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February 1, 2023

British Columbia Utilities Commission
Suite 410, 900 Howe Street
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Attention: Sara Hardgrave, Acting Commission Secretary

Dear Sara Hardgrave:

Re: British Columbia Utilities Commission (BCUC) Inquiry into the Acquisition of Renewable Natural Gas (RNG) by Public Utilities in British Columbia (Inquiry) Phase 2

FortisBC Energy Inc. (FEI) Final Argument Submission

On July 28, 2022, the BCUC issued its Decision and Order G-212-22 on Phase 1 of the Inquiry into the Acquisition of Renewable Natural Gas by Public Utilities in British Columbia (Inquiry).[1] Also on July 28, 2022, the BCUC issued its Phase 1 Report[2] and, by Order G-213-22,[3] initiated Phase 2 of the Inquiry, inviting parties to make submissions on specific questions raised in Section 9.0 of the Phase 1 Report.

On January 12, 2023, following the submission of intervener evidence and one round of information requests on that evidence, the BCUC determined that the evidentiary record was sufficient to move to final argument with respect to the definition of Renewable Natural Gas (RNG).[4] In particular, the BCUC invited interveners to address the following:

1. Whether, in addition to the two scenarios determined to be an acquisition of RNG made in the Phase 1 Report, RNG may also be acquired in each of the following scenarios (with comments sought on associated eligibility criteria, if any):
    a. Conventional Natural Gas is acquired, and an appropriate quantum of Environmental Attributes (EAs), in a form not associated with the production of biomethane, are acquired separately.
    b. Conventional Natural Gas is acquired, and an appropriate quantum of carbon capture and storage – a carbon offset is acquired separately. If so, what is the appropriate quantum of carbon that should be captured to associate with a unit of Conventional Natural Gas.

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1 Online: https://docs.bcuc.com/Documents/Other/2022/DOC_67309_G-212-22-BCUC-RNG-Inquiry-Phase1-Decision.pdf.
2 Online: https://docs.bcuc.com/Documents/Other/2022/DOC_67310_Final-RNG-Report.pdf.
3 Exhibit A-2.
4 Exhibit A-11.

c. Emissions from the combustion of Conventional Natural Gas are captured and either stored or neutralized at the point of combustion.

2. Whether, for each scenario 1(a), 1(b) and 1(c), the validation of the carbon intensity (CI) of the resulting RNG, is necessary to ensure that GHG emissions are reduced. If an acceptable tracking and verification methodology is necessary, what methodology should be adopted?

FEI has limited its submissions to the above specified topics.

FEI appreciates the BCUC's efforts in this Inquiry to organize the terminology related to the acquisition of RNG. FEI refers to the products contemplated under Scenarios 1(a), (b) and (c) as "abated gas," as these are instances where the GHG emissions associated with conventional natural gas have been abated through various means. Generally, FEI supports the acquisitions of abated gas as contemplated in Scenarios 1(a), (b) and (c). FEI considers that these scenarios represent important pathways by which it can reduce the CI of the commodity it acquires and should be amongst accepted methods to enable it to meet GHG reduction targets.[5] FEI is also not opposed to the validation of the CI of such abated gases to ensure that GHG emissions are reduced. However, the BCUC's efforts to facilitate the acquisition of abated gases is limited by its statutory authority.

FEI's specific submissions are summarized as follows:

- Following the rules of statutory interpretation, the term RNG in the GGRR means methane produced from biogenic feedstocks and does not include Scenarios 1(a), (b) and (c). The term RNG in the GGRR has a technical meaning in the industry which is consistent with the use of the term by the Legislature in contextual documents. This definition does not include Scenarios 1(a), (b) and (c) and it is not open to the BCUC to create its own meaning for RNG.
- FEI would support a recommendation to Government from the BCUC to amend the GGRR to facilitate Scenarios 1(a), (b) and (c).
- FEI would support the BCUC crafting its own guidelines pursuant to section 71 of the *Utilities Commission Act* (UCA) to facilitate Scenarios 1(a), (b) and (c).
- While the BCUC has not been delegated authority to amend the scope of prescribed undertakings for the purposes of section 18 of the *Clean Energy Act*, FEI would support guidelines under section 71 of the UCA regarding the validation of the CI of abated gases as contemplated under Scenarios 1(a), (b) and (c).

1. RNG UNDER THE GGRR MEANS METHANE PRODUCED FROM BIOGENIC FEEDSTOCKS

The GGRR describes the acquisition of RNG, within certain parameters, as a class of prescribed undertaking. As part of Phase 1 of the Inquiry, the BCUC determined that, for the purposes of interpreting the GGRR, RNG is "acquired" when:[6]

[5] FEI notes that it anticipates the Province will be setting out acceptable methods as part of the Greenhouse Gas Reduction Standard.
[6] Phase 1 Report, p. 25.

- Biomethane is acquired with its associated EAs – as, for example, in the case of FEI's biomethane purchase agreements; and
- Conventional Natural Gas is acquired and an appropriate quantum of EAs that are associated with the production of biomethane are acquired separately.

However, in confirming that the above acquired products constitute RNG under the GGRR, the BCUC also observed that RNG is not expressly defined in the GGRR, or indeed, in any statutes in British Columbia.[7] As such, as part of Phase 2 of the Inquiry, the BCUC asked interveners to consider whether conventional natural gas paired with non-biomethane-based EAs or carbon offsets (Scenarios 1(a) and (b)) or where emissions from conventional natural gas are captured and stored at the point of combustion (Scenario 1(c)) could be said to be "acquired" as RNG under the GGRR.

FEI provided submissions in this regard as part of Phase 1 of the Inquiry, stating that "based on legislation as it exists today, purchasing EAs and pairing these attributes with conventional natural gas in British Columbia would not satisfy the definition of RNG in the GGRR."[8] In addition to the submissions below, FEI continues to rely on its earlier submissions from Phase 1 of the Inquiry and, in particular, reiterates that the lack of a definition of RNG in the GGRR does not empower the BCUC to *create* a definition on the basis of submissions from interveners in this Inquiry. Rather, following the rules of statutory definition, the meaning of RNG is confined to the meaning of the term intended by the Legislature and technical meaning given to it by the RNG industry, which are consistent.

1.1 The Definition of RNG Cannot be Expanded Beyond its Intended Technical Meaning

It is common for legislative terms not to be specifically defined, leading decision-makers and courts to engage in the process of statutory interpretation. Indeed, in order to properly exercise its powers and fully satisfy its obligations under the UCA, the BCUC must interpret "RNG" as a statutory term.

As discussed below, RNG, which is also commonly referred to as "Biomethane", refers to methane produced from biogenic feedstocks (i.e., organic-based waste materials or biomass) that is upgraded to pipeline-quality gas. Therefore, expanding the definition of RNG to include Scenarios 1(a), (b) and (c) would be inconsistent with constraints of statutory interpretation accepted by the courts and, ultimately, would distort the meaning of RNG.

1.1.1 Purposive Approach to Statutory Interpretation Precludes Expanding the Definition of RNG Beyond the Intention of the Legislature

FEI submits that the Legislature intended the meaning of RNG to be limited to methane produced from biogenic feedstocks, and therefore, the BCUC's definition of RNG for the purposes of acquiring RNG under the GGRR cannot be expanded to include Scenarios 1(a), (b) or (c). As discussed below, this interpretation is supported by the scheme and object of the *Clean Energy Act* and the GGRR, and the intention of the Legislature.

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7 Phase 1 Report, p. 15.
8 FEI Phase 1 Inquiry Submission, p. 3. Online: https://docs.bcuc.com/Documents/Arguments/2022/DOC_65489_2022-01-31-FEI-Submission-regarding-Inquiry.pdf.

The GGRR is a regulation made pursuant to the enabling power of the *Clean Energy Act*. Section 18 of the *Clean Energy Act* establishes the definition of, and the role of the BCUC in setting rates for, "prescribed undertakings":

> **Greenhouse gas reduction**
>
> **18** (1) In this section, "prescribed undertaking" means a project, program, contract or expenditure that is in a class of projects, programs, contracts or expenditures prescribed for the purpose of reducing greenhouse gas emissions in British Columbia.
>
> (2) In setting rates under the *Utilities Commission Act* for a public utility carrying out a prescribed undertaking, the commission must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking.
>
> (3) The commission must not exercise a power under the Utilities Commission Act in a way that would directly or indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking.
>
> (4) A public utility referred to in subsection (2) must submit to the minister, on the minister's request, a report respecting the prescribed undertaking.
>
> (5) A report to be submitted under subsection (4) must include the information the minister specifies and be submitted in the form and by the time the minister specifies.

Subsection 35(n) of the *Clean Energy Act* gives the LGIC the power to make regulations for the purposes of the definition of "prescribed undertaking" in section 18:

> . . . prescribing classes of projects, programs, contractors or expenditures that encourage
>
> (i) the use of
>
> (A) electricity, or
>
> (B) energy directly from a clean or renewable resource
>
> instead of the use of other energy sources that produce higher greenhouse gas emissions, or
>
> (ii) the use of natural gas, hydrogen or electricity in vehicles, and the construction and operation of infrastructure for natural gas or hydrogen fuelling or electricity charging.
>
> [Emphasis added]

The GGRR enables the acquisition of RNG as a prescribed undertaking under the following sections:

> (3.7) A public utility's undertaking that is in the class defined in subsection (3.8) is a prescribed undertaking for the purposes of section 18 of the Act.
>
> (3.71) For the purposes of subsection (3.8), "**acquires renewable natural gas**" includes producing renewable natural gas by producing or purchasing biogas and upgrading it to renewable natural gas.

(3.8) The public utility acquires renewable natural gas

(a) at costs that meet the following criteria, as applicable:

(i) if the public utility acquires renewable natural gas by purchasing it, the price of the renewable natural gas does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the contract for purchase is signed;

(ii) if the public utility acquires renewable natural gas by producing it, the levelized cost of production reasonably expected by the public utility does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the public utility decides to construct or purchase the production facility, and

(b) that, in a calendar year, does not exceed 15% of the total amount, in GJ, of natural gas provided by the public utility to its non-bypass customers in 2019, subject to subsection (3.9) and section 10.

(3.9) The volume referred to in subsection (3.8) (b) does not include renewable natural gas acquired by the public utility that the public utility provides to a customer in accordance with a rate under which the full cost of the following is recovered from the customer:

(a) the acquisition of the renewable natural gas;

(b) the service related to the provision of the renewable natural gas.

In the leading case on statutory interpretation, *Re Rizzo & Rizzo Shoes Ltd*,[9] the Supreme Court of Canada adopted the modern principle of interpretation formulated by Elmer Driedger in *The Construction of Statutes* as follows:[10]

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This approach to statutory interpretation must also be followed in interpreting regulations such as the GGRR.[11]

As affirmed by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* the grammatical and ordinary meaning of the words of an Act are not determinative; rather, decision-makers and courts are "obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading".[12] Further, where, as here, the provision under consideration is found in a statute or

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9 [1998] 1 SCR 27 [*Rizzo*] (TAB 11). See also: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 [*Bell ExpressVu*] (TAB 2).
10 *Rizzo* at paras. 18-23 (TAB 11).
11 *Glykis v. Hydro-Québec*, 2004 SCC 60 at para. 5 (TAB 4).
12 2006 SCC 4 [*ATCO*] at para. 48 (TAB 1).

regulation that is itself a component of a larger statutory scheme, the Supreme Court of Canada has found that:[13]

> . . . the surroundings that colour the words and scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd*., [2001] 2 S.C.R. 867, 2001 SCC 56 (CanLII), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".

Therefore, in interpreting the meaning of RNG in the GGRR, a purposive analysis is used at every stage of interpretation. In particular, the purpose of the legislation must be taken into account, either "directly, through descriptions of purpose emanating from the legislature itself or some other authoritative source; and indirectly, through inference drawn from reading the legislative text and examining the external context or tracing the evolution of the provision to be interpreted."[14] The Supreme Court of Canada further described the relevance of extrinsic evidence in the *References re Greenhouse Gas Pollution Pricing Act*:[15]

> . . . a court may consider the statute's legislative history — the events leading up to its enactment, for example, as well as government policy papers and legislative debates — in order to determine what the legislative purpose is".

The following legislative purposes are revealed by applying the interpretive tools described above.

First, the legislative purpose of the GGRR is to reduce greenhouse gas. This purpose is evident not only from the title of the regulation,[16] but also from the legislative scheme and statements of the enacting government in enacting the *Clean Energy Act* in 2010. For example, the then-Minister of Energy, Mines and Petroleum Products, Hon. Member Blair Lekstrom commented on the Act's purpose respecting greenhouse gases as follows:[17]

> The act will strengthen our environmental stewardship and reduce greenhouse gas emissions by increasing the clean or renewable generation target from 90 to 93 percent; by prohibiting the development of energy projects in parks, protected areas and conservancies; by amending the Environmental Assessment Act to specifically provide for assessment of cumulative environmental effects; by enabling consumers to manage their consumption and reduce costs with smart meters; and by <u>enabling new utility programs to encourage the use of clean or renewable energy and vehicles powered by electricity, natural gas and hydrogen</u>. [emphasis added.]

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13 *Bell ExpressVu* at para. 27 (TAB 2).
14 Ruth Sullivan, *Statutory Interpretation* (Irwin Books: Third Edition) at p. 189 (TAB 13).
15 2021 SCC 11 at para. 62 [*GHG Reference*] (TAB 9).
16 The Supreme Court of Canada has frequently used a statute's title as a tool for the purposes of characterization: *GHG Reference* at para. 58 (TAB 9). *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1004 (TAB 8).
17 British Columbia, Legislative Assembly, Hansard, 39th Parl., 2nd Sess., No. 3 (April 28, 2010) at 4976-4968. Online: https://www.leg.bc.ca/documents-data/debate-transcripts/39th-parliament/2nd-session/20100428pm-Hansard-v16n3#bill17-1R; see also: Ministry of Energy, Mines and Petroleum Resources & BC Hydro, News Release: "New Act Powers B.C. Forward with Clean Energy and Jobs" (April 28, 2010). Online: https://archive.news.gov.bc.ca/releases/news_releases_2009-2013/2010PREM0090-000483.htm.

Second, and more specifically, the legislative purpose of the GGRR's provisions relating to the acquisition of RNG as a prescribed undertaking are to support investments by natural gas utilities that will: (1) increase the use of RNG; and (2) reduce greenhouse gas emissions. This purpose is evident from official public communications from the enacting government, as well as from the statutory scheme itself. In a March 2017 news release, the Province stated the purpose of the amendments to the GGRR was to:[18]

> … support investments by natural gas utilities that will increase the use of LNG and renewable natural gas in the transportation, marine and other sectors and reduce greenhouse gas (GHG) emissions.

In the same communication, the Province defined RNG as being:[19]

> … derived from biogas created when organic waste decomposes at landfills, agricultural and forestry waste sites and wastewater treatment facilities.

The news release is not only evidence of the legislative intent underlying the amendments adding RNG as a prescribed undertaking to the GGRR, but also evidence of the Legislature's intended meaning of RNG. Further reinforcing the above definition of RNG, the Province relied on the *Resource Supply Potential for Renewable Natural Gas in B.C. Study* in the development of the RNG amendments to the GGRR which describes RNG as follows:[20]

> Production of Renewable Natural Gas (RNG) can currently be achieved by two general methods. Biogas can be produced within anaerobic digestion (AD) plants, or it can occur within landfills and be collected using wells and pipes; biogas produced in landfills is known as landfill gas (LFG). Once captured, biogas or LFG can be upgraded to RNG.

More recently, in 2021, the Province issued a news release with respect to amendments to the GGRR increasing the production and use of renewable natural gas. The Province once again defined RNG as "derived from biogas, which is produced from decomposing organic waste from landfills, forestry, agricultural waste and wastewater from treatment facilities, can be injected into the existing natural gas system and used interchangeably with natural gas."[21]

This is consistent with the definition of "biomethane" in section 1 of the *Carbon Tax Act*,[22] which states that "biomethane" means methane produced from biomass.

In short, the Province has been clear and consistent with respect to the definition of RNG. This clear legislative intent leaves no room to expand the definition to include Scenarios 1(a), (b), or (c).

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[18] British Columbia Ministry of Energy and Mines, "Increasing the market for LNG and renewable natural gas" (March 22, 2017). Online: https://news.gov.bc.ca/14374.

[19] British Columbia Ministry of Energy and Mines, "Increasing the market for LNG and renewable natural gas" (March 22, 2017). Online: https://news.gov.bc.ca/14374.

[20] British Columbia Ministry of Energy and Mines, Resource Supply Potential for Renewable Natural Gas in B.C. Study (March 2017) at p. 5. Online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/transportation/renewable-low-carbon-fuels/resource_supply_potential_for_renewable_natural_gas_in_bc_public_version.pdf.

[21] British Columbia Ministry of Energy and Mines, "Province enables increased investments in renewable gas, hydrogen" (July 2, 2021). Online: https://news.gov.bc.ca/24820.

[22] [SBC 2008] c. 40.

1.1.2 There is A Single Technical Meaning of RNG

The term "RNG" as it occurs in the GGRR has a single technical meaning that does not include Scenarios 1(a), (b) and (c). In some cases, as is in the GGRR, a law maker may use a term that has a technical meaning,[23] for example, when a statute is addressed to a specialized audience about a technical subject.[24]

The GGRR does not apply generally to the public, but rather, applies to public utilities in the furtherance of specific policy objectives. The GGRR provisions relevant to the definition of RNG are targeted at an even narrower audience – public utilities who produce or acquire RNG. Those with specialized industry knowledge have a particular understanding of the meaning of RNG. The following list reflects the definitions attributed to RNG by various industry participants:

- **Pacific Northern Gas:** "RNG is a low carbon, pipeline-quality gas that is fully interchangeable with conventional natural gas. RNG is produced by capturing and upgrading biogas generated by decomposing organic waste by-products from farming and forestry, landfills and wastewater treatment plants."[25]
- **Canadian Gas Association:** "RNG is natural gas produced from organic waste from farms, forests, landfills, and water treatment plants."[26]
- **Canadian Biogas Association**: "Biogas can be upgraded to Renewable Natural Gas (RNG), which is carbon neutral and interchangeable with conventional natural gas."[27]
- **U.S. Department of Energy:** "RNG is essentially biogas (the gaseous product of the decomposition of organic matter) that has been processed to purity standards . . . Biomethane . . . is another term for this purified pipeline-quality fuel".[28]
- **U.S. Environmental Protection Agency:** "Renewable natural gas (RNG) is a term used to describe biogas that has been upgraded for use in place of fossil natural gas."[29]
- **Chevron:** "Renewable natural gas, or RNG, is biogas that has been upgraded and placed in the conventional natural gas system."[30]
- **Enbridge:** "RNG is created by capturing methane emissions from organic waste, landfills and wastewater treatment plants. A renewable source of energy, it can be

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[23] Sullivan at p. 73 (TAB 13); *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1984] 2 S.C.R. 232 (TAB 7).

[24] *Unwin v. Hanson*, [1891] 2 Q.B. 115 (Eng. C.A.) at p. 119 (TAB 12); *Great Western Railway Co. v. Carpalla United Clay Co. Ltd*., [1909] 1 Ch. 218 at p. 236 (TAB 5). See also: *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), where Lord Diplock states at p. 638, ". . . the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates." (TAB 3).

[25] Pacific Northern Gas, "PNG and ATCO Future Fuel Sign 15-Year Renewable Natural Gas Supply Agreement" (November 10, 2021). Online: https://png.ca/news/png-and-atco-future-fuel-sign-15-year-rng-supply-agreement/.

[26] Canadian Gas Association, "The Renewable Natural Gas Opportunity". Online: https://www.cga.ca/natural-gas-101/the-renewable-natural-gas-opportunity/.

[27] Canadian Biogas Association, "Biogas 101". Online: https://biogasassociation.ca/biogas_101/.

[28] U.S. Department of Energy, Alternative Fuels Data Center: Renewable Natural Gas Production. Online: https://afdc.energy.gov/fuels/natural_gas_renewable.html.

[29] U.S. Environmental Protection Agency, "Renewable Natural Gas" (November 2, 2022). Online: https://www.epa.gov/lmop/renewable-natural-gas.

[30] Chevron, "things to know about renewable natural gas" (April 25, 2022). Online: https://www.chevron.com/newsroom/2022/q2/things-to-know-about-renewable-natural-gas.

injected into our natural gas network and used for residential and commercial energy needs as well as transportation fuel."[31]

- **ATCO Energy:** "Renewable natural gas is produced by capturing and utilizing methane produced from the decomposition of organic materials that would otherwise be released to the atmosphere."[32]
- **FortisBC Energy Inc.:** "Biomethane means biogas purified or upgraded to pipeline quality gas, also referred to as renewable natural gas."[33]

All of the above definitions are consistent and show that the industry accepted technical meaning of RNG is that it is methane produced from biogenic feedstocks. This accords with the distinction drawn generally between "renewable natural gas" and "conventional natural gas". Each term connotes a different source of methane with the former derived from renewable biogas and the latter derived from non-renewable fossil gas. FEI submits that it would be inconsistent with the meaning of each term to conflate the two definitions.

Importantly, as expressed by the Supreme Court of Canada, "where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term…"[34] Scenarios 1(a), (b) and (c) go well-beyond the technical meaning of RNG, despite according with the purpose of the GGRR, and are clearly not within the meaning of RNG accepted by those "conversant" in the business of RNG. FEI submits that the inclusion of these Scenarios as part of the definition of RNG would be contrary to the Legislature's intent.

Moreover, even if the term RNG were ambiguous, the particular meaning accepted by the industry nonetheless prevails. This principle is explained in the seminal English case *Unwin v. Hanson:*[35]

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.

Therefore, even if the BCUC finds that the term RNG is ambiguous, the BCUC does not have the authority to set out a definition of its choice. Rather, the BCUC must rely on the meaning of the term as it is used by the industry and the Legislature in the contextual documents quoted above.

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31 Enbridge, "The Future of Clean Energy: a guide to producing and using RNG" (July 2021). Online: https://www.enbridgegas.com/-/media/Extranet-Pages/Sustainability/Clean-transportation/RNG-for-Municipalities/enbridge-gas-guide-RNG.ashx?rev=98db711405f6452b83c69a7170628065.

32 ATCO Ltd., "Renewable Natural Gas" (2023). Online: https://www.atco.com/en-ca/business/energy-infrastructure/renewable-natural-gas.html.

33 FortisBC Energy Inc., General Terms and Conditions, p. 1. Online: https://www.cdn.fortisbc.com/libraries/docs/default-source/about-us-documents/regulatory-affairs-documents/gas-utility/fortisbc_generaltermsandconditions.pdf?sfvrsn=202bc0bf_29.

34 *Perka v. The Queen*, [1984] 2 SCR 232 at p. 265 (TAB 6).

35 [1891] 2 Q.B. 115 (Eng. C.A.) (TAB 12).

1.1.3 Substituting the Intention of the Legislature Would Contravene Parliamentary Supremacy

Finally, based on the legislative intent and technical meaning of RNG outlined out above, FEI submits that expanding the meaning of RNG as contemplated in Scenarios 1(a), (b) and (c) would go beyond its statutory authority. In particular, to do so would interfere with the Legislature's exclusive power to make laws and would be contrary to the foundational principle of parliamentary supremacy. As expressed by the Supreme Court of Canada in *Reference re Pan-Canadian Securities Regulation*:[36]

> Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature's law-making function.

Despite the term RNG not being defined in the GGRR, the BCUC does not have open-ended discretion to adopt its own definition. Rather, its discretion is limited by the principles of statutory interpretation; namely, the meaning of RNG is constrained by its grammatical and ordinary sense, the context, the objective of the legislation and the intention of parliament. As discussed above, these factors clearly show that RNG has a singular technical meaning that is well-understood in the industry and has been plainly adopted by the Legislature as apparent from news releases and other contextual documents.

Ultimately, if the BCUC were to apply a subjective definition of RNG it would thwart the Legislature's power to make laws, contrary to the principle of parliamentary supremacy.

1.2 FEI Supports Streamlining the Acquisition of Abated Gases

While FEI submits that the definition of RNG under the GGRR cannot be interpreted as being broad enough to encompass the types of acquisitions contemplated in Scenarios 1 (a), (b) or (c), the utility is supportive of the BCUC:

- Recommending amendments to the GGRR that enable Scenarios 1 (a), (b) and (c); and
- Exploring alternative means of streamlining the acquisition of these and other abated gases under section 71 of the UCA.

FEI addresses each of these approaches below.

1.2.1 The BCUC is Well-Placed to Make a Recommendation to Government

Based on the results of this Inquiry, FEI submits that the BCUC is well-placed to provide a recommendation to the provincial governmental that it ought to enable the acquisition of abated gas, as contemplated in Scenarios 1(a), (b) and (c) under the GGRR. While the GGRR is silent on these scenarios, they would produce lower or zero CI abated gas, which would further the objectives of reducing GHG emissions.

Amendments to the GGRR that allowed for the acquisition of abated gas would provide for a broader range of pathways for FEI to cost-effectively meet GHG emissions targets. For

[36] 2018 SCC 48 at para. 55 (TAB 10).

example, conventional natural gas has a lifecycle CI of approximately +59 kgCO2e/GJ, and therefore, when a unit (GJ) of lignin is produced and used at a customer's premise, that customer avoids a unit of conventional natural gas and has reduced carbon emissions by 59 kgCO2e. The emissions associated with the use of lignin would be created but at a much lower CI of approximately 0 kgCO2e/GJ. FEI could purchase the EAs (the reduction in emissions) from that customer, and the customer would then be deemed to not have reduced carbon emissions by 59 kgCO2e and FEI would have the right to claim the emissions reductions. It is this carbon reduction EA that has value. FEI would pair this carbon reduction EA with an existing unit of conventional natural gas which results in a 0 CI GJ of conventional natural gas (+59 kgC02e/GJ - 59 kgCO2e/GJ = 0 kgCO2e/GJ).[37]

Further, supporting amendments to legislation would also be necessary to support this regime (e.g., the exemption of conventional natural gas from the *Carbon Tax Act* where it is paired with an EA).[38] Currently, FEI's customers are exempt from carbon tax on biomethane, so unless customers were also exempt from carbon tax on these other types of low carbon energies, it is unlikely that FEI would pursue these pathways because it would result in customers effectively paying for emissions reductions twice, once when they pay for the low carbon energy and again when they pay a carbon tax rate equivalent to that of conventional natural gas on the low carbon energy.

Such a recommendation, if implemented, would provide the utility with several additional means of meeting BC's GHG reduction targets, potentially lowering costs to FEI's customers, and supporting the long-term goal of transitioning FEI's existing natural gas network to low carbon fuels.[39]

1.2.2 The BCUC Can Also Develop its Own Guidelines Facilitating the Acquisition of Additional Low Carbon Fuels

FEI submits that the BCUC may also choose to develop a new set of guidelines to streamline the acquisition of abated gases under section 71 of the UCA.

Like the BCUC's existing Rules for Natural Gas Supply Contracts,[40] these new guidelines could facilitate the BCUC's review of energy supply contracts where the utility acquires conventional natural gas with an associated EA in a form not associated with the production of biomethane or with a separate carbon offset, or where the associated carbon emissions are captured and stored. While FEI submits that the content of such guidelines would need to be determined as part of an additional process, at a high level, they could:

- Clearly define applicable abated gases that may be acquired by a public utility; and
- Specify the information required by the BCUC to facilitate the review of the acquisition of such abated gases under section 71 of the UCA.

Such guidelines would signal that the BCUC is willing to accept the acquisition of these abated gases in the public interest and help streamline the application process by setting out the information requirements for public utilities in advance.

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37 Exhibit C10-3, p. 4.
38 Exhibit C10-3, p. 4.
39 Exhibit C10-3, p. 4.
40 Online: https://docs.bcuc.com/documents/Guidelines/2012/DOC_4236_DOC_4236_G-130-06%20Rules%20for%20Natural%20Gas%20Energy%20Supply%20Contracts.pdf.

While this would provide public utilities with greater flexibility with respect to the acquisition of abated gases furthering the reduction of GHG emissions, FEI reiterates that it is unlikely that it would make use of these GHG reduction pathways until such a time that the Province recognized them as compliance pathways to a public utility's GHG reduction obligations.[41]

2. VALIDATION OF CARBON INTENSITY (CI)

The BCUC also seeks submissions regarding whether the validation of the CI of the abated gases identified in Scenarios 1(a), (b) and (c) is necessary to ensure that GHG emissions are reduced. As Scenarios 1(a), (b) and (c) are not RNG, FEI submits that this question is not relevant to the acquisition of RNG as a prescribed undertaking pursuant to section 18 of the CEA and the GGRR.

More generally, FEI submits that the BCUC does not have the jurisdiction to impose additional requirements on the acquisition of RNG or any other fuels acquired under the GGRR, including setting a CI requirement. The jurisdiction to define categories of prescribed undertakings for the purpose of section 18 of the *Clean Energy Act* has been given to the LGIC pursuant to subsection 35(n) of that Act. The BCUC has not been delegated this power.

Indeed, as explained by the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) in its Letter of Comment, the Province intends to establish a CI threshold through amendments to the GGRR:[42]

> The Province is currently contemplating amendments to the GGGR that would set a CI maximum threshold for Low Carbon Resources under the GGRR. This could include prescribing a methodology that public utilities would be required to use to demonstrate to the British Columbia Utilities Commission (BCUC) that the Low Carbon Resources they are seeking to acquire fall at or below this threshold.

FEI, therefore, submits that the BCUC does not have jurisdiction over the scope of prescribed undertakings and may not impose a CI or other requirements that would limit the scope of prescribed undertakings as defined by the LGIC.

However, as discussed above, the BCUC may set out its own guidelines for the acquisition of abated gases under section 71 of the UCA. In this context, the BCUC may find it is in the public interest to validate the CI of abated gases identified in Scenarios 1(a), (b) and (c) to ensure that GHG emissions are reduced. FEI has three submissions on this point.

First, to avoid potentially working at cross purposes and creating confusion in the industry, FEI submits that the BCUC should allow the Province to proceed with the development of amendments to the GGRR before implementing a methodology (if any) to validate CI. As noted above, the Ministry has indicated that it is already contemplating amendments to the GGGR that would set a CI maximum threshold, which could include a prescribed methodology that public utilities would be required to use. In FEI's submission, it would be greatly preferable for the BCUC to take a consistent approach with the Ministry.

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41 Exhibit C10-3, p. 6.
42 Exhibit E-2, p. 2.

Second, like the Ministry, FEI continues to believe that public utilities bear the primary responsibility to ensure the integrity of the EAs associated with low carbon resources through contractual and third-party verification including, in particular, the verification of CI.[43] However, should the BCUC ultimately adopt criteria created by the Province, or establish its own criteria, to validate the CI of fuels acquired under the GGRR, FEI submits that the recommendations summarized by the Ministry in its Letter of Comment are a reasonable foundation to use to develop a validation framework for EAs generally, including the tracking and verification of CI. These recommendations include:[44]

- The criteria used to assess the integrity of EAs include, as applicable, verifiable information on the source of the abated gas,[45] the feedstock used to produce it, the location of the production facility, date of production, and the CI profile of the Low Carbon Resource determined over its lifecycle.

- The EAs must have provable effects with respect to:

  (a) their acquisition by a public utility;

  (b) the exclusive ownership of the EAs by the public utility;

  (c) the rights to use and apply the EAs to effect in BC;

  (d) the starting and end dates for the availability of the EAs;

  (e) the quantum of the EAs; and

  (f) evidence to support linkages between the EAs and GHG mitigation or avoidance in BC.

- The role of the BCUC should include reviewing that the integrity of EAs acquired by public utilities has been met, using application of a common methodology, third-party verification, and registry.

- An obligation by public utilities to report the acquisition of RNG and related EAs to the BCUC, and to certify the reported information is true and correct to the best of the public utility's knowledge.

- That a random sampling of third-party verification is carried out to provide assurances of the integrity of the third-party processes to the BCUC and the public.

- Information pertaining to public utilities' claims for GHG mitigation and sustainable climate status be transparent and available to BC natural gas ratepayers and the public.

Third, the development of a framework of this kind would benefit from input from utilities, including FEI. Therefore, FEI recommends that any such framework be developed with the benefit of further process to ensure participants are, to the extent possible, able to share their

[43] Exhibit E-2, p. 3.
[44] Exhibit E-2, pp. 3-4.
[45] In Exhibit E-2, p. 2, the Ministry used the term Low Carbon Resources to refer to "low carbon resources under sections 3.71, 3.8, 3.9 and 6 to 10 of the GGRR (Low Carbon Resources)"; however, here FEI is referring to the abated gas as contemplated in Scenarios (1) (a), (b) and (c), and, as such, has adjusted the wording of the recommendations accordingly.

experience and expertise as part of creating or selecting a validation framework and associated methodologies.

3. CONCLUSION

FEI supports the acquisitions of abated gas as contemplated in Scenarios 1(a), (b) and (c). In particular, FEI considers that these scenarios represent important pathways by which it can reduce the CI of the content of its pipelines and should be an accepted method to enable it to meet GHG reduction targets.

However, the BCUC has not been delegated authority to amend the scope of prescribed undertakings for the purposes of section 18 of the *Clean Energy Act*, and cannot create it own definition of RNG contrary to the meaning of that term as used by the Legislature and industry.

Nonetheless, FEI would support a recommendation to Government to amend the GGRR to facilitate Scenarios 1(a), (b) and (c). FEI would also support the BCUC crafting its own guidelines pursuant to section 71 of the UCA to facilitate Scenarios 1(a), (b) and (c). This could include guidelines for the validation of CI of such abated gases.

If further information is required, please contact the undersigned.

Sincerely,

FORTISBC ENERGY INC.

Original signed:

Sarah Walsh

Attachments

cc (email only): Registered Interveners

BRITISH COLUMBIA UTILITIES COMMISSION

FORTISBC ENERGY INC.

BRITISH COLUMBIA UTILITIES COMMISSION (BCUC) INQUIRY INTO THE ACQUISITION OF RENEWABLE NATURAL GAS (RNG) BY PUBLIC UTILITIES IN BRITISH COLUMBIA (INQUIRY) PHASE 2

BOOK OF AUTHORITIES

Final Argument

of

FortisBC Energy Inc.

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TAB 1

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

Neutral citation: 2006 SCC 4.

Répertorié : ATCO Gas and Pipelines Ltd. *c.* Alberta (Energy and Utilities Board)

Référence neutre : 2006 CSC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

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of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

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the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

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ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

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La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, *Q.C.*, *Lawrence E. Smith*, *Q.C.*, *H. Martin Kay*, *Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall*, *Q.C.*, and *Michael D. Schafler*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny* and *Susan Kushneryk*, for the intervener Union Gas Limited.

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Trebilcock, Michael J. « The Consumer Interest and Regulatory Reform », in G. B. Doern, ed., *The Regulatory Process in Canada.* Toronto : Macmillan of Canada, 1978, 94.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

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The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

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sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

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1.1 *Overview of the Facts*

ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

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persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

1.2.1.2 *Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

12

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

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The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

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To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

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decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

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Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

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31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> . . . the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

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must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

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conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

40 La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

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s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

(2) No owner of a gas utility designated under subsection (1) shall

. . .

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

. . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . .

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

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PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

42 Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

43 Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

44 Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

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test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

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proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

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50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

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Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

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three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

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5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

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compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

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provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

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MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

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the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

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purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

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carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

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legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

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or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

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that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

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profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

In the absence of any property right or interest and of any harm to the customers arising from the

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

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In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

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making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

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issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

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99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

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The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "'*Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

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A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

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time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

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and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

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The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

> [TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

> [TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

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mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

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the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

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Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

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exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

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current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

> [TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

> [TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

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This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

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that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

138 Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit :

> [TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

139 Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce.

3. Le terrain en tant que bien non amortissable

140 La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $.

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141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

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Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

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4. Lack of Reciprocity

4. L'absence de réciprocité

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

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APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

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addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

. . .

Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

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Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

. . .

Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

. . .

Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

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compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

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fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

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(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

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and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

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Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

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(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

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Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

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TAB 2

Bell ExpressVu Limited Partnership *Appellant*

v.

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', and c.o.b as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them *Respondents*

and

The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada *Interveners*

Indexed as: Bell ExpressVu Limited Partnership *v.* Rex

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

Bell ExpressVu Limited Partnership *Appelante*

c.

Richard Rex, Richard Rex, faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group' et 'Digital Media Group', Anne Marie Halley, alias Anne Marie Rex, Michael Rex, alias Mike Rex, Rodney Kibler, alias Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, M. Untel 1 à 20, M^me^ Unetelle 1 à 20 et toute autre personne qui a été vue travaillant dans les locaux situés au 22409, avenue McIntosh, Maple Ridge, Colombie-Britannique, ou identifiée comme étant une telle personne, qui exploite des entreprises, ou l'une ou plusieurs de celles-ci, faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', ou qui travaille pour ces entreprises ou pour l'une ou plusieurs de celles-ci *Intimés*

et

Le procureur général du Canada, l'Association canadienne des distributeurs de films, DIRECTV, Inc., la Canadian Alliance for Freedom of Information and Ideas et le Congres Iberoamericain du Canada *Intervenants*

Répertorié : Bell ExpressVu Limited Partnership *c.* Rex

Référence neutre : 2002 CSC 42.

N^o^ du greffe : 28227.

2001 : 4 décembre; 2002 : 26 avril.

2002 SCC 42 (CanLII)

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Communications law — Radiocommunications — Direct-to-home distribution of television programming — Decoding in Canada of encrypted signals originating from foreign satellite distributor — Whether s. 9(1)(c) of Radiocommunication Act prohibits decoding of all encrypted satellite signals, with a limited exception, or whether it bars only unauthorized decoding of signals that emanate from licensed Canadian distributors — Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c).

Statutes — Interpretation — Principles — Contextual approach — Grammatical and ordinary sense — "Charter values" to be used as an interpretive principle only in circumstances of genuine ambiguity.

Appeals — Constitutional questions — Factual record necessary for constitutional questions to be answered.

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell U.S. decoding systems to Canadian customers that enable them to receive and watch U.S. DTH progamming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed". The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(*c*) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies, and dismissed the appellant's appeal.

Présents : Les juges L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

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

Droit des communications — Radiocommunication — Distribution de programmation télévisuelle par satellite de radiodiffusion directe — Décodage au Canada de signaux encodés émanant de distributeurs étrangers utilisant des satellites — L'article 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de tous les signaux encodés émis par des satellites, sous réserve d'une exception limitée, ou prohibe-t-il seulement le décodage de signaux émanant de distributeurs canadiens titulaires de licence? — Loi sur la radiocommunication, L.R.C. 1985, ch. R-2, art. 9(1)c).

Lois — Interprétation — Principes — Approche contextuelle — Sens ordinaire et grammatical — Recours aux « valeurs de la Charte » comme principe d'interprétation seulement en cas d'ambiguïté véritable.

Appels — Questions constitutionnelles — Refus de répondre aux questions constitutionnelles pour cause d'absence de fondement factuel.

L'appelante, une entreprise de distribution de programmation télévisuelle par satellite de radiodiffusion directe (« SRD »), encode ses signaux pour en circonscrire la réception. Les intimés vendent à des clients canadiens des décodeurs américains leur permettant de recevoir et de regarder de la programmation SRD américaine. Ils fournissent en outre une adresse postale aux États-Unis à ceux de leurs clients qui n'en possèdent pas déjà une, car les radiodiffuseurs américains n'autorisent pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis. L'appelante, à titre d'entreprise de distribution titulaire d'une licence, a intenté une action devant la Cour suprême de la Colombie-Britannique en vertu de l'al. 9(1)*c*) et du par. 18(1) de la *Loi sur la radiocommunication*, sollicitant notamment une injonction interdisant aux intimés d'aider des résidants canadiens à s'abonner à la programmation SRD américaine et à décoder les signaux pertinents. L'alinéa 9(1)*c*) interdit « de décoder, sans l'autorisation de leur distributeur légitime, [. . .] un signal d'abonnement ou une alimentation réseau ». Le juge siégeant en chambre a refusé l'injonction demandée. La Cour d'appel à la majorité a jugé que la personne qui décode des signaux non visés par la réglementation, tels ceux diffusés par les entreprises SRD américaines, ne contrevient pas à la disposition en question et elle a rejeté l'appel formé par l'appelante.

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Held: The appeal should be allowed. Section 9(1)(*c*) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the 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. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the "*Charter* values" presumption.

When the entire context of s. 9(1)(*c*) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents' decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not "lawful distributors" under the Act. This interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception accords well with the objectives set out in the *Broadcasting Act* and complements the scheme of the *Copyright Act*.

The constitutional questions stated in this appeal are not answered because there is no *Charter* record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial. "*Charter* values" cannot inform the interpretation given to s. 9(1)(*c*) of the *Radiocommunication Act*, for these

Arrêt : Le pourvoi est accueilli. L'alinéa 9(1)*c*) interdit le décodage de tous les signaux encodés transmis par satellite, sous réserve d'une exception limitée.

Le tribunal appelé à interpréter une disposition législative doit, dans chaque cas, se livrer à l'analyse contextuelle et téléologique privilégiée avant de décider si le texte de la disposition est ambigu. À cette fin, il lui faut lire les mots de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de celle-ci et l'intention du législateur. C'est uniquement lorsque au moins deux interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes, y compris d'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* ».

L'examen du contexte global de l'al. 9(1)*c*) et l'interprétation des mots qui le composent suivant leur sens ordinaire et grammatical, en conformité avec le cadre législatif dans lequel s'inscrit cette disposition, ne révèlent aucune ambiguïté et il n'est en conséquence pas nécessaire de recourir à l'un ou l'autre des principes subsidiaires d'interprétation législative. Puisque la *Loi sur la radiocommunication* n'interdit pas la radiodiffusion de signaux d'abonnement (exception faite de l'al. 9(1)*e*) qui interdit la retransmission non autorisée au Canada de tels signaux) et ne s'applique qu'au décodage survenant au Canada et aux autres endroits prévus au par. 3(3), la présente affaire ne soulève aucune question touchant à l'exercice extraterritorial de certains pouvoirs. Le législateur entendait interdire de manière absolue aux résidants du Canada de décoder des signaux d'abonnement encodés. La seule exception à cette interdiction est le cas où l'intéressé a obtenu l'autorisation de le faire du distributeur détenant au Canada les droits requis pour transmettre le signal concerné et en permettre le décodage. En l'espèce, les radiodiffuseurs SRD américains ne sont pas des « distributeurs légitimes » au sens de la Loi. Le fait de considérer que l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée est une interprétation qui s'accorde bien avec les objets de la *Loi sur la radiodiffusion* et qui complète le régime établi par la *Loi sur le droit d'auteur*.

Aucune réponse n'a été donnée à l'égard des questions constitutionnelles, puisque le dossier ne comportait pas d'éléments relatifs à la *Charte* propres à permettre à la Cour de se prononcer sur ces questions. Une partie ne peut invoquer un argument entièrement nouveau qui aurait nécessité la production d'éléments de preuve additionnels au procès. Les « valeurs de la *Charte* » ne peuvent être

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values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

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Not followed: *R. v. Love* (1997), 117 Man. R. (2d) 123; *R. v. Ereiser* (1997), 156 Sask. R. 71; *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. v. Thériault*, [2000] R.J.Q. 2736, aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 O.R. (3d) 737; **referred to:** *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL), aff'd (1995), 106 Man. R. (2d) 37, leave to appeal ref'd (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449 (QL), rev'd (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd [1998] A.J. No. 628 (QL); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. v. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Corbiere v. Canada (Minister of Indian*

utilisées pour éclairer l'interprétation de l'al. 9(1)*c*), puisqu'elles ne doivent être utilisées comme principe d'interprétation qu'en cas d'ambiguïté véritable. L'application d'une présomption générale de conformité à la *Charte* pourrait parfois contrecarrer le respect de l'intention véritable du législateur, contrairement à ce que prescrit la démarche privilégiée en matière d'interprétation législative, et perturber à tort l'équilibre dialogique entre les pouvoirs législatif, exécutif et judiciaire. Lorsqu'une loi n'est pas ambiguë, les tribunaux doivent donner effet à l'intention clairement exprimée par le législateur et éviter d'utiliser la *Charte* pour arriver à un résultat différent.

Jurisprudence

Arrêts non suivis : *R. c. Love* (1997), 117 Man. R. (2d) 123; *R. c. Ereiser* (1997), 156 Sask. R. 71; *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. c. Thériault*, [2000] R.J.Q. 2736, conf. par C.S. Drummondville, n^{o} 405-36-000044-003, 13 juin 2001; *R. c. Gregory Électronique Inc.*, [2000] J.Q. n^{o} 4923 (QL), conf. par [2001] J.Q. n^{o} 4925 (QL); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, n^{o} 540-73-000055-980, 31 octobre 2000; *R. c. Branton* (2001), 53 O.R. (3d) 737; **arrêts mentionnés :** *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL), conf. par (1995), 106 Man. R. (2d) 37, autorisation d'appel refusée (1996), 110 Man. R. (2d) 153; *R. c. King*, [1996] N.B.J. No. 449 (QL), inf. par (1997), 187 R.N.-B. (2d) 185; *R. c. Knibb* (1997), 198 A.R. 161, conf. par [1998] A.J. No. 628 (QL); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245, conf. par [1997] A.C.F. n^{o} 1563 (QL); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026; *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. c. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56; *Stoddard c. Watson*, [1993] 2 R.C.S. 1069; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015; *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108; *R. c. Goulis* (1981), 33 O.R. (2d) 55; *R. c. Hasselwander*, [1993] 2 R.C.S. 398; *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53; *Westminster Bank Ltd. c. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743; *Québec (Procureur général) c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831;

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and Northern Affairs), [1999] 2 S.C.R. 203; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Gayle* (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Mills*, [1999] 3 S.C.R. 668; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, dismissing an appeal from a decision of the British Columbia Supreme Court, [1999] B.C.J. No. 3092 (QL), refusing to grant an injunction. Appeal allowed.

K. William McKenzie, *Eugene Meehan*, *Q.C.*, and *Jessica Duncan*, for the appellant.

Alan D. Gold and *Maureen McGuire*, for all respondents except Michelle Lee.

Graham R. Garton, *Q.C.*, and *Christopher Rupar*, for the intervener the Attorney General of Canada.

Roger T. Hughes, *Q.C.*, for the intervener the Canadian Motion Picture Distributors Association.

Christopher D. Bredt, *Jeffrey D. Vallis* and *Davit D. Akman*, for the intervener DIRECTV, Inc.

Ian W. M. Angus, for the intervener the Canadian Alliance for Freedom of Information and Ideas.

Alan Riddell, for the intervener the Congres Iberoamerican du Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(*c*) of the *Radiocommunication*

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, qui a rejeté l'appel formé contre une décision de la Cour suprême de la Colombie-Britannique, [1999] B.C.J. No. 3092 (QL). Pourvoi accueilli.

K. William McKenzie, *Eugene Meehan*, *c.r.*, et *Jessica Duncan*, pour l'appelante.

Alan D. Gold et *Maureen McGuire*, pour tous les intimés, à l'exception de Michelle Lee.

Graham R. Garton, *c.r.*, et *Christopher Rupar*, pour l'intervenant le procureur général du Canada.

Roger T. Hughes, *c.r.*, pour l'intervenante l'Association canadienne des distributeurs de films.

Christopher D. Bredt, *Jeffrey D. Vallis* et *Davit D. Akman*, pour l'intervenante DIRECTV, Inc.

Ian W. M. Angus, pour l'intervenante la Canadian Alliance for Freedom of Information and Ideas.

Alan Riddell, pour l'intervenant le Congres Iberoamericain du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Le présent pourvoi porte sur une question qui divise les tribunaux du pays, en l'occurrence l'interprétation qu'il convient de donner à l'al.

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Act, R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). In practical terms, the issue is whether s. 9(1)(*c*) prohibits the decoding of all encrypted satellite signals, with a limited exception, or whether it bars only the unauthorized decoding of signals that emanate from licensed Canadian distributors.

The respondents facilitate what is generally referred to as "grey marketing" of foreign broadcast signals. Although there is much debate — indeed rhetoric — about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(*c*) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

II. Background

The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the *Broadcasting Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

9(1)*c*) de la *Loi sur la radiocommunication*, L.R.C. 1985, ch. R-2 (mod. par L.C. 1991, ch. 11, art. 83). Plus concrètement, il s'agit de décider si l'al. 9(1)*c*) interdit le décodage de tous les signaux encodés transmis par satellite, sous réserve d'une exception limitée, ou s'il interdit seulement le décodage non autorisé des signaux émanant de distributeurs canadiens titulaires d'une licence.

2 Les intimés facilitent ce que l'on appelle généralement le « marché gris » de la radiodiffusion des signaux étrangers. Quoique cette expression suscite de nombreux débats — de fait une polémique — il n'est pas nécessaire d'y prendre part dans les présents motifs. En effet, la question fondamentale est plus restreinte et touche à l'interprétation de la disposition en cause : Eu égard aux faits de l'espèce, l'al. 9(1)*c*) a-t-il pour effet d'interdire le décodage des signaux encodés émanant de radiodiffuseurs américains? Pour les motifs qui suivent, j'arrive à la conclusion que cette disposition produit cet effet. En conséquence, j'accueillerais le pourvoi.

II. Contexte

3 L'appelante, une société en commandite, est une entreprise de distribution d'émissions de télévision par satellite de radiodiffusion directe (ci-après « entreprise de distribution SRD » ou « radiodiffuseur SRD »). Elle est l'un des deux fournisseurs qui exploitent actuellement la licence d'entreprise de distribution SRD que leur a accordée le Conseil de la radiodiffusion et des télécommunications canadiennes (le « CRTC ») en vertu de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11. Il existe deux distributeurs dans la même situation aux États-Unis, mais aucun n'est titulaire d'une licence du CRTC. Le marché de la radiodiffusion réglementée au Canada est effectivement fermé aux non-Canadiens depuis avril 1996, par suite de la décision du gouverneur en conseil ordonnant au CRTC de ne pas délivrer de licences de radiodiffusion ni d'accorder de modification ou de renouvellement de telles licences aux demandeurs qui sont des non-Canadiens (DORS/96-192). Cependant, les entreprises américaines sont titulaires de licences délivrées par la Federal Communications Commission des États-Unis qui les autorisent à diffuser leurs signaux dans ce pays. L'intervenante DIRECTV est la plus importante des deux sociétés américaines.

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4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

Les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux téléspectateurs au moyen de satellites. Ils possèdent tous un ou plusieurs satellites en orbite géosynchrone, ou ont accès à de tels appareils. Seulement quelques degrés de longitude terrestre séparent habituellement les satellites, qui occupent les créneaux orbitaux attribués par convention internationale à chacun des différents pays signataires. À partir de stations terrestres de transmission sens terre-satellite, les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux satellites, qui les rediffusent sur une large portion de la surface terrestre, qu'on appelle l'« empreinte » du satellite. Les signaux relayés par satellite ont une portée qui ne respecte pas les frontières internationales et s'étend souvent à de nombreux pays. Toute personne qui se trouve à l'intérieur de l'empreinte et dispose du matériel requis (en général une petite antenne parabolique de réception, un amplificateur et un récepteur) peut capter les signaux.

5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

L'appelante utilise les satellites d'une entreprise canadienne, Telesat Canada. De plus, comme tous les autres radiodiffuseurs SRD au Canada et aux États-Unis, l'appelante encode ses signaux pour en circonscrire la réception. Pour décoder ou débrouiller les signaux de l'appelante et obtenir leur réception en clair, le client doit être muni d'un dispositif supplémentaire propre à l'appelante, les décodeurs des différents distributeurs n'étant pas compatibles entre eux. L'élément fonctionnel du décodeur est constitué d'une carte à puce à code unique que l'appelante active à distance. Grâce à ce dispositif, une fois que le client a choisi un bloc d'émissions et payé les frais d'abonnement, l'appelante peut transmettre au décodeur le message indiquant que le client est autorisé à décoder ses signaux. Le décodeur est ensuite activé et le client a accès à la programmation débrouillée.

6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding

L'intimé Richard Rex exploite une entreprise connue sous le nom Can-Am Satellites. Les autres intimés sont soit des employés de Can-Am Satellites soit des entrepreneurs indépendants retenus par celle-ci. Les intimés vendent des

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systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.

The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

décodeurs américains de signaux SRD aux clients canadiens qui désirent s'abonner aux services offerts par les radiodiffuseurs SRD américains, lesquels utilisent des satellites qui appartiennent à des sociétés américaines et qui sont exploités par celles-ci et occupent des créneaux orbitaux ayant été attribués aux États-Unis. Les empreintes des radiodiffuseurs SRD américains sont suffisamment larges pour que leurs signaux puissent être captés presque partout au Canada. Mais comme ces radiodiffuseurs n'autorisent pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis, les intimés fournissent en outre une adresse postale aux États-Unis à ceux de leurs clients qui n'en possèdent pas déjà une. Les intimés communiquent ensuite avec les radiodiffuseurs SRD américains pour le compte de leurs clients, fournissant les noms, adresse postale aux États-Unis et numéro de carte de crédit de chacun de ceux-ci. Il semble que cela soit suffisant pour convaincre les radiodiffuseurs américains que l'abonné est un résidant des États-Unis. La carte à puce du client est ensuite activée.

7 Dans le passé, les intimés offraient des services analogues à des résidants des États-Unis, de façon à pouvoir obtenir l'autorisation de décoder les signaux de l'appelante. Les intimés étaient des vendeurs autorisés de l'appelante à l'époque, mais comme cette pratique constituait un manquement à la convention de mandat, l'appelante a mis fin unilatéralement à leurs relations.

8 Le présent pourvoi fait suite à une action intentée par l'appelante devant la Cour suprême de la Colombie-Britannique. L'appelante, à titre d'entreprise de distribution titulaire d'une licence, a pris action en vertu de l'al. 9(1)*c*) et du par. 18(1) de la *Loi sur la radiocommunication*. Elle a notamment demandé une injonction interdisant aux intimés d'aider des résidants canadiens à s'abonner aux émissions transmises par des services SRD américains et à décoder les signaux pertinents. Le juge siégeant en chambre qui a été saisi de la demande a refusé l'injonction demandée et a ordonné que l'affaire soit entendue promptement. En appel de cette décision, la Cour d'appel de la Colombie-Britannique a débouté l'appelante, madame le juge Huddart rédigeant des motifs de dissidence.

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9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

III. Relevant Statutory Provisions

10 The *Radiocommunication Act* is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the *Broadcasting Act*, provide context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 *Radiocommunication Act*, R.S.C. 1985, c. R-2

2. In this Act,

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

. . .

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

"lawful distributor", in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

. . .

"radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

. . .

"subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

L'appelante a sollicité l'autorisation de se pourvoir devant notre Cour, qui a fait droit à sa demande le 19 avril 2001, avec dépens en faveur de la demanderesse quelle que soit l'issue de l'appel ([2001] 1 R.C.S. vi). Le 4 septembre 2001, le Juge en chef a accueilli la requête présentée subséquemment par les intimés afin d'obtenir la formulation de questions constitutionnelles.

III. Dispositions législatives applicables

La *Loi sur la radiocommunication* est l'un des piliers législatifs du système canadien de radiodiffusion. Cette loi, ainsi qu'une autre tout aussi importante, la *Loi sur la radiodiffusion*, établissent le contexte crucial pour juger le présent pourvoi. Les dispositions les plus pertinentes sont reproduites ci-après, mais j'en citerai d'autres au besoin dans l'exposé de mes motifs.

Loi sur la radiocommunication, L.R.C. 1985, ch. R-2

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« distributeur légitime » La personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement ou une alimentation réseau, en situation d'encodage, et à en permettre le décodage.

« encodage » Traitement électronique ou autre visant à empêcher la réception en clair.

. . .

« radiocommunication » ou « radio » Toute transmission, émission ou réception de signes, de signaux, d'écrits, d'images, de sons ou de renseignements de toute nature, au moyen d'ondes électromagnétiques de fréquences inférieures à 3 000 GHz transmises dans l'espace sans guide artificiel.

« radiodiffusion » Toute radiocommunication dont les émissions sont destinées à être reçues directement par le public en général.

. . .

« signal d'abonnement » Radiocommunication destinée à être reçue, directement ou non, par le public au Canada ou ailleurs moyennant paiement d'un prix d'abonnement ou de toute autre forme de redevance.

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9. (1) No person shall

. . .

(*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

. . .

10. (1) Every person who

. . .

(*b*) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

. . .

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

. . .

(2.1) Every person who contravenes paragraph 9(1)(*c*) or (*d*) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

. . .

(2.5) No person shall be convicted of an offence under paragraph 9(1)(*c*), (*d*) or (*e*) if the person exercised all due diligence to prevent the commission of the offence.

. . .

9. (1) Il est interdit :

. . .

c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau;

. . .

10. (1) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, dans le cas d'une personne physique, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines, ou, dans le cas d'une personne morale, une amende maximale de vingt-cinq mille dollars quiconque, selon le cas :

. . .

b) sans excuse légitime, fabrique, importe, distribue, loue, met en vente, vend, installe, modifie, exploite ou possède tout matériel ou dispositif, ou composante de celui-ci, dans des circonstances donnant à penser que l'un ou l'autre est utilisé en vue d'enfreindre l'article 9, l'a été ou est destiné à l'être;

. . .

(2.1) Quiconque contrevient aux alinéas 9(1)*c*) ou *d*) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, dans le cas d'une personne physique, une amende maximale de dix mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines, dans le cas d'une personne morale, une amende maximale de vingt-cinq mille dollars.

. . .

(2.5) Nul ne peut être déclaré coupable de l'infraction visée aux alinéas 9(1)*c*), *d*) ou *e*) s'il a pris les mesures nécessaires pour l'empêcher.

. . .

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18. (1) Any person who

(*a*) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

. . .

(*c*) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*, or

. . .

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(*c*), (*d*) or (*e*) or 10(1)(*b*), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

. . .

(6) Nothing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*.

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

"broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

. . .

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

. . .

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or

18. (1) Peut former, devant tout tribunal compétent, un recours civil à l'encontre du contrevenant quiconque a subi une perte ou des dommages par suite d'une contravention aux alinéas 9(1)*c*), *d*) ou *e*) ou 10(1)*b*) et :

a) soit détient, à titre de titulaire du droit d'auteur ou d'une licence accordée par ce dernier, un droit dans le contenu d'un signal d'abonnement ou d'une alimentation réseau;

. . .

c) soit est titulaire d'une licence attribuée, au titre de la *Loi sur la radiodiffusion*, par le Conseil de la radiodiffusion et des télécommunications canadiennes et l'autorisant à exploiter une entreprise de radiodiffusion;

. . .

Cette personne est admise à exercer tous recours, notamment par voie de dommages-intérêts, d'injonction ou de reddition de compte, selon ce que le tribunal estime indiqué.

. . .

(6) Le présent article ne porte pas atteinte aux droits et aux recours prévus par la *Loi sur le droit d'auteur*.

Loi sur la radiodiffusion, L.C. 1991, ch. 11

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« entreprise de distribution » Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable.

. . .

« entreprise de radiodiffusion » S'entend notamment d'une entreprise de distribution ou de programmation, ou d'un réseau.

. . .

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temporary residence or dwelling unit or to another such undertaking;

. . .

(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

3. (1) It is hereby declared as the broadcasting policy for Canada that

(*a*) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(*b*) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

. . .

(*d*) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances

« radiodiffusion » Transmission, à l'aide d'ondes radioélectriques ou de tout autre moyen de télécommunication, d'émissions encodées ou non et destinées à être reçues par le public à l'aide d'un récepteur, à l'exception de celle qui est destinée à la présentation dans un lieu public seulement.

. . .

(2) Pour l'application de la présente loi, sont inclus dans les moyens de télécommunication les systèmes électromagnétiques — notamment les fils, les câbles et les systèmes radio ou optiques —, ainsi que les autres procédés techniques semblables.

(3) L'interprétation et l'application de la présente loi doivent se faire de manière compatible avec la liberté d'expression et l'indépendance, en matière de journalisme, de création et de programmation, dont jouissent les entreprises de radiodiffusion.

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

b) le système canadien de radiodiffusion, composé d'éléments publics, privés et communautaires, utilise des fréquences qui sont du domaine public et offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle;

. . .

d) le système canadien de radiodiffusion devrait :

(i) servir à sauvegarder, enrichir et renforcer la structure culturelle, politique, sociale et économique du Canada,

(ii) favoriser l'épanouissement de l'expression canadienne en proposant une très large programmation qui traduise des attitudes, des opinions, des idées, des valeurs et une créativité artistique canadiennes, qui mette en valeur des divertissements faisant appel à des artistes canadiens et qui fournisse de l'information et de l'analyse concernant le Canada et l'étranger considérés d'un point de vue canadien,

(iii) par sa programmation et par les chances que son fonctionnement offre en matière d'emploi, répondre aux besoins et aux intérêts, et refléter la condition

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and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

. . .

(*t*) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Copyright Act, R.S.C. 1985, c. C-42

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*a*) to fix it,

(*b*) to reproduce any fixation of it that was made without the broadcaster's consent,

et les aspirations, des hommes, des femmes et des enfants canadiens, notamment l'égalité sur le plan des droits, la dualité linguistique et le caractère multiculturel et multiracial de la société canadienne ainsi que la place particulière qu'y occupent les peuples autochtones,

(iv) demeurer aisément adaptable aux progrès scientifiques et techniques;

. . .

t) les entreprises de distribution :

(i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

(ii) devraient assurer efficacement, à l'aide des techniques les plus efficientes, la fourniture de la programmation à des tarifs abordables,

(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,

(iv) peuvent, si le Conseil le juge opportun, créer une programmation — locale ou autre — de nature à favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion, et en particulier à permettre aux minorités linguistiques et culturelles mal desservies d'avoir accès aux services de radiodiffusion.

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42

21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :

a) de le fixer;

b) d'en reproduire toute fixation faite sans son autorisation;

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(*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

31. . . .

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(*a*) the communication is a retransmission of a local or distant signal;

(*b*) the retransmission is lawful under the *Broadcasting Act*;

(*c*) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and

(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;

d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas *a*), *b*) et *d*).

31. . . .

(2) Ne constitue pas une violation du droit d'auteur la communication au public, par télécommunication, d'une œuvre, lorsqu'elle consiste en la retransmission d'un signal local ou éloigné, selon le cas, celle-ci étant licite en vertu de la *Loi sur la radiodiffusion*, que le signal est retransmis, sauf obligation ou permission légale ou réglementaire, intégralement et simultanément et que, dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi.

IV. Judgments Below

A. *Supreme Court of British Columbia*, [1999] B.C.J. No. 3092 (QL)

In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(*c*). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the *Radiocommunication Act*. He interpreted s. 9(1)(*c*) as applying only to the theft of signals from "lawful distributors" in Canada, and not applying to the "paid subscription by Canadians to signals from distributors outside Canada" (para. 20). He reasoned (at paras. 18-19):

The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted

IV. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [1999] B.C.J. No. 3092 (QL)

12

Dans un jugement prononcé de vive voix dans son cabinet, le juge Brenner (maintenant juge en chef de la C.S.C.-B.) a souligné l'existence de décisions ayant interprété de façon contradictoire l'al. 9(1)*c*). À son avis, cependant, cette disposition n'est ni ambiguë ni incompatible avec les autres dispositions de la *Loi sur la radiocommunication*. Selon lui, l'al. 9(1)*c*) ne s'applique qu'au vol de signaux commis contre un « distributeur légitime » au Canada, et non aux [TRADUCTION] « abonnements pris et payés par des Canadiens afin de recevoir des signaux transmis par des distributeurs de l'extérieur du Canada » (par. 20). Le juge Brenner a fait le raisonnement suivant (aux par. 18-19) :

[TRADUCTION] Dans cette disposition, l'infraction créée par le législateur au moyen de libellé qu'il a choisi d'utiliser est le vol de signaux encodés aux distributeurs situés au Canada. À mon sens, si, comme le prétend [l'appelante], le législateur avait voulu que l'infraction soit le

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transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(c) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.

The interpretation of s. 9(1)(c) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(c) to apply to such conduct, it would have said so in clear language. In my view the quasi criminal provisions in the Radiocommunication Act should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

B. *Court of Appeal for British Columbia* (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(*c*). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, "[l]egislation which can reasonably be said to bear two unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous" (para. 35). For this reason, and the fact that s. 9(1)(*c*) bears penal consequences, the majority held that the "narrower interpretation adopted by the chambers judge . . . must . . . prevail" (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.

décodage, au Canada, d'un signal émanant de l'extérieur du Canada, il l'aurait dit. Le législateur aurait pu, à l'al. 9(1)c), interdire expressément le décodage non autorisé de tout signal d'abonnement. Or il a décidé de ne pas le faire.

L'interprétation de l'al. 9(1)c) préconisée par [l'appelante] ne fait aucune distinction entre la personne qui s'abonne, moyennant paiement, aux services d'un distributeur non résidant et la personne qui vole les signaux d'un distributeur légitime au Canada. Suivant une telle interprétation, une personne résidant au Canada pourrait commettre un vol, même si elle paie les services qu'elle reçoit. Si le législateur avait voulu que l'al. 9(1)c) s'applique à cette situation, il l'aurait dit clairement. Selon moi, les dispositions quasi pénales de la Loi sur la radiocommunication ne doivent pas être interprétées ainsi en l'absence d'une disposition législative claire à cet effet.

Le juge Brenner a en conséquence refusé à l'appelante l'injonction qu'elle demandait et il a ordonné que l'affaire soit entendue promptement.

B. *Cour d'appel de la Colombie-Britannique* (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

S'exprimant pour les juges majoritaires de la Cour d'appel, le juge Finch (maintenant juge en chef de la Colombie-Britannique) a relevé deux courants jurisprudentiels divergents concernant l'interprétation qu'il convient de donner à l'al. 9(1)*c*). Les juges majoritaires ont également souligné que, dans des jugements de chacun de ces courants, on a jugé que la disposition n'était pas ambiguë, mais, de l'avis des juges de la majorité, [TRADUCTION] « [u]ne disposition dont on peut raisonnablement dire qu'elle se prête à deux interprétations non ambiguës mais contradictoires doit à tout le moins être considérée comme ambiguë » (par. 35). Pour cette raison et parce que l'al. 9(1)*c*) entraîne des conséquences du point de vue pénal, les juges majoritaires ont conclu que [TRADUCTION] « l'interprétation restrictive du juge siégeant en chambre [. . .] doit [. . .] être retenue » (par. 35). Toutefois, indépendamment de la jurisprudence contradictoire, la majorité était disposée à aboutir au même résultat par l'application des principes d'interprétation législative.

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Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed" (emphasis added). The majority interpreted the legislator's choice of the definite article "the", underlined in the above phrase, to mean that the prohibition applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal" (para. 36). In other words, "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" (para. 36). Consequently, according to the majority, there is no contravention of s. 9(1)(*c*) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies.

The majority characterized s. 9(1)(*c*) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority's view, Parliament elected to regulate merely in respect of signals transmitted by parties who are authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription programming signal", the majority held that "the fact that a subscription program signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(c) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the *Canadian Charter of Rights and Freedoms* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

15 Aux termes du texte anglais de l'al. 9(1)*c*), il est interdit de décoder un signal d'abonnement ou une alimentation réseau sans l'autorisation du « *lawful distributor of the signal or feed* » (je souligne). La majorité a considéré que le fait que le législateur ait choisi d'utiliser l'article défini « *the* » — qui est souligné dans l'extrait qui précède — signifie que l'interdiction ne s'applique qu'aux [TRADUCTION] « signaux radiodiffusés par les distributeurs légitimes titulaires d'une licence les autorisant à permettre le décodage du signal en question » (par. 36). En d'autres termes, [TRADUCTION] « [s]i un signal d'abonnement n'a pas de distributeur légitime au Canada, personne ne saurait être autorisé à en permettre le décodage » (par. 36). Par conséquent, la majorité a conclu que la personne qui décode des signaux non visés par la réglementation, tels ceux diffusés par les entreprises SRD américaines, ne contrevient pas à l'al. 9(1)*c*).

16 La majorité a jugé que l'al. 9(1)*c*) visait clairement la personne qui reçoit le signal et non celle qui le distribue, mais elle a ajouté que le législateur ne s'était pas exprimé d'une manière qui aurait pour effet d'interdire le décodage de tout signal encodé, indépendamment de son origine. Au contraire, de l'avis de la majorité, le législateur a plutôt décidé de réglementer uniquement les signaux transmis par des personnes légalement autorisées par le droit canadien à le faire. Rejetant la thèse de l'appelante concernant les mots « *or elsewhere* » (« ou ailleurs » en français) employés dans la définition de « signal d'abonnement », la majorité a conclu que [TRADUCTION] « le fait qu'un signal d'abonnement émanant de l'extérieur du Canada soit destiné à être capté à l'extérieur du Canada n'empêche pas que, suivant l'al. 9(1)*c*), le décodage d'un tel signal n'est illégal que s'il a lieu sans la permission d'un distributeur légitime » (par. 40).

17 S'appuyant sur ces considérations, la majorité a estimé qu'il était inutile d'examiner [TRADUCTION] « les questions de principe plus générales » ou les questions touchant à l'application de la *Charte canadienne des droits et libertés* (par. 44). Ne relevant aucune erreur dans l'interprétation du juge siégeant en chambre, la majorité a rejeté l'appel.

