. At page 740, Lord Pearce says:

> If one disregards all illegal provision for the needs of the country, there is a vacuum and chaos.
>
> In my view, the principle of necessity or implied mandate applies to the present circumstances in Rhodesia.

(Emphasis added.)

It should be noted that neither the American cases on necessity, nor the comments of Lord Pearce in *Madzimbamuto* can be applied directly to the present case. All of these cases are concerned with insurrectionary governments, the present case is not. But even more fundamental than this distinction is the fact that all of these cases require that the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the Constitution. In the present case, the laws in question *do* impair these rights. Nonetheless, the necessity cases on insurrectionary governments illustrate the more general proposition that temporary effect can be given to invalid laws where this is necessary to preserve the rule of law.

The doctrine of state necessity has also been used to uphold laws enacted by a lawful government in contravention of express constitutional provisions under extraordinary circumstances which render it impossible for the government to comply with the Constitution. In *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195, the Court of Appeal of Cyprus invoked the doctrine of state necessity to hold valid a law passed in direct contravention of the express provisions of the Cypriot Constitution.

Cyprus is a dyarchy, power being shared between Greek and Turkish Cypriots. The 1960 Cypriot Constitution contained several entrenched

Cette dernière réserve, c.-à-d. *c*), équivaut au critère de l'ordre public.

Ici encore, il est clair que les raisons d'appliquer le principe de l'état de nécessité sont liées à un souci d'assurer la primauté du droit. À la p. 740, lord Pearce dit:

> [TRADUCTION] Si l'on écarte toutes les dispositions illégales pourvoyant aux besoins du pays, il y a vide et chaos.
>
> À mon avis, le principe de l'état de nécessité ou du mandat implicite s'applique à la situation actuelle en Rhodésie.

(C'est nous qui soulignons.)

Il faut noter que ni la jurisprudence américaine sur l'état de nécessité, ni les observations de lord Pearce dans l'arrêt *Madzimbamuto*, ne peuvent être appliquées directement à la présente espèce. Toute cette jurisprudence porte sur des gouvernements insurrectionnels, ce n'est pas le cas en l'espèce. Mais, ce qui est encore plus fondamental que cette distinction, tous ces précédents requièrent que les lois sauvées par l'application du principe ne portent pas atteinte aux droits des citoyens garantis par la Constitution. En l'espèce, les lois en question portent *effectivement* atteinte à ces droits. Néanmoins, la jurisprudence sur l'état de nécessité en cas de gouvernement insurrectionnel illustre la proposition plus générale selon laquelle des lois invalides peuvent être déclarées temporairement opérantes si cela est nécessaire pour préserver la primauté du droit.

Le principe de l'état de nécessité a aussi été utilisé pour maintenir des lois adoptées, par un gouvernement légitime, contrairement à des dispositions constitutionnelles expresses, dans des circonstances extraordinaires où il était impossible pour le gouvernement de respecter la Constitution. Dans l'arrêt *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195, la Cour d'appel de Chypre a invoqué le principe de l'état de nécessité pour juger valide une loi adoptée directement à l'encontre des dispositions expresses de la Constitution cypriote.

Chypre est une dyarchie, le pouvoir étant partagé entre les Cypriotes grecs et turcs. La Constitution cypriote de 1960 comportait plusieurs dispo-

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provisions guaranteeing the equality of status of the two Cypriot communities. In particular, the Constitution established a High Court of Justice and a Supreme Constitutional Court, each staffed by judges from both communities and governed by a neutral (non-Cypriot) President. A Turkish Cypriot charged with an offence against a Greek Cypriot was given the right to be tried by such a "mixed" court. In addition, all laws were required to be enacted in both the Turkish and the Greek languages. These constitutional provisions, termed "basic articles", could not be amended.

In 1963, Turkish insurgents gained control over those parts of Cyprus inhabited by the Turkish community. This effectively prevented Turkish Cypriots from participating in the government of the country, including the Parliament of Cyprus and all courts located outside the Turkish areas. As a consequence, it became impossible to constitute "mixed" courts as required by the Constitution, to assemble the Supreme Constitutional Court, or to enact laws in Turkish, there being virtually no qualified translators available during the insurgency.

To deal with the emergency, the Parliament of Cyprus passed a temporary law abolishing the requirement of mixed courts for the duration of the insurrection and conferring on a new Court of Appeal, composed solely of Greek Cypriot Judges, the jurisdiction then vested by the Constitution in the Supreme Constitutional Court. This temporary measure, enacted in Greek only, was challenged as unconstitutional.

The Court of Appeal upheld the law on grounds of necessity. Josephides J. at p. 265 set forth four prerequisites which he said must be satisfied before the doctrine of state necessity could apply to validate such an unconstitutional law:

(*a*) an imperative and inevitable necessity or exceptional circumstances;

(*b*) no other remedy to apply;

(*c*) the measure taken must be proportionate to the necessity; and

sitions garantissant l'égalité de statut des deux communautés cypriotes. En particulier, la Constitution a créé une haute cour de justice et une cour suprême constitutionnelle, dont les juges devaient provenir des deux communautés et qui étaient régies par un président neutre (non cypriote). Un Cypriote turc accusé d'une infraction contre un Cypriote grec avait le droit d'être jugé par un tel tribunal «mixte». En outre, toutes les lois devaient être adoptées en langue turque et en langue grecque. Ces dispositions constitutionnelles, appelées «articles fondamentaux», ne pouvaient pas être modifiées.

En 1963, des insurgés turcs ont pris le contrôle des zones de Chypre habitées par la communauté turque. Cela a empêché les Cypriotes turcs de participer au gouvernement du pays, y compris au Parlement de Chypre et à tous les tribunaux situés à l'extérieur des zones turques. En conséquence, il devint impossible de constituer des tribunaux «mixtes» comme le requérait la Constitution, de rassembler la Cour suprême constitutionnelle ou d'adopter les lois en turc, aucun traducteur qualifié n'étant en fait disponible pendant l'insurrection.

Afin de remédier à la situation d'urgence, le Parlement de Chypre a adopté une loi temporaire abolissant l'exigence des tribunaux mixtes pour la durée de l'insurrection et conférant à une nouvelle cour d'appel, composée uniquement de juges cypriotes grecs, la compétence attribuée par la Constitution à la Cour suprême constitutionnelle. Cette mesure temporaire, adoptée en grec uniquement, fut contestée comme étant inconstitutionnelle.

La Cour d'appel a maintenu cette loi pour des motifs de nécessité. À la page 265, le juge Josephides énonce quatre conditions préalables qui, d'après lui, doivent être remplies pour que le principe de l'état de nécessité puisse s'appliquer et valider une telle loi inconstitutionnelle:

[TRADUCTION]

a) un état de nécessité impératif et inévitable ou des circonstances exceptionnelles;

b) aucune autre solution possible;

c) la mesure prise doit être proportionnée à l'état de nécessité; et

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(*d*) it must be of a temporary character limited to the duration of the exceptional circumstances.

Josephides J. added:

A law thus enacted is subject to the control of this court to decide whether the aforesaid prerequisites are satisfied, *i.e.* whether there exists such a necessity and whether the measures taken were necessary to meet it.

All four conditions being satisfied, Josephides J. concluded (at p. 268) that the impugned law, while unconstitutional, was nevertheless effectual "for the duration of the necessity and no more".

The question in *Ibrahim*, *supra*, was whether a temporary unconstitutional law, enacted in order to meet the exigencies of a state of emergency, could be valid. The question in the present Reference is quite different. Here, the Court is concerned with whether unconstitutional laws can be given temporary validity in order to avoid a state of emergency. It is the Court which must take steps to avoid the deleterious consequences of the Manitoba Legislature's persistent failure to observe the Constitution. In *Ibrahim* the Court simply condoned the measures taken by the Parliament of Cyprus in response to a necessitous situation arising out of circumstances beyond its control. Thus, *Ibrahim* is not directly applicable to the circumstances of the present case.

The principle that can be deduced from the *Ibrahim* case with respect to the present context, however, is that a Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the rule of law. The case stands for the proposition that under conditions of emergency, when it is impossible to comply with the Constitution, the Court may allow the government a temporary reprieve from such compliance in order to preserve society and maintain, as nearly as possible, normal conditions. The overriding concern is the protection of the rule of law.

d) elle doit être de nature temporaire et limitée à la durée des circonstances exceptionnelles.

Le juge Josephides ajoute:

[TRADUCTION] Une loi ainsi adoptée est soumise au contrôle de cette cour qui décidera si les conditions préalables précitées sont remplies, c.-à-d. s'il existe un tel état de nécessité et si les mesures prises étaient nécessaires pour y remédier.

Les quatre conditions étant remplies, le juge Josephides a conclu (à la p. 268) que la loi attaquée, quoique inconstitutionnelle, était néanmoins opérante [TRADUCTION] «pendant la durée de l'état de nécessité et pas plus».

Dans l'arrêt *Ibrahim*, précité, la question était de savoir si une loi inconstitutionnelle temporaire, adoptée afin de répondre aux exigences d'une situation d'urgence, pouvait être valide. La question qui se pose dans le présent renvoi est tout à fait différente. En l'espèce, il s'agit pour la Cour de déterminer si des lois inconstitutionnelles peuvent être déclarées temporairement valides afin d'éviter une situation d'urgence. C'est la Cour qui doit prendre des mesures afin d'éviter les conséquences néfastes de l'omission incessante de la législature du Manitoba de se conformer à la Constitution. Dans l'arrêt *Ibrahim*, la Cour a simplement approuvé les mesures prises par le Parlement de Chypre afin de faire face à un état de nécessité découlant de circonstances indépendantes de sa volonté. Ainsi, l'arrêt *Ibrahim* n'est pas directement applicable aux circonstances de la présente espèce.