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18 Dissenting, Huddart J.A. considered the text of s. 9(1)(*c*) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted programming signals . . . regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most . . . provides support for a less inclusive interpretation of s. 9(1)(c) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

Dissidente, madame le juge Huddart a examiné le texte de l'al. 9(1)*c*) à la lumière des définitions figurant à l'art. 2 et elle a estimé que l'intention du législateur était évidente : la disposition [TRADUCTION] « a tout simplement pour effet de frapper d'illégalité le décodage au Canada de tous les signaux d'abonnement encodés [. . .] indépendamment de leur source ou de leur destination », sauf dans les cas où la personne légitimement autorisée au Canada à transmettre le signal concerné et à en permettre le décodage accorde la permission de le faire (par. 48). Elle a souligné que les décisions invoquées par le juge siégeant en chambre [TRADUCTION] « [t]out au plus [. . .] appuient une interprétation de l'al. 9(1)*c*) lui reconnaissant une portée moins exhaustive que celle suggérée par son libellé, en raison des conséquences qu'il emporte du point de vue pénal » (par. 54), puis elle énonce un certain nombre de raisons pour lesquelles ces décisions ne devraient pas être suivies.

19 For one, "the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament" (para. 55). As well, the more restrictive reading of s. 9(1)(*c*) "ignores the broader policy objective" of the governing regulatory scheme, this being "the maintenance of a distinctively Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger" (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that "[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. . . . Yet only Canada can control the reception of foreign signals in Canada" (para. 50).

Tout d'abord, [TRADUCTION] « on n'amorce pas l'interprétation d'une disposition législative en la qualifiant de pénale. L'interprétation consiste à dégager l'intention du législateur » (par. 55). De plus, l'interprétation restrictive de l'al. 9(1)*c*) [TRADUCTION] « ne tient pas compte de l'objectif directeur plus général » du cadre réglementaire applicable, savoir « l'existence d'un système de radiodiffusion véritablement canadien dans un pays au vaste territoire mais faiblement peuplé, et ce à l'intérieur de l'empreinte de transmission d'un pays à la population dix fois plus grande et qui, peut-on prétendre, est celui qui répand le plus sa culture aux quatre coins du monde » (par. 49). Le juge Huddart a également fait état de la question des droits d'auteur et affirmé qu'[TRADUCTION] « [i]l est raisonnablement possible d'inférer que, indépendamment des lois canadiennes, les distributeurs américains ont des motifs commerciaux ou juridiques de ne pas s'attaquer au marché canadien. [. . .] Néanmoins, seul le Canada peut régir la réception de signaux étrangers au Canada » (par. 50).

20 Huddart J.A. declined the respondents' invitation to read s. 9(1)(*c*) in a manner that "respect[s] section 2(*b*) of the *Charter*" (para. 57), relying on *Canada*

S'appuyant sur l'arrêt *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, madame le juge Huddart a refusé de donner à l'al. 9(1)*c*) une

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(Attorney General) v. Mossop, [1993] 1 S.C.R. 554, in this regard. She then concluded (at para. 58):

> In summary, I am not persuaded the line of cases on which the chambers judge relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(c), taken alone, provide a clear basis for the determination of Parliament's intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the *Act* within that scheme, and with the scheme of the *Act* itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in *R. v. Love* [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

V. Issues

This appeal raises three issues:

1. Does s. 9(1)(*c*) of the *Radiocommunication Act* create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?

2. Is s. 9(1)(*c*) of the *Radiocommunication Act* inconsistent with s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the *Charter*?

interprétation [TRADUCTION] « respect[ant] l'al. 2*b*) de la *Charte* » (par. 57), comme l'invitaient à le faire les intimés. Elle a ensuite conclu ainsi (au par. 58) :

> [TRADUCTION] En résumé, je ne suis pas persuadée que la jurisprudence sur laquelle s'est fondé le juge siégeant en chambre établit que la disposition est ambiguë ou susceptible d'interprétations contradictoires. Je n'estime pas que les tribunaux ont dégagé deux interprétations tout à fait différentes mais non équivoques. Considéré isolément, le texte de l'al. 9(1)c) permet de dégager clairement l'intention du législateur. Cette interprétation est compatible avec l'objet de l'ensemble du cadre réglementaire dans le contexte des conventions internationales sur le droit d'auteur, avec l'objet de la *Loi* à l'intérieur de ce cadre et avec le régime établi par la *Loi* elle-même. Les juges et les tribunaux qui ont interprété la disposition différemment l'ont fait pour limiter son application de manière à éviter les conséquences d'ordre pénal, alors que le législateur a manifestement voulu que les actes en question produisent de telles conséquences, comme au moins un des juges souscrivant à cette thèse l'a reconnu expressément dans ses motifs. À mon avis, il faut donner une interprétation alambiquée à cette disposition pour arriver à la conclusion tirée dans *R. c. Love* [(1997), 117 Man. R. (2d) 123 (B.R.)] et dans les décisions qui l'ont suivie.

Le juge Huddart aurait accueilli le pourvoi et rendu le jugement déclaratoire demandé par l'appelante.

V. Les questions en litige

Le présent pourvoi soulève trois questions :

1. L'alinéa 9(1)*c*) de la *Loi sur la radiocommunication* interdit-il le décodage de manière absolue, sous réserve d'une exception limitée, ou autorise-t-il le décodage de tous les signaux, sauf ceux pour lesquels il existe un distributeur légitime qui n'a pas donné l'autorisation de le faire?

2. L'alinéa 9(1)*c*) de la *Loi sur la radiocommunication* est-il incompatible avec l'al. 2*b*) de la *Charte canadienne des droits et libertés*?

3. Dans l'affirmative, la disposition législative peut-elle être justifiée au regard de l'article premier de la *Charte*?

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VI. Analysis

A. *Introduction*

22 It is no exaggeration to state that s. 9(1)(*c*) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (1995), 106 Man. R. (2d) 37 (Q.B.) (*sub nom. R. v. O'Connor*), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.) (*sub nom. King v. Canada (Attorney General)*); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd [1998] A.J. No. 628 (QL) (Q.B.) (*sub nom. R. v. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at p. 2034.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001 (*sub nom. R. v. D'Argy*); *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v.*

VI. L'analyse

A. *Introduction*

On peut, sans exagérer, affirmer que l'al. 9(1)*c*) de la *Loi sur la radiocommunication*, une loi fédérale, n'a pas été appliqué de manière uniforme par les tribunaux du pays. D'une part, dans certaines décisions les tribunaux ont interprété cette disposition (ou suggéré qu'elle pouvait l'être) d'une manière ayant pour effet de créer une interdiction absolue, assortie d'une exception limitée, savoir les cas où le distributeur canadien légitime accorde l'autorisation prévue : *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (C. prov.), par. 36, conf. par (1995), 106 Man. R. (2d) 37 (B.R.) (*sub nom. R. c. O'Connor*), par. 10, demande d'autorisation d'appel à la Cour d'appel refusée pour d'autres motifs (1996), 110 Man. R. (2d) 153 (C.A.); *R. c. King*, [1996] N.B.J. No. 449 (QL) (B.R.), par. 19-20, inf. pour d'autres motifs par (1997), 187 R.N.-B. (2d) 185 (C.A.) (*sub nom. King c. Canada (Attorney General)*); *R. c. Knibb* (1997), 198 A.R. 161 (C. prov.), conf. par [1998] A.J. No. 628 (QL) (B.R.) (*sub nom. R. c. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245 (1re inst.), conf. par [1997] A.C.F. nº 1563 (QL) (C.A.); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, par. 72; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), p. 2034.

D'autre part, on relève un certain nombre de décisions à l'effet contraire, où les tribunaux ont adhéré à l'interprétation plus restrictive retenue en l'espèce par les juges majoritaires de la Cour d'appel de la Colombie-Britannique : *R. c. Love* (1997), 117 Man. R. (2d) 123 (B.R.); *R. c. Ereiser* (1997), 156 Sask. R. 71 (B.R.); *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL) (C.S.); *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (C. prov.), par. 12; *R. c. Thériault*, [2000] R.J.Q. 2736 (C.Q.), conf. par C.S. Drummondville, nº 405-36-000044-003, 13 juin 2001 (*sub nom. R. c. D'Argy*); *R. c. Gregory Électronique Inc.*, [2000] J.Q. nº 4923 (QL) (C.Q.), conf. par [2001] J.Q. nº 4925 (QL) (C.S.); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, nº 540-73-000055-980, 31 octobre 2000;

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Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(*c*). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(*c*). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(*c*) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

R. c. Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. c. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 Comme on peut le constater, cette divergence d'interprétations ne s'explique pas seulement par le fait que différentes juridictions dans diverses provinces ont adopté des démarches distinctes. Bien que les tribunaux de dernier ressort de la Colombie-Britannique et de l'Ontario se soient prononcés en faveur de l'interprétation restrictive et que ces décisions lient les tribunaux inférieurs de ces provinces, et que la Cour d'appel fédérale ait rendu une décision à l'effet contraire liant la Section de première instance de cette cour, les tribunaux de première instance de l'Alberta, du Manitoba et du Québec ont rendu des décisions inconciliables et il n'y a pas encore, dans ces provinces, d'arrêt contraignant sur la question. Le présent pourvoi offre donc à notre Cour l'occasion d'harmoniser les interprétations discordantes qui existent dans l'ensemble du Canada.

25 En toute déférence, j'estime que la Cour d'appel de la Colombie-Britannique a mal interprété l'al. 9(1)*c*) en tentant de trouver son chemin dans ce dédale de décisions contradictoires. À mon avis, cinq aspects de la décision des juges majoritaires requièrent examen. Premièrement, les juges majoritaires ont commencé leur analyse en tenant pour acquis qu'il y avait ambiguïté. Deuxièmement, ils ont accordé une importance excessive au seul fait qu'un grand nombre de juges avaient divergé d'opinions quant à l'interprétation de l'al. 9(1)*c*). Troisièmement, ils ne se sont pas arrêtés suffisamment à la place de la *Loi sur la radiocommunication* au sein du régime de réglementation de la radiodiffusion au Canada ni pris en considération les objectifs de ce régime, estimant plutôt qu'il était inutile d'examiner ces [TRADUCTION] « questions de principe plus générales ». Quatrièmement, les juges majoritaires n'ont pas interprété le texte anglais de la disposition conformément à sa structure grammaticale, à savoir une interdiction suivie d'une exception limitée. Enfin, ils ont dans les faits inversé les éléments du texte de la disposition, de telle sorte que les signaux dont un distributeur légitime pouvait permettre le décodage (c'est-à-dire l'exception) se trouvaient à définir l'étendue même de l'interdiction.

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B. *Does Section 9(1)(c) of the Radiocommunication Act Create an Absolute Prohibition Against Decoding, Followed by a Limited Exception, or Does it Allow all Decoding, Except for Those Signals for Which There Is a Lawful Distributor who Has not Granted its Authorization?*

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like

B. *L'alinéa 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de manière absolue, sous réserve d'une exception limitée, ou autorise-t-il le décodage de tous les signaux, sauf ceux pour lesquels il existe un distributeur légitime qui n'a pas donné l'autorisation de le faire?*

(1) Principes d'interprétation législative

Voici comment, à la p. 87 de son ouvrage *Construction of Statutes* (2e éd. 1983), Elmer Driedger a énoncé le principe applicable, de la manière qui fait maintenant autorité :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Notre Cour a à maintes reprises privilégié la méthode moderne d'interprétation législative proposée par Driedger, et ce dans divers contextes : voir, par exemple, *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, p. 578, le juge Estey; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3, p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 25; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65, par. 26; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33, le juge en chef McLachlin; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 27. Je tiens également à souligner que, pour ce qui est de la législation fédérale, le bien-fondé de la méthode privilégiée par notre Cour est renforcé par l'art. 12 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui dispose que tout texte « est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet ».

Cette méthode reconnaît le rôle important que joue inévitablement le contexte dans l'interprétation par les tribunaux du texte d'une loi. Comme l'a fait remarquer avec perspicacité le professeur John Willis dans son influent article intitulé « Statute Interpretation in a Nutshell » (1938), 16 *R. du B.*

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people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

can. 1, p. 6, [TRADUCTION] « les mots, comme les gens, prennent la couleur de leur environnement ». Cela étant, lorsque la disposition litigieuse fait partie d'une loi qui est elle-même un élément d'un cadre législatif plus large, l'environnement qui colore les mots employés dans la loi et le cadre dans lequel celle-ci s'inscrit sont plus vastes. En pareil cas, l'application du principe énoncé par Driedger fait naître ce que notre Cour a qualifié, dans *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56, par. 52, de « principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet ». (Voir également *Stoddard c. Watson*, [1993] 2 R.C.S. 1069, p. 1079; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer.)

Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

28 D'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* » — ne s'appliquent que si le sens d'une disposition est ambiguë. (Voir, relativement à l'interprétation stricte : *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, p. 115, le juge Dickson (plus tard Juge en chef du Canada); *R. c. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), p. 59-60; *R. c. Hasselwander*, [1993] 2 R.C.S. 398, p. 413, et *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53, par. 46. Je vais examiner plus loin le principe du respect des « valeurs de la *Charte* ».)

What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to

29 Qu'est-ce donc qu'une ambiguïté en droit? Une ambiguïté doit être « réelle » (*Marcotte*, précité, p. 115). Le texte de la disposition doit être [TRADUCTION] « raisonnablement susceptible de donner lieu à plus d'une interprétation » (*Westminster Bank Ltd. c. Zang*, [1966] A.C. 182 (H.L.), p. 222, lord Reid). Il est cependant nécessaire de tenir compte du « contexte global » de la disposition pour pouvoir déterminer si elle est raisonnablement susceptible de multiples interprétations. Sont pertinents à cet égard les propos suivants, prononcés par le juge Major dans l'arrêt *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, par. 14 : « C'est uniquement lorsque deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune

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which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts — or, for that matter, several doctrinal writers — have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

(2) Application to this Case

31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (*Chieu*, *supra*, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters are "encrypted" under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not "lawful distributors" under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay "a subscription fee or other charge" for unscrambled reception. Finally, I note that the "encrypted network feed" portion of s. 9(1)(*c*) is not relevant on these facts and can be ignored for the purposes of analysis.

également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes » (je souligne), propos auxquels j'ajouterais ce qui suit : « y compris d'autres principes d'interprétation ».

Voila pourquoi on ne saurait conclure à l'existence d'une ambiguïté du seul fait que plusieurs tribunaux — et d'ailleurs plusieurs auteurs — ont interprété différemment une même disposition. Autant il serait inapproprié de faire le décompte des décisions appuyant les diverses interprétations divergentes et d'appliquer celle qui recueille le « plus haut total », autant il est inapproprié de partir du principe que l'existence d'interprétations divergentes révèle la présence d'une ambiguïté. Il est donc nécessaire, dans chaque cas, que le tribunal appelé à interpréter une disposition législative se livre à l'analyse contextuelle et téléologique énoncée par Driedger, puis se demande si [TRADUCTION] « le texte est suffisamment ambigu pour inciter deux personnes à dépenser des sommes considérables pour faire valoir deux interprétations divergentes » (Willis, *loc. cit.*, p. 4-5).

(2) Application aux faits de l'espèce

Il n'est pas nécessaire, dans chaque cas, d'analyser séparément les divers facteurs d'interprétation énumérés par Driedger et, quoi qu'il en soit, ils sont étroitement liés et interdépendants (*Chieu*, précité, par. 28). Dans le contexte du présent pourvoi, mon analyse est divisée en deux grandes rubriques. Toutefois, avant de l'amorcer, je tiens à mettre en relief un certain nombre d'éléments propres à la présente affaire. Premièrement, nul ne conteste le fait que les signaux des radiodiffuseurs SRD américains sont « encodés » au sens de la Loi, non plus que le fait que ces radiodiffuseurs ne sont pas des « distributeurs légitimes » au sens de la Loi. Deuxièmement, tous les radiodiffuseurs SRD au Canada et aux États-Unis exigent le paiement « d'un prix d'abonnement ou de toute autre forme de redevance » pour l'accès à leurs signaux débrouillés. Enfin, je précise que les mots « alimentation réseau » figurant à l'al. 9(1)*c*) ne sont pas pertinents en l'espèce et qu'on peut en faire abstraction dans l'analyse.

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(a) *Grammatical and Ordinary Sense*

In its basic form, s. 9(1)(*c*) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

No person shall

. . .

(*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

Il est interdit :

. . .

c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau; [Emphasis added.]

The provision opens with the announcement of a broad prohibition ("No person shall"), follows by announcing the nature ("decode") and object ("an encrypted subscription programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with an authorization from the lawful distributor"). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in *Pearlman*, *supra*, at p. 2031).

The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(*c*) is directed towards the reception side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute's having an extraterritorial reach. In the present case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(*c*) is the decoding of "an encrypted subscription programming signal" (in French, "*un signal d'abonnement*") (emphasis added). The usage of the indefinite article here is telling: it signifies

a) *Sens ordinaire et grammatical*

32 Fondamentalement, l'al. 9(1)*c*) se présente comme une interdiction assortie d'une exception limitée. Je reproduis à nouveau le texte de cette disposition en en soulignant les passages pertinents :

Il est interdit :

. . .

c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau;

No person shall

. . .

(*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed; [Je souligne.]

La disposition énonce une interdiction générale (« Il est interdit »), qu'elle précise en en indiquant la nature (« décoder ») et l'objet (« un signal d'abonnement ou une alimentation réseau ») et qu'elle assortit d'une exception (« sans l'autorisation de leur distributeur légitime ») : voir *Pearlman*, précité, p. 2031. La version anglaise énonce elle aussi ces quatre éléments, quoique dans un ordre légèrement différent.

33 L'activité interdite est le décodage. Par conséquent, comme l'a fait remarquer la Cour d'appel, l'interdiction prévue à l'al. 9(1)*c*) vise l'aspect réception de la radiodiffusion. Indépendamment de la provenance des signaux, lorsque le décodage reproché a lieu au Canada, la question de la possible portée extraterritoriale de la Loi ne se soulève pas. Dans la présente affaire, la réception dont l'appelante demande l'interdiction se produit entièrement au Canada.

34 L'objet de l'interdiction revêt une importance cruciale dans le présent pourvoi. Aux termes de l'al. 9(1)*c*), il est interdit de décoder « un signal d'abonnement » (en anglais « *an encrypted subscription programming signal* ») (je souligne). L'emploi de l'article indéfini est révélateur. Le mot « un »

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"one, some [or] any" (*Canadian Oxford Dictionary* (1998), at p. 1). Thus, what is prohibited is the decoding of any encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of "subscription programming signal" suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act defines that term as, "radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge" (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in *Branton*, *supra*, at para. 26, "that the wording 'or elsewhere' is limited to the type of situation contemplated in s. 3(3)" of the Act. Section 3(3) reads:

3. . . .

(3) This Act applies within Canada and on board

(*a*) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(*b*) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,

(ii) a citizen or resident of Canada, or

(iii) a corporation incorporated or resident in Canada; and

(*c*) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of "subscription programming signal". Section 3(3) specifies the geographic scope of the *Radiocommunication Act* and all its constituent

a notamment le sens suivant : « . . . **2** (Avec une valeur générale au sens de "tous les") . . . » (*Le Grand Robert de la langue française* (2e éd. 2001), t. 6, p. 1607). La loi interdit donc de décoder tous les signaux d'abonnement, sous réserve de l'exception prévue.

La définition de « signal d'abonnement » tend à indiquer que l'interdiction frappe également les signaux émanant d'autres pays. Cette expression est définie ainsi à l'art. 2 de la Loi : « Radiocommunication destinée à être reçue, directement ou non, par le public au Canada ou ailleurs ["*or elsewhere*" dans la version anglaise] moyennant paiement d'un prix d'abonnement ou de toute autre forme de redevance » (je souligne). En toute déférence, je ne souscris ni à la thèse des intimés ni à l'opinion exprimée par madame le juge Weiler de la Cour d'appel dans l'affaire *Branton*, précitée, par. 26, selon laquelle [TRADUCTION] « les termes "*or elsewhere*" ne visent que le genre de situations envisagées au par. 3(3) » de la Loi, dont voici le texte :

3. . . .

(3) La présente loi s'applique au Canada et à bord :

a) d'un navire, bâtiment ou aéronef soit immatriculé ou faisant l'objet d'un permis aux termes d'une loi fédérale, soit appartenant à Sa Majesté du chef du Canada ou d'une province, ou placé sous sa responsabilité;

b) d'un véhicule spatial placé sous la responsabilité de Sa Majesté du chef du Canada ou d'une province, ou de celle d'un citoyen canadien, d'un résident du Canada ou d'une personne morale constituée ou résidant au Canada;

c) d'une plate-forme, installation, construction ou formation fixée au plateau continental canadien.

Cette disposition vise une situation tout à fait différente de celle visée par la définition de « signal d'abonnement ». Le paragraphe 3(3) précise la portée géographique de la *Loi sur la radiocommunication* et de toutes les dispositions qui la composent,

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provisions, as is confirmed by the marginal note accompanying the subsection, which states "Geographical application". To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(*a*) through (*c*) could potentially be subject to liability for unlawful decoding under s. 9(1)(*c*); in this way, s. 3(3) addresses the "where" question. On the other hand, the definition of "subscription programming signal" provides meaning to the s. 9(1)(*c*) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the "what" question. These are two altogether separate issues.

Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain" (*Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). Parliament has provided express direction to this effect through its enactment of s. 10 of the *Interpretation Act*, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" ("*ou ailleurs*", in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their

comme le confirme la note marginale « Application géographique ». Si l'on reformule cette explication dans le contexte du présent pourvoi, cela signifie que quiconque se trouve au Canada ou à bord de l'une des choses énumérées aux al. 3(3)*a*) à *c*) est susceptible de se voir reprocher l'infraction de décodage illégal prévue à l'al. 9(1)*c*); en ce sens, le par. 3(3) aide à répondre à la question de savoir « où » s'applique la loi. Par ailleurs, la définition de « signal d'abonnement » précise dans quel cas une personne engage sa responsabilité au titre de l'al. 9(1)*c*) en indiquant la catégorie de signaux dont le décodage non autorisé déclenche l'application de cette disposition; cela permet de répondre à la question de l'objet de l'interdiction, la question du « quoi ». Il s'agit de deux questions tout à fait distinctes.

37 En outre, le législateur n'aurait pas eu besoin d'inclure les mots « ou ailleurs » en français à la définition de « signal d'abonnement » à l'art. 2 (et « *or elsewhere* » en anglais) s'il avait seulement voulu que cette expression s'entende d'une radiocommunication destinée à être reçue directement ou non par le public à bord des bâtiments, véhicules spatiaux ou installations visés au par. 3(3). À mon avis, l'emploi de ces mots ne se voulait pas tautologique. On affirme parfois, lorsqu'un tribunal se penche sur le sens ordinaire et grammatical d'une disposition, que « [l]e législateur ne parle pas pour ne rien dire » (*Québec (Procureur général) c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). Le législateur l'a confirmé expressément en édictant l'art. 10 de la *Loi d'interprétation*, qui précise notamment que « [l]a règle de droit a vocation permanente ». Quoi qu'il en soit, l'expression « ou ailleurs » en français (« *or elsewhere* » en anglais) évoque un champ d'application beaucoup plus vaste que celui correspondant aux exemples restreints énumérés au par. 3(3), et je serais réticent à établir une équivalence entre les deux.

38 Par conséquent, je suis d'avis que la définition de « signal d'abonnement » vise les signaux émanant de distributeurs étrangers et destinés à être reçus par un public étranger. Rappelons que, puisque la *Loi sur la radiocommunication* n'interdit pas la radiodiffusion de signaux d'abonnement (exception faite de l'al. 9(1)*e*) qui interdit la retransmission non

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unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament did in fact choose language in s. 9(1)(*c*) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(*c*) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the word "*leur*" that modifies "*distributeur légitime*": a number of cases considering the French version of s. 9(1)(*c*) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in *Thériault*, *supra*, at p. 2739; *Gregory Électronique, supra*, at paras. 24-26; and *S.D.S. Satellite*, *supra*, at p. 7. See also *Branton*, *supra*, at para. 25).

40 I do not agree with these opinions. The definite article "the" and the possessive adjective "*leur*" merely identify the party who can authorize the decoding in accordance with the exception (see *Pearlman*, *supra*, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding", I cannot see how it necessarily follows that decoding unregulated signals "cannot therefore be in breach of the *Radiocommunication Act*" (par. 36). Such an

autorisée au Canada de tels signaux) et ne s'applique qu'au décodage survenant aux endroits prévus au par. 3(3), la présente affaire ne soulève aucune question touchant à l'exercice extraterritorial de certains pouvoirs. À ce stade-ci de l'analyse, cela signifie, contrairement à la conclusion du juge siégeant en chambre et à celle des juges majoritaires de la Cour d'appel, que le législateur a en fait choisi, à l'al. 9(1)*c*), un libellé interdisant le décodage de tous les signaux d'abonnement, indépendamment de leur origine, « sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci ». Je vais maintenant examiner cette exception.

La Cour d'appel a invoqué la présence de l'article défini à la fin du texte anglais de l'al. 9(1)*c*) (« *the signal* ») au soutien de son interprétation restrictive de cette disposition. Devant notre Cour, l'avocat des intimés a également fait valoir que la présence de l'article défini « *the* » qui précède les mots « *lawful distributor* » confirme que la disposition [TRADUCTION] « n'est censée s'appliquer que lorsqu'il existe un distributeur légitime ». Enfin, les intimés ont attiré notre attention sur le texte de la version française de la disposition et, en particulier, sur la présence du déterminant possessif « leur » avant les mots « distributeur légitime » : dans un certain nombre d'affaires où l'on a analysé la version française de l'al. 9(1)*c*), le tribunal a fondé son interprétation restrictive sur l'emploi de ce mot (voir les décisions suivantes de la Cour du Québec : *Thériault*, précitée, p. 2739; *Gregory Électronique*, précitée, par. 24-26, et *S.D.S. Satellite*, précitée, p. 7. Voir également l'affaire *Branton*, précitée, par. 25).

Je ne partage pas ces opinions. L'adjectif possessif « leur » et l'article défini « *the* » ne font qu'identifier la partie qui peut autoriser le décodage conformément à l'exception prévue (voir *Pearlman*, précité, p. 2032). En conséquence, bien que je souscrive à l'opinion de la majorité de la Cour d'appel selon laquelle, [TRADUCTION] « [s]i un signal d'abonnement n'a pas de distributeur légitime au Canada, personne ne saurait être autorisé à en permettre le décodage », je ne vois pas comment il s'ensuit nécessairement que le décodage de signaux non assujettis à la

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approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman*, *supra*, at p. 2031: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

In my view, the definite articles are used in the exception portion of s. 9(1)(*c*) in order to identify from amongst the genus of signals captured by the prohibition (any encrypted subscription programming signal) that species of signals for which the rule is "otherwise". Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for the (definite) particular signal that is decoded, the person has received authorization from the (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase "lawful right" ("*légitimement autorisée*") comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(*c*)) or a Minister's licence (s. 5(1)(*a*)). Instead, it deliberately chose broader language. I therefore agree with the opinion

réglementation « ne peut de ce fait contrevenir à la *Loi sur la radiocommunication* » (par. 36). Pareille conclusion exigerait que l'on intègre à l'interdiction certains mots de l'exception, ce qui constituerait une démarche circulaire et erronée. Je vais me référer à nouveau à la décision du juge Provost, de la Cour du Québec, dans l'affaire *Pearlman*, précitée, p. 2031 : « Rechercher d'abord l'exception et définir ensuite le principe par rapport à l'exception risquent de fausser le sens du texte et de trahir l'intention de son rédacteur. »

41 À mon avis, les articles définis employés dans la version anglaise de l'exception prévue à l'al. 9(1)*c*) servent à identifier, parmi le genre de signaux touchés par l'interdiction (tous les signaux d'abonnement), ceux pour lesquels la règle cède le pas à l'exception. Du point de vue grammatical, donc, le choix d'articles définis et indéfinis donne essentiellement lieu à l'interprétation suivante : Il est interdit à quiconque de décoder quelque (indéfini) signal d'abonnement que ce soit à moins d'avoir obtenu, pour le (défini) signal en cause, l'autorisation du (défini) distributeur légitime. Par conséquent, comme cela peut arriver, s'il n'existe aucun distributeur légitime susceptible d'accorder cette autorisation, l'interdiction générale doit continuer à produire ses effets.

42 Bien que j'aie déjà indiqué que, dans la présente affaire, les distributeurs SRD américains ne sont pas des « distributeurs légitimes » au sens de la Loi, il convient d'analyser cette expression, car elle est importante dans le processus d'interprétation. Aux termes de l'art. 2, « distributeur légitime » s'entend de « [l]a personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement [. . .] et à en permettre le décodage ». À cet égard, le seul fait qu'une personne soit autorisée dans un autre pays à transmettre des signaux n'a pas pour effet de faire de celle-ci le distributeur légitimement autorisé de ces signaux au Canada. En outre l'expression « légitimement autorisée » (« *lawful right* ») suppose le respect d'autres conditions que la seule obtention d'une licence du CRTC. En définissant ce terme, le législateur aurait pu mentionner expressément qu'il s'agit d'une personne titulaire d'une licence délivrée par le CRTC (comme il l'a fait

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of Létourneau J.A. in the Federal Court of Appeal decision in *Norsat*, *supra*, at para. 4, that

> [t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the *Act*, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of "broadcasting" under the *Broadcasting Act* (i.e., where the transmitted programming is "made solely for performance or display in a public place") and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a "lawful distributor" for the purposes of the *Radiocommunication Act*.

43 In the end, I conclude that when the words of s. 9(1)(*c*) are read in their grammatical and ordinary sense, taking into account the definitions provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

(b) *Broader Context*

44 Although the *Radiocommunication Act* is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorization to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with

à l'al. 18(1)*c*)) ou par le ministre (al. 5(1)*a*)). Il a plutôt opté pour une formulation plus générale. En conséquence, je partage l'opinion suivante, exprimée par le juge Létourneau de la Cour d'appel fédérale dans l'affaire *Norsat*, précitée, par. 4 :

> La personne « légitimement autorisée » est celle qui possède les droits réglementaires en vertu de la licence qui lui est régulièrement délivrée conformément à la Loi, l'autorisation du Conseil de la radiodiffusion et des télécommunications canadiennes ainsi que les droits contractuels et les droits d'auteur se rapportant nécessairement au contenu qu'implique la transmission d'un signal d'abonnement ou d'une alimentation réseau.

Comme l'a fait remarquer le procureur général du Canada, cette interprétation signifie que, même lorsque la transmission du signal d'abonnement n'est pas visée par la définition de « radiodiffusion » au sens de la *Loi sur la radiodiffusion* (c'est-à-dire lorsque la transmission d'émissions est « destinée à la présentation dans un lieu public seulement ») et qu'aucune licence de radiodiffusion n'est donc requise, d'autres facteurs doivent être pris en considération pour déterminer si le transmetteur du signal est un « distributeur légitime » pour l'application de la *Loi sur la radiocommunication*.

En fin de compte, j'arrive à la conclusion que, lorsqu'on interprète les mots utilisés à l'al. 9(1)*c*) suivant leur sens ordinaire et grammatical et en tenant compte des définitions de l'art. 2, cette disposition a pour effet d'interdire à quiconque de décoder au Canada tout signal d'abonnement brouillé — quelle que soit son origine — à moins d'avoir obtenu la permission de le faire de la personne légitimement autorisée, suivant le droit canadien, à transmettre le signal concerné et à en permettre le décodage.

b) *Contexte élargi*

Bien que la *Loi sur la radiocommunication* ne comporte malheureusement pas de disposition précisant son objet, elle s'inscrit dans un cadre plus large. Elle établit principalement les règles relatives à l'attribution de fréquences de radiocommunication définies, aux autorisations de posséder et d'utiliser des appareils radio et à la réglementation technique du spectre des radiofréquences. La Loi

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radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

> The *Radiocommunication Act* embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

The *Broadcasting Act* came into force in 1991, in an omnibus statute that also brought substantial amendments to the *Radiocommunication Act*, including the addition thereto of s. 9(1)(*c*). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian public. Of note for the present appeal is that the definition of "broadcasting" in the *Broadcasting Act* captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The *Broadcasting Act* also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(*a*) through (*t*)). The emphasis of the Act, however, is placed on broadcasting and not reception.

Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in *Knibb*, *supra*, at paras. 38-39, which was adopted by Gibson J. in the Federal Court, Trial Division decision in *Norsat*, *supra*, at para. 35:

> The *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and

établit également des restrictions applicables en matière de réception et de brouillage des radiocommunications, y compris le type de signaux d'abonnement en litige dans le présent pourvoi. S. Handa et autres, dans *Communications Law in Canada* (feuilles mobiles), p. 3.8, disent de la *Loi sur la radiocommunication* qu'elle est l'un [TRADUCTION] « des trois piliers législatifs régissant la distribution au Canada ». Ils ajoutent ce qui suit, à la p. 3.17 :

> [TRADUCTION] La *Loi sur la radiocommunication* régit toutes les utilisations privées et publiques du spectre des radiofréquences. Le lien étroit unissant cette loi et celles relatives aux télécommunications et à la radiodiffusion tient au fait que les télécommunications et la radiodiffusion sont les deux principaux domaines d'utilisation du spectre des radiofréquences.

45 Entrée en vigueur en 1991, la *Loi sur la radiodiffusion* est une loi omnibus qui a également apporté des modifications substantielles à la *Loi sur la radiocommunication*, notamment par l'ajout de l'al. 9(1)*c*). Elle a pour objet général de réglementer et de surveiller la transmission d'émissions au public canadien. Un aspect important à signaler dans le cadre du présent pourvoi est le fait que la transmission d'émissions encodées dont il est question en l'espèce est visée par la définition de « radiodiffusion » dans la *Loi sur la radiodiffusion* et que les radiodiffuseurs SRD, telle l'appelante, sont assujettis à cette loi et obtiennent leur licence sous son régime. Sont énoncés, aux al. 3(1)*a*) à *t*) de la *Loi sur la radiodiffusion*, 20 objectifs généraux de la politique canadienne de radiodiffusion. Toutefois, la loi met l'accent sur la radiodiffusion, et non sur la réception.

46 En fin de compte, ces lois s'appliquent en tandem. À cet égard, je souscris aux propos suivants du juge LeGrandeur de la Cour provinciale de l'Alberta dans l'affaire *Knibb*, précitée, par. 38-39, qu'a fait siens le juge Gibson de la Section de première instance de la Cour fédérale dans *Norsat*, précité, par. 35 :

> [TRADUCTION] La *Loi sur la radiodiffusion* et la *Loi sur la radiocommunication* doivent être considérées comme fonctionnant dans le cadre d'un seul régime réglementaire. Les dispositions de chaque loi doivent

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consideration must be given to each statute's roll [*sic*] in the overall scheme. [Cite to R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 286.]

donc être lues en tenant compte de leurs contextes réciproques et il faut tenir compte du rôle de chaque loi dans le régime général. [Renvoi à R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), p. 286.]

The addition of s. 9(1)(*c*), (*d*) and (*e*) and other sections to the *Radiocommunication Act* through the provisions of the *Broadcasting Act*, 1991 are supportive of that approach in my view. Subsections 9(1)(*c*), (*d*) and (*e*) of the *Radiocommunication Act* must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

Selon moi, l'ajout des al. 9(1)*c*), *d*) et *e*) et d'autres dispositions à la *Loi sur la radiocommunication*, par l'intermédiaire des dispositions de la *Loi sur la radiodiffusion* de 1991, appuie cette méthode d'interprétation. Les alinéas 9(1)*c*), *d*) et *e*) de la *Loi sur la radiocommunication* doivent être considérés comme faisant partie du mécanisme par lequel doit être mise en œuvre la politique de réglementation de la radiodiffusion au Canada qui y est énoncée.

47 Canada's broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(*d*) and 3(1)(*t*) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

La politique canadienne de radiodiffusion possède un certain nombre de caractéristiques propres et elle établit une orientation incontestablement axée sur la culture. Il y est déclaré qu'au Canada les radiofréquences sont du domaine public, qu'il est fondamental que le système de radiodiffusion soit la propriété des Canadiens et sous leur contrôle et que la programmation offerte par le système de radiodiffusion est « un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle ». Les alinéas 3(1)*d*) et *t*) énoncent un certain nombre d'objectifs de mise en œuvre précis à l'intention du système de radiodiffusion en général, et des entreprises de distribution en particulier (y compris les entreprises de distribution SRD). Enfin, le par. 3(2) dispose que « le système canadien de radiodiffusion constitue un système unique » dont il convient de confier la réglementation et la surveillance « à un seul organisme public autonome ».

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(*c*). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

Dans ce contexte, peu d'éléments appuient une interprétation restrictive de l'al. 9(1)*c*). En effet, comme l'a soutenu devant nous l'avocat du procureur général du Canada, après examen de la politique canadienne de radiodiffusion adoptée par le législateur, l'on peut à juste titre poser les questions suivantes :

why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come

[TRADUCTION] Pourquoi le législateur aurait-il adopté une disposition correspondant à l'interprétation restrictive préconisée en l'espèce? Pourquoi le législateur aurait-il précisé que le système doit être la propriété des Canadiens et pourvu à la production canadienne et

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in and sweep all of that aside? What purpose would have been served?

On the other hand, the interpretation of s. 9(1)(*c*) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the *Broadcasting Act*. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.

There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorize decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

au contenu canadien de la radiodiffusion, puis tout bonnement laisser les radiodiffuseurs étrangers non assujettis à la réglementation s'amener sur le marché et faire fi de toutes ces exigences? Quelle fin aurait alors été servie?

49 Par contre, l'interprétation de l'al. 9(1)*c*) qui, à mon avis, découle du sens ordinaire et grammatical des mots utilisés dans cette disposition s'accorde bien avec les objectifs de la *Loi sur la radiodiffusion*. Le fait que les radiodiffuseurs SRD encodent leurs signaux, permettant ainsi la concentration des mesures de réglementation sur les aspects réception et décodage du système, contribue d'ailleurs à la réalisation des objectifs de la politique de radiodiffusion établis par la loi, ainsi qu'à la réglementation et à la surveillance du système canadien de radiodiffusion en tant que système unique. Dans ces circonstances, il est logique que le législateur ait voulu inciter les radiodiffuseurs à se plier au processus réglementaire en disposant qu'ils ne peuvent autoriser le décodage de leurs signaux et percevoir en contrepartie un prix d'abonnement qu'après avoir obtenu les approbations requises des autorités compétentes.

50 Il existe un autre facteur contextuel qui, bien qu'il ne soit en aucune manière déterminant, confirme l'interprétation selon laquelle l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée. Comme je l'ai souligné précédemment, l'expression « légitimement autorisée » figurant dans la définition de « distributeur légitime » intègre des aspects touchant au droit des contrats et au droit d'auteur. Selon la preuve versée au dossier, les accords commerciaux liant l'appelante et ses divers fournisseurs d'émissions stipulent que l'appelante doit respecter les droits accordés à ces fournisseurs par les titulaires du droit d'auteur sur le contenu des émissions. Les droits qu'acquièrent ainsi les fournisseurs permettent la radiodiffusion des émissions dans des régions données, que ce soit à la grandeur du Canada ou dans une partie du pays. En conséquence, l'appelante n'est pas légitimement autorisée à permettre le décodage de ses signaux d'abonnement à l'extérieur du champ d'application géographique du droit de présenter sa programmation que lui accorde le contrat.

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51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(*c*) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

Ainsi, le titulaire du droit d'auteur sur la programmation peut conclure des contrats de licence distincts dans des régions différentes ou dans des pays différents (par exemple au Canada et aux États-Unis). Il semble d'ailleurs que de tels arrangements soient monnaie courante dans ce secteur d'activité. Dans la présente affaire, le radiodiffuseur SRD américain DIRECTV a plaidé la même interprétation de l'al. 9(1)*c*) que celle préconisée par l'appelante, en partie à cause de la responsabilité à laquelle il s'expose tant vis-à-vis des titulaires du droit d'auteur aux États-Unis que des titulaires de licence au Canada du fait que ses signaux débordent la frontière et sont décodés au Canada.

52 I also believe that the reading of s. 9(1)(*c*) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(*c*) and 21(1)(*d*) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(*c*) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 *M.C.L.R.* 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(*a*) and 18(6) of the *Radiocommunication Act* both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

J'estime également que le fait de considérer que l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée complète le régime établi par la *Loi sur le droit d'auteur*. Les alinéas 21(1)*c*) et *d*) de cette loi confèrent au radiodiffuseur, à l'égard du signal de communication qu'il émet, un droit d'auteur comportant le droit exclusif de le retransmettre (sous réserve des exceptions prévues au par. 31(2)) et, dans le cas d'un signal de communication télévisuel, de l'exécuter en public moyennant droit d'entrée. Si l'on considère que l'al. 9(1)*c*) a pour effet d'interdire absolument tout décodage, sauf avec la permission de la personne légitimement autorisée à transmettre le signal concerné et à en permettre le décodage, la protection de cette disposition s'étend également aux titulaires des droits d'auteur sur la programmation elle-même, puisqu'il interdit la réception non autorisée de tout signal violant le droit d'auteur, même s'il n'y a ni retransmission ni reproduction : voir F. P. Eliadis et S. C. McCormack, « Vanquishing Wizards, Pirates and Musketeers : The Regulation of Encrypted Satellite TV Signals » (1993), 3 *M.C.L.R.* 211, p. 213-218. Enfin, je signale que les recours civils prévus à l'al. 18(1)*a*) et au par. 18(6) de la *Loi sur la radiocommunication* indiquent que les questions touchant au droit d'auteur sont pertinentes pour l'application de celle-ci, facteur qui appuie la conclusion selon laquelle il existe un lien entre cette loi et celle sur le droit d'auteur.

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(c) *Section 9(1)(c) as a "Quasi-Criminal" Provision*

I wish to comment regarding the respondents' argument regarding the penal effects that the "absolute prohibition" interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who "has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(*c*)") and does not therefore directly engage the penal aspects of the *Radiocommunication Act*, the respondents direct our attention to ss. 10(1)(*b*) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(*c*). Respondents' counsel argued before us that, if s. 9(1)(*c*) is interpreted in the manner suggested by the appellant, "hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute" and that "the effect of [the appellant's] submissions is to criminalize subscribers even if they pay every cent to which DIRECTV is entitled". The thrust of the respondents' submission is that the presence of ss. 10(1)(*b*) and 10(2.1) in the *Radiocommunication Act* provides context that is important to the interpretation of s. 9(1)(*c*), and that this context militates in favour of the respondents' position.

Section 9(1)(*c*) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(*b*) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9"

c) *L'alinéa 9(1)c) en tant que disposition « quasi pénale »*

53 Je tiens à commenter l'argument des intimés relatif aux conséquences pénales qu'entraînerait l'interprétation voulant que la disposition en cause constitue une « interdiction absolue ». Bien que la présente affaire découle d'un recours civil exercé par l'appelante en vertu du par. 18(1) de la Loi (en qualité de personne qui « a subi une perte ou des dommages par suite d'une contravention [à l']aliné[a] 9(1)*c*) ») et ne fasse donc pas intervenir directement les aspects pénaux de cette loi, les intimés invitent notre Cour à se pencher sur l'al. 10(1)*b*) et le par. 10(2.1) de la *Loi sur la radiocommunication*. Suivant chacune de ces dispositions, commet une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque fournit du matériel en vue d'enfreindre l'art. 9 et quiconque contrevient dans les faits à l'al. 9(1)*c*). Devant nous, l'avocat des intimés a plaidé que, si l'al. 9(1)*c*) est interprété de la manière suggérée par l'appelante, [TRADUCTION] « des centaines de milliers de canadiens peuvent s'attendre à recevoir de la visite, puisqu'ils enfreindront la loi » et que « les arguments [de l'appelante] ont pour effet de transformer les abonnés en criminels, et ce même s'ils paient jusqu'au dernier cent les sommes auxquelles a droit DIRECTV ». Essentiellement, l'intimé prétend que la présence de l'al. 10(1)*b*) et du par. 10(2.1) dans la *Loi sur la radiocommunication* constitue un élément contextuel important pour l'interprétation de l'al. 9(1)*c*) et que cet élément milite en faveur de sa thèse.

54 L'alinéa 9(1)*c*) a effectivement un « caractère hybride », dans la mesure où son application emporte des sanctions civiles et des sanctions pénales. Cependant, je ne suis pas convaincu que ce facteur joue un rôle important dans le processus d'interprétation en l'espèce. Quoi qu'il en soit, je ne crois pas qu'il soit exact d'insinuer que la décision rendue dans le présent pourvoi aura pour effet de transformer sur-le-champ en criminels les résidants canadiens qui sont abonnés à des services SRD américains et paient leur abonnement. L'infraction d'ordre pénal créée par l'al. 10(1)*b*) doit être commise dans des circonstances « donnant à penser que

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(emphasis added), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(*c*) . . . if the person exercised all due diligence to prevent the commission of the offence". Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

(d) *Conclusion*

55 After considering the entire context of s. 9(1)(*c*), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

C. *The Constitutional Questions*

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74, mandates that constitutional questions be stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to

[tout matériel ou dispositif, ou composante de celui-ci] est utilisé en vue d'enfreindre l'article 9, l'a été ou est destiné à l'être » (je souligne). De plus, l'alinéa 10(1)*b*) permet à la personne à qui on reproche cette infraction de plaider l'« excuse légitime » en défense. En outre, le par. 10(2.5) dispose que « [n]ul ne peut être déclaré coupable de l'infraction visée [à l'alinéa] 9(1)*c*) [. . .] s'il a pris les mesures nécessaires pour l'empêcher ». Comme il n'est ni nécessaire ni opportun de s'interroger sur le sens de ces dispositions en l'absence du contexte factuel approprié, je m'abstiendrai de le faire.

d) *Conclusion*

Après examen du contexte global de l'al. 9(1)*c*) et interprétation des mots qui le composent suivant leur sens ordinaire et grammatical, en conformité avec le cadre législatif dans lequel s'inscrit cette disposition, j'arrive à la conclusion que celle-ci ne recèle aucune ambiguïté. Je ne peux que conclure que le législateur entendait interdire de manière absolue aux résidants du Canada de décoder des signaux d'abonnement encodés. La seule exception à cette interdiction est le cas où l'intéressé a obtenu l'autorisation de le faire du distributeur détenant au Canada les droits requis pour transmettre le signal concerné et en permettre le décodage. Il n'est pas nécessaire, dans les circonstances, de recourir à l'un ou l'autre des principes subsidiaires d'interprétation législative.

C. *Les questions constitutionnelles*

Comme je vais le préciser ci-après, je n'entends pas répondre aux questions constitutionnelles formulées dans le cadre du présent pourvoi.

L'article 32 des *Règles de la Cour suprême du Canada*, DORS/83-74, requiert la formulation de questions constitutionnelles dans tout pourvoi où la validité ou l'applicabilité constitutionnelle d'une loi est contestée, en plus d'établir les exigences procédurales à respecter à cette fin. Comme l'a reconnu notre Cour, la règle 32 vise à faire en sorte que le procureur général du Canada, les procureurs généraux des provinces et les ministres de la Justice des territoires soient informés de toute contestation constitutionnelle et puissent décider s'il y a lieu

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intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49, *per* L'Heureux-Dubé J.; see also B. A. Crane and H. S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71; *Corbiere*, *supra*, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 643-44, *per* Cory J.). Like many general rules, however, this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, *supra*; *Idziak*, *supra*; *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 69, leave to appeal refused January 24, 2002, [2002] 1 S.C.R. vii.

In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: *Bisaillon*, *supra*; Crane and Brown, *supra*, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, "[t]his policy . . . is of particular importance in constitutional matters" (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1580; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *R. v. Mills*,

ou non qu'ils interviennent : *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 49, le juge L'Heureux-Dubé; voir également B. A. Crane et H. S. Brown, *Supreme Court of Canada Practice 2000* (1999), p. 253. La règle 32 a également pour objet d'informer les parties et d'éventuels intervenants des questions constitutionnelles soumises à la Cour.

58 De façon générale, le Juge en chef ou un autre juge de notre Cour accorde aux parties à un pourvoi une « grande latitude » dans la formulation des questions constitutionnelles : *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, p. 71; *Corbiere*, précité, par. 48. Cette grande latitude est particulièrement pertinente dans une affaire comme celle qui nous occupe, où ce sont les intimés qui ont présenté la requête sollicitant la formulation des questions constitutionnelles. Généralement, l'intimé peut avancer, en appel, tout argument tendant à justifier la décision du tribunal d'instance inférieure (*Perka c. La Reine*, [1984] 2 R.C.S. 232, p. 240; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, p. 643-644, le juge Cory). Toutefois, comme bien d'autres règles d'ordre général, cette règle souffre une exception. L'intimé, comme toute autre partie d'ailleurs, ne peut invoquer un argument entièrement nouveau qui aurait nécessité la production d'éléments de preuve additionnels au procès : *Perka*, précité; *Idziak*, précité; *R. c. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), par. 69, autorisation de pourvoi refusée le 24 janvier 2002, [2002] 1 R.C.S. vii.

59 Par ailleurs, même lorsque des questions constitutionnelles sont formulées conformément à la règle 32, il peut en bout de ligne arriver que le dossier factuel constitué en appel soit insuffisant pour permettre de trancher ces questions. En pareil cas, notre Cour n'est pas tenue de répondre aux questions formulées : *Bisaillon*, précité; Crane et Brown, *op. cit.*, p. 254. En fait, il existe des raisons impérieuses de ne pas répondre à de telles questions : bien que notre Cour s'abstienne généralement de se prononcer sur des questions abstraites, « [c]ette politique [. . .] revêt une importance particulière dans les affaires constitutionnelles » (*Moysa c. Alberta (Labour Relations Board)*, [1989] 1 R.C.S. 1572, p.

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[1999] 3 S.C.R. 668, at para. 38, *per* McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 357: "The procedural requirements of Rule 32 of the *Supreme Court Rules* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record" (emphasis added).

60 Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, *per* McIntyre J.; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86, *per* Iacobucci and Arbour JJ.; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at paras. 18-19. One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role *vis-à-vis* statute law.

1580; voir également *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1099; *Baron c. Canada*, [1993] 1 R.C.S. 416, p. 452; *R. c. Mills*, [1999] 3 R.C.S. 668, par. 38, les juges McLachlin et Iacobucci). En conséquence, comme l'a dit le juge Sopinka au nom de notre Cour dans *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, p. 357 : « La procédure établie par l'art. 32 des *Règles de la Cour suprême* ne vise pas à introduire de nouvelles questions, mais à définir avec précision les questions constitutionnelles litigieuses qui ressortent du dossier » (je souligne).

Au cours des plaidoiries, l'avocat des intimés a à juste titre concédé que le dossier ne renferme pas d'éléments relatifs à la *Charte* propres à permettre à notre Cour de se prononcer sur les questions formulées. Il a plutôt fait valoir que les « valeurs de la *Charte* » devaient éclairer l'interprétation de la *Loi sur la radiocommunication*. Dans la mesure où cet argument est présenté comme une proposition indépendante, il doit être rejeté. Bien que j'aie déjà exposé la démarche à privilégier en matière d'interprétation législative, il y a lieu d'y revenir, étant donné la manière dont les intimés voudraient que notre Cour tienne compte de la *Charte* et l'applique.

Il est depuis longtemps admis que, lorsqu'il leur est possible de le faire sans perturber le juste équilibre entre l'action judiciaire et l'action législative, les tribunaux doivent appliquer et faire évoluer les règles de la common law en conformité avec les valeurs et principes consacrés par la *Charte* : *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 603, le juge McIntyre; *Cloutier c. Langlois*, [1990] 1 R.C.S. 158, p. 184; *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 675; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83, par. 86, les juges Iacobucci et Arbour; *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 R.C.S. 156, 2002 CSC 8, par. 18-19. Il faut évidemment se rappeler que la common law ressortit au pouvoir judiciaire. En effet les tribunaux sont chargés d'appliquer la common law et de veiller à ce qu'elle continue de refléter les valeurs fondamentales de la société. Cependant, ils ne jouent pas le même rôle vis-à-vis du droit d'origine législative.

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Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

62 Les textes législatifs sont l'expression de la volonté du législateur. Ils complètent, modifient ou remplacent la common law. Plus précisément, lorsqu'une loi est en jeu dans une instance judiciaire, il incombe au tribunal (sauf contestation fondée sur des motifs d'ordre constitutionnel) de l'interpréter et de l'appliquer conformément à l'intention souveraine du législateur. À cet égard, bien qu'on affirme parfois qu'[TRADUCTION] « il convient que les tribunaux privilégient les interprétations tendant à favoriser les principes et les valeurs consacrés par la *Charte* plutôt que celles qui n'ont pas cet effet » (Sullivan, *op. cit.*, p. 325), il importe de souligner le fait que, dans la mesure où notre Cour a reconnu un principe d'interprétation fondé sur le respect des « valeurs de la *Charte* », ce principe ne s'applique uniquement qu'en cas d'ambiguïté véritable, c'est-à-dire lorsqu'une disposition législative se prête à des interprétations divergentes mais par ailleurs tout aussi plausibles l'une que l'autre.

This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558, *per* L'Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771, *per* McLachlin J. (as she then was); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *Mossop*, *supra*, at pp. 581-82, *per* Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66, *per* Cory J.; *Mills*, *supra*, at paras. 22 and 56; *Sharpe*, *supra*, at para. 33.

63 Notre Cour s'est efforcée d'exprimer clairement ce principe à de nombreuses reprises : voir, par exemple, *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, p. 558, le juge L'Heureux-Dubé; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1078, le juge Lamer (plus tard Juge en chef); *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 771, le juge McLachlin (maintenant Juge en chef); *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 660; *Mossop*, précité, p. 581-582, le juge en chef Lamer; *R. c. Lucas*, [1998] 1 R.C.S. 439, par. 66, le juge Cory; *Mills*, précité, par. 22 et 56; *Sharpe*, précité, par. 33.

These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:

64 Dans ces arrêts, notre Cour reconnaît qu'appliquer une présomption générale de conformité à la *Charte* pourrait parfois contrecarrer le respect de l'intention véritable du législateur, contrairement à ce que prescrit la démarche privilégiée en matière d'interprétation législative. Dans l'arrêt *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 752, la Cour a énoncé une raison supplémentaire justifiant de limiter l'application de la règle d'interprétation fondée sur le respect des « valeurs de la *Charte* » :

[T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional

[C]onsulter la *Charte* en l'absence d'une telle ambiguïté la prive d'un objet plus important, la détermination de la constitutionnalité d'une loi. Si les dispositions

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validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80, *per* Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)" (*Vriend*, *supra*, at para. 139).

66 To reiterate what was stated in *Symes*, *supra*, and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of

législatives devaient être rendues compatibles avec la *Charte* même en l'absence d'ambiguïté, alors il ne serait jamais possible d'appliquer, plutôt que de simplement consulter, les valeurs de la *Charte*. En outre, le gouvernement ne pourrait jamais justifier une atteinte à la *Charte* comme une limite raisonnable en vertu de l'article premier puisque le processus d'interprétation empêcherait initialement de conclure à l'existence d'une atteinte à la *Charte*. [Souligné dans l'original.]

(Voir également *Willick c. Willick*, [1994] 3 R.C.S. 670, p. 679-680, le juge Sopinka.)

Fondamentalement, ce dernier point évoque la question du rôle que doivent jouer les tribunaux au sein de la démocratie canadienne. Dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 136-142, notre Cour a dit que dialogue et respect mutuels devaient être au cœur des rapports entre les pouvoirs législatif, exécutif et judiciaire. Elle a ajouté que le contrôle judiciaire fondé sur des motifs prévus par la *Charte* confère une certaine vitalité au processus démocratique en ce qu'il favorise à la fois l'interaction dynamique et la responsabilité entre ces divers pouvoirs. « Les tribunaux examinent le travail du législateur, et le législateur réagit aux décisions des tribunaux en adoptant d'autres textes de loi (ou même en se prévalant de l'art. 33 de la *Charte* pour les soustraire à la *Charte*) » (*Vriend*, précité, par. 139).

Pour rappeler ce qui a été dit dans les arrêts *Symes* et *Willick*, précités, si les tribunaux devaient interpréter toutes les lois de manière à faire en sorte qu'elles soient conformes à la *Charte*, cela perturberait à tort l'équilibre dialogique. Chaque fois que ce principe serait appliqué, il préviendrait tout contrôle judiciaire fondé sur des motifs prévus par la *Charte*, recours qui permet de profiter des mécanismes internes de pondération que comporte l'article premier. Ainsi, les législateurs seraient en grande partie dépouillés du pouvoir que leur reconnaît la Constitution d'apporter, par voie législative, des restrictions raisonnables aux droits et libertés garantis par la *Charte*, lesquels possèderaient dès lors un caractère quasi absolu. En fait, le législateur qui ne voudrait pas se retrouver dans une telle situation devrait, d'une manière ou d'une autre, justifier expressément dans le texte législatif la limitation du droit garanti par la *Charte*, sans bénéficier des

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such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(*c*) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(*c*), and, if they are, whether they are justified under s. 1.

VII. Disposition

In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(*c*) of the *Radiocommunication Act* creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

Appeal allowed with costs.

Solicitors for the appellant: Crawford, McKenzie, McLean & Wilford, Orillia and Lang Michener, Ottawa.

Solicitors for all the respondents, except Michelle Lee: Gold & Fuerst, Toronto.

avantages d'un débat devant les tribunaux relativement aux restrictions qui sont acceptables dans une société libre et démocratique. Avant longtemps, les tribunaux seraient appelés à interpréter ce genre de texte de loi à la lumière des principes consacrés par la *Charte*. Le caractère manifestement impraticable d'une telle façon de faire met en évidence l'importance de maintenir le dialogue entre les pouvoirs composant l'État. Par conséquent, lorsqu'une loi n'est pas ambiguë, les tribunaux doivent donner effet à l'intention clairement exprimée par le législateur et éviter d'utiliser la *Charte* pour arriver à un résultat différent.

67 Il est fort possible, lorsque l'affaire retournera à procès, que l'avocat des intimés demande que l'al. 9(1)*c*) de la *Loi sur la radiocommunication* soit déclaré inconstitutionnel au motif qu'il porte atteinte à la *Charte*. À ce moment, il sera nécessaire d'examiner la preuve relative à l'identité des titulaires des droits à la liberté d'expression en cause, et de se demander si l'al. 9(1)*c*) porte atteinte à ces droits et, dans l'affirmative, si l'atteinte est justifiée au regard de l'article premier.

VII. Dispositif

68 Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler le jugement de la Cour d'appel de la Colombie-Britannique et de déclarer que l'al. 9(1)*c*) de la *Loi sur la radiocommunication* a pour effet de créer une interdiction prohibant tout décodage de signaux d'abonnement, sous réserve d'une exception, savoir le cas où l'intéressé a obtenu la permission de le faire de la personne légitimement autorisée au Canada à transmettre le signal concerné et à en permettre le décodage. Aucune réponse n'est donnée à l'égard des questions constitutionnelles formulées sur ordonnance du Juge en chef.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Crawford, McKenzie, McLean & Wilford, Orillia et Lang Michener, Ottawa.

Procureurs de tous les intimés, à l'exception de Michelle Lee : Gold & Fuerst, Toronto.

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Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitors for the intervener the Canadian Motion Picture Distributors Association: Sim, Hughes, Ashton & McKay, Toronto.

Solicitors for the intervener DIRECTV, Inc.: Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Canadian Alliance for Freedom of Information and Ideas: Ian W. M. Angus, Port Hope.

Solicitors for the intervener the Congres Iberoamerican du Canada: Soloway, Wright, Ottawa.

Procureur de l'intervenant le procureur général du Canada : Le ministère de la Justice, Ottawa.

Procureurs de l'intervenante l'Association canadienne des distributeurs de films : Sim, Hughes, Ashton & McKay, Toronto.

Procureurs de l'intervenante DIRECTV, Inc. : Borden Ladner Gervais, Toronto.

Procureur de l'intervenante la Canadian Alliance for Freedom of Information and Ideas : Ian W. M. Angus, Port Hope.

Procureurs de l'intervenant le Congres Iberoamericain du Canada : Soloway, Wright, Ottawa.

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TAB 3

the root of the matter on the prior occasion", appears precisely apposite to the failure, in answer to the counterclaim in no. 969, to raise the matters founded on in no. 534 which, if then substantiated, would have been then decisive. An instance of a hard case in which the rule was applied is *In re Koenigsberg* [1948] Ch. 727.

Their Lordships are, accordingly, of opinion that the Full Court was right in ordering that the statement of claim in no. 534 be struck out as an abuse of the process of the court; they will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitors: *Stephenson, Harwood & Tatham; Allen & Overy.*

R. W. L-S.

[HOUSE OF LORDS]

BLACK-CLAWSON INTERNATIONAL LTD. . . APPELLANTS

AND

PAPIERWERKE WALDHOF-ASCHAFFENBURG A.G. . . . . RESPONDENTS

1974 Oct. 14, 15, 16, 17, 21, 22, 30, 31
1975 March 5

Lord Reid, Viscount Dilhorne, Lord Wilberforce, Lord Diplock and Lord Simon of Glaisdale

Conflict of Laws—Foreign judgment—Recognition—English bills of exchange not honoured by German company—Three-year limitation period in Germany—Action in German court by English company dismissed as time-barred under German law—Whether German judgment "conclusive" to bar English action—Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 *Geo.* 5, *c.* 13), *s.* 8 (1) (3)—*Reciprocal Enforcement of Foreign Judgments (Germany) Order* 1961 (*S.I.* 1961 *No.* 1199), *Sch.*

Statute—Construction—Report of committee appointed by Lord Chancellor—Draft Bill incorporated in report—Act of Parliament passed in terms of Bill—Report as aid to construction

By section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933:

> ". . . a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, . . . shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings."

The plaintiffs, an English company, became holders in due course of two English bills of exchange accepted by the predecessors of the defendants, a West German company without any assets in England. The bills were drawn, negotiated and payable in England. The plaintiffs became their holders only

shortly before action on them would have become time-barred by effluxion of six years from their acceptance. In German law the period of limitation was three years. In August 1972, just within the six-year period of limitation under English law, the English company began proceedings on two of the bills dishonoured in 1966 (a) in Germany in the District Court of Munich and (b) in England in the High Court, where they obtained leave ex parte to issue the writ and serve notice of it on the German company outside the jurisdiction under R.S.C., Ord. 11, r. 1. In November 1972 the German court dismissed the suit on the ground that the limitation period of three years prescribed by German substantive law relating to bills of exchange had expired.

In August 1973 the English company served notice of the writ on the German company, which applied to have it set aside. The master, and Talbot J. on appeal, refused to set it aside, and the judge also refused leave to appeal from his decision.

The German company applied to the Court of Appeal for leave to appeal and at the hearing raised for the first time a new point, namely, that on the proper construction of section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, made applicable to the German Federal Republic by a Convention of 1960, the German judgment was "conclusive" and binding on the English courts. The court, having granted leave, reversed Talbot J.'s decision and allowed the appeal on the new point. The English company appealed to the House of Lords:—

Held, allowing the appeal (Lord Diplock dissenting), that section 8 (1) of the Act only operated to make foreign judgments conclusive between the parties as to the matter thereby adjudicated upon and, since the foreign judgment here was not a decision on the merits but a decision that the period of limitation applied, proceedings by the English company in the English courts were not barred (post, pp. 618E–F, 626C–D, 634A–B, 650D–E).

Per Lord Reid. The Act did not deal with judgments which could not be enforced and accordingly did not deal with defendants' judgments which merely protected them against claims made against them, so that section 8 had no application to the present case and did not entitle the defendants to rely on the foreign judgment delivered (post, pp. 615F–G, 616C, E–F).

Harris v. *Quine* (1869) L.R. 4 Q.B. 653, D.C. applied.

Per Lord Reid, Lord Wilberforce and Lord Diplock. In considering the report of the Foreign Judgments (Reciprocal Enforcement) Committee 1932 presented to Parliament before the passing of the Act of 1933 and containing a draft Bill which was substantially adopted in the subsequent legislation, the House, in construing the Act, was entitled to have regard to the statement contained in the report of the mischief aimed at and of the state of the law as it was then understood to be, but it was not entitled to take into account the committee's recommendations or its comments on the draft Bill, (post, pp. 614D–F, 629C–D, 638F–H).

Per Viscount Dilhorne. When there is no material difference between a draft Bill attached to such a report and the Act subsequently passed by Parliament it is legitimate to assume that it accepted the committee's recommendations, which are then an accurate source of information as to the intentions of Parliament (post, pp. 622C–E, 623E).

Per Lord Wilberforce and Lord Diplock. It is not proper to use the report of a committee or commission or any official notes on a clause of a draft Bill for a direct statement of what a proposed enactment is to mean or what the committee or commission thought it means (post, pp. 629D, 637D).

Per Lord Simon of Glaisdale. When Parliament has legislated in the light of a public report, that report should be available to a court of construction to enable it to place itself in the position of the legislators in order to ascertain the meaning of the words used, which is only ascertainable if the court is in possession of the knowledge possessed by the promulgators of the instrument (post, p. 646F–G).

Decision of the Court of Appeal [1974] Q.B. 660; [1974] 2 W.L.R. 789; [1974] 2 All E.R. 611 reversed.

The following cases are referred to in their Lordships' opinions:

Assam Railways and Trading Co. Ltd. v. *Inland Revenue Commissioners* [1935] A.C. 445, H.L.(E.).

Barclays Bank Ltd. v. *Aschaffenburger Zellstoffwerke A.G.* [1967] 1 Lloyd's Rep. 387.

Barras v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402, H.L.(Sc.).

Bernardi v. *Motteux* (1781) 2 Doug.K.B. 575.

Blunt v. *Blunt* [1943] A.C. 517; [1943] 2 All E.R. 76, H.L.(E.).

Bondholders Securities Corporation v. *Manville* [1933] 4 D.L.R. 699.

Carvell v. *Wallace* (1873) 3 N.S.R. 165.

Casanova and Co. v. *C. G. Meier & Co.* (1885) 1 T.L.R. 213, D.C.

Courtauld v. *Legh* (1869) L.R. 4 Exch. 126.

Eastman Photographic Materials Co. Ltd. v. *Comptroller-General of Patents, Designs, and Trade Marks* [1898] A.C. 571, H.L.(E.).

Evans v. *Bartlam* [1937] A.C. 473; [1937] 2 All E.R. 646, H.L.(E.).

Godard v. *Gray* (1870) L.R. 6 Q.B. 139.

Gundry v. *Pinniger* (1851) 14 Beav. 94; (1852) 1 De G.M. & G. 502.

Harris v. *Quine* (1869) L.R. 4 Q.B. 653, D.C.

Hawkins v. *Gathercole* (1855) 6 De G.M. & G. 1.

Heatons Transport (St. Helens) Ltd. v. *Transport and General Workers' Union* [1973] A.C. 15; [1972] 3 W.L.R. 431; [1972] I.C.R. 308; [1972] 3 All E.R. 101, H.L.(E.).

Heydon's Case (1584) 3 Co.Rep. 7a.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155, P.C.

Huber v. *Steiner* (1835) 2 Bing.N.C. 202.

Kingston's (Duchess of) Case (1776) 20 St.Tr. 355.

Letang v. *Cooper* [1965] 1 Q.B. 232; [1964] 3 W.L.R. 573; [1964] 2 All E.R. 929, C.A.

Maunsell v. *Olins* [1975] A.C. 373; [1974] 3 W.L.R. 835; [1975] 1 All E.R. 16, H.L.(E.).

National Assistance Board v. *Wilkinson* [1952] 2 Q.B. 648; [1952] 2 All E.R. 255, D.C.

National Provincial Bank Ltd. v. *Hastings Car Mart Ltd.* [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.).

Osenton (Charles) & Co. v. *Johnston* [1942] A.C. 130; [1941] 2 All E.R. 245, H.L.(E.).

Pedersen v. *Young* (1964) 110 C.L.R. 162.

Povey v. *Povey* [1972] Fam. 40; [1971] 2 W.L.R. 381; [1970] 3 All E.R. 612, D.C.

Prenn v. *Simmonds* [1971] 1 W.L.R. 1381; [1971] 3 All E.R. 237, H.L.(E.).

Ricardo v. *Garcias* (1845) 12 Cl. & F. 368, H.L.(E.).
River Wear Commissioners v. *Adamson* (1877) 2 App.Cas. 743, H.L.(E.).
Rookes v. *Barnard* [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).
Ross Smith (orse. Radford) v. *Ross Smith* [1963] A.C. 280; [1962] 2 W.L.R. 388; [1962] 1 All E.R. 344, H.L.(E.).
Shenton v. *Tyler* [1939] Ch. 620; [1939] 1 All E.R. 827, C.A.
Shiloh Spinners Ltd. v. *Harding* [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.).
Thoday v. *Thoday* [1964] P. 181; [1964] 2 W.L.R. 371; [1964] 1 All E.R. 341, C.A.
Warner v. *Buffalo Dry Dock Co.* (1933) 67 F.(2d) 540; (1934) 291 U.S. 678.
Western Coal and Mining Co. v. *Jones* (1946) 164 A.L.R. 685.

The following additional cases were cited in argument:

Abrahams v. *Mac Fisheries Ltd.* [1925] 2 K.B. 18.
African Banking Corporation v. *Owen* (1897) 4 O.R. 253.
Attorney-General v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49, H.L.(E.).
Bank of Hindustan, China and Japan, In re (1873) 9 Ch.App. 1.
Bristol Tramways, etc. Carriage Co. Ltd. v. *Fiat Motors Ltd.* [1910] 2 K.B. 831, C.A.
Carl Zeiss Stiftung v. *Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).
Coast Lines Ltd. v. *Hudig & Veder Chartering N.V.* [1972] 2 Q.B. 34; [1972] 2 W.L.R. 280; [1972] 1 All E.R. 451, C.A.
Cooke v. *Gill* (1873) L.R. 8 C.P. 107.
Cozens v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 318; [1966] 2 W.L.R. 1134; [1966] 2 All E.R. 276.
Davies v. *Davies Jenkins & Co. Ltd.* [1968] A.C. 1097; [1967] 2 W.L.R. 1139; [1967] 1 All E.R. 913, H.L.(E.).
Dullewe v. *Dullewe* [1969] 2 A.C. 313; [1969] 2 W.L.R. 811, P.C.
Eldon (Lord) v. *Hedley Brothers* [1935] 2 K.B. 1, C.A.
Hagen, The [1908] P. 189, C.A.
Hilder v. *Dexter* [1902] A.C. 474, H.L.(E.).
Huntington v. *Attrill* [1893] A.C. 150, P.C.
Jaeger Co. Ltd. v. *Jaeger* (1929) 46 R.P.C. 336, C.A.
Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.(E.).
Kok Hoong v. *Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993; [1964] 2 W.L.R. 150; [1964] 1 All E.R. 300, P.C.
Laing and Irvine v. *Anderson* (1871) 10 M. 74.
Lake v. *Lake* [1955] P. 336; [1955] 3 W.L.R. 145; [1955] 2 All E.R. 538, C.A.
Langerman v. *Van Iddekinge* [1916] T.P.D. 123.
Leader v. *Duffey* (1888) 13 App.Cas. 294, H.L.(I.).
Low, In re, Bland v. *Low* [1894] 1 Ch. 147, C.A.
Macartney, In re, Macfarlane v. *Macartney* [1921] 1 Ch. 522.
Midgley v. *Midgley* [1893] 3 Ch. 282, C.A.
Mixnam's Properties Ltd. v. *Chertsey Urban District Council* [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627, H.L.(E.).
New Brunswick Railway Co. v. *British and French Trust Corporation Ltd.* [1939] A.C. 1; [1938] 4 All E.R. 747, H.L.(E.).

Pillai v. *Mudanayake* [1953] A.C. 514; [1953] 2 W.L.R. 1142; [1955] 2 All E.R. 833, P.C.
Read v. *Brown* (1888) 22 Q.B.D. 128, C.A.
Reed v. *Nutt* (1890) 24 Q.B.D. 669, D.C.
Reeves v. *Butcher* [1891] 2 Q.B. 509, C.A.
Reg. v. *Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931; [1973] 2 W.L.R. 746; [1973] 2 All E.R. 204, H.L.(E.).
Smith v. *Central Asbestos Co. Ltd.* [1973] A.C. 518; [1972] 3 W.L.R. 333; [1972] 2 All E.R. 1135, H.L.(E.).
Société Anonyme Metallurgique de Prayon, Trooz, Belgium v. *Koppel* (1933) 77 S.J. 800.
Société Cooperative Sidmetal v. *Titan International Ltd.* [1966] 1 Q.B. 828; [1965] 3 W.L.R. 847; [1965] 3 All E.R. 494.
Sugden v. *Sugden* [1957] P. 120; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300, C.A.
Thomson v. *Lord Clanmorris* [1900] 1 Ch. 718, C.A.
Turner v. *Midland Railway Co.* (1911) 80 L.J.K.B. 516, D.C.
Tyne Improvement Commissioners v. *Armement Anversois S/A* (*The Brabo*) [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.).

APPEAL from the Court of Appeal.

This was an appeal, by leave of the Court of Appeal, from an order of that court (Lord Denning M.R., Megaw and Scarman L.JJ.) dated March 19, 1974, (a) allowing an appeal from the order of Talbot J. made on February 7, 1974, whereby he ordered that the appeal of the present respondents, Papierwerke Waldhof-Aschaffenburg A.G. (the defendants), from the order of Master Bickford-Smith given on December 7, 1973, refusing to discharge the order of Master Elton dated August 29, 1972, giving leave to the present appellants, Black-Clawson International Ltd. (the plaintiffs), to issue the writ of summons herein and to serve notice thereof on the defendants in West Germany and refusing to order that the writ, the service thereof and all subsequent proceedings be set aside, be dismissed; (b) ordering that the order of Talbot J. be set aside and refusing leave to the appellants to issue the writ herein and to serve notice thereof on the respondents in West Germany; (c) directing that the costs of the appeal be paid by the present appellants and that no order be made for the costs of the hearing below.

The facts stated by Viscount Dilhorne were as follows: Under a contract made in December 1961 the appellants agreed to sell paper making machinery to a German company, whose rights and liabilities were acquired by the respondents as a result of a merger in 1970. Both companies are referred to as the respondents. The price to be paid was £1,210,162. As part payment of the purchase price the respondents accepted 20 bills of exchange drawn on them by the appellants. Each bill had a face value of £48,406 and was drawn, negotiated and payable in London. Two bills were to mature every six months between August 1963 and February 1968.

In 1965 the respondents complained of delays in delivery and of defects in the machinery delivered. This was referred to arbitration and despite the time that had elapsed, that arbitration (which was proceeding in Switzerland) had not yet been concluded and was not likely to be for a considerable time.

Thereafter the respondents refused to honour any of the bills which matured.

Two bills which had been dishonoured when presented by Barclays Bank by whom they had been discounted, were the subject of litigation in this country and in Germany. The bank's claim was strenuously resisted at every stage.[1] When judgment was given in this country for the bank (under R.S.C., Ord. 14), it was not satisfied. When the bank sought to enforce the judgment in Germany, that was resisted on the ground that the respondents had had no opportunity of stating their case. This plea was finally rejected by the Federal Supreme Court of Germany on March 25, 1970.

In view of the difficulties that the bank had encountered in getting payment of the amounts due on these two bills, when two bills due for payment on August 31, 1966, were dishonoured, the bank called on the Export Credit Guarantee Department to implement a guarantee they had given to the bank and that department in turn called on the appellants to implement their undertaking to indemnify the department against any moneys the department had to pay to the bank. In accordance with their agreement with the bank, the appellants bought these bills in August 1972 and so became holders of them for value.

In the same month, on August 24, 1972, the appellants began proceedings against the respondents in the District Court of Munich. Five days later the appellants applied ex parte in this country for leave to issue a writ against the respondents claiming the amount due on the two bills and interest and also asking leave to serve notice of the writ on the respondents in Germany. They feared that the proceedings in Germany might be held to be time-barred in Germany; and if the writ was not issued, their claim would shortly have become statute-barred in this country. They were given the leave for which they asked.

On November 30, 1972, the District Court of Munich dismissed the appellants' claim holding that under German law the applicable period of limitation was three years and so that the appellants' claim was time-barred.

Notice of the issue of the writ was served on the respondents on August 14, 1973.

The respondents did not enter an appearance but by summons sought an order that the writ, service of notice thereof and all subsequent proceedings thereon should be set aside. The master refused to make that order and the respondents' appeal to Talbot J., the judge in chambers, was dismissed. The respondents then appealed to the Court of Appeal which gave judgment in their favour on March 19, 1974.

On March 27, 1974, the Munich Court of Appeal allowed the appellants' appeal against the decision of the District Court on the ground that the English period of limitation, namely six years, was applicable to their claim. The Appeal Court referred the case back to the District Court for continuation of the proceedings and in those proceedings the respondents were entitled to put forward any defence they might have to the claim.

The respondents appealed against the decision of the Munich Court of Appeal to the Federal Supreme Court but that appeal had not yet been

[1] See *Barclays Bank Ltd.* v. *Aschaffenburger Zellstoffwerke A.G.* [1967] 1 Lloyd's Rep. 387.

heard. Leave was given by the House of Lords on a preliminary petition by the appellants for the decision of the Munich Court of Appeal to be referred to in the printed Cases.

Conrad Dehn Q.C. and *Peter Scott* for the appellants. The relevant law is set out in *Dicey & Morris, The Conflict of Laws,* 9th ed. (1973), rule 194, pp. 1058–1059. This has not changed substantially since the 3rd ed. (1922), rule 115, pp. 455–456. This supports the contention that a foreign judgment in favour of a defendent is not an answer to an action in England if it does not purport to decide the matter on the merits.

Section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, the vital section in this appeal, on its true construction only applies to judgments in favour of a successful plaintiff (including a defendant counterclaiming). A judgment for a defendant simply dismissing a plaintiff's claim is not within section 8. The Act is primarily concerned with the enforcement of judgments and a judgment for a defendant cannot be enforced: see the Act's title and the definitions of " judgment creditor " and " judgment debtor " in section 11 (1) bearing on the meaning of " judgment " as used in the Act and of its definition. Section 8 only applies to judgments " to which Part I of the Act applies or would have applied if a sum of money had been payable thereunder."

Section 8 (1) provides for the case where a plaintiff obtains judgment for relief other than payment of a sum of money, e.g., specific performance or an order for the delivery of a chattel. An order for costs would be a separate matter analogous to the case of a defendant succeeding on a counterclaim. An order for costs would be enforceable but would not be relevant under section 8 in relation to questions of conclusiveness and res judicata.

As to the case of judgments reversed on appeal, see section 2 (2) and section 5.

It would not be right to say that the judgment in the present case would have come under Part I of the Act if a sum of money had been payable. Part I did not apply because it was not an enforceable judgment at all and it was inconceivable that a sum of money would have been payable under it. The words " and may be relied on by way of defence or counterclaim in any such proceedings " do not make sense only if section 8 applies also to judgments where the plaintiff's claim has been dismissed. They would apply, for example, where A sues B in a foreign country for damages for trespass and obtains judgment in a superior court for a small amount of damages; subsequently he sues B in England for a larger amount of damages for the same trespass; there A's action is not barred by section 6 of the Act, but B can rely on the foreign judgment by way of defence as to the amount.

Further, the words " founded on the same cause of action " cannot be construed strictly, as the respondents' argument requires, since, if they are, there could be no circumstances in which a party could ever rely on a foreign judgment by way of counterclaim, as two opposing parties can never have the same cause of action in the narrow sense against each other. They must mean arising out of the same dispute or the same matter.

Alternatively, the words " shall be recognised in any court in the United Kingdom as conclusive between the parties thereto " in section 8 (1) of the Act of 1933 mean that the judgment shall be conclusive on the matter adjudicated upon. Here the only relevant matter adjudicated on by the German courts is whether the appellants' remedy is barred in Germany by the German law of limitations. The adjudication on that point has no relevance when an action is brought on the bills in England and where (as in this case) English is the proper law of the contract. Indeed, even if it were not, the German law of limitations would not extinguish the right. A decision on a limitation point is not an adjudication on the merits. When a plaintiff brings proceedings in England to enforce a claim after proceedings in a foreign court have been dismissed on the ground of the local law of limitations, the common law position is that there has not been a dismissal on the merits. The presumption is that an Act is not intended to alter the common law unless it does so expressly.

The law on this point was correctly laid down in *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653 in which reliance was placed on *Huber* v. *Steiner* (1835) 2 Bing.N.C. 202; see also *Société Anonyme Metallurgique de Prayon, Trooz, Belgium* v. *Koppel* (1933) 77 S.J. 800. The law was also correctly laid down in the American Restatement of the Law; Conflict of Laws, 2nd ed. (1971), para. 110.

There is nothing in the Act of 1933 to suggest that a radical change in the law was intended and the presumption stands that Parliament did not intend to alter the common law: see *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751 and *Lord Eldon* v. *Hedley Brothers* [1935] 2 K.B. 1, 24. In the Court of Appeal in this case that principle has been ignored and the decision proceeded on the opposite assumption. In the light of the authorities it is inconceivable that, if Parliament had meant to depart from the common law, it would not have done so in plain terms. Accordingly the law plainly stated in *Dicey & Morris, The Conflict of Laws,* 9th ed., rule 197, pp. 1058–1059 stands. That law must have been known to Parliament when it passed the Act. Compare the 1st ed. (1896), rule 100, p. 422. See also *Westlake's Private International Law,* 1st ed. (1858), p. 367, para. 380 and 7th ed. (1925), p. 330, para. 239.

It is desired to refer to the report of the Foreign Judgments (Reciprocal Enforcement) Committee, December 12, 1932 (Cmd. 4213), appointed by Viscount Sankey L.C. in November 1931 under the chairmanship of Lord Justice Greer, in order to show the circumstances existing when the Act of 1933 went through Parliament and what was the mischief that it was designed to remedy. The draft Bill annexed to the report was identical with the Act, save for two trifling amendments. The report was not before the Court of Appeal.

In construing a statute the courts are entitled to consider the circumstances in which the words were used. They may look at the report of a committee appointed to consider the law because there may be no better source of information regarding the mischief intended to be remedied by the Act. Judicial notice should be taken of the reports of statutory commissions recording things which must have been in the contemplation

of the legislature. One can also refer to a report to see what it does not contain.

In the present case the report reveals the mischief, contains a draft Bill which was passed and includes a commentary by the committee on the meaning of the draft Bill.

The House of Lords is entitled to look at this report because: (1) It is evidence of the general factual and legal situation forming the background of the Act, i.e., the state of the law as it was believed to be.

(2) It is evidence of the mischief underlying the passing of the Act, the state of affairs within the factual and legal situation which it was the purpose of Parliament to remedy or change.

(3) It contains information bearing on the nature and scope of the remedy or change provided by the Act and it is plain that the committee's recommendations were accepted.

(4) It contains a draft Bill which to all intents and purposes was enacted without alteration, together with a commentary on the Bill composed by a committee, of which the chairman was a distinguished lawyer, Lord Justice Greer, and which comprised other distinguished lawyers. Since the Bill and the commentary were before Parliament when it passed the Act, it is reasonable to assume that it believed that the Bill meant what was set out in the commentary. The rules of construction applicable to private documents like wills do not necessarily apply to public documents like Acts of Parliament. When there is an ambiguity in an Act of Parliament it must be relevant to see what Parliament meant to say.

(5) The report contained draft conventions, which had been negotiated with officials of foreign governments, intended to fit in with the draft Bill. Two of these became actual conventions soon afterwards.

Two questions arise as to the mischief to be remedied: (1) Was the mischief the fact that the English law as to the recognition of foreign judgments, to which the Act was going to apply, was not set out in any statute? (2) Was the rule in *Harris* v. *Quine*, L.R. 4 Q.B. 653, regarded as an evil or defect to be remedied?

The authorities relating to the five points set out are as follows: (1) *Abrahams* v. *Mac Fisheries Ltd.* [1925] 2 K.B. 18, 34; *Pillai* v. *Mudanayake* [1953] A.C. 514, 528; *Rookes* v. *Barnard* [1964] A.C. 1129, 1146, 1148, 1236; (2) *Thomson* v. *Lord Clanmorris* [1900] 1 Ch. 718, 725; *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks* [1898] A.C. 571, 573–576; *Assam Railways and Trading Co. Ltd.* v. *Inland Revenue Commissioners* [1935] A.C. 445, 457–458; *Letang* v. *Cooper* [1965] 1 Q.B. 232, 240; *Dullewe* v. *Dullewe* [1969] 2 A.C. 313, 320; *Heatons Transport (St. Helens) Ltd.* v. *Transport and General Workers' Union* [1973] A.C. 15, 84, 92, 101. The only authority against looking at such a report to find the mischief with which Parliament was dealing is *Smith* v. *Central Asbestos Co. Ltd.* [1973] A.C. 518, 525. In the light of the other authorities it should not stand, since in that case no cases were cited to the House of Lords on that point. It is distinguishable because it was said there that the mischief was well known. The alleged difficulty which the House might have in keeping apart matters which should not be considered is not well founded, for that is to treat the House as though it were a jury. Judges often admit evidence on the

basis that they can put it out of their minds if it proves not to be relevant. (3) The *Assam Railways* case [1935] A.C. 445 and *Letang* v. *Cooper* [1965] 1 Q.B. 232 bear on the point; see also *Shenton* v. *Tyler* [1939] Ch. 620, 628 and *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 318, 321. Reliance is placed on the report of the Law Commission on The Interpretation of Statutes 1969 (Law Com. No. 21), p. 30, para. 52; pp. 48–49, para. 80. It would be unsatisfactory if judges refused to look at such reports. A better rule would be that the court will look at White Papers and at reports such as these and will attach such weight to them as is proper. It is unreasonable for a court to refuse to look at such documents in case it should be contaminated. (4) There is no direct authority on this point, but it follows from (2) and (3). (5) There is no authority on this point. If an Act of Parliament passed to give effect to a foreign treaty is ambiguous, the treaty may be looked at on the footing that the Crown will not break its international obligations.

On the whole matter, see also *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1965] A.C. 1175, 1201, 1210–1211, 1217, 1221, 1222, 1228.

Anthony Lincoln Q.C., Stanley Brodie and *D. T. Donaldson* for the respondents. Unless there is an ambiguity in the Act and if its words are plain in the context there is no need for the court to resort to any extrinsic aids whatsoever for its interpretation. There is no ambiguity in the present Act. The alleged ambiguity has been introduced from outside on the basis of *Harris* v. *Quine,* L.R. 4 Q.B. 653. It is the appellants who are seeking to introduce words into the Act.

There is nothing in the report of 1932 which damages the respondents' interests. There are passages in it which might help either side. The respondents wish neither to exclude nor introduce the report.

It is not disputed that the House of Lords may in a proper case look at extrinsic facts and circumstances at the time of the enactment to solve difficulty or doubt in the construction of a particular word for the limited purpose of ascertaining the mischief intended to be cured by the Act of Parliament. But this is not a proper case so far as the mischief is concerned.

Only limited assistance can be obtained from this report. It aimed at the provision of a code to help foreign courts in relation to the achievement of reciprocity in the enforcement of judgments. It was unlikely that, once the Act was passed, a foreign court would look behind it at the travaux préparatoires, the documents and the reports. The code in the Act was everything. In solving the difficulty nothing but the code should be taken into account by the House of Lords. The central point is the appellants' own admission that the Act was a code. A foreign court would be unlikely to know about *Harris* v. *Quine,* L.R. 4 Q.B. 653.

Since in principle there is no difference between the two parties in the present case as to the mischief dealt with in the Act, it is unnecessary to look further. The House of Lords is not entitled to look at the report for the recommendations of the committee, to see what the committee thought would be enacted by the terms of the draft Bill.

From *Smith* v. *Central Asbestos Co. Ltd.* [1973] A.C. 518, 529–530, it appears that to look at such a report would involve a prolonged comparison

between the passages relating to the mischief aimed at and those relating to the intentions and recommendations of the committee. The proposal to examine past history would considerably extend the length of any hearing.

Hilder v. *Dexter* [1902] A.C. 474, 477, provides a graphic illustration of the draftsman of a statute refraining from construing it. *Davies* v. *Davies Jenkins & Co. Ltd.* [1968] A.C. 1097, 1120–1121, indicates that when a recommended draft is embodied in an Act of Parliament, it may be that Parliament did not interpret the words in the same sense as the committee who recommended them.

Leader v. *Duffey* (1888) 13 App.Cas. 294, 301, in dealing with the principles of interpretation, condemns the sort of argument which the appellants in the present case are presenting in assuming fallaciously that the legislature intended not to supersede the common law but to codify it and then seeking to bend the language of the Act in favour of that assumption.

Odgers' Construction of Deeds and Statutes, 5th ed. (1967), cites *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, 463, giving warning against creating or imagining ambiguities.

In interpreting a codifying statute, as distinct from a code, the express statutory enactment alone must be looked at and there is no presumption that the common law is being preserved; only in the case of an ambiguous provision can resort be had to extraneous aids: see *Bristol Tramways, etc. Carriage Co. Ltd.* v. *Fiat Motors Ltd.* [1910] 2 K.B. 831, 836.

As to what amounts to ambiguity in an Act of Parliament, see *Kirkness* v. *John Hudson & Co. Ltd.* [1955] A.C. 696, 710–712, 713–714, 724, 734. Where there is no ambiguity it is not permissible to go back to earlier documents or an earlier state of the law in order to import other words into the plain provision. The canon is the same, whether it is sought to look at later enactments or past pronouncements on the law. See also *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, 460–461, 468, and *Reg.* v. *Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, 949–950. There must be a considerable lack of clarity before the court will insert words into a statute.

The report will not be of much assistance. It may usefully be referred to in order to indicate the mischief aimed at by the Act or to show what the law was before it was passed but not to show what the committee meant the draft Bill to achieve, and their recommendations should not be relied on.

[LORD REID intimated that the appellants might refer to the report.]

Dehn Q.C. continuing. The report was presented to Parliament in December 1932. The Act received the royal assent on April 13, 1933.

Paragraph 2 on p. 5 of the report dealt with the mischief aimed at. Annex V (p. 60) contains the comments on and explanations of the draft Bill, and paragraph 7 (p. 62) refers to changes of the common law in commenting on clause 4 of the Bill. See also paragraph 8 (pp. 62–63) and paragraph 11 (p. 64). There is here no reference to *Harris* v. *Quine,* L.R. 4 Q.B. 653. In the report itself, see paragraph 8 (p. 9), paragraph 10 (*b*) (p. 11), paragraph 12 (*e*) (p. 13), paragraph 16 (p. 15), paragraph 17 (p. 16), paragraph 18 (p. 17), paragraph 19 (p. 18), paragraph 24 (p. 21).

Note article 3 (3) in the draft Convention with Belgium (p. 38) and

article 3 (2) in the draft Convention with Germany, as to the recognition of judgments, and paragraph 19 of Annex V (pp. 66–67).

Part of the mischief which it was intended to remedy was that the conditions under which foreign judgments were recognised as final and conclusive under English common law were not set out in any statute. It is therefore reasonable to approach the Act on the basis that Parliament did not intend to depart from the common law. The mischief was that foreign lawyers could not find in any statute any obligation in English law to recognise foreign judgments, and what was needed for that purpose was a statute apart from the common law, since foreign lawyers were not satisfied to be told simply that at common law the English courts did recognise foreign judgments, not understanding that the common law was just as definite as a statute.

The important thing about section 8 (1) of the Act of 1933 is that it is tied to the circumstances to which Part I of the Act is extended.

The appellants' first submission is that section 8 (1) deals only with enforceable judgments. Alternatively, a judgment to be recognised as conclusive is to be conclusive on the matter adjudicated upon.

Two people cannot have the same cause of action against each other. For section 8 (1) to operate the proceedings must be founded on the same cause of action in both countries. The respondents are wrong in saying the words mean it must always be possible for the defendant in England to rely on the foreign judgment. Suppose A sues B in Germany and obtains a judgment, say, for the delivery up of a motor car which B takes back to England. If A sues B in England for the same relief, relying on the foreign judgment, B could not rely on it too; and if B sues A in England, say, for a breach of contract, A could then rely on the German judgment by way of counterclaim for delivery up of the car. In the construction of the words "founded on the same cause of action" the words "founded on" mean "arising out of" and the words "cause of action," which cannot be narrowly construed, mean "matter of dispute." Section 8 (1) is only concerned with cases where the plaintiff has won his case abroad.

There are two possible meanings of "conclusive": (1) conclusive as to the cause of action and (2) conclusive as to the matter adjudicated upon. The latter is the better because it is in accordance with the common law and with *Harris* v. *Quine,* L.R. 4 Q.B. 653, and there is a presumption that Parliament did not intend to alter the common law, from which section 8 (1) did not depart, or to overrule that case.

There is a distinction between a judgment and an order. By an order a person is ordered to do something, e.g., pay costs or restore a chattel. It is possible to see what was adjudicated on in a case by the judgment. If that can be determined, that is what is final and conclusive, but if it cannot be determined from the judgment, it is more difficult to find what was adjudicated on and resort may be had to the evidence of foreign experts.

It is plain from section 8 (1) that Parliament was concerned only to deal with proceedings founded on the same cause of action and was not stating the whole of the common law relating to the recognition of foreign

judgments. No words in it are inconsistent with the appellants' construction of "conclusive."

From the judgment of the German court dated December 27, 1972, it is clear on the face of it that the action was dismissed "in view of the defence of prescription." The whole document signed by the judges constitutes the judgment. See *Dicey & Morris, The Conflict of Laws,* 9th ed., pp. 1058–1059, rule 194, and footnote 52 and pp. 1018, 1021–1022, rule 184.

Section 8 of the Act does not debar an English court from considering and determining what was the matter adjudicated on by the foreign court. It can see whether the decision was on the merits and went to the cause of action. If the decision was on a limitation point, the English court would hold that the merits had not been adjudicated on and that therefore the judgment was not conclusive. As to estoppel per rem judicatam: see *Thoday* v. *Thoday* [1964] P. 181, 197–198. A judgment is final if it is not interlocutory, and conclusive if one cannot start again. The intention of Parliament was to simplify procedure, not to enlarge the ambit of enforceable foreign judgments to be recognised in England.

As to decisions on the merits, see *Reed* v. *Nutt* (1890) 24 Q.B.D. 669, 673, 674.

As to judgments given in other parts of the United Kingdom, Scotland and Northern Ireland are in the position of foreign countries. There are conventions with the Isle of Man and with Jersey and Guernsey. The effect of the Judgments Extension Act 1868 was that judgments in different parts of the United Kingdom for debts, damages or costs could be registered and could then be enforceable. By the Schedule to the Act a defendant's judgment can only be registered in so far as it relates to costs. See also sections 1 and 4 and compare section 1 with section 2 (2) (*a*) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. See also section 9 of the Administration of Justice Act 1920 and the definition of "judgment" in section 12 (1). The Act has been extended to many parts of the Commonwealth.

As to the meaning of "judgment or order," see *Lake* v. *Lake* [1955] P. 336 and *In re Bank of Hindustan, China and Japan* (1873) 9 Ch.App. 1, 24–26.

The English court will look behind the formal judgment of a foreign court: see sections 2 (5), 4 (1) (*b*) and (2) (*a*) (iii) of the Act of 1933.

There are circumstances in which it might be useful for the appellants to keep their English action alive and have a judgment in England, even if they won on this point in the Supreme Court of Germany. (1) The respondents might defeat them on a procedural point on the full trial. (2) The full trial proceedings might turn out to be very protracted and the respondents might bring assets into this country. If the appellants failed in the Supreme Court they might proceed in England at once.

Lincoln Q.C. The respondents confine themselves to this appeal. If they were to put forward a counterclaim they might seem to be submitting to the jurisdiction of the courts of this country, which they do not. The discretion of the court should be exercised in favour of a foreigner not being brought before the English courts.

At the end of the day there are only two possible results of the action in Germany. Either the appellants will be awarded a specific sum regis-

trable under the Act of 1933 or the action will be dismissed. The appellants are trying to proceed in two jurisdictions simultaneously. A

The report of the Greer committee shows the mischief at which the Act of 1933 was striking and the grievance which it was intended to put right: see p. 5, paragraph 3. The grievance was that foreign courts and traders could not know what English law was as to the enforcement of foreign judgments and they wanted an Act or code to declare it so that they could afford reciprocal treatment. But, if the appellants are right, B foreigners reading section 8 (1) of the Act will have to insert after the words "conclusive . . . in all proceedings" the words "on the matters adjudicated upon." Compare section 8 (3) where the language is different. It would be strange if section 8 (1) only covered a litigant who has recovered judgment for a sum of money and not one who has succeeded in a defence. Such a defendant would not want to be sued again in this country.

The Greer committee were principally, but not exclusively, concerned C with the collection of debts. They were also concerned with successful defendants. A foreign lawyer reading the Act of 1933 would have to guess that the words omitted in section 8 (1), but found in section 8 (3), must be read into section 8 (1). He would also have to guess that the principle of *Harris* v. *Quine*, L.R. 4 Q.B. 653, was preserved by the Act, though it was not mentioned in it. Strictly speaking the intentions expressed in the Greer D report are not admissible on the construction of the Act but it can be looked at to show the mischief. In this connection the committee expressed their views as to the legal situation in 1932. Parliament has given effect to the report. The Act constitutes a code for the recognition as well as the enforcement of foreign judgments. The appellants' contentions would defeat the intention of the Act, the words of which are plain and should be literally construed. E

The German court embarked on the process of adjudication of the claim. One must distinguish between cases where a defendant pleads to the jurisdiction and cases where he pleads, for example, limitation. If a plea to the jurisdiction is upheld the court does not adjudicate on the claim. The useful expression "on the merits" has a meaning in that context. But if the court embarks on an adjudication and upholds a particular defence, F that is an adjudication which results in a dispositive judgment in the sense that it disposes of the claim substantially and finally.

Suppose A sues B in the German courts for breach of contract. B pleads "no contract" and obtains judgment. That is res judicata by local law and in England. (Res = matter.) No further action on that cause of action could be pursued in England. Suppose B had raised a procedural plea, e.g., that there was no memorandum in writing, and that the plea G succeeded. If there is judgment for B it disposes of the claim finally and conclusively by the terms of the local law. That too would give rise to a cause of action estoppel. Though the conclusion was reached as a result of a purely procedural plea, there would be res judicata in the full sense.

In *Harris* v. *Quine*, L.R. 4 Q.B. 653, there was no argument as to cause of action estoppel. Suppose that in an English court a plea of illegality is H raised by the defendant (e.g., that a debt was a gambling debt). If the judge upholds the plea the judgment is conclusive, since the court has embarked on the adjudication of the matter and the resultant judgment

gives rise to cause of action estoppel. "On the merits" is a flexible expression and one not altogether clear. Procedural pleas are no different in their effect from substantive pleas.

Even a default judgment gives rise to a cause of action estoppel on the basis that the defendant is taken to have assented to the plaintiff's allegations so that, although the judge has not tried the matter, the judgment is deemed to have been on the merits.

If need be, it would be submitted that *Harris* v. *Quine,* L.R. 4 Q.B. 653, was wrongly decided, though that is not necessary to the submission that it was superseded by the Act of 1933. It may be that action estoppel was not so clearly defined when it was decided.

In Germany the limitation of actions is classed as part of the substantive law, so that, if a plea of limitation succeeds, that disposes of the matter in dispute, the cause of action, and the matter is conclusively and finally determined so as to be res judicata in that country. What is res judicata there should be res judicata here.

The minimum estoppel must be cause of action estoppel (1) if the judgment purports to dispose of the claim saying that the plaintiffs are or are not entitled to succeed and (2) if it is final and conclusive and not variable by the court itself or by a court of co-ordinate jurisdiction. A final judgment allowing or dismissing a claim cannot grant less than it discloses on its face. In section 12 (*e*) of the Act there is a reference to the Scottish system of entering judgment.

As to the meaning of the word "judgment" in the Act, this may, in common parlance, embrace the whole of the reasoning of the court. But in this Act, to make it work, the word must have the narrower meaning of the operative part of the judgment entered by the court at the end of the trial: see the definition in section 11 (1) of the Act and R.S.C., Ord. 71, r. 13. As to the English form of judgment, see *The Supreme Court Practice* 1973, vol. 2, p. 24, para. 47, Form 45. R.S.C., Ord. 71, r. 13 (4) (*d*) severs the judgment from the grounds on which the judgment was based. What the judgment entered tells one is what has been done. It is not practicable for the whole of a reasoned judgment to be registered. The reciprocal intention of the Act requires that we should regard our judgments as foreigners do theirs. What should be registered here is the dispositive part of the judgment. See also R.S.C., Ord. 71, rr. 2 and 7. One would expect the word "judgment" to be used consistently in the rules, the Act and conventions with foreign countries. The word as used in the context of section 8 (1) of the Act should not be construed more widely than is necessary to give effect to the enactment. It must have the same meaning in Part I and Part II of the Act.

Section 8 (1) is silent as to the defendant's rights which are just as important as the plaintiff's, but its terms make it plain that they are referring to defendants. It refers back to Part I of the Act. Section 1 (2) lays down the three conditions for the applicability of Part I. The effect of section 8 (1) is to transplant section 1 (2) into the context of non-pecuniary judgments in favour of plaintiffs but all its other functions remain. The word "conclusive" has the same meaning in section 8 (1) as in section 1 (2). See also section 4 (1) (*b*). The words of section 8 (1) are equally apt to apply to a successful defendant. See also the definitions of "judgment

creditor" and "judgment debtor" in section 11 (1) in relation to article 4 of the draft convention in Annex IV of the Greer report. Article III of the Schedule to the Reciprocal Enforcement of Foreign Judgments (Germany) Order 1961 (S.I. 1961 No. 1199) avoids naming the plaintiff or the defendant as the successful party. A judgment for a defendant can be final and conclusive: *Dicey & Morris, The Conflict of Laws*, 9th ed., rule 194, pp. 1058–1059. Section 6 of the Act supports the respondents' contentions. In section 8 (1) the words "founded on the same cause of action" would seem to have in mind the case of a plaintiff having a second try and are designed to protect defendants who have been successful abroad. For a definition of "cause of action" see *Letang* v. *Cooper* [1965] 1 Q.B. 232, 242–243. The words of section 8 (1) of the Act up to "founded on the same cause of action" are apt to protect a successful defendant abroad and to compel a normal construction of the normal words without looking behind them.

Section 8 (1) of the Act was intended to deal with cause of action estoppel. The combination of the words "conclusive" and "cause of action," without the further words "of any matter of law or fact" found in section 8 (3), indicates that. If issue estoppel had been intended the subsection would not have been confined to "proceedings founded on the same cause of action." The value of issue estoppel is that the same parties fighting another dispute can rely on something decided in a different dispute. It was brought into prominence by Diplock L.J. in *Thoday* v. *Thoday* [1964] P. 181. The concept had been developing since *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155. Thus, if A recovered judgment against B on a breach of contract, it must have been held that there was a contract and by the date of the Greer committee's report an estoppel would have arisen in a subsequent action so that the existence of the contract could not have been disputed. Paragraph 4, p. 7, of the report indicates that the use of the words "cause of action" in section 8 (1) was not accidental.

A cause of action is a factual situation which gives a plaintiff a right to a remedy in the courts, but it may give rise to rights in the defendant. The rights may be composite and obligations may be imposed on the plaintiff. Thus the remedy may be available both to the plaintiff and the defendant. If one establishes a cause of action one also establishes a right, but that does not mean that the cause of action is the right. The cause of action confers a right which one is entitled to enforce. In section 8 (1) the draftsman was directing his mind to proceedings in respect of the same cause of action. What merges in the judgment is the cause of action. Then the cause of action is the operative part of the judgment which carries with it various adjudications on fact and law. The facts are adjudicated on because they are necessary to the judgment and they form part of the judgment. The words "founded on" in section 8 (1) should be read as "in respect of." Section 8 (3) relates to issue estoppel so far as it was understood at the time. As to issue estoppel, see *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 913. What the Greer committee was concerned with was the matters adjudicated upon. Section 8 (1) of the Act of 1933 is dealing with cause of action

estoppel. Section 8 (3) is dealing with anything else which may have been overlooked in the common law.

The real question adjudicated upon here was: Can I have my money? To say that a debt is statute-barred is only a preliminary to the result of the case. The certificate of an English judgment under the Act contains only the dispositive part. So too with many foreign judgments; they contain only the dispositive part, with no reasoning. The judgment is the final act, which is dispositive; inherent in it are all the grounds and facts necessary to it. It matters not whether these facts are physically found in the document. In section 8 (3) the words "decided therein" mean "inherent in." An English court is not precluded from going behind the sealed copy to see what was inherent in the judgment. The word "judgment" is conceptual. To find what was in it one may need extrinsic evidence. The register kept under the Act is just a book with columns giving the barest possible recitals. The actual document does not get into the register.

As to res judicata in the case of a default judgment, see *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [1939] A.C. 1, 19–20, 37–38, and *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993, 1010.

The Reciprocal Enforcement of Foreign Judgments (Germany) Order 1961 (S.I. 1961 No. 1199) sets out in article V (2) and (3) the judgments to which it applies. Its terms are not confined to plaintiffs' successes but also extend to defendants' successes. See also article I (3). Compare article 5 (2) in the corresponding draft convention in the Greer committee's report annex IV (b), p. 47.

Part I of the Act of 1933 is explicitly concerned with defendants as much as plaintiffs. There is no reason why the legislature should not have been concerned with successful defendants in Part II. The Act was meant to be a complete self-contained code.

The enforcement of a judgment means no more than giving it force and validity. The judgment is the act by which the legal relationships are declared: see *Jaeger Co. Ltd.* v. *Jaeger* (1929) 46 R.P.C. 336, 349–350.

In this case the German judgment decided that the remedy was barred in Germany and the claim was disposed of by applying the substantive law. The defence put up succeeded and the remedy was barred, just as it would have been if the defendant's plea had been one of illegality. A plaintiff in Germany is not allowed to give evidence on his own behalf: if he loses his case by reason of this procedural bar, there is nonetheless an adjudication. The only legal system which can declare the purport and effect of a judgment is the local system.

In English law a time-barred debt may survive extracurially the expiry of the time limit in some circumstances: (1) When payment has been made under a mistake of fact as regards the time bar the sum is irrecoverable. (2) A creditor may appropriate the time-barred debt to the discharge of a debt owing to him. (3) A lien on property securing a time-barred debt remains: see *Midgley* v. *Midgley* [1893] 3 Ch. 282.

The matter decided in Germany was whether or not the plaintiffs could get the money they claimed. The judgment was conclusive on that and the English courts must honour judgments on such matters. The judgment

would say either that the plaintiffs had a right or no right to their money, not that they were successful or unsuccessful in respect of the limitation plea. If a matter is res judicata in Germany, it is res judicata in England; the res is the recovery of the money. The English approach to limitations or illegality must not be written into the German system. " Conclusive " in section 8 (1) of the Act means conclusive as to the matter adjudicated on. The nature of the pleas in the German court is no concern of an English court. The only authority for the principle that in order to be enforced by an English court a foreign judgment must be conclusive on the merits is *Harris* v. *Quine*, L.R. 4 Q.B. 653. As to that case see *Cheshire's Private International Law*, 9th ed. (1974), pp. 688–698 and *Preston and Newsom's Limitation of Actions*, 3rd ed. (1953), p. 16. For all practical purposes the right dies with the judgment.

As to the meaning of cause of action, see *Cooke* v. *Gill* (1873) L.R. 8 C.P. 107, 115; *Read* v. *Brown* (1888) 22 Q.B.D. 128; *Sugden* v. *Sugden* [1957] P. 120 and *Reeves* v. *Butcher* [1891] 2 Q.B. 509. Where there is a judgment on a cause of action as defined in the authorities, one cannot go behind it because the cause of action has gone. Here the enforceable claim was disposed of in Germany.

As to *Harris* v. *Quine*, L.R. 4 Q.B. 653, it is submitted alternatively (1) that it is distinguishable; (2) that it is dubious or wrongly decided; (3) that it was superseded by the Act of 1933.

As to (1), the Manx law of limitation was the same as the English law, being treated as procedural, whereas in Germany it is treated as substantive law. The classifications of foreign law ought to be followed.

As to (2), no argument was addressed to the court on cause of action estoppel, which existed then and which has been confirmed by subsequent decisions. It is a case standing on its own and an exception.

As to (3), the German judgment was conclusive. In similar circumstances the German courts would treat English judgments as conclusive. On the principles of reciprocity, giving effect to the intention of the Act of 1933 as expressed in the preamble, the principles of *Tyne Improvement Commissioners* v. *Armement Anversois S/A (The Brabo)* [1949] A.C. 326 should be applied.

If on appeal in Germany the plaintiffs (the appellants) win, the judgment should be enforced there, where the defendants (the respondents) have assets, and not here. No leave should be given for enforcement here by way of action. Execution of a provisional judgment could be had on the defendants putting up a guarantee. If in the end it proved that they were wrong, they would have to repay. If on appeal in Germany the plaintiffs succeeded, the case would return to the court of first instance when other pleas could be put in. At the end either there would be a judgment for the sum claimed or the plaintiffs would be defeated. If the plaintiffs win in the end, there is no reason to give them leave to sue in England. If they lose, the matter will have been thoroughly debated in the German courts.

Harris v. *Quine*, L.R. 4 Q.B. 653, has been considered in several choices of law cases. Though in *Turner* v. *Midland Railway Co.* (1911) 80 L.J.K.B. 516, 517–518, it was purported to apply that case, it did not touch on the doctrine of res judicata. There was no foreign judgment in that case. In

Société Anonyme Metallurgique de Prayon, Trooz, Belgium v. *Koppel*, 77 S.J. 800 there was no previous foreign judgment. It was an application of *Huber* v. *Steiner*, 2 Bing.N.C. 202. In *Casanova and Co.* v. *C. G. Meier & Co.* (1885) 1 T.L.R. 213, 215, the situation was similar. *Harris* v. *Quine*, L.R. 4 Q.B. 653, was cited in argument in relation to choice of law and not res judicata. In *In re Low, Bland* v. *Low* [1894] 1 Ch. 147, 154–155, 157, 158, 162, a *Harris* v. *Quine* situation did not arise in the case of the Scottish judgment. *Laing and Irvine* v. *Anderson* (1871) 10 M. 74, 75 has nothing to do with the case. Nor have *African Banking Corporation* v. *Owen* (1897) 4 O.R. 253 or *Langerman* v. *Van Iddekinge* [1916] T.P.D. 123 both of which were choice of law cases; the courts simply applied their own limitation periods. *Carvell* v. *Wallace* (1873) 3 N.S.R. 165, 170 was simply a case where the court was determining which law it had to apply. None of these cases contradict the submission that *Huber* v. *Steiner*, 2 Bing.N.C. 202, was decided on choice of law and not on the doctrine of res judicata. These cases are not authority for the proposition that where a foreign judgment is based on a limitation plea an English court will consider itself free to adjudicate on the matter. The doctrine as to decisions "on the merits" must be considerably modified.

If the German Federal Supreme Court upholds the court of first instance and dismisses the claim, leave should not be granted to the plaintiffs to start an action in England because: (1) There are no assets here and, since it is purely speculative that one day there might be, a judgment here would be illusory. (2) In any event the defendants have undertaken to consent to arbitration and they can still counterclaim for amounts alleged to be due to them. (3) There has been delay and that goes to the merits of the plaintiffs' conduct since they cannot have a better title than Barclays Bank and are tainted by its delay in enforcement. (4) The plaintiffs chose the German forum and, having lost there, should not transfer to the English forum: *The Hagen* [1908] P. 189, 201. (5) If the money were paid to the plaintiffs and the defendants subsequently succeeded on the arbitration there is a real danger that they would not see their money again. (6) It was earlier stated that the plaintiffs had no intention of pursuing both actions in both countries at the same time.

Dehn Q.C. in reply. It is fundamental that *Harris* v. *Quine*, L.R. 4 Q.B. 653, correctly states the law of England. (1) No argument to the effect that it was wrongly decided was submitted in the courts below. (2) Consequently the House of Lords has not the benefit of the judgments of the courts below on this point, save that it was treated as correct. (3) In their printed case in the House of Lords the respondents set out no arguments to show that it was wrongly decided. (4) No reported case or textbook suggests that it was wrongly decided. (5) There are several cases in which the principle has been referred to with approval: *Carvell* v. *Wallace*, 3 N.S.R. 165; *Bondholders Securities Corporation* v. *Manville* [1933] 4 D.L.R. 699, 722; *Pederson* v. *Young* (1964) 110 C.L.R. 162; *Warner* v. *Buffalo Dry Dock Co.* (1933) 67 F.(2d) 540, 542; 291 U.S. 678; *Western Coal and Mining Co.* v. *Jones* (1946) 164 A.L.R. 685, 691. (6) English textbooks have referred to *Harris* v. *Quine*, L.R. 4 Q.B. 653, as having been rightly decided—*Dicey, Westlake, Preston and Newsom, Halsbury's*

Laws of England, 4th ed., vol. 8 (1974), p. 485, para. 737; 3rd ed., vol. 24 (1958), pp. 181–182 n.(o), Professor H. C. Gutteridge Q.C. (himself a member of the Greer Committee) on "Reciprocity in Regard to Foreign Judgments," 13 *British Year Book of International Law* (1932), pp. 60–61. See also Horace Emerson Read on "Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth" (Harvard Series), p. 101. (7) The criticism in *Cheshire's Private International Law,* 9th ed. (1974), pp. 688–689, would at most only restrict the ambit of *Harris* v. *Quine,* L.R. 4 Q.B. 653, and would not destroy its effect. *Huber* v. *Steiner,* 2 Bing.N.C. 202 has been constantly supported. (8) In order to succeed the respondents must show that *Harris* v. *Quine,* L.R. 4 Q.B. 653, was wrongly decided and they have not pointed out any error in the reasoning or shown that it was contrary to principle: even cause of action estoppel was there considered: see the argument for the plaintiffs at p. 656 and the judgment of Cockburn C.J. at p. 657. See also *Thoday* v. *Thoday* [1964] P. 181, 197–198.

It would be a very strong thing for an action like this to be dismissed on an interlocutory application when its ground is a point of law argued for the first time in the House of Lords to the effect that an authority which has stood for more than a century was wrongly decided.

It is not true to say that what is res judicata abroad is res judicata here and, if there is cause of action estoppel abroad, there is cause of action estoppel here. There is no authority that comity or reciprocity requires such a rule to be applied. Reliance is placed on the article by Professor Gutteridge in 13 *British Year Book of International Law* at pp. 51 et seq. which shows that there is no uniformity in this matter and that it is wrong to assume that foreign courts recognise one another's judgments on a uniform basis. Indeed, there is no evidence that all or any of them apply such a rule.

In several important respects a foreign judgment is not the equivalent of an English judgment. Foreign judgments cannot be directly enforced in England. The cause of action does not merge in the foreign judgment as it does in English judgments. It is not a principle of the law of nations that a state is bound to enforce the judgments of a foreign tribunal: *Godard* v. *Gray* (1870) L.R. 6 Q.B. 139, 148, 149–150. If a plaintiff sues here on the original cause of action whether the defendant is estopped from denying that there is a cause of action depends on what the foreign court adjudicated. If the foreign judgment was on the merits there may be a cause of action estoppel. The English courts have always exercised their right to refuse to enforce a foreign judgment if enforcement would be contrary to public policy or if it is penal: see *Dicey & Morris, The Conflict of Laws,* 9th ed., r. 187, pp. 1031–1032, r. 189, p. 1037. See also *In re Macartney, Macfarlane* v. *Macartney* [1921] 1 Ch. 522 and *Huntington* v. *Attrill* [1893] A.C. 150. There is no reason in principle to expect English courts to recognise as giving rise to cause of action estoppel foreign judgments which, had they been given in England would not have given rise to it here. In *Midgley* v. *Midgley* [1893] 3 Ch. 282, 298–299, relied on by the respondents, it was not held that the cause of action had gone, only that the claim was not enforceable. Mere procedural pleas do not extinguish a right. In the case of a default

judgment the court is deemed to give judgment on the merits because the defendant had the opportunity to defend, though he did not. A plaintiff may fail although he has a good cause of action, but he cannot succeed if he has not a good cause of action. A cause of action is a right derived from a factual situation which entitles the holder of a right to obtain from a court somewhere, some time, by action or other legal proceeding, a remedy against another person. But a particular court at a particular time may not allow that right to be enforced, say, because of the local law of limitation. In such a case the decision is not on the merits and the court is merely deciding that the right cannot be enforced then and there. In the circumstances an English court would be saying in effect: "We are not giving you the remedy, but you may try in another country." The German judgment, though final in Germany, did not create a cause of action estoppel. If the right survives an action may be brought in another country.

As to the construction of section 8 (1) of the Act of 1933, it applies only to enforceable judgments. The Act was concerned with such judgments and this applies as much to section 8 as to Part I. The Greer committee was considering only such judgments.

It is implicit in the whole of Part I that the judgments must be enforceable. Part II extends the scope of the Act to non-money judgments but it does not extend to cases where the plaintiff lost. Paragraph 2 on p. 5 of the Greer report (dealing with English judgments not being enforced abroad) supports the submission that it was not intended to cover the case in which the plaintiff lost. If the committee were considering such cases, paragraph 4 on p. 7 and the footnotes thereto would be inconsistent with *Harris* v. *Quine*, L.R. 4 Q.B. 653. It is inconceivable that that case could have been overlooked by the committee or that it could have been intended to overrule it. The only acceptable explanation is that the committee intended the draft Act to apply to enforceable judgments only and were referring to recognition in that context and, where judgments are not registrable, recognition is an essential step to enforcement. This construction of Part I of the Act of 1933 avoids the difficulty of reconciling *Harris* v. *Quine*, L.R. 4 Q.B. 653, with section 8. The words "by way of defence" in section 8 (1) need not mean that cases where the plaintiff lost abroad are covered. A might win an action abroad against B for a certain sum. If afterwards he sued B in England claiming a greater sum, B could rely on the foreign judgment by way of issue estoppel on the proper amount to be awarded. On costs the Act is also concerned with enforceable judgments. Foreign governments were concerned with reciprocal enforcement of judgments, not with cases where the claim was dismissed.

As to the long title of an Act as a guide to its construction, see *Maxwell on Interpretation of Statutes*, 12th ed. (1969), p. 4. In section 8 (1) "conclusive" means conclusive on the matters adjudicated upon and "judgment" covers the whole of the document provided by the German court as its signed judgment. Looking at that, one sees that the only thing adjudicated upon is the German law of limitation and that there was no adjudication on the merits. Even if the judgment was formally restricted to the operative part, an English court can look

at the foreign court's reasons, if given, to see whether the adjudication was on the merits. The court must look at more than the dispositive judgment to see what the cause of action is: see the *Kok Hoong* case [1964] A.C. 993, 1013. Once one accepts a distinction between substantive law and procedural law it is important to find out the ground of the judgment. A case can be dismissed procedurally although there is a good cause of action.

Section 8 of the Act of 1933 should be construed so as to be consistent with *Harris* v. *Quine*, L.R. 4 Q.B. 653. There is a presumption that Parliament did not intend to alter the common law. This is confirmed by the Greer committee's report, which did not suggest that that case was part of the mischief to be remedied. The report makes it clear that the draft Bill was not designed to alter the common law, save in a limited number of cases specified. If there is any ambiguity the Act should be construed as not altering the common law. The Bill was proposed in the light of the draft conventions in the report and in anticipation of conventions in that form being made: see paragraphs 16–17 (pp. 15–17) of the report and paragraph 22 (pp. 19–20).

The mere fact that section 8 (1) provides that a foreign judgment is to be " conclusive " does not indicate what it is to be conclusive of. For that one must read something into it in any event. It is conclusive of what was adjudicated on. Until one looks at the reasoning of the judgment all one knows is that the plaintiff cannot here and now have the remedy he claims. Beyond that, one can look at the judge's reasons. " Cause of action " broadly construed means " matter in dispute." Then there is nothing inconsistent with *Harris* v. *Quine*, L.R. 4 Q.B. 653, if " conclusive " means " conclusive of the matter in dispute."

As to the principle of reciprocity, see *Société Cooperative Sidmetal* v. *Titan International Ltd.* [1966] 1 Q.B. 828, 844, 845, 846, 847.

A foreigner would not be misled by the terms of section 8 if he looked at the convention first and the Act afterwards.

The concept of deciding cases " on the merits " is applied in other common law jurisdictions and regard should be had to it in construing the Act of 1933.

As to the question of discretion, if *Harris* v. *Quine*, L.R. 4 Q.B. 653, were held to have been wrongly decided and the Court of Appeal were held to have been right in its interpretation of section 8 of the Act of 1933, there would be an overwhelming case for setting aside the writ. But if the House of Lords does not so decide, the House should not interfere with the exercise of their discretion by the master and the judge. The majority of the Court of Appeal agreed with the way in which the discretion had been exercised.

It must be right to let the action proceed because: (1) There would be no good defence to the action in England. (2) If it did not proceed, the plaintiffs would lose the chance of proceeding on the two bills in question, even though they started proceedings in England in time and it might mean that they had lost all chance of obtaining the price of the machinery. (3) England is the proper and convenient forum for trial when a foreign buyer gives bills of exchange for a price payable in England. (4) There would be no hardship to the defendants. This

matter is separate from the arbitration proceedings. Further, if the Federal Supreme Court reverses the decision of the lower court, there will be no difference between the English courts and the German courts.

The fact that the defendants have no assets here is no reason for not letting the plaintiffs sue here. Indeed the fact that the defendants are fighting so hard not to be sued here would suggest that they intend to bring assets here. Reliance is placed on *Coast Lines Ltd.* v. *Hudig & Veder Chartering N.V.* [1972] 2 Q.B. 34, 45. If the plaintiffs want to get a judgment which will be of little use to them, it is not for the courts to save them from themselves.

As to the suggestion that the courts should lean in favour of a foreigner in such matters, *The Hagen* [1908] P. 189, 201 and *The Brabo* [1949] A.C. 326 were different from the present case because here the foreign company has accepted bills payable in England.

The reason why the plaintiffs, having sued in the German forum, now seek to sue in England is the problem of their being possibly out of time in Germany and only just in time in England, so that they seek to preserve their rights in both countries. They sued in Germany because it would be more satisfactory to win there. It is not their intention to pursue the action in England until the decision of the Federal Court in Germany is known. Whether the plaintiffs win or lose in Germany, the English action should be allowed to proceed.

Their Lordships took time for consideration.

March 5. LORD REID. My Lords, the main question at issue in this case is the proper interpretation of section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933. The facts are not in dispute: they have been set out by my noble and learned friends and I shall not repeat them. It is sufficient to say at this point that the respondents, a German company, were sued by the appellants in Germany in respect of dishonoured bills of exchange. The action was dismissed as being time-barred without any inquiry into the merits. The German period of limitation is shorter than in England and the appellants now seek to raise the same question here. The main issue in this case is whether section 8 entitles the respondents to rely on the German judgment as conclusive on the merits.

In this case it appears to me to be unusually important to consider as aids to construction all other material which the law allows us to look at, and I shall first state my view on that matter. We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further inquiry is permissible. But that certainly does not apply to section 8.

One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself " in the shoes " of the maker or

makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind.

It has always been said to be important to consider the " mischief " which the Act was apparently intended to remedy. The word " mischief " is traditional. I would expand it in this way. In addition to reading the Act you look at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it, and you consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act. There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the " mischief." Of course it may and quite often does go further. But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for. The mischief which this Act was intended to remedy may have been common knowledge 40 years ago. I do not think that it is today. But it so happens that a committee including many eminent and highly skilled members made a full investigation of the matter and reported some months before the Act was passed: Foreign Judgments (Reciprocal Enforcement) Committee 1932 (Cmd. 4213).

I think that we can take this report as accurately stating the " mischief " and the law as it was then understood to be, and therefore we are fully entitled to look at those parts of the report which deal with those matters.

But the report contains a great deal more than that. It contains recommendations, a draft Bill and other instruments intended to embody those recommendations, and comments on what the committee thought the Bill achieved. The draft Bill corresponds in all material respects with the Act so it is clear that Parliament adopted the recommendations of the committee. But nevertheless I do not think that we are entitled to take any of this into account in construing the Act.

Construction of the provisions of an Act is for the court and for no one else. This may seem technical but it is good sense. Occasionally we can find clear evidence of what was intended; more often any such evidence, if there is any, is vague and uncertain. If we are to take into account evidence of Parliament's intention the first thing we must do is to reverse our present practice with regard to consulting Hansard. I have more than once drawn attention to the practical difficulties that would involve, but the difficulty goes deeper. The questions which give rise to debate are rarely those which later have to be decided by the courts. One might take the views of the promoters of a Bill as an indication of the intention of Parliament but any view the promoters may have had about questions which later come before the court will not often appear in Hansard and often those questions have

never occurred to the promoters. At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter, and it would, I think, generally be dangerous to attach weight to what some other members of either House may have said. The difficulties in assessing any references there might have been in Parliament to the question before the court are such that, in my view, our best course is to adhere to present practice.

If we are to refrain from considering expressions of intention in Parliament it appears to me that a fortiori we should disregard expressions of intention by committees or royal commissions which reported before the Bill was introduced. I may add that we did in fact examine the whole of this report—it would have been difficult to avoid that—but I am left in some doubt as to how the committee would have answered some of the questions which we have now to answer, because I do not think that they were ever considered by the committee.

The committee in paragraph 2 set out the fact that, whereas we accept foreign judgments as conclusive, foreign courts do not in effect recognise English judgments, so that a successful plaintiff here has to fight his case over again on the merits. They regarded this as a substantial grievance. This could be avoided by making conventions with foreign countries, but the committee say that there were two difficulties. First, technically we do not enforce the foreign judgment as such, and, second, our law depends on case law and is not formulated in the statute book. There is nowhere in the report any suggestion of any complaint, grievance or difficulty with regard to British or foreign judgments in favour of the defendant, and I think that it is quite clear that they did not consider that there was any "mischief" with regard to such judgments which required the intervention of Parliament.

Moreover, when they set out the existing law as they understood it, they do so in a way which was entirely correct if one only has regard to a judgment in favour of the plaintiff or a judgment for costs in favour of a successful defendant, but was clearly not correct with regard to a judgment dismissing the plaintiff's action. A committee of such eminence could not have been mistaken about the law, so the only possible inference is that the committee intended only to deal with plaintiffs' judgments.

The difficulty with regard to judgments for defendants is that an action may be dismissed for a variety of reasons: the case may have been decided against the plaintiff on the merits or for some quite different reason such as a time-bar or some other preliminary plea.

That matter was dealt with by a strong court in *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653 when it was held that dismissal of an action in the Isle of Man because of a short period of limitation, which did not destroy the plaintiff's right but merely made it unenforceable, was not a bar to subsequent proceedings in England on the same cause of action.

There is not much reference to the case in subsequent authorities but it was noted in the textbooks and in the 60-odd years which elapsed before the committee's report there is no indication of any disapproval of it. But the committee never mentioned it or its subject matter. The only possible inference is that they did not think it relevant to their inquiry.

It has been said that it would be strange that the Act should only deal with judgments in favour of a plaintiff and omit dealing with judgments in favour of a defendant. Looking to the matters which I have dealt with I do not find that in the least strange.

It is clear that the Act did not intend to codify the whole law as to the effect of foreign judgments. Section 8 (3) is only one proof of that. So I approach section 8 with the expectation that it has a limited scope.

I now turn to the Act. Clearly its principal purpose—dealt with in Part I—was to facilitate the enforcement here of rights given by foreign judgments to recover sums of money. Besides rights given to plaintiffs in foreign actions, such rights might be given to defendants on counterclaims or under orders for costs in favour of a successful defendant. These I may call plaintiffs' judgments. But Part I has no application to defendants' judgments which entitle them to nothing but merely protects them against claims made against them. It would I think be a misuse of language to say that such a judgment can be enforced. It can only be used as a shield or defence.

I think that section 8 is ambiguous, so this is a case where it is permissible to look at the long title. It states that the Act makes provision for the enforcement here of certain foreign judgments, for facilitating the enforcement abroad of judgments given here and " for other purposes in connection with the matters aforesaid." The matters aforesaid all refer to plaintiffs' judgments which are enforceable. I do not see here any indication of an intention to deal with judgments which are not enforceable.

Section 8 is in Part II under the heading " Miscellaneous and General." I do not think that the other sections in Part II throw any light on its scope.

The first question which arises is whether section 8 has any application at all to defendants' judgments. There is provision in the Act for severance and no doubt it applies to those parts of defendants' judgments which entitle the defendant to some remedy. But does the section apply at all to a judgment or part of a judgment which merely absolves the defendant or dismisses the action against him? Looking to all the matters I have mentioned they seem to me to make it probable that section 8 was not intended to deal with such judgments at all.

Section 8 provides as follows:

> " (1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings. (2) This section shall not apply in the case of any judgment—(*a*) where the judgment has been registered and the registration thereof has been set aside on some ground other than—(i) that a sum of money was not payable under the judgment; or (ii) that the judgment had been wholly or partly satisfied; or (iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or (*b*) where the judgment has not been registered, it is

A shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (*a*) of this subsection. (3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before B the passing of this Act."

I find the first few lines very obscure. The section sets out to deal with a judgment to which Part I applies "or would have applied if a sum of money had been payable thereunder." A plaintiff's judgment may order specific performance or it may be merely a declaration. It is easy to apply these words in such cases. But I find it extremely difficult to apply them to C defendants' judgments. The essence of such a judgment is that the defendant has succeeded and that he has no liability to pay or do anything. No sum of money could possibly have been payable under such a judgment. It is only by putting an unnatural meaning on these words that defendants' judgments can be brought within the section at all.

I cannot believe that good draftsmen—as this committee certainly were D —would have employed such an obscure expression if the intention had been to deal with defendants' judgments. It was argued that it throws us back to section 1 (2) and (3), which is in these terms:

"(2) Any judgment of a superior court of a foreign country to which this Part of this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a E judgment to which this Part of this Act applies, if—(*a*) it is final and conclusive as between the parties thereto; and (*b*) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and (*c*) it is given after the coming into operation of the Order in Council directing that this Part of this Act shall extend to that foreign country. (3) For the purposes of this section, a judgment shall be F deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court."

It is said that the effect of these obscure words in section 8 (1) is to make the section apply to all judgments which would come within the terms of section 1 (2) if condition (*b*) were omitted. Besides the fact that this G would be a very odd way of bringing in another section of the Act that cannot be right. If (*b*) is omitted then section 1 (2) would apply to every kind of judgment including judgments on status and family matters and in rem. No one suggests that section 8 was meant to deal with them. I am not at all clear what meaning the respondents would attach to these obscure words if mere reference back to section 1 (2) will not do.

H Then it is said that the references in the last lines of section 8 (1) to defence and counterclaim show that the section must have been intended to deal with defendants' judgments. I do not agree.

It is necessary to look closely at the preceding words in the section. It

makes judgments to which it applies conclusive " in all proceedings founded on the same cause of action." I think that cause of action normally means a right alleged to flow from the facts pleaded. But often cause of action is used to denote those facts; for example, a statute may provide that the cause of action must arise within a particular area: that must mean the facts and not the right.

Here I think it must mean the facts. Suppose that the defendant abroad raises proceedings here on the same facts as those in the foreign case. If cause of action meant right, only one person has the cause of action and the section would not apply at all because the proceedings here would not be founded on the same cause of action. That could not have been intended.

But if the cause of action refers to the facts there is no difficulty in applying this part of the section even if the section has no application to defendants' judgments. A successful plaintiff abroad is entitled to disregard his foreign judgment and sue here again on his original right because a right does not merge in a foreign judgment. It might pay him to do that because he thinks that he could get here an even more favourable judgment than he got abroad. But this section would prevent that. The original defendant could plead the foreign plaintiff's judgment as a defence to prevent the plaintiff's attempt to do better for himself here. Similarly if the successful plaintiff abroad held an unsatisfied foreign judgment and he were sued here in some other cause of action, he could counterclaim in respect of his unsatisfied foreign judgment. So there is ample scope for the operation of the last part of the subsection even if the section applies solely to plaintiffs' judgments.

I am therefore of opinion that section 8 has no application to the present case and does not entitle the respondents to rely on the foreign judgment on a preliminary point to prevent inquiry into the merits here. If further justification for my view be needed, it would, I think, be unjust if a foreign judgment on a preliminary point were in itself sufficient to prevent inquiry into the merits here.

I may add that if it were held that the section does apply to defendants' judgments, I would, perhaps with difficulty, agree with those of your Lordships who think that the appellants should succeed

Then the respondents maintain that *Harris* v. *Quine,* L.R. 4 Q.B. 653 was wrongly decided. I am clearly of opinion for reasons given by your Lordships that the decision was right.

Finally I agree with your Lordships in the matter of discretion. I would therefore allow the appeal.

VISCOUNT DILHORNE stated the facts and continued: My Lords, in the Court of Appeal the respondents put forward a new point based on section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, and it was on this ground that the court (Lord Denning M.R., Megaw and Scarman L.JJ.) allowed the appeal.

The long title of that Act reads as follows:

> " An Act to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom, for

facilitating the enforcement in foreign countries of judgments given in the United Kingdom, and for other purposes in connection with the matters aforesaid."

Part I of the Act is headed "Registration of Foreign Judgments" and is directed to securing the enforcement of foreign judgments in this country. Part II is headed "Miscellaneous and General." Section 8 is the first section in this Part. [His Lordship read section 8 and continued:] The judgments to which Part I of the Act applies are defined in section 1 (2) and (3) of the Act.

Such a judgment may be registered if it has not been wholly satisfied and if it is not one which could not have been enforced by execution in the country of the original court. If a judgment of a foreign court is registered, then for the purposes of execution, if it is not competent to a party to apply for the registration to be set aside or such an application has been finally determined, the registered judgment is to be of the same force and effect as a judgment originally given by the registering court. Proceedings may be taken on it as if it were a judgment of that court and the judgment is to carry interest as if it were a judgment of that court (section 2 (2)).

Part I of the Act only applies to judgments under which a sum of money is payable. Section 8 (1) applies to all judgments to which Part I applies and also to judgments to which that Part does not apply but would have applied if money had been payable under them, that is to say judgments which are final and conclusive and given after the Order in Council applying Part I to the foreign country concerned has been made (section 1 (2) (*a*) and (*c*)).

I cannot therefore see that there is any ground for concluding, as was contended by the appellants, that section 8 (1) only applies to judgments which can be enforced. Section 8 (1) does not deal at all with enforcement. That is dealt with in Part I.

As it was not disputed that in this case section 1 (2) (*a*) and (*c*) were satisfied, in my opinion the judgment of the District Court of Munich was one to which section 8 (1) applies.

That subsection goes on to provide that such a judgment shall be recognised in any court in the United Kingdom as "conclusive between the parties thereto," and to state when it is to be so recognised, namely "in all proceedings founded on the same cause of action." It concludes by saying that it may be relied on by way of defence or counterclaim in any such proceedings. The subsection does not expressly state of what the judgment is to be conclusive and the controversy in this appeal is as to that.

In *Thoday* v. *Thoday* [1964] P. 181, 197 Diplock L.J., as he then was, said that there were two species of estoppel per rem judicatam. The first, which he called "cause of action estoppel," was that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. The second, which my noble and learned friend called "issue estoppel," arises where in previous litigation one of the matters in issue between the parties has already been decided by a competent court.

Lord Denning M.R. in the Court of Appeal held that section 8 (1) dealt with "cause of action estoppel" and section 8 (3) with "issue estoppel"; and that as the proceedings in England would be founded on the same cause of action as those in Germany, the judgment in Germany was to be treated as conclusive. That judgment did not decide that money was not owed by the respondents to the appellants but that it was not recoverable owing to the German period of limitation. Nevertheless, in Lord Denning's view, section 8 (1) operated to prevent the appellants from suing in this country on the same cause of action even though the period of limitation under English law had not expired.

Megaw L.J. and Scarman L.J. held that section 8 (1) displaced the common law as to the enforcement and recognition of foreign judgments, and agreed that the judgment of the German court prevented proceedings being instituted in this country.

The contrary view advanced by the appellants was that the judgment of the foreign court was only by section 8 (1) made conclusive as to the matters decided therein and so was conclusive only on the question whether the limit imposed by German law on the time within which actions must be instituted applied and barred the action.

Although since 1964 the use of the expressions "cause of action estoppel" and "issue estoppel" has become common, I do not think that that division into two species of estoppel per rem judicatam was recognised in 1933 or that those expressions were then used. If that be right, it would indeed be singular if Parliament had then intended section 8 (1) only to apply to "cause of action estoppel" and section 8 (3) only to "issue estoppel."

In this connection I think the way in which section 8 (3) is drafted is illuminating. If that section was intended to cover issue estoppel, I would not have expected it to commence with the words: "Nothing in this section shall be taken to prevent . . ." That is a formula frequently used in statutes when a provision is inserted ex abundanti cautela. Its use in section 8 (3) leads me to the conclusion that section 8 (3) was not intended to cover issue estoppel as a distinct species of res judicata but was inserted to ensure that the Act did not by section 8 (1) reduce the recognition given by the courts of this country under the common law to foreign judgments. It follows that section 8 (1) was not intended, if this be so, to cover only one species of estoppel per rem judicatam.

Our attention was drawn to the fact that the Foreign Judgments (Reciprocal Enforcement) Act 1933 was passed by Parliament on April 13, 1933, shortly after the report of a committee called the Foreign Judgments (Reciprocal Enforcement) Committee had been presented to Parliament. That was done in December 1932. The committee had been appointed by the then Lord Chancellor [Viscount Sankey] and its chairman was Greer L.J. It had among its members many very eminent lawyers. To its report were annexed a draft of conventions to be entered into with foreign countries and a draft Bill, clause 8 of which was in precisely the same terms as section 8 of the Act.

The question was debated to what extent could recourse be had to the committee's report as an aid to the construction of section 8.

Ever since *Heydon's Case* (1584) 3 Co.Rep. 7a it has been recognised that there are, in connection with the interpretation of statutes, four questions to be considered: (1) what was the common law before the making of the Act; (2) what was the mischief or defect for which the law did not provide; (3) what remedy Parliament had provided; and (4) the reason for the remedy: see *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs, and Trade Marks* [1898] A.C. 571.

In that case Lord Halsbury L.C. cited a passage from the report of commissioners appointed to inquire into the duties, organisation and arrangements of the Patent Office in relation to trade marks and designs. That passage not only referred to what the existing law was but also to what the commissioners thought it ought to be; and after citing it, Lord Halsbury said, at p. 575:

> "My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."

Many instances were cited in the course of the argument where the courts have had regard to the reports of such commissions or committees; e.g. in *Rookes* v. *Barnard* [1964] A.C. 1129 and *Heatons Transport (St. Helens) Ltd.* v. *Transport and General Workers' Union* [1973] A.C. 15 to the Report of the Royal Commission on Trade Unions and Employees' Associations, in *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1965] A.C. 1175 to the Report of the Royal Commission on Marriage and Divorce and in *Letang* v. *Cooper* [1965] 1 Q.B. 232 to the Report of the Tucker Committee on the Limitation of Actions. Other instances could be cited and, despite the observations of Lord Wright with which Lord Thankerton agreed in *Assam Railways and Trading Co. Ltd.* v. *Inland Revenue Commissioners* [1935] A.C. 445, it is now, I think, clearly established that regard can be had to such reports.