Cependant, le principe qui peut être dégagé de l'arrêt *Ibrahim* par rapport au présent contexte est qu'une cour peut temporairement considérer comme valides et opérantes des lois entachées d'un vice d'ordre constitutionnel afin de préserver la primauté du droit. L'affaire appuie la thèse selon laquelle, en situation d'urgence, lorsqu'il est impossible d'observer la Constitution, la Cour peut permettre au gouvernement de surseoir temporairement à cette observance afin de protéger la société et de maintenir, autant que possible, une situation normale. Le souci primordial est de protéger la primauté du droit.

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A third situation in which the doctrine of necessity has been applied is where the executive has taken emergency action to fill a legislative void created by a court ruling. In the Pakistani case of *Special Reference No. 1 of 1955*, P.L.R. 1956 W.P. 598, there was a challenge to emergency action taken by the Governor General of Pakistan in the face of an apparent legal vacuum. The *Indian Independence Act*, 1947, was the original Constitution for the newly created dominions of India and Pakistan. As a step toward complete independence, the Act provided for a Constituent Assembly in each country, with power to amend the Act and enact new constitutional laws. Royal assent was required for the passage of all such constitutional legislation.

The Constituent Assembly of Pakistan set out immediately to forge its own Constitution. From 1947 to 1954 it enacted 44 constitutional amendments. The members of the Assembly, however, felt that it was important that the new Constitution have roots as independent of imperial authority as possible. They therefore deliberately failed to obtain royal assent to any of the amendments. Indeed, in 1948, the Assembly passed an amendment purportedly abolishing the requirement of royal assent. This amendment, like the other 43, was itself passed without royal assent.

In *Federation of Pakistan v. Tamizuddin Khan*, P.L.R. 1956 W.P. 306, the Federal Court of Pakistan held the constitutional amendments void. It followed that a great many statutes and regulations enacted pursuant to the invalid amendments were themselves nullities. The situation that obtained was in many respects similar to that now facing Manitoba.

The Governor General of Pakistan reacted to the emergency by summoning a Constituent Convention and issuing a proclamation assuming to himself, until the Convention could act, the power to validate and enforce all laws necessary to preserve the State and maintain the government of the country. This action was challenged, and in *Special Reference No. 1 of 1955*, *supra*, the Fed-

Un troisième cas où le principe de l'état de nécessité a été appliqué est celui où l'exécutif a pris des mesures d'urgence pour combler un vide législatif créé par une décision judiciaire. Dans l'affaire pakistanaise *Special Reference No. 1 of 1955*, P.L.R. 1956 W.P. 598, on contestait une mesure d'urgence prise par le gouverneur général du Pakistan face à un vide juridique apparent. L'*Indian Independence Act* de 1947 a servi de constitution initiale aux dominions de l'Inde et du Pakistan nouvellement créés. À titre d'étape vers l'indépendance totale, cette loi prévoyait une assemblée constituante pour chaque pays, dotée du pouvoir de modifier ladite loi et d'adopter de nouvelles lois constitutionnelles. La sanction royale était requise pour l'adoption de toute loi constitutionnelle de cette nature.

L'assemblée constituante du Pakistan a entrepris immédiatement de forger sa propre constitution. De 1947 à 1954, elle a adopté 44 modifications constitutionnelles. Toutefois, les membres de cette assemblée estimaient important que la nouvelle Constitution ait une assise aussi indépendante que possible du pouvoir impérial. Ils ont donc délibérément omis d'obtenir la sanction royale pour toutes ces modifications. D'ailleurs, en 1948, l'Assemblée a adopté une modification dans le but d'abolir l'exigence de la sanction royale. Cette modification, comme les 43 autres, fut elle-même adoptée sans la sanction royale.

Dans l'arrêt *Federation of Pakistan v. Tamizuddin Khan*, P.L.R. 1956 W.P. 306, la Cour fédérale du Pakistan a déclaré nulles ces modifications constitutionnelles. Il s'ensuivit qu'un grand nombre de lois et de règlements adoptés en vertu des modifications invalides étaient eux-mêmes nuls. La situation qui en a résulté est, à bien des égards, analogue à celle à laquelle fait maintenant face le Manitoba.

Le gouverneur général du Pakistan, en réaction à cette situation d'urgence, a convoqué une convention constituante et lancé une proclamation lui attribuant personnellement, jusqu'à ce que la convention puisse agir, le pouvoir de valider et de faire exécuter toutes les lois nécessaires à la préservation de l'État et au maintien du gouvernement du pays. Cette mesure fut contestée et, dans l'arrêt

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eral Court of Pakistan held that although the Governor General's action was not authorized by the Constitution, it nevertheless was valid under the doctrine of state necessity. Muhammad Munir C.J. said (at p. 671):

> The disaster that stared the Governor-General in the face, consequent on the illegal manner in which the Constituent Assembly exercised its legislative authority is apparent ... The Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of the 16th April, 1955, declaring that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall be retrospectively enforceable is accordingly valid during the interim period, i.e., until the validity of these laws is decided upon by the new Constituent Assembly.

The *Special Reference No. 1 of 1955*, *supra*, stands for the proposition that a situation of state necessity can arise as a consequence of judicial invalidation of unconstitutional laws, leaving a legal void. The difference between that case and the present is that in the present case it is the *judicial* branch of government that is retrospectively recognizing unconstitutional laws as temporarily valid and enforceable, while in the *Special Reference No. 1 of 1955* case it was the *executive* branch of government which proclaimed that laws were retrospectively valid and enforceable, and the role of the judiciary was simply to condone the actions of the executive.

Thus, the *Special Reference No. 1 of 1955* case, *supra*, cannot be directly applied to the present set of circumstances. It is, however, illustrative of the broader principles which justify this Court's action in the present case: namely, that otherwise invalid acts may be recognized as temporarily valid in order to preserve normative order and the rule of law. The Federal Court of Pakistan allowed an unconstitutional exercise of executive power since the effects of *not* allowing such an exercise of power would have been anarchy and chaos and thereby a violation of the rule of law.

Special Reference No. 1 of 1955, précité, la Cour fédérale du Pakistan a conclu que, même si elle n'était pas autorisée par la Constitution, cette intervention du gouverneur général était néanmoins valide en vertu du principe de l'état de nécessité. Le juge en chef Muhammad Munir a affirmé (à la p. 671):

> [TRADUCTION] Le désastre auquel faisait face le gouverneur général par suite de l'exercice illégal par l'Assemblée constituante de son pouvoir législatif, est évident ... On doit donc conclure que le gouverneur général a agi pour éviter un désastre imminent et prévenir la désagrégation de l'État et de la société. Sa proclamation du 16 avril 1955 déclarant que les lois mentionnées dans l'annexe de l'Emergency Powers Ordinance de 1955 seront exécutoires rétroactivement est en conséquence valide dans l'intervalle, c.-à-d. tant que la nouvelle Assemblée constituante ne se sera pas prononcée sur la validité de ces lois.

L'arrêt *Special Reference No. 1 of 1955*, précité, appuie la thèse selon laquelle un état de nécessité peut survenir par suite d'une invalidation judiciaire de lois inconstitutionnelles créant un vide juridique. La différence entre cette affaire et le présent cas réside dans le fait qu'en l'espèce c'est l'organe *judiciaire* du gouvernement qui, rétroactivement, reconnaît des lois inconstitutionnelles comme étant valides et opérantes, alors que dans l'affaire *Special Reference No. 1 of 1955*, précité, c'est l'organe *exécutif* du gouvernement qui a proclamé que les lois étaient rétroactivement valides et opérantes, le rôle du pouvoir judiciaire consistant simplement à approuver les actes du pouvoir exécutif.

Ainsi, l'arrêt *Special Reference No. 1 of 1955*, précité, ne saurait être appliqué directement aux circonstances de la présente affaire. Il constitue cependant une illustration des principes plus larges qui justifient l'intervention de cette Cour en l'espèce: savoir que ces lois par ailleurs invalides peuvent être reconnues comme temporairement valides afin de préserver l'ordre normatif et la primauté du droit. La Cour fédérale du Pakistan a autorisé un exercice inconstitutionnel de pouvoir exécutif parce que le *refus* de l'autoriser aurait eu pour effet de susciter l'anarchie et le chaos et, par conséquent, de violer la primauté du droit.

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The cases on the necessity doctrine in all three circumstances discussed above point to the same conclusion: the courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law. This is well expressed by Mr. Justice Triantafyllides in *Ibrahim*, *supra*, at p. 237:

> If the position was that the administration of justice and the preservation of the rule of law and order in the State could no longer be secured in a manner which would not be inconsistent with the constitution, a constitution under which the sovereign will of the people could not be expressed so as to regulate through an amendment of the fundamental law such a situation, then the House of Representatives, elected by the people, should be empowered to take such necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation. Otherwise the absurd corollary would have been entailed *viz.* that a State, and the people, should be allowed to perish for the sake of the constitution; on the contrary, a constitution should exist for the preservation of the State and the welfare of the people.

(Emphasis added.)

The doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.

In every case in which the doctrine of state necessity has been applied it has been either the executive or the legislative branch of government which has responded to the necessitous circumstances, later to have its actions tested in the courts. This fact does not, however, detract from the general relevance of these cases in demonstrating that the courts will not allow the Constitution to be used to create chaos and disorder.