In that case counsel had sought to refer to recommendations of the Royal Commission on Income Tax of 1920 and to argue that the Finance Act 1920 followed those recommendations. The House did not allow him to do so, Lord Wright saying, at p. 458:

> ". . . on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate: as to this, I agree with Farwell L.J. in *Rex* v. *West Riding of Yorkshire County Council* [1906] 2 K.B. 676, 716 where he says 'I think the true rule is expressed with accuracy by Lord Langdale in giving the judgment of the Privy Council in the *Gorham Case* in Moore, 1852 edition, p. 462, 'We must endeavour to attain for ourselves the true meaning of the language employed'—in the Articles and Liturgy—'assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate, and the meaning of the words employed.' . . . It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is

inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted."

Despite these observations, in *Shenton* v. *Tyler* [1939] Ch. 620 Greene M.R. cited a recommendation of the Common Law Commissioners of 1852 saying that it was accepted by the legislature and embodied in the Evidence Amendment Act 1853.

The task confronting a court when construing a statute is to determine what was Parliament's intention. In a perfect world the language employed in the Act would not be capable of more than one interpretation but due in part to the lack of precision of the English language, often more than one interpretation is possible. Then, to enable Parliament's intention to be determined, as I understand the position, one may have regard to what was the law at the time of the enactment and to what was the mischief at which it was directed.

That one can look at such reports to discern the mischief is now, I think, established but there is a difference of opinion as to what may be looked at in such reports. Can one have regard to the recommendations of the committee or commission? Where a draft Bill is attached to the report, as is now frequently the case, and was the case in this instance, can one refer to the terms of the draft Bill when they have been enacted without material alteration by Parliament? Can one refer to the notes on the clauses of the draft Bill appended to it by the committee, and in the present case to the terms of the draft conventions prepared by the committee and attached to their report? Is it legitimate to make use of such parts of a report as an aid to the construction of the Act?

In my opinion it is. The reason why one is entitled to consider what was the mischief at which the Act was aimed is surely that that will throw a revealing light on the object and purpose of the Act, that is to say the intention of Parliament; and, applying Lord Halsbury's observations cited above, what more accurate source of information both as to the law at the time and as to the evil or defect which the Act was intended to remedy can be imagined than the report of such a committee or, for that matter, the reports of the Law Commission?

The contrary view seems to impose on judges the task of being selective in their reading of such reports. What part may they look at and what not? Have they to stop reading when they come to a recommendation? Have they to ignore the fact, if it be the fact, that the draft Bill was enacted without alteration? To ignore what the committee intended the draft Bill to do and what the committee thought it would do? I think not.

I think so to hold would be to draw a very artificial line which serves no useful purpose. What weight is to be given to a committee's recommendation is another matter. That may depend on the particular circumstances. If the report of the committee merely contains recommendations, while I think that regard can be had to them, little weight may be attached to them as it may not follow that Parliament had accepted them. Parliament may have decided to go further or not so far. But where, as here, a draft Bill is attached to the report, then one can compare its provisions with those of the Act and if there is no difference or no material difference

in their language, then surely it is legitimate to conclude, as Greene M.R. did in *Shenton* v. *Tyler* [1939] Ch. 620, that Parliament had accepted the recommendation of the committee and had intended to implement it. In such a case that recommendation becomes as it did in *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs, and Trade Marks* [1898] A.C. 571 the most accurate source of information as to the intention of Parliament.

Of course, it may be that the language used in the draft Bill and in the Act is defective and does not carry out the committee's and Parliament's intention. Regard must be had to that possibility, however remote it may be.

In *Letang* v. *Cooper* [1965] 1 Q.B. 232, 240 Lord Denning M.R. said:

> "It is legitimate to look at the report of such a committee," (the Tucker Committee on the Limitation of Actions) "so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief."

While I respectfully agree that recommendations of a committee may not help much when there is a possibility that Parliament may have decided to do something different, where there is no such possibility, as where the draft Bill has been enacted without alteration, in my opinion it can safely be assumed that it was Parliament's intention to do what the committee recommended and to achieve the object the committee had in mind. Then, in my view the recommendations of the committee and their observations on their draft Bill may form a valuable aid to construction which the courts should not be inhibited from taking into account.

It does not follow that if one can have regard to the whole of a committee's report, one ought also to be able to refer to Hansard to see what the Minister in charge of a Bill has said it was intended to do. In the course of the passage of a Bill through both Houses there may be many statements by Ministers, and what is said by a Minister in introducing a Bill in one House is no sure guide as to the intention of the enactment, for changes of intention may occur during its passage. But when a Bill is drafted by such a committee as that in this case and enacted without alteration, then, I repeat, in my opinion it is legitimate to have regard to the whole of the committee's report, including the terms of the draft Bill attached to it, to the committee's notes on its clauses and to the draft conventions annexed to the report, for they constitute a most valuable guide to the intention of Parliament.

The report of the committee begins with a summary of the committee's recommendations and the reason therefor. They were primarily concerned with securing that English judgments should be recognised and enforced in foreign countries without the case having to be fought again on the merits in a foreign court. To that end conventions had to be entered into with

foreign countries and the committee had ascertained that some foreign countries would be willing to allow judgments to be enforced "on similar conditions to those on which we enforce theirs, provided that those conditions are defined in a convention" (paragraph 2). They pointed out that there were two difficulties in the way of concluding such conventions: (i) that under the then existing procedure foreign judgments were not enforced as such, and (ii) "The principles on which English courts accept foreign judgments as conclusive depend on case law and are not to be found formulated in the Statute Book." Their aim was, they said, to remove these difficulties; and, they said, so far as the position in England was concerned, the change they proposed involved "no radical alterations of the present position."

Paragraph 4 of their report appears under the heading "The Present Position. (i) Recognition and enforcement of foreign judgments in England," and reads as follows:

> "Under English common law a foreign judgment (other than a judgment given in a criminal or fiscal matter), though it does not operate in England to merge the original cause of action, is, provided that certain reasonably well-defined conditions are satisfied, recognised as conclusive between the persons who were parties to the proceedings in the foreign court as regards the question therein adjudicated upon, and can be relied upon by any of the said parties or their privies, if further proceedings are brought in England by any other such party or his privy in respect of the same cause of action."

To this paragraph there was the following footnote:

> "The words 'question adjudicated upon' refer to the actual decision (the operative parts of the judgment) as opposed to the grounds or reasoning upon which it may be based, in the course of which other points of law or fact may have been incidentally decided as preliminaries (necessary or otherwise) to the final conclusion. The authorities on the effect of foreign judgments in English law are not very numerous. They appear, however, clearly to justify the statement of the position given above though it may be that this statement is slightly too narrow. This statement is in any case only intended to apply to judgments in ordinary proceedings in personam."

The wording of this paragraph closely resembles that of section 8 (1) of the Act and the passages in the report to which I have referred establish, in my opinion, that by Part I of the Bill the committee sought to secure that certain foreign judgments were capable of being enforced as such in English courts and by section 8 to state in a statute the principles on which English courts recognise foreign judgments as conclusive. There is nothing to be found in these passages or elsewhere in the report to support the contention that it was the committee's intention to alter or depart in any way from the principles on which English courts had under the common law regarded foreign judgments as conclusive.

Paragraph 10 of the report states the reasons in the committee's view for "the present failure" of foreign courts to recognise and enforce British

judgments and the steps necessary to remedy that position. In paragraph 10 (*b*) they say:

> "The whole of the English procedure, including the conditions required for the recognition of a foreign judgment as conclusive, depends upon rules of common law only. There is always a natural tendency for the foreign court to suppose that such common law rules are too indefinite to be applied as rigidly as the provisions of a statute or a code, and that they are largely discretionary. . . ."

The report continues:

> "Therefore, in the case of these countries, in practice . . . the conclusion of an international convention—containing reciprocal obligations for the recognition and enforcement of judgments which will be made binding as part of the municipal law of the foreign country together with the statement of our own rules in statutory form—appears to be the only manner by which anything like reciprocal treatment can be secured in the matter of the recognition and enforcement of British judgments."

And in paragraph 16 the report states:

> "It was, however, desirable that such legislation, in laying down the conditions under which, in return for reciprocal treatment, the judgments of foreign countries should be enforced, should not depart from the substantive principles of the common law applicable to foreign judgments in general."

In paragraph 23 the committee emphasised the manner in which the draft Bill and rules on the one hand and the draft conventions on the other had been prepared "concurrently with and in the light of each other, so as to render the arrangements proposed in connexion with foreign judgments in the United Kingdom consistent with the conventions, and vice versa."

One annex to the report IV (b) contains a draft convention with Germany. Article 3 thereof deals with the recognition of judgments and article 3 (2) provides that a judgment which is recognised

> "shall be treated as conclusive as to the matter thereby adjudicated upon in any further action between the parties . . . and as to such matter shall constitute a defence in a further action between them in respect of the same cause of action."

No such convention was entered into with Germany until 1961 and article III (4) of that convention corresponds with article 3 (2) of the draft.

In their notes on the clauses of the draft Bill, the committee say (annex V, paragraph 13):

> "Clause 8" (now section 8 of the Act) "contains the provisions of the Bill with regard to the recognition of foreign judgments as final and conclusive between the parties as regards the question therein adjudicated upon. It is entirely in accordance with the position at common law" (as explained in paragraph 4 of the report) "and clause 8 (3)" (section 8 (3) of the Act) "saves the existing common law rules in any

cases where the rule laid down by the Act may be narrower in operation than the common law." A

The report thus shows, in my opinion beyond any question of doubt, that it was not the committee's intention by clause 8 to make any change in the existing common law rules as to recognition of foreign judgments; that clause 8 (3) was inserted ex abundanti cautela and that clause 8 (1) was only intended to operate to make a judgment conclusive between the parties as to the matter thereby adjudicated upon. B

Unfortunately the report was not brought to the attention of the Court of Appeal.

Parliament by enacting clause 8 without alteration must, in my opinion, have intended to implement the intentions of the committee and I can see no ground for holding that they did not effectively do so.

What, then, was the question adjudicated upon by the District Court of Munich on November 30, 1972? C It was not that no money was owed by the respondents to the appellants. The expert evidence in this case made it clear that the appellants' right to payment was not extinguished by that decision. It was not a judgment " on the merits," an expression used not infrequently by lawyers, and used by the committee in paragraph 1 of their report and one to which I must confess I have no difficulty in attaching a meaning. D It was a decision that the German period of limitation applied and that the appellants' claim was consequently time-barred.

In these circumstances what was the position at common law? That was in my opinion clearly settled by the decision in *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653.

There it was held that a Manx statute which provided a three year period of limitation barred the remedy but did not extinguish the debt and that E proceedings to recover the debt, though time-barred in the Isle of Man, could be brought in this country. In the course of his judgment Blackburn J. said, at p. 658:

> " . . . it was said the plea, . . . would show that the Manx court had determined the matter, and that the matter ought not to be litigated again in the courts of this country; and, no doubt, wherever it can be F shown that a court of competent jurisdiction has decided the matter, the plaintiff is estopped from disputing the decision, or litigating the matter in another court, while the decision of the first court remains unreversed. But, in the present case, all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover." G

So here all that the German court decided was that in the German courts the appellants could not recover.

It was contended that this case was wrongly decided. I found that argument entirely unconvincing. It is a decision which has stood unchallenged since 1869. It was submitted that the committee must when preparing their report have overlooked it. I cannot accept that. It is a H decision cited in *Dicey, Conflict of Laws* without any adverse comment and, at p. 422 in the 1st edition (1896) of that work as authority for the proposition that

A "... it is not an answer to an action in England if it be ... a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it on the merits, e.g., if it is given in favour of the defendant on the ground that the action is barred by a statute of limitations."

If the Act of 1933 had not been passed, then under the common law, in the light of this decision, proceedings by the appellants in England would not B have been barred by the decision of the Munich court. As in my opinion section 8 of the Act was intended to and does preserve the common law position without alteration, the respondents' claim that that decision prevents proceedings in England must be rejected.

In the Court of Appeal some importance was attached to the concluding words of section 8 (1), that the judgment is to be recognised as conclusive C between the parties in all proceedings founded on the same cause of action and "may be relied on by way of defence or counterclaim in any such proceedings." Res judicata may be relied on by way of defence but the need to provide that it may be relied on by way of counterclaim founded on the same cause of action is somewhat obscure. Whatever its content be, the inclusion of the reference to a counterclaim does not, in my view, answer the question or throw a light on the answer to the question of what D is a judgment to be recognised as conclusive? In my opinion, though the words "of the matter adjudicated upon" are not in section 8 (1), though they were in the draft convention and in paragraph 4 of the report, nevertheless the language of that subsection provides that a judgment to which the subsection applies is to be conclusive of what it decides and not of what it does not decide. And the judgment of the Munich court did not E decide that money was not owing by the respondents to the appellants. It was not a decision on the merits of the appellants' claim.

I would therefore allow the appeal. But the position has changed since the Court of Appeal's decision. The judgment of the Munich Court has been reversed and that judgment reversing it is now under appeal.

In these circumstances while leave should be given to issue the writ and to serve notice thereof on the respondents, thereafter there should be a stay F pending the decision of the Federal Supreme Court and with liberty to apply after the decision of the court has been given. I can see that formidable arguments may be advanced, if the Federal Supreme Court upholds the reversal of the decision of the Munich court, for saying that the appellants, having chosen the German courts as the forum and as the case can then be heard on its merits, should not in the exercise of discretion be allowed at G the same time to proceed in the courts of this country. But it is not necessary or desirable to express any opinion on that now.

For the reasons I have stated, in my opinion this appeal should be allowed.

LORD WILBERFORCE. My Lords, this appeal is essentially concerned H with the interpretation of section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. From the facts which have been fully stated I select those necessary for our decision.

1. The present action is brought upon two bills of exchange drawn by

the appellants and accepted by a predecessor in business of the respondents —it is not disputed that the respondents have succeeded to any liability on these bills. The proper law of these bills is English law. The German proceedings were brought by the appellants against the respondents on these same bills after dishonour.

2. Action on the bills in England is not, we must assume, barred by the English Limitation Act 1939.

3. In Germany, a three year period of limitation applies to bills of exchange. If the German period is applied to the bills, action upon them is barred by German law. The question litigated in Germany, upon which the German courts have differed, is whether in proceedings before a German court the German period does apply. The basis of the affirmative decision of the District Court of Munich is (briefly) that limitation is, under German law, classified as a matter of substance, not of procedure; that as the proper law of the bills is English law, this involves the application by a German court of English law; that under English law limitation is regarded as a matter of procedure; that, applying the doctrine of renvoi (accepted by the German court), reference back has to be made to the lex fori, i.e. German law, so that the proceedings were barred.

4. According to expert evidence, German law, though classifying limitation as a matter of substance, did not, in relation to the subject matter of dispute, extinguish the right, but did affect the remedy. As this point is crucial, I quote certain passages from the evidence filed on behalf of the respondents:

> " In German law what is described in England as the limitation of actions does not extinguish the right. Nonetheless such limitation is a matter of substance, not of procedure." Dr. F. A. Mann.
>
> " The completion of the limitation affects the substantive quality of the right. Notwithstanding the limitation it is true the right remains in existence. Its effect, however, is weakened by the fact that the obligor is entitled permanently to refuse performance." Professor Hefermehl, commenting on the German Civil Code, section 222, cited by Dr. F. A. Mann:
>
> " . . . the position is that, while the debts under the bills are not extinguished, the defendants are under no duty to pay them because they have a permanent answer to them." Dr. F. A. Mann.

5. The judgment of the District Court of Munich, dated November 30, 1972, is in evidence. It consists of a single document containing (i) a dispositive part, (ii) a statement of facts, (iii) grounds for the decision. The dispositive part states " The suit is dismissed." The grounds for decision set out fully the grounds in law for holding that the claim is barred by the German law as to limitation. I mention this point because the respondents contend that the " judgment " to be recognised under the Act of 1933 is the dispositive provision dismissing the suit and nothing more.

After this preface I come to the Act of 1933. It is in two parts. Part I contains provisions for the enforcement of foreign judgments by registration. Part II contains miscellaneous and general provisions starting with section 8, which deals with recognition. The question for decision is whether, and if so to what extent, section 8 (1) applies to the present situation. There

A are two issues. The first is whether the subsection applies at all to foreign judgments dismissing a suit, i.e., in favour of a defendant: the appellants' contention is that it only applies to judgments which could, if certain other elements existed (e.g., an order to pay money), be enforceable under Part I. The second issue is for what purpose and to what extent a foreign judgment is "conclusive." The appellants' contention is that it is to be conclusive as to any matter adjudicated upon, but no further. Since in this B case all that was adjudicated upon was that the plaintiffs have no remedy in Germany upon the bills, by reason of the expiry of the German limitation period, recognition of this fact does not prevent the appellants from suing in England. I shall deal first with the second point.

My Lords, we are entitled, in my opinion, to approach the interpretation of this subsection, and of the Act of 1933 as a whole, from the background C of the law as it stood, or was thought to stand, in 1933 and of the legislative intention. As to these matters the report to which my noble and learned friend, Lord Reid, has referred is of assistance. He has set out in his opinion the basis upon which the courts may consult such documents. I agree with his reasoning and I only desire to add an observation of my own on one point. In my opinion it is not proper or desirable to make use of such a document as a committee or commission report, or for that D matter of anything reported as said in Parliament, or any official notes on clauses, for a direct statement of what a proposed enactment is to mean or of what the committee or commission thought it means—on this point I am in agreement with my noble and learned friend Lord Diplock. To be concrete, in a case where a committee prepared a draft Bill and accompanies that by a clause by clause commentary, it ought not to be permissible, E even if the proposed Bill is enacted without variation, to take the meaning of the Bill from the commentary. There are, to my mind, two kinds of reason for this. The first is the practical one, that if this process were allowed the courts would merely have to interpret, as in argument we were invited to interpret, two documents instead of one—the Bill and the commentary on it, in particular annex V, paragraph 13. The second is one of consti- F tutional principle. Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved upon the judges from the earliest times is an essential part of the constitutional process by which G subjects are brought under the rule of law—as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say. The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated, so often indeed as to have become an incantation. H If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety,

considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs. A

It is sound enough to ascertain, if that can be done, the objectives of any particular measure, and the background of the enactment; but to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning in particular applications of a clause or a phrase, would be a stunting of the law and not a healthy development.

In this light I can state in summary form the considerations to which B the report brings me in interpreting the Act. First, the objective of the Act is clear: it was to secure the enforcement by other countries of English judgments, mainly money judgments, upon principles similar to those on which foreign judgments were recognised in England. Second, the Act was to be based upon and to follow with minimal departures the common law. Third, the Act was to state in statutory form the general principles C upon which foreign judgments (to which the Act applied) would be recognised in English courts. Fourth, the Act, a draft of which was annexed to the report, and which the eventual statute adopted with negligible variation, was prepared in the contemplation that bilateral conventions would be entered into with foreign States, with a view to securing reciprocity of treatment. It is made clear that negotiations had taken place with the Belgian, French and German governments: draft conventions had been D prepared and are annexed to the report: the Act was intended to operate upon and in aid of these conventions. [The convention with Germany was not, in fact, signed until 1960 and was given effect to by S.I. 1961, No. 1199; but it followed closely the draft scheduled to the report.] Fifth, it is relevant to notice that the committee included a number of persons of acknowledged competence, and indeed distinction, in the field of private international law, who must be taken to be familiar with established rules E and decided cases.

One of the rules, which they must be taken to be aware of, relates to the distinction made in English private international law between matters of substance and matters of procedure, and within that, the classification of limitation as a matter of procedure. Classification of limitation as procedural means that in proceedings in an English court, English law, as the F lex fori, will apply its domestic law as to limitation and will not apply foreign limitation provisions even if the foreign law is the proper law, unless, at least, they extinguish the right. This principle has been part of English law since, at any rate, *Huber* v. *Steiner* (1835) 2 Bing.N.C. 202. I quote the well-known statement of principle by Tindal C.J., at p. 210:

> "The distinction between that part of the law of the foreign country G where a personal contract is made, which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates ad litis decisionem, is adopted from the foreign country; so much of the law as affects the remedy only, all that relates ad litis ordinationem, is taken from the lex fori of that country where the action is brought." H

Huber v. *Steiner* was not itself a case involving a foreign judgment, but the question arises immediately whether the same principle applies. The

answer to this can only be affirmative. If English law applies its own limitation provisions to a foreign obligation, even where there is evidence that action on that obligation would (or would not) be barred by the limitation provisions of the proper law of that obligation, it would seem inevitably to follow that English law should not recognise a foreign judgment to the same effect—more precisely should treat the foreign judgment as a decision as to the remedy procedurally available, or not available, in the foreign court and nothing more. Exactly that was in fact decided in 1869 by *Harris* v. *Quine*, L.R. 4 Q.B. 653. Cockburn C.J. at p. 657 treated the matter as concluded by *Huber* v. *Steiner*:

> "... the law being as I have stated, there is no judgment of the Manx court barring the present action, as there was no plea going to the merits, according to the view which we are bound to take of the Manx statute of limitations, and the issue which the Manx court decided in favour of the defendant is not the same issue as is raised in the present action."

Blackburn J. at p. 658:

> "But it was said the plea, if amended according to the facts, would show that the Manx court had determined the matter, ... But, ... all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover."

We see here, in the judgment of Cockburn C.J., a reference to a plea going "to the merits." This expression, whether related to pleas or to judgments, is a familiar one in English law: any practitioner would use it —even if it is not always understood. It is used in many well-known authorities—see *Ricardo* v. *Garcias* (1845) 12 Cl. & F. 368, 377, 389, 390; *Godard* v. *Gray* (1870) L.R. 6 Q.B. 139, 150 and in writers of authority—see *Foote's Private International Jurisprudence*, 5th ed. (1925), p. 553; *Dicey's Conflict of Laws*, 3rd ed. (1922), p. 455; *Story's Conflict of Laws*, 2nd ed. (1841), pp. 830–831, section 576. See also *American Law Institute* (*Restatement of the Law—Second*) *Conflict of Laws*, 2d, vol. I, section 110: "A judgment that is not on the merits will be recognised in other states only as to issues actually decided." All of what was said in *Harris* v. *Quine* applies directly to the present case, and unless the respondents can escape from the force of this authority, must conclude the appeal against them. They had, basically, two arguments. First they contended that *Harris* v. *Quine* was wrongly decided, or at least that it stood alone and ought not to be followed. I regard this as a hopeless contention. It may be true that, as regards this subject matter, *Harris* v. *Quine* is the only English reported case where a foreign judgment and its recognition was involved. But, as I have shown, it represents a logical and inevitable consequence of *Huber* v. *Steiner*, 2 Bing.N.C. 202 and other cases, and is merely an application of a principle too firmly established to be now put in question. *Harris* v. *Quine* has been cited often enough in English and Commonwealth cases. See *Casanova and Co.* v. *C. G. Meier & Co.* (1885) 1 T.L.R. 213; *Carvell* v. *Wallace* (1873) 3 N.S.R. 165; *Bondholders Securities Corporation* v. *Manville* [1933] 4 D.L.R. 699; *Pedersen* v. *Young* (1964) 110 C.L.R. 162, sometimes, I must say, irrelevantly, but it has never been

doubted. The principle is well recognised by courts of authority in the U.S.A. *Warner* v. *Buffalo Dry Dock Co.* (1933) 67 F. (2d) 540; cert. den. (1934) 291 U.S. 678; *Western Coal and Mining Co.* v. *Jones* (1946) 164 A.L.R. 685 (S.C.Cal.) and see the *Restatement* quoted above. As at the year 1933, then, *Harris* v. *Quine* was undoubtedly good law.

Secondly, and more substantially, the appellants say that *Harris* v. *Quine* is superseded by section 8 (1) of the Act of 1933: this was in effect the view of the Court of Appeal.

Before looking at the language of the subsection, it may be useful to consider what this contention involves. It involves the proposition that a well-established principle of English law, namely, that to obtain recognition, a foreign judgment must be on the merits and not be based merely on a "procedural" provision of the lex fori, is swept away in favour of a new principle that a foreign judgment, on whatever grounds it proceeds, is conclusive for all purposes, so long at least as the same "cause of action" is involved, or the same facts. If one accepts that the presumption is against changes in the common law, and that this presumption is fortified in the present case by the report of 1932, if one accepts moreover that the principle under consideration was perfectly well known and understood in 1932, it was to be expected that on this point the common law would only be changed by a clear and express provision. Yet what is relied upon is the word "conclusive" coupled with a reference to "cause of action." I return to these words later: What, one could ask, could be the purpose of the change? Why should this Act make a judgment conclusive as to something it never decided? Why, to take the present case, should a foreign judgment be conclusive on a matter whose proper law is English, and accepted as English by the foreign court, when that foreign law itself does not destroy the right, but only limits the remedy it will grant? For English law to abolish the distinction between substance and procedure, or to classify limitation as substance, might be an intelligible objective, but short of this, and leaving the distinction and classification intact, to change the effect of a judgment is something that, at the least, requires explanation.

Some suggestion was made that to extend the recognition of foreign judgments might be desired on grounds of reciprocity: but I cannot understand this. There was no evidence that foreign courts grant or would grant the wider recognition argued for by the respondents and in any case reciprocity was to be achieved by the proposed conventions. There is nothing in this alleged principle—one of uncertain extent—which assists either way in the interpretation of the Act.

I find then, so far, no intelligible reason for supposing the common law to be changed. But the respondents say the words of the section are clear—clear words must be given effect to—conclusive means conclusive and that is that. This, however, I cannot accept. In the first place one has to ask, "*What* is conclusive?," the section says the "judgment"—so what is "the judgment"? The respondents say that the judgment is the dispositive—"the suit is dismissed." If this is contained in a self-contained document, as in the English practice, one may not look beyond it. If in a comprehensive document, as in the German practice, only that part of it which states the disposition is the judgment, not the whole of the judg-

ment showing what was decided or adjudicated upon. But there is no warrant for this limitation. The courts in this country, when faced with a foreign judgment, whether in favour of the plaintiff or the defendant, in English proceedings, invariably look at the whole matter: the order made: the reasons: the nature of the rival claims, resorting if necessary to extrinsic evidence to explain them and to expose the reality. They do not confine themselves to the fact of the record, or to the formal order. It must be remembered that at common law foreign judgments do not give rise to an estoppel by record. If relied on by a plaintiff in an English court, they are so as obligations, which the defendant ought to discharge: so the nature of the obligation must be made known and if necessary explained. If they are relied on by a defendant as a bar in English proceedings, the nature of the bar must be inquired into, from an inspection of the matter adjudicated upon. *Harris* v. *Quine*, L.R. 4 Q.B. 653 itself is an example of this. One can cite many passages of authority:

> "In general, in pleading a former judgment, you produce it with the proceedings to show it is a judgment between the same parties and on the same matters." (*Ricardo* v. *Garcias*, 12 Cl. & F. 368, 387 *per* Lord Lyndhurst L.C.)
>
> "Every plea of a former judgment in bar ought to set forth so much, at least, of the judgment, as would show that it was final and conclusive on the merits." (at p. 389 *per* Bethell arg.)
>
> "No one contends that the judgment and proceedings should be set out in full, but we should have such a description of them as would enable us to know what was decided." (at p. 394 *per* Lord Brougham.)

So, in my opinion, to say that in a case such as the present the English court must stop at the first line of the German judgment and ignore the rest is irrational and out of line with what the courts do. And then "conclusive": conclusive of or as to what? The respondents say "conclusive that the cause of action on which the foreign proceedings were brought no longer exists." But the subsection does not say this: the words "in all proceedings founded on the same cause of action" merely describes the occasion on which the conclusiveness arises. There is nothing here—and, I add in passing, nothing in Part I of the Act—to indicate that the conclusiveness is to extend, irrespective of what the judgment decided, to the whole of the cause of action. Why should we give to the judgment a greater force than it receives by the law of the country where it is given? Certainly the law of Germany does not say that the cause of action does not exist.

In my opinion, therefore, an interpretation of both "judgment" and "conclusive" which would require courts in this country to examine the judgment, see what it decided, and hold it conclusive as a judgment and for what it adjudicates, is both open on the language and is entirely consistent with the common law. To quote another leading authority: "As to whatever it *meant* to decide, we must take it as conclusive." *Bernardi* v. *Motteux* (1781) 2 Doug.K.B. 575, 581 *per* Lord Mansfield C.J.

The appellants finally relied strongly on the wording of section 8 (3) of the Act of 1933. I agree with my noble and learned friend, Lord Simon

of Glaisdale, in the reasons he has given, why this subsection is of no assistance and shall not repeat them in words of my own.

In my opinion, if this case had arisen at any time between 1869 and 1933 there could be no doubt how it would have been decided. I see no reason why the Act of 1933 should be understood as intending to bring about a different result. The language of section 8 (1) does not so compel. The German judgment would be conclusive for what it decided and for nothing more. The plaintiffs' claim has not been decided on the merits, and they should be allowed to pursue it. This being my conclusion on the second point, it is not necessary to decide the first. I prefer to reserve my opinion upon whether subsection (1) of section 8 applies to defendants' judgments.

There remains finally the question of residual discretion, and I must say that the situation now existing is unfortunate. This House is called upon to decide this matter before it knows how the German proceedings will finally terminate. It is not in a position effectively or with knowledge to exercise such discretion as the courts ought to exercise. In my opinion, if a majority of your Lordships disagree with the legal position taken by the Court of Appeal, the appeal should be allowed. But I suggest that the present proceedings should be stayed, with liberty to apply after determination of the final appeal in Germany and that the matter then be brought afresh, if the plaintiffs so desire, before the master to decide whether they should be allowed to continue their action here. Obviously this House cannot now foresee all the contingencies. If the respondents' appeal in Germany is allowed by the Federal Supreme Court and the matter is restored to where it was when this case was before the Court of Appeal, then, if your Lordships take a different view of the law from the Court of Appeal, there would appear to be—ceteris paribus—a strong case for allowing the plaintiffs to continue with their action here. If, on the other hand, the respondents' appeal in Germany is dismissed—so that the plaintiffs in one way or another can proceed in Germany—then the conditions on which the plaintiffs should (if at all) be allowed to sue the defendants also in this country would require examination. I do not think that this House can at the present stage offer any useful guidance as to the manner in which that could be decided.

LORD DIPLOCK. My Lords, if the effect of the interpretation given by the majority of this House to section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, were confined to the United Kingdom, I should content myself with recording my respectful dissent and my agreement with the interpretation unanimously placed upon it by the Court of Appeal. But the Act is designed to facilitate the reciprocal enforcement of the judgments of foreign courts in the United Kingdom and of the judgments of United Kingdom courts in foreign states. It makes provision enabling and requiring English, Scots and Northern Irish courts to comply with obligations which the United Kingdom Government has assumed in international law towards the governments of those foreign states with which it has entered into conventions "for the recognition and enforcement of judgments in civil and commercial matters." So the consequences of your Lordships' decision on this matter will not be confined to the

municipal law of the United Kingdom. It may have repercussions in international law and and in the municipal law of those foreign states with which conventions have been made. This emboldens me to state briefly why I am unable to accept either of the constructions of section 8 (1) which commend themselves to those of your Lordships who consider that the interpretation placed on it by the Court of Appeal was wrong.

In a sentence the question that divides us is: "Did section 8 of the Act of 1933 alter the common law as it had been stated by the Court of Queen's Bench in 1869 in *Harris* v. *Quine*, L.R. 4 Q.B. 653?"

All three members of the Court of Appeal thought that it did. They reached this conclusion by looking at the actual words of the section. They considered that the meaning of those words was plain and unambiguous. For my part I find their reasoning convincing. I would not seek to improve upon the way in which it is put in the judgment of Scarman L.J. I am content to adopt it as my own. I would, however, supplement it with three brief comments.

First, I can see no warrant for confining the application of the section to judgments in favour of a plaintiff or counterclaimant. Since it applies only to "proceedings founded on the same cause of action" as that disposed of by the foreign judgment, such proceedings ex hypothesi must be brought by a party who was the plaintiff in the foreign action against a party who was the defendant in that action. The reference to reliance on the foreign judgment "by way of defence" in my view clearly indicates that the section does apply to foreign judgments in favour of defendants.

Secondly, if there had not been the reported, albeit isolated, case of *Harris* v. *Quine* which had been mentioned without adverse comment in the standard textbooks on English private international law, I venture to think that it never would have occurred to any English lawyer that the actual words of section 8 (1) were to be understood as drawing any distinction between, on the one hand, foreign judgments given in favour of a defendant on the ground that the plaintiff's cause of action was time-barred under the domestic law of the foreign court, and, on the other hand, all other foreign judgments given in favour of plaintiffs or defendants on any other ground. If it were possible to discern from its provisions taken as a whole that the Act was intended to apply only to foreign judgments given "on the merits"—a phrase which I find elusive as a term of art, but which I take it would exclude judgments given upon the ground of non-compliance with a procedural rule of the foreign court or upon some other ground which would be classified in English private international law as governed by the lex fori—this might justify construing the word "judgment" in the same restricted sense in section 8 (1). But it is clear from section 4 (1) (*a*) (iii) that, provided the defendant has had due notice of the proceedings, a foreign judgment by default obtained against him by the plaintiff is enforceable under Part I of the Act, notwithstanding that it has been given upon what is solely a procedural ground governed by the lex fori and is not a judgment which can be described as being "on the merits." So the distinction sought to be drawn is peculiar to judgments in favour of a defendant on the ground that the plaintiff's cause of action was time-barred under the domestic law of the foreign state, and must be derived as a matter of construction from the words of section 8 itself. For my

part, I am unable to discern any suggestion of that distinction in those words. A

Thirdly, the word "conclusive" is, in my view, used in the section in the same meaning as in the phrase "final and conclusive as between the parties thereto" which is used in section 1 (2) (*a*) as descriptive of foreign judgments to which Part I of the Act applies. This is incorporated by reference into section 8 (1) itself. So I would answer the question "Conclusive of what?" by saying that it is conclusive of that of which the B foreign judgment is conclusive in the country of the foreign court. Whatever else the foreign judgment does, its dispositive or operative part must embody a decision of the foreign court upon the ultimate question whether the plaintiff is entitled to the remedy he claimed that the court ought to grant him against the defendant as redress for the facts that he relied upon as constituting his cause of action. So, in a subsequent action brought in an English court by the same plaintiff against the same defendant founded C upon the same facts and claiming the same remedy the foreign judgment is at very least conclusive of the question whether or not the plaintiff is entitled to that remedy.

In the course of reaching its ultimate decision disposing of the plaintiff's claim to the remedy he seeks, the foreign court may have incidentally decided other matters of fact or law essential to the plaintiff's claim to be D entitled to the remedy or to the defendant's answer to that claim. Whether decisions of this kind will be embodied in the same document which contains the dispositive or operative part of the foreign judgment will depend upon the practice followed by the foreign court; and the conclusiveness attaching to such incidental decisions in subsequent litigation in the country of the foreign court between the same parties but not founded on the same cause of action, will depend upon the extent to which the foreign system E of law incorporates a principle similar to the English doctrine of issue estoppel. The English doctrine of issue estoppel, though it did not acquire that name until later, was well known in 1933. It had been brought into prominence in the recent case of *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155. It is based on public policy and section 8 (3) of the Act preserves it as respects foreign judgments, whether or not the system F of law of the foreign country incorporates a similar principle.

Section 8 (1), however, in contrast to section 8 (3), applies only to proceedings founded on the *same* cause of action as that for which the plaintiff claimed a remedy in the foreign action. If the judgment in the foreign court contains, as it must, the ultimate decision of the foreign court disposing of the plaintiff's claim to the remedy he seeks, the conclusiveness of this decision cannot, in my view, be rendered inconclusive G by any failure of the foreign court to reach decisions on incidental matters of fact or law which it considers unnecessary for the purpose of disposing of the plaintiff's claim to the remedy he sought—even though, if the same remedy had been sought in an action brought in England, the English court would have considered it necessary to decide those incidental matters.

The attention of the Court of Appeal had not been drawn to the report H of the Foreign Judgments (Reciprocal Enforcement) Committee which had been presented to Parliament in December 1932. To that report there was annexed a draft Bill of which the wording was almost identical with that

of the Act which received the Royal Assent in April 1933. Also annexed was a commentary and explanation of the draft Bill. It is apparent from the committee's comments on clause 8, which is reproduced verbatim by section 8 of the Act, that they did not consider that it made any alteration to the common law. The membership of the committee included experts in private international law who must have been aware of the decision in *Harris* v. *Quine*, L.R. 4 Q.B. 653; I would therefore accept the inference that the committee did not realise that the language that they had recommended for clause 8 would have the result of altering the common law as to the effect given by English courts to judgments of foreign courts in favour of defendants which were based solely on the ground that the plaintiff's remedy was time-barred under the domestic law of the foreign state. On the other hand it would, in my view, be quite unrealistic to suppose that the members of either House of Parliament who voted on the Bill gave any thought, either individually or collectively, to the decision in *Harris* v. *Quine* or to the effect of clause 8 upon it. The most that can be inferred is that those who took the trouble to read the small print on p. 64 of annex V to the report were not aware that it would alter the existing common law in any way.

I do not, however, understand that any of your Lordships go so far as to suggest that a court is entitled to put a strained construction on the words of section 8 in order to give them the effect the committee thought that they had, if this would involve departing from their plain and natural meaning. It is for the court and no one else to decide what words in a statute mean. What the committee thought they meant is, in itself, irrelevant. Oral evidence by members of the committee as to their opinion of what the section meant would plainly be inadmissible. It does not become admissible by being reduced to writing.

What is suggested is that recourse may be had to the report as an aid to construction in order to ascertain, first, what the existing law was understood to be upon the subject matter of the Act; and, secondly, what was the mischief for which Parliament intended to provide a remedy by the Act.

As regards the first of these purposes for which recourse may be had to the report, the Act deals with a technical subject matter—the treatment to be accorded by courts in the United Kingdom to judgments of foreign courts. The expressions used in it are terms of legal art which were in current use in English and Scots law at the time the Act was passed. In order to understand their meaning the court must inform itself as to what the existing law was upon this technical subject matter. In order to do this it may have recourse to decided cases, to legal textbooks or other writings of recognised authorities, among whom would rank the members of the committee. Their report contains a summary of the existing law, as they understood it. As such it is part of the material to which the court may have recourse for the purpose of ascertaining what was the existing law upon the subject matter of the Act. There is, however, no real doubt as to what it was.

As regards recourse to the report for the purpose of ascertaining the mischief for which Parliament intended to provide a remedy by the Act, this is based upon the so-called "mischief" rule which finds its origin in *Heydon's Case*, 3 Co.Rep. 7a decided under the Tudor monarchy in

1584. The rule was propounded by the judges in an age when statutes were drafted in a form very different from that which they assume today. Those who composed the Parliaments of those days were chary of creating exceptions to the common law; and, when they did so, thought it necessary to incorporate in the statute the reasons which justified the changes in the common law that the statute made. Statutes in the sixteenth century and for long thereafter in addition to the enacting words contained lengthy preambles reciting the particular mischief or defect in the common law that the enacting words were designed to remedy. So, when it was laid down, the "mischief" rule did not require the court to travel beyond the actual words of the statute itself to identify "the mischief and defect for which the common law did not provide," for this would have been stated in the preamble. It was a rule of construction of the actual words appearing in the statute and nothing else. In construing modern statutes which contain no preambles to serve as aids to the construction of enacting words the "mischief" rule must be used with caution to justify any reference to extraneous documents for this purpose. If the enacting words are plain and unambiguous in themselves there is no need to have recourse to any "mischief" rule. To speak of mischief and of remedy is to describe the obverse and the reverse of a single coin. The former is that part of the existing law that is changed by the plain words of the Act; the latter is the change that these words made in it.

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses of the Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.

This is not to say that where those words are not clear and unambiguous in themselves but are fairly susceptible of more than one meaning, the court, for the purpose of resolving—though not of inventing—an ambiguity, may not pay regard to authoritative statements that were matters of public knowledge at the time the Act was passed, as to what were regarded as deficiencies in that branch of the existing law with which the Act deals. Where such statements are made in official reports commissioned by government, laid before Parliament and published, they clearly fall within this category and may be used to resolve the ambiguity in favour of a meaning which will result in correcting those deficiencies in preference to some alternative meaning that will leave the deficiencies uncorrected. The justification of this use of such reports as an aid to the construction of the words used in the statute is that knowledge of their contents may be taken to be shared by those whose conduct the statute regulates and would influence their understanding of the meaning of ambiguous enacting words.

My Lords, I do not think that the actual words of section 8 of the

Act of 1933 are fairly susceptible of any other meaning than that ascribed to them by the Court of Appeal. So I see no need to look at the report of the committee; but much of the argument in this House has been devoted to a meticulous verbal analysis of everything that the committee said in it. For my part this recourse to the report for the purpose of ascertaining what was the "mischief" for which Parliament intended to provide a remedy by the Act has only served to confirm me in the view that section 8 should be construed as the Court of Appeal construed it.

The mischief was said by the authors of the report to be that foreign courts did not, in effect, recognise judgments of English courts as conclusive. The reason for this was the difficulty in convincing foreign courts that reciprocal treatment was accorded to their own judgments in the United Kingdom. The causes of the difficulty were said to be: (1) the lack of any provision in the English legal system for the direct enforcement of foreign judgments for sums of money by execution rather than by action; and (2) the dependence of the English recognition of foreign judgments upon unwritten rules of common law which foreign courts suspected of being indefinite and discretionary as compared with written law embodied in a code or statute.

These were the reasons why, in the committee's view (paragraph 10), the only manner of securing reciprocal treatment by foreign countries in the matter of the recognition and enforcement of British judgments was by

> "the conclusion of an international convention—containing reciprocal obligations for the recognition and enforcement of judgments which will be made binding as part of the municipal law of the foreign country *together with the statement of our own rules in statutory form*—. ..."

The conclusion that I would draw from this is that in the committee's view the Act would fail in its purpose of inducing foreign states to enter into such conventions unless, as well as amending the existing law by providing a method of obtaining direct execution of foreign judgments for money sums, it also embodied a comprehensive written statement of at least the minimum effect which courts in the United Kingdom were required to give to judgments of courts of foreign states with which reciprocal conventions had been concluded—such written statement to be in substitution for the written rules of the common law and to obviate the necessity of resorting to an examination of previous judicial decisions on this topic. That, after all, is what the lawyers of the three countries with whom informal negotiations had already been conducted, France, Germany and Belgium, understand as being the purpose of a code. Yet the construction which commends itself to the majority of your Lordships can only be arrived at by going beyond the actual wording of the Act and resorting to an examination of previous judicial decisions and specifically the decision in *Harris* v. *Quine*. To do this is to perpetuate one of the very mischiefs which, according to the committee, it was the purpose of the proposed Bill to remedy.

Annexed to the report were draft treaties with France, Germany and Belgium providing for the reciprocal enforcement and recognition of judgments of superior courts of the high contracting parties. Article 3 in each

of these treaties, like section 8 of the draft Bill, dealt with the recognition of judgments, as distinct from their direct enforcement by execution. The final paragraph of that article stated what was meant by the "recognition" of a judgment which the high contracting parties mutually undertook to grant to judgments of one another's superior courts. It was to the obligation to be assumed by the United Kingdom Government under this article that section 8 (1) of the Act was intended to give statutory effect.

The paragraph (annex IV (b), article 3, paragraph 2) was in the following terms:

> "The recognition of a judgment under paragraph (1) of this article means that such judgment shall be treated as conclusive as to the matter thereby adjudicated upon in any further action between the parties (judgment creditor and judgment debtor) and as to such matter shall constitute a defence in a further action between them in respect of the same cause of action."

There are differences of phraseology between this provision of the treaties and section 8 (1) of the Act. What is significant for my present purpose is that the treaty says that the judgment shall be treated as conclusive "*as to the matter thereby adjudicated upon*" whereas the words I have italicised are omitted from section 8 (1). These additional words may be ambiguous in themselves, but the committee (some of whose members are said to have negotiated the draft treaties with representatives of the foreign governments concerned) explained in a footnote to paragraph 4 in the body of the report what they meant by this phrase:

> "The words 'question adjudicated upon' refer to the actual decision (the operative parts of the judgment) as opposed to the grounds or reasoning upon which it may be based, in the course of which other points of law or fact may have been incidentally decided as preliminaries (necessary or otherwise) to the final conclusion."

While this on the one hand would appear to limit the "matter adjudicated upon" to the decision of the ultimate question dealt with by the dispositive or operative part of the judgment, viz. whether or not the plaintiff was entitled to the remedy that he claimed that the court ought to grant him against the defendant as redress for the facts that he relied upon as constituting his cause of action; it would, on the other hand, bind the United Kingdom government to treat the decision of that ultimate question as conclusive whatever might be the grounds or reasoning on which it was based.

In construing a treaty recourse may be had, in public international law, to the travaux préparatoires for the purpose of resolving any ambiguity in the treaty; and it would appear from the history of the negotiations contained in the body of the report that the report itself might be regarded as forming part of the travaux préparatoires. If this were so, recourse to the report would in my view clearly lead to the conclusion that the high contracting parties in using the phrase "matter adjudicated upon" had undertaken to treat as conclusive the dispositive or operative part of the judgment.

Where an Act of Parliament is passed to enable or to require United

Kingdom courts to give effect to international obligations assumed by Her Majesty's Government under a treaty, it is a well-established rule of construction that any ambiguity in the words of the Act should be resolved in favour of ascribing to them a meaning which would result in the performance of those international obligations—not in their breach. For this additional reason recourse to the report serves to confirm me in the view that section 8 should be construed as the Court of Appeal construed it.

LORD SIMON OF GLAISDALE. My Lords, Black-Clawson, an English company, became holders in due course of two bills of exchange accepted by the predecessor in title of Papierwerke but dishonoured by Papierwerke. The bills were drawn, negotiated and payable in England. Black-Clawson became their holders only shortly before action on them in England would have become time-barred by effluxion of six years from their acceptance. Papierwerke is a German company without any assets in England, its principal assets being in Germany; and, by the German law of limitation of actions, the time for suing on a bill of exchange is three years. Although it is a slight oversimplification, for the purpose of this appeal it can be stated that, according to the expert evidence, in German law effluxion of the period of limitation bars the remedy (as in England) without extinguishing the right (as it does in Scotland). Whether a German court should, in an action on the bills, apply the English limitation period of six years or the German limitation period of three years depends on the appropriate choice-of-law rule in German private international law: this is a question to which different answers have been returned at first instance by the District Court in Munich and on appeal by the Bavarian Court of Appeal, and which now awaits decision by the German Federal Supreme Court. In view of the doubt whether an action on the bills in Germany would be held to be time-barred, Black-Clawson, though starting such an action, tried to preserve a fall-back position in England. Before the effluxion of six years from the date of acceptance they applied ex parte in England for, and obtained, leave to issue a writ against Papierwerke and to serve it on them in Germany. Since Black-Clawson's German action was proceeding, they gave no notice to Papierwerke of the issue of the English writ. On November 30, 1972, the Munich District Court dismissed Black-Clawson's claim on the bills. The court held that, under German private international law, the relevant limitation period was the German one of three years, not the English one of six years, with the result that Black-Clawson's claim was time-barred. The judgment handed down was in three parts. The first (headed "Final Judgment") has in argument conveniently been called "the dispositive part." This stated in translation: "I. The suit is dismissed. II. The plaintiff shall bear the costs of the dispute. III. The judgment is provisionally enforceable." [Then followed provisions permitting the plaintiff to avert compulsory execution by providing security.] The second part of the judgment handed down (headed "Facts") was a statement of the facts of the case and the issues. The third part of the judgment handed down (headed "Grounds for the Decision") made it clear that the action was dismissed on the ground that it was time-barred under what was held to be the relevant German choice-of-law rule.

Though Black-Clawson appealed against this judgment to the Bavarian Court of Appeal, they now gave notice to Papierwerke of the issue of the English writ. Papierwerke countered by a summons to set aside the English writ and all proceedings in pursuance thereof. The master dismissed Papierwerke's summons to set the writ aside. Papierwerke appealed to Talbot J., who, on the authority of *Harris* v. *Quine*, L.R. 4 Q.B. 653, in the knowledge of the pending appeal to the Bavarian Court of Appeal, and in exercise of his discretion, dismissed Papierwerke's appeal.

In *Harris* v. *Quine* the plaintiffs were attorneys in the Isle of Man and were retained by the defendant to conduct a suit in the courts of the Isle of Man. The plaintiffs subsequently sued for their fees in the Isle of Man; but the Manx court held that their claim was time-barred by the Manx statute of limitations, under which the relevant period was three years. The plaintiffs then sued in England within the six-year English limitation period. It was held by a powerful court that, as the Manx statute-barred the remedy only and did not extinguish the debt, the judgment of the Manx court was no bar to the English proceedings. Cockburn C.J. said, at p. 657:

> ". . . there is no judgment of the Manx court barring the present action, as there was no plea going to the merits, . . . and the issue which the Manx court decided in favour of the defendant is not the same issue as is raised in the present action."

Blackburn J. said, at p. 658:

> ". . . all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover. If the plaintiffs could have shown, as was attempted in *Huber* v. *Steiner*, 2 Bing.N.C. 202, that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter."

Lush J. said, at p. 658:

> "Had the Manx statute of limitations . . . extinguished the right after the limited time and not merely barred the remedy, there would have been good ground for defence in this court. But the Manx law is like our statute of limitations, and bars the remedy only; and all that was decided in the Manx court was, that the action could not be maintained there."

Hayes J. concurred. The decision has been cited in successive editions of *Dicey, The Conflict of Laws*, as authority for the words "on the merits" italicised by me in the proposition that:

> "A foreign judgment in personam . . . is a good defence to an action in England for the same matter when either—(1) the judgment was in favour of the defendant and was final and conclusive *on the merits*; or . . ."

(*Dicey and Morris, The Conflict of Laws*, 9th ed. (1973), rule 194, p. 1058; cf. 1st ed. (1896), rule 100, p. 422.) Such was the decision which Talbot J. followed and the rule which he applied. He held that the decision of the Munich District Court was not final and conclusive "on the merits"; it merely decided, like the judgment of the Isle of Man court in *Harris* v.

Quine, L.R. 4 Q.B. 653, that the plaintiff's remedy was time-barred in the foreign court.

Papierwerke appealed to the English Court of Appeal. In addition to argument on the proper exercise of the discretion to allow the English writ to stand, which they had urged before the master and Talbot J., Papierwerke put forward a new point to the Court of Appeal. This was based on section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. It was argued on behalf of Papierwerke that this subsection had abrogated the decision in *Harris* v. *Quine*. The Court of Appeal [1974] Q.B. 660 allowed the appeal. So far as discretion was concerned Lord Denning M.R. (p. 673F–G) doubted whether it would be a case for leave to serve a writ out of the jurisdiction. Megaw L.J. said, p. 673:

> "On the arguments presented before Master Bickford-Smith and Talbot J., their decisions were in my opinion right, including their exercise of the discretion under R.S.C., Ord. 11, r. 1."

Scarman L.J. said, p. 679:

> "If the judge was correct in law in holding that the German judgment was not 'res judicata,' I do not think that his exercise of discretion can be successfully challenged in this court."

But the Court of Appeal was unanimous in holding that section 8 (1) of the Act of 1933 has modified the rule in *Harris* v. *Quine*, and had rendered the judgment of the Munich District Court conclusive against any cause of action on the bills by Black-Clawson in this country.

Shortly after the English Court of Appeal had given judgment, the Bavarian Court of Appeal gave their judgment. They allowed Black-Clawson's appeal, holding that the limitation period according to German private international law was the English period of six years not the German period of three years. The judgment of the Bavarian Court of Appeal is under appeal to the German Federal Supreme Court. Black-Clawson have appealed to your Lordships against the judgment of the English Court of Appeal, in order to safeguard themselves in case the Federal Supreme Court reinstates the judgment of the Munich District Court.

The appeal to your Lordships raises two main issues: first, what is the proper interpretation to be given to section 8 (1) of the Act of 1933, in particular in relation to *Harris* v. *Quine*; and, secondly, how far the discretion exercised by Talbot J. can be reviewed in an appellate tribunal.

I confess, my Lords, that when I first read section 8 of the Act of 1933 I was under an immediate and powerful impression that the Court of Appeal must be right. It seemed obvious that subsection (1) was dealing with cause of action estoppel and subsection (3) with issue estoppel. If so, the judgment of the Munich District Court did not merely determine an issue between the parties relating to the operation of the German law of limitation of action; it dismissed Black-Clawson's action founded on the bills; and such judgment would have to be recognised in any court in the United Kingdom as conclusive in all proceedings founded on the same cause of action, i.e., liability arising from acceptance of the bills.

But, though the foregoing was my first and strong impression, I soon realised that I was looking at section 8 with 1974 eyes and interpreting it in

1974 terms; and that in so doing I was falling into fundamental error. Contemporanea expositio est fortissima in lege. The concepts of cause of action and issue estoppel were not developed by 1933 (there is, for example, no reflection of the distinction in the notes to *Duchess of Kingston's Case* (1776) 20 St.Tr. 355 in the authoritatively edited 13th edition (1929) of *Smith's Leading Cases,* vol. 2, pp. 644 et seq.), and could not possibly be what Parliament and the draftsman then had in mind. My initial response had been scarcely less anachronistic than if I had attempted to interpret Magna Carta by reference to *Rookes* v. *Barnard* [1964] A.C. 1129.

The matter was, in my judgment, put beyond doubt when your Lordships looked, de bene esse, at the report of the Greer Committee on Reciprocal Enforcement of Foreign Judgments (1932) (Cmd. 4213). This was the report of a committee of lawyers (practising, official and academic) of high distinction and of great expertise in private international law. Its terms of reference were:

> "To consider (1) what provisions should be included in conventions made with foreign countries for the mutual enforcement of judgments on the basis of reciprocity, and (2) what legislation is necessary or desirable for the purpose of enabling such conventions to be made and to become effective, or for the purpose of securing reciprocal treatment from foreign countries."

The report discussed the prevailing law and the various problems which stood in the way of reciprocal enforcement of judgments. It annexed conventions which had been officially negotiated in draft with three foreign countries (Belgium, France and Germany), and which could be carried into effect if appropriate legislation were enacted in this country. It drafted and annexed (annex 1) a suitable draft Bill, clause 8 of which corresponds exactly with section 8 of the Act of 1933. Annex V contained a commentary on the draft Bill. Paragraph 13 of annex V (p. 64) reads:

> "Clause 8 contains the provisions of the Bill with regard to the recognition of foreign judgments as final and conclusive between the parties *as regards the question therein adjudicated upon. It is entirely in accordance with the position at common law* (as explained in paragraph 4 of the report), and clause 8 (3) saves the existing common law rules in any cases where the rule laid down by the Act may be narrower in operation than the common law." (My italics.)

Annex IV (b) was a draft convention with Germany. Article 3 dealt with reciprocal recognition of judgments. Paragraph 2 (p. 46) reads:

> "The recognition of a judgment under paragraph (1) of this article means that such judgment shall be treated as *conclusive as to the matter thereby adjudicated upon* in any further action between the parties (judgment creditor and judgment debtor) and as to such matter shall constitute a defence in a further action between them in respect of the same cause of action." (My italics.)

There was similar provision in the draft conventions with France (p. 54) and Belgium (p. 38).

If this material and that cited by my noble and learned friends is available to a court of construction, it is plain beyond doubt (if there could have been any doubt) that Parliament (in so far as it legislated in the light of the report) did not have in legislative contemplation the modern concepts of issue and cause of action estoppel; it also shows that Parliament did not mean to abrogate the rule in *Harris* v. *Quine*, L.R. 4 Q.B. 653. The Court of Appeal apparently was not asked to look at the report. The first questions which arise in this appeal are therefore whether your Lordships, as a court of statutory construction, are entitled to examine the Greer report, and, if so, for what purpose or purposes: the answers to these questions should indicate how much of the material which has been cited from it by my noble and learned friends and myself is available as an aid to construction. This raises some fundamental issues relating to statutory construction.

Courts of construction interpret statutes with a view to ascertaining the intention of Parliament expressed therein. But, as in interpretation of all written material, what is to be ascertained is the meaning of what Parliament has said and not what Parliament meant to say. This is not a self-evident juristic truth. It could be urged that in a parliamentary democracy, where the purpose of the legislature is to permit its electorate to influence the decisions which affect themselves, what should be given effect to is what Parliament meant to say; since it is to be presumed that it is this that truly reflects the desired influence of the citizens on the decision-making which affects themselves. To this, however, there are three answers. First, in interpretation of all written material the law in this country has set great pragmatic store on limiting the material available for forensic scrutiny: society generally thereby enjoys the advantages of economy in forensic manpower and time. By concentrating on the meaning of what has been said, to the exclusion of what was meant to be said, the material for scrutiny is greatly reduced. Specifically, experience in the United States has tended to show that scrutiny of the legislative proceedings is apt to be a disappointingly misleading and wasteful guide to the legislative intention. Secondly, interpretation cannot be concerned wholly with what the promulgator of a written instrument meant by it: interpretation must also be frequently concerned with the reasonable expectation of those who may be affected thereby. This is most clearly to be seen in the interpretation of a contract: it has long been accepted that the concern of the court is not so much with the subject-matter of consent between the parties (which may, indeed, exceptionally, be entirely absent) as with the reasonable expectation of the promisee. So, too, in statutory construction, the court is not solely concerned with what the citizens, through their parliamentary representatives, meant to say; it is also concerned with the reasonable expectation of those citizens who are affected by the statute, and whose understanding of the meaning of what was said is therefore relevant. The sovereignty of Parliament runs in tandem with the rule of objective law. Thirdly, if the draftsman uses the tools of his trade correctly, the meaning of his words should actually represent what their promulgator meant to say. And the court of construction, retracing the same path in the opposite direction, should arrive, via the meaning of what was said, at what the promulgator meant to say.

There are, however, two riders to be noted in relation to this last consideration. First, draftsmen's offices, government departments, houses of parliament and courts of justice are all manned by fallible human beings; with the result that the court's exposition of the meaning of what Parliament has said is inherently liable to differ from what Parliament meant to say. The object of the parliamentary and forensic techniques should be to minimise such liability to error; so that artificial rules which stand unnecessarily in the way (i.e., which cannot be used as a code of communication) should be eliminated. Secondly, most words in the English language have a number of shades of meaning. Even the bright isolating rays of the draftsman's technical skills—his juxtapositions and differentiations—are rarely sufficient in themselves to pick out, without any possibility of mistake by a court of construction, the exact shade of meaning intended, to the exclusion of a penumbra of other possible meanings. The draftsman therefore needs the full co-operation of the court of construction: they must be tuned in on the same wavelength. In order to understand the meaning of the words which the draftsman has used to convey what Parliament meant to say, the court must so far retrace the path of the draftsman as actually to put itself in his position and that of Parliament. The expositio must be both contemporanea and eodem loco. All this is merely the counterpart of what my noble and learned friend, Lord Wilberforce, said in *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, 1383H–1384A, in relation to the interpretation of another class of written material:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."

I can see no reason why a court of construction of a statute should limit itself in ascertaining the matrix of facts more than a court of construction of any other written material. A public report to Parliament is an important part of the matrix of a statute founded on it. Where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in darkness or half-light. I conclude therefore that such a report should be available to the court of construction, so that the latter can put itself in the shoes of the draftsman and place itself on the parliamentary benches—in much the same way as a court of construction puts itself (as the saying goes) in the armchair of a testator. The object is the same in each case—namely, to ascertain the meaning of the words used, that meaning only being ascertainable if the court is in possession of the knowledge possessed by the promulgator of the instrument.

Halsbury's Laws of England, 3rd ed., vol. 36 (1961), p. 411, para. 622, states:

> "Reference may not be made for the purpose of ascertaining the meaning of a statute to the recommendations contained in the report of a Royal Commission or of a departmental committee or in a White Paper which shortly preceded the statute under consideration because it does not follow that such recommendations were accepted by the

> legislature. On the other hand, reports of commissions preceding the enactment of a statute may be considered as showing the facts which must be assumed to have been within the contemplation of the legislature when the statute was passed."

As regards the first sentence of this passage, I find unconvincing the reason given for non-reference; I should have thought that, in general, recourse to the statute itself will make it immediately apparent whether or not the recommendation has been accepted by the legislature. I would wish to leave open for consideration in a later case where the point is crucial whether this statement is correct.

As regards the second sentence, the critical questions in the instant case are whether such a report (here the Greer report) may be looked at in order to ascertain, first, what was the "mischief" which the provision falling for construction was designed to remedy, secondly, what was believed by Parliament to be the pre-existing law, and, thirdly, where a draft Bill is annexed to the report in the same terms as the statute falling for construction, the opinion expressed by the committee as to the effect of its provisions.

The first question is, then, whether the Greer report can be looked at in order to ascertain what was the "mischief" which Parliament was seeking to remedy. "Mischief" is an old, technical expression; but it reflects a firmly established and salutary rule of statutory construction. It is rare indeed that a statute can be properly interpreted without knowing what was the legislative objective. It would be trespassing on your Lordships' patience were I to repeat what, in collaboration with my noble and learned friend, Lord Diplock, I said about this matter in *Maunsell* v. *Olins* [1975] A.C. 373, 393–395. At the very least, ascertainment of the statutory objective can immediately eliminate many of the possible meanings that the language of the Act might bear; and, if an ambiguity still remains, consideration of the statutory objective is one of the means of resolving it.

The statutory objective is primarily to be collected from the provisions of the statute itself. In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity—it is the plainest of all the guides to the general objectives of a statute. But it will not always help as to particular provisions. As to the statutory objective of these, a report leading to the Act is likely to be the most potent aid; and, in my judgment, it would be mere obscurantism not to avail oneself of it. There is, indeed, clear and high authority that it is available for this purpose.

In *River Wear Commissioners* v. *Adamson* (1877) 2 App.Cas. 743, 763, Lord Blackburn said:

> "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."

In *Eastman Photographic Materials Company Ltd.* v. *Comptroller-General*

of Patents, Designs, and Trade Marks [1898] A.C. 571 the Earl of Halsbury L.C. cited this passage from Lord Blackburn's speech specifically as authority for looking at the report of a commission in the light of which Parliament had enacted the statute which fell for construction in the *Eastman* case. Lord Halsbury said, at p. 573:

> ". . . I think it desirable, . . . to say something as to what sources of construction we are entitled to appeal to in order to construe a statute. Among the things which have passed into canons of construction recorded in *Heydon's Case*, 3 Co.Rep. 7a, we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy."

Lord Halsbury then, at p. 574, cited at length from the report of the commission dealing with the law pre-existing the Act which fell for construction and with its defects; and added, at p. 575:

> "I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."

Lord Halsbury also cited Turner L.J. in *Hawkins* v. *Gathercole* (1855) 6 De G.M. & G. 1, 21 as further authority. I am therefore of opinion that the Greer report is available to your Lordships in construing the 1933 Act, by way of helping to show what facts were within the knowledge of Parliament and what was the defect in the pre-existing law which called for parliamentary remedy.

Ascertainment of a defect in the law presupposes ascertainment of the law which contains the defect. But, for purposes of statutory construction, is it the pre-existing law, as correctly determined, which is relevant, or what that law was understood to be?

There may be a communis error as to the law. This is a source of law until it is corrected (see *Broom's Legal Maxims*, 10th ed. (1939), p. 86). Indeed, a legal error may well be held to be too inveterate for correction (see, e.g., *Ross Smith* (*orse. Radford*) v. *Ross Smith* [1963] A.C. 280). Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament's intention, it must follow that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be. On reflection, I do not think that my hesitation on this point in *Povey* v. *Povey* [1972] Fam. 40, 52C, was justified. See also *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402.

There is another canon of construction, which I shall have to cite later in greater detail, to which, for the same foregoing reasons, it is Parliament's understanding of the law which is relevant, rather than the law in an abstract juridical correctitude. This is the canon whereby the courts will presume that Parliament would use clear words if the intention were to abrogate a long-standing rule of law: though, no doubt, courts of construction will be readier to apply this presumption if satisfied that the rule in question is juridically well founded and if its framers carry weight in the

law; whereas, on the other hand, the presumption will be weaker if the rule has been authoritatively questioned.

My Lords, I have spoken of " Parliament's " understanding of the law. Of course, a settlor, a testator, the parties to a contract, or individual members of Parliament, may not know the relevant law. It is the draftsman of the instrument in question who knows the law (or is presumed to do so); and his knowledge, so far as forensic interpretation is concerned, is irrebuttably imputed to the person for whom he is drafting. The draftsman knows the legal effect that the person for whom he is drafting wants to bring about; and he will draft accordingly, against his understanding of the prevailing law, and using as a code of communication to the courts of construction various canons of construction. Few testators will have heard of the rule in *Gundry* v. *Pinniger* (1851) 14 Beav. 94 (1852) 1 De G.M. & G. 502. But few draftsmen of wills will be ignorant of the rule; so that when the words " next-of-kin " appear in a will there is a strong though rebuttable presumption that the draftsman used them to denote those who would be the testator's next-of-kin *on his death,* and an irrebuttable presumption that the draftsman used them in order to produce the legal effect desired by the testator. Similarly, many M.P.s before 1969 did not know the legal rule that when the word " child " was used in a legal instrument, it was presumptively taken to mean a legitimate child; but the draftsman of a statute did know this; and a court of construction will conclude that his usage was to carry into legal effect what Parliament desired. So again, few M.P.s in 1933 will have known of the rule in *Harris* v. *Quine,* L.R. 4 Q.B. 653; but few, if any, members of the Greer committee, which drafted clause 8 of the draft Bill, will have been ignorant of it. I have pointed out that this rule had been cited in successive editions of *Dicey* without question. It had been followed in the Commonwealth and in the United States. No one had suggested that it was wrongly decided. It made good sense: any other rule would make the foreign judgment conclusive as to more than it actually decided. The legal knowledge of the Greer committee as draftsmen of the Act of 1933 must be ascribed to Parliament in its enactment.

Quite apart from the irrebuttable ascription to Parliament of a draftsman's knowledge of the law in relation to which Parliament is legislating, in my view a report like that of the Greer committee can also be looked at independently, like any other work of legal authority, in order to ascertain what was conceived to be the prevailing state of the law.

The most difficult question in this appeal, to my mind, arises out of the modern practice of annexation to a report to Parliament of a draft Bill with a commentary on it. Is such a commentary available to a court construing the ensuing statute?

My Lords, before turning to this question, may I venture to summarise what aids to construction your Lordships obtain from the Greer report irrespective of its commentary on the draft Bill?: (1) *Harris* v. *Quine,* although not cited by name, was part of the antecedent common law; (2) negatively, the rule in *Harris* v. *Quine* was not regarded as a defect requiring remedy; (3) positively, the conventions negotiated in draft, and for which the statute was required for legal implementation, reflected, and

thereby endorsed, the rule in *Harris* v. *Quine*; (4) a provision such as the subsequent section 8 (1) of the Act of 1933 might well be restrictive of the common law; if therefore such a provision were enacted as part of the codification of the common law it would require a saving clause (such as the subsequent section 8 (3)): although this was specifically stated in the commentary, it sufficiently appears from the body of the report.

The foregoing, however, although going far to showing that section 8 (1) was not meant to abrogate the rule in *Harris* v. *Quine*, is not absolutely conclusive when it comes to interpretation. It unfortunately happens, occasionally, that a statutory provision has an unlooked-for effect. Such a situation is sometimes described in the phrase, "Whatever Parliament was aiming at, it hit such-and-such a target fair and square." If the words of section 8 can only be read as abrogating the rule in *Harris* v. *Quine*, L.R. 4 Q.B. 653, why then it must be so, however little that was the legislative objective. After all, the first and most elementary (and, I would add, salutary) rule of construction is that the words of a statute must be read in the most natural sense which they bear in their context. But I do not myself so read section 8. There is, in fact, ambiguity inherent in it; it lies in the word "judgment." This word in its context is capable of meaning either the "dispositive" part of the court's pronouncement only, or the whole of such pronouncement including the grounds of judgment. If "judgment" in section 8 (1) refers only to the "dispositive" part of the pronouncement of the court, I think that it would inevitably follow that *Harris* v. *Quine* has been abrogated: an action on the bills has been dismissed, and that is an end of it. But if "judgment" embraces also the grounds of the decision, all that is "conclusive between the parties" is what the whole "judgment," including its grounds, has decided. In the instant case that was that Black-Clawson's claim was time-barred in Germany. If, as I think, "judgment" is so ambiguous, the ambiguity must be resolved. There are, in fact, three canons of construction available here for its resolution.

The first is that clear and unmistakable words will be required for the abrogation of a long-standing rule of law: see *Maxwell on Interpretation of Statutes*, 12th ed. (1969), p. 116.

> "It is a well established principle of construction that a statute is not to be taken as affecting fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion" (Devlin J. in *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648, 661).

The rule in *Harris* v. *Quine* was just such a long-standing rule of law as is appropriate for the application of this canon: and any ambiguity must be resolved in such a way that the rule in *Harris* v. *Quine* is not abrogated.

Secondly, consideration of the legislative objective is available and required, not only to place a court of construction in the shoes of the draftsman, but also to resolve any ambiguity: see *Maunsell* v. *Olins* [1975] A.C. 373, 395A–D. It was no part of the legislative objective to abrogate the rule in *Harris* v. *Quine*; so that the construction which does not have that effect should be preferred.

Thirdly, there is a presumption against a change of terminological usage. " . . . it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament " (Cleasby B. in *Courtauld* v. *Legh* (1869) L.R. 4 Exch. 126, 130). A fortiori when the words occur in the same section of an Act. " Judgment " in subsection (3) can only be read in its wider sense, as including the grounds of decision; it cannot be limited to the " dispositive " part of the judgment (" any matter of law or fact decided therein "). There is therefore a presumption that " judgment " in subsection (1) is also not so limited.

For all these reasons this does not seem to me to be a case where it can be said that, whatever Parliament was trying to do, it succeeded, however inadvertently, in abrogating the rule in *Harris* v. *Quine*.

It remains to consider, in this context, section 8 (3). I hope that I have sufficiently indicated that the report in itself, without necessity of recourse to the commentary, indicates the objective of this subsection—namely, that it was inserted as a saving provision and by way of reassurance. I should, I think, in any event, have surmised from the use of the common drafting formula, " Nothing in this section shall be taken to prevent . . . ", that the subsection was inserted ex abundanti cautela, and was not intended as a substantive provision to deal with issue estoppel in contradistinction to cause of action estoppel dealt with in section 8 (1).

My conclusion is therefore that, regardless of the draft Bill and the commentary thereon, the Greer report is available as an aid to construction in such a way as to make it clear that it was not the intention of Parliament in section 8 (1) to abrogate the rule in *Harris* v. *Quine*, L.R. 4 Q.B. 653. It is, thus, strictly, unnecessary to decide whether the commentary on the draft Bill is also available as an aid to construction. But the technique of a draft Bill with commentary is so common nowadays in reports to Parliament as to excuse, I hope, some expatiation on the matter. The argument against recourse to such a commentary is that if what Parliament or parliamentarians (or, indeed, any promulgators of a written instrument) think is the meaning of what is said is irrelevant, so must be the opinion of any draftsman, including the draftsman of a Bill annexed to a report to Parliament. But I confess that I find this less than conclusive. In essence, drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves. If it comes about that the declared meaning of a statutory provision is not what Parliament meant, the system is at fault. Sometimes the fault is merely a reflection of human fallibility. But where the fault arises from a technical refusal to consider relevant material, such refusal requires justification. The commentary on a draft Bill in a report to Parliament is not merely an expression of opinion—even if it were only that, it would be an expression of expert opinion, and I can see no more reason for excluding it than any other relevant matter of expert opinion. But actually it is more: that experts publicly expressed the view that a certain draft would have such-and-such an effect is one of the facts within the shared knowledge of Parliament and the citizenry. To refuse to consider such a commentary, when Parliament has legislated on the basis and faith of it, is for the interpreter to fail to put himself in the real position of the

promulgator of the instrument before essaying its interpretation. It is refusing to follow what is perhaps the most important clue to meaning. It is perversely neglecting the reality, while chasing shadows. As Aneurin Bevan said: "Why read the crystal when you can read the book?" Here the book is already open: it is merely a matter of reading on. Certainly, a court of construction cannot be precluded from saying that what the committee thought as to the meaning of its draft was incorrect. But that is one thing: to dismiss, out of hand and for all purposes, an authoritative opinion in the light of which Parliament has legislated is quite another.

So, as at present advised, I think that your Lordships would have been entitled, if necessary, to consider the commentary of the Greer committee on the draft Bill.

The only other matter that I need add in this part of the case is that I agree with those of my noble and learned friends who hold that section 8 is not limited to plaintiffs' judgments.

In my view, therefore, Talbot J. was correct in following *Harris* v. *Quine*, and in holding that he had a discretion whether to allow the writ to stand. After he had given judgment Black-Clawson's appeal from the decision of the Munich District Court to the Bavarian Court of Appeal was heard and determined. It was argued that this was a new factor, showing a commitment to the proceedings in Germany which would make it inequitable to allow a fall-back position in England. But Talbot J. exercised his discretion in the knowledge that such an appeal was pending; so it is no new factor permitting an appellate tribunal to substitute its own exercise of discretion for that of the judge in chambers. Unless the discretion has been exercised in legal or factual error, an appellate court should not other than exceptionally interfere with the judge's discretion unless it is seen on other grounds that his decision might well result in injustice being done: *Evans* v. *Bartlam* [1937] A.C. 473; *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, 138; *Blunt* v. *Blunt* [1943] A.C. 517, 526–527; *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691, 728. I respectfully agree with Megaw and Scarman L.JJ. that there are no grounds in the instant case for interfering with the exercise of discretion by the judge in chambers. I would therefore allow the appeal.

On the other hand, I cannot accede to the contention on behalf of Black-Clawson that they should be at liberty to pursue their remedy in England even if the Federal Supreme Court should decide in their favour. I therefore agree with the order proposed by my noble and learned friends, Lord Wilberforce and Viscount Dilhorne.

Appeal allowed.

Solicitors: *Slaughter & May; Herbert Smith & Co.*

F. C.

TAB 4

Hydro-Québec *Appellant*

v.

Modestos Glykis and Eleftheria Theodossiou Glykis *Respondents*

Hydro-Québec *Appelante*

c.

Modestos Glykis et Eleftheria Theodossiou Glykis *Intimés*

2004 SCC 60 (CanLII)

INDEXED AS: GLYKIS *v.* HYDRO-QUÉBEC

Neutral citation: 2004 SCC 60.

File No.: 29588.

2004: April 13; 2004: October 1.

Present: McLachlin C.J. and Bastarache, Binnie, Arbour,* LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Public services — Supply of electricity — Interruption of service — Customer refusing to pay bill for electricity supplied to his rental property — Hydro-Québec ceasing to deliver electricity to customer's principal residence — Whether Hydro-Québec may interrupt supply of electricity to service point other than one in respect of which bill unpaid — Bylaw No. 411 establishing the conditions governing the supply of electricity, (1987) 119 G.O. II, 1233, ss. 3 "customer", "delivery point", 99.

After a customer refused to pay an amount he owed for electricity services supplied to a rental property he owned, Hydro-Québec, after serving notice on him, interrupted the supply of electricity to his residence even though the account for that delivery point was not in arrears. The customer and his wife brought an action against Hydro-Québec, alleging that they had sustained damage as a result of the interruption of service. The Superior Court dismissed the action, holding that Hydro-Québec has the right to interrupt the supply of electricity to a service point other than the one in respect of which the bill is unpaid. The majority of the Court of Appeal set aside the judgment.

Held (LeBel and Fish JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Bastarache, Binnie and Deschamps JJ.: Regulatory provisions must be interpreted by following the approach to statutory

* Arbour J. took no part in the judgment.

RÉPERTORIÉ : GLYKIS *c.* HYDRO-QUÉBEC

Référence neutre : 2004 CSC 60.

N° du greffe : 29588.

2004 : 13 avril; 2004 : 1er octobre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, Arbour*, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Services publics — Fourniture d'électricité — Interruption de service — Client refusant de payer une facture pour l'électricité fournie à son immeuble locatif — Hydro-Québec cessant de livrer l'électricité à la résidence principale du client — Hydro-Québec peut-elle interrompre la fourniture d'électricité à un point de service autre que celui pour lequel un compte est en souffrance? — Règlement n° 411 établissant les conditions de fourniture de l'électricité, (1987) 119 G.O. II, 1918, art. 3 « client », « point de livraison », 99.

À la suite du refus d'un client de payer la somme qu'il doit pour des services d'électricité fournis à un immeuble locatif dont il est propriétaire, Hydro-Québec, après avis, interrompt la fourniture d'électricité à sa résidence même si aucun arrérage n'est dû pour ce point de livraison. Le client et son épouse intentent une action contre Hydro-Québec alléguant avoir subi des dommages en raison de l'interruption de service. La Cour supérieure rejette l'action, concluant qu'Hydro-Québec a le droit d'interrompre la fourniture d'électricité à un point de service autre que celui pour lequel le compte est en souffrance. La Cour d'appel, à la majorité, infirme ce jugement.

Arrêt (les juges LeBel et Fish sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Bastarache, Binnie et Deschamps : L'interprétation de textes réglementaires doit, avec les adaptations nécessaires, se faire

* La juge Arbour n'a pas pris part au jugement.

interpretation, with necessary adaptations. Thus, the relevant provision must be read in its entire context, taking into consideration the ordinary and grammatical sense of the words, together with the scheme and object of the statute and the intention of the legislature. In the instant case, s. 99(1) of *Bylaw No. 411 establishing the conditions governing the supply of electricity* provided the basis for the authority to interrupt service where "the customer fail[ed] to pay his bill on time". Since a customer, as defined in the bylaw, may have more than one contract, since each contract corresponds to a separate delivery point, and since Hydro-Québec may interrupt service when a customer has not paid his or her bill, the ordinary meaning of the words leads to the conclusion that s. 99(1) allows power to be interrupted at any delivery point in respect of which the defaulting customer holds a contract. Section 99 establishes a relationship between the customer and Hydro-Québec, rather than between a delivery point and the service provider. The right to interrupt service at any delivery point is consistent with other provisions of the bylaw and reflects the legislature's intention to give Hydro-Québec a means to limit overdue amounts by putting pressure on defaulting customers. The legislative history of Hydro-Québec's constituent legislation confirms this interpretation. Furthermore, since the service provider does not choose its customers, the possible interruption of service is not an exorbitant or draconian measure, as it is preceded by a warning and affects only the defaulting customer. Nor can the rule limiting the exception for nonperformance of obligations to correlative obligations (art. 1591 C.C.Q.) be an obstacle to the power of interruption exercised in the case at bar. Interpreted in light of arts. 1590 and 300 C.C.Q., the customer's correlative obligation to Hydro-Québec includes all contracts between them. Finally, this power to interrupt service does not confer a new right, as it dates from the last century and is very similar to powers conferred by law on other public utilities.

Per LeBel and Fish JJ. (dissenting): Since the content of a contract between Hydro-Québec and a customer is determined largely by statutes and regulations, the discretionary power to interrupt the supply of electricity at all of a customer's service points if the customer has failed to pay a bill relating to one of his or her contracts must be expressly granted by the legislature. However, it can be seen from s. 99 of *Bylaw No. 411 establishing the conditions governing the supply of electricity* that the contractual relationship between Hydro-Québec and the consumer is founded on a contract. This regulatory scheme based on the concept that contracts are linked to individual service points defines the scope of Hydro-Québec's power to act. It allows Hydro-Québec to manage contracts, but not to interfere in other contractual

selon la méthode d'interprétation de textes législatifs. Ainsi, la disposition visée doit être lue dans son contexte global, en prenant en considération le sens ordinaire et grammatical des mots, ainsi que l'esprit et l'objet de la loi et l'intention du législateur. En l'espèce, l'art. 99, par. 1° du *Règlement n° 411 établissant les conditions de fourniture de l'électricité* constitue le fondement du pouvoir d'interruption de service lorsque le « client ne paie pas sa facture à échéance ». Puisqu'un client, tel que défini au règlement, peut avoir plusieurs abonnements, que chaque abonnement correspond à un point de livraison distinct, et qu'Hydro-Québec peut interrompre le service lorsque le client ne paie pas sa facture, le sens ordinaire des mots amène à conclure que l'art. 99, par. 1° permet l'interruption à n'importe quel point de livraison pour lequel le client défaillant est titulaire d'un abonnement. L'article 99 établit une relation entre le client et Hydro-Québec, et non entre un point de livraison et le fournisseur de service. Le droit d'interrompre le service à n'importe quel point de livraison est compatible avec d'autres dispositions du règlement et reflète l'intention du législateur de doter Hydro-Québec d'un moyen de limiter les sommes en souffrance tout en faisant pression sur les clients défaillants. L'historique législatif de la loi constitutive d'Hydro-Québec confirme d'ailleurs cette interprétation. De plus, comme le fournisseur de service ne choisit pas ses clients, l'interruption éventuelle du service n'est pas une mesure exorbitante ou draconienne puisqu'elle est précédée d'un avis et que celle-ci ne touche que le client défaillant. Par ailleurs, la règle limitant aux obligations corrélatives le droit d'invoquer l'exception d'inexécution des obligations (art. 1591 C.c.Q.) ne saurait faire obstacle au pouvoir d'interruption exercé en l'espèce. Interprétée à la lumière des art. 1590 et 300 C.c.Q., l'obligation corrélative du client envers Hydro-Québec inclut tous les abonnements dont il est titulaire. Enfin, ce pouvoir d'interruption ne confère aucun droit inédit puisqu'il date du siècle dernier et est tout à fait semblable à celui conféré par la loi à d'autres fournisseurs de services publics.

Les juges LeBel et Fish (dissidents) : Puisque la législation et la réglementation déterminent largement le contenu du contrat entre Hydro-Québec et son client, le pouvoir discrétionnaire d'interrompre la fourniture d'électricité à tous les points de service d'un client au cas de défaut de paiement à l'égard de l'un de ses abonnements doit être expressément accordé par le législateur. Or, il ressort de l'art. 99 du *Règlement n° 411 établissant les conditions de fourniture de l'électricité* que la relation contractuelle entre Hydro-Québec et le consommateur est établie sur la base d'un abonnement. Cette structure réglementaire fondée sur un concept d'abonnement rattaché à des points de service distincts délimite la portée du pouvoir d'intervention d'Hydro-Québec. Elle permet de gérer les abonnements, mais non de s'immiscer dans

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relationships. This interpretation nevertheless does not deprive Hydro-Québec of the right to recover the amount of a claim in the ordinary manner. It simply means that Hydro-Québec cannot interrupt service at will other than at the service point linked to the contract in respect of which the dispute has arisen.

Cases Cited

By Deschamps J.

Considered: *Montreal Gas Co. v. Cadieux*, [1899] A.C. 589; **referred to:** *Boucher v. Commission hydro-électrique de Québec*, [1968] R.L. 347; *Delage v. Hydro-Québec*, Sup. Ct. Montréal, No. 500-05-013881-73, December 11, 1973; *Landry v. Hydro-Québec*, Sup. Ct. Québec, No. 200-05-003524-928, October 28, 1992; *Dallaire v. Hydro-Québec*, Sup. Ct. Québec, No. 200-05-003377-939, January 7, 1994; *Godbout v. Hydro-Québec*, [2001] R.D.I. 106; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42.

By LeBel and Fish JJ. (dissenting)

Bédard v. Hydro-Québec, [1982] C.A. 518; *Montreal Gas Co. v. Cadieux*, [1899] A.C. 589, rev'g (1898), 28 S.C.R. 382; *Solunac v. Hydro-Québec*, R.E.J.B. 2001-23403.

Statutes and Regulations Cited

Act respecting the mode of payment for electric and gas service in certain buildings, R.S.Q., c. M-37, s. 2.

Act to amend and consolidate the act incorporating the Royal Electric Company, S.Q. 1898, 61 Vict., c. 66, ss. 27, 29.

Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend the powers of the said Company, S. Prov. C. 1849, 12 Vict., c. 183, s. 20.

Bylaw No. 411 establishing the conditions governing the supply of electricity, (1987) 119 G.O. II, 1233, ss. 3 "customer", "delivery point", 10, 82(1), 99.

Bylaw No. 634 respecting the conditions governing the supply of electricity, (1996) 128 G.O. II, 2292.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 300, 1437, 1590, 1591.

Electric Power Terms and Conditions of Supply Regulation, Man. Reg. 186/90, s. 17.

Hydro-Québec Act, R.S.Q., c. H-5, ss. 22.0.1 [ad. 1983, c. 15, s. 15], 48.

Nova Scotia Power Incorporated Approved Regulations, November 1, 2002, s. 6.1.

Quebec Hydro-Electric Commission Act, R.S.Q. 1941, c. 98A, s. 51 [ad. 1945, c. 30, s. 22].

SaskEnergy Act, S.S. 1992, c. S-35.1, s. 35.

des relations contractuelles différentes. Cette interprétation ne prive pas pour autant Hydro-Québec du droit de recouvrir ses créances par les moyens habituels. Elle signifie tout simplement qu'Hydro-Québec ne peut à son gré interrompre le service ailleurs qu'au point de service de l'abonnement où le différend a pris naissance.

Jurisprudence

Citée par la juge Deschamps

Arrêt examiné : *Montreal Gas Co. c. Cadieux*, [1899] A.C. 589; **arrêts mentionnés :** *Boucher c. Commission hydro-électrique de Québec*, [1968] R.L. 347; *Delage c. Hydro-Québec*, C.S. Montréal, n^{o} 500-05-013881-73, 11 décembre 1973; *Landry c. Hydro-Québec*, C.S. Québec, n^{o} 200-05-003524-928, 28 octobre 1992; *Dallaire c. Hydro-Québec*, C.S. Québec, n^{o} 200-05-003377-939, 7 janvier 1994; *Godbout c. Hydro-Québec*, [2001] R.D.I. 106; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42.

Citée par les juges LeBel et Fish (dissidents)

Bédard c. Hydro-Québec, [1982] C.A. 518; *Montreal Gas Co. c. Cadieux*, [1899] A.C. 589, inf. (1898), 28 R.C.S. 382; *Solunac c. Hydro-Québec*, R.E.J.B. 2001-23403.

Lois et règlements cités

Acte pour amender l'Acte d'Incorporation de la Nouvelle Compagnie du Gaz de Montréal, et pour étendre les pouvoirs de la dite Compagnie, S. Prov. C. 1849, 12 Vict., ch. 183, art. 20.

Code civil du Québec, L.Q. 1991, ch. 64, art. 300, 1437, 1590, 1591.

Electric Power Terms and Conditions of Supply Regulation, Règl. du Man. 186/90, art. 17.

Loi amendant et refondant la loi constituant en corporation la compagnie royale d'électricité, S.Q. 1898, 61 Vict., ch. 66, art. 27, 29.

Loi de la Commission hydroélectrique de Québec, S.R.Q. 1941, ch. 98A, art. 51 [aj. 1945, ch. 30, art. 22].

Loi sur Hydro-Québec, L.R.Q., ch. H-5, art. 22.0.1 [aj. 1983, ch. 15, art. 15], 48.

Loi sur le mode de paiement des services d'électricité et de gaz dans certains immeubles, L.R.Q., ch. M-37, art. 2.

Nova Scotia Power Incorporated Approved Regulations, 1er novembre 2002, art. 6.1.

Règlement n^{o} 411 établissant les conditions de fourniture de l'électricité, (1987) 119 G.O. II, 1918, art. 3 « client », « point de livraison », 10, 82, par. 1^{o}, 99.

Règlement n^{o} 634 sur les conditions de fourniture de l'électricité, (1996) 128 G.O. II, 2998.

SaskEnergy Act, S.S. 1992, ch. S-35.1, art. 35.

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APPEAL from a judgment of the Quebec Court of Appeal, [2003] R.J.Q. 36, [2002] Q.J. No. 5661 (QL), reversing a decision of the Superior Court. Appeal allowed, LeBel and Fish JJ. dissenting.

Jules Brière, *Hélène Gauvin* and *Jacinte Lafontaine*, for the appellant.

Jérôme Choquette, *Q.C.*, and *Jean-Stéphane Kourie*, for the respondents.

English version of the judgment of McLachlin C.J. and Bastarache, Binnie and Deschamps JJ. delivered by

DESCHAMPS J. —

I. Introduction

1 This appeal concerns the right of the appellant, Hydro-Québec, to interrupt the supply of electricity to a service point other than the one in respect of which the bill is unpaid. For the reasons that follow, I would allow the appeal.

2 In June 1994, the respondent, Modestos Glykis, was the owner of a rental property. He refused to pay the amount he owed for electricity supplied to that property. After serving notice on Mr. Glykis, Hydro-Québec interrupted the supply of electricity to his residence, even though the account for that delivery point was not in arrears. Glykis paid the bill after a few days without power. He and his spouse, Eleftheria Theodossiou, brought an action against Hydro-Québec. They alleged that they had sustained damage as a result of the interruption of service.

3 Rousseau J. of the Superior Court ruled that the payment was due and that Hydro-Québec had the right to interrupt service: Sup. Ct. Montréal, No. 500-05-013674-955, July 26, 1999. She applied the interpretation given in the vast majority of cases to the provisions enabling Hydro-Québec to take such actions (*Boucher v. Commission hydro-électrique de Québec*, [1968] R.L. 347 (Prov. Ct.); *Delage v. Hydro-Québec*, Sup. Ct. Montréal, No. 500-05-013881-73, December 11, 1973; *Landry v. Hydro-Québec*, Sup. Ct. Québec, No. 200-05-003524-928, October 28,

POURVOI contre un arrêt de la Cour d'appel du Québec, [2003] R.J.Q. 36, [2002] J.Q. nº 5661 (QL), qui a infirmé un jugement de la Cour supérieure. Pourvoi accueilli, les juges LeBel et Fish sont dissidents.

Jules Brière, *Hélène Gauvin* et *Jacinte Lafontaine*, pour l'appelante.

Jérôme Choquette, *c.r.*, et *Jean-Stéphane Kourie*, pour les intimés.

Le jugement de la juge en chef McLachlin et des juges Bastarache, Binnie et Deschamps a été rendu par

LA JUGE DESCHAMPS —

I. Introduction

Le pourvoi porte sur le droit de l'appelante Hydro-Québec d'interrompre la fourniture d'électricité à un point de service autre que celui pour lequel le compte est en souffrance. Pour les motifs qui suivent, je suis d'avis d'accueillir le pourvoi.

En juin 1994, l'intimé, M. Modestos Glykis, est propriétaire d'un immeuble locatif. Il refuse de payer la somme qu'il doit pour des services d'électricité fournis à cet immeuble. Hydro-Québec, après avis à M. Glykis, interrompt la fourniture d'électricité à sa résidence même si aucun arrérage n'est dû pour ce point de livraison. M. Glykis paie après quelques jours d'interruption. Son épouse, M^me^ Eleftheria Theodossiou et lui-même intentent une poursuite. Ils allèguent avoir subi des dommages par suite de l'interruption de service.

La juge Rousseau, de la Cour supérieure, conclut que le compte est en souffrance et qu'Hydro-Québec était en droit d'interrompre le service : C.S. Montréal, nº 500-05-013674-955, 26 juillet 1999. Elle suit l'interprétation largement majoritaire donnée aux dispositions habilitant Hydro-Québec à prendre une telle mesure (*Boucher c. Commission hydro-électrique de Québec*, [1968] R.L. 347 (C.P.); *Delage c. Hydro-Québec*, C.S. Montréal, nº 500-05-013881-73, 11 décembre 1973; *Landry c. Hydro-Québec*, C.S. Québec, nº 200-05-003524-928, 28 octobre

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1992; *Dallaire v. Hydro-Québec*, Sup. Ct. Québec, No. 200-05-003377-939, January 7, 1994; *Godbout v. Hydro-Québec*, [2001] R.D.I. 106 (Sup. Ct.)).

The majority of the Court of Appeal set aside the judgment: [2003] R.J.Q. 36. Nuss J.A. was of the view that an interruption of service is aimed at preventing a customer's debt from growing and cannot be used to pressure a customer into paying. According to him, service may be interrupted only at the delivery point with respect to which the bill is unpaid. As for Brossard J.A., he acknowledged that the applicable legislative provisions allowed power to be cut off at a location other than the one with the overdue payment, but found that such a power was exorbitant. Mailhot J.A., dissenting, upheld the Superior Court's approach and concluded that art. 1590 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), gives Hydro-Québec the authority to rely on its bylaws to enforce its right to have a customer perform his or her obligation to pay an overdue bill.

II. Analysis

The approach to statutory interpretation is well-known (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42). A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

A. *The Ordinary Sense of the Enabling Statutory and Regulatory Provisions*

At the time in question, s. 22.0.1 of the *Hydro-Québec Act*, R.S.Q., c. H-5 (as am. by S.Q. 1983, c. 15, s. 15), authorized Hydro-Québec to adopt bylaws fixing the conditions for the provision of its service:

22.0.1 The rates and conditions upon which power is supplied must be consistent with sound financial management.

1992; *Dallaire c. Hydro-Québec*, C.S. Québec, nº 200-05-003377-939, 7 janvier 1994; *Godbout c. Hydro-Québec*, [2001] R.D.I. 106 (C.S.)).

4 La Cour d'appel, à la majorité, infirme le jugement : [2003] R.J.Q. 36. Le juge Nuss estime que l'interruption de service a pour but d'éviter l'accroissement de la dette d'un client et ne peut être utilisée pour faire pression en vue d'obtenir paiement. Selon lui, l'interruption de service ne peut avoir lieu qu'au point correspondant au compte en souffrance. Le juge Brossard, quant à lui, reconnaît que les dispositions législatives applicables permettent l'interruption à un point autre que celui pour lequel la somme est due, mais il conclut qu'un tel pouvoir est exorbitant. La juge Mailhot, dissidente, confirme l'approche de la Cour supérieure et conclut que l'art. 1590 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »), autorise Hydro-Québec à s'appuyer sur sa réglementation pour mettre en œuvre son droit à l'exécution de l'obligation du client de payer le compte échu.

II. Analyse

5 La méthode d'interprétation des textes législatifs est bien connue (*Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42). La disposition législative doit être lue dans son contexte global, en prenant en considération non seulement le sens ordinaire et grammatical des mots mais aussi l'esprit et l'objet de la loi et l'intention du législateur. Cette méthode, énoncée à l'occasion de l'analyse de textes législatifs, s'impose, avec les adaptations nécessaires, pour l'interprétation de textes réglementaires.

A. *Le sens ordinaire de l'habilitation législative et réglementaire*

6 L'article 22.0.1 de la *Loi sur Hydro-Québec*, L.R.Q., ch. H-5 (mod. L.Q. 1983, ch. 15, art. 15), autorisait, à l'époque pertinente, Hydro-Québec à adopter des règlements fixant les conditions de fourniture de service :

22.0.1 Les tarifs et les conditions auxquels l'énergie est fournie doivent être compatibles avec une saine administration financière.

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The rates and conditions are fixed by by-law of the Corporation, according to the categories it determines, or by special contracts.

The by-laws and contracts are subject to the approval of the Government.

7 At the time the dispute arose, s. 99(1) of *Bylaw No. 411 establishing the conditions governing the supply of electricity*, (1987) 119 G.O. II, 1233 ("Bylaw"), provided the basis for the authority to interrupt service. In 1996, it was replaced by *Bylaw No. 634 respecting the conditions governing the supply of electricity*, (1996) 128 G.O. II, 2292, but the changes are not relevant to this case. Section 99 reads as follows:

99. Subject to provisions in the Act respecting the mode of instalment for electric and gas service in certain buildings (R.S.Q., c. M-37), Hydro-Québec may refuse to supply or deliver electricity or may interrupt the supply or delivery of it in the following cases:

(1) the customer fails to pay his bill on time;

(2) a federal, provincial or municipal agency with jurisdiction in this realm orders it to do so;

(3) public safety requires that it do so;

(4) the customer defrauds, manipulates or tampers with metering equipment or any other Hydro-Québec equipment, impedes the supply or delivery of electricity or contravenes Section 104;

(5) the customer refuses to provide Hydro-Québec with information required under this Bylaw or supplies erroneous information;

(6) the customer refuses to make the deposit or supply any other guarantee required under this Bylaw;

(7) the customer fails to make the modifications or adjustments necessary to ensure that his electrical installation complies with requirements stipulated in this Bylaw or, despite Hydro-Québec's request that he do so, fails to eliminate the causes of disturbances on the system;

(8) the customer does not use electricity in accordance with conditions and requirements stipulated in Division 1 of this Chapter;

(9) contrary to Section 103, the customer refuses Hydro-Québec representatives access to his premises;

(10) contrary to Section 65, the customer refuses to allow the installation on his premises of Hydro-Québec's equipment, including metering and control equipment;

Ces tarifs et ces conditions sont fixés par règlement de la Société, selon les catégories qu'elle détermine, ou par contrats spéciaux.

Ces règlements et ces contrats sont soumis à l'approbation du gouvernement.

Au moment du litige, le par. 1º de l'art. 99 du *Règlement nº 411 établissant les conditions de fourniture de l'électricité*, (1987) 119 G.O. II, 1918 (« Règlement »), constituait le fondement du pouvoir d'interruption de service. Il a été remplacé en 1996 par le *Règlement nº 634 sur les conditions de fourniture de l'électricité*, (1996) 128 G.O. II, 2998, mais les changements ne sont pas pertinents pour les besoins du dossier. L'article 99 dispose :

99. Sous réserve de la Loi sur le mode de paiement des services d'électricité et de gaz dans certains immeubles (L.R.Q., c. M-37), le distributeur peut refuser de fournir ou de livrer l'électricité ou en interrompre la fourniture ou la livraison dans les cas suivants :

1º le client ne paie pas sa facture à échéance;

2º un organisme fédéral, provincial ou municipal ayant juridiction en la matière l'ordonne;

3º la sécurité publique l'exige;

4º le client fraude, manipule ou dérange l'appareillage de comptage ou tout autre appareillage du distributeur, entrave la fourniture ou la livraison de l'électricité ou contrevient à l'article 104;

5º le client refuse de fournir au distributeur les renseignements exigibles en vertu du présent règlement ou fournit des renseignements erronés;

6º le client refuse de fournir le dépôt ou toute autre garantie exigibles en vertu du présent règlement;

7º le client n'apporte pas les modifications ou ajustements nécessaires pour que son installation électrique soit conforme aux exigences prévues au présent règlement, ou, malgré la demande du distributeur, il n'élimine pas les clauses de perturbation au réseau;

8º le client n'utilise pas l'électricité conformément aux conditions et aux exigences prévues à la section 1 du présent chapitre;

9º le client refuse l'accès chez lui aux représentants du distributeur, contrairement à l'article 103;

10º le client refuse de permettre l'installation, chez lui, de l'équipement du distributeur, dont l'équipement de comptage et de contrôle, contrairement à l'article 65;

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(11) the customer's electrical installation has been connected to Hydro-Québec's system without the latter's approval;

(12) the customer's electrical installation has not been approved or, as the case may be, authorized by an authority having jurisdiction in this realm according to any applicable legislative or regulatory provision; or

(13) an individual, partnership, corporation or organization covered by Section 14 uses electricity without having concluded a contract.

The word "customer", which appears in 10 of the 13 subsections of s. 99, is defined in s. 3 of the Bylaw:

customer: An individual, partnership, corporation or organization having one or more contracts.

Section 3 also defines the term "delivery point":

delivery point: Point located immediately on the load side of Hydro-Québec's metering equipment and from which electricity is put at the disposal of the customer. In cases where Hydro-Québec does not install metering equipment, or where it is on the line side of the connection point, the delivery point is the connection point.

Moreover, s. 10 expressly provides that "[e]very delivery point is covered by a separate contract", except in certain circumstances not applicable in the case at bar.

There is no provision expressly limiting the exercise of the right to interrupt service to the location for which the bill is outstanding.

According to the ordinary meaning of the words, since a customer, as defined in s. 3, may have more than one contract, since each contract corresponds to a separate delivery point, and since Hydro-Québec may interrupt service when a customer has not paid his or her bill, it follows that s. 99(1) allows power to be interrupted at any delivery point in respect of which the defaulting customer holds a contract.

The use in s. 99(1) of the words "his bill" in the singular form in the phrase "fails to pay his bill" gives another indication of the ambit of the

11º l'installation électrique du client a été raccordée au réseau du distributeur sans l'approbation de celui-ci;

12º l'installation électrique du client n'a pas été approuvée ou, le cas échéant, autorisée par une autorité ayant juridiction en la matière d'après toute disposition législative ou réglementaire applicable; ou

13º une personne, société, corporation ou organisme visé à l'article 14 utilise l'électricité sans avoir conclu un abonnement.

8 Le mot « client », employé dans 10 des 13 paragraphes de l'art. 99, est défini à l'art. 3 du Règlement :

Client : une personne, une société, une corporation ou un organisme titulaire d'un ou de plusieurs abonnements.

9 Cet article définit aussi l'expression « point de livraison » :

Point de livraison : un point situé immédiatement après l'appareillage de comptage du distributeur et à partir duquel l'électricité est mise à la disposition du client; lorsque le distributeur n'installe pas d'appareillage de comptage ou lorsque celui-ci est en amont du point de raccordement, le point de livraison se situe au point de raccordement.

10 De plus, l'art. 10 énonce expressément que « [c]haque point de livraison fait l'objet d'un abonnement distinct », sauf certaines exceptions qui ne sont pas applicables en l'espèce.

11 Aucune disposition ne limite expressément l'exercice du droit d'interrompre le service au lieu pour lequel la facture est impayée.

12 Selon le sens ordinaire des mots, comme un client, selon la définition, peut avoir plusieurs abonnements, que chaque abonnement correspond à un point de livraison distinct et qu'Hydro-Québec peut interrompre le service lorsque le client ne paie pas sa facture, il s'ensuit que l'art. 99, par. 1º permet l'interruption à n'importe quel point de livraison pour lequel le client défaillant est titulaire d'un abonnement.

13 L'utilisation à l'art. 99, par. 1º des mots « sa facture » au singulier dans l'expression « ne paie pas sa facture » donne une indication additionnelle de la

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provision. The possessive adjective "his" links the customer to the bill, and the bill is in no way linked to the "contract" or "delivery point", as neither of these terms even appears in the provision. Use of the plural rather than the singular form would have meant that all bills relating to all delivery points would have to be in arrears before service could be interrupted. Thus, the provision refers to one bill for one contract out of all the contracts the customer may have signed. Had the definite article been used, as in "the customer fails to pay the bill", the bill would not have been linked to the customer. Finally, connecting the bill to the one delivery point with an account in arrears would make the use of the word "customer" superfluous. Had the legislature intended to limit the application of the provision to the place in respect of which the bill was unpaid, the use of the word "contract" or "delivery point", both of which entail a limitation, would have been sufficient.

14 The introductory paragraph to s. 99 also supports this interpretation. The paragraph provides for two measures: refusing to supply or deliver electricity and interrupting the supply or delivery thereof. Had the legislature intended that the service be limited to the delivery point in respect of which the bill was unpaid, there would be no need to mention the refusal to supply or deliver electricity in cases where the customer has not paid. Clearly, no unpaid bills can exist before the electricity is supplied or delivered. The refusal to supply or deliver services can relate only to cases where the customer has not paid his or her bill for another delivery point. For the first subsection to be interpreted in harmony with the introductory paragraph, it must allow for the interruption of service at any delivery point where service is provided to a customer.

15 Aside from s. 99(13), which applies to cases where power is fraudulently obtained by a person without a contract, and ss. 99(2) and 99(3), which apply to circumstances over which the parties have no control, the wording of s. 99 establishes a relationship between the customer and Hydro-Québec, rather than between a delivery point and the service provider.

portée de la disposition. L'adjectif possessif « sa » fait le lien entre le client et la facture, alors que celle-ci n'est reliée d'aucune façon aux expessions « abonnement » ou « point de livraison », qui ne figurent même pas dans cette disposition. De plus, si le pluriel avait été employé plutôt que le singulier, toutes les factures relatives à tous les points de livraison auraient dû être en souffrance pour donner ouverture au droit d'interruption. Il s'agit donc d'une facture pour un abonnement parmi tous ceux dont le client est titulaire. De même, l'utilisation de l'article défini — le client ne paie pas la facture — n'aurait pas permis de relier la facture au client. Enfin, relier la facture au seul point de livraison pour lequel il y a défaut rend inutile l'utilisation du mot « client ». Si le législateur n'avait voulu viser que le lieu pour lequel le compte est en souffrance, l'utilisation des termes « abonnement » ou « point de livraison », qui, eux, comportent une limitation, aurait été suffisante.

Le paragraphe introductif de l'art. 99 supporte aussi cette interprétation. Ce paragraphe prévoit deux mesures : le refus de fourniture ou de livraison ou l'interruption. Si le législateur avait voulu que la facture se rapporte au seul point de livraison pour lequel le service est impayé, il aurait été inutile de mentionner le refus de fourniture ou de livraison en cas de non-paiement par le client. Il ne peut, évidemment, y avoir de facture impayée avant la fourniture ou la livraison. Le refus de fourniture ou de livraison de service ne peut viser que le cas où le client n'a pas payé sa facture à un autre point de livraison. Pour interpréter harmonieusement le paragraphe premier avec le paragraphe introductif, il faut envisager l'interruption à n'importe quel point de livraison où le service est fourni à un client.

Sauf le par. 13º, qui porte sur le cas d'utilisation frauduleuse par une personne qui n'est pas abonnée et les par. 2º et 3º, qui évoquent des circonstances indépendantes de la volonté des parties, le texte de l'art. 99 établit une relation entre le client et Hydro-Québec, et non entre un point de livraison et le fournisseur de service.

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There are references to this supplier-customer relationship elsewhere in the Bylaw. In certain circumstances, Hydro-Québec may, pursuant to s. 82(1), require a deposit in the case of a contract covering domestic use. For example, a person requesting service may be required to provide a deposit if he or she failed to pay by the due date a bill for a contract he or she holds or held. Thus, s. 82(1) also establishes a connection between the customer and Hydro-Québec, rather than between Hydro-Québec and individual delivery points.

Given the ordinary sense of the words used in the definitions in the Bylaw, and based on a grammatical analysis, the interpretation according to which an interruption of service may take place at any delivery point must prevail.

B. *The Scheme and the Object of the Provision*

The Bylaw sets out the conditions for the supply of the service. The obligational content of a contract between Hydro-Québec and a customer is not open to negotiation between the parties. Hydro-Québec may not impose special conditions if the customer is or is expected to become insolvent. If the customer meets the conditions set out in the Bylaw, Hydro-Québec is required to provide the service. In a free market, a service provider may, except where this would be inconsistent with its constitutional obligations, refuse to do business with a customer it believes to be insolvent. However, the obligation to provide the service to the public ceases to apply where a customer fails to pay his or her bill. The provision is undeniably to Hydro-Québec's advantage. It not only places limits on debts, but also offers an effective means of putting pressure on defaulting customers and inciting them to pay what they owe.

The amount owed by an individual customer may be very small compared with the costs of legal proceedings. The Bylaw therefore gives Hydro-Québec another means to put pressure on its customers. Insofar as the service provider does not choose the customers it does business with, a possible interruption of service is not, in my view, an exorbitant or draconian measure. On the one hand, the exercise of this right is preceded by a warning; on the other hand, the interruption affects only the

16 Cette relation fournisseur-client est reprise ailleurs dans le Règlement. Ainsi, dans certaines circonstances, Hydro-Québec peut, conformément au par. 1º de l'art. 82, exiger un dépôt dans le cas d'un abonnement pour fins d'usage domestique. Ainsi, le demandeur de service peut se voir imposer le versement d'un dépôt s'il n'a pas acquitté à l'échéance une facture pour laquelle il est ou était le détenteur d'abonnement. L'article 82, par. 1º établit donc aussi un lien entre le client et Hydro-Québec, et non entre Hydro-Québec et chaque point de livraison.

17 Vu le sens ordinaire des mots utilisés dans les définitions du Règlement et compte tenu de l'analyse grammaticale, l'interprétation suivant laquelle l'interruption peut avoir lieu à n'importe quel point de livraison doit prévaloir.

B. *L'esprit et l'objet de la disposition*

18 Le Règlement établit les conditions de fourniture de service. Le contenu obligationnel du contrat liant Hydro-Québec au client n'est pas laissé à la négociation entre les parties. Hydro-Québec ne peut imposer de conditions particulières en cas d'insolvabilité réelle ou anticipée. Si le client satisfait aux conditions prescrites par le Règlement, Hydro-Québec est obligée de fournir le service. Sur un marché libre, un fournisseur de service, hormis ses obligations constitutionnelles, peut refuser de faire affaire avec un client qu'il estime insolvable. L'obligation de fournir le service au public cède cependant lorsque le client ne paie pas sa facture. La disposition est indéniablement à l'avantage d'Hydro-Québec. Elle ne sert pas seulement à limiter l'endettement. Elle offre par ailleurs un moyen efficace de faire pression sur les clients défaillants et de les inciter au paiement des montants dus.

19 Les montants impayés par chaque client peuvent s'avérer minimes par rapport aux coûts d'une poursuite judiciaire. Le Règlement prévoit donc pour Hydro-Québec un autre moyen de faire pression sur ses clients. Dans la mesure où le fournisseur de service ne choisit pas les clients avec qui il fait affaire, j'estime que l'interruption éventuelle du service n'est pas une mesure exorbitante ou draconienne. D'une part, l'exercice du droit est précédé d'un avis et, d'autre part, l'interruption ne

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defaulting customer. It should be noted that the introductory paragraph includes an important limitation that protects apartment dwellers whose rent includes the cost of electricity. In such cases, Hydro-Québec may not interrupt service and thereby deprive persons of electricity when they have already paid for it in paying their rent, which is often the case for senior citizens. This type of contract is covered by the *Act respecting the mode of payment for electric and gas service in certain buildings*, R.S.Q., c. M-37, which provides that Hydro-Québec can have rent assigned to it should the customer be in default (s. 2). In such cases, Hydro-Québec may not interrupt service but is not limited to going to court to collect outstanding amounts.

20 It is difficult to understand how an approach that favours poorer customers who cannot pay their bills could modify the interpretation adopted above as regards the power to interrupt. People whose rent includes the cost of electricity are not affected as a result of the wording of the introductory paragraph quoted above. Moreover, the only effect of the interpretation supported by the majority of the Court of Appeal would be to favour customers holding two or more contracts, which is not generally the case for poorer citizens. It would of course be possible to conjure up pathetic cases, but this is not the case here. More importantly, the parties did not argue that Hydro-Québec had improperly exercised its discretion in deciding to interrupt service. Only its authority to make such a decision has been challenged.

21 The argument that the mandatory nature of the service contract is a source of law or a ground for an interpretation favourable to the respondents cannot be accepted either. Neither Hydro-Québec nor the customer may change the content of the contract, the terms of which are dictated by the Bylaw. Thus, no judge may circumvent or reduce the obligations flowing from the contract on the ground that it is a contract of adhesion within the meaning of art. 1437 C.C.Q.

touche que le client défaillant. Il faut en effet noter que le paragraphe introductif comporte une limitation importante qui protège tous les occupants de logements dont le loyer inclut le service d'électricité. Dans ces cas, Hydro-Québec ne peut interrompre le service et priver ainsi d'électricité des personnes qui ont payé pour le service en acquittant leur loyer, ce qui est souvent le cas des personnes âgées. Ce type d'abonnement est visé par la *Loi sur le mode de paiement des services d'électricité et de gaz dans certains immeubles*, L.R.Q., ch. M-37, laquelle prévoit qu'Hydro-Québec peut obtenir une cession de loyer en cas de défaut de l'abonné (art. 2). Dans ces cas, Hydro-Québec ne peut interrompre le service, mais elle n'est pas limitée à un recours devant les tribunaux lorsqu'un compte est en souffrance.

Il est difficile de concevoir comment une approche favorisant les clients plus pauvres et incapables de payer leur compte pourrait, en ce qui a trait au pouvoir d'interruption, modifier l'interprétation adoptée ci-dessus. Ceux dont le loyer inclut le coût de l'électricité ne sont pas touchés en raison du libellé du paragraphe introductif, cité précédemment. De plus, l'interprétation préconisée par les juges majoritaires de la Cour d'appel a comme seul effet de favoriser les clients détenteurs de plusieurs abonnements, ce qui n'est généralement pas le lot des citoyens plus démunis. Il est certes possible d'imaginer des cas pathétiques, mais ce n'est pas le cas en l'espèce. Plus important encore, les parties n'ont pas plaidé qu'Hydro-Québec avait mal exercé sa discrétion en décidant d'interrompre le service. Seul son pouvoir de prendre une telle décision a été mis en question.

L'argument voulant que le caractère obligatoire du contrat de service soit source de droit ou motif d'interprétation favorable aux intimés ne peut non plus être retenu. Ni Hydro-Québec ni le client ne peuvent modifier la teneur du contrat dont les termes sont dictés par le Règlement. Un juge ne peut donc le contourner ou réduire les obligations en découlant au motif qu'il s'agit d'un contrat d'adhésion au sens de l'art. 1437 C.c.Q.

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The provision authorizing interruptions of service is limited in scope, but its purpose is clearly not to protect the customer and cannot be raised in support of an interpretation favourable to the customer. Rather, it supports an interpretation that allows for the expeditious resolution of disputes between Hydro-Québec and its customers. Neither the wording nor the purpose of the provision when considered in the overall context of the Bylaw warrants regarding the provision as only a means to prevent debts from growing.

C. *The Legislative Context*

The Royal Electric Company already had the authority to interrupt service when it was integrated into Hydro-Québec. Sections 27 and 29 of the Company's constituent legislation (*Act to amend and consolidate the act incorporating the Royal Electric Company*, S.Q. 1898, 61 Vict., c. 66) provided as follows:

27. If any person supplied by the company neglect [*sic*] to pay the rent, rate or charge due to the company at the time fixed for the payment thereof, the company, or any person acting under its authority, on giving eight days' previous notice, may stop the supply to the person in arrears, as aforesaid, by any means the company or its officers may see fit to use; and the company may recover the rent or charges then due, together with the expenses of cutting off the electricity, notwithstanding any contract to furnish for a longer time.

29. The two preceding sections shall not prevent any of the provisions therein contained being altered or modified by contract.

This power was retained and has been enjoyed by Hydro-Québec ever since s. 51 of the *Quebec Hydro-Electric Commission Act*, R.S.Q. 1941, c. 98A (as am. by S.Q. 1945, c. 30, s. 22), was enacted in 1945:

51. The Commission may avail itself of the provisions of sections 26, 27, 28, 29 and 32 of the act 61 Victoria, chapter 66.

When the *Hydro-Québec Act* was amended in 1983, the text of former s. 51 was retained in s. 48

22 La disposition autorisant l'interruption de service est circonscrite, mais son application ne vise certainement pas à protéger le client. Son but ne peut être invoqué au soutien d'une interprétation favorable au client. Il milite plutôt en faveur d'une interprétation qui permet la résolution rapide des différends entre Hydro-Québec et ses clients. Ne voir dans la disposition qu'un moyen d'éviter un accroissement de la dette n'est justifié ni par le texte ni par l'objet de la disposition considérée dans le contexte global du Règlement.

C. *Le contexte législatif*

23 Lors de son intégration à Hydro-Québec, la Compagnie royale d'électricité disposait d'un pouvoir d'interruption de service. Les articles 27 et 29 de sa loi constitutive (*Loi amendant et refondant la loi constituant en corporation la compagnie royale d'électricité*, S.Q. 1898, 61 Vict., ch. 66) prévoyaient :

27. Dans le cas où une personne recevant de la compagnie un approvisionnement d'électricité néglige de payer les loyers, taux ou redevances dus à la compagnie, aux dates fixées pour leur payement, la compagnie ou toute autre personne agissant en son nom, après un avis préalable de huit jours, pourra suspendre l'approvisionnement à la personne ainsi arriérée, comme susdit, par tous moyens que la compagnie ou ses officiers jugeront convenables; et la compagnie pourra recouvrer les loyers ou redevances dus à cette date, ainsi que les dépenses résultant de l'interception de l'électricité, nonobstant tout contrat d'approvisionnement pour une période ultérieure.

29. Les deux sections précédentes n'auront pas pour effet d'empêcher les dispositions qu'elles contiennent d'être changées ou modifiées par contrat.

24 Ce pouvoir a été préservé et bénéficie à Hydro-Québec depuis l'adoption, en 1945, de l'art. 51 de la *Loi de la Commission hydroélectrique de Québec*, S.R.Q. 1941, ch. 98A (mod. S.Q. 1945, ch. 30, art. 22) :

51. La Commission peut se prévaloir des dispositions des articles 26, 27, 28, 29 et 32 de la loi 61 Victoria chapitre 66.

25 Lors de la modification de la *Loi sur Hydro-Québec* en 1983, la disposition a été conservée à

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despite the adoption at the same time of s. 22.0.1, which authorizes the passing of bylaws:

48. The Company may avail itself of the provisions of sections 26, 27, 28, 29 and 32 of chapter 66 of the statutes of 1897-1898.

It may also take advantage of the provisions of sections 16, 18 and 19 of the Act 12 Victoria, chapter 183 (Provincial Statutes of Canada) and of section 20 of the said Act as amended by section 8 of the Statutes of Québec, 1872, chapter 61.

26 A similar power to interrupt service was granted to the New City Gas Company of Montreal: *Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend the powers of the said Company*, S. Prov. C. 1849, 12 Vict., c. 183. This provision was considered by the Privy Council in *Montreal Gas Co. v. Cadieux*, [1899] A.C. 589. Preferring an interpretation based on the supplier-customer relationship to one based on the point of delivery, Sir Henry Strong, writing for the court, stated the following (at pp. 592-93):

There is nothing in the Act to limit the right of the company to the service-pipes of the defaulter in a particular building or connected with a particular meter in respect of which the default has been committed. There is nothing in the Act to throw the rate, rent, or charge for gas upon the premises for which the supply is furnished, or to make it payable out of the premises of the defaulter. The supply is to the consumer and the default is the consumer's default. His liability to the company is a liability for the whole of the debt which he owes them at the time.

. . .

Their Lordships are unable to see anything unreasonable in the particular instance given, or anything unreasonable in a provision authorizing a gas company to cease supplying a customer who will not pay his gas bills; but the real answer to the argument of the learned judge is that it is not for the Court to pronounce an opinion upon the policy of the Legislature. Their only duty is to give effect to the language of the Legislature construing it fairly. It seems impossible to find the limitation in question in the language of the statute without introducing some proviso or some qualifying words which are not there.

l'art. 48 malgré l'adoption, au même moment, de l'art. 22.0.1 qui autorise l'adoption de règlements :

48. La Société peut se prévaloir des dispositions des articles 26, 27, 28, 29 et 32 du chapitre 66 des lois de 1897-1898.

Elle peut aussi se prévaloir des dispositions des articles 16, 18 et 19 de la loi 12 Victoria, chapitre 183 (Statuts provinciaux du Canada) et de l'article 20 de ladite loi modifié par l'article 8 du Statut de Québec, 1872, chapitre 61.

Un pouvoir d'interruption semblable a aussi été accordé à la Nouvelle Compagnie du Gaz de Montréal : *Acte pour amender l'Acte d'Incorporation de la Nouvelle Compagnie du Gaz de Montréal, et pour étendre les pouvoirs de la dite Compagnie*, S. Prov. C. 1849, 12 Vict., ch. 183. Cette disposition a été étudiée par le Conseil privé dans l'affaire *Montreal Gas Co. c. Cadieux*, [1899] A.C. 589. Préconisant une interprétation axée sur la relation fournisseur-client plutôt que sur le point de livraison, Sir Henry Strong a dit ce qui suit au nom de la cour (p. 592-593) :

[TRADUCTION] Aucune disposition de la Loi ne contraint la compagnie à exercer son droit seulement à l'égard des conduites de branchement du débiteur défaillant dans un immeuble donné ou à l'égard de celles qui sont reliées au compteur pour lequel il y a défaut. La Loi n'impute aucunement le coût du gaz à l'immeuble desservi ni ne le rend exigible par voie d'exécution sur l'immeuble du débiteur défaillant. Le gaz est fourni au consommateur, et c'est ce dernier qui est en défaut. Son obligation envers la compagnie a pour objet la totalité des sommes qu'il doit alors à cette dernière.

. . .

Leurs Seigneuries ne voient rien de déraisonnable dans le cas considéré ni dans la disposition autorisant la compagnie du gaz à cesser d'approvisionner le client qui néglige d'acquitter sa facture. Mais surtout, pour répondre à l'argument formulé par le juge, la Cour n'a pas à donner son avis sur le choix du législateur. Il lui incombe seulement de donner effet au libellé de la loi en l'interprétant objectivement. Il paraît impossible de voir dans le texte de la loi la limitation alléguée sans y intégrer une condition ou une restriction qui en est absente.

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By referring specifically to chapter 66 of the statutes of Quebec from 1898, the legislature could not, in my opinion, have expressed more clearly its intention to preserve the law as interpreted by the Privy Council. This not only enabled Hydro-Québec to pass a bylaw authorizing the interruption of service at a point other than the one in respect of which an amount is overdue, it also incorporated by reference a judicial interpretation confirming the scope of the power to interrupt service.

The legislative history therefore confirms the interpretation given by the Superior Court and the minority of the Court of Appeal.

However, the respondents argue that, in the context of the coming into force of the *Civil Code of Québec* and, more specifically, of art. 1591 C.C.Q., an interruption of service may be used only in answer to failure to perform a correlative obligation. According to them, only an interruption of service corresponding to the contract for which the bill is unpaid is compatible with the rule limiting the exception for nonperformance of obligations to correlative obligations.

This argument, which was endorsed by one of the judges of the majority of the Court of Appeal, cannot be accepted. Article 1590 C.C.Q. provides that creditors may take any other measure provided by law to enforce their right to the performance of an obligation:

1590. An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay.

Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence,

(1) force specific performance of the obligation;

(2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;

(3) take any other measure provided by law to enforce his right to the performance of the obligation.

En renvoyant spécifiquement au ch. 66 des lois du Québec de 1898, le législateur ne pouvait, à mon avis, exprimer plus clairement son intention de préserver le droit ainsi interprété par le Conseil privé. Non seulement permet-il à Hydro-Québec d'adopter un règlement qui autorise l'interruption de service à un point autre que celui pour lequel la somme est en souffrance, mais il incorpore par renvoi une interprétation judiciaire confirmant la portée du pouvoir d'interruption. 27

La prise en considération de l'historique législatif confirme donc l'interprétation donnée par la Cour supérieure et par la juge minoritaire de la Cour d'appel. 28

Les intimés soulèvent cependant que, dans le contexte de l'adoption du *Code civil du Québec*, et plus particulièrement de l'art. 1591 C.c.Q., l'interruption ne peut sanctionner que le non-respect des obligations corrélatives. Selon les intimés, seule une interruption correspondant à l'abonnement pour lequel le compte est impayé est compatible avec la règle limitant aux obligations corrélatives le droit d'invoquer l'exception d'inexécution des obligations. 29

Cet argument, retenu par l'un des juges majoritaires de la Cour d'appel, ne peut être accepté. L'article 1590 C.c.Q. prévoit que le créancier peut prendre tout autre moyen que la loi prévoit pour la mise en œuvre de son droit à l'exécution de l'obligation : 30

1590. L'obligation confère au créancier le droit d'exiger qu'elle soit exécutée entièrement, correctement et sans retard.

Lorsque le débiteur, sans justification, n'exécute pas son obligation et qu'il est en demeure, le créancier peut, sans préjudice de son droit à l'exécution par équivalent de tout ou partie de l'obligation:

1º Forcer l'exécution en nature de l'obligation;

2º Obtenir, si l'obligation est contractuelle, la résolution ou la résiliation du contrat ou la réduction de sa propre obligation corrélative;

3º Prendre tout autre moyen que la loi prévoit pour la mise en œuvre de son droit à l'exécution de l'obligation.

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31 Hydro-Québec has the right, as limited by the Bylaw, to interrupt the service provided to a customer. The power is reinforced both by the third subparagraph of the second paragraph of art. 1590 C.C.Q. and by art. 300 C.C.Q., which states that public bodies are primarily governed by their special Acts:

> **300.** Legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them; legal persons established for a private interest are primarily governed by the Acts applicable to their particular type.

Interpreted from this perspective, the customer's correlative obligation to Hydro-Québec includes all contracts between them. Neither art. 1590 nor art. 1591 C.C.Q. is an obstacle to the power to interrupt service. On the contrary, they incorporate it.

32 The power to interrupt service does not confer a new right. It dates from the last century and is very similar to powers conferred by law on other public utilities (*SaskEnergy Act*, S.S. 1992, c. S-35.1, s. 35; *Electric Power Terms and Conditions of Supply Regulation*, Man. Reg. 186/90, s. 17; *Nova Scotia Power Incorporated Approved Regulations*, November 1, 2002, s. 6.1).

III. Conclusion

33 The right to interrupt service at a location other than the one in respect of which the bill is unpaid is expressed clearly. This right is consistent with other provisions of the Bylaw and reflects the legislature's intention to give Hydro-Québec a means to limit overdue amounts by putting pressure on defaulting customers.

34 Hydro-Québec did not request costs in this Court. On the contrary, it offered to pay the respondents' judicial costs and such reasonable extrajudicial costs as might be fixed by the Court. Nor did Hydro-Québec ask for its costs in the Court of Appeal.

35 For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal without costs and uphold the judgment of the Superior Court

Hydro-Québec, dans les limites fixées par le Règlement, a le droit d'interrompre le service fourni à un client. Ce pouvoir est préservé tant par le troisième paragraphe du deuxième alinéa de l'art. 1590 que par le texte de l'art. 300 C.c.Q., qui énonce que les corps publics sont d'abord régis par leurs lois particulières:

> **300.** Les personnes morales de droit public sont d'abord régies par les lois particulières qui les constituent et par celles qui leur sont applicables; les personnes morales de droit privé sont d'abord régies par les lois applicables à leur espèce.

Ainsi interprétée, l'obligation corrélative du client envers Hydro-Québec inclut tous les abonnements dont il est titulaire. Ni l'art. 1590 ni l'art. 1591 C.c.Q. ne font obstacle au pouvoir d'interruption. Au contraire, ils l'incorporent.

Le pouvoir d'interruption ne confère par ailleurs aucun droit inédit. Il date du siècle dernier et est tout à fait semblable à celui conféré par la loi à d'autres fournisseurs de services publics (*SaskEnergy Act*, S.S. 1992, ch. S-35.1, art. 35; *Electric Power Terms and Conditions of Supply Regulation*, Règl. du Man. 186/90, art. 17; *Nova Scotia Power Incorporated Approved Regulations*, 1er novembre 2002, art. 6.1).

III. Conclusion

Le droit d'interrompre le service à un point autre que celui pour lequel le compte est en souffrance est exprimé en termes clairs. Il est compatible avec d'autres dispositions du Règlement et reflète l'intention du législateur de doter Hydro-Québec d'un moyen de limiter les sommes en souffrance tout en faisant pression sur les clients défaillants.

Hydro-Québec n'a pas réclamé les dépens devant notre Cour. Elle a au contraire offert de payer les frais judiciaires des intimés et les frais extrajudiciaires raisonnables qui pourraient être fixés par la Cour. De plus, Hydro-Québec n'a pas demandé à notre Cour de lui accorder les dépens en Cour d'appel.

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel sans frais et de confirmer le jugement de la Cour supérieure

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dismissing the action with costs. As for the judicial and extrajudicial costs connected with the appeal to this Court, Hydro-Québec is ordered to pay the respondents an amount to be fixed by the Registrar on a solicitor-client basis.

English version of the reasons delivered by

LeBel and Fish JJ. (dissenting) — We have considered the reasons of our colleague Justice Deschamps. With respect, we do not agree. In our view, rather, the judgment of the Quebec Court of Appeal ([2003] R.J.Q. 36), in particular as explained in the reasons of Nuss J.A., correctly interprets s. 99 of Hydro-Québec's bylaw entitled *Bylaw No. 411 establishing the conditions governing the supply of electricity*, (1987) 119 G.O. II, 1233.

It is not our intention to go back over either the statement of facts of our colleague Deschamps J. or her presentation of the history of the regulatory and statutory provisions relevant to this case. Our disagreement is limited to Hydro-Québec's contention that it has an exceptional power allowing it, should a customer fail to pay a bill relating to one contract, to interrupt service in respect of all of the customer's contracts.

The efficacy of such a measure — the interruption of service — to put pressure on customers is not a valid reason for giving judicial recognition to this power if it has not been granted to Hydro-Québec by the legislature. The contract with Hydro-Québec is an example of a regulated contract between a public utility and a customer (*Bédard v. Hydro-Québec*, [1982] C.A. 518). The content of such a contract is determined largely by statutes and regulations. The power claimed by Hydro-Québec must fall within the legal framework defined by those statutes and regulations.

In essence, Hydro-Québec submits that it has a discretionary power to interrupt the supply of electricity at all of a customer's service points if the customer has failed to pay or is late in paying a bill relating to any one of his or her contracts. According

rejetant l'action avec dépens. En ce qui a trait aux frais judiciaires et extrajudiciaires liés au pourvoi devant notre Cour, il est ordonné à Hydro-Québec de payer aux intimés le montant qui sera fixé par la Registraire sur la base avocat-client.

Les motifs suivants ont été rendus par

Les juges LeBel et Fish (dissidents) — Nous avons eu l'occasion de prendre connaissance des motifs de notre collègue, la juge Deschamps. Avec égards, nous ne sommes pas d'accord avec ceux-ci. Nous sommes plutôt d'opinion que le jugement de la Cour d'appel du Québec ([2003] R.J.Q. 36), tel qu'exprimé notamment dans les motifs du juge Nuss, donne l'interprétation correcte des dispositions de l'art. 99 du règlement d'Hydro-Québec, le *Règlement n^o^ 411 établissant les conditions de fourniture de l'électricité*, (1987) 119 G.O. II, 1918. 36

Nous n'entendons pas revenir sur l'exposé des faits de notre collègue la juge Deschamps, non plus que sur son historique des dispositions réglementaires et législatives pertinentes en l'espèce. Notre désaccord porte en effet strictement sur l'existence du pouvoir exceptionnel qu'Hydro-Québec prétend détenir et qui l'autoriserait à interrompre le service à l'égard de tous les abonnements d'un client en cas de non-paiement d'un compte afférent à l'un de ceux-ci. 37

L'efficacité d'une telle mesure — l'interruption de service — pour faire pression sur la clientèle ne saurait constituer un motif valable de reconnaître judiciairement un tel pouvoir à Hydro-Québec si le législateur ne le lui a pas attribué. Le contrat d'Hydro-Québec constitue un exemple de contrat réglementé entre un fournisseur de services publics et un client (*Bédard c. Hydro-Québec*, [1982] C.A. 518). La législation et la réglementation déterminent largement le contenu d'un tel contrat. Il faut que le pouvoir réclamé par Hydro-Québec se situe à l'intérieur du cadre juridique ainsi défini. 38

En substance, Hydro-Québec soutient qu'elle possède le pouvoir discrétionnaire d'interrompre la fourniture d'électricité à tous les points de service d'un client au cas de défaut ou de retard de paiement à l'égard de l'un de ses abonnements. Ce pouvoir ne 39

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to the appellant, this power is not subject to due diligence. It may be exercised as the appellant sees fit, whether the debt be $5, $500 or $50,000. Thus, Hydro-Québec may exercise it to put pressure on a customer even if the customer has the most legitimate of arguments that a particular amount is not due.

40 Once again, such a power would have to have been effectively and expressly granted by the legislature. There is no clear indication of this in the statutes and regulations relied on by the appellant. In his reasons for judgment, Brossard J.A. of the Court of Appeal stressed that this authority had been granted — if it had in fact been granted — only by reference to nineteenth-century legislation governing the activities of public utilities whose undertakings have since been incorporated into the one now operated by Hydro-Québec (at paras. 30-31):

> [TRANSLATION] This exorbitant power is not even conferred upon it [Hydro-Québec] directly and expressly by its enabling statute. It is conferred upon it by use of the legislative technique of reference to an 1898 statute entitled *An Act to amend and consolidate the act incorporating the Royal Electric Company*.
>
> Sections 27 and 28 of the 1898 Act reproduced, *mutatis mutandis*, the provisions relating to the power conferred upon the New City Gas Company of Montreal by the *Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend the powers of the said Company*.

41 Thus, the legislation incorporating the Royal Electric Company restated the substance of s. 20 of the statute governing the New City Gas Company of Montreal (S. Prov. C. 1849, 12 Vict., c. 183). The various formulations of these provisions granted a variety of powers to private companies that enjoyed local monopolies. Their provisions indirectly form part of the statutory and regulatory framework of a Crown corporation that now holds a monopoly over the distribution of electricity in Quebec, and may now affect the nature of contractual relations between, on the one hand, a Crown corporation that must provide a public service to a clientele it does not choose and, on the other hand, customers who must buy their electricity from it.

serait soumis à aucun contrôle préalable. Il s'exercerait au gré de l'appelante, que la dette soit de 5, 500 ou 50 000 $. Il permettrait ainsi à Hydro-Québec de faire pression sur son client même lorsque ce dernier a les motifs les plus légitimes de contester l'exigibilité d'une somme en particulier.

Encore aurait-il fallu qu'un tel pouvoir soit effectivement et expressément accordé par le législateur. Il ne ressort certes pas avec limpidité de la législation et de la réglementation qu'invoque l'appelante. Dans ses motifs, le juge Brossard, de la Cour d'appel, souligne que ce pouvoir n'aurait été accordé — si tant est qu'il l'ait été — que par des renvois à des lois du dix-neuvième siècle qui régissaient les activités des fournisseurs de services publics dont les entreprises ont été intégrées dans celle qu'exploite maintenant Hydro-Québec (par. 30-31) :

> Ce pouvoir exorbitant ne lui [Hydro-Québec] est même pas conféré directement et expressément par sa loi constitutive. Il lui est accordé par l'utilisation de la technique législative de renvoi à une loi de 1898 intitulée *Loi constituant en corporation la Compagnie royale d'électricité.*
>
> Les articles 27 et 28 de cette loi de 1898 reproduisaient, *mutatis mutandis*, les dispositions relatives au pouvoir conféré à la New City Gas Company of Montreal par l'*Acte pour amender l'Acte d'incorporation de la Nouvelle Compagnie du Gaz* [*de*] *Montréal, et pour étendre les pouvoirs de la dite Compagnie*.

La loi qui incorporait la Compagnie royale d'électricité reprenait ainsi la substance de l'art. 20 de la loi régissant la Nouvelle Compagnie du Gaz de Montréal (S. Prov. C. 1849, 12 Vict., ch. 183). Ces textes au libellé variable accordaient des pouvoirs divers à des sociétés privées jouissant d'un monopole local. Leurs dispositions se trouvent à faire indirectement partie du cadre législatif et réglementaire d'une société d'État qui détient désormais un monopole pour la distribution de l'électricité au Québec et peuvent affecter maintenant la nature des rapports contractuels entre une société d'État tenue de fournir un service public à une clientèle qu'elle ne choisit pas et des clients qui doivent lui acheter leur électricité.

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The appellant's position on the scope of its powers is based on the Privy Council's decision in *Montreal Gas Co. v. Cadieux*, [1899] A.C. 589. The Privy Council reversed a decision of this Court regarding the interpretation of the provisions authorizing the supplier to interrupt service (*Cadieux v. Montreal Gas Co.* (1898), 28 S.C.R. 382). According to the interpretation adopted by the Privy Council, the power to interrupt the supply of electricity applied to all of a customer's contracts. This Court had come to a different conclusion that restricted the exercise of this power exclusively to the delivery point in respect of which the debtor was in default. We think it helpful to reproduce here the following passage from the reasons of Girouard J. of this Court in *Cadieux* (at pp. 386-87):

Exorbitant powers like those conferred by section twenty must be construed strictly, and if ever intended to cover all the buildings or premises of the same proprietor, or occupant, when in default with regard to one of them only, must be granted in clear and no ambiguous language. The express provision contained in that section that the notice to cut off must be given "to the occupier or person in charge," plainly indicates that only premises so occupied and in default must suffer. Clause six of the contract of the respondents with the city of Montreal, containing a stipulation that they will "collect and receive the several sums of money at any time due by the gas consumers from the latter only," and not from the city, conveys the same idea. Cutting off the gas is the most efficient mode of collection and must therefore be enforced against the consumer, that is the occupant only of the premises in default. To allow a different interpretation of the words of the statute would lead to the most absurd consequences, as for instance, when the proprietor has ordered gas meters for several premises occupied by different tenants in the same or separate buildings, or when a corporation like the city of Montreal neglects to pay its gas bill on its buildings, or some of them, but not on its streets. These results must be avoided if a reasonable construction of the statutes would permit us to do so.

Although it was reversed, this judgment gave a better account of the nature of the relationship between service providers and buyers. At any rate, the legislative context has since evolved. Hydro-Québec has absorbed the companies that were granted these powers. The series of references to

42 La thèse de l'appelante, quant à l'étendue de ses pouvoirs, repose sur le jugement du Conseil privé dans *Montreal Gas Co. c. Cadieux*, [1899] A.C. 589. Le Conseil infirmait alors un arrêt de notre Cour relatif à l'interprétation des dispositions autorisant le fournisseur à interrompre le service (*Cadieux c. Montreal Gas Co.* (1898), 28 R.C.S. 382). Selon l'interprétation adoptée par le Conseil privé, le pouvoir d'interrompre la fourniture d'électricité valait pour tous les abonnements d'un client. Notre Cour avait tiré une conclusion différente qui restreignait l'exercice de ce pouvoir au seul point de livraison pour lequel le débiteur se trouvait en défaut. Nous croyons d'ailleurs utile de reproduire le passage suivant des motifs du juge Girouard, de notre Cour, dans *Cadieux* (p. 386-387) :

[TRADUCTION] Des pouvoirs exorbitants comme ceux que confère l'article vingt doivent être interprétés strictement et, s'ils sont censés viser tous les immeubles ou locaux d'un même propriétaire ou occupant ayant manqué à ses obligations quant à l'un d'eux seulement, ils doivent être accordés au moyen d'un libellé clair et non équivoque. Le fait que l'article exige expressément la remise d'un avis d'interruption « à l'occupant ou à la personne responsable » indique clairement que seuls les locaux occupés ou pour lesquels il y a défaut doivent être touchés. La clause six du contrat intervenu entre la partie intimée et la ville de Montréal, précisant que « toute somme due par un consommateur de gaz ne sera recouvrée qu'auprès de ce dernier », et non de la ville, va dans le même sens. L'interruption de service est le moyen le plus efficace d'obtenir le paiement d'une somme en souffrance; elle doit donc viser le consommateur, soit l'occupant des seuls locaux pour lesquels il y a défaut. Interpréter différemment les dispositions de la loi aurait les conséquences les plus absurdes, notamment lorsqu'un propriétaire a fait installer des compteurs individuels pour les logements occupés par différents locataires dans un même immeuble ou dans des immeubles distincts ou qu'une entité comme la ville de Montréal omet de régler sa facture de gaz pour l'un de ses immeubles, ou certains d'entre eux, mais pas pour l'éclairage des rues. Pareils résultats doivent être évités si une interprétation raisonnable des dispositions législatives le permet.