Turning back to the present case, because of the Manitoba Legislature's persistent violation of the constitutional dictates of the *Manitoba Act, 1870*, the Province of Manitoba is in a state of emergency: all of the Acts of the Legislature of Manitoba, purportedly repealed, spent and current (with the

La jurisprudence concernant le principe de l'état de nécessité, dans les trois cas que je viens d'analyser, amène à la même conclusion: les tribunaux reconnaîtront la validité de textes législatifs inconstitutionnels lorsque l'omission de le faire entraînerait le chaos sur le plan juridique et violerait ainsi l'exigence constitutionnelle de la primauté du droit. C'est ce qui est bien exprimé par le juge Triantafyllides dans l'arrêt *Ibrahim*, précité, à la p. 237:

> [TRADUCTION] Si la situation était telle que l'administration de la justice et la préservation de la primauté du droit et de l'ordre dans l'État ne pourraient plus être assurées d'une manière qui ne soit pas incompatible avec la constitution, une constitution en vertu de laquelle la volonté souveraine du peuple ne pourrait plus être exprimée de manière à régler cette situation par une modification de la loi fondamentale, la Chambre des représentants, élue par le peuple, devrait alors pouvoir prendre les mesures nécessaires que justifie le principe de l'état de nécessité, compte tenu de l'urgence de la situation. Sinon, un corollaire absurde s'imposerait: on laisserait périr l'État et le peuple par égard pour la constitution; au contraire, une constitution doit exister pour la préservation de l'État et le bien-être du peuple.

(C'est nous qui soulignons.)

Le principe de l'état de nécessité ne sert pas, dans cette jurisprudence, à justifier des lois qui sont au-dessus de la constitution; il sert au contraire à garantir le principe non écrit, mais inhérent, de la primauté du droit qui doit être à la base de toute constitution.

Dans chaque cas où on a appliqué le principe de l'état de nécessité, c'est soit l'organe exécutif soit l'organe législatif du gouvernement qui a réagi à l'état de nécessité pour voir ensuite ses actes contestés devant les tribunaux. Cependant, ce fait ne diminue en rien l'importance générale de ces précédents qui démontrent que les tribunaux ne permettront pas que la Constitution serve à créer le chaos et le désordre.

Pour en revenir à la présente espèce, en raison de la violation incessante, par la législature du Manitoba, des prescriptions constitutionnelles de la *Loi de 1870 sur le Manitoba*, la province du Manitoba se trouve dans une situation d'urgence: toutes les lois de la législature du Manitoba, appa-

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exception of those recent laws which have been enacted, printed and published in both languages), are and always have been invalid and of no force or effect, and the Legislature is unable to immediately re-enact these unilingual laws in both languages. The Constitution will not suffer a province without laws. Thus the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws of the Province prior to the date of this judgment, which are not saved by the *de facto* or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the rule of law preserved.

remment abrogées, périmées ou actuelles (à l'exception des lois récentes qui ont été adoptées, imprimées et publiées dans les deux langues), sont et ont toujours été invalides et inopérantes, et la Législature est dans l'impossibilité d'adopter de nouveau immédiatement dans les deux langues ces lois unilingues. La Constitution ne permet pas qu'une province soit dépourvue de lois. La Constitution exige donc que les lois actuelles de la législature du Manitoba soient déclarées temporairement valides et opérantes à compter de la date du présent jugement et que les droits, obligations et autres effets découlant de ces lois et des lois de cette province abrogées ou devenues périmées avant la date du présent jugement, qui ne sont pas sauvés par l'application du principe de la validité *de facto* ou de quelque autre principe, soient réputés temporairement avoir été opérants et incontestables et continuer de l'être. C'est là la seule manière d'éviter le chaos juridique et de préserver la primauté du droit.

To summarize, the legal situation in the Province of Manitoba is as follows. All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force or effect.

En résumé, la situation de la province du Manitoba sur le plan juridique est la suivante. Toutes les lois adoptées dans une seule langue par la législature du Manitoba sont et ont toujours été invalides et inopérantes.

All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing. Rights, obligations and any other effects which have arisen under these current laws by virtue of reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate, are enforceable and forever beyond challenge under the *de facto* doctrine. The same is true of those rights, obligations and other effects which have arisen under current laws and are saved by doctrines such as *res judicata* and mistake of law.

Toutes les lois de la législature du Manitoba qui seraient actuellement valides et opérantes, n'était-ce du vice dont elles sont entachées sur le plan constitutionnel, sont réputées temporairement valides et opérantes à compter de la date du présent jugement jusqu'à l'expiration du délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier. Les droits, obligations et tous autres effets découlant de ces lois actuelles, du fait que l'on se soit fié aux actes d'officers publics ou à la validité juridique présumée de corps publics ou privés, sont exécutoires et à tout jamais incontestables par application du principe de la validité *de facto*. C'est également le cas des droits, obligations et autres effets qui ont découlé des lois actuelles et qui sont sauvés par l'application de principes comme ceux de la chose jugée et de l'erreur de droit.

Rights, obligations and any other effects which have arisen under purportedly repealed or spent laws by virtue of reliance on acts of public offi-

Les droits, obligations et autres effets qui ont découlé de lois apparemment abrogées ou périmées, du fait que l'on se soit fié aux actes d'offi-

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cials, or on the assumed legal validity of public or private bodies corporate are enforceable and forever beyond challenge under the *de facto* doctrine. The same is true of those rights, obligations and other effects which have arisen under purportedly repealed or spent laws and are saved by doctrines such as *res judicata* and mistake of law.

All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws. At the termination of the minimum period these rights, obligations and other effects will cease to have force and effect unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. As a consequence, to ensure the continuing validity and enforceability of rights, obligations and any other effects not saved by the *de facto* or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be enacted, printed and published, and then repealed, in both official languages.

As concerns the future, the Constitution requires that, from the date of this judgment, all new Acts of the Manitoba Legislature be enacted, printed and published in both French and English. Any Acts of the Legislature that do not meet this requirement will be invalid and of no force or effect.

VI

The Duration of the Temporary Period

The difficult question, then, is what is the duration of the minimum period necessary for translaciers publics ou à la validité juridique présumée de corps publics ou privés, sont exécutoires et à tout jamais incontestables par application du principe de la validité *de facto*. C'est également le cas des droits, obligations et autres effets qui ont découlé de lois apparemment abrogées ou périmées et qui sont sauvés par l'application de principes comme ceux de la chose jugée et de l'erreur de droit.

Tous les droits, obligations et autres effets qui ont découlé des lois de la législature du Manitoba qui sont apparemment abrogées ou périmées ou qui seraient actuellement en vigueur n'était-ce du vice dont elles sont entachées sur le plan constitutionnel, et qui *ne* sont *pas* sauvés par l'application du principe de la validité *de facto* ou de principes comme ceux de la chose jugée et de l'erreur de droit, sont réputés temporairement avoir été pleinement exécutoires et incontestables et continuer de l'être à compter de la date où ils ont commencé à exister jusqu'à l'expiration du délai minimum requis pour traduire, adopter, imprimer et publier ces lois. À l'expiration de ce délai minimum, ces droits, obligations et autres effets cesseront d'être opérants à moins que les lois dont ils découlent n'aient été traduites, adoptées de nouveau, imprimées et publiées dans les deux langues. En conséquence, pour assurer que les droits, obligations et autres effets, qui ne sont pas sauvés par le principe de la validité *de facto* ou d'autres principes, demeurent valides et exécutoires, il se peut qu'il faille adopter de nouveau, imprimer et publier, pour ensuite abroger, dans les deux langues officielles, les lois abrogées ou périmées de la Législature dont ces droits, obligations et autres effets sont censés avoir découlé.

Quant à l'avenir, la Constitution exige qu'à compter de la date du présent jugement toutes les nouvelles lois de la législature du Manitoba soient adoptées, imprimées et publiées à la fois en français et en anglais. Toute loi de la Législature qui ne sastisfera pas à cette exigence sera invalide et inopérante.

VI

La durée du délai de validité temporaire

La question délicate qui se pose est donc de savoir quelle doit être la durée du délai minimum

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tion, re-enactment, printing and publishing of the unilingual Acts of the Manitoba Legislature?

It was argued by the Attorney General of Canada and by the Fédération des francophones hors Québec that this Court fix some arbitrary period such as a year or two years during which the Manitoba Legislature could re-enact its unilingual legislation in both languages.

This solution would not be satisfactory. We do not know how many of the Acts of the Legislature have already been translated. We know nothing as to the availability of translators or their daily output. We thus have no factual basis for determining a period during which compliance with s. 23 of the *Manitoba Act, 1870* would not be possible.

As presently equipped the Court is incapable of determining the period of time during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty. The Court will, however, at the request of either the Attorney General of Canada, or the Attorney General of Manitoba, made within one hundred and twenty days of the date of this judgment, make such a determination. The Attorney General of Canada was granted carriage of this Reference and the Attorney General of Manitoba represents the province whose laws are in issue in this case. Following such a request, a special hearing will be set and submissions will be accepted from the Attorney General of Canada and the Attorney General of Manitoba and the other interveners.

The period of temporary validity will not apply to any unilingual Acts of the Legislature enacted after the date of judgment. From the date of judgment, laws which are not enacted, printed, and published in both languages will be invalid and of no force and effect *ab initio*.

requis pour traduire, adopter de nouveau, imprimer et publier les lois unilingues de la législature du Manitoba?

Le procureur général du Canada et la Fédération des francophones hors Québec ont soutenu que cette Cour devrait fixer un délai arbitraire d'une année ou deux au cours duquel la législature du Manitoba pourrait adopter de nouveau ses lois unilingues dans les deux langues.

Cette solution ne serait pas satisfaisante. Nous ne connaissons pas le nombre des lois de la Législature qui ont déjà été traduites. Nous ignorons tout au sujet du nombre de traducteurs disponibles ou de leur production quotidienne. Nous ne disposons donc d'aucun fondement factuel permettant de déterminer le délai pendant lequel il ne serait pas possible de se conformer à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Compte tenu de la documentation dont elle dispose actuellement, la Cour est incapable de déterminer le délai pendant lequel il serait impossible à la législature du Manitoba de se conformer à son obligation constitutionnelle. Cependant, la Cour statuera sur ce point à la demande de l'un ou l'autre du procureur général du Canada ou du procureur général du Manitoba, faite dans les cent vingt jours de la date du présent jugement. Le procureur général du Canada s'est vu confier la charge du présent renvoi et le procureur général du Manitoba représente la province dont les lois sont en cause en l'espèce. Suite à cette demande, une audition spéciale sera fixée et le procureur général du Canada, le procureur général du Manitoba et les autres intervenants seront invités à soumettre des mémoires.

Le délai de validité temporaire ne s'appliquera pas aux lois unilingues adoptées par la Législature après la date du présent jugement. À compter de la date de ce jugement, les lois qui ne seront pas adoptées, imprimées et publiées dans les deux langues seront invalides et inopérantes dès le départ.

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VII

Question 4

The Status of the 1980 Act

Question No. 4 of this Reference asks whether any of the provisions of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, 1980 (Man.), c. 3 (the 1980 Act), are inconsistent with s. 23 of the *Manitoba Act, 1870* and, if so, whether the inconsistent provisions are invalid and of no force or effect.

The Act in its entirety reads:

Definition of "official language".

1 In this Act "official language" means the English language or the French language.

Interpretation where conflict.

2 Where the meaning of a provision of an Act in one official language conflicts with, is repugnant to or is inconsistent with the meaning of the corresponding provision of the Act in the other official language

(a) the provision in the official language in which the Bill for the Act was printed when copies thereof were first distributed to the members of the assembly in the assembly prevails over the corresponding provision in the other official language; and

(b) if the Bill for the Act was printed in both official languages when copies thereof were first distributed to the members of the assembly in the assembly, preference shall be given to that meaning of the provision that, according to the true spirit, intent and meaning of the Act as a whole, best insures the attainment of its objects.

Certificate on introduction of Bill.

3(1) Where a Bill introduced in the Legislature is printed in only one of the official languages when copies thereof are first distributed to the members of the assembly in the assembly, the Clerk of the House shall endorse on the Bill a certificate certifying that the Bill was printed in that official language when copies thereof were first distributed to the members of the assembly in the assembly and, if the Bill is enacted, that certificate shall be printed on the Act in all copies thereof printed and published by or on behalf of the government.

Language for distribution of old statutes.

3(2) For greater certainty in the interpretation of the statutes of the province heretofore enacted, the Bills for

VII

Question nº 4

Le statut de la Loi de 1980

La question nº 4 du présent renvoi est de savoir si des dispositions de la *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1980 (Man.), chap. 3 (la Loi de 1980), sont incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* et, dans l'affirmative, si les dispositions incompatibles sont invalides et inopérantes.

Voici le texte complet de la Loi:

Définition de l'expression «langue officielle».

1 Dans la présente loi, «langue officielle» désigne le français ou l'anglais.

Interprétation en cas de conflit.

2 Lorsque les deux versions d'une disposition d'une loi rédigée dans les deux langues officielles n'ont pas le même sens, se contredisent ou sont incompatibles

a) la disposition rédigée dans la langue officielle dans laquelle le projet de loi a été imprimé et distribué initialement aux députés de l'Assemblée à l'Assemblée l'emporte sur la disposition correspondante rédigée dans l'autre langue officielle; et

b) dans le cas où le projet de loi a été imprimé et distribué initialement aux députés de l'Assemblée à l'Assemblée dans les deux langues officielles, la version qui, d'après l'esprit, l'intention et le sens véritables de la loi considérée globalement, assure le mieux la réalisation de ses objets a préséance sur l'autre.

Attestation de dépôt du projet de loi.

3(1) Lorsqu'un projet de loi déposé devant la Législature est imprimé et distribué initialement aux députés de l'Assemblée à l'Assemblée dans une seule langue officielle, le Greffier de la Chambre doit signer sur le projet de loi une attestation indiquant que la langue du projet de loi est la langue officielle dans laquelle le projet de loi a été imprimé et distribué initialement aux députés de l'Assemblée à l'Assemblée et, si le projet de loi est adopté, cette attestation doit être imprimée sur toutes les copies de cette loi imprimées et publiées par le gouvernement ou en son nom.

Langue de distribution des anciennes lois.

3(2) Pour éviter toute ambiguïté dans l'interprétation des lois de la province adoptées jusqu'à présent, les

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all Acts heretofore enacted shall be conclusively deemed to have been printed in the English language when copies thereof were first distributed to the members of the assembly in the assembly.

Where translation of Bill deemed enacted.

4(1) Where a Bill for an Act that was introduced in the Legislature was printed in only one of the official languages and was enacted before a translation thereof into the other official language was available, if subsequently there is deposited with the Clerk of the House a translation of the Act into that other official language, certified to be a true translation of the Act by a person designated by the Speaker for the purpose of examining and certifying the translation of the Act, that translation of the Act into that other official language shall, for all purposes, be valid and of the same effect as the Act in the official language in which the Bill for the Act was printed, from and after the date of the enactment of the Act.

Printing of translation.

4(2) Where the translation of an Act into an official language is deposited with the Clerk of the House in accordance with subsection (1), the Clerk of the House shall endorse on the translation a certificate certifying that the translation, certified by the person designated by the Speaker for the purpose of examining and certifying the translation of the Act, has been deposited with him as of the date on which it was so deposited, and that certificate, and the certificate of the person designated by the Speaker for the purpose of examining and certifying the translation of the Act shall be printed on the translation of the Act in all copies thereof printed and published by or on behalf of the government.

Reference to lines in Acts.

5 Where in an Act of the Legislature enacted before January 1, 1981, there is a reference to a specific line of a section, subsection, clause, sub-clause, sub-sub-clause, paragraph, sub-paragraph, schedule, form or other portion of that Act or any other Act of the Legislature enacted before January 1, 1981 (hereinafter in this section referred to as the "named Act") and there appears to be an inconsistency or ambiguity raised by the reference because that specific line in the named Act printed in one official language differs in content from the specific line in the named Act printed in the other official language, the reference shall be deemed to be a reference to that specific line in the named Act printed in the English language.

projets de loi des lois adoptées jusqu'à présent sont, par les présentes, irrévocablement présumés avoir été imprimés et distribués initialement aux députés de l'Assemblée à l'Assemblée dans la langue anglaise.

Entrée en vigueur présumée des traductions.

4(1) Lorsqu'un projet de loi déposé devant la Législature et imprimé dans une seule langue officielle est adopté avant que sa traduction dans l'autre langue officielle ne soit disponible, la traduction de la loi est réputée, à toute fin que de droit, à compter de la date de l'adoption de la loi, avoir la même valeur légale et produire le même effet que la version de la loi établie dans la langue officielle dans laquelle le projet de loi correspondant a été imprimé, lorsqu'une traduction de la loi dans l'autre langue officielle, attestée quant à son exactitude par la personne désignée par l'Orateur pour vérifier la traduction de la loi et attester son exactitude, est subséquemment déposée devant le Greffier de la Chambre.

Publication de la traduction.

4(2) Lorsque la traduction d'une loi dans une langue officielle est déposée devant le Greffier de la Chambre conformément au paragraphe (1), le Greffier de la Chambre doit signer sur le texte traduit une attestation indiquant que la traduction, attestée par la personne désignée par l'Orateur pour vérifier la traduction de la loi et en attester l'exactitude, a été déposée auprès de lui à la date à laquelle elle a été déposée; cette attestation et celle de la personne désignée par l'Orateur pour vérifier la traduction de la loi et en attester l'exactitude doivent être imprimées sur tous les textes de la loi traduite imprimés et publiés par le gouvernement ou en son nom.

Mention de lignes dans une loi.

5 Lorsque, dans une loi de la Législature adoptée avant le 1er janvier 1981, il est mentionné une ligne précise d'un article, d'un paragraphe, d'une disposition, d'une sous-disposition, d'une sous-sous-disposition, d'un alinéa, d'un sous-alinéa, d'une annexe, d'une formule ou d'une autre partie de ladite loi ou de toute autre loi de la Législature adoptée avant le 1er janvier 1981 (appelée la «loi désignée» au présent article), et que la mention semble faire apparaître une contradiction ou une ambiguïté du fait que la ligne de la loi désignée imprimée dans une langue officielle ne correspond pas à la même ligne de la loi désignée imprimée dans l'autre langue officielle, la mention est réputée être une mention de la ligne en question de la loi désignée imprimée dans la langue anglaise.

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Place in Continuing Consolidation.

6 This Act may be referred to as chapter S207 of the Continuing Consolidation of the Statutes of Manitoba.

Repeal.

7 An Act to provide that the English language shall be the Official Language of the Province of Manitoba, being chapter O10 of the Revised Statutes, is repealed.

Commencement of Act.

8 This Act comes into force on the day it receives the royal assent.

The Act was amended in 1982 to add the following subsection:

Where a Speaker unable to act.