43 Bien qu'il ait été infirmé, ce jugement rendait mieux compte de la nature des relations établies entre le fournisseur et l'acheteur du service. De toute façon, le contexte législatif a évolué. Hydro-Québec a absorbé les sociétés auxquelles ces pouvoirs ont été accordés. À cause des renvois en

provisions worded in various ways make it necessary to determine whether the legislature really intended to grant Hydro-Québec powers as extensive as it submits in respect of all the activities connected with its monopoly over the distribution of electricity to consumers. Moreover, such powers depart from the general principles of the law of contracts stated clearly in art. 1591 of the *Civil Code of Québec*, S.Q. 1991, c. 64, the relevance of which Brossard J.A. noted at para. 38 by highlighting certain of its words:

> 1591. Where the obligations arising from a synallagmatic contract are exigible and one of the parties fails to perform his obligation to a substantial degree or does not offer to perform it, the other party may refuse to perform his *correlative* obligation *to a corresponding degree*, unless he is bound by law, the will of the parties or usage to perform first.

44 Hydro-Québec's interpretation of the statutory and regulatory provisions in issue likens the nonperformance of a specific contract to the nonperformance of all agreements between it and the customer. The parties could of course agree that this would be the case. The rules respecting compensation may also apply in appropriate circumstances. The legislature, too, may require the application of such rules. However, the principle that contracts are interpreted and applied separately is all the more valid in the case at bar given that Hydro-Québec's regulatory scheme is based on the concept that contracts are linked to individual service points.

45 In this regard, Nuss J.A. (at para. 68) cited with approval the judgment of the Court of Québec in *Solunac v. Hydro-Québec*, R.E.J.B. 2001-23403, at para. 107, where Gosselin J.C.Q. stated the following: [TRANSLATION] "The entire scheme of the Bylaw is based on the equation 'delivery point equals contract equals customer', as has already been demonstrated." It can be seen from s. 99 of the relevant bylaw that the contractual relationship between Hydro-Québec and the consumer is founded on a contract. Reference is made to a "customer", but always in relation to a "contract", which itself relates to an individual service point.

cascade à des textes de facture variée, on en est réduit à rechercher si le législateur a vraiment voulu accorder à Hydro-Québec des pouvoirs aussi étendus qu'elle le prétend à l'égard de l'ensemble des activités liées à l'exercice de son monopole sur la distribution de l'électricité aux consommateurs. De plus, de tels pouvoirs dérogent aux principes généraux du droit des contrats qu'énonce bien l'art. 1591 du *Code civil du Québec*, L.Q. 1991, ch. 64, et dont le juge Brossard rappelle la pertinence au par. 38 en mettant en relief certains mots de cette disposition :

> 1591. Lorsque les obligations résultant d'un contrat synallagmatique sont exigibles et que l'une des parties n'exécute pas substantiellement la sienne ou n'offre pas de l'exécuter, l'autre partie peut, *dans une mesure correspondante*, refuser d'exécuter son obligation *corrélative*, à moins qu'il ne résulte de la loi, de la volonté des parties ou des usages qu'elle soit tenue d'exécuter la première.

L'interprétation donnée par Hydro-Québec aux dispositions législatives et réglementaires en litige assimile l'inexécution d'un contrat particulier à celle de l'ensemble des ententes qui la lient à un client. Certes, les parties peuvent stipuler qu'il en sera ainsi. Les règles relatives à la compensation sont susceptibles de s'appliquer dans les situations qui s'y prêtent. Le législateur peut aussi imposer l'application de telles règles. Cependant, le principe selon lequel les contrats s'interprètent et s'appliquent distinctement s'impose d'autant plus en l'espèce que la structure réglementaire d'Hydro-Québec est basée sur un concept d'abonnement rattaché à des points de service distincts.

À cet égard, le juge Nuss (par. 68) cite et approuve le jugement de la Cour du Québec dans *Solunac c. Hydro-Québec*, R.E.J.B. 2001-23403, par. 107, où le juge Gosselin souligne que : « Tout le Règlement est en effet configuré sur la base de l'équation "un point de livraison = un abonnement = un client", comme on l'a déjà fait ressortir. » À la lecture de l'art. 99 du règlement pertinent, on constate que la relation contractuelle entre Hydro-Québec et le consommateur est établie sur la base d'un abonnement. On se réfère à la notion de client, mais toujours en fonction du concept d'abonnement, qui vise lui-même un point de service distinct. Cette structure

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This regulatory scheme defines the scope of Hydro-Québec's power to act. It allows Hydro-Québec to manage contracts, but not to interfere in other contractual relationships.

This interpretation nevertheless does not deprive Hydro-Québec of the right to recover the amount of a claim in the ordinary manner. It simply means that the appellant cannot interrupt service at will other than at the service point linked to the contract in respect of which the dispute has arisen. For these reasons, we are of the opinion that the judgment of the majority of the Court of Appeal was correct and this appeal should be dismissed with costs.

Appeal allowed, LeBel *and* Fish JJ. *dissenting.*

Solicitors for the appellant: Lavery, de Billy, Québec.

Solicitors for the respondents: Choquette Beaupré Rhéaume, Montréal.

réglementaire délimite ainsi la portée du pouvoir d'intervention d'Hydro-Québec. Elle permet de gérer les abonnements, mais non de s'immiscer dans des relations contractuelles différentes.

46

Cette interprétation ne prive pas pour autant Hydro-Québec du droit de recouvrir ses créances par les moyens habituels. Elle dit tout simplement que l'appelante ne peut à son gré interrompre le service ailleurs qu'au point de service de l'abonnement où le différend a pris naissance. Pour ces raisons, il nous paraît donc que le jugement majoritaire de la Cour d'appel est bien fondé et que le présent pourvoi doit être rejeté avec dépens.

Pourvoi accueilli, les juges LeBel *et* Fish *sont dissidents.*

Procureurs de l'appelante : Lavery, de Billy, Québec.

Procureurs des intimés : Choquette Beaupré Rhéaume, Montréal.

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TAB 5

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LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

any statutory power, and that he is not bound to admit anybody on his own land except on his own terms.

[The questions raised by the cross-appeals were compromised.]

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; Warwick Webb & Co.*

H. C. R.

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EVE J. *June* 23, 24, 25, 27, 29, 30; *July* 1, 2, 3, 14.

C. A. *Nov.* 18, 19, 20, 23.

GREAT WESTERN RAILWAY COMPANY *v.* CARPALLA UNITED CHINA CLAY COMPANY, LIMITED.

[1907 G. 2110.]

Mines and "other Minerals"—China Clay—Railway Company—Compulsory Purchase of Surface—Right to Support—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78.

China clay underlying land in Cornwall purchased by a railway company for the purposes of its undertaking, and occupying only a small fraction of the subsoil, is a "mineral" within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845.

Lord Provost and Magistrates of Glasgow v. *Farie*, (1888) 13 App. Cas. 657, distinguished.

THIS was an appeal from a decision of Eve J. which raised the question whether china clay under a piece of land in Cornwall purchased by a railway company for the purposes of its undertaking was a "mineral" excepted from the conveyance by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845. The facts were shortly as follows.

In the year 1896 the Great Western Railway Company became the owners of the undertaking, property, railway, and works of the Cornwall Minerals Railway Company. This railway was constructed in part across some two and a half acres of land in the parishes of St. Mewan and St. Stephen's in Branwell, in the county of Cornwall, acquired for the purposes of the railway under their statutory powers from a predecessor in title of the defendant Viscount Clifden, and conveyed to the Cornwall Minerals Railway Company by an indenture dated November 17,

1881. The purchase-money paid for these two and a half acres was a sum of 336*l.* 16*s.* 6*d.*, and the conveyance contained no reference to mines or minerals.

The Carpalla United China Clay Company, Limited, and their predecessors for many years past had been digging and excavating from land belonging to their co-defendant Viscount Clifden, immediately adjoining and lying to the west of the land sold to the railway company, large quantities of a rock or substance known as china clay rock. The rock had been removed by surface or open workings, the excavation resulting in a large quarry or pit of considerable area and depth. The workings had been carried on under setts or licences granted by Lord Clifden and his predecessors, and in April of 1907 were approaching at one part very close to the boundary of the railway company's land.

On April 17, 1907, Lord Clifden and the Carpalla Company served upon the railway company statutory notices under s. 78 of the Railways Clauses Consolidation Act, 1845, of their respective intentions to dig, work, mine, and search for the china clay, china stone, and mica clay lying under the railway and works connected therewith, and in, under, and throughout lands adjoining to and within the distance of forty yards from the said railway and works. By a sett or lease executed in June, 1907, and subsequent therefore to his statutory notice to the railway company, Lord Clifden granted to the Carpalla Company licence to work, mine, and search for china clay, china stone, and mica clay under and throughout the land comprised in his notice, for a term of twenty-one years from January 1, 1907. Upon receipt of the notices the railway company did not, within the statutory period or at any time thereafter, express their willingness under s. 79 of the said Act to treat with the Carpalla Company or Lord Clifden for the payment of compensation, and in October, 1907, commenced this action against the Carpalla Company and Lord Clifden, claiming an injunction to restrain the defendants from excavating upon the lands near or adjacent to the railway so or in such manner as to let down or otherwise injure the said railway or the land upon which the same is situate, or to deprive the plaintiffs of their right to have the same

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railway and land laterally supported by the said adjacent lands, and from entering into and upon the plaintiffs' railway and land and excavating thereon or removing the china clay and other the soil or subsoil thereof.

The action was tried with witnesses and occupied nine days in the Court below, a great deal of scientific evidence being put in as to the nature, composition, and origin of china clay, the result of which is given in the following judgment of Eve J. The action came on for hearing on June 23, 1908.

Cripps, K.C., P. O. Lawrence, K.C., Howard Wright, and *Colefax,* for the plaintiffs.

Astbury, K.C., and *A. F. C. Luxmoore,* for the Carpalla Company.

Sir R. Finlay, K.C., Upjohn, K.C., and *Christopher James,* for Viscount Clifden. (1)

July 14. EVE J., after stating the facts as above, referring to ss. 77, 78, and 79 of the Railways Clauses Consolidation Act, 1845, and stating the nature of the action, continued:—The claim to this relief is founded on the assertion that the substance sought to be excavated and removed is in fact part of and not a mineral under the land purchased by the company, and this is the issue which I have to determine. The notices of intention to work specify three substances, china clay, china stone, and mica clay, but it is admitted that there is no china stone to be worked here, and mica clay is only a clay of a coarser and rougher texture deposited in the process of producing china clay, and at these particular pits it is discarded as refuse. For all practical purposes, therefore, the intention to excavate and work may be regarded as an intention to excavate and work for the purposes of obtaining china clay, and it is to this substance, its nature, composition, texture, and characteristics, to the materials from which its component elements are derived, and to the agencies which have brought about the conditions in or under

(1) The arguments were the same in the Court below, though not quite so full, as in the Court of Appeal, and it has not been thought necessary to report them twice over.

which these materials are found, that the evidence has been mainly directed. The substance known as china clay or kaolin is a clay possessing exceptional qualities, primarily of colour and to a lesser degree of purity and softness, which render it suitable for use principally in the manufacture of porcelain, and to some extent in the manufacture of high-class paper and in the bleaching of calico. That it has many characteristics common to other clays is demonstrated by the geological examinations and chemical analyses made by the eminent scientists who have given evidence at this trial. It is produced by submitting to a process of hydration a rock or substance known as china clay rock. This rock, which occurs in nests or pockets in the granite formation only, is found in a state of more or less decomposition, and generally charged with moisture to a greater or less extent. The nest or pocket is, as a rule, situate on the slope of a hill, and its presence is indicated by a slight depression on the surface corresponding to the superficial area of the nest or pocket. According to the evidence of Mr. Coon, who speaks with an experience of thirty years as an engineer and as a merchant and manager in connection with the china clay industry, the china clay rock never comes to the surface; it is always found under what is called an overburden. As a rule this overburden consists of granite lying immediately below the surface soil or meat earth, as it is termed in the West of England, in a condition of more or less disintegration, rottenness, or decomposition. I say "as a rule" because in this case an instance has been proved at Central Treviscoe where china clay rock has been found under an overburden of hard solid granite thirty feet and more in thickness, and in the very pit now being worked by the defendant company it has been proved on both sides (east and west) of the railway to underlie an overburden of killas varying in thickness from ten feet to forty-six feet. To get at the china clay rock the meat earth and the overburden are wholly removed, the result, of course, being a complete destruction of the surface. The china clay rock is then excavated, broken up with picks, and exposed to the action of running water on a slope. The coarser and heavier elements of its composition are precipitated early in the process, and then, by a

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series of operations involving chiefly successive checks of the flow of water and consequent successive deposits of the heavier particles present in solution, the lightest and finest elements are ultimately alone left in suspense in the water, and these, when finally precipitated and dried, constitute the commercial article known as china clay. This is the substance which the defendants contend is a mineral within the statute, and which the plaintiffs allege to be the soil or subsoil which they have already purchased and on which their railway has been built. In order to determine which of these contentions is right it is necessary to inquire into the composition and origin of the china clay. As I have already said, the china clay rock occurs in the granite formation only. Granite is an igneous rock the mineral constitution of which differs in various places, but which may be said to be practically of general uniform crystalline constitution composed of felspar, quartz, and mica. Granite when exposed to atmospheric or other agencies becomes decomposed to an extent varying with its mineral constitution, and the first element which is the subject of decomposition is the felspar. The decomposed felspar results in the formation of a clayey material, and china clay rock is granite in which the felspar has been wholly decomposed and replaced by this clay. Different opinions are held by geologists and others as to the agency by which this complete decomposition has been brought about. Some contend that the decomposing agent is the carbonic acid in the rain-water. Others again reject the rain-water or sub-aerial theory and insist that all the known facts combine to prove that the agency by which such complete decomposition has been brought about had its origin in subterranean depths, and that the agent penetrated to the decomposed mass by means of cracks and fissures, many of which are now filled up with minerals which admittedly came from lower depths. A third class of scientists, represented by some of the most eminent who have given evidence in this case, incline to the view that both causes—sub-aerial and subterranean, or pneumatolytic, as the latter has been called—may have contributed to the result. Between these conflicting opinions it is fortunately not necessary for me to decide. It is sufficient for my purpose to find as a fact that

there are in the granite formation in the part of the country with which I have to deal in this case nests or pockets of varying superficial areas, and in most instances of unknown depths, wherein is to be found a granite in which the felspars have been wholly decomposed and replaced with the clayey material I have already mentioned. It is further established by the evidence that these nests or pockets are sporadic, that their existence adds materially to the value of the land, and that their presence or absence is not to be accounted for by any apparent differences in the overlying granite or other materials. As a general rule it may, I think, be said that they occur under an overburden of less decomposed granite, but, as I have already stated, they have been found under hard undecomposed granite, and under a wholly alien overburden such as the killas. Even when it occurs under an overburden of decomposing granite, china clay rock has, I think, characteristics apart from colour which differentiate it sufficiently from the overburden to enable those acquainted with the local formation to fix approximately the line of demarcation between the overburden and the china clay rock. The decomposed felspar—the clayey substance which has replaced the felspar—constitutes, say the defendants, the china clay. All we do, they add, is to extract this clayey substance by a sifting or washing process, whereby we disengage it from the other material with which it is found in mechanical combination. I cannot myself see that it is any answer to this contention to say that in the china clay of commerce there is still to be found a proportion of the other materials with which the clayey substance was originally completely combined. Take for example the presence of mica crystals in the commercial china clay. It is admittedly one of the objects of the washing process to separate the clayey substance from the mica, and this to a large extent is achieved, but because it is not wholly effected, and because the china clay is merchantable, notwithstanding the continued presence of some mica crystals, can it logically be asserted that mica is an essential constituent of china clay? I cannot bring myself to adopt any such view. In my opinion china clay or kaolin is the clayey substance in the china clay rock representing the decomposed felspar, and the mere fact that in the process of separating

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and extracting it from the rock a condition of disengagement is reached which is sufficient for practical commercial purposes, and beyond which it is therefore unnecessary to prolong the process, cannot, in my opinion, alter the real nature of the substance or convert the resultant product from a natural substance into an artificial combination of diverse elements originally combined in wholly different proportions. On the evidence, therefore, I come to the conclusion that china clay is a natural product—that is, the substance representing felspar in granite which has been converted into china clay rock by the complete decomposition of one of its three essential constituents. The question I have now to decide is whether such a clay as I have described is a mineral. It is common ground that it has been so regarded by geologists, mineralogists, and text-book writers for very many years past, not only in this country, but in America, France, and Germany. Jameson as early as in 1820, Professor Lapworth himself as late as in 1899, and Dr. Hatch and Professors Dana and Miers—the latter the well-known professor at Oxford—at intermediate dates, are all responsible for well-known and authoritative works wherein it is classed as a mineral. It is true that when the witnesses for the railway company were confronted with these authorities they drew a distinction between kaolin and the china clay of commerce and suggested that the former might possess attributes which would qualify it as a mineral, but which were not to be found in the latter, but I attach no importance to this distinction, in that I regard kaolin and china clay as convertible terms, and the mere fact that the clay can be turned to commercial uses without being altogether dissociated from foreign substances cannot, in my opinion, alter its real character. But the question does not really rest on the printed authorities to which I have just alluded. The scientific witnesses who were called on behalf of the railway company frankly admitted that down to some time in the latter part of last year they shared in the generally accepted view that kaolin or china clay was a mineral. Indeed in a case tried in 1904, *North British Ry. Co.* v. *Turners, Ld.* (1), Professors Boyd Dawkins and Lapworth, two of the witnesses who in this case have been called to prove

(1) (1904) 6 F. 900

that it is not a mineral, gave evidence that kaolin or china clay—treating the two words as synonymous—is a mineral, a definite chemical composition, and having very frequently a definite crystalline form. These views they have been led to discard, so they told us in the box, by more careful microscopic and local examinations of china clay and the sources from which it is derived, and the conclusions to which these examinations have led them are directly opposed to those which they shared with the scientific world generally down to the summer of last year. They now degrade china clay to an artificial product, a heterogeneous compound or mixture of everything that is in the china clay rock, and unredeemed by any one of the qualities which Dr. Hatch says are the essential characteristics of a mineral—that is to say, definite mineral composition, definite physical qualities, and definite crystal form. On the other hand, Professor Gregory, with whose evidence I was much impressed, would be no party to what I have called the degradation of kaolin or china clay. In his opinion it is a mineral, the main bulk of which is kaolinite, a crystalline substance which all parties agree is in all senses of the word a mineral. It is right that I should add that none of the plaintiffs' witnesses would admit the presence of kaolinite in the Carpalla kaolin, and on the evidence as it stands I should not be prepared to hold that this has been conclusively established. But again I am not really called upon to decide between the conflicting views of scientific men as to the exact category in which this china clay should be included to secure that accuracy of expression at which science is always aiming. What I have to determine is whether the substance is a mineral within the meaning of the Act of Parliament. Having heard all the evidence and listened to the forcible arguments which have been addressed to me, I cannot entertain any doubt as to its being such a mineral. It is found in intimate combination with elements which go to make up the subsoil of the district, and it owes its origin to the decomposition in past ages of constituent parts of that subsoil, but in its present condition occurring sparsely and sporadically, and always under an overburden of a character distinctive from the rock in which it is found, it cannot, I think, with any justice be regarded as constituting the

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land sold. It is a sedentary deposit occupying the space formerly occupied by the felspars. It can only be abstracted by the disintegration of that wherein it is deposited, and when so abstracted it is a thing which, to use Buckley J.'s words in *Great Western Ry. Co.* v. *Blades* (1), "has a value of its own apart from the soil in which it is found." It is not, in my opinion, the soil itself. Whatever be the true scientific definition of a mineral, and whatever be the correct classification of kaolin thereunder, I cannot bring myself to hold that a substance universally regarded as a mineral before and for more than sixty years after the passing of the Act which I am construing ought now to be treated as not falling within the class of substances therein referred to as minerals. Under all the circumstances, therefore, I do not consider the facts of this case bring it within either of the authorities which have been so fully discussed, and holding as I do that the china clay is a mineral within the meaning of the Act of 1845, I have no alternative but to dismiss the action with costs.

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The plaintiffs appealed. The appeal came on for hearing on November 18, 1908.

Sir C. A. Cripps, K.C., P. O. Lawrence, K.C., Howard Wright, and *Colefax*, for the appellants. The defendants are not entitled to work these beds of clay so as to let down our railway line. The question turns on the meaning of the word "minerals" in ss. 77 and 78 of the Railways Clauses Consolidation Act, 1845. Though a "mineral" prima facie includes anything lying under the land which has a value of its own, as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted from the purchase of the land by virtue of a statutory reservation. In determining whether we have bought the right to support by the clay in question in this case the Court will take into consideration all the surrounding circumstances. Clay is not invariably a mineral. Where it forms the surface or subsoil it will be held to constitute the "land" purchased for the purposes of the

(1) [1901] 2 Ch. 624, 638.

undertaking, and not a mineral within s. 77: *Lord Provost and Magistrates of Glasgow* v. *Farie* (1); *Great Western Ry. Co.* v. *Blades*. (2) Although the conveyance to our predecessors does not expressly provide for it, it must be taken that they bought this clay, which is really only part of the surface soil, and that we are entitled to restrain the respondents from working it: *In re Todd, Birleston & Co. and North Eastern Ry. Co.* (3)

[FLETCHER MOULTON L.J. referred to *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (4)]

Lord Provost and Magistrates of Glasgow v. *Farie* (1) was not overruled or shaken by *Midland Ry. Co.* v. *Robinson*. (5) No doubt in some cases clay is a mineral within the section, whether it is got by underground or by open workings: *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (6); but we do not suggest any distinction founded on the method of working the clay.

Sir R. Finlay, K.C., *Upjohn, K.C.*, and *Christopher James*, for the defendant Viscount Clifden. In determining what is a mineral within the statutory exception regard must be had to the object of ss. 77—79, which was merely to enable a railway company, instead of purchasing the minerals at the time when they purchased the land, to postpone payment for the mines or minerals under or near the railway until the mine owner gave notice of his intention to work them. As regards the authorities there is no analogy between the facts of this case and the facts in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) That case decides nothing except that where the alleged mineral forms part of the ordinary soil of the district it is not to be considered a mineral within the exception in s. 77; it proceeded on the footing that the clay which was in question in that case formed the very substance of the ground which had been purchased. *Great Western Ry. Co.* v. *Blades* (2) and *In re Todd, Birleston & Co. and North Eastern Ry. Co.* (3) are to the same effect. In *Midland Ry. Co.* v. *Robinson* (5) the only point decided was that minerals excepted from the conveyance by the Act could be worked by open workings, and it has no bearing on this case.

(1) 13 App. Cas. 657.
(2) [1901] 2 Ch. 624.
(3) [1903] 1 K. B. 603.
(4) [1893] 1 Ch. 427.
(5) (1889) 15 App. Cas. 19.
(6) (1882) 20 Ch. D. 552.

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Here the china clay does not form part of the ordinary subsoil of the country; and in fact it is so rare that it forms less than 1 per cent. of the subsoil. The decomposition of the felspar which takes place below the surface is distinct from disintegration, and the felspar is converted into china clay, which is a specifically different thing. China clay is unquestionably a mineral, and it lies at some considerable depth from the surface. What the defendants are taking away is not the subsoil generally, it is only a small fraction which is extracted from the subsoil.

Astbury, K.C., and *A. F. C. Luxmoore*, for the Carpalla Company, adopted the argument of their co-defendant.

P. O. Lawrence, K.C., in reply. The evidence shews that what the defendants are carrying away is the soil of the district, just as much as the clay was in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) and *Great Western Ry. Co.* v. *Blades*. (2) The real question is what is the subsoil in this particular district; it is what the defendants are carrying away, which in fact is the "land" purchased for the purposes of the undertaking.

COZENS-HARDY M.R. The question in this appeal is whether the Great Western Railway Company, or their predecessors in title, purchased china clay, or whether the Great Western Company must now purchase it. The conveyance under which the Great Western Railway Company claims was executed in 1881. It conveyed the strip of land upon which the line is now completed, but it did not include those things which were excepted by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845. That section I had better read: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased." There is no suggestion that whatever was excepted was expressly purchased here, and the section goes on, "and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

(1) 13 App. Cas. 657. (2) [1901] 2 Ch. 624.

Now this section has given rise to a great number of decisions, which represent various views of the meaning of the words there used. If it were necessary for me to attempt to reconcile the views of the learned Law Lords who decided *Lord Provost and Magistrates of Glasgow* v. *Farie* (1), or to discover any common principle running through their speeches, I should certainly desire time to consider my judgment, but no such task is, I think, imposed upon me. I take that case as finally deciding that where a bed of clay underlies the surface, and is the ordinary soil of the whole district in which the land is situate, such clay, though it might elsewhere be a mineral, is not within the statutory reservation to the vendor, but passes to the railway company as part of the land which was conveyed to the railway company. It was not disputed that before the decision in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1), and apart from that case, the present appeal could not have been presented with any prospect of success. In my opinion the facts of the present case fall short of, and in truth bear but slight resemblance to, the facts in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) China clay is not the substance of the subsoil; beneath the "meat earth" there is found a stratum or layer of irregular but very considerable depth, which is locally known as the "overburden," or (in part of the pit or mine which we have heard most of) as "growan." This "overburden" is not china clay and does not possess the properties of china clay; it has to be removed until a stratum or layer of china clay rock is reached. The upper layer may be regarded as disintegrated granite; the lower layer is decomposed granite, from which kaolin or china clay is obtained by washing, a process very similar to that used in streaming for tin. The attempt to make out that the upper layer differs only in colour from the lower layer seems to me to have wholly failed. It is not sufficient to say that both are granite formations. I attach considerable importance to the fact that within a few yards, and on one side of the Carpalla mine or quarry, the china clay bed is found beneath an upper stratum of killas, and it could scarcely be argued that that china clay was china clay which the Carpalla Company were

(1) 13 App. Cas. 657

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not entitled to work. On this short ground, which is substantially that upon which Eve J. proceeded, I agree with his judgment, and I think this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The scheme of the Railways Clauses Consolidation Acts with regard to mines situated beneath land proposed to be taken for the railway is to give to the railway company the privilege of postponing purchase of those mines until such time as the owner of the land which they are purchasing may desire to work them or mines contiguous to them. It was not intended that this provision should in any way do injustice to either party. I may respectfully say I agree with the remarks of Lord Macnaghten in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) that the scheme was one which was advantageous to both. Bearing in mind that it is merely a question of postponement of purchase the question which the Court has here to decide presents itself in this shape: Aye or No, by the conveyance of the land, without mentioning "all the mines or minerals," was the china clay then and there purchased by the railway company?

In the first place let me say that I cannot entertain any doubt as to china clay being a mineral. It seems to me to be typically a mineral in the ordinary and in the legal acceptation of the term. I reject the whole of the evidence that was given at the trial of this case with regard to china clay being a mineral on two grounds. In the first place I think that such evidence was inadmissible. The question is as to the interpretation of an ordinary English word in its proper legal acceptation, and that is for the Court, and is not a matter of evidence. The other ground upon which I reject it is that in my opinion the whole of that evidence was directed to a false issue. It consisted in asking mineralogists whether this substance, so well known commercially and so important industrially, was a mineral. To a mineralogist the question would mean, Was it a definite and specific mineral, homogeneous, and possessing

(1) 13 App. Cas. 657.

known mineralogical characteristics? That is an issue which is perfectly immaterial here. Many of the best-known minerals are mixtures of a large variety of different minerals if that word be used in its strict mineralogical sense, but that does not prevent the well-known mixture being in the eye of the law a mineral. Putting that evidence, therefore, on one side, I say that china clay appears to me, in the ordinary acceptation of the word and in the legal acceptation of the word, to be typically a mineral. If I were rash enough to venture a definition of "mineral" I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which make it occupy so much of the earth's crust. I should not think that what in engineering cases is usually known as "contractor's muck" is a mineral. To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of the earth's crust, for the purpose of making embankments, where the material goes from one position in the earth's crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statuary, or for the manufacture of lime. Ironstone for the purpose of obtaining the iron, slate for its numerous uses, to which I need not refer—all these things seem to me to be properly called minerals, because from their properties they have a value in use.

Now apart from authority I should have thought that the group of sections in the Railways Clauses Consolidation Acts which reserves from an ordinary purchase by a railway company mines of coal, ironstone, slate, and other minerals would have

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left the owner of the land from whom it was purchased free to work minerals in that sense, and I cannot myself think that it makes any difference for this purpose whether a particular mineral goes down as far towards the centre of the earth as it is possible to prove it, or whether it comes up to the surface of the earth. I cannot, apart from authority, think that such matter can make any difference to the question of whether it is a mineral either in the ordinary or legal acceptation of the term, or in the sense in which the word is used in those sections of the Railways Clauses Consolidation Acts.

There are, however, authorities which make it doubtful whether this view is correct so far as the use of the word in the Railways Clauses Consolidation Acts is concerned, but they do not raise any doubt in my mind that china clay is a mineral in the ordinary or legal acceptation of the term. A great deal of evidence has been given as to the nature and probable origin of china clay. It is common ground that it is formed in situ and that the primal matter from which it is formed is the granite which is found so widely in that part of the country, and that this granite has passed through a chemical change which has decomposed one of the components (the felspar) which constitute it. The granite has thus been rotted, the felspar not only being decomposed, but also, I conclude from the evidence, partially changed by the intrusion of these chemical reagents into compounds which were not found in the felspar itself. We have not got to decide the question as to whether the chemical reagents came from above or came from below, but I cannot help saying that the theory that this change has been brought about by atmospheric conditions and by the water that comes from above appears to me wholly insufficient to account for the presence of the china clay, and if I had to decide the question I should say that the operations by which the china clay has been produced were very much more closely akin to those operations whereby the rock of a country is metallized and veins are formed. This altered granite is found in granitic formations sporadically and exceptionally. It is quite true that in the southern portion of Cornwall it is found much less rarely than in other granitic portions of the world. That is not very surprising, since this part of Cornwall has evidently been in the past subjected

to influences which have metallized much of the rock, and probably some of those influences have caused the comparatively frequent occurrence of china clay in this neighbourhood. But although its occurrence in South Cornwall is comparatively frequent as compared to its presence in granitic districts generally, even here in neighbourhoods which include the richest portion of the deposits of china clay it is very rare. We have evidence that it amounts to only a little more than a half per cent. on the large granitic estates of Lord Clifden. You have only to look at the map to see that, so far from its being the ordinary rock of the neighbourhood, it is so rare, and it appears in such small quantities, that to find it in a locality is somewhat like striking oil in Pennsylvania—it is considered to be a very valuable discovery.

Nor is it only that the occurrence of the china clay rock is exceptional. We have also to consider what is done with this rock to extract from it commercial china clay. The rock is granite; only one of the three component parts of granite is true china clay; and although no doubt in commercial china clay a certain portion of the mica is also to be found, yet still that which makes it china clay is the presence of a large proportion of decomposed felspar. But it is clear from the evidence, and from the nature of the bodies, that a very large portion of the old granite (more especially that which existed in the shape of quartz) must be separated from this china clay rock by manufacturing operations in order to make commercial china clay, and in fact the china clay is extracted much in the same way that galena or other lead ores would be extracted from the results of mining a lead lode.

Keeping these facts in one's mind, one asks oneself, Is there any case which has ever decided that a rare and valuable substance, obtained exceptionally from under the surface of the earth by means of mining and manufacturing operations such as these, is not a mineral within the meaning of these reservations? I can find no such case. The only case which is put to us as an authority to the contrary binding upon us is *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) *Great Western Ry. Co.* v.

(1) 13 App. Cas. 657.

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Blades (1) was confessedly a case which followed *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) and does not carry the matter any further. Now, on looking at *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), I find that the opinions of the four learned Lords who decided that case went on very different grounds. The dissenting judgment of Lord Herschell held that the reservation was extremely wide. The judgment of Lord Macnaghten agreed with that of Lord Herschell so far as concerns limitations to the reservation, depending on the nature of the mineral, but he considered that "mines" as used in these sections of the Railways Clauses Consolidation Acts did not include open workings. The opinions of Lord Halsbury and Lord Watson, however, did turn upon the nature of the substance which it was proposed to take out of the ground, and, reading their opinions with a very genuine desire to arrive at that which influenced their Lordships, I have come to the conclusion that they decided that the brick earth in that case was not within the reservation because that which was proposed to be removed from the soil would have been generally regarded in the locality as mere soil. It was the clay which was the common soil of the neighbourhood, and I think that both of those learned Lords came to the conclusion that, in the fair interpretation of a conveyance of the land reserving the minerals in such a locality, this common soil of the neighbourhood would have been supposed to pass as land and not be reserved as minerals. I do not think that they intended to lay down that things which were in their nature minerals ceased to be within the reservation if they came up to the surface of the ground. It is evident that Lord Watson did not, because in a subsequent case, in which he said that he adhered to all that he had said in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), he held that if the surface of the ground consisted of substances which were properly termed minerals the very surface itself might be taken. Now on that interpretation of the judgments of those noble Lords it is clear that the decision in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) does not affect the present case. I do not think that any two things could be more strikingly opposed in their nature than this rare and

(1) [1901] 2 Ch. 624. (2) 13 App. Cas. 657.

exceptional mineral (known it is true as china clay, but as little like clay in appearance as almost any mineral could be) and the common clay which would be considered to be the ordinary soil of an agricultural district. I feel, therefore, no difficulty in this case arising out of the decision of the House of Lords in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) I hold that these deposits are minerals, that they were not purchased by the Great Western Railway Company at the date when they purchased the land, but remained the property of the person who sold the land to them; and I cannot say that I feel that such a decision is either extraordinary in its consequences or unfair to the Great Western Railway Company, even though it could be shewn that these minerals extended from the surface to the centre of the earth, because it only means that these minerals have to be purchased now because they were not purchased then. It is only a question of the date and not of the amount of the payment to be made for the land, because, as they certainly belonged to the owner of the land at the time the railway company made the purchase, the railway company would be obliged then to purchase, or must now pay for these minerals, however valuable they are and however deep they descend.

FARWELL L.J. Whatever may be the difficulties occasioned by the reasons given in some of the decided cases, I cannot say that I think there is any difficulty in deciding the present case when the facts are once known. It appears to me to turn on the true construction to be put on the conveyance of 1881, read by the light of the Railways Clauses Consolidation Acts and bearing in mind the relation of the parties, namely, a railway company, with compulsory powers for the purpose of making its line, and a vendor. These considerations exclude the ordinary presumptions as to the surface owner acquiring the right to support. The true view is that pointed out in many of the cases, that the railway company buys under exceptional circumstances, having a postponed option of purchase of minerals—a postponement which, as explained by Lord Macnaghten in *Farie's Case* (2), is for the

(1) 13 App. Cas. 657. (2) 13 App. Cas. 696.

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benefit both of the railway company and of the owner of the minerals. Regarded from that point of view, and putting oneself in the position of the parties as they were in 1881, then, with the qualification I have already stated arising from the fact that the parties are a railway company acquiring under statutory powers and a vendor, I see no reason why the other ordinary rules applicable to construction of documents should not apply. One such rule is that stated by Lord Ellenborough in *Robinson* v. *French*. (1) A written instrument must be "construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." I ask myself, In 1881 what was the term which would be applied to china clay within that definition? Clearly, a mineral. I have only to go to Professor Lapworth to discover that. He tells us, and the text-books also shew, that china clay, the only clay acknowledged by geologists as a mineral, is kaolin or china clay, which, like other minerals, sometimes appears crystallized, and then has a definite composition and a particular character, and so on. That was evidence which he gave in *Great Western Ry. Co.* v. *Blades*. (2) He goes on to say that he has since changed his mind, but that is absolutely immaterial. The inquiry is, What was the ordinary accepted sense in 1881? The Professor says he accepted this from the ordinary text-books and the ordinary state of knowledge at the time he gave his evidence in *Great Western Ry. Co.* v. *Blades* (2), which was obviously in accord with what was the ordinary knowledge in 1881. The meaning of the word "excepted," by virtue of the Act, from the conveyance cannot be altered because experts have since changed their minds as to the true scientific terminology. The parties were then dealing with a

(1) (1803) 4 East, 130, 135. (2) [1901] 2 Ch. 624.

substance well known, certainly in the West Country, and excepted from the conveyance, because it was well known to be, and was spoken of by the parties to the conveyance and everybody else as, a mineral; and I agree with Fletcher Moulton L.J.'s observations as to the inapplicability, both by reason of inadmissibility and irrelevancy, of the greater part of the expert evidence here given. It was irrelevant for the further reason, to my mind, that it was addressed to the wrong period; it does not matter that the professors have changed their minds as to the true definition of kaolin or china clay since the year 1881. The point is, What did ordinary persons, amongst whom must be included the contracting parties to this conveyance, mean by the words "china clay" in 1881? Was it or was it not a mineral? I cannot doubt myself that if the parties then bargaining for the conveyance of the land had said "But there may be china clay here," the answer would have been, "If there is it is a mineral, and we need not trouble ourselves about it, because you will be able to work it if and when it is found." That disposes of the case, and shews why, in my opinion, *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) has no reference to it. If the defendants had been quarrying granite to be used for metalling roads, or something of that sort, there might have been a question whether or not it came within *Lord Provost and Magistrates of Glasgow* v. *Farie* (1); but when they are in fact taking this mineral substance, which I understand to be felspar in some way or other turned into a hydrated silicate of alumina by some chemical action the exact nature of which is not known, it appears to me that so far from its being the soil it is a very, very small fraction of the soil, and without desiring to criticize Lord Halsbury, I venture to think that he was a little hard on Mellish L.J. I do not think the Lord Justice intended to say that the definition of "mineral" can depend on the fluctuation of the market. What I understand him to mean is that china clay might be regarded as a mineral because it is one of those things which are usually worked with the object of making a profit, not because a profit is made, but because the object is to make a profit, and the substance is extracted from the soil for

(1) 13 App. Cas. 657.

C. A. 1908 GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED.

the purpose of making a profit out of it when gotten. It is not taking the soil itself, but extracting a mineral substance from the soil. The result is, in my opinion, that Eve J. was quite right.

Solicitors: *R. R. Nelson; Coode, Kingdon & Cotton, for Shilson, Coode & Co., St. Austell; Walker, Martineau & Co.*

W. C. D.

C. A. 1908 Nov. 26.

CHAPMAN *v.* MICHAELSON.

[1908 C. 508.]

Money-lender—Registration—Mortgage in favour of unregistered Money-lender—Validity—Declaratory Order—Equitable Relief—Imposition of Terms—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*a*), (*b*), (*c*)—*Rules of Supreme Court*, 1883, *Order* XXV., *r.* 5.

The trustee of a debtor under a scheme of arrangement with his creditors brought an action against an unregistered money-lender, who, in the course of his business, had taken a mortgage from the debtor to secure a loan, for a declaration that the mortgage was illegal and void under s. 2 of the Money-lenders Act, 1900:—

Held, that the Court had power to give a declaratory judgment, although no ancillary relief was claimed, and that it ought not to impose upon the plaintiff equitable terms as to repayment of the actual money advanced as a condition of giving the declaratory judgment.

Lodge v. *National Union Investment Co.*, [1907] 1 Ch. 300, distinguished.

Decision of Eve J., [1908] 2 Ch. 612, affirmed.

APPEAL from a decision of Eve J. (1)

The plaintiff brought this action as the trustee of the property of L. R. W. Loyd under a scheme of arrangement with his creditors. The defendant was a money-lender who carried on business in partnership with S. J. Samuel under the registered trade name of "Sydney Mostyn" at the registered address of 3, Lower Church Street, Bath, and 41, Bridge Street, Bristol. The plaintiff alleged that a mortgage dated February 14, 1905, executed by Loyd in favour of the defendant was entered into by the defendant in the course of his business of a money-lender

(1) [1908] 2 Ch. 612.

TAB 6

William Francis Perka, Paul Oscar Nelson, William Terry Hines and Stephen Earl Johnson *Appellants*;

and

Her Majesty The Queen *Respondent*.

File No.: 17217.

1984: January 31, February 1; 1984: October 11.

Present: Ritchie, Dickson, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Defences — Necessity — Illegal drugs found on distressed vessel seeking refuge in Canadian waters — Charges of importing narcotics and of possession for the purpose of trafficking — Whether defence available — Criminal Code, R.S.C. 1970, c. C-34, s. 7(3) — Narcotic Control Act, R.S.C. 1970, c. N-1, s. 7(2).

Criminal law — Drug offences — Botanical defence — Whether the Narcotic Control Act intended to include all forms of marihuana — Narcotic Control Act, R.S.C. 1970, c. N-1, s. 2.

Interpretation — Technical and scientific terms — Meaning of the phrase "Cannabis sativa L." — Meaning frozen at the time of enactment — Narcotic Control Act, R.S.C. 1970, c. N-1, s. 2, Schedule: item 3.

Appeal — Arguments on appeal — Whether respondent limited to appellants' points of law — Rules of the Supreme Court of Canada, SOR/83-74, Rule 29(1).

Following the seizure of their cannabis cargo by the police in Canadian waters, appellants were charged with importing cannabis into Canada and with possession for the purpose of trafficking. At trial, the accused advanced the defence of necessity claiming that they did not plan to import into Canada as their destination was Alaska but that, following a series of mechanical problems aggravated by deteriorating weather, they had decided for the safety of ship and crew to seek refuge on the Canadian shoreline to repair the vessel. The vessel found a sheltered cove but grounded amidships on a rock. The defence tendered evidence that the captain, fearing he was going to capsize, ordered the men to offload the cargo. When the police arrived on the scene

William Francis Perka, Paul Oscar Nelson, William Terry Hines et Stephen Earl Johnson *Appelants*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 17217.

1984: 31 janvier, 1er février; 1984: 11 octobre.

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

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

Droit criminel — Moyens de défense — Nécessité — Drogue illégale découverte à bord d'un navire en détresse qui avait cherché refuge dans les eaux canadiennes — Accusations d'importation de stupéfiants et de possession en vue d'en faire le trafic — Ce moyen de défense peut-il être invoqué? — Code criminel, S.R.C. 1970, chap. C-34, art. 7(3) — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 7(2).

Droit criminel — Infractions en matière de stupéfiants — Moyen de défense fondé sur la classification botanique — La Loi sur les stupéfiants vise-t-elle à inclure toutes les espèces de marihuana? — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 2.

Interprétation — Termes techniques et scientifiques — Sens de l'expression «Cannabis sativa L.» — Le sens à donner à cette expression est celui qu'elle avait au moment de l'adoption de la Loi — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 2, Annexe: art. 3.

Appel — Plaidoiries — L'intimée est-elle limitée par les points de droit soulevés par les appelants? — Règles de la Cour suprême du Canada, DORS/83-74, art. 29(1).

À la suite de la saisie de leur cargaison de cannabis par la police dans les eaux canadiennes, les appelants ont été accusés d'avoir importé du cannabis au Canada et d'en avoir eu la possession en vue d'en faire le trafic. Au procès, les accusés ont invoqué le moyen de défense fondé sur la nécessité, soutenant qu'ils n'avaient pas eu l'intention d'importer au Canada, puisque leur destination était l'Alaska, mais qu'à la suite d'une série d'ennuis mécaniques aggravés par le mauvais temps, ils avaient décidé, par mesure de précaution pour le navire et pour l'équipage, de chercher refuge sur la côte canadienne afin de réparer le navire. Le navire a trouvé une baie abritée mais s'est échoué par le milieu sur des rochers. La défense a soumis en preuve que le capitaine,

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most of the marihuana was onshore. The accused also relied upon a "botanical defence" arguing that the Crown had failed to prove that the ship's cargo was "*Cannabis sativa* L." as provided for in the schedule to the *Narcotic Control Act*. The trial judge, however, withdrew the botanical defence from the jury. The appellants were acquitted. The Court of Appeal set aside the acquittal and ordered a new trial holding that the trial judge erred in refusing to grant the Crown's application to call rebuttal evidence with respect to the condition of the vessel. The Court also held that the trial judge was correct in withdrawing the botanical defence from the jury.

Held: The appeals should be dismissed.

Per Ritchie, Dickson, Chouinard and Lamer JJ.: The defence of necessity is available in Canada and should be recognized as an excuse operating by virtue of s. 7(3) of the *Criminal Code*. The essential criteria for the operation of the defence is the moral involuntariness of the wrongful action measured on the basis of society's expectation of appropriate and normal resistance to pressure. The defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril. The act in question may only be characterized as involuntary where it was inevitable, unavoidable, and where no reasonable opportunity for an alternative course of action that did not involve a breach of the law was available to the accused. As well the harm inflicted by the violation of the law must be less than the harm the accused sought to avoid. Where it was contemplated or ought to have been contemplated by the accused that his actions would likely give rise to an emergency requiring the breach of the law it may not be open to him to claim his response was involuntary; mere negligence or involvement in criminal or immoral activity when the emergency arose, however, will not disentitle an accused from relying upon the defence. Finally, where sufficient evidence is placed before the Court to raise the issue of necessity the onus falls upon the Crown to meet the defence and prove beyond a reasonable doubt that the accused's act was voluntary; the accused bears no burden of proof. In this case, the trial judge was correct in instructing the jury upon necessity, however, he erred in his directions to them. Although he adequately charged the jury upon the majority of issues pertinent to the proper test for neces-

qui craignait que le navire ne chavire, a ordonné à l'équipage de décharger la cargaison. À l'arrivée de la police sur les lieux, presque toute la marihuana était déjà à terre. Les accusés ont aussi invoqué le moyen de défense fondé sur la «classification botanique», soutenant que la poursuite n'avait pas prouvé que la cargaison du navire était du «*Cannabis sativa* L.» comme le prévoit l'annexe de la *Loi sur les stupéfiants*. Cependant, le juge du procès n'a pas soumis le moyen de défense fondé sur la classification botanique à l'appréciation du jury. Les appelants ont été acquittés. La Cour d'appel a annulé l'acquittement et ordonné un nouveau procès, statuant que le juge du procès a commis une erreur en refusant de permettre à la poursuite de produire une contre-preuve quant à l'état du navire. La Cour a aussi statué que le juge du procès a eu raison de ne pas soumettre à l'appréciation du jury le moyen de défense fondé sur la classification botanique.

Arrêt: Les pourvois sont rejetés.

Les juges Ritchie, Dickson, Chouinard et Lamer: Le moyen de défense fondé sur la nécessité peut être invoqué au Canada et il doit être considéré comme une excuse applicable en vertu du par. 7(3) du *Code criminel*. Le critère essentiel qui régit l'application de ce moyen de défense est le caractère involontaire, du point de vue moral, de l'acte mauvais, qui se mesure en fonction de ce que la société considère comme une résistance normale et appropriée à la pression. Ce moyen de défense ne s'applique qu'à une situation de danger imminent où l'on a agi afin d'éviter un péril imminent et immédiat. L'acte en question ne peut être qualifié d'involontaire que s'il était inévitable et s'il ne s'offrait à l'accusé aucune possibilité raisonnable d'adopter une autre ligne de conduite qui ne comportait pas d'infraction à la loi. De même, le mal causé par la violation de la loi doit être moindre que celui que l'accusé a cherché à éviter. Si l'accusé a prévu ou aurait dû prévoir que ses actes pourraient donner lieu à une situation d'urgence qui exigerait la perpétration d'une infraction à la loi, il se peut qu'il ne puisse pas faire valoir que sa réaction a été involontaire. Toutefois, la simple négligence ou le simple fait qu'il participait à une activité criminelle ou immorale lorsque la situation d'urgence s'est présentée n'empêche pas l'accusé d'invoquer ce moyen de défense. Enfin, lorsque l'on fournit à la Cour suffisamment d'éléments de preuve pour soulever la question de la nécessité, il incombe à la poursuite de réfuter ce moyen de défense et de prouver hors de tout doute raisonnable que l'acte de l'accusé était volontaire; le fardeau de la preuve n'incombe pas à l'accusé. En l'espèce, le juge du procès a eu raison de donner au jury des directives quant au

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sity he did not direct their attention to the issue of the availability of a reasonable legal alternative. This error goes to the heart of the defence and justifies a new trial.

The trial judge was correct in withdrawing the appellants' botanical defence from the jury as the phrase "*Cannabis sativa* L." in the *Narcotic Control Act* was meant to embrace all forms of marihuana. In keeping with the doctrine of *contemporanea expositio* the meaning to be given to this phrase is the meaning the botanical community ascribed to it when the Act became law in 1961. At that time, botanists were virtually unanimous in holding that cannabis (marihuana) consisted only of one species and that the plants which some botanists referred to as "*Cannabis indica* Lam." and "*Cannabis ruderalis* Jan." were merely subspecies of "*Cannabis sativa* L.". Where the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity has shifted.

Since a new trial must be ordered there is no need to decide whether the trial judge erred in refusing to allow the Crown to tender rebuttal evidence.

Per Wilson J.: The defence of necessity must be grounded either on excuse or on justification. The only way in which the defence of necessity can be applied as an excuse is where the accused's act is done in the interest of self-preservation. Such an act must be characterized not by the voluntariness of the act but by its unpunishable nature. As such, the act may be exempted from culpability if it arose in a life-threatening situation of necessity. Where, however, a defence by way of excuse is premised on compassion for the accused or on a perceived failure to achieve a desired instrumental end of punishment, the judicial response must be to fashion an appropriate sentence but to reject the defence as such.

moyen de défense fondé sur la nécessité, mais il a toutefois commis une erreur en lui donnant ses directives. Même s'il a donné aux jurés des directives suffisantes quant à la majorité des questions relatives au critère applicable en matière de nécessité, il n'a pas attiré leur attention sur la question de la possibilité d'adopter une autre ligne de conduite légale et raisonnable. Cette erreur touche le coeur même du moyen de défense et justifie la tenue d'un nouveau procès.

Le juge du procès a eu raison de ne pas soumettre à l'appréciation du jury le moyen de défense fondé sur la classification botanique puisqu'en employant l'expression «*Cannabis sativa* L.» dans la *Loi sur les stupéfiants*, le législateur a voulu inclure toutes les espèces de marihuana. Conformément à la doctrine de la *contemporanea expositio*, le sens que doit recevoir cette expression est celui que la communauté des botanistes lui donnait lorsque la Loi est entrée en vigueur en 1961. À cette époque, presque tous les botanistes considéraient que le cannabis (marihuana) ne consistait qu'en une seule espèce et que les plantes que certains botanistes désignaient sous les noms de «*Cannabis indica* Lam.» et de «*Cannabis ruderalis* Jan.» n'étaient que des sous-espèces du «*Cannabis sativa* L.» Lorsque le législateur choisit délibérément un terme scientifique ou technique précis pour désigner une classe tout aussi précise et particulière de choses, ce serait faire violence à l'intention du législateur que de donner un sens nouveau à un tel terme chaque fois qu'il y a un changement de consensus taxinomique chez les membres de la communauté scientifique concernée.

Puisqu'il convient d'ordonner un nouveau procès, point n'est besoin de décider si le juge du procès a commis une erreur en refusant d'accorder à la poursuite le droit de présenter une contre-preuve.

Le juge Wilson: La nécessité invoquée comme moyen de défense doit se fonder sur une excuse ou une justification. Le seul cas où le moyen de défense fondé sur la nécessité peut être invoqué comme une excuse est celui où l'accusé a accompli l'acte en question afin d'assurer sa propre conservation. Cet acte doit se distinguer non par son caractère volontaire, mais par le fait qu'il ne peut entraîner aucune peine. L'auteur d'un tel acte peut être exempté de toute culpabilité s'il l'a accompli dans une situation de nécessité où sa vie était en danger. Toutefois, si l'excuse invoquée comme moyen de défense repose sur la compassion pour l'accusé ou sur le sentiment que l'imposition de la peine prévue n'aura pas l'effet souhaité, les juges doivent réagir en concevant une sentence appropriée, mais en rejetant le moyen de défense comme tel.

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Where necessity is invoked as a justification, the accused must show that he operated under a conflicting legal duty which made his seemingly wrongful act right. Such justification must be premised on a right or duty recognized by law. This excludes conduct attempted to be justified on the ground of an ethical duty internal to the conscience of the accused as well as conduct sought to be justified on the basis of a perceived maximization of social utility resulting from it. Rather, the conduct must stem from the accused's duty to satisfy his legal obligations and to respect the principle of the universality of rights. The justification therefore does not depend on the immediacy or "normative involuntariness" of the accused's act. Finally, the justification is not established simply by showing a conflict of legal duties. Since the defence rests on the rightfulness of the accused's choice of one over the other, the rule of proportionality is central to the evaluation of the justification.

Morgentaler v. The Queen, [1976] 1 S.C.R. 616; *R. v. Salvador* (1981), 59 C.C.C. (2d) 521; *R. v. Gilkes* (1978), 8 C.R. (3d) 159; *R. v. Doud* (1982), 18 M.V.R. 146; *R. v. Byng* (1977), 20 N.S.R. (2d) 125; *R. v. Walker* (1979), 48 C.C.C. (2d) 126; *Reniger v. Fogossa* (1551), 1 Plowd. 1; *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273; *United States v. Holmes*, 26 Fed. Cas. 360 (1842); *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Moylan*, 417 F.2d 1002 (1969); *United States v. Cullen*, 454 F.2d 386 (1971); *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (1976); *United States v. Richardson*, 588 F.2d 1235 (1978); *R. v. Morgentaler* (1976), 33 C.R.N.S. 244; *R. v. Guenther* (1978), 8 Alta. L.R. (2d) 125; *R. v. Pootlass* (1977), 1 C.R. (3d) 378; *R. v. Fry* (1977), 36 C.C.C. (2d) 396; *R. v. Morris* (1981), 61 C.C.C. (2d) 163; *Southwark London Borough Council v. Williams*, [1971] Ch. 734; *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653; *Dairy Foods, Inc. v. Co-opérative Agricole de Granby*, [1976] 2 S.C.R. 651; *The SS. "Tordenskjold" v. The SS. "Euphemia"* (1908), 41 S.C.R. 154; *Dormuth v. Untereiner*, [1964] S.C.R. 122; *Brown v. Dean*, [1910] A.C. 373; *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239; *Gambart v. Ball* (1863), 32 L.J.C.P. 166; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *R. v. Herbert, Coombs and Spanks* (1975), 28 C.C.C. (2d) 423; *R. v. Deslaurier, Paskell and Pinney*, Ont. Co. Ct. (District of York), July 1974; *People v. Hamilton*, 105 Cal. App. 3d 113 (1980); *United States v. Lupo*, 652 F.2d 723 (1981);

Lorsque la nécessité est invoquée comme une justification, l'accusé doit démontrer qu'il a agi en raison d'obligations légales contradictoires, ce qui a fait de son acte apparemment mauvais un acte bon. Cette justification doit reposer sur un droit ou une obligation reconnus par la loi. Cela a pour effet d'exclure la conduite que l'on tente de justifier par une obligation morale que ressentait intérieurement l'accusé et celle que l'on cherche à justifier par ce qu'on croit être la réalisation d'un plus grand bien pour la société. La conduite doit plutôt découler de l'obligation qui incombe à l'accusé de s'acquitter des responsabilités que lui confère la loi et de respecter le principe de l'universalité des droits. La justification ne dépend donc pas du caractère immédiat ou du «caractère involontaire dit normatif» de l'acte de l'accusé. Enfin, on n'établit pas une justification simplement en démontrant l'existence d'un conflit entre des obligations légales. Étant donné que le moyen de défense repose sur la justesse du choix fait par l'accusé, la règle de la proportionnalité joue un rôle capital dans l'évaluation de la justification.

Jurisprudence: *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. v. Salvador* (1981), 59 C.C.C. (2d) 521; *R. v. Gilkes* (1978), 8 C.R. (3d) 159; *R. v. Doud* (1982), 18 M.V.R. 146; *R. v. Byng* (1977), 20 N.S.R. (2d) 125; *R. v. Walker* (1979), 48 C.C.C. (2d) 126; *Reniger v. Fogossa* (1551), 1 Plowd. 1; *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273; *United States v. Holmes*, 26 Fed. Cas. 360 (1842); *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Moylan*, 417 F.2d 1002 (1969); *United States v. Cullen*, 454 F.2d 386 (1971); *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (1976); *United States v. Richardson*, 588 F.2d 1235 (1978); *R. v. Morgentaler* (1976), 33 C.R.N.S. 244; *R. v. Guenther* (1978), 8 Alta. L.R. (2d) 125; *R. v. Pootlass* (1977), 1 C.R. (3d) 378; *R. v. Fry* (1977), 36 C.C.C. (2d) 396; *R. v. Morris* (1981), 61 C.C.C. (2d) 163; *Southwark London Borough Council v. Williams*, [1971] Ch. 734; *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653; *Dairy Foods, Inc. c. Co-opérative Agricole de Granby*, [1976] 2 R.C.S. 651; *The SS. «Tordenskjold» v. The SS. «Euphemia»* (1908), 41 R.C.S. 154; *Dormuth v. Untereiner*, [1964] R.C.S. 122; *Brown v. Dean*, [1910] A.C. 373; *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239; *Gambart v. Ball* (1863), 32 L.J.C.P. 166; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *R. v. Herbert, Coombs and Spanks* (1975), 28 C.C.C. (2d) 423; *R. v. Deslaurier, Paskell and Pinney*, Cour de comté (district de York, Ont.), juillet 1974; *People v. Hamilton*, 105 Cal. App. 3d 113 (1980); *United States v. Lupo*, 652 F.2d 723 (1981);

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United States v. Kelly, 527 F.2d 961 (1976); *United States v. Gavic*, 520 F.2d 1346 (1975); *United States v. Spann*, 515 F.2d 579 (1975); *United States v. Walton*, 514 F.2d 201 (1975); *United States v. Honneus*, 508 F.2d 566 (1974); *United States v. Kinsey*, 505 F.2d 1354 (1974); *United States v. Sifuentes*, 504 F.2d 845 (1974); *United States v. Gaines*, 489 F.2d 690 (1974); *United States v. Moore*, 446 F.2d 448 (1971); *Director of Public Prosecutions v. Morgan*, [1975] 2 All E.R. 347; *State v. Green*, 470 S.W. 2d 565 (1971); *People v. Whipple*, 279 P. 1008 (1929); *People v. Noble*, 170 N.W. 2d 916 (1969); *State v. St. Clair*, 262 S.W. 2d 25 (1953); *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *R. v. Instan*, [1893] 1 Q.B. 450; *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (1910); *Ploof v. Putman*, 71 A. 188 (1908); *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004; *Mouse's Case* (1608), 12 Co. Rep. 63; Ch. corr., Amiens, April 22, 1898, *Ménard's Case*, S. 1899.2.1, referred to.

APPEALS from a judgment of the British Columbia Court of Appeal (1982), 69 C.C.C. (2d) 405, 38 B.C.L.R. 273, allowing the Crown's appeal from the acquittal of the accused and ordering a new trial. Appeals dismissed.

Clayton C. Ruby, for the appellant Nelson.

Jeffrey Green and *Janice R. Dillon*, for the appellants Perka, Hines and Johnson.

S. David Frankel, for the respondent.

The judgment of Ritchie, Dickson, Chouinard and Lamer JJ. was delivered by

DICKSON J.—In this case we consider (i) a recurring legal problem, the "necessity" defence; (ii) what is commonly known as the "botanical" or "cannabis species" defence.

I Facts

The appellants are drug smugglers. At trial, they led evidence that in early 1979 three of the appellants were employed, with sixteen crew members, to deliver, by ship (the *Samarkanda*) a load of cannabis (marihuana) worth $6,000,000 or $7,000,000 from a point in international waters off the coast of Colombia, South America, to a drop point in international waters 200 miles off the

United States v. Kelly, 527 F.2d 961 (1976); *United States v. Gavic*, 520 F.2d 1346 (1975); *United States v. Spann*, 515 F.2d 579 (1975); *United States v. Walton*, 514 F.2d 201 (1975); *United States v. Honneus*, 508 F.2d 566 (1974); *United States v. Kinsey*, 505 F.2d 1354 (1974); *United States v. Sifuentes*, 504 F.2d 845 (1974); *United States v. Gaines*, 489 F.2d 690 (1974); *United States v. Moore*, 446 F.2d 448 (1971); *Director of Public Prosecutions v. Morgan*, [1975] 2 All E.R. 347; *State v. Green*, 470 S.W. 2d 565 (1971); *People v. Whipple*, 279 P. 1008 (1929); *People v. Noble*, 170 N.W. 2d 916 (1969); *State v. St. Clair*, 262 S.W. 2d 25 (1953); *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *R. v. Instan*, [1893] 1 Q.B. 450; *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (1910); *Ploof v. Putman*, 71 A. 188 (1908); *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004; *Mouse's Case* (1608), 12 Co. Rep. 63; Ch. corr., Amiens, 22 avril, 1898, *arrêt Ménard*, S. 1899.2.1.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique (1982), 69 C.C.C. (2d) 405, 38 B.C.L.R. 273, qui a accueilli l'appel interjeté par le ministère publique à l'encontre de l'acquittement des accusés et ordonné un nouveau procès. Pourvois rejetés.

Clayton C. Ruby, pour l'appelant Nelson.

Jeffrey Green et *Janice R. Dillon*, pour les appelants Perka, Hines et Johnson.

S. David Frankel, pour l'intimée.

Version française du jugement des juges Ritchie, Dickson, Chouinard et Lamer rendu par

LE JUGE DICKSON—Dans la présente affaire, nous devons examiner (i) un problème juridique qui se pose souvent, savoir le moyen de défense fondé sur la «nécessité», (ii) ce qu'on appelle communément le moyen de défense fondé sur la «classification botanique» ou «l'espèce de cannabis».

I Les faits

Les appelants font la contrebande de la drogue. Au procès, ils ont mis en preuve qu'au début de 1979 trois des appelants ont été embauchés, avec seize membres d'équipage, en vue de livrer par navire (le *Samarkanda*) un chargement de cannabis (marihuana) valant de 6 000 000 $ à 7 000 000 $, à partir d'un endroit situé dans les eaux internationales au large de la côte de la

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coast of Alaska. The ship left Tumaco, Colombia, empty with a port clearance document stating the destination to be Juneau, Alaska. For three weeks the ship remained in international waters off the coast of Colombia. While there, a DC-6 aircraft made four trips, dropping into the water shrimp nets with a total of 634 bales of cannabis which were retrieved by the ship's longboats.

A "communications" package was also dropped from a light aircraft, giving instructions for a rendez-vous with another vessel, the *Julia "B"*, which was to pick up the cargo of cannabis from the *Samarkanda* in international waters off the coast of Alaska. *En route*, according to the defence evidence, the vessel began to encounter a series of problems; engine breakdowns, overheating generators and malfunctioning navigation devices, aggravated by deteriorating weather. In the meantime the fourth appellant, Nelson, part owner of the illicit cargo, and three other persons left Seattle in a small boat, the *Whitecap*, intending to rendez-vous with the *Samarkanda* at the drop point in Alaska. The problems of the *Samarkanda* intensified as fuel was consumed. The vessel became lighter, the intakes in the hull for sea water, used as a coolant, lost suction and took in air instead, causing the generators to overheat. At this point the vessel was 180 miles from the Canadian coastline. The weather worsened. There were eight-to-ten-foot swells and a rising wind. It was finally decided for the safety of ship and crew to seek refuge on the Canadian shoreline for the purpose of making temporary repairs. The *Whitecap* found a sheltered cove on the west coast of Vancouver Island, "No Name Bay". The *Samarkanda* followed the *Whitecap* into the Bay but later grounded amidships on a rock because the depth sounder was not working. The tide ran out. The vessel listed severely to starboard, to the extent that the Captain, fearing the vessel was going to capsize, ordered the men to offload the

Colombie, en Amérique du Sud, jusqu'à un point de livraison situé dans les eaux internationales à 200 milles au large de la côte de l'Alaska. Le navire est parti vide de Tumaco (Colombie) muni d'une déclaration de douanes indiquant Juneau (Alaska) comme destination. Pendant trois semaines, le navire est demeuré dans les eaux internationales au large de la Colombie. Pendant qu'il y séjournait, un avion de type DC-6 a effectué quatre voyages, larguant à la mer des filets à crevettes chargés, au total, de 634 ballots de marihuana qui ont été récupérés au moyen des chaloupes de sauvetage du navire.

Un avion léger a aussi largué un colis de «renseignements» contenant des directives au sujet d'un rendez-vous avec un autre navire, le *Julia «B»*, qui devait prendre livraison de la cargaison de cannabis du *Samarkanda* dans les eaux internationales au large de la côte de l'Alaska. En cours de route, selon les témoignages de la défense, le navire a connu une série d'ennuis, pannes des machines, surchauffe des générateurs et mauvais fonctionnement des instruments de navigation, tout cela aggravé par le mauvais temps. Dans l'intervalle, le quatrième appelant, Nelson, copropriétaire de la cargaison illicite et trois autres personnes sont partis de Seattle dans un petit bateau, le *Whitecap*, dans l'intention de rejoindre le *Samarkanda* au point de livraison en Alaska. Les problèmes du *Samarkanda* se sont aggravés à mesure qu'il consommait son carburant. Le navire est devenu plus léger, les prises d'eau de mer de la coque servant au système de refroidissement se sont mises à aspirer de l'air plutôt que de l'eau ce qui a causé la surchauffe des générateurs. À ce moment-là, le navire était à 180 milles des côtes canadiennes. Le mauvais temps empirait. La hauteur de la houle était de huit à dix pieds et le vent s'élevait. Par mesure de précaution pour le navire et pour l'équipage, on a finalement décidé de chercher refuge sur la côte canadienne afin d'effectuer des réparations temporaires. Le *Whitecap* a trouvé une baie abritée sur la côte ouest de l'île Vancouver, appelée «No Name Bay». Le *Samarkanda* a suivi le *Whitecap* dans la baie, mais s'est plus tard échoué par le milieu sur les rochers parce que le sondeur de profondeur ne fonctionnait plus. La marée a baissé. Le navire donnait dangereusement de la bande à tribord, à tel point que le capitaine, qui

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cargo. That is a brief summary of the defence evidence.

Early on the morning of May 22, 1979 police officers entered No Name Bay in a marked police boat with siren sounding. The *Samarkanda* and the *Whitecap* were arrested, as were all the appellants except Perka and Nelson, the same morning. The vessels and 33.49 tons of cannabis marihuana were seized by the police officers.

Charged with importing cannabis into Canada and with possession for the purpose of trafficking, the appellants claimed they did not plan to import into Canada or to leave their cargo of cannabis in Canada. They had planned to make repairs and leave. Expert witnesses on marine matters called by the defence testified that the decision to come ashore was, in the opinion of one witness, expedient and prudent and in the opinion of another, essential. At trial, counsel for the Crown alleged that the evidence of the ship's distress was a recent fabrication. Crown counsel relied on the circumstances under which the appellants were arrested to belie the "necessity" defence; when the police arrived on the scene most of the marihuana was already onshore, along with plastic ground sheets, battery operated lights, liquor, food, clothing, camp stoves, and sleeping bags. Nevertheless, the jury believed the appellants and acquitted them.

The acquittal was reversed on appeal. After the close of the case for the accused at trial, the Crown had applied to call rebuttal evidence with respect to the condition of the vessel. The trial judge refused the Crown's application. He held that the defence evidence relating to the happenings in the engine room should not have caught the prosecution by surprise and in the circumstances, the conditions for calling rebuttal evidence had not been met. At trial the defence also relied upon a "botanical defence" arguing that the Crown had failed to prove that the ship's cargo was "*cannabis sativa* L.", as provided for in the Schedule to the *Narcotic Control Act*, R.S.C. 1970, c. N-1. Thus

craignait que le navire ne chavire, a ordonné à l'équipage de décharger la cargaison. Il s'agit là d'un bref résumé de la preuve de la défense.

Tôt le matin du 22 mai 1979, des policiers sont entrés dans No Name Bay à bord d'un bateau de la police identifié comme tel et dont la sirène était en marche. Ce matin-là, ils ont arraisonné le *Samarkanda* et le *Whitecap* et procédé à l'arrestation de tous les appelants sauf Perka et Nelson. Les policiers ont saisi les navires et 33,49 tonnes de marihuana.

Accusés d'avoir importé du cannabis au Canada et d'en avoir eu la possession en vue d'en faire le trafic, les appelants ont prétendu qu'ils n'avaient pas eu l'intention d'importer ni de laisser leur cargaison de cannabis au Canada. Ils avaient projeté d'effectuer des réparations et de repartir. Des témoins experts des questions marines assignés par la défense ont affirmé que la décision d'accoster était, de l'avis d'un des témoins, bonne et prudente et, de l'avis d'un autre témoin, essentielle. Au procès, le substitut du procureur général a soutenu que la preuve de l'état de détresse du navire était de fabrication récente. Le substitut du procureur général a invoqué les circonstances dans lesquelles les appelants ont été arrêtés pour contredire le moyen de défense fondé sur la «nécessité»; à l'arrivée de la police sur les lieux, presque toute la marihuana était déjà à terre, avec des tapis de sol en plastique, des lampes de poche, de la boisson alcoolisée, de la nourriture, des vêtements, des poêles de camping et des sacs de couchage. Néanmoins le jury a cru les appelants et les a acquittés.

L'acquittement a été infirmé en appel. À la fin de la présentation de la preuve des accusés au procès, la poursuite a demandé la permission de produire une contre-preuve quant à l'état du navire. Le juge du procès a rejeté la demande de la poursuite. Il a statué que la preuve de la défense quant à ce qui s'est produit dans la chambre des machines n'aurait pas dû prendre la poursuite par surprise et que, dans les circonstances, les conditions permettant de produire une contre-preuve n'étaient pas remplies. Au procès, la défense a aussi invoqué le moyen de défense fondé sur la «classification botanique», soutenant que la poursuite n'avait pas prouvé que la cargaison du navire

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the appellants had committed no offence. The trial judge withdrew the botanical defence from the jury. On appeal by the Crown, the Court of Appeal, in allowing the appeal, held that the trial judge had erred in refusing to grant leave to the Crown to call rebuttal evidence and, on the cross-appeal held that the judge was correct in withdrawing the botanical defence from the jury.