4(3) Where the Speaker is absent or unable for any other reason to designate a person for the purpose of examining and certifying the translation of an Act, the Deputy Speaker may designate a person for that purpose, and where there is no Speaker or Deputy Speaker, or both the Speaker and the Deputy Speaker are absent or unable to act, the Attorney-General may designate a person for the purpose of examining and certifying the translation of an Act.

(*An Act to Amend an Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, 1982 (Man.), c. 3, s. 1.)

This amendment was enacted, printed and published in both French and English (see *Loi modifiant la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1982 (Man.), c. 3).

There is a dispute among the parties, however, as to whether the 1980 Act itself was enacted, printed and published in both languages or whether it was enacted, printed and published in English only. The Attorney General of Manitoba claims that the 1980 Act was passed in both languages. Counsel for Alliance Québec says that it was not. The record before the Court is inconclusive. On the one hand, counsel for Alliance Québec has submitted the sworn statement of the Acting Clerk for the Legislative Assembly of Manitoba that the 1980 Act was passed in the French language by the Manitoba Legislature (Appendices to factum of Alliance Québec, at p. 13). And counsel for the Attorney General of Canada has submitted a French version of the 1980 Act, entitled "*Loi sur*

Classement dans la codification permanente.

6 La présente loi est le chapitre S207 de la codification permanente des Lois du Manitoba.

Abrogation.

7 La loi prévoyant que la langue anglaise est la langue officielle de la province du Manitoba, chapitre O10 des Lois révisées, est abrogée.

Entrée en vigueur de la loi.

8 La présente loi entre en vigueur le jour de la sanction royale.

La Loi a été modifiée en 1982 par l'adjonction du paragraphe suivant:

Absence ou empêchement d'agir de l'Orateur.

4(3) Lorsque l'Orateur est absent ou empêché pour toute autre raison de désigner une personne pour vérifier la traduction d'une loi et en attester l'exactitude, l'Orateur suppléant peut désigner une personne à cette fin. Lorsqu'il n'y a ni Orateur ni Orateur suppléant, ou en cas d'absence ou d'empêchement de ces derniers, le procureur général peut procéder à cette désignation.

(*Loi modifiant la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1982 (Man.), chap. 3, art. 1.)

Cette modification a été adoptée, imprimée et publiée en anglais et en français (voir *Loi modifiant la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1982 (Man.), chap. 3).

Les parties ne s'entendent pas cependant sur la question de savoir si la Loi de 1980 a elle-même été adoptée, imprimée et publiée dans les deux langues ou si elle a été adoptée, imprimée et publiée en anglais seulement. Le procureur général du Manitoba soutient que la Loi de 1980 a été adoptée dans les deux langues. L'avocat d'Alliance Québec affirme le contraire. Le dossier soumis à la Cour n'est pas déterminant. D'une part, l'avocat d'Alliance Québec a produit une déclaration sous serment du greffier suppléant de l'assemblée législative du Manitoba, selon laquelle la Loi de 1980 a été adoptée en français par la législature du Manitoba (annexes du mémoire d'Alliance Québec, à la p. 13). L'avocat du procureur général du Canada a présenté une version française de la Loi de 1980

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l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs" (factum of the Attorney General of Canada, at p. 60). On the other hand, there is no French language version of the 1980 Act in the 1980 volume of the *Statutes of Manitoba*. Nor does such a version appear in the *Continuing Consolidation of the Statutes of Manitoba*, although an English version of the Act appears there, as chapter S207. Finally, the English version of the Act has, in the upper right hand corner, the notation: "Assented to July 9, 1980". The French version submitted by the Attorney General of Canada has a similar notation, but the date is left blank. It reads: "*Sanctionnée le 1980*".

On the record as it stands, it is difficult to say with certitude whether the 1980 Act was indeed passed in both languages or whether, even if passed in both languages, it ever received royal assent, or whether, even if passed and assented to in both languages, it was ever actually published in French. It is unnecessary to resolve this factual question for the purposes of this Reference. It is enough to say that if the 1980 Act was not enacted, printed and published in both English and French, the entire Act, with the exception of new s. 4(3), is invalid and of no force or effect under s. 23 of the *Manitoba Act, 1870*. Beyond this, several individual sections of the 1980 Act, including new s. 4(3), are, themselves, in substantive conflict with s. 23 of the *Manitoba Act, 1870* and invalid.

In *Blaikie No. 1*, this Court held that Chapter III of Title I of the *Charter of the French language*, 1977 (Que.), c. 5, ss. 7-13, was *ultra vires* the Legislature of Quebec by virtue of s. 133 of the *Constitution Act, 1867*. Among the provisions struck down were these:

7. French is the language of the legislature and the courts in Quebec.

8. Legislative bills shall be drafted in the official language. They shall also be tabled in the Assemblée nationale, passed and assented to in that language.

intitulée *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs* (mémoire du procureur général du Canada, à la p. 58). D'autre part, aucune version française de la Loi de 1980 ne figure dans le volume de 1980 des *Statutes of Manitoba*. On ne trouve pas non plus de telle version dans la *Codification permanente des lois du Manitoba*, bien qu'une version anglaise de la Loi s'y trouve sous le numéro de chapitre S207. Enfin, la version anglaise de la Loi porte, dans le coin supérieur droit, la mention «*Assented to July 9, 1980*». La version française présentée par le procureur général du Canada comporte une mention semblable, mais la date est laissée en blanc. Elle se lit «Sanctionnée le 1980».

Selon le dossier dans son état actuel, il est difficile de dire avec certitude si la Loi de 1980 a vraiment été adoptée dans les deux langues ou, à supposer qu'elle ait été adoptée dans les deux langues, si elle a reçu la sanction royale, ou encore, à supposer qu'elle ait été adoptée et sanctionnée dans les deux langues, si elle a jamais été vraiment publiée en français. Il n'est pas nécessaire de trancher cette question de fait pour les fins du présent renvoi. Il suffit de dire que, si la Loi de 1980 n'a pas été adoptée, imprimée et publiée à la fois en anglais et en français, la totalité de la Loi, à l'exception du nouveau par. 4(3), est invalide et inopérante en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba*. En outre, plusieurs articles précis de la Loi de 1980, dont le nouveau par. 4(3), sont eux-mêmes fondamentalement incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* et invalides.

Dans l'arrêt *Blaikie n° 1*, cette Cour a statué que les art. 7 à 13 du chapitre III du titre premier de la *Charte de la langue française*, 1977 (Qué.), chap. 5, étaient *ultra vires* de la législature du Québec en vertu de l'art. 133 de la *Loi constitutionnelle de 1867*. Parmi les dispositions invalidées, il y a les suivantes:

7. Le français est la langue de la législation et de la justice au Québec.

8. Les projets de loi sont rédigés dans la langue officielle. Ils sont également, en cette langue, déposés à l'Assemblée nationale, adoptés et sanctionnés.

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9. Only the French text of the statutes and regulations is official.

10. An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration.

The teaching of *Blaikie No. 1* is three-fold. First, s. 133 of the *Constitution Act, 1867* demands not just bilingual printing and publication, but bilingual *enactment*. "It was urged before this Court that there was no requirement of enactment in both languages, as contrasted with printing and publishing. However, if full weight is given to every word of s. 133 it becomes apparent that this requirement is implicit" (at p. 1022).

Second, the English and French texts of laws must be equally authoritative. "[Section 133] not only provides but requires that official status be given to both French and English ..." (at p. 1022) (holding unconstitutional ss. 8, 9 of the *Charter of the French language*, reproduced *supra*). Cf. *Constitution Act, 1982*, s. 18(1).

In the Quebec Court of Appeal, *Attorney General of Quebec v. Blaikie* (1978), 95 D.L.R. (3d) 42, Dubé J.A. said, after setting forth ss. 7 to 13 of the *Charter of the French language* and s. 133 of the *Constitution Act, 1867* (at p. 51):

[TRANSLATION] It seems to me, obviously, that these two Acts are in flagrant contradiction. Chapter III of the *Charter of the French Language* seeks to make the French language the only official language in the National Assembly and before the Courts, with respect to both oral and written proceedings, whereas s.133 of the *British North America Act, 1867*, on the other hand, seeks to put the French language and the English language on exactly the same footing of equality before the Legislature and before the Courts of Quebec, as well as before the Houses of the Parliament of Canada and before the Courts of Canada.

(Emphasis added.)

Deschênes C.J.S.C., put it this way in the Quebec Superior Court (1978), 85 D.L.R. (3d) 252, at p. 264:

9. Seul le texte français des lois et des règlements est officiel.

10. L'Administration imprime et publie une version anglaise des projets de loi, des lois et des règlements.

L'arrêt *Blaikie n°* 1 nous enseigne trois choses. En premier lieu, l'art. 133 de la *Loi constitutionnelle de 1867* exige non seulement l'impression et la publication bilingues, mais encore l'*adoption* bilingue. «On a soutenu devant la Cour que cette exigence ne vise pas l'adoption des lois dans les deux langues, mais seulement leur impression et leur publication. Cependant, si l'on donne à chaque mot de l'art. 133 toute sa portée, il devient évident que cette exigence est implicite» (à la p. 1022).

En deuxième lieu, les versions anglaise et française des lois doivent faire pareillement autorité. «[L'article 133] ne prévoit pas seulement mais exige, qu'un statut officiel soit reconnu à l'anglais et au français ...» (à la p. 1022) (où l'on déclare inconstitutionnels les art. 8 et 9 de la *Charte de la langue française*, déjà cités). Comparer avec la *Loi constitutionnelle de 1982*, par. 18(1).

En Cour d'appel du Québec, *Procureur général du Québec c. Blaikie*, [1978] C.A. 351, le juge Dubé, après avoir cité les art. 7 à 13 de la *Charte de la langue française* et l'art. 133 de la *Loi constitutionnelle de 1867*, affirme ceci (à la p. 361):

Il me semble de toute évidence que ces deux Lois sont en contradiction flagrante: Le chapitre III de la *Charte de la langue française* veut rendre la langue française la seule langue officielle de l'Assemblée nationale et devant les Tribunaux tant dans les procédures verbales qu'écrites alors que l'article 133 de l'*Acte de l'Amérique du Nord britannique, 1867*, au contraire, veut que la langue française et que la langue anglaise soient exactement sur un pied d'égalité devant la législature et devant les Tribunaux du Québec de même que devant les chambres du parlement du Canada et devant les Tribunaux du Canada.

(C'est nous qui soulignons.)

Le juge en chef Deschênes s'exprime ainsi en Cour supérieure du Québec, [1978] C.S. 37, à la p. 47:

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The Court therefore holds to its conclusion that the requirement of the printing and publishing of the laws in the two languages, French and English, necessarily implies that of their passing and assent in these two languages in a way that the two versions possess this character that Bill 22 called "authentic" and that the Charter qualifies rather as "official".

These observations, which make clear that both versions of laws are to be equally authoritative, were adopted by this Court in disposing of the Attorney General's appeal (at p. 1027).

The third criterion which emerges from *Blaikie No. 1* is the requirement of simultaneity in the use of both languages in the enactment process.

The Attorney-General of Quebec maintains that this expression ["both those languages shall be used"] does not imply simultaneity in the use of both the French and English languages.

. . .

The Court is totally incapable of finding in the second part of s. 133 justification for the alternates or the sequence of the languages that the Attorney-General of Quebec suggests can be read there: this is not one or the other language as a choice, but the two at the same time which must be used in the records and journals of the Legislature.

. . .

The Court concludes that arts. 7 to 10 of the Charter contravene s. 133 of the *British North America Act, 1867*, inasmuch as they purport to abolish the obligation of using simultaneously the two languages, French and English, in the "Records" or archives of the National Assembly. [*Blaikie v. Attorney-General of Quebec* (1978), 85 D.L.R. (3d) at pp. 260-61, adopted in the reasons for judgment of this Court in *Attorney-General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1027.]

(Emphasis added.)

As this Court observed in *Blaikie No. 1* "it would be strange to have a requirement, as in s. 133 of the *Constitution Act, 1867*, that both English and French 'shall be used in the . . . Records and Journals' . . . and not to have this requirement extend to the enactment of legislation" (at p. 1022). Simultaneity of the use of both English and French is therefore required throughout the process of enacting bills into law.

La Cour s'en tient donc à sa conclusion que l'exigence de l'impression et de la publication des lois dans les deux langues française et anglaise implique nécessairement celle de leur adoption et sanction dans ces deux langues de sorte que les deux versions possèdent ce caractère que la Loi 22 appelait authentique et que la Charte qualifie plutôt d'officiel.

Ces observations, qui démontrent clairement que les deux versions des lois doivent faire pareillement autorité, ont été adoptées par cette Cour lorsqu'elle s'est prononcée sur le pourvoi du Procureur général (à la p. 1027).

Le troisième critère qui ressort de l'arrêt *Blaikie n° 1* est l'exigence de l'usage simultané des deux langues dans le processus d'adoption.

Le Procureur général du Québec soutient que cette expression [«l'usage de ces deux langues sera obligatoire»] n'emporte pas simultanéité de l'usage des deux langues française et anglaise.

. . .

La Cour est tout à fait incapable de trouver dans la deuxième partie de l'article 133 la permission d'alternance ou de succession des langues que le Procureur général du Québec suggère d'y lire: ce n'est pas l'une ou l'autre langue au choix, mais les deux à la fois qui doivent être employées dans les *Records and Journals* de la Législature.

. . .

La Cour conclut que les articles 7 à 10 de la Charte contreviennent à l'article 133 de l'A.A.N.B. en autant qu'ils prétendent supprimer l'obligation de l'emploi simultané des deux langues française et anglaise dans les *Records* ou archives de l'Assemblée nationale. [*Blaikie c. Procureur général du Québec*, [1978] C.S. 37, aux pp. 44 et 45, motifs que cette Cour a adoptés dans ses propres motifs de jugement dans l'arrêt *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, à la p. 1027.]

(C'est nous qui soulignons.)

Comme cette Cour le fait remarquer dans l'arrêt *Blaikie n° 1*, «il serait singulier que l'art. 133 prescrive que «dans la rédaction des archives, procès-verbaux et journaux» . . . l'usage de l'anglais et du français «sera obligatoire» et que cette exigence ne s'applique pas également à l'adoption des lois» (à la p. 1022). L'usage simultané de l'anglais et du français est donc requis pendant tout le processus d'adoption des lois.

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To summarize, *Blaikie No. 1* stands for the proposition that s. 133 of the *Constitution Act, 1867* requires (i) simultaneous enactment of legislation in both English and French, and (ii) equal authority and status for both the English and the French versions. Nothing less would adequately preserve the linguistic guarantees of those sections or ensure that the law was equally accessible to francophones and anglophones alike.

As we have said, s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are coterminous. *Blaikie No. 1* is therefore controlling on the question of the effect of s. 23 of the *Manitoba Act, 1870* on the similar legislation in issue here. Applying the criteria as laid down in *Blaikie No. 1* to the present case, it is clear that the 1980 Act does not meet the requirements of s. 23 of the *Manitoba Act, 1870*.

The heart of the 1980 Act is s. 4(1), which authorizes the bilingual promulgation of legislation in two stages: (i) the enactment of a statute in one official language only; and (ii) subsequent translation into the other official language. The translation, once certified and deposited with the Clerk of the House, is deemed "valid and of the same effect" as the formally enacted version.

This procedure is insufficient to satisfy s. 23 of the *Manitoba Act, 1870*. Bilingual enactment is required by s. 23 and unilingual enactment, followed by the later deposit of a translation, is not bilingual enactment. Moreover, s. 4(1) does not contemplate simultaneity in the use of English and French in the enactment process, *i.e.* in the Records and Journals of the Legislature, as required by s. 23.

Beyond this, the provision for the deposit of a translation is entirely voluntary. There is no requirement that a translation be deposited. Section 4(1) says only that "*if* . . . there is deposited with the Clerk of the House a translation . . . " the

En résumé, l'arrêt *Blaikie nº 1* appuie la thèse selon laquelle l'art. 133 de la *Loi constitutionnelle de 1867* exige (i) qu'il y ait adoption simultanée des lois en anglais et en français et (ii) que les versions anglaise et française fassent pareillement autorité et aient le même statut. Rien de moins ne pourrait assurer adéquatement la préservation des garanties linguistiques accordées par ces articles et l'égalité d'accès aux lois pour les francophones et les anglophones pareillement.

Comme nous l'avons déjà dit, l'art. 23 de la *Loi de 1870 sur le Manitoba* et l'art. 133 de la *Loi constitutionnelle de 1867* coïncident. En conséquence, l'arrêt *Blaikie nº 1* est déterminant quant à la question de l'effet de l'art. 23 de la *Loi de 1870 sur le Manitoba* sur les dispositions législatives semblables qui sont en cause ici. Appliquant le critère énoncé dans l'arrêt *Blaikie nº 1* à la présente espèce, il est évident que la Loi de 1980 ne satisfait pas aux exigences de l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Le principe de la Loi de 1980 se trouve au par. 4(1) qui autorise la promulgation bilingue des lois en deux étapes: (i) l'adoption d'une loi dans une seule langue officielle et (ii) la traduction subséquente dans l'autre langue officielle. Après avoir été attestée et déposée auprès du greffier de la Chambre, la traduction est réputée «avoir la même valeur légale et produire le même effet» que la version déjà adoptée.

Cette procédure est insuffisante pour satisfaire aux exigences de l'art. 23 de la *Loi de 1870 sur le Manitoba*. L'article 23 exige l'adoption dans les deux langues et l'adoption dans une seule langue suivie, plus tard, du dépôt d'une traduction ne constitue pas de l'adoption dans les deux langues. De plus, le par. 4(1) n'envisage pas l'usage simultané de l'anglais et du français dans le processus d'adoption, c.-à-d. dans les archives, procès-verbaux et journaux de la législature, comme l'exige l'art. 23.

En outre, la disposition prévoyant le dépôt d'une traduction est entièrement facultative. Il n'y a aucune obligation de déposer une traduction. Le paragraphe 4(1) dit seulement que «*lorsqu'*une traduction . . . est subséquemment déposée devant

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translation will be deemed valid and effective. To be sure, most recent legislation in Manitoba has been bilingually promulgated in accordance with this procedure. But that is because the provincial government has chosen to do so. The 1980 Act nowhere requires that the procedure set forth in s. 4(1) be followed. Unilingually promulgated legislation is still permissible under the Act.

Finally, the effort to give legal force and effect to a mere translation of an Act through certification and deposit with the Clerk of the House must fail as an unconstitutional attempt to interfere with the powers of the Lieutenant-Governor. Royal assent is required of all enactments. Section 4(1) purports to do away with royal assent for the translations of Acts, while giving the translations the full force of law. This scheme is clearly *ultra vires* the province under s. 41(*a*) of the *Constitution Act, 1982*. See *In re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.)

For all of these reasons, s. 4(1) of the 1980 Act is invalid.

Section 4(2), which facilitates the process of certifying translations, is also invalid because it is inextricably linked to s. 4(1). It would be meaningless standing alone. *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518.

Section 4(3), added by amendment in 1982, is subject to the same infirmity.