était du «*cannabis sativa* L.», comme le prévoit l'annexe de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1. Ainsi, les appelants n'avaient commis aucune infraction. Le juge du procès n'a pas soumis le moyen de défense fondé sur la classification botanique à l'appréciation du jury. La Cour d'appel a accueilli l'appel formé par Sa Majesté et statué que le juge du procès avait commis une erreur en refusant de permettre à la poursuite de produire une contre-preuve; au sujet de l'appel incident, elle a statué que le juge a eu raison de ne pas soumettre à l'appréciation du jury le moyen de défense fondé sur la classification botanique.

The appellants have now appealed to this Court. In addition to claiming that the Court of Appeal erred in reversing the trial judge on the rebuttal issue, the appellants contend that the Court of Appeal applied the wrong standard in ordering a new trial. The appellants also contend that the botanical defence should have been left with the jury. The Crown, of course, takes the opposite position on each of these questions and has raised one of its own: whether the trial judge erred in charging the jury with respect to the necessity defence. Because the appellants raised a preliminary objection to this Court even addressing this last issue, I will deal with it first.

Les appelants se pourvoient maintenant devant cette Cour. En plus de soutenir que la Cour d'appel a commis une erreur en infirmant la décision du juge du procès sur la question de la contre-preuve, les appelants font valoir que la Cour d'appel a appliqué le mauvais critère en ordonnant un nouveau procès. Les appelants soutiennent aussi que le moyen de défense fondé sur la classification botanique aurait dû être soumis à l'appréciation du jury. La poursuite, cela va de soi, soutient le contraire sur chacun de ces moyens et a soulevé sa propre question: le juge du procès a-t-il commis une erreur en donnant des directives au jury quant au moyen de défense fondé sur la nécessité? Parce que les appelants ont contesté, à titre d'opposition préliminaire, le droit de cette Cour d'aborder cette dernière question, j'analyserai ce moyen en premier lieu.

The appellants argue that this Court should not consider the Crown's contentions with respect to the necessity defence because the Court of Appeal decided that the defence was available and the jury could properly be instructed on it. Accordingly, the appellants contend the Crown's argument with respect to the defence of necessity is really in the nature of a cross-appeal. Since the Crown does not have an appeal as of right to this Court and since leave has not been granted, the appellants say this Court does not have jurisdiction to decide the issues raised by the "cross-appeal".

Les appelants prétendent que cette Cour ne devrait pas étudier les prétentions de Sa Majesté relativement au moyen de défense fondé sur la nécessité parce que la Cour d'appel a décidé que l'on pouvait recourir à ce moyen de défense et que le jury pouvait à bon droit recevoir des directives à ce sujet. En conséquence, les appelants soutiennent que l'argument de Sa Majesté quant au moyen de défense fondé sur la nécessité participe vraiment de la nature d'un pourvoi incident. Puisque Sa Majesté ne dispose pas d'un pourvoi de plein droit devant cette Cour et puisque l'autorisation de se pourvoir n'a pas été accordée, les appelants affirment que cette Cour n'a pas compétence pour se prononcer sur les moyens soulevés par le «pourvoi incident».

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In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellants' points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial. See *Brown v. Dean*, [1910] A.C. 373; *Dormuth v. Untereiner*, [1964] S.C.R. 122; *The SS. "Tordenskjold" v. The SS. "Euphemia"* (1908), 41 S.C.R. 154; *Dairy Foods, Inc. v. Co-opérative Agricole de Granby*, [1976] 2 S.C.R. 651. That is not the case here. The necessity defence was raised and fully argued in both courts below. Therefore, if we regard the Crown's submission as an argument to sustain the judgment below, this Court undoubtedly has jurisdiction to hear and decide the issue. Even if we regard the Crown's submission with regard to necessity as seeking to vary the decision of the court below, the *Rules of the Supreme Court of Canada*, Rule 29(1), would still give this Court the power to treat the whole case as open:

29. (1) If a respondent intends at the hearing of an appeal to argue that the decision of the court below should be varied, he shall, within thirty days after the service of the notice of appeal or within such time as a Judge allows, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way limit the power of the Court to treat the whole case as open but may, in the discretion of the Court, be a ground for an adjournment of the hearing.

(Emphasis added.)

In the event, at the hearing of the appeal the Court did treat the whole case as open and ruled that the Court would address the merits of the Crown's contentions with respect to the necessity defence. That I now propose to do.

En matière civile et en matière criminelle, il est loisible à un intimé de soumettre des arguments à l'appui du jugement d'instance inférieure et il n'est pas limité aux points de droit soulevés par les appelants. Une partie ne peut cependant pas soulever un argument entièrement nouveau qui n'a pas été soulevé devant les cours d'instance inférieure et au sujet duquel il aurait pu être nécessaire de soumettre des éléments de preuve au procès. Voir *Brown v. Dean*, [1910] A.C. 373; *Dormuth v. Untereiner*, [1964] R.C.S. 122; *The SS. «Tordenskjold» v. The SS. «Euphemia»* (1908), 41 R.C.S. 154; *Dairy Foods, Inc. c. Co-opérative Agricole de Granby*, [1976] 2 R.C.S. 651. Ce n'est pas le cas en l'espèce. Le moyen de défense fondé sur la nécessité a été soulevé et débattu à fond en première instance et en appel. En conséquence, si nous considérons la prétention de Sa Majesté comme un argument à l'appui du jugement d'instance inférieure, cette Cour a manifestement compétence pour entendre et trancher la question. Même si nous considérons que la prétention de Sa Majesté quant au moyen de défense fondé sur la nécessité vise à faire modifier la décision de la Cour d'appel, le par. 29(1) des *Règles de la Cour suprême du Canada* accorde quand même à la Cour le pouvoir de considérer l'ensemble de l'affaire:

29. (1) Lorsque l'intimé a l'intention de plaider à l'audition d'un pourvoi que le jugement du tribunal d'instance inférieure devrait être modifié, il doit, dans les 30 jours de la signification de l'avis de pourvoi ou dans le délai accordé par un juge, en aviser toutes les parties intéressées. Le défaut de donner cet avis ne modifie aucunement le pouvoir de la Cour de considérer l'ensemble de l'affaire, mais peut justifier à la discrétion de la Cour, un ajournement de l'audition.

(C'est moi qui souligne.)

En définitive, à l'audition du pourvoi cette Cour a considéré l'ensemble de l'affaire et statué que la Cour se prononcerait sur le fond des prétentions de la poursuite quant au moyen de défense fondé sur la nécessité. C'est ce que je ferai maintenant.

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II The Necessity Defence

a) *History and Background*

From earliest times it has been maintained that in some situations the force of circumstances makes it unrealistic and unjust to attach criminal liability to actions which, on their face, violate the law. Aristotle, in the *Nicomachean Ethics*, Book III, 1110a (trans. D. Ross, 1975, at p. 49), discusses the jettisoning of cargo from a ship in distress and remarks that "any sensible man does so" to secure the safety of himself and his crew. Pollard, arguing for the defendant in the case of *Reniger v. Fogossa* (1551), 1 Plowd. 1 at p. 18, maintained:

> . . . in every Law there are some Things which when they happen a Man may break the Words of the Law, and yet not break the Law itself; and such Things are exempted out of the Penalty of the Law, and the Law privileges them although they are done against the Letter of it, for breaking the Words of the Law is not breaking the Law, so as the Intent of the Law is not broken. And therefore the Words of the Law of Nature, of the Law of this Realm, and of other Realms, and of the Law of God will also yield and give Way to some Acts and things done against the Words of the same Laws, and that is, where the Words of them are broken to avoid greater Inconveniences, or through Necessity, or by Compulsion . . .

In *Leviathan* (Pelican ed. 1968), at p. 157, Hobbes writes:

> If a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory: yet a man would reason thus, if I doe it not, I die presently: if I doe it, I die afterwards; therefore by doing it, there is time of life gained; Nature therefore compells him to the fact.

To much the same purpose Kant, in *The Metaphysical Elements of Justice* (trans. Ladd, 1965), discussing the actions of a person who, to save his own life sacrifices that of another, says at p. 41:

II Le moyen de défense fondé sur la nécessité

a) *Historique*

Depuis très longtemps, on considère que dans certaines situations la force des circonstances fait qu'il n'est ni réaliste ni juste d'attacher une responsabilité criminelle à des actes qui, à première vue, enfreignent la loi. Dans *Éthique à Nicomaque*, livre III, 1110*a*) (trad. J. Tricot, 1959, à la p. 120), Aristote traite du jet par-dessus bord de la cargaison d'un navire en détresse et souligne que lorsqu'il s'agit de son propre salut et de celui de ses compagnons «un homme de sens agit toujours ainsi». Pollard, qui représentait le défendeur dans l'affaire *Reniger v. Fogossa* (1551), 1 Plowd. 1, a soutenu à la p. 18:

> [TRADUCTION] . . . toute loi comporte des circonstances où une personne peut enfreindre la lettre de la loi sans pourtant enfreindre la loi elle-même; et les actes qu'elle accomplit alors ne sont pas soumis à la sanction de la loi, même la loi les encourage quoiqu'ils soient accomplis contrairement à la lettre de la loi, parce que contrevenir à la lettre de la loi n'est pas contrevenir à la loi elle-même, pour autant qu'il n'y a pas contravention à l'intention de la loi. En conséquence la lettre de la loi naturelle, de la loi du Royaume, de celle des autres royaumes et de celle de Dieu permet aussi d'accomplir certains actes qui vont à l'encontre de la lettre de ces mêmes lois lorsqu'il y a contravention à la lettre de la loi soit pour éviter des inconvénients plus grands, soit par nécessité ou par contrainte . . .

Dans le *Léviathan* (trad. F. Tricaud, éd. Sirey, Paris, 1971), aux pp. 322 et 323, Hobbes écrit:

> Si l'on contraint un homme, par l'effroi d'une mort immédiate, à accomplir un acte contraire à la loi, cet homme est entièrement excusé, parce que nulle loi ne peut obliger un homme à renoncer à sa propre préservation. Supposons même qu'une telle loi oblige: on se tiendrait malgré tout le raisonnement suivant: si je n'accomplis pas cet acte, je meurs immédiatement; si je l'accomplis je meurs plus tard; en l'accomplissant, je gagne donc quelque temps de vie. La nature contraint donc cet homme à accomplir cet acte.

Presque dans le même sens, Kant, *Métaphysique des mœurs, Doctrine du droit* (trad. A. Philonenko, 1971), affirme, à la p. 110, en parlant des actes d'une personne qui, pour sauver sa propre vie, sacrifierait celle d'autrui:

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A penal law applying to such a situation could never have the effect intended, for the threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned). Hence, we must judge that, although an act of self-preservation through violence is not inculpable, it still is unpunishable . . .

Ainsi une telle loi pénale n'aurait pas l'effet visé; c'est que la menace d'un mal qui est encore incertain (perdre la vie par une décision de justice) ne peut surpasser la peur devant un mal certain (à savoir la noyade). Aussi l'acte de conservation de soi par violence ne doit pas être considéré comme innocent . . . , mais comme impunissable . . .

In those jurisdictions in which such a general principle has been recognized or codified it is most often referred to by the term "necessity". Classic and harrowing instances which have been cited to illustrate the arguments both for and against this principle include the mother who steals food for her starving child, the shipwrecked mariners who resort to cannibalism (*R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273) or throw passengers overboard to lighten a sinking lifeboat (*United States v. Holmes*, 26 Fed. Cas. 360 (1842)), and the more mundane case of the motorist who exceeds the speed limit taking an injured person to the hospital.

Dans les ressorts où un tel principe général a été reconnu ou codifié, il est souvent désigné par le terme «nécessité». Parmi les exemples classiques et poignants cités pour illustrer les arguments pour et contre ce principe, il y a celui de la mère qui vole de la nourriture pour nourrir son enfant affamé, celui des naufragés qui ont recours au cannibalisme (*R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273) ou qui jettent des passagers pardessus bord pour alléger le canot de sauvetage en train de couler (*United States v. Holmes*, 26 Fed. Cas. 360 (1842)), et le cas plus banal de l'automobiliste qui dépasse la limite de vitesse en conduisant un blessé à l'hôpital.

In the United States a general defence of necessity has been recognized in the statutory law of a number of states and has found its way into the *Model Penal Code* of the American Law Institute. Attempts have been made, with mixed success, in American jurisdictions to apply the defence to multifarious types of conduct, including cases involving prison escapes, *United States v. Bailey*, 444 U.S. 394 (1980); social protests and civil disobedience, *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *certiorari* denied 397 U.S. 910; *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971); and unorthodox medical treatments, *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976); *United States v. Richardson*, 588 F.2d 1235 (9th Cir. 1978).

Aux États-Unis, un moyen de défense général fondé sur la nécessité a été reconnu dans le droit écrit de nombreux États et il a été introduit dans le *Model Penal Code* de l'American Law Institute. On a essayé avec plus ou moins de succès, dans les ressorts américains, d'appliquer ce moyen de défense à divers types de conduite notamment dans des cas où il était question d'évasion de prison, *United States v. Bailey*, 444 U.S. 394 (1980); de manifestations de protestation et de désobéissance civile, *United States v. Moylan*, 417 F.2d 1002 (4e cir. 1969), *certiorari* refusé 397 U.S. 910; *United States v. Cullen*, 454 F.2d 386 (7e cir. 1971); de traitements médicaux hétérodoxes, *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976); *United States v. Richardson*, 588 F.2d 1235 (9e cir. 1978).

In England, opinion as to the existence of a general defence of necessity has varied. Blackstone in his *Commentaries on the Law* (abridged edition of Wm. Hardcastle Browne, edited by Bernard C. Gavit, 1941) mentioned two principles capable of being read as underlying such a defence. In Book 4, chap. 2, at p. 761, he says:

En Angleterre, l'opinion quant à l'existence d'un moyen de défense général fondé sur la nécessité a varié. Blackstone dans son ouvrage *Commentaries on the Law* (édition abrégée de Wm. Hardcastle Browne, éditée par Bernard C. Gavit, 1941) mentionne deux principes susceptibles d'être interprétés comme sous-tendant un tel moyen de défense. Dans le livre 4, chap. 2, à la p. 761, il affirme:

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As punishments are only inflicted for the abuse of that free will, which God has given to man, it is just that a man should be excused for those acts, which are done through unavoidable force and compulsion.

Then under the rubric "Choice Between Two Evils" he writes:

Choice Between Two Evils. This species of necessity is the result of reason and reflection and obliges a man to do an act, which, without such obligation, would be criminal. This occurs, when a man has his choice of two evils set before him, and chooses the less pernicious one. He rejects the greater evil and chooses the less. As where a man is bound to arrest another for a capital offence, and being resisted, kills the offender, rather than permit him to escape.

Stephen, *A History of the Criminal Law of England* (1883), vol. II, p. 108, refers to compulsion by necessity as one of the curiosities of the law, "a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient". At page 110 he concedes it just possible to imagine cases in which the expedience of breaking the law would be so overwhelmingly great that people might be justified in doing so but says that "these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards".

Later English commentators have had even more doubts on the matter. *Halsbury's Laws of England* (4th ed. 1976), vol. 11, para. 26, has this to say on the subject:

26. Necessity. Although there are cases in which it is not criminal for a person to cause harm to the person or property of another, there is no general rule giving rise to a defence of necessity, and it seems that, outside the specific cases mentioned, it is no defence to a crime to show that its commission was necessary in order to avoid a greater evil to the defendant or to others.

While Glanville Williams ("The Defence of Necessity", (1953) 6 C.L.P. 216) has been able to assert "with some assurance" that the defence of necessity is recognized by English law, the authors

[TRADUCTION] Puisque des peines ne peuvent donc être infligées que si l'on abuse du libre arbitre que Dieu a accordé à l'homme, il n'est que juste qu'un homme soit excusé des actes qu'il a accomplis à cause d'une force ou d'une contrainte irrésistible.

Puis sous la rubrique [TRADUCTION] «Choix entre deux maux», il écrit:

[TRADUCTION] **Choix entre deux maux**. Cette sorte de nécessité découle du raisonnement et de la réflexion et oblige un [homme] à accomplir un acte qui, sans cette obligation, serait criminel. Cela se produit lorsqu'un homme a le choix entre deux maux qui se présentent à lui et choisit le moindre. Il rejette le plus grand mal et choisit le moindre. Tel est le cas de l'homme qui est tenu d'en arrêter un autre pour une infraction punissable de mort et qui, parce que le contrevenant résiste, le tue plutôt que de le laisser s'échapper.

Stephen, *A History of the Criminal Law of England* (1883), vol. II, p. 108, parle de la contrainte par nécessité comme de l'une des curiosités du droit, [TRADUCTION] «un sujet à propos duquel la loi anglaise est si vague que, si jamais il se présentait des affaires qui soulèvent la question, les juges pourraient pratiquement établir la règle qui leur paraîtrait utile». À la page 110, il reconnaît qu'il est bien possible d'imaginer des cas où l'avantage de contrevenir à la loi serait si grand que des personnes pourraient être justifiées de le faire, mais il ajoute que [TRADUCTION] «ces cas ne peuvent pas être précisés à l'avance et ils doivent être soumis à l'appréciation d'un jury après coup».

Après lui, les glossateurs anglais ont encore eu plus de doutes sur la question. Voici ce qu'on dit dans *Halsbury's Laws of England* (4e éd., 1976), vol. 11, par. 26:

[TRADUCTION] **26. Nécessité.** Bien qu'il y ait des cas où ce n'est pas un crime que de causer à autrui un préjudice personnel ou matériel, il n'y a pas de règle générale qui donne lieu à une défense fondée sur la nécessité et il semble que, sauf pour les cas précis mentionnés, la preuve que la perpétration d'un crime était nécessaire pour éviter un mal plus grand au défendeur ou à autrui ne constitue pas un moyen de défense valable.

Bien que Glanville Williams («The Defence of Necessity», (1953) 6 C.L.P. 216) ait pu affirmer [TRADUCTION] «avec une certaine assurance» que le droit anglais reconnaît le moyen de défense

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of Smith & Hogan, *Criminal Law* (4th ed. 1978) at pp. 193-94 state that "the better view appears to be that a general defence of necessity is not recognized by the English courts at the present time".

A Working Party of the English Law Commission proposed to resolve this uncertainty by recognizing a general defence of necessity, but one that was carefully circumscribed to prevent its being invoked in extravagant and inappropriate cases. The English Law Commission, however, rejected the Working Party proposal and instead made two counterproposals (Law Com. No. 83, Part IV) which recognized the possibility of the existence of a defence of necessity at common law but clearly disapproved of its principles. The Commission proposed:

> First, that no attempt should be made to establish the defence by legislation. Secondly, that the proposed Act should expressly abolish any such defence as may exist at common law.

In Canada the existence and the extent of a general defence of necessity was discussed by this Court in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. As to whether or not the defence exists at all I had occasion to say at p. 678:

> On the authorities it is manifestly difficult to be categorical and state that there is a law of necessity, paramount over other laws, relieving obedience from the letter of the law. If it does exist, it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible.

Subsequent to *Morgentaler*, the courts appear to have assumed that a defence of necessity does exist in Canada. On the later trial of Dr. Morgentaler, the defence of necessity was again raised on a charge of procuring a miscarriage. Some admissible evidence was made in support of the plea and the case went to the jury, which rendered a verdict of not guilty. An appeal by the Crown from the acquittal failed: *R. v. Morgentaler* (1976), 33 C.R.N.S. 244. Leave to appeal to this Court was

fondé sur la nécessité, les auteurs de Smith & Hogan, *Criminal Law* (4e éd., 1978), affirment, aux pp. 193 et 194, que [TRADUCTION] «le meilleur point de vue semble être que les tribunaux anglais ne reconnaissent pour l'instant aucun moyen de défense général fondé sur la nécessité».

Un comité de travail de l'English Law Commission a proposé de lever cette incertitude en reconnaissant un moyen de défense général fondé sur la nécessité qui serait délimité avec soin pour éviter qu'on l'invoque de façon extravagante et inopportune. L'English Law Commission a toutefois rejeté la proposition du comité de travail et plutôt formulé les deux contre-propositions suivantes (Law Com. No. 83, partie IV) dans lesquelles elle reconnaît qu'il peut exister en *common law* un moyen de défense fondé sur la nécessité, mais en désapprouve nettement les principes. La Commission a proposé:

> [TRADUCTION] En premier lieu, qu'on s'abstienne d'essayer d'établir le moyen de défense par voie de législation. En second lieu, que la loi proposée abolisse expressément tout moyen de défense de cette sorte qui peut exister en *common law*.

Au Canada, cette Cour a étudié l'existence et la portée du moyen de défense général fondé sur la nécessité dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616. Quant à la question de savoir si ce moyen de défense existe, j'ai eu l'occasion d'affirmer à la p. 678:

> En se basant sur les précédents, il est manifestement difficile d'être catégorique et de déclarer qu'il existe une loi de la nécessité, primant les autres lois, et qui dispense d'obéir à la lettre de la loi. Si elle existe, elle ne peut faire plus que justifier la désobéissance dans des situations urgentes de danger imminent et évident lorsque l'obéissance à la loi est démonstrativement impossible.

Depuis l'arrêt *Morgentaler*, les tribunaux semblent présumer qu'il existe, au Canada, un moyen de défense fondé sur la nécessité. Au procès subséquent du docteur Morgentaler, on a de nouveau invoqué la nécessité comme moyen de défense à l'encontre d'une accusation d'avoir procuré un avortement. Des éléments de preuve recevables ont été présentés à l'appui du moyen de défense et l'affaire a été soumise au jury qui a rendu un verdict d'acquittement. L'appel interjeté par la

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refused, [1976] 1 S.C.R. x. The defence also succeeded in four other cases: *R. v. Guenther* (1978), 8 Alta L.R. (2d) 125; *R. v. Pootlass* (1977), 1 C.R. (3d) 378; *R. v. Fry* (1977), 36 C.C.C. (2d) 396; *R. v. Morris* (1981), 61 C.C.C. (2d) 163. In a number of other cases the existence of such a defence was acknowledged but held to be unavailable on the facts. Some examples include: *R. v. Gilkes* (1978), 8 C.R. (3d) 159; *R. v. Doud* (1982), 18 M.V.R. 146; *R. v. Byng* (1977), 20 N.S.R. (2d) 125; *R. v. Walker* (1979), 48 C.C.C. (2d) 126 and *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S.S.C. App. Div.), the case most nearly analogous to the one at bar, of which more anon.

In the present appeal the Crown does not challenge the appellants' claim that necessity is a common law defence preserved by *Criminal Code* s. 7(3). Rather, the Crown claims the trial judge erred in (1) instructing the jury on the defence in light of the facts and (2) imposing the burden of disproof of the defence upon the Crown, rather than imposing the burden of proof on the appellants.

b) *The Conceptual Foundation of the Defence*

In *Morgentaler*, *supra*, I characterized necessity as an "ill-defined and elusive concept". Despite the apparently growing consensus as to the existence of a defence of necessity that statement is equally true today.

This is no doubt in part because, though apparently laying down a single rule as to criminal liability, the "defence" of necessity in fact is capable of embracing two different and distinct notions. As Mr. Justice Macdonald observed succinctly but accurately in the *Salvador* case, *supra*, at p. 542:

> Generally speaking, the defence of necessity covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good.

poursuite à l'encontre de l'acquittement a échoué. *R. v. Morgentaler* (1976), 33 C.R.N.S. 244. L'autorisation de pourvoi en cette Cour a été refusée, [1976] 1 R.C.S. x. Le moyen de défense a aussi été accepté dans quatre autres affaires: *R. v. Guenther* (1978), 8 Alta L.R. (2d) 125; *R. v. Pootlass* (1977), 1 C.R. (3d) 378; *R. v. Fry* (1977), 36 C.C.C. (2d) 396; *R. v. Morris* (1981), 61 C.C.C. (2d) 163. Dans un certain nombre d'autres affaires, on a conclu que ce moyen de défense existait, mais qu'on ne pouvait y recourir en raison des faits en présence. Parmi ces affaires, il y a *R. v. Gilkes* (1978), 8 C.R. (3d) 159; *R. v. Doud* (1982), 18 M.V.R. 146; *R. v. Byng* (1977), 20 N.S.R. (2d) 125; *R. v. Walker* (1979), 48 C.C.C. (2d) 126 et *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (C.S. N.-É., Div. d'appel), l'affaire qui ressemble le plus à l'espèce et sur laquelle je reviendrai plus loin.

Dans le présent pourvoi, Sa Majesté ne conteste pas la prétention des appelants selon laquelle la nécessité est un moyen de défense de *common law* préservé par le par. 7(3) du *Code criminel*. Sa Majesté soutient plutôt que le juge du procès a commis une erreur (1) en donnant des directives au jury sur ce moyen de défense vu les faits et (2) en imposant à Sa Majesté le fardeau de réfuter ce moyen de défense plutôt que d'imposer aux appelants le fardeau d'en faire la preuve.

b) *Fondement conceptuel de ce moyen de défense*

Dans l'arrêt *Morgentaler*, précité, j'ai qualifié la nécessité de «concept mal défini et difficile à cerner». Malgré le consensus apparemment croissant quant à l'existence d'un moyen de défense fondé sur la nécessité, cette affirmation est tout aussi vraie aujourd'hui.

C'est sans doute en partie parce que, même s'il semble poser une seule règle quant à la responsabilité criminelle, le «moyen de défense» fondé sur la nécessité peut viser deux notions différentes et distinctes. Comme le juge Macdonald le souligne brièvement mais avec justesse dans l'arrêt *Salvador*, précité, à la p. 542:

> [TRADUCTION] De façon générale, le moyen de défense fondé sur la nécessité vise tous les cas où l'inobservation de la loi est excusée par une situation d'urgence ou justifiée par la réalisation d'un plus grand bien.

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Working Paper 29 of the Law Reform Commission of Canada at p. 93 makes this same point in somewhat more detail:

> The rationale of necessity, however, is clear. Essentially it involves two factors. One is the avoidance of greater harm or the pursuit of some greater good, the other is the difficulty of compliance with law in emergencies. From these two factors emerge two different but related principles. The first is a utilitarian principle to the effect that, within certain limits, it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it. The second is a humanitarian principle to the effect that, again within limits, it is excusable in an emergency to break the law if compliance would impose an intolerable burden on the accused.

Despite any superficial similarities, these two principles are in fact quite distinct and many of the confusions and the difficulties in the cases (and, with respect, in academic discussions) arise from a failure to distinguish between them.

Criminal theory recognizes a distinction between "justifications" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider *rightful*, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer.

In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who labours under a mistake of fact, the drunkard, the sleepwalker: these are all

Le document de travail 29 de la Commission de réforme du droit du Canada exprime, à la p. 108, la même idée de façon un peu plus détaillée:

> Le principe de la nécessité est effectivement clair. Il comporte deux aspects, dont le premier consiste dans la tentative d'éviter un plus grand mal ou de réaliser un plus grand bien. Le deuxième aspect a trait à la difficulté de se conformer à la loi dans les situations d'urgence. De ces deux aspects émergent deux principes distincts mais qui ne sont pas étrangers l'un à l'autre. Le premier est un principe utilitaire selon lequel on est fondé, dans certaines limites, à enfreindre la lettre de la loi si, ce faisant, on évite un mal plus grand. Selon le second principe, qui est de nature humanitaire, il est excusable d'enfreindre la loi dans une situation d'urgence, toujours dans certaines limites, lorsqu'il serait trop difficile pour l'accusé de s'y conformer.

Malgré leur similitude apparente, ces deux principes sont en réalité tout à fait distincts et une partie des difficultés et de la confusion rencontrées dans les causes (et, quant à cela, dans les études d'auteurs) découle de l'omission de faire la distinction entre l'un et l'autre.

La théorie en matière criminelle fait la distinction entre les «justifications» et les «excuses». Une «justification» a pour effet de repousser le caractère mauvais d'un acte qui techniquement constitue un crime. L'agent de police qui abat celui qui retient des otages, la victime innocente d'une agression qui recourt à la force pour se défendre contre son agresseur, le bon samaritain qui réquisitionne une voiture et enfreint la limite de vitesse pour amener au plus tôt la victime d'un accident à l'hôpital, ce sont toutes là des personnes dont nous considérons les actes comme *bons* et non comme mauvais. Les gens sont souvent louangés pour de tels actes parce qu'ils sont accomplis pour un motif grand et noble. L'idée de punition paraît souvent incompatible avec l'approbation que l'auteur de l'acte reçoit de la part de la société.

Par contre, une «excuse» consiste à reconnaître le caractère mauvais de l'acte, mais à affirmer que les circonstances dans lesquelles il a été accompli sont telles qu'il ne devrait pas être attribué à son auteur. L'auteur d'un acte qui, à cause d'une maladie mentale, est incapable de juger la nature et les conséquences de ses actes, la personne qui agit sous l'influence d'une erreur de fait, la per-

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actors of whose "criminal" actions we disapprove intensely, but whom, in appropriate circumstances, our law will not punish.

Herbert Packer, *The Limits of the Criminal Sanction* (1968), expresses the distinction thus at p. 113:

> . . . conduct that we choose not to treat as criminal is "justifiable" if our reason for treating it as noncriminal is predominantly that it is conduct that we applaud, or at least do not actively seek to discourage: conduct is "excusable" if we deplore it but for some extrinsic reason conclude that it is not politic to punish it.

It will be seen that the two different approaches to the "defence" of necessity from Blackstone forward correspond, the one to a justification, the other to an excuse. As the examples cited above illustrate, the criminal law recognizes and our *Criminal Code* codifies a number of specific categories of justification and of excuse. The remainder, those instances that conform to the general principle but do not fall within any specific category such as self-defence on the one hand or insanity on the other, purportedly fall within the "residual defence" of necessity.

As a "justification" this residual defence can be related to Blackstone's concept of a "choice of evils". It would exculpate actors whose conduct could reasonably have been viewed as "necessary" in order to prevent a greater evil than that resulting from the violation of the law. As articulated, especially in some of the American cases, it involves a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it, and when the balance is clearly in favour of disobeying, exculpates an actor who contravenes a criminal statute. This is the "greater good" formulation of the necessity defence: in some circumstances, it is alleged, the values of society, indeed of the crimi-

sonne alcoolique, le somnambule: ce sont là des auteurs d'actes dont nous désapprouvons fortement les actes «criminels», mais que, dans certaines circonstances précises, notre loi ne punira pas.

Herbert Packer, dans *The Limits of the Criminal Sanction* (1968), énonce la distinction de la façon suivante, à la p. 113:

> [TRADUCTION] . . . une conduite que nous choisissons de ne pas considérer comme criminelle est «justifiable» si le motif de ne pas la considérer ainsi tient principalement à ce qu'il s'agit là d'une conduite que nous approuvons ou que, à tout le moins, nous ne cherchons pas activement à décourager; une conduite est «excusable» si nous la déplorons, mais si pour quelque motif extrinsèque nous concluons qu'il ne serait pas de bonne politique de la punir.

On constate que les deux manières d'aborder le «moyen de défense» fondé sur la nécessité depuis Blackstone correspondent, dans un cas, à la justification et, dans l'autre cas, à l'excuse. Comme l'illustrent les exemples mentionnés plus haut, le droit criminel reconnaît et notre *Code criminel* codifie un certain nombre de catégories précises de justifications et d'excuses. Quant aux autres cas, c'est-à-dire ceux qui sont conformes au principe général mais qui ne relèvent d'aucune catégorie précise comme la légitime défense d'une part ou l'aliénation mentale d'autre part, ils sont censés relever du «moyen de défense résiduel» fondé sur la nécessité.

En tant que «justification» ce moyen de défense résiduel peut se rattacher au concept du «choix entre deux maux» énoncé par Blackstone. Il permettrait de disculper des personnes dont la conduite aurait pu raisonnablement être considérée comme «nécessaire» pour éviter un mal plus grand que celui résultant de la violation de la loi. Tel qu'énoncé, plus particulièrement dans certaines décisions américaines, il comporte une évaluation pratique des avantages d'observer la loi par rapport aux avantages de ne pas l'observer, et si la balance penche nettement en faveur de l'inobservation de la loi, il permet de disculper la personne qui contrevient à une loi en matière criminelle. C'est là la formulation, dite du «plus grand bien», du moyen de défense fondé sur la nécessité: dans certaines circonstances, prétend-on, les valeurs

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nal law itself, are better promoted by disobeying a given statute than by observing it.

With regard to this conceptualization of a residual defence of necessity, I retain the skepticism I expressed in *Morgentaler*, *supra*, at p. 678. It is still my opinion that, "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value". The *Criminal Code* has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function. Such a doctrine could well become the last resort of scoundrels and in the words of Edmund Davies L.J. in *Southwark London Borough Council v. Williams*, [1971] Ch. 734, it could "very easily become simply a mask for anarchy".

Conceptualized as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in the *Nicomachean Ethics, supra*, at

sociales et le droit criminel lui-même sont mieux servis par l'inobservation d'une loi donnée que par son observation.

À l'égard de cette conceptualisation d'un moyen de défense résiduel fondé sur la nécessité, je conserve les mêmes doutes que ceux que j'ai exprimés dans l'arrêt *Morgentaler*, précité, à la p. 678. J'estime toujours qu'«[a]ucun système de droit positif ne peut admettre un principe qui permettrait à quelqu'un de violer la loi parce que, à son avis, elle entre en conflit avec des valeurs sociales plus élevées». Le *Code criminel* précise un nombre de situations distinguables où une personne est justifiée de commettre ce qui autrement constituerait une infraction criminelle. Aller plus loin et soutenir qu'on peut justifier des actes manifestement illégaux à cause des avantages qu'ils présentent aurait pour effet d'introduire un élément de subjectivité indu dans le droit criminel. Ce serait inviter les tribunaux à réévaluer rétrospectivement l'intention du législateur et à apprécier le bien-fondé relatif des politiques sociales qui sous-tendent les interdictions en matière criminelle. Ni l'un ni l'autre de ces rôles ne cadre bien avec la fonction judiciaire. Une telle doctrine pourrait bien devenir le recours ultime de canailles et, pour reprendre les termes du lord juge Edmund Davies dans *Southwark London Borough Council v. Williams*, [1971] Ch. 734, elle pourrait [TRADUCTION] «très facilement devenir simplement le masque de l'anarchie».

Vu comme une «excuse» cependant, le moyen de défense résiduel fondé sur la nécessité, à mon avis, prête beaucoup moins à la critique. Il se fonde sur une appréciation réaliste de la faiblesse humaine, tout en reconnaissant qu'un droit criminel humain et libéral ne peut astreindre des personnes à l'observation stricte des lois dans des situations d'urgence où les instincts normaux de l'être humain, que ce soit celui de conservation ou d'altruisme, commandent irrésistiblement l'inobservation de la loi. Le caractère objectif du droit criminel est préservé; de tels actes sont toujours mauvais, mais dans les circonstances ils sont excusables. Ce n'est pas l'éloge qu'on provoque, mais l'indulgence, lorsqu'on accomplit un acte mauvais alors qu'on est soumis à une pression qui, selon l'expression

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p. 49, "overstrains human nature and which no one could withstand".

George Fletcher, *Rethinking Criminal Law* (1978), decribes this view of necessity as "compulsion of circumstance" which description points to the conceptual link between necessity as an excuse and the familiar criminal law requirement that in order to engage criminal liability, the actions constituting the *actus reus* of an offence must be voluntary. Literally this voluntariness requirement simply refers to the need that the prohibited physical acts must have been under the conscious control of the actor. Without such control, there is, for purposes of the criminal law, no act. The excuse of necessity does not go to voluntariness in this sense. The lost alpinist who on the point of freezing to death breaks open an isolated mountain cabin is not literally behaving in an involuntary fashion. He has control over his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act is not a "voluntary" one. His "choice" to break the law is no true choice at all; it is remorselessly compelled by normal human instincts. This sort of involuntariness is often described as "moral or normative involuntariness". Its place in criminal theory is described by Fletcher at pp. 804-05 as follows:

> The notion of voluntariness adds a valuable dimension to the theory of excuses. That conduct is involuntary—even in the normative sense—explains why it cannot fairly be punished. Indeed, H.L.A. Hart builds his theory of excuses on the principle that the distribution of punishment should be reserved for those who voluntarily break the law. Of the arguments he advances for this principle of justice, the most explicit is that it is preferable to live in a society where we have the maximum opportunity to choose whether we shall become the subject of criminal liability. In addition, Hart intimates that it is ideologically desirable for the government to treat its citizens as self-actuating, choosing agents. This principle of respect for individual autonomy is implicitly confirmed whenever those who lack an adequate choice are excused for their offenses.

d'Aristote dans l'*Éthique à Nicomaque*, précité, à la p. 121, «surpasse[. . .] les forces humaines et que personne ne pourrait supporter».

George Fletcher, dans *Rethinking Criminal Law* (1978), définit cet aspect de la nécessité comme [TRADUCTION] «la contrainte des circonstances» et cette définition fait ressortir le lien conceptuel qui existe entre la nécessité en tant qu'excuse et l'exigence bien connue en droit criminel que pour qu'il y ait responsabilité criminelle, les actes qui constituent l'*actus reus* d'une infraction doivent être volontaires. Littéralement, cette exigence de caractère volontaire signifie simplement que les actes matériels interdits doivent avoir été accomplis sous le contrôle conscient de leur auteur. Sans ce contrôle, il n'y a pas d'acte pour les fins du droit criminel. L'excuse de nécessité ne vise pas le caractère volontaire dans ce sens. L'alpiniste perdu qui, sur le point de mourir gelé, s'introduit par effraction dans un chalet de montagne isolé n'agit pas littéralement de façon involontaire. Il a le contrôle de ses actes au point d'être physiquement capable de s'abstenir d'agir. En réalité toutefois son acte n'est pas «volontaire». Le «choix» qu'il a d'enfreindre la loi n'est nullement un choix véritable; il est poussé implacablement par les instincts normaux de l'être humain. Ce caractère involontaire est souvent décrit comme «le caractère involontaire dit moral ou normatif». Fletcher décrit ainsi sa place dans la théorie du droit criminel, aux pp. 804 et 805:

> [TRADUCTION] La notion du caractère volontaire ajoute une dimension importante à la théorie des excuses. Cette conduite est involontaire—même dans le sens normatif—ce qui explique pourquoi on ne peut pas en toute équité la punir. En réalité, H.L.A. Hart fonde sa théorie des excuses sur le principe que l'imposition d'une peine devrait se limiter à ceux qui enfreignent volontairement la loi. Parmi les arguments qu'il invoque à l'appui de ce principe de justice, le plus explicite est celui qu'il est préférable de vivre dans une société qui nous offre le plus d'occasions de choisir d'être ou de ne pas être assujettis à une responsabilité criminelle. De plus, Hart laisse entendre que, du point de vue idéologique, il est souhaitable que le gouvernement considère les citoyens comme des personnes responsables et autonomes. Ce principe du respect de l'autonomie individuelle est implicitement confirmé chaque fois que ceux qui n'ont pas la possibilité raisonnable de choisir sont excusés de leurs infractions.

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I agree with this formulation of the rationale for excuses in the criminal law. In my view this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

Punishment of such acts, as Fletcher notes at p. 813, can be seen as purposeless as well as unjust:

> . . . involuntary conduct cannot be deterred and therefore it is pointless and wasteful to punish involuntary actors. This theory . . . of pointless punishment, carries considerable weight in current Anglo-American legal thought.

Relating necessity to the principle that the law ought not to punish involuntary acts leads to a conceptualization of the defence that integrates it into the normal rules for criminal liability rather than constituting it as a *sui generis* exception and threatening to engulf large portions of the criminal law. Such a conceptualization accords with our traditional legal, moral and philosophic views as to what sorts of acts and what sorts of actors ought to be punished. In this formulation it is a defence which I do not hesitate to acknowledge and would not hesitate to apply to relevant facts capable of satisfying its necessary prerequisites.

c) *Limitations on the Defence*

If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, there-

Je suis d'accord avec cette formulation de la raison d'être des excuses en droit criminel. À mon avis, cette raison d'être s'étend au delà des excuses qui sont codifiées et englobe l'excuse résiduelle connue sous le nom de moyen de défense fondé sur la nécessité. Au coeur de ce moyen de défense, il y a le sentiment d'injustice que soulève la punition pour une violation de la loi commise dans des circonstances où la personne n'avait pas d'autre choix viable ou raisonnable; l'acte était mauvais, mais il est excusé parce qu'il était vraiment inévitable.

Comme le souligne Fletcher à la p. 813, on peut considérer que la punition de tels actes est aussi inutile qu'injuste:

> [TRADUCTION] . . . le comportement involontaire ne peut faire l'objet de dissuasion et, en conséquence, il est inutile et vain de punir les auteurs d'actes involontaires. Cette théorie . . . de la punition inutile revêt une importance considérable dans la pensée juridique anglo-américaine contemporaine.

Le rattachement de la nécessité au principe selon lequel la loi ne devrait pas punir des actes involontaires débouche sur une conceptualisation du moyen de défense qui a pour effet de l'intégrer aux règles normales en matière de responsabilité criminelle plutôt que d'en faire une exception *sui generis* et de menacer d'engloutir de grandes parties du droit criminel. Une telle conceptualisation concorde avec les points de vue juridiques, moraux et philosophiques traditionnels quant aux types d'actes et de personnes que l'on devrait punir. Dans cette formulation, il s'agit d'un moyen de défense que je n'hésite pas à reconnaître et que je n'hésiterais pas à appliquer aux faits pertinents qui satisfont aux conditions nécessaires à son application.

c) *Limites du moyen de défense*

Si le moyen de défense fondé sur la nécessité doit faire partie de façon valable et logique de notre droit criminel, il faut, comme tout le monde s'est accordé à le reconnaître, qu'il soit strictement contrôlé et scrupuleusement limité aux situations qui répondent à sa raison d'être fondamentale. Cette raison d'être, comme je l'ai indiqué, est la reconnaissance qu'il ne convient pas de punir des actes qui sont «involontaires» sur le plan normatif.

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fore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.

In *Morgentaler*, *supra*, I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible". In my opinion this restriction focuses directly on the "involuntariness" of the purportedly necessitous behaviour by providing a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense.

The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all. In LaFave & Scott, *Criminal Law* (1972), at p. 388, one reads:

> It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant to avoid the harm, other than the option of disobeying the literal terms of the law—the rescue ship may appear, the storm may pass; and so the defendant must wait until that hope of survival disappears.

At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.

The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way*

Les contrôles et limites appropriés imposés au moyen de défense fondé sur la nécessité visent donc à assurer que les actes auxquels on demande d'appliquer le bénéfice de l'excuse sont vraiment «involontaires» au sens requis.

Dans l'arrêt *Morgentaler*, précité, j'ai exprimé l'avis que tout moyen de défense fondé sur la nécessité ne s'applique qu'aux cas de désobéissance «dans des situations urgentes de danger imminent et évident lorsque l'obéissance à la loi est démonstrativement impossible». À mon avis, cette restriction vise directement le «caractère involontaire» de la conduite apparemment nécessaire, en fournissant un certain nombre de critères qui permettent de déterminer si l'acte mauvais était vraiment la seule réaction possible pour la personne en question ou si, en réalité, elle a fait ce qu'on pourrait à juste titre appeler un choix. Si elle a fait un choix, alors l'acte mauvais ne peut pas avoir été involontaire au sens pertinent.

L'exigence que la situation soit urgente et que le danger soit imminent permet de vérifier s'il était vraiment inévitable que la personne agisse. À la page 388 de l'ouvrage de LaFave & Scott intitulé *Criminal Law* (1972), on peut lire:

> [TRADUCTION] On dit parfois que le moyen de défense fondé sur la nécessité ne s'applique que dans les situations d'urgence—quand la menace de mal est immédiate, la menace de désastre imminente. Ce n'est peut-être qu'une autre manière de dire qu'avant que la menace de mal ne devienne immédiate, il y a généralement d'autres possibilités pour le défendeur d'éviter ce mal hormis celle de ne pas observer la lettre de la loi—le navire de sauvetage peut arriver, la tempête peut s'apaiser; et alors le défendeur doit attendre que tout espoir de survie disparaisse.

Au moins, la situation doit être à ce point urgente et le danger à ce point pressant qu'un être humain normal serait instinctivement forcé d'agir et de considérer tout conseil de temporiser comme déraisonnable.

L'exigence que l'obéissance à la loi soit «démonstrativement impossible» pousse cette appréciation un cran plus loin. Si l'accusé se devait d'agir, pouvait-il vraiment agir de manière à éviter le danger ou à prévenir le mal sans contrevenir à la loi? *Y avait-il moyen de s'en sortir légalement?* Je

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out? I think this is what Bracton means when he lists "necessity" as a defence, providing the wrongful act was not "avoidable". The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.

The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.

Even if the requirements for urgency and "no legal way out" are met, there is clearly a further consideration. There must be some way of assuring proportionality. No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him. According to Fletcher, this requirement is also related to the notion of voluntariness (at p. 804):

> . . . if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable. For example, if the actor has to blow up a whole city in order to avoid the breaking of his finger, we might appropriately expect him to endure the harm to himself. His surrendering to the threat in this case violates our expectations of appropriate and normal resistance and pressure. Yet as we lower the degree of harm to others and increase the threatened harm to the person under duress we will reach a threshold at which, in the language of the Model Penal Code, "a person of reasonable firmness" would be "unable to resist". Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.

crois que c'est ce que Bracton veut dire lorsqu'il mentionne la «nécessité» comme moyen de défense pourvu que l'acte mauvais n'ait pas été «évitable». Il faut se demander si l'auteur de l'acte avait réellement le choix: pouvait-il faire autrement? S'il y avait une solution raisonnable et légale autre que celle de contrevenir à la loi, alors la décision de contrevenir à la loi est un acte volontaire, mu par quelque considération autre que les impératifs de la «nécessité» et de l'instinct humain.

On ne saurait trop insister sur cette exigence qu'il n'y ait pas d'autre solution légale et raisonnable possible.

Même si les exigences qu'il y ait urgence et absence de «moyen de s'en sortir légalement» sont remplies, il y a nettement une autre considération. Il doit y avoir un moyen quelconque d'assurer la proportionnalité. Aucun système raisonnable de justice criminelle, si libéral et humanitaire soit-il, ne pourrait excuser l'imposition d'un mal plus grand afin de permettre à l'auteur de l'acte d'éviter un moindre mal. Dans de telles circonstances, on s'attend à ce que la personne subisse le mal et s'abstienne d'agir illégalement. Si elle ne peut se contrôler, nous ne l'excuserons pas. Selon Fletcher, cette exigence se rattache aussi à la notion du caractère volontaire (à la p. 804):

> [TRADUCTION] . . . si l'écart entre le mal causé et l'avantage tiré devient trop considérable, l'acte sera plus susceptible d'être considéré comme volontaire et donc inexcusable. Par exemple, si la personne doit détruire une ville entière afin d'éviter de se briser un doigt, on s'attendrait à juste titre à ce qu'elle subisse le mal elle-même. Céder à la menace dans un tel cas ne correspond pas à la résistance normale et ordinaire aux pressions à laquelle on s'attendrait. Néanmoins, à mesure que diminue le mal fait aux autres et qu'augmente la menace de mal pour la personne soumise à la contrainte, on en vient à un seuil où, selon les termes du Model Penal Code, «une personne ayant une force de caractère raisonnable» serait «incapable de résister». La détermination de ce seuil relève manifestement d'une appréciation morale de ce à quoi on s'attend qu'une personne puisse résister dans des situations difficiles. Un moyen utile d'effectuer cette appréciation consiste à comparer les intérêts opposés qui sont en jeu et à évaluer la mesure dans laquelle le mal causé par une personne dépasse l'avantage qui découle de son acte.

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I would therefore add to the preceding requirements a stipulation of proportionality expressable, as it was in *Morgentaler*, by the proviso that the harm inflicted must be less than the harm sought to be avoided.

d) *Illegality or Contributory Fault*

The Crown submits that there is an additional limitation on the availability of the defence of necessity. Citing *R. v. Salvador*, *supra*, it argues that because the appellants were committing a crime when their necessitous circumstances arose, they should be denied the defence of necessity as a matter of law.

In *Salvador*, Jones J.A. thought it highly relevant that the accused were engaged in an illegal venture when they were forced ashore. He would have denied the necessity defence in such circumstances. At page 528, he said:

> Should the appellants who embarked on an illegal venture be now heard to plead necessity when it was the venture which eventually gave rise to that necessity? One who undertakes an ocean voyage in a 56-foot yacht loaded to the gunnels with narcotics could scarcely be surprised at getting into difficulties at sea or eventually running afoul of the law. To put things in perspective, this was a voyage by a band of conspirators with a cargo of contraband having every intention of violating the law of nations from the outset. It is clear from their evidence that they were employed for that purpose. I fail to see how any self-respecting nation, as a signatory to the Convention on Narcotic Drugs, could countenance the defence of necessity or distress in such circumstances.

Macdonald J.A. (Cooper and Hart JJ.A. concurring) said, in agreement, after holding that the necessity defence was not available because compliance with the law was not demonstrably impossible (at p. 545):

> Finally I have grave reservations whether the defence of necessity has any application to the circumstances of this case. I entertain such reservation primarily because the appellants were actively engaged in the commission of a joint criminal venture when the circumstances arose

J'ajouterais donc aux exigences précédentes une disposition de proportionnalité exprimable, comme dans l'arrêt *Morgentaler*, par la réserve que le mal causé soit moindre que celui qu'on cherche à éviter.

d) *Illégalité ou faute contributive*

Sa Majesté soutient qu'il y a une autre restriction à la possibilité d'invoquer le moyen de défense fondé sur la nécessité. Citant l'arrêt *R. v. Salvador*, précité, elle fait valoir que, parce que les appelants commettaient un crime quand l'état de nécessité est survenu, il faut leur refuser de plein droit le moyen de défense fondé sur la nécessité.

Dans l'arrêt *Salvador*, le juge Jones de la Cour d'appel a estimé très important le fait que les accusés étaient engagés dans une entreprise illégale lorsqu'ils ont été forcés d'accoster. Il aurait refusé le moyen de défense fondé sur la nécessité dans ces circonstances. Il affirme, à la p. 528:

> [TRADUCTION] Devrait-on maintenant permettre aux appelants, qui se sont engagés dans une entreprise illégale, d'invoquer la nécessité alors que c'est cette entreprise qui a finalement donné lieu à cette nécessité? Celui qui entreprend un voyage en mer dans un yacht de 56 pieds bourré de stupéfiants jusqu'aux plats-bords peut difficilement s'étonner de rencontrer des difficultés en mer ou même de s'attirer les foudres de la loi. Pour situer les choses dans leur contexte, il s'agit du voyage d'un groupe de conspirateurs qui transportaient une cargaison de contrebande et qui, dès le départ, avaient parfaitement l'intention de violer le droit international. Il est manifeste, d'après leurs dépositions, qu'ils ont été embauchés à cette fin. Je ne vois pas comment un pays qui se respecte peut, à titre de signataire de la Convention sur les stupéfiants, autoriser le moyen de défense fondé sur la nécessité ou la détresse dans ces circonstances.

Le juge Macdonald de la Cour d'appel (à l'avis duquel les juges Cooper et Hart souscrivent) s'accorde pour affirmer, après avoir statué que le moyen de défense fondé sur la nécessité ne pouvait être invoqué parce que l'obéissance à la loi n'était pas démonstrativement impossible (à la p. 545):

> [TRADUCTION] Enfin, je doute sérieusement que le moyen de défense fondé sur la nécessité puisse s'appliquer aux circonstances de l'espèce. J'ai ces doutes principalement parce que les appelants étaient activement engagés dans la réalisation d'une entreprise criminelle

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that they contend gave rise to, or supported, the defence of necessity.

Were it indeed accurate that the fact of doing something illegal when the necessitous circumstances arise will deny one the benefit of the necessity defence, I would nevertheless doubt that this principle would be relevant to the present case. The accused here (as incidentally was also apparently the case in *Salvador*) were not doing anything illegal under Canadian law when the necessity arose. They were on the high seas. They were conspiring to import marihuana into the United States, not Canada. If such a limitation on the necessity defence were to be formulated, in my view, the accused should, at a minimum, be violating some law of the forum, not just the law of a foreign state.

In any event, I have considerable doubt as to the cogency of such a limitation. If the conduct in which an accused was engaging at the time the peril arose was illegal, then it should clearly be punished, but I fail to see the relevance of its illegal character to the question of whether the accused's subsequent conduct in dealing with this emergent peril ought to be excused on the basis of necessity. At most the illegality—or if one adopts Jones J.A.'s approach, the immorality—of the preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful. But that wrongfulness is never in any doubt. Necessity goes to *excuse* conduct, not to *justify* it. Where it is found to apply it carries with it no implicit vindication of the deed to which it attaches. That cannot be over-emphasized. Were the defence of necessity to succeed in the present case, it would not in any way amount to a vindication of importing controlled substances nor to a critique of the law prohibiting such importation. It would also have nothing to say about the comparative social utility of breaking the law against importing as compared to obeying the law. The question, as I have said, is never whether what the accused has done is wrongful. It is always and by definition, wrongful. The question is whether what he has done is voluntary. Except in the limited

conjointe quand sont survenues les circonstances qui, prétendent-ils, donnent lieu au moyen de défense fondé sur la nécessité ou le justifient.

Même s'il était exact que l'accomplissement d'un acte illégal au moment où survient l'état de nécessité empêche quelqu'un de profiter du moyen de défense fondé sur la nécessité, je ne suis cependant pas certain que ce principe s'appliquerait à l'espèce. Les accusés en l'espèce (comme, soit dit en passant, c'était apparemment le cas dans l'affaire *Salvador*) ne faisaient rien d'illégal en vertu du droit canadien lorsque l'état de nécessité est survenu. Ils étaient en haute mer. Ils complotaient en vue d'importer de la marihuana aux États-Unis et non au Canada. S'il y avait lieu d'imposer une telle restriction au moyen de défense fondé sur la nécessité, j'estime que les accusés devraient à tout le moins avoir enfreint une loi intérieure et non seulement la loi d'un pays étranger.

De toute façon, je doute fortement de la pertinence d'une telle restriction. Si la conduite d'un accusé au moment où le danger est survenu était illégale, il y a manifestement lieu de le punir, mais je ne vois pas de lien entre le caractère illégal de cette conduite et la question de savoir si la conduite adoptée subséquemment par l'accusé pour faire face à ce danger imminent devrait être excusée pour cause de nécessité. Tout au plus l'illégalité—ou l'immoralité si on adopte la façon du juge Jones d'aborder la question—de la conduite précédente de l'accusé rend-elle mauvaise la conduite qu'il a subséquemment adoptée pour faire face à la situation d'urgence. Toutefois, ce caractère mauvais n'est jamais mis en doute. La nécessité a pour effet d'*excuser* la conduite, et non de la *justifier*. Lorsqu'on décide qu'elle s'applique, elle ne comporte aucune justification implicite de l'acte auquel elle a trait. On ne saurait trop insister sur ce point. Si jamais le moyen de défense fondé sur la nécessité était accepté en l'espèce, cela ne reviendrait absolument pas à justifier l'importation de substances contrôlées ni à critiquer la loi interdisant une telle importation. Cela ne voudrait rien dire non plus quant à l'utilité sociale relative de l'inobservation de la loi interdisant cette importation par rapport à son observation. Comme je l'ai dit, il ne s'agit jamais de savoir si ce que l'accusé a

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sense I intend to discuss below, I do not see the relevance of the legality or even the morality of what the accused was doing at the time the emergency arose to this question of the voluntariness of the subsequent conduct.

In *Salvador*, Jones J.A. cited sources in support of his view that illegal conduct should act as a bar to the necessity defence. These sources do not support that view but do support a closely related notion—that if the accused's own "fault" (including negligence or recklessness) is responsible for the events giving rise to the necessity, he may not rely on the necessity defence.

This limitation has found expression in several American state statutes codifying the necessity defence, such as those of New York and Illinois and has been adopted by the United States National Commission on Reform of Federal Criminal Laws which recommended that the defence apply only "where the situation developed through no fault of the actor". A parallel is sometimes drawn between such a limitation and the restrictions placed on the availability of the largely analogous defence of duress. See, *e.g.*, A. J. Ashworth, "Reason, Logic and Criminal Liability", (1975) 91 L.Q.R. 102 at p. 106.

In my view the accused's fault in bringing about the situation later invoked to excuse his conduct *can* be relevant to the availability of the defence of necessity, but not in the sweeping way suggested by some of the commentators and in some of the statutory formulations. Insofar as the accused's "fault" reflects on the moral quality of the action taken to meet the emergency, it is irrelevant to the issue of the availability of the defence on the same basis as the illegality or immorality of the actions preceding the emergency are irrelevant. If this fault is capable of attracting criminal or civil liability in its own right, the culprit should be

fait est mauvais. Cet acte est toujours et par définition mauvais. La question est de savoir si l'acte qu'il a accompli est volontaire. Sauf dans le sens limité dont je traiterai plus loin, je ne vois pas l'importance que peut avoir sur cette question du caractère volontaire de la conduite subséquente la légalité ou la moralité de ce que l'accusé faisait au moment où la situation d'urgence est survenue.

Dans l'arrêt *Salvador*, le juge Jones de la Cour d'appel a cité des sources qui étayent son point de vue qu'une conduite illégale devrait empêcher d'invoquer le moyen de défense fondé sur la nécessité. Ces sources étayent non pas ce point de vue, mais plutôt une notion apparentée—celle portant que si la propre «faute» de l'accusé (y compris sa négligence ou son insouciance) est à la source des événements qui ont donné lieu à la nécessité, il ne peut invoquer le moyen de défense fondé sur la nécessité.

Cette restriction est exprimée dans les lois de plusieurs États américains, comme celles des États de New York et de l'Illinois, où se trouve codifié le moyen de défense fondé sur la nécessité, et elle a été adoptée par la United States National Commission on Reform of Federal Criminal Laws qui recommande que le moyen de défense ne s'applique que [TRADUCTION] «lorsque la situation n'est due à aucune faute de la part de l'auteur de l'acte». On compare parfois cette restriction à celles imposées à la possibilité d'invoquer le moyen de défense très semblable fondé sur la contrainte. Voir, par exemple, A.J. Ashworth, «Reason, Logic and Criminal Liability», (1975) 91 L.Q.R. 102, à la p. 106.

À mon avis, la faute de l'accusé qui occasionne la situation que celui-ci invoque par la suite pour justifier sa conduite *peut* avoir de l'importance quant à la possibilité de recourir au moyen de défense fondé sur la nécessité, mais non de la façon générale suggérée par certains glossateurs et dans certaines formulations législatives. Dans la mesure où la «faute» de l'accusé a un effet sur la qualité morale de l'acte accompli pour faire face à la situation d'urgence, elle est sans importance quant à la question de la possibilité d'invoquer le moyen de défense tout comme le sont l'illégalité ou l'immoralité des actes qui ont précédé la situation

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appropriately sanctioned. I see no basis, however, for "transferring" such liability to the actions taken in response to the emergency, especially where to do so would result in attaching criminal consequences on the basis of negligence to actions which would otherwise be excused.

In my view the better approach to the relationship of fault to the availability of necessity as a defence is based once again on the question of whether the actions sought to be excused were truly "involuntary". If the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency. His response was in that sense not "involuntary". "Contributory fault" of this nature, but only of this nature, is a relevant consideration to the availability of the defence.

It is on this point that the analogy to duress is especially enlightening. Section 17 of the *Criminal Code* provides:

17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion . . .

(Emphasis added.)

The rationale for the proviso making the defence unavailable to a member of a criminal conspiracy or association, is the same as that articulated with regard to the common law defence of duress by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653 at p. 670:

d'urgence. Si cette faute peut en soi entraîner une responsabilité criminelle ou civile, le coupable doit être puni en conséquence. Je ne vois cependant aucun motif d'appliquer cette responsabilité aux actes accomplis pour faire face à la situation d'urgence, plus particulièrement si cela avait pour effet d'attribuer, pour cause de négligence, des conséquences criminelles à des actes qui autrement seraient excusés.

À mon avis, la meilleure façon d'aborder le lien entre la faute et la possibilité d'invoquer la nécessité comme moyen de défense est celle qui consiste encore une fois à se demander si les actes qu'on demande d'excuser ont été vraiment «involontaires». Si l'état de nécessité était clairement prévisible par un observateur raisonnable, si l'auteur a prévu ou aurait dû prévoir que ses actes pourraient donner lieu à une situation d'urgence qui exigerait la perpétration d'une infraction à la loi, alors je doute que ce à quoi l'accusé a fait face ait été une situation d'urgence au sens pertinent. Sa réaction n'a pas, dans ce sens, été «involontaire». Une «faute contributive» de cette nature, mais de cette nature seulement, est une considération pertinente quant à la possibilité d'invoquer le moyen de défense.

C'est sur ce point que l'analogie avec la contrainte est particulièrement révélatrice. L'article 17 du *Code criminel* dispose:

17. Une personne qui commet une infraction, sous l'effet de la contrainte exercée par des menaces de mort immédiate ou de lésion corporelle grave de la part d'une personne présente lorsque l'infraction est commise, est excusée d'avoir commis l'infraction si elle croit que les menaces seront mises à exécution et si elle n'est partie à aucun complot ou aucune association par laquelle elle est soumise à la contrainte . . .

(C'est moi qui souligne.)

La raison d'être de la réserve qui empêche une partie à un complot ou à une association criminels d'invoquer ce moyen de défense est la même que celle énoncée, quant au moyen de défense de *common law* fondé sur la contrainte, par lord Morris of Borth-y-Gest dans l'arrêt *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653, à la p. 670:

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In posing the case where someone is 'really' threatened I use the word 'really' in order to emphasise that duress must never be allowed to be the easy answer of those . . . who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant.

If section 17 and the comments of Lord Morris of Borth-y-Gest embody a notion of "contributory fault" it is not *per se* on account of the accused's participation in criminal or immoral activity at the time he became subject to threats, nor on account of any simple negligence on his part, but rather on account of the clear foreseeability of his becoming subject to such threats and domination and the consequent conclusion that he was not "really" threatened.

In my view the same test is applicable to necessity. If the accused's "fault" consists of actions whose clear consequences were in the situation that actually ensued, then he was not "really" confronted with an emergency which compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is unavailable. Mere negligence, however, or the simple fact that he was engaged in illegal or immoral conduct when the emergency arose will not disentitle an individual to rely on the defence of necessity.

e) *Onus of Proof*

Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown

[TRADUCTION] En citant le cas où quelqu'un est «réellement» menacé, j'emploie le mot «réellement» pour insister sur le fait qu'il ne faut jamais permettre que la contrainte constitue une réponse facile pour ceux . . . qui auraient pu sans difficulté éviter de se soumettre à des menaces ou ceux qui se placent d'eux-mêmes à la disposition et sous l'emprise de quelque malfaiteur despotique.

Si l'article 17 et les observations de lord Morris of Borth-y-Gest comportent une notion de «faute contributive», ce n'est pas en soi à cause de la participation de l'accusé à l'activité criminelle ou immorale au moment où il a fait l'objet de menaces, ni à cause d'une simple négligence de sa part, mais plutôt à cause de la nette prévisibilité du fait qu'il serait assujetti à de telles menaces et à une telle emprise et à cause de la conclusion qui en découle qu'il n'était pas «réellement» menacé.

À mon sens, le même critère s'applique à la nécessité. Si la «faute» de l'accusé consiste en des actes dont les conséquences manifestes étaient la situation qui s'en est véritablement suivie, alors l'accusé n'a pas «réellement» fait face à une situation d'urgence qui l'a obligé à commettre l'acte illégal qu'il demande maintenant d'excuser. Dans ces situations, ce moyen de défense ne peut être invoqué. La simple négligence, cependant, ou le simple fait qu'elle agissait de manière illégale ou immorale lorsque la situation d'urgence s'est présentée n'empêche pas une personne d'invoquer le moyen de défense fondé sur la nécessité.

e) *Fardeau de la preuve*

Bien que la nécessité soit désignée comme un moyen de défense en ce sens que c'est l'accusé qui l'invoque, il incombe toujours à la poursuite de faire la preuve d'un acte volontaire. La poursuite doit prouver chacun des éléments du crime imputé. Un de ces éléments est le caractère volontaire de l'acte. Normalement, le caractère volontaire peut se présumer, mais si l'accusé soumet à la cour, au moyen de ses propres témoins ou d'un contre-interrogatoire des témoins de la poursuite, des éléments de preuve suffisants pour soulever un doute que la situation engendrée par des forces extérieures était à ce point urgente que l'omission d'agir pouvait mettre en danger la vie ou la santé de quelqu'un et

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must be prepared to meet that issue. There is no onus of proof on the accused.

The Crown argues, however, that s. 7(2) of the *Narcotic Control Act* shifts the burden of persuasion to the accused.

Section 7(2) provides:

7. (1) . . .

(2) In any prosecution under this Act the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

The Crown contends that the defence of necessity is an "exception, exemption, excuse or qualification prescribed by law". I find no merit in this contention.

The *Narcotic Control Act* provides for several statutory exceptions to its broad prohibitions against importation, sale, manufacture, and possession. The offences created by the Act are generally subject to the proviso that the accused not have been acting under the authority of the Act or the regulations thereunder. See sections 3(1) (possession), 5(1) (importation), 6(1) (cultivation). Section 12 of the Act implements this scheme by providing for a set of regulations governing the issuance of licences for, *inter alia*, the importation, sale, manufacture, or possession of narcotics. One who sells, imports, manufactures or possesses narcotics pursuant to such authority does not commit an offence.

It seems clear that it is to these statutory exceptions that s. 7(2) refers, and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s. 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section

que, suivant une analyse raisonnable des faits, il était impossible d'observer la loi, alors la poursuite se doit d'écarter ce doute. Le fardeau de la preuve ne repose pas sur l'accusé.

Sa Majesté soutient cependant que le par. 7(2) de la *Loi sur les stupéfiants* transfère à l'accusé l'obligation de convaincre.

Le paragraphe 7(2) est ainsi conçu:

7. (1) . . .

(2) Dans toutes poursuites sous le régime de la présente loi, il incombe à l'accusé de prouver qu'une exception, une exemption, une excuse ou une réserve, que prescrit la loi, jouent en sa faveur et le poursuivant n'est pas tenu, sauf à titre de réfutation, de prouver que l'exception, l'exemption, l'excuse ou la réserve ne jouent pas en faveur de l'accusé, qu'elles aient été ou non énoncées dans la dénonciation ou l'acte d'accusation.

Sa Majesté prétend que le moyen de défense fondé sur la nécessité est «une exception, une exemption, une excuse ou une réserve, que prescrit la loi». À mon avis, cet argument n'est pas fondé.

La *Loi sur les stupéfiants* prescrit plusieurs exceptions à l'interdiction générale d'importer, de vendre, de fabriquer ou d'avoir en sa possession des stupéfiants. Les infractions créées par la Loi sont généralement assujetties à la réserve que l'accusé ne doit pas avoir agi sous le régime de la Loi ou de ses règlements d'application. Voir les par. 3(1) (possession), 5(1) (importation) et 6(1) (culture). L'article 12 de la Loi met en application ce régime en prévoyant l'adoption d'un ensemble de règlements régissant la délivrance de permis, notamment, d'importation, de vente, de fabrication ou de possession de stupéfiants. Quiconque vend, importe, fabrique ou a en sa possession des stupéfiants conformément à une telle autorisation ne commet aucune infraction.

Il semble clair que c'est à ces exceptions prévues par la Loi que renvoie le par. 7(2) et non à un moyen de défense de *common law* comme celui fondé sur la nécessité. Celui qui veut invoquer le fait qu'il détient un permis ou une autre autorisation légale à l'encontre d'une accusation d'importation a l'obligation, en vertu du par. 7(2) de convaincre le juge des faits qu'un tel permis existe.

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7(2) does not place a persuasive burden as to the defence of necessity on the accused.

f) *Preliminary Conclusions as to the Defence of Necessity*

It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse; (2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) of the *Criminal Code*; (3) necessity as an excuse implies no vindication of the deeds of the actor; (4) the criterion is the moral involuntariness of the wrongful action; (5) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure; (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril; (10) where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

g) *The Judge's Charge*

The trial judge concluded that there was before him an adequate body of evidence to raise the issue of necessity and proceeded to direct the jury with respect to the defence. As I have earlier indicated, the Crown disputes whether the defence was open to the accused in the circumstances of

Celui qui invoque la nécessité n'a pas cette obligation. Le paragraphe 7(2) n'impose à l'accusé aucune obligation de convaincre pour ce qui est du moyen de défense fondé sur la nécessité.

f) *Conclusions préliminaires quant au moyen de défense fondé sur la nécessité*

Il est maintenant possible de résumer un certain nombre de conclusions quant au moyen de défense fondé sur la nécessité relativement à sa nature, à son fondement et à ses limites: (1) le moyen de défense fondé sur la nécessité peut être considéré soit comme une justification soit comme une excuse; (2) il faut le considérer au Canada comme une excuse applicable en vertu du par. 7(3) du *Code criminel*; (3) la nécessité en tant qu'excuse ne comporte aucune justification des actes de la personne en question; (4) le critère applicable est le caractère involontaire, du point de vue moral, de l'acte mauvais; (5) ce caractère involontaire se mesure en fonction de ce que la société considère comme une résistance normale et appropriée à la pression; (6) la négligence ou la participation à une activité criminelle ou immorale n'empêche pas l'auteur de l'acte d'invoquer l'excuse de nécessité; (7) des actes ou des circonstances qui montrent que l'acte mauvais n'était pas vraiment involontaire ont pour effet d'écarter ce moyen de défense; (8) l'existence d'une autre solution raisonnable et légale a aussi pour effet d'écarter ce moyen de défense; pour être involontaire, l'acte doit être inévitable et n'offrir aucune possibilité raisonnable d'adopter une autre ligne de conduite qui ne comporte pas d'infraction à la loi; (9) ce moyen de défense ne s'applique qu'à une situation de danger imminent où on a agi afin d'éviter un péril imminent et immédiat; (10) si l'accusé fournit à la cour suffisamment d'éléments de preuve pour soulever la question, il incombe à la poursuite de contredire cette preuve hors de tout doute raisonnable.

g) *L'exposé du juge au jury*

Le juge du procès a conclu qu'on lui avait soumis suffisamment d'éléments de preuve pour soulever le moyen de défense fondé sur la nécessité et a donné au jury des directives quant à ce moyen de défense. Comme je l'ai déjà mentionné, Sa Majesté conteste que les accusés puissent invoquer

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the case and submits further that if it was in fact available, the trial judge erred in his direction.