The same could be said of ss. 1, 2, 3 and 5. All contemplate the unconstitutional two step promulgation process authorized by s. 4(1) and are designed either to facilitate or complement that scheme.

Additionally, ss. 2(a) and 5 violate *Blaikie No. 1*'s requirement that the English and French texts of statutes be equally authoritative. Section 2(a) provides that when one version conflicts with the other, the original enactment prevails over the subsequent translation. And s. 5 provides that for all laws enacted before January 1, 1981 any ambiguities or inconsistencies in cross-references

le Greffier de la Chambre», elle est réputée avoir la même valeur légale et produire le même effet. Certes, la plupart des lois récentes du Manitoba ont été promulguées dans les deux langues selon cette procédure. Mais c'est parce que le gouvernement provincial a choisi de le faire. Aucune disposition de la Loi de 1980 n'exige que la procédure énoncée au par. 4(1) soit suivie. La promulgation de lois unilingues est encore permise selon la Loi.

Enfin, la tentative de rendre juridiquement opérante la simple traduction d'une loi par son attestation et son dépôt auprès du greffier de la Chambre doit échouer pour le motif qu'il s'agit là d'une tentative inconstitutionnelle de porter atteinte aux pouvoirs du lieutenant-gouverneur. Toutes les lois doivent recevoir la sanction royale. Le paragraphe 4(1) a pour objet de soustraire les traductions de lois à la sanction royale tout en leur donnant force de loi. Cette méthode est manifestement *ultra vires* de la province en vertu de l'al. 41*a*) de la *Loi constitutionnelle de 1982*. Voir *In re Initiative and Referendum Act*, [1919] A.C. 935 (C.P.)

Pour tous ces motifs, le par. 4(1) de la Loi de 1980 est invalide.

Le paragraphe 4(2), qui facilite le processus d'attestation des traductions, est également invalide parce qu'il est inextricablement lié au par. 4(1). Seul, il serait vide de sens. *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (C.P.), à la p. 518.

Le paragraphe 4(3), ajouté par modification en 1982, est entaché du même vice.

On pourrait en dire autant des art. 1, 2, 3 et 5. Tous ces articles envisagent le processus inconstitutionnel de promulgation en deux étapes autorisé par le par. 4(1) et ils ont pour objet soit de faciliter soit de compléter ce processus.

De plus, l'alinéa 2a) et l'art. 5 vont à l'encontre de l'exigence, énoncée dans l'arrêt *Blaikie n° 1*, que les versions anglaise et française des lois fassent pareillement autorité. L'alinéa 2a) prévoit que lorsqu'une version n'a pas le même sens que l'autre version, le texte législatif original l'emporte sur sa traduction subséquente. L'article 5 dispose que, pour toutes les lois adoptées avant le 1er janvier

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to other laws are to be resolved by reference to the English text of such laws. These provisions cannot stand. Any mechanism for resolving semantic conflicts between the English and French versions of a statute which prefers one text to the other renders the non-preferred text legally irrelevant, since it cannot safely be relied upon. The non-preferred version has the status of law only in so far as it is consistent with the preferred version. In all instances, it is necessary to have regard to the preferred version in order to know the law. This is in conflict with the command of *Blaikie No. 1* that both language versions be "official" (at p. 1022).

1981, toute ambiguïté ou incohérence dans les renvois à d'autres lois doit se résoudre en fonction du texte anglais de ces lois. Ces dispositions ne peuvent être maintenues. Tout mécanisme de solution des divergences de sens entre la version anglaise et la version française d'une loi qui accorde la préférence à un texte (texte désigné) plutôt qu'à l'autre texte a pour effet de rendre ce dernier texte (non désigné) juridiquement inapplicable puisqu'on ne peut s'y fier. La version non désignée n'a le statut de loi que dans la mesure où elle est compatible avec la version désignée. Dans tous les cas, il est nécessaire de se référer à la version désignée pour savoir ce que dit la loi. Cela est incompatible avec l'exigence, énoncée dans l'arrêt *Blaikie nº 1*, que les versions dans l'une et l'autre langue soient «officielles» (à la p. 1022).

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It does not matter, for constitutional purposes, whether the linguistic preference is expressly given to one language, as in s. 5, or left to be determined by the member who introduces the bill, as in s. 2(a). Any mechanism for attributing superior status to one language version, however fashioned, violates s. 23 of the *Manitoba Act, 1870*.

Pour les fins constitutionnelles, il importe peu que la préférence soit expressément accordée à une langue, comme à l'art. 5, ou déterminée par le député qui dépose le projet de loi, comme à l'al. 2a). Tout mécanisme quel qu'il soit visant à conférer un statut supérieur à une version dans une langue contrevient à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Section 3(1), which provides for certification of the language of enactment, and s. 3(2), which establishes a conclusive presumption that the language of enactment was English in the case of all statutes enacted before the coming into effect of the 1980 Act, are clearly ancillary to and inseverable from s. 2(1). They are also, as we have said, inseverable parts of the unilingual enactment scheme envisaged by s. 4(1). They therefore fall with these two sections.

Le paragraphe 3(1) qui prévoit l'attestation de la langue d'adoption et le par. 3(2), qui établit une présomption irréfutable que la langue d'adoption a été l'anglais pour toutes les lois adoptées avant l'entrée en vigueur de la Loi de 1980, sont manifestement accessoires au par. 2(1) et inséparables de ce dernier. Ils sont aussi, comme nous l'avons déjà dit, inséparables du processus d'adoption unilingue envisagé par le par. 4(1). En conséquence, ils tombent avec ces deux paragraphes.

Section 1, which provides simply that the term "official language" means either English or French, would be innocuous in any other context. It is clearly, however, ancillary to the invalid provisions of the 1980 Act. The term it defines, "official language", appears fourteen times in the four unconstitutional sections discussed above. In our view, s. 1, although unobjectionable in itself, is inseverable from the invalid provisions and falls with them. It would, in any event, be meaningless standing alone.

Dans tout autre contexte, l'art. 1, qui dispose simplement que l'expression «langue officielle» désigne le français ou l'anglais, serait sans conséquence. Toutefois, il est manifestement accessoire aux dispositions invalides de la Loi de 1980. L'expression «langue officielle» qu'il définit figure douze fois dans les quatre dispositions inconstitutionnelles que je viens d'analyser. À notre avis, bien qu'il soit acceptable en soi, l'art. 1 est inséparable des dispositions invalides et tombe donc avec elles. De toute façon, seul, il serait vide de sens.

Subsection 2(b) provides that where a statute is bilingually enacted, conflicts in meaning between the two language versions are to be resolved by giving preference to the version that "according to the true spirit, intent and meaning of the Act as a whole, best insures the attainment of its objects". This subsection, too, is inextricably bound up with the other unconstitutional provisions of the 1980 Act, and is invalid for that reason.

L'alinéa 2b) dispose que lorsqu'une loi est adoptée dans les deux langues, on doit résoudre les divergences de sens entre les deux versions en donnant préséance à la version qui, «d'après l'esprit, l'intention et le sens véritables de la loi considérée globalement, assure le mieux la réalisation de ses objets». Cet alinéa est, lui aussi, inextricablement lié aux autres dispositions inconstitutionnelles de la Loi de 1980 et est invalide pour ce motif.

Sections 1 to 5 of the 1980 Act are invalid and of no force or effect under s. 23 of the *Manitoba Act, 1870*.

Les articles 1 à 5 de la Loi de 1980 sont invalides et inopérants en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Sections 6, 7 and 8 of the 1980 Act, however, are severable from the unconstitutional moiety and do not substantively conflict with s. 23. Section 7, for example, repeals the *Official Language Act 1890* which this Court held invalid in *Attorney General of Manitoba v. Forest*, *supra*. Section 6, in turn, gives the 1980 Act a chapter number in the *Continuing Consolidation of the Statutes of Manitoba*. And s. 8 simply provides for the Act coming into force on the day it receives royal assent. These three provisions are unobjectionable and can stand on their own, free from the defects which infect the rest of the 1980 Act. They are, in our view, severable from the unconstitutional provisions of the 1980 Act.

Les articles 6, 7 et 8 de la Loi de 1980 sont toutefois séparables de la partie inconstitutionnelle de cette loi et ne sont pas fondamentalement incompatibles avec l'art. 23. Par exemple, l'art. 7 abroge l'*Official Language Act, 1890* que cette Cour a déjà déclarée invalide dans l'arrêt *Procureur général du Manitoba c. Forest*, précité. L'article 6, quant à lui, donne à la Loi de 1980 un numéro de chapitre dans la *Codification permanente des lois du Manitoba*. Et l'article 8 prévoit simplement que la Loi entrera en vigueur le jour où elle recevra la sanction royale. Ces trois articles sont acceptables et peuvent être valides en soi, vu qu'ils sont exempts des vices qui entachent le reste de la Loi de 1980. Ils sont, à notre avis, séparables des dispositions inconstitutionnelles de la Loi de 1980.

To summarize, the entire Act, except for new s. 4(3), may be invalid under s. 23 of the *Manitoba Act, 1870*, if it was not enacted, printed and published bilingually. The record is inconclusive on this point. Substantively, ss. 6, 7 and 8 are unobjectionable. Section 4(1), however, violates s. 23's requirement of simultaneous, bilingual enactment and ss. 2(a) and 5 violate s. 23's requirement that both language versions be equally authoritative. The remaining sections of the Act are inseverable from the constitutionally infirm provisions and fall with them.

En résumé, toute la Loi, sauf le nouveau par. 4(3), peut être invalide en vertu de l'art. 23 de la *Loi de 1870 sur le Manitoba* si elle n'a pas été adoptée, imprimée et publiée dans les deux langues. Le dossier n'est pas concluant sur ce point. Les articles 6, 7 et 8 sont fondamentalement acceptables. Cependant, le par. 4(1) va à l'encontre de l'exigence de l'art. 23 quant à l'adoption bilingue simultanée et l'al. 2a) et l'art. 5 vont à l'encontre de l'exigence de l'art. 23 que les versions dans les deux langues fassent pareillement autorité. Les autres articles de la Loi sont inséparables des dispositions inconstitutionnelles et tombent donc avec elles.

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VIII

Conclusions

i) Section 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* are mandatory;

ii) All Acts of the Manitoba Legislature that were not printed and published in both the English and French languages are, and always have been, invalid and of no force and effect;

iii) The Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect (*i.e.* current Acts) are deemed to have temporary validity and force and effect from the date of this judgment to the expiry of the minimum period required for translation, re-enactment, printing and publishing;

iv) Rights, obligations and any other effects which have arisen under current Acts, and purportedly repealed or spent Acts, of the Legislature of Manitoba, which are not saved by the *de facto* doctrine or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, valid, and of force and effect until the expiry of the minimum period required for translation, re-enactment, printing and publishing;

v) The Court will, at the request of either the Attorney General of Canada or the Attorney General of Manitoba, made within one hundred and twenty days of the date of this judgment, establish the minimum period necessary for translation, re-enactment, printing and publishing of (1) unilingual Acts of the Legislature of Manitoba which would be currently in force were it not for their constitutional defect, and (2) the unilingual repealed and spent Acts of the Legislature of Manitoba. Following such a request, a special hearing will be set and submissions will be accepted from the Attorney General of Canada and the Attorney General of Manitoba and the other interveners.

vi) *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes,*

VIII

Conclusions

i) L'article 133 de la *Loi constitutionnelle de 1867* et l'art. 23 de la *Loi de 1870 sur le Manitoba* sont impératifs;

ii) Toutes les lois de la législature du Manitoba qui n'ont pas été imprimées et publiées en anglais et en français sont invalides et inopérantes et l'ont toujours été;

iii) Les lois de la législature du Manitoba qui seraient actuellement en vigueur, n'était-ce du vice dont elles sont entachées sur le plan constitutionnel (c.-à-d. les lois actuelles), sont réputées temporairement valides et opérantes à compter de la date du présent jugement jusqu'à l'expiration du délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier;

iv) Les droits, obligations et tous autres effets qui ont découlé des lois actuelles ou des lois apparemment abrogées et périmées de la législature du Manitoba et qui ne sont pas sauvés par l'application du principe de la validité *de facto* ou de principes comme ceux de la chose jugée et de l'erreur de droit, sont réputés temporairement avoir été valides et opérantes et continuer de l'être jusqu'à l'expiration du délai minimum requis pour traduire, adopter de nouveau, imprimer et publier ces lois;

v) À la demande du procureur général du Canada ou du procureur général du Manitoba, faite dans les cent vingt jours de la date du présent jugement, la Cour fixera le délai minimum requis pour traduire, adopter de nouveau, imprimer et publier (1) les lois unilingues de la législature du Manitoba qui seraient actuellement en vigueur, n'était-ce du vice dont elles sont entachées sur le plan constitutionnel et (2) les lois unilingues abrogées ou périmées de la législature du Manitoba. Suite à cette demande, une audition spéciale sera fixée et le procureur général du Canada, le procureur général du Manitoba et les autres intervenants seront invités à soumettre des mémoires.

vi) La *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, 1980

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1980 (Man.), c. 3, is invalid and of no force and effect in its entirety if it was not enacted, printed, and published in both official languages. In any event, ss. 1 to 5 are invalid and of no force and effect.

IX

Answer to the Questions

Question 1

"Are the requirements of section 133 of the Constitution Act, 1867 and of section 23 of the Manitoba Act, 1870 respecting the use of both the English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and

(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba

mandatory?"

Answer:

Yes.

Question 2

"Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of section 23 of the Manitoba Act, 1870?"

Answer:

Yes, but, for the reasons given by the Court, the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 3

"If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?"

(Man.), chap. 3, est totalement invalide et inopérante si elle n'a pas été adoptée, imprimée et publiée dans les deux langues officielles. De toute façon, les art. 1 à 5 sont invalides et inopérants.

IX

Réponse aux questions

Question nº 1

«Les obligations imposées par l'article 133 de la Loi constitutionnelle de 1867 et par l'article 23 de la Loi de 1870 sur le Manitoba, relativement à l'usage du français et de l'anglais dans:

a) les archives, procès-verbaux et journaux des chambres du Parlement du Canada et des législatures du Québec et du Manitoba, et

b) les actes du Parlement du Canada et des législatures du Québec et du Manitoba

sont-elles impératives?»

Réponse:

Oui.

Question nº 2

«Est-ce que les dispositions de l'article 23 de la Loi de 1870 sur le Manitoba rendent invalides les lois et les règlements de la province du Manitoba qui n'ont pas été imprimés et publiés en langue anglaise et en langue française?»

Réponse:

Oui, mais pour les motifs exposés par la Cour, les lois actuelles de la Législature qui sont invalides seront réputées temporairement valides pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 3

«Dans l'hypothèse où il a été répondu par l'affirmative à la question nº 2, les textes législatifs qui n'ont pas été imprimés et publiés en langue anglaise et en langue française sont-ils opérants et, dans l'affirmative, dans quelle mesure et à quelles conditions?»

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Answer:

The Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because they are invalid, but, for the reasons given by the Court, the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 4

"Are any of the provisions of An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, inconsistent with the provisions of section 23 of the Manitoba Act, 1870, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?"

Answer:

If *An Act respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes* enacted by S.M. 1980, Ch. 3, was not enacted, printed and published in both official languages, then it is invalid and of no force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

The questions referred to were answered as follows:

Question 1:—Yes.

Question 2:—Yes, but, for the reasons given by the Court, the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 3:—The Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because

Réponse:

Les lois de la Législature qui n'ont pas été adoptées, imprimées et publiées en français et en anglais sont inopérantes pour cause d'invalidité mais, pour les motifs exposés par la Cour, les lois actuelles de la Législature seront réputées temporairement opérantes pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 4

«Est-ce que l'une ou l'autre des dispositions de la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs, constituant le chapitre 3 des Statuts du Manitoba de 1980, sont incompatibles avec les dispositions de l'article 23 de la Loi de 1870 sur le Manitoba et, dans l'affirmative, est-ce que les dispositions considérées sont, dans la mesure de l'incompatibilité, invalides et inopérantes?»

Réponse:

Si la *Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs*, promulguée à S.M. 1980, chap. 3, n'a pas été adoptée, imprimée et publiée dans les deux langues officielles, alors elle est totalement invalide et inopérante.

Si la Loi a été adoptée, imprimée et publiée dans les deux langues officielles, alors les art. 1 à 5 sont invalides et inopérants.

Les questions soumises reçoivent les réponses suivantes:

Question nº 1:—Oui.

Question nº 2:—Oui, mais pour les motifs exposés par la Cour, les lois actuelles de la Législature qui sont invalides seront réputées temporairement valides pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 3:—Les lois de la Législature qui n'ont pas été adoptées, imprimées et publiées en français et en anglais sont inopérantes pour cause d'in-

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they are invalid, but, for the reasons given by the Court, the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 4:—If An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, was not enacted, printed and published in both official languages, then it is invalid and of no force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

Solicitor for the Attorney General of Canada: R. Tassé, Ottawa.

Solicitor for the Société franco-manitobaine: Joseph E. Magnet, Ottawa.

Solicitor for the Fédération des francophones hors Québec: Gérald-A. Beaudoin, Hull.

Solicitors for the Attorney General of Quebec: Jean-K. Samson and André Binette, Ste-Foy.

Solicitor for Roger Bilodeau: Vaughan L. Baird, Winnipeg.

Solicitor for Alliance Québec: Stephen A. Scott, Montréal.

Solicitor for the Freedom of Choice Movement: Walter J. Roustan, Montréal.

Solicitor for the Attorney General of Manitoba: R. H. Tallin, Winnipeg.

Solicitor for Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz and Patricia Maltman: D. C. H. McCaffrey, Winnipeg.

validité mais, pour les motifs exposés par la Cour, les lois actuelles de la Législature seront réputées temporairement opérantes pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Question nº 4:—Si la Loi sur l'application de l'article 23 de l'Acte du Manitoba aux textes législatifs, promulguée à S.M. 1980, chap. 3, n'a pas été adoptée, imprimée et publiée dans les deux langues officielles, alors elle est totalement invalide et inopérante.

Si la Loi a été adoptée, imprimée et publiée dans les deux langues officielles, alors les art. 1 à 5 sont invalides et inopérants.

Procureur du procureur général du Canada: R. Tassé, Ottawa.

Procureur de la Société franco-manitobaine: Joseph E. Magnet, Ottawa.

Procureur de la Fédération des francophones hors Québec: Gérald-A. Beaudoin, Hull.

Procureurs du procureur général du Québec: Jean-K. Samson et André Binette, Ste-Foy.

Procureur de Roger Bilodeau: Vaughan L. Baird, Winnipeg.

Procureur d'Alliance Québec: Stephen A. Scott, Montréal.

Procureur du Mouvement de la liberté de choix: Walter J. Roustan, Montréal.

Procureur du procureur général du Manitoba: R. H. Tallin, Winnipeg.

Procureur de Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz et Patricia Maltman: D. C. H. McCaffrey, Winnipeg.

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