In my view the trial judge was correct in concluding that on the evidence before him he should instruct the jury with regard to necessity. There was evidence before him from which a jury might conclude that the accused's actions in coming ashore with their cargo of cannabis were aimed at self-preservation in response to an overwhelming emergency. I have already indicated that in my view they were not engaged in conduct that was illegal under Canadian criminal law at the time the emergency arose, and that even if they were, that fact alone would not disentitle them to raise the defence. The question then becomes whether the trial judge erred in charging the jury in the terms that he did.

The summary of conclusions with regard to necessity in the foregoing section indicates that for the defence to succeed, an accused's actions must be, in the relevant sense, an "involuntary" response to an imminent and overwhelming peril. The defence cannot succeed if the response was disproportional to the peril or if it was not "involuntary" in the sense that the emergency was not "real" or not imminent or that there was a reasonable alternative response that was not illegal.

In the course of his charge on the issue of necessity the trial judge instructed the jury, using the specific words that appear in *Morgentaler*, to the effect that they must find facts which amount to an "urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible" in order for the appellants' non-compliance with the law against importation and possession of cannabis to be excused. That is the correct test. It is, with respect, however, my view that in explaining the meaning and application of this test, the trial judge fell into error.

ce moyen de défense dans les circonstances de l'espèce et soutient de plus que même s'ils le pouvaient, le juge du procès a commis une erreur dans ses directives.

À mon avis, le juge du procès a eu raison de conclure que, compte tenu des éléments de preuve qui lui étaient soumis, il devait donner au jury des directives quant au moyen de défense fondé sur la nécessité. On lui avait soumis des éléments de preuve qui pouvaient permettre à un jury de conclure que les actes accomplis par les accusés en accostant avec leur cargaison de cannabis visaient à assurer leur propre conservation face à une situation d'urgence incontrôlable. J'ai déjà souligné qu'à mon sens leur conduite, au moment où est survenue la situation d'urgence, n'était pas illégale en vertu du droit criminel canadien et que même si elle l'avait été, ce fait à lui seul ne les empêcherait pas de soulever le moyen de défense. Il faut alors se demander si le juge du procès a commis une erreur en donnant au jury les directives qu'il lui a données.

Le résumé des conclusions quant au moyen de défense fondé sur la nécessité, dans la section précédente, indique que pour que le moyen de défense soit accepté, les actes des accusés doivent constituer, au sens pertinent, une réaction «involontaire» face à un danger immédiat et incontrôlable. Le moyen de défense n'est pas acceptable si la réaction était disproportionnée au danger ou si elle n'était pas «involontaire» en ce sens que l'urgence n'était pas «véritable» ou imminente ou s'il y avait une autre réaction possible qui soit raisonnable et légale.

Dans ses directives sur le moyen de défense fondé sur la nécessité, le juge du procès a déclaré au jury, en reprenant exactement les mots utilisés dans l'arrêt *Morgentaler*, qu'il devait conclure à l'existence de faits équivalant à une «situation urgente de danger imminent et évident lorsque l'obéissance à la loi est démonstrativement impossible» pour que la contravention des appelants à la loi qui interdit l'importation et la possession de cannabis puisse être excusée. C'est là le critère applicable. Avec égards cependant, j'estime qu'en expliquant le sens et l'application de ce critère, le juge du procès a commis une erreur.

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The trial judge was obliged, in my opinion, to direct the jury's attention to a number of issues pertinent to the test for necessity. Was the emergency a real one? Did it constitute an immediate threat of the harm purportedly feared? Was the response proportionate? In comparing this response to the danger that motivated it, was the danger one that society would reasonably expect the average person to withstand? Was there any reasonable legal alternative to the illegal response open to the accused? Although the trial judge did not explicitly pose each and every one of these questions in my view his charge was adequate to bring the considerations underlying them to the jury's attention on every issue except the last one, the question of a reasonable alternative.

Le juge du procès était tenu, à mon avis, d'attirer l'attention du jury sur un certain nombre de questions relatives au critère de la nécessité. Y avait-il réellement une situation d'urgence? Constituait-elle une menace immédiate du mal qu'on prétendait redouter? La réaction était-elle proportionnée? Si on compare cette réaction au danger qui l'a motivée, ce danger en était-il un auquel la société s'attend raisonnablement à voir une personne ordinaire résister? S'offrait-il aux accusés une solution légale et raisonnable autre que la réaction illégale? Bien que le juge du procès n'ait pas posé explicitement chacune de ces questions, j'estime que ses directives étaient suffisantes pour porter à l'attention du jury les considérations qui les sous-tendent, sauf pour ce qui est de la dernière, savoir la question de la solution de rechange raisonnable.

This issue was the determining obstacle to the success of the defence of necessity in a number of the cases referred to earlier, including *Gilkes*, *Doud*, *Byng* and for the present case most notably, because of the similarity of its factual basis, *Salvador*. Indeed in most cases where the defence is raised this consideration will almost certainly be the most important one.

Cette question a été l'obstacle déterminant à l'acceptation du moyen de défense fondé sur la nécessité dans un bon nombre d'affaires mentionnées précédemment, dont *Gilkes*, *Doud*, *Byng* et l'affaire *Salvador* qui nous intéresse plus particulièrement en raison de la similitude de ses faits avec ceux de la présente espèce. En réalité, dans la plupart des cas où le moyen de défense est soulevé, cette considération est certainement la plus importante.

In his charge, the trial judge did not advert to this requirement. He did tell the jury that they must find facts capable of showing that "compliance with the law [was] demonstrably impossible . . ." but on his recharge he put before the jury a significantly different test. The test, he said, is:

Dans ses directives, le juge du procès n'a pas mentionné cette exigence. Il a dit aux jurés qu'ils devaient conclure à l'existence de faits qui peuvent démontrer que «l'obéissance à la loi [était] démonstrativement impossible . . .», mais dans ses nouvelles directives il a présenté au jury un critère sensiblement différent. Le critère, a-t-il dit, est le suivant:

> . . . can you find facts from this evidence, and that means all the evidence, of course, that the situation of the Samarkanda at sea was so appallingly dire and dangerous to life that a reasonable doubt arises as to whether or not their decision was justified?

> [TRADUCTION] . . . pouvez-vous conclure d'après ces témoignages, et par là j'entends l'ensemble des témoignages bien sûr, que la situation du Samarkanda en mer était à ce point terrible et dangereuse qu'il existe un doute raisonnable quant à savoir si leur décision était justifiée?

And again, at the conclusion of the recharge:

Et de nouveau, à la fin de ses nouvelles directives:

> There is no need for the evidence to show you that a certainty of death would result unless the action complained of by the Crown was taken. It doesn't go so far as that. You have to look at it as reasonable people and

> [TRADUCTION] Il n'est pas nécessaire que la preuve vous convainque que la mort aurait été la conséquence certaine si l'acte reproché par la poursuite n'avait pas été accompli. Les choses ne vont pas aussi loin. Vous devez

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decide on any reasonable view of the matter, would these people have been justified in doing what they did? That is all that necessity means.

Both of these passages imply that the crucial consideration was whether the accused acted reasonably in coming into shore with their load of cannabis rather than facing death at sea. That is not sufficient as a test. Even if it does deal with the reality of the peril, its imminence and the proportionality of putting into shore, it does not deal at all with the question of whether there existed any other reasonable responses to the peril that were not illegal. Indeed, aside from the initial repetition of the *Morgentaler* formula, the trial judge did not advert to this consideration at all, nor did he direct the jury's attention to the relevance of evidence indicating the possibility of such alternative courses of action. In these respects I believe he erred in law. He did not properly put the question of a "legal way out" before the jury.

In my view this was a serious error and omission going to the heart of the defence of necessity. The error justifies a new trial.

III The Botanical Defence

The *Narcotic Control Act*, s. 2, defines cannabis (marihuana) as "*Cannabis sativa* L." At trial, the appellants presented expert testimony to the effect that there are three species of cannabis—*Cannabis sativa* L., *Cannabis indica* Lam., and *Cannabis ruderalis* Jan. The Crown countered with expert testimony that there is only one species of cannabis—the prohibited *Cannabis sativa* L.

The divergence in views among botanists is of recent origin. Before 1970, there were isolated references in the literature to *Cannabis indica* (Lamarck 1785) and *Cannabis ruderalis* (Janischevsky 1924) but the prevailing botanical view

considérer la situation comme des personnes raisonnables et décider, de façon raisonnable, si ces personnes étaient justifiées de faire ce qu'elles ont fait. C'est là tout ce que le terme nécessité veut dire.

Ces deux passages donnent à entendre que la considération cruciale était de savoir si les accusés ont agi raisonnablement en venant à terre avec leur chargement de cannabis plutôt que de faire face à la mort en mer. Ce n'est pas un critère suffisant. Même s'il tient compte de la réalité du danger, de son imminence et de sa proportionnalité avec le fait de revenir à terre, il ne tient pas du tout compte de la question de savoir s'il existait, face au danger, quelque autre réaction raisonnable qui n'aurait pas été illégale. En réalité, à part la répétition initiale de la formule de l'arrêt *Morgentaler*, le juge du procès n'a absolument pas mentionné cette considération, ni attiré l'attention du jury sur la pertinence d'éléments de preuve qui indiqueraient la possibilité d'adopter une autre ligne de conduite. À cet égard, je crois qu'il a commis une erreur de droit. Il n'a pas bien présenté au jury la question du «moyen de s'en sortir légalement».

À mon avis, il s'agit là d'une erreur et d'une omission graves qui touchent le coeur même du moyen de défense fondé sur la nécessité. Cette erreur justifie la tenue d'un nouveau procès.

III Le moyen de défense fondé sur la classification botanique

À l'article 2 de la *Loi sur les stupéfiants*, le cannabis (marihuana) est défini comme le «*Cannabis sativa* L.». Au procès, les appelants ont soumis des témoignages d'experts selon lesquels il y a trois espèces de cannabis—le *Cannabis sativa* L., le *Cannabis indica* Lam. et le *Cannabis ruderalis* Jan. La poursuite a contredit ces témoignages par d'autres témoignages d'experts portant qu'il n'existe qu'une seule espèce de cannabis—le *Cannabis sativa* L. interdit.

Cette divergence d'opinions chez les botanistes est récente. Avant 1970, on mentionnait parfois dans les écrits scientifiques le *Cannabis indica* (Lamarck 1785) et le *Cannabis ruderalis* (Janischevsky 1924), mais l'opinion prédominante des

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was that marihuana was monotypic and consisted only of *Cannabis sativa* L.

It was proven at trial that the *Samarkanda*'s cargo was marihuana but it was not proven that it was *Cannabis sativa* L., as opposed to *Cannabis indica* Lam. or *Cannabis ruderalis* Jan. The laboratory tests performed by the Crown were not designed to distinguish among the three purported species, the Crown's experts being of the view that all marihuana was *Cannabis sativa* L. Counsel for the accused asked the trial judge to put the question whether marihuana was monotypic or polytypic to the jury, with an instruction that if they found there were three species of cannabis and the Crown had not proven that the cannabis in the possession of the appellants was the prohibited species, they should find the appellants not guilty.

The trial judge agreed with the accused that the taxonomic question was one of fact but ruled that its resolution was unnecessary because Parliament, when it used the term *Cannabis sativa* L. in the *Narcotic Control Act*, meant to embrace all marihuana. In his view, since all marihuana was prohibited by the Act, it was irrelevant whether the plant was botanically polytypic or monotypic. He declined to put the accused's "botanical defence" to the jury.

The appellants contend that the trial judge erred in ruling as a matter of law that the term "*Cannabis sativa* L." in the *Narcotic Control Act* embraces all marihuana. They rely principally on the rule of statutory construction that technical terms in statutes should be given their technical meaning.

It is clear that the Latin phrase "*Cannabis sativa* L." is a technical term. Botanical nomenclature is governed by an internationally accepted set of regulations which provide that Latin is the official language of botany. Pursuant to the *Code of Botanical Nomenclature*, plant species are assigned a Latin binomial with the name of the

botanistes était qu'il n'y avait qu'une seule espèce de marihuana, savoir le *Cannabis sativa* L.

Il a été établi au procès que la cargaison du *Samarkanda* était de la marihuana, mais il n'a pas été prouvé qu'il s'agissait de *Cannabis sativa* L. plutôt que de *Cannabis indica* Lam. ou de *Cannabis ruderalis* Jan. Les analyses en laboratoire faites par la poursuite ne visaient pas à faire la distinction entre ces trois prétendues espèces, les experts de la poursuite étant d'avis que toute marihuana est du *Cannabis sativa* L. Les avocats des accusés ont demandé au juge du procès de soumettre au jury la question de savoir s'il existe une seule ou plusieurs espèces de marihuana, et de lui préciser que s'il concluait qu'il y a trois espèces de cannabis et que la poursuite n'a pas établi que le cannabis qui se trouvait en la possession des appelants était de l'espèce interdite, il devait acquitter les appelants.

Le juge du procès s'est dit d'accord avec les accusés que la question de taxinomie était une question de fait, mais il a statué qu'il n'était pas nécessaire de la résoudre puisque le Parlement, en utilisant l'expression «*Cannabis sativa* L.» dans la *Loi sur les stupéfiants*, a voulu viser toutes les espèces de marihuana. À son avis, puisque la Loi interdit toute marihuana, il importe peu qu'il y ait une seule ou plusieurs espèces de ces plantes selon la botanique. Il a refusé de soumettre à l'appréciation du jury le moyen de défense des accusés fondé sur la «classification botanique».

Les appelants soutiennent que le juge du procès a commis une erreur en statuant, en tant que question de droit, que l'expression «*Cannabis sativa* L.» dans la *Loi sur les stupéfiants* vise toutes les espèces de marihuana. Ils invoquent particulièrement la règle d'interprétation des lois selon laquelle les termes techniques dans les lois doivent s'interpréter selon leur sens technique.

Il est manifeste que l'expression latine «*Cannabis sativa* L.» est un terme technique. La nomenclature botanique est régie par un ensemble de règles acceptées internationalement et qui font du latin la langue officielle de la botanique. Selon le *Code of Botanical Nomenclature*, les espèces de plantes sont désignées par un binôme latin auquel

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author (the taxonomist who first identifies and names the species) appended in abbreviated form. The first word in the binomial identifies the genus, or "family" to which the plant in question belongs; the second word identifies the species. "*Cannabis sativa* L." in this naming system designates the species *sativa* of the genus *cannabis*. The "L." stands for Linnaeus, the botanist who discovered the plant in 1753.

It is well established that technical and scientific terms which appear in statutes should be given their technical or scientific meaning: see *Maxwell on the Interpretation of Statutes* (12th ed. 1969) at p. 28. The question presented in the case at bar, however, is not whether the term "*Cannabis sativa* L." should be assigned its scientific or technical meaning. The parties agree that it should. The real dispute, as I see it, is as to when, in temporal terms, that meaning should be fixed. The appellants argue, in effect, for the meaning which the scientific community would today give to the phrase. They submit that a jury could reasonably find from the expert evidence presented that the scientific community is now of the view that there are three species of the genus cannabis, of which *Cannabis sativa* L. is only one. The Crown, on the other hand, argues that the meaning to be given to the phrase "*Cannabis sativa* L." is the meaning which the botanical community ascribed to it when the *Narcotic Control Act* became law in 1961. In 1961, botanists were virtually unanimous in holding that cannabis marihuana consisted of only one species and that the plants which some botanists referred to as *Cannabis indica* Lam. and *Cannabis ruderalis* Jan. were merely subspecies of *Cannabis sativa* L. The appellants, as I have said, ask that we give the phrase in question the meaning which their experts say it bears at present among members of the botanical community; the Crown asks us to freeze its meaning at the time of enactment.

The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute

s'ajoute le nom de l'auteur (le taxinomiste qui le premier identifie et nomme l'espèce) sous forme abrégée. Le premier élément du binôme identifie le genre ou la «famille» à laquelle la plante en cause appartient; le second élément identifie l'espèce. «*Cannabis sativa* L.», selon ce système de désignation, s'entend de l'espèce *sativa* du genre *cannabis*. Le «L.» signifie Linnaeus, savoir le botaniste qui a découvert cette plante en 1753.

Il est bien reconnu que les termes techniques et scientifiques qu'on trouve dans les lois doivent s'interpréter selon leur sens technique ou scientifique: voir *Maxwell on the Interpretation of Statutes* (12e éd., 1969), à la p. 28. La question soumise en l'espèce n'est cependant pas de savoir si l'expression «*Cannabis sativa* L.» doit être interprétée selon son sens technique ou scientifique. Les parties s'accordent pour dire qu'elle doit être interprétée ainsi. Le véritable différend, à mon sens, porte sur l'époque à laquelle il faut se situer pour en arrêter le sens. Les appelants préconisent, en effet, le sens que la communauté scientifique donnerait aujourd'hui à l'expression. Ils soutiennent que le jury pourrait raisonnablement conclure, d'après les témoignages d'experts soumis, que la communauté scientifique est maintenant d'avis qu'il y a trois espèces du genre cannabis et que le *Cannabis sativa* L. est l'une de ces espèces. La poursuite, d'autre part, soutient que le sens à donner à l'expression «*Cannabis sativa* L.» est celui que lui donnait la communauté des botanistes lorsque la *Loi sur les stupéfiants* est entrée en vigueur en 1961. En 1961, presque tous les botanistes considéraient que le cannabis (marihuana) ne consistait qu'en une seule espèce et que les plantes que certains botanistes désignaient sous les noms de *Cannabis indica* Lam. et de *Cannabis ruderalis* Jan. n'étaient que des sous-espèces du *Cannabis sativa* L. Les appelants, je l'ai déjà dit, demandent que nous donnions à l'expression en question le sens que, d'après le témoignage de leurs experts, lui donnent actuellement les membres de la communauté des botanistes; Sa Majesté nous demande d'adopter le sens qu'elle avait à l'époque de l'adoption de la Loi.

La doctrine de la *contemporanea expositio* est bien établie dans notre droit. [TRADUCTION] «Les

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must be construed as they would have been the day after the statute was passed . . . " *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (*per* Lord Esher, M.R.). See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes*, *supra*, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".

This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted. In *Gambart v. Ball* (1863), 32 L.J.C.P. 166, for example, it was held that the *Engraving Copyright Act* of 1735, which prohibited unauthorized engraving or "in any other manner" copying prints and engravings, applied to photographic reproduction—a process invented more than one hundred years after the Act was passed. (See also Maxwell, *supra*, at pp. 102 and 243-44.) This kind of interpretive approach is most likely to be taken, however, with legislative language that is broad or "open-textured". It is appropriate, as the judgments of Viscount Sankey in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, and Viscount Jowitt in *Attorney-General for Ontario v. Attorney-General for Canada* (the *Privy Council Appeals Reference*), [1947] A.C. 127, indicate, to the interpretation of the words in constitutional documents, whose meaning must be capable of growth and development to meet changing circumstances. But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. It is clear that Parliament intended in 1961, by the phrase "*Cannabis sativa*

termes d'une loi doivent s'interpréter comme ils l'auraient été le lendemain de l'adoption de cette loi . . . » *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, à la p. 242 (lord Esher, M.R.). Voir également Driedger, *Construction of Statutes* (2e éd., 1983) à la p. 163: [TRADUCTION] «Puisqu'une loi doit être examinée en fonction de toutes les circonstances qui existaient au moment de son adoption, il s'ensuit logiquement que les termes de cette loi doivent recevoir le sens qu'ils avaient au moment de son adoption et c'est ce que les tribunaux ont décidé»; *Maxwell on the Interpretation of Statutes*, précité, à la p. 85: [TRADUCTION] «Les termes d'une loi s'interprètent généralement selon le sens qu'ils avaient au moment de son adoption».

Cela ne signifie pas, bien sûr, que tous les termes de toutes les lois doivent toujours se limiter à leur sens original. On a souvent jugé que des catégories générales contenues dans des lois incluent des choses inconnues au moment de l'adoption de ces lois. Dans l'arrêt *Gambart v. Ball* (1863), 32 L.J.C.P. 166, par exemple, on a statué que l'*Engraving Copyright Act* de 1735, qui interdisait la gravure ou la reproduction [TRADUCTION] «par tout autre moyen», sans autorisation, de gravures ou imprimés s'appliquait à la reproduction photographique—un procédé inventé plus de cent ans après l'adoption de la Loi. (Voir également *Maxwell*, précité, aux pp. 102, 243 et 244.) Toutefois, ce mode d'interprétation est plus susceptible d'être adopté dans le cas d'une formulation législative générale. Comme le soulignent le vicomte Sankey dans l'arrêt *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, et le vicomte Jowitt dans l'arrêt *Attorney-General for Ontario v. Attorney-General for Canada* (le *Renvoi sur les appels au Conseil privé*), [1947] A.C. 127, il est utile pour interpréter les termes de documents constitutionnels dont le sens doit être susceptible d'évoluer pour répondre aux changements de circonstances. Mais lorsque, comme en l'espèce, le législateur a délibérément choisi un terme scientifique ou technique précis pour désigner une classe tout aussi précise et particulière de choses, ce serait faire violence à l'intention du législateur que de donner un sens nouveau à un tel terme chaque fois qu'il y a un changement de

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L.", to prohibit all cannabis. The fact that some, possibly a majority, of botanists would now give that phrase a less expansive reading in the light of studies not undertaken until the early 1970's, does not alter that intention. The interpretation given to the *Narcotic Control Act* by the trial judge was consistent with Parliament's apparent intent in enacting the legislation, and was, in my opinion, correct.

There is no question in my mind that the appellants were given "fair warning" by the *Narcotic Control Act* that their conduct was illegal. It is common knowledge in our society that marihuana is an illegal drug. It is not common knowledge that some botanists have recently concluded that there are three separate species of the mother plant, based on morphological considerations. Against this background, it seems highly unlikely that the citizen seeking guidance from his country's laws as to what he may or may not do, would see in the language "*Cannabis sativa* L." a basis for the three species botanical argument relied upon by the appellants in the case at bar. It would simply be unreasonable to assume that by using the phrase "*Cannabis sativa* L." Parliament meant to prohibit only some intoxicating marihuana and exempt the rest. Such an interpretation would be at odds with the general scheme of the *Narcotic Control Act* as well as the common understanding of society at large. Under the circumstances, it seems clear that the statute gives ample warning as written. Fairness does not demand that it be more narrowly construed.

This has been the approach taken by the two Canadian courts who have considered the botanical defence, and both have rejected it. See *R. v. Herbert, Coombs and Spanks* (1975), 28 C.C.C. (2d) 423, at p. 439; *R. v. Deslaurier, Paskell and Pinney*, Ont. Co. Ct. (District of York), July 1974, Steen J. The American cases are in accord. See,

consensus taxinomique chez les membres de la communauté scientifique concernée. Il est manifeste qu'en 1961 le législateur a voulu par l'expression «*Cannabis sativa* L.» interdire tout cannabis. Le fait que certains botanistes, voire même la majorité d'entre eux, donneraient maintenant à l'expression un sens moins large compte tenu d'études qui n'ont été effectuées qu'à partir du début des années 70 ne change rien à cette intention. L'interprétation donnée à la *Loi sur les stupéfiants* par le juge du procès est conforme à l'intention manifeste que le législateur avait en adoptant la Loi et est, à mon avis, correcte.

Je ne doute absolument pas que la *Loi sur les stupéfiants* ait fourni aux appelants un «avertissement raisonnable» du caractère illégal de leur conduite. Il est de notoriété publique dans notre société que la marihuana est une drogue illégale. Il n'est cependant pas de notoriété publique que certains botanistes ont conclu récemment qu'en fonction de considérations morphologiques la plante mère se divise en trois espèces différentes. Dans ce contexte, il semble très invraisemblable qu'un citoyen qui consulte les lois du pays pour savoir ce qu'il peut faire et ce qui lui est interdit de faire voie dans l'expression «*Cannabis sativa* L.» une justification de l'argument invoqué par les appelants dans la présente affaire, portant qu'il y a trois espèces de cannabis. Il ne serait tout simplement pas raisonnable de supposer qu'en employant l'expression «*Cannabis sativa* L.», le législateur n'ait voulu interdire qu'une espèce de marihuana et soustraire les autres espèces à la Loi. Une telle interprétation serait incompatible avec l'économie générale de la *Loi sur les stupéfiants* et avec la compréhension ordinaire qu'en a la société en général. Dans ces circonstances, il semble clair que le texte de la Loi donne un avertissement suffisant. L'équité n'exige pas qu'il soit interprété de façon plus restrictive.

C'est là la façon d'aborder la question qu'ont adoptée les deux tribunaux canadiens qui ont étudié le moyen de défense fondé sur la classification botanique et qui l'ont tous deux rejeté. Voir *R. v. Herbert, Coombs and Spanks* (1975), 28 C.C.C. (2d) 423, à la p. 439; *R. v. Deslaurier, Paskell and Pinney*, Cour de comté de l'Ontario (district de

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for example, *People v. Hamilton*, 105 Cal. App. 3d 113 (1980); *United States v. Lupo*, 652 F.2d 723 (7th Cir. 1981); *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976); *United States v. Gavic*, 520 F.2d 1346 (8th Cir. 1975); *United States v. Spann*, 515 F.2d 579 (10th Cir. 1975); *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975); *United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974); *United States v. Kinsey*, 505 F.2d 1354 (2nd Cir. 1974); *United States v. Sifuentes*, 504 F.2d 845 (4th Cir. 1974); *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974); *United States v. Moore*, 446 F.2d 448 (3rd Cir. 1971).

The trial judge was correct in withdrawing the appellants' botanical defence from the jury.

IV Rebuttal Evidence

The British Columbia Court of Appeal concluded that the trial judge erred in law in denying the Crown the right of rebuttal and based its order for a new trial on this finding. I have already concluded that there must be a new trial owing to the error of law in the trial judge's charge with respect to necessity. At this new trial the issue of whether in the circumstances of the first trial the Crown was entitled in law to present the rebuttal evidence it sought to adduce will no longer be relevant and will have no effect on the outcome of the case. I do not, accordingly, find it necessary to decide whether the trial judge erred in law in exercising his discretion to refuse to allow the rebuttal.

V Conclusion

On the basis of all the above, it is my conclusion that the Court of Appeal was correct in the result in ordering a new trial and was correct in sustaining the trial judge's decision to withhold the

York), juillet 1974, le juge Steen. La jurisprudence américaine va dans le même sens. Voir par exemple: *People v. Hamilton*, 105 Cal. App. 3d 113 (1980); *United States v. Lupo*, 652 F.2d 723 (7e cir. 1981); *United States v. Kelly*, 527 F.2d 961 (9e cir. 1976); *United States v. Gavic*, 520 F.2d 1346 (8e cir. 1975); *United States v. Spann*, 515 F.2d 579 (10e cir. 1975); *United States v. Walton*, 514 F.2d 201 (cir. du district de Columbia 1975); *United States v. Honneus*, 508 F.2d 566 (1er cir. 1974); *United States v. Kinsey*, 505 F.2d 1354 (2e cir. 1974); *United States v. Sifuentes*, 504 F.2d 845 (4e cir. 1974); *United States v. Gaines*, 489 F.2d 690 (5e cir. 1974); *United States v. Moore*, 446 F.2d 448 (3e cir. 1971).

Le juge du procès a eu raison de ne pas soumettre à l'appréciation du jury le moyen de défense des appelants fondé sur la classification botanique.

IV La contre-preuve

La Cour d'appel de la Colombie-Britannique a conclu que le juge du procès a commis une erreur de droit en refusant à la poursuite le droit de présenter une contre-preuve et a fondé son ordonnance de nouveau procès sur cette conclusion. J'ai déjà conclu qu'un nouveau procès doit être tenu en raison de l'erreur de droit commise par le juge du procès dans les directives qu'il a données au jury au sujet du moyen de défense fondé sur la nécessité. À ce nouveau procès, la question de savoir si, dans les circonstances du premier procès, la poursuite était habilitée, en droit, à soumettre la contre-preuve qu'elle a voulu produire n'aura plus d'importance et n'aura aucune incidence sur l'issue de l'affaire. En conséquence, je n'estime pas nécessaire de décider si le juge du procès a commis une erreur de droit en exerçant son pouvoir discrétionnaire de refuser la présentation de la contre-preuve.

V Conclusion

Compte tenu de tout ce qui précède, je conclus qu'en définitive la Cour d'appel a eu raison d'ordonner un nouveau procès et de confirmer la décision du juge du procès de ne pas soumettre à

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botanical defence from the jury.

I would dismiss the appeals.

The following are the reasons delivered by

WILSON J.—The factual background of this case, the history of the litigation in the courts below and the grounds on which the appeal was taken in this Court are very fully set out in the reasons for judgment of Mr. Justice Dickson (as he was at the date of the hearing) and it is not necessary for me to repeat them. Indeed, inasmuch as Dickson J.'s conclusion as to the defence of necessity seems clearly correct on the facts of this case and his disposition of the appeal manifestly just in the circumstances, I am dealing in these reasons only with the proposition very forcefully advanced by Dickson J. in his reasons that the appropriate jurisprudential basis on which to premise the defence of necessity is exclusively that of excuse. My concern is that the learned Justice appears to be closing the door on justification as an appropriate jurisprudential basis in some cases and I am firmly of the view that this is a door which should be left open by the Court.

As Dickson J. points out, criminal law theory recognizes a distinction between justification and excuse. In the case of justification the wrongfulness of the alleged offensive act is challenged; in the case of excuse the wrongfulness is acknowledged but a ground for the exercise of judicial compassion for the actor is asserted. By way of illustration, an act may be said to be justified when an essential element of the offence is absent, so that the defence effectively converts the accused's act from wrongful to rightful. Accordingly, those defences which serve to establish a lack of culpable intent on the part of the accused, or which demonstrate that, although the accused intended to commit the act, the act was one which the accused was within his rights to commit, may be labeled justification in so far as they elucidate the innocent nature of the act giving rise to the charge. Such doctrines as mistake of fact, automatism, etc. which, in the words of Lord Hailsham in *Director of Public Prosecutions v. Morgan*, [1975] 2 All E.R. 347 (H.L.), are raised in order to "negative" *mens rea*, may be appropriately placed

l'appréciation du jury le moyen de défense fondé sur la classification botanique.

Je suis d'avis de rejeter les pourvois.

Version française des motifs rendus par

LE JUGE WILSON—Les faits du présent litige, son déroulement devant les cours d'instance inférieure et les moyens d'appel invoqués en cette Cour font l'objet d'un exposé très complet dans les motifs de jugement du juge Dickson, maintenant Juge en chef, et il ne m'est donc pas nécessaire de les reprendre ici. En fait, puisque la conclusion du juge Dickson quant au moyen de défense fondé sur la nécessité semble bien fondée compte tenu des faits de l'espèce et que celui-ci paraît avoir tranché le pourvoi de manière manifestement juste dans les circonstances, je me limite dans les présents motifs à la proposition qu'il a avancée fort énergiquement et qui porte que l'excuse est le seul fondement jurisprudentiel approprié du moyen de défense fondé sur la nécessité. Ma préoccupation réside dans le fait que le savant juge Dickson paraît ainsi écarter la justification comme fondement jurisprudentiel approprié dans certains cas, ce que, j'en suis convaincue, la Cour doit éviter de faire.

Comme le fait remarquer le juge Dickson, la théorie en matière de droit criminel reconnaît une distinction entre la justification et l'excuse. Dans le cas de la justification, on conteste le caractère mauvais de l'acte préjudiciable; quand on plaide l'excuse, par contre, on reconnaît le caractère mauvais de l'acte, tout en affirmant qu'il y a un motif qui justifie le tribunal à avoir de la compassion pour son auteur. Par exemple, on peut dire qu'un acte est justifié en l'absence d'un élément essentiel de l'infraction, de sorte que le moyen de défense invoqué a pour effet de transformer en acte bon l'acte mauvais de l'accusé. Par conséquent, les moyens de défense qui servent à établir l'absence d'intention coupable chez l'accusé ou qui démontrent que, même s'il a eu l'intention de commettre l'acte, l'accusé avait le droit de le commettre, peuvent être qualifiés de justifications dans la mesure où ils expliquent le caractère innocent de l'acte reproché dans l'acte d'accusation. Des théories comme celles de l'erreur de fait, de l'automatisme, etc. qui, pour reprendre l'expression de lord Hailsham dans l'arrêt *Director of Public Prosecu-*

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in this category as they are invoked in order to undermine the very ingredient of culpability. Similarly, the accused who claims to have acted out of self-defence or provocation in utilizing aggressive force against another individual raises a justificatory defence in that he asserts the essential rightfulness of his aggressive act.

On the other hand, an excuse requires the court to evaluate the presence or absence of the accused's will. In contemporary jurisprudence the most forceful champion of excuse in criminal law has been Professor George Fletcher who has advocated a trend toward individualizing the conceptual basis for culpability so that all circumstances subjectively relevant to the accused be considered by the court. As such, the jury is requested to exercise compassion for the accused's predicament in its evaluation of his claim: "I couldn't help myself" (Fletcher, "The Individualization of Excusing Conditions", (1974) 47 S. Cal. L. Rev. 1269). This type of analysis is reflected in the dissent of Seiler J. of the Supreme Court of Missouri in *State v. Green*, 470 S.W. 2d 565 (1971), in which the accused's prison escape was seen as excusable due to the intolerability of his confinement with aggressive homosexual inmates by whom he had been repeatedly victimized. The basis of the defence could not have been that of justification based on an objective balance of evils since numerous U.S. courts had already established that the evil of prison escape outweighed the evil of intolerable prison conditions (see, *e.g.*, *People v. Whipple*, 279 P. 1008 (Cal. App. 1929); *People v. Noble*, 170 N.W. 2d 916 (Mich. App. 1969)). Rather, the issue for Seiler J. was the blamelessness of an accused in committing an act which, although admittedly wrong, was one for which any juror might have compassion. Thus, the nature of an excuse is to personalize the plea so that, while justification looks to the rightness of the act, excuse speaks to the compassion of the court for the actor.

tions v. Morgan, [1975] 2 All E.R. 347 (H.L.), sont soulevées pour [TRADUCTION] «repousser» la *mens rea*, peuvent être situées à juste titre dans cette catégorie puisqu'elles sont invoquées pour miner le fondement même de la culpabilité. De même, l'accusé qui prétend avoir agi en légitime défense ou par suite d'une provocation en agressant une autre personne, soulève un moyen de défense justificatif en ce qu'il invoque le caractère foncièrement bon de son acte agressif.

Dans le cas de l'excuse, par contre, le tribunal doit déterminer si l'accusé a agi volontairement. Parmi les auteurs contemporains, le défenseur le plus acharné de l'excuse en droit criminel est le professeur George Fletcher qui a préconisé l'individualisation du fondement conceptuel de la culpabilité de manière à ce que le tribunal tienne compte de l'ensemble des circonstances subjectivement pertinentes à l'accusé. Dans ce contexte, on demande au jury de compatir à la situation difficile de l'accusé en appréciant sa prétention: [TRADUCTION] «C'était plus fort que moi» (Fletcher, «The Individualization of Excusing Conditions», (1974) 47 S. Cal. L. Rev. 1269). Ce genre d'analyse se dégage des motifs de dissidence du juge Seiler de la Cour suprême du Missouri dans la décision *State v. Green*, 470 S.W. 2d 565 (1971), où il a considéré que l'évasion de l'accusé était excusable en raison du caractère intolérable de son incarcération avec des détenus homosexuels qui l'avaient agressé à maintes reprises. Le moyen de défense invoqué n'aurait pu être celui de la justification fondée sur une prépondérance objective des maux puisque de nombreux tribunaux américains avaient déjà établi que l'évasion d'un détenu est un mal plus grave que celui que constituent des conditions de détention intolérables (voir, par exemple, les décisions *People v. Whipple*, 279 P. 1008 (Cal. App. 1929); *People v. Noble*, 170 N.W. 2d 916 (Mich. App. 1969)). Le juge Seiler a estimé plutôt qu'on ne pouvait reprocher à un accusé d'avoir commis un acte qui, quoique manifestement mauvais, était de nature à susciter la compassion de n'importe quel juré. Donc, l'excuse consiste à personnaliser le plaidoyer de manière à éveiller la compassion du tribunal pour l'auteur de l'acte alors que la justification invoque le caractère bon de l'acte.

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As Dickson J. points out, although the necessity defence has engendered a significant amount of judicial and scholarly debate, it remains a somewhat elusive concept. It is, however, clear that justification and excuse are conceptually quite distinct and that any elucidation of a principled basis for the defence of necessity must be grounded in one or the other.

Turning first to the category of excuse, the concept of "normative involuntariness" stressed in the reasons of Dickson J. may, on one reading, be said to fit squarely within the framework of an individualized plea which Professor Fletcher indicates characterizes all claims of excusability. The notional involuntariness of the action is assessed in the context of the accused's particular situation. The court must ask not only whether the offensive act accompanied by the requisite culpable mental state (*i.e.* intention, recklessness, etc.) has been established by the prosecution, but whether or not the accused acted so as to attract society's moral outrage. In some U.S. jurisdictions this type of evaluation has been utilized to excuse from criminal liability individuals who commit intentional offensive acts but who operate under mental or sociological impairments with which one can sympathize (see *State v. St. Clair*, 262 S.W. 2d 25 (Mo. S.C. 1953)), or to form the theoretical basis for a defence where the accused confronted a desperate situation for which society might well be expected to express its compassion (see *United States v. Holmes*, 26 Fed. Cas. 360 (E.D. Pa. 1842)). In evaluating a claim of "normative involuntariness" we seem to be told that the individual's criminally wrongful act was nevertheless blameless in the circumstances.

The position in English law, by contrast, was most accurately stated in the well-known case of *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273, in which Lord Coleridge warned against allowing "compassion for the criminal to change or weaken in any manner the legal definition of the crime" (p. 288). The underlying principle here is the

Comme le souligne le juge Dickson, bien que beaucoup ait été écrit, aussi bien dans la jurisprudence que dans la doctrine, sur la nécessité comme moyen de défense, ce concept demeure assez difficile à cerner. Il est toutefois clair que, du point de vue conceptuel, la justification et l'excuse sont tout à fait distinctes et que toute explication logique du moyen de défense fondé sur la nécessité doit se fonder sur l'une ou l'autre.

Si l'on prend d'abord la catégorie de l'excuse, on peut, selon une interprétation, dire que le concept du «caractère involontaire dit normatif» sur lequel le juge Dickson insiste dans ses motifs, correspond exactement au plaidoyer individualisé qui, selon le professeur Fletcher, caractérise tout moyen fondé sur l'excuse. Le caractère involontaire de l'acte sur le plan conceptuel s'apprécie en fonction de la situation particulière de l'accusé. Le tribunal doit se demander non seulement si la poursuite a réussi à établir la perpétration d'un acte préjudiciable assorti de l'état mental coupable requis (c.-à-d. l'intention, l'incurie, etc.), mais aussi si l'accusé a agi de manière à outrager la morale de la société. Dans certains ressorts américains, on s'est servi de ce type d'appréciation pour exonérer de toute responsabilité criminelle des personnes qui ont commis intentionnellement des actes préjudiciables, mais dans des conditions mentales ou sociologiques qui peuvent susciter la compassion (voir *State v. St. Clair*, 262 S.W. 2d 25 (Mo. S.C. 1953)), ou encore pour établir le fondement théorique d'un moyen de défense lorsque l'accusé s'est trouvé dans une situation désespérée qui pourrait fort bien provoquer un mouvement de compassion de la part de la société (voir *United States v. Holmes*, 26 Fed. Cas. 360 (E.D. Pa. 1842)). Quand le «caractère involontaire dit normatif» est invoqué, on semble vouloir nous dire que l'acte criminel commis par une personne ne peut pas pour autant être blâmé dans les circonstances.

Le point de vue retenu en droit anglais est différent; il trouve son expression la plus exacte dans la décision bien connue *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273, où lord Coleridge souligne qu'il ne faut pas permettre [TRADUCTION] «que la compassion pour le criminel change ou affaiblisse de quelque manière la définition

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universality of rights, that all individuals whose actions are subjected to legal evaluation must be considered equal in standing. Indeed, it may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating upon his will, is so fundamental to the criminal law as rarely to receive explicit articulation. However, the entire premise expressed by such thinkers as Kant and Hegel that man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one's own will and in the universal right to be free from the imposition of the impulses and will of others (see Hegel, *Philosophy of Right* (trans. Knox, 1952), at pp. 226-27) supports the view that an individualized assessment of offensive conduct is simply not possible. If the obligation to refrain from criminal behaviour is perceived as a reflection of the fundamental duty to be rationally cognizant of the equal freedom of all individuals, then the focus of an analysis of *culpability* must be on the act itself (including its physical and mental elements) and not on the actor. The universality of such obligations precludes the relevance of what Fletcher refers to as "an individualized excusing condition".

légale du crime» (p. 288). Le principe fondamental qui entre en jeu ici est celui de l'universalité des droits, c'est-à-dire que toutes les personnes dont les actes sont soumis à l'examen judiciaire doivent être traitées sur le même pied. En fait, on peut dire que ce concept de l'appréciation égale qui fait abstraction des mobiles particuliers de l'auteur de l'acte ou des pressions particulières qui s'exerçaient sur sa volonté est à ce point primordial en droit criminel qu'il est rarement formulé explicitement. Cependant, toute la prémisse exprimée par des penseurs comme Kant et Hegel, savoir que l'homme est de par sa nature un être rationnel et que cela se manifeste dans la capacité qu'il a de surmonter les impulsions de sa propre volonté et aussi dans le droit universel de ne pas avoir à se plier aux impulsions et à la volonté d'autrui (voir Hegel, *Philosophy of Right* (trad. en anglais par Knox, 1952) aux pp. 226 et 227), appuie le point de vue qu'une appréciation individualisée d'une conduite préjudiciable n'est tout simplement pas possible. Si l'on perçoit l'obligation d'éviter toute conduite criminelle comme un reflet du devoir fondamental d'avoir une conscience rationnelle de la liberté égale dont jouissent toutes les personnes, alors une analyse de la *culpabilité* doit viser l'acte lui-même (aussi bien son élément matériel que son élément moral) et non pas son auteur. L'universalité de ces obligations a pour effet d'exclure la pertinence de ce que Fletcher appelle [TRADUCTION] «une circonstance qui peut, dans un cas d'espèce, servir d'excuse».

On the other hand, the necessity of an act may be said to exempt an actor from *punishment*, since the person who acts in a state of what Dickson J. calls "normative involuntariness" may be viewed as having been moved to act by the instinct for self-preservation. If so, the defence does not invoke the Court's compassion but rather embodies an implicit statement that the sanction threatened by the law (*i.e.* future punishment in one form or another) could never overcome the fear of immediate death which the accused faced. Accordingly, in such a case the law is incapable of controlling the accused's conduct and responding to it with any punishment at all. Although such an act dictated by the necessity of self-preservation is a voluntary one (in the normal sense of the word), its "norma-

Par ailleurs, on peut prétendre que le caractère nécessaire d'un acte exempte son auteur d'une *punition*, étant donné qu'on peut considérer que la personne dont l'acte revêt, pour reprendre les termes du juge Dickson, un «caractère involontaire dit normatif», a été poussée à agir par l'instinct de conservation. En pareil cas, le moyen de défense ne fait pas appel à la compassion de la cour, mais il sous-entend que la menace de sanction prévue par la loi (c.-à-d. une punition future, quelle qu'en soit la forme) ne pourrait jamais l'emporter sur la crainte d'une mort immédiate qu'a éprouvée l'accusé. Par conséquent, dans un tel cas, la loi est incapable d'exercer la moindre influence sur la conduite de l'accusé en y répondant par l'imposition d'une peine quelconque. Bien qu'un tel acte

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tive involuntariness" (in the sense that the actor faced no realistic choice) may form the basis of a defence if this is conceived as based on the pointlessness of punishment rather than on a view of the act itself as one the accused was entitled to commit. Indeed, one finds an explicit warning to this effect in Kant, *The Metaphysical Elements of Justice* (trans. Ladd, 1965), at pp. 41-42, where it is asserted that "through a strange confusion among jurists" the analysis of the wrongfulness of an act is often intertwined with the unquestionable futility of inflicting punishment on a person who has acted in despair or in circumstances of dire necessity.

It may be opportune at this point to comment briefly on the need to avoid slipping into what may be labeled an "instrumentalist analysis" of the purposes of punishment. For example, an analytic focus on excusing conditions is often premised on the fact that punishment in such situations will not serve the further goals of deterrence, rehabilitation, etc. (see, *e.g.*, Glanville Williams, *Criminal Law: The General Part* (2nd ed. 1961), esp. at pp. 738-39). Such considerations, however, cannot form the basis of an acceptable defence since they seem to view criminal culpability merely as a phenomenon in a chain of cause and effect. From an instrumentalist point of view the question is not whether liability is demanded in and of itself (as Lord Coleridge insisted must be the case in *Dudley and Stephens*, *supra*), but rather whether the infliction of punishment will have some positive consequential effect (see, *e.g.*, J. Bentham, *An Introduction to the Principles of Morals and Legislation*, vol. II, 2nd ed., 1823, p. 1).

The view of criminal liability as purposive only when it serves as a means to a further end is inherently problematic since the further goals of punishment are by their very nature one step removed from the determination of guilt or inno-

dicté par la nécessité d'assurer sa propre conservation soit volontaire (au sens usuel de ce terme), son «caractère involontaire dit normatif» (en ce sens que son auteur n'avait pas vraiment le choix) peut servir de fondement à un moyen de défense si on conçoit cela comme fondé sur l'inutilité de toute punition plutôt que sur une perception de l'acte lui-même comme en étant un que l'accusé avait le droit de commettre. En fait, on trouve une mise en garde en ce sens dans Kant, *Métaphysique des moeurs*, *Doctrine du droit* (trad. A. Philonenko, 1971), à la p. 110, où l'on affirme que, «par une étrange confusion», l'analyse du caractère mauvais d'un acte est souvent entrecroisée avec la futilité incontestable de l'imposition d'une peine à une personne qui a agi en désespoir de cause ou dans des circonstances d'extrême nécessité.

À ce stade, il peut être opportun de formuler de brèves observations sur la nécessité d'éviter de glisser dans ce qu'on peut appeler une «analyse instrumentale» de l'objet d'une peine. Par exemple, l'examen analytique des circonstances qui servent d'excuse a souvent pour prémisse que l'imposition d'une peine dans ces situations ne répondra pas aux objectifs supplémentaires de dissuasion, de réinsertion sociale, etc. (voir, par exemple, Glanville Williams, *Criminal Law: The General Part* (2e éd., 1961), particulièrement au pp. 738 et 739). De telles considérations ne peuvent toutefois pas constituer le fondement d'un moyen de défense acceptable puisqu'elles semblent concevoir la culpabilité criminelle simplement comme un maillon dans une chaîne de causes et d'effets. D'un point de vue «instrumental», la question n'est pas de savoir si la responsabilité est nécessaire en soi (comme lord Coleridge a souligné que ce devait être le cas dans l'affaire *Dudley and Stephens*, précitée), mais plutôt de savoir si l'imposition d'une peine aura un effet positif appréciable (voir, par exemple, J. Bentham, *An Introduction to the Principles of Morals and Legislation*, vol. II, 2e éd., 1823, p. 1).

Il y a des difficultés inhérentes au point de vue selon lequel la responsabilité criminelle n'a d'utilité que si elle sert à réaliser une autre fin, car les objectifs supplémentaires d'une punition sont, de par leur nature même, proches de la détermination

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cence. Just as we do not inquire into the socio-economic effects of a particular remedy for determining parties' respective rights in civil litigation (see, *e.g., Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (C.A.)), it does not seem possible to evaluate criminality with regard to the end results which punishment will or will not achieve. Accordingly, if the basis for the accused's defence is reducible to compassion for his individual attributes or predicament, or the ineffectiveness of punishment in rehabilitating him or deterring future acts, the question raised is the type of remedy and the fashioning of an appropriate sentence. The concerns embodied in such a defence are legitimately addressed to the sentencing process but cannot, in my view, be the basis of a successful defence leading to an acquittal.

de la culpabilité ou de l'innocence. Tout comme nous ne nous interrogeons pas sur les conséquences socio-économiques d'un redressement particulier pour déterminer les droits respectifs des parties dans un litige civil (voir, par exemple, l'arrêt *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (C.A.)), de même il ne semble pas possible d'apprécier la criminalité en fonction des résultats définitifs qu'une peine permettra ou non d'atteindre. Par conséquent, si le fondement du moyen de défense invoqué par l'accusé peut se ramener à la compassion pour ses qualités personnelles ou sa situation difficile, ou à l'inefficacité d'une peine pour ce qui est de réaliser sa réinsertion sociale ou de le dissuader de récidiver, la question qui se pose alors porte sur le type de redressement à envisager et le façonnage d'une peine appropriée. C'est à bon droit que les préoccupations que comporte ce moyen de défense visent le processus de la détermination d'une sentence mais, selon moi, on ne peut obtenir un acquittement en invoquant un moyen de défense fondé sur ces préoccupations.

This, however, is distinguishable from the situation in which punishment cannot on any grounds be justified, such as the situation where a person has acted in order to save his own life. As Kant indicates, although the law must refrain from asserting that conduct which otherwise constitutes an offence is rightful if done for the sake of self-preservation, there is no punishment which could conceivably be appropriate to the accused's act. As such, the actor falling within the Dickson J. category of "normative involuntariness" is excused, not because there is no instrumental ground on which to justify his punishment, but because no purpose inherent to criminal liability and punishment—*i.e.* the setting right of a wrongful act—can be accomplished for an act which no rational person would avoid.

Toutefois, ce cas se distingue de la situation où l'imposition d'une peine est complètement injustifiable, par exemple, lorsqu'une personne a agi en vue de sauver sa propre vie. Comme l'indique Kant, bien que la loi doit se garder de qualifier de bonne une conduite par ailleurs criminelle si elle a pour but la conservation de soi, on ne peut concevoir de peine qui convienne à l'acte commis par l'accusé. Dans ces circonstances, l'auteur d'un acte qui revêt, suivant les termes du juge Dickson, un «caractère involontaire dit normatif» est excusé non pas parce que, sur le plan pratique, rien ne justifie sa punition, mais parce qu'aucune fin inhérente à la responsabilité criminelle et à l'imposition d'une peine, c.-à.-d. la réparation d'un acte mauvais, ne peut être réalisée pour un acte qu'aucune personne raisonnable n'éviterait de commettre.

Returning to the defence of necessity as a justification, it may generally be said that an act is justified on grounds of necessity if the court can say that not only was the act a necessary one but it was rightful rather than wrongful. When grounded on the fundamental principle that a successful defence must characterize an act as one which the

Revenons maintenant au moyen de défense fondé sur la nécessité vu comme une justification. À ce sujet, on peut dire de façon générale qu'un acte est justifié pour cause de nécessité si le tribunal peut conclure non seulement qu'il s'agissait d'un acte nécessaire, mais que cet acte était bon plutôt que mauvais. Il existe un principe fonda-

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accused was within his rights to commit, it becomes immediately apparent that the defence does not depend on the immediacy or "normative involuntariness" of the accused's act unless, of course, the involuntariness is such as to be pertinent to the ordinary analysis of *mens rea*. The fact that one act is done out of a sense of immediacy or urgency and another after some contemplation cannot, in my view, serve to distinguish the quality of the act in terms of right or wrong. Rather, the justification must be premised on the need to fulfil a duty conflicting with the one which the accused is charged with having breached.

In discussing justification based on a conflict of duties one must be mindful of the viewpoint expressed by Dickson J. in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 at p. 678, to the effect that "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value". This statement, in my view, is clearly correct if the "higher social value" to which the accused points is one which is not reflected in the legal system in the form of a duty. That is to say, pursuit of a purely ethical "duty" such as, for example, the duty to give to charity, may represent an ethically good or virtuous act but is not within the realm of legal obligations and cannot therefore validly be invoked as a basis on which to violate the positive criminal law. This illustration exemplifies the essential proposition that although "a morally motivated act contrary to law may be ethically justified . . . the actor must accept the [legal] penalty for his action": *United States v. Moylan*, 417 F. 2d 1002 (4th Cir. 1969), at p. 1008.

Similarly, Dickson J. in his reasons for judgment in the present case correctly underlines the fact that a utilitarian balancing of the benefits of

mental selon lequel un moyen de défense, pour réussir, doit qualifier l'acte en cause comme en étant un que l'accusé avait le droit de commettre; dans cette optique, il devient tout de suite évident que le moyen de défense ne dépend ni du caractère immédiat ni du «caractère involontaire dit normatif» de l'acte de l'accusé, à moins que, bien entendu, ce caractère involontaire ne soit pertinent dans le contexte d'une analyse ordinaire de la *mens rea*. À mon avis, le fait qu'un acte ait été accompli par suite d'un sentiment d'imminence ou d'urgence et qu'un autre ne l'ait été qu'après réflexion ne peut pas servir à qualifier l'acte en question de bon ou de mauvais. Au contraire, la justification doit reposer sur la nécessité de remplir une obligation incompatible avec celle à laquelle on reproche à l'accusé d'avoir manqué.

En analysant la justification fondée sur l'existence d'obligations contradictoires, il faut garder à l'esprit le point de vue exprimé par le juge Dickson dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à la p. 678, selon lequel, «[a]ucun système de droit positif ne peut admettre un principe qui permettrait à quelqu'un de violer la loi parce que, à son avis, elle entre en conflit avec des valeurs sociales plus élevées». Selon moi, cet énoncé est manifestement exact si les «valeurs sociales plus élevées» invoquées par l'accusé ne se traduisent pas dans le système de droit sous la forme d'une obligation. Autrement dit, l'acquittement d'une «obligation» purement morale, comme par exemple celle de donner aux oeuvres de bienfaisance, peut constituer un acte moralement bon ou vertueux sans pour autant relever du domaine des obligations légales et, par conséquent, il ne saurait à bon droit être invoqué pour justifier la violation du droit criminel positif. Cet exemple illustre la proposition fondamentale selon laquelle même si [TRADUCTION] «un acte illégal motivé par des considérations d'ordre moral peut être justifié du point de vue de l'éthique . . . l'auteur d'un tel acte doit accepter la peine [prévue par la loi]»: *United States v. Moylan*, 417 F. 2d 1002 (4e Cir. 1969), à la p. 1008.

De même, c'est avec raison que le juge Dickson, dans les motifs qu'il a rédigés en l'espèce, souligne le fait qu'une évaluation pratique des avantages

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obeying the law as opposed to disobeying it cannot possibly represent a legitimate principle against which to measure the legality of an action since any violation of right permitted to be justified on such a utilitarian calculus does not, in Dickson J.'s words, "fit[s] well with the judicial function". The maximization of social utility may well be a goal of legislative policy but it is not part of the judicial task of delineating right and wrong. The case of *Southwark London Borough Council v. Williams*, [1971] Ch. 734 (C.A.), affords an appropriate illustration. In raising a defence of necessity to a charge of trespass the defendants implicitly argued that a violation of the rights of the property owner was justified because of the maximized social utility achieved by their using the property in that otherwise the defendants would remain homeless and the property unused. Lord Justice Megaw recognized that it was no part of the adjudicator's task either to maximize utility or distribute scarce resources on some criterion of merit as demanded by the defendants since the distribution of society's resources is a political process that must be accomplished by a distributive mechanism encompassing the entire policy. Lord Denning pointed out that if such claims became a matter of right for an adjudicative body to determine and enforce, the very notion of right would be undermined. He said at p. 744: "If homelessness were once admitted as a defence to trespass, no one's house could be safe".

Accordingly, not only can the system of positive law not tolerate an individual opting to act in accordance with the dictates of his conscience in the event of a conflict with legal duties, but it cannot permit acts in violation of legal obligations to be justified on the grounds that social utility is thereby increased. In both situations the conflicting "duty" to which the defence arguments point is one which the court cannot take into account as it invokes considerations external to a judicial analysis of the rightness or wrongness of the impugned

d'observer la loi par rapport aux avantages de ne pas l'observer ne peut en aucune manière constituer un principe valable en fonction duquel on doit apprécier la légalité d'un acte, parce que permettre qu'une violation de la loi soit justifiée d'après une telle évaluation pratique, pour reprendre les termes du juge Dickson, «ne cadre [pas] bien avec la fonction judiciaire». Le législateur peut fort bien viser la réalisation d'un plus grand bien pour la société, mais il n'appartient nullement aux tribunaux de déterminer ce qui est bon et ce qui est mauvais. L'arrêt *Southwark London Borough Council v. Williams*, [1971] Ch. 734 (C.A.), en est un bon exemple. En opposant à une accusation d'intrusion un moyen de défense fondé sur la nécessité, les défendeurs ont implicitement fait valoir que la violation des droits du propriétaire était justifiée du fait que leur usage de l'immeuble a permis de réaliser un plus grand bien pour la société en ce sens que, sans cela, les défendeurs seraient restés sans abri et l'immeuble serait resté inutilisé. Le lord juge Megaw a reconnu que la tâche d'un juge ne consiste aucunement à réaliser le plus grand bien possible ni à répartir des ressources peu abondantes selon quelque critère de mérite, comme l'exigeaient les défendeurs, puisque la répartition des ressources de la société est un processus politique qui doit se réaliser à l'échelon national. Lord Denning fait remarquer que si ce genre de revendications devenait une affaire de droit qu'une instance décisionnelle aurait à déterminer et à faire appliquer, la notion même de droit s'en trouverait affaiblie. Il écrit, à la p. 744: [TRADUCTION] «Si le fait d'être sans abri était admis une seule fois comme moyen de défense contre une accusation d'intrusion, aucune maison ne serait plus en sécurité».

En conséquence, non seulement le système de droit positif ne peut-il pas tolérer qu'une personne choisisse d'agir selon la voix de sa conscience lorsque celle-ci entre en conflit avec des obligations légales, mais il ne peut pas non plus permettre que des actes qui constituent des manquements à de telles obligations soient justifiés en raison de la réalisation d'un plus grand bien pour la société. Dans ni l'un ni l'autre cas, le tribunal ne peut-il prendre en considération «l'obligation» contradictoire sur laquelle portent les arguments de la

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act. As Lord Coleridge succinctly put it in *Dudley and Stephens*, *supra*, at p. 287: "Who is to be the judge of this sort of necessity?"

On the other hand, in some circumstances defence counsel may be able to point to a conflicting duty which courts can and do recognize. For example, one may break the law in circumstances where it is necessary to rescue someone to whom one owes a positive duty of rescue (see *R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.)), since failure to act in such a situation may itself constitute a culpable act or omission (see *R. v. Instan*, [1893] 1 Q.B. 450). Similarly, if one subscribes to the viewpoint articulated by Laskin C.J.C. in *Morgentaler*, *supra*, and perceives a doctor's defence to an abortion charge as his legal obligation to treat the mother rather than his alleged ethical duty to perform an unauthorized abortion, then the defence may be invoked without violating the prohibition enunciated by Dickson J. in *Morgentaler* against choosing a non-legal duty over a legal one.

It must be acknowledged, however, that on the existing state of the law the defence of necessity as justification would not be available to the person who rescues a stranger since the absence of a legal duty to rescue strangers reduces such a case to a conflict of a legal with a purely ethical duty. Such an act of rescue may be one deserving of no punishment and, indeed, deserving of praise, but it is nevertheless a culpable act if the law is violated in the process of the rescue.

As Professor E. J. Weinrib has most astutely pointed out, rescue scenarios often represent the mirror image of necessity scenarios; to acknowledge necessity as a justification premised on the

défense, étant donné qu'elle fait appel à des considérations étrangères à une analyse judiciaire du caractère bon ou mauvais de l'acte en cause. La question qui se pose est succinctement formulée par lord Coleridge dans l'affaire *Dudley and Stephens*, précitée, à la p. 287: [TRADUCTION] «À qui appartient-il de juger de ce type de nécessité?»

D'un autre côté, l'avocat de la défense pourra, dans certaines circonstances, être en mesure d'alléguer l'existence d'une obligation contradictoire qui sera reconnue effectivement par les tribunaux. On peut, par exemple, enfreindre la loi dans une situation où il est nécessaire de se porter à la rescousse d'une personne envers laquelle on a une obligation réelle de secours (voir *R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Cour de comté, Ont.)), étant donné que le défaut d'agir en pareil cas peut en soi entraîner la culpabilité (voir l'affaire *R. v. Instan*, [1893] 1 Q.B. 450). Dans le même ordre d'idées, si l'on souscrit à l'opinion exprimée par le juge en chef Laskin dans l'arrêt *Morgentaler*, précité, et qu'on estime qu'un médecin accusé d'avoir provoqué un avortement peut soulever comme moyen de défense son obligation légale de soigner la mère, plutôt que sa prétendue obligation morale de pratiquer un avortement non autorisé, alors ce moyen de défense peut être invoqué sans qu'il y ait violation de l'interdiction, énoncée par le juge Dickson dans l'arrêt *Morgentaler*, de choisir de remplir une obligation non légale de préférence à une obligation légale.

Il faut toutefois reconnaître que, suivant l'état actuel du droit, la personne qui sauve un inconnu ne saurait, pour se justifier, se prévaloir du moyen de défense fondé sur la nécessité étant donné que l'absence d'obligation légale de sauver un inconnu a pour effet de réduire un cas de ce genre à un conflit entre une obligation légale et une obligation purement morale. Il se peut qu'un tel acte de sauvetage ne mérite à son auteur aucune punition et qu'il soit même digne d'éloges, mais il constitue néanmoins un acte coupable si la loi est violée au cours de l'opération de sauvetage.

Comme l'a fait si judicieusement remarquer le professeur E.J. Weinrib, les scénarios de sauvetage sont souvent le reflet de scénarios de nécessité; en reconnaissant la nécessité comme une justification

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discharge of the conflicting duty to rescue a stranger could, without much stretch of the imagination, be turned around so as to enable a potential rescuee to assert a right to be rescued by any stranger (Weinrib, "The Case for a Duty to Rescue", (1980) 90 Yale L.J. 247, at pp. 273-74). By way of illustration, in the classic torts case of *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910), it was held that a ship owner was right in helping himself to the use of a dock owner's property during a storm, thus invoking the defence of necessity to a charge of trespass to the dock. The argument was premised on the notion of conflicting legal duties and was allowed to succeed in large part due to a previous ruling in *Ploof v. Putnam*, 71 A. 188 (Vt. S.C. 1908), in which a dock owner in similar circumstances was held liable to a ship owner for refusing to grant the ship access to the dock during a storm. The combined effect of the two cases may be said to turn the altruistic action into a coercive one in that the rescuer is not only given a valid justification but the rescuee is perceived as having an enforceable right. For this reason the common law has refrained from enunciating either an extended duty to rescue or an expansive right of necessity. In such circumstances "[t]here may be a moral duty to . . . [perform a rescue], but it is not practicable to make it a legal duty" (*Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, *per* Lord Reid at p. 1027). Rather, persons in need of aid from unknown passersby have been left to "be relieved by the charitable and the good" (*per* Lord Denning in *Southwark London Borough Council*, *supra*, at p. 744).

fondée sur l'acquittement de l'obligation contradictoire de sauver un inconnu, on pourrait, sans grand effort d'imagination, arriver à reconnaître à une personne en détresse le droit de se faire sauver par n'importe quel étranger (Weinrib, «The Case for a Duty to Rescue», (1980) 90 Yale L.J. 247, aux pp. 273 et 274). À titre exemple, dans la décision classique en matière de responsabilité délictuelle *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910), la cour a retenu le moyen de défense fondé sur la nécessité opposé à une accusation d'intrusion par un propriétaire de navire qui avait, sans autorisation, utilisé des installations portuaires pendant une tempête. L'argument invoqué reposait sur la notion d'obligations légales contradictoires et devait son succès en grande partie à la décision antérieure *Ploof v. Putnam*, 71 A. 188 (Vt. S.C. 1908), dans laquelle le propriétaire d'un port, dans des circonstances semblables, a été déclaré responsable envers le propriétaire d'un navire pour avoir refusé au navire l'accès aux installations portuaires au cours d'une tempête. On peut dire que ces deux décisions ont pour effet cumulatif de transformer un acte altruiste en un acte obligatoire en ce sens que non seulement celui qui porte secours bénéficie d'une justification valable, mais aussi celui qui est secouru est considéré comme ayant un droit qu'il peut faire valoir. C'est pour cette raison que la *common law* s'est abstenue d'énoncer une obligation étendue de secourir ou un droit élargi d'invoquer la nécessité. Dans ces circonstances, [TRADUCTION] «[i]l peut y avoir une obligation morale de . . . [porter secours], mais il n'est pas possible d'en faire une obligation légale» (*Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, lord Reid, à la p. 1027). Au lieu de cela, il ne reste plus aux personnes ayant besoin de l'aide de passants inconnus qu'à compter [TRADUCTION] «sur l'aide d'un bon Samaritain» (lord Denning dans l'arrêt *Southwark London Borough Council*, précité, à la p. 744).

In similar fashion the ethical considerations of the "charitable and the good" must be kept analytically distinct from duties imposed by law. Accordingly, where necessity is invoked as a justification for violation of the law, the justification must, in my view, be restricted to situations where

De la même façon, il faut, sur le plan analytique, garder une distinction entre les obligations légales et les considérations morales relatives au «bon Samaritain». Par conséquent, lorsque la nécessité est invoquée pour justifier une violation de la loi, la justification doit, à mon avis, se limiter

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the accused's act constitutes the discharge of a duty recognized by law. The justification is not, however, established simply by showing a conflict of legal duties. The rule of proportionality is central to the evaluation of a justification premised on two conflicting duties since the defence rests on the rightfulness of the accused's choice of one over the other.

As the facts before the Court in the present case do not involve a conflict of legal duties it is unnecessary to discuss in detail how a court should go about assessing the relative extent of two evils. Suffice it to say that any such assessment must respect the notion of right upon which justification is based. The assessment cannot entail a mere utilitarian calculation of, for example, lives saved and deaths avoided in the aggregate but must somehow attempt to come to grips with the nature of the rights and duties being assessed. This would seem to be consistent with Lord Coleridge's conclusion that necessity can provide no justification for the taking of a life, such an act representing the most extreme form of rights violation. As discussed above, if any defence for such a homicidal act is to succeed, it would have to be framed as an excuse grounded on self-preservation. It could not possibly be declared by the Court to be rightful. By contrast, the justification analysis would seem to support those cases in which fulfilment of the legal duty to save persons entrusted to one's care is preferred over the lesser offences of trespass or petty theft: see *Mouse's Case* (1608), 12 Co. Rep. 63; Ch. corr., Amiens, April 22, 1898, *Ménard's Case*, S. 1899.2.1. The crucial question for the justification defence is whether the accused's act can be said to represent a furtherance of or a detraction from the principle of the universality of rights.

In summary, it seems to me that the category of "normative involuntariness" into which an act done in the interests of self-preservation falls is characterized not by the literal voluntariness of the act but by its unpunishable nature. As such, the act may be exempted from culpability if it arose in a life-threatening situation of necessity. Where,

aux cas où l'acte de l'accusé constitue l'acquittement d'une obligation légale. Toutefois, on n'établit pas la justification simplement en démontrant l'existence d'obligations légales contradictoires. Étant donné que le moyen de défense repose sur la justesse du choix fait par l'accusé, la règle de la proportionnalité joue un rôle capital dans l'appréciation d'une justification fondée sur deux obligations contradictoires.

Comme les faits de l'espèce ne comportent aucun conflit d'obligations légales, il n'est pas nécessaire d'examiner en détail la manière dont un tribunal doit apprécier l'étendue relative de deux maux. Il suffit de dire que toute appréciation de ce genre doit tenir compte de la notion du bien sur laquelle s'appuie la justification. L'appréciation ne peut se limiter à une simple évaluation pratique, par exemple, du nombre de vies sauvées et de morts évitées, mais doit, de quelque manière, traduire une tentative de saisir la nature des droits et des obligations examinés. Cela semblerait compatible avec la conclusion de lord Coleridge que la nécessité ne justifie nullement l'homicide qui constitue la forme la plus extrême d'atteinte à des droits. Il se dégage de l'analyse précédente que, pour réussir, un moyen de défense invoqué en cas d'homicide doit prendre la forme d'une excuse fondée sur la conservation de soi. Il est impossible qu'un tribunal qualifie de bon un homicide. Par contre, l'analyse de la justification semble appuyer les décisions où les tribunaux ont jugé que l'obligation légale de sauver les personnes dont on a la garde l'emporte sur les infractions moindres d'intrusion et de larcin: voir *Mouse's Case* (1608), 12 Co. Rep. 63; Ch. corr., Amiens, 22 avril 1898, *arrêt Ménard*, S. 1899.2.1. La question fondamentale qui se pose dans le cas du moyen de défense fondé sur la justification est de savoir si l'acte de l'accusé respecte le principe de l'universalité des droits ou s'il y déroge.

En résumé, il me semble que la catégorie du «caractère involontaire dit normatif» dans laquelle se situe tout acte accompli en vue de la conservation de soi se distingue non pas par le caractère volontaire, au sens littéral, de l'acte, mais par le fait qu'il ne peut entraîner aucune peine. L'auteur d'un tel acte peut être exempté de toute culpabilité

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however, a defence by way of excuse is premised on compassion for the accused or on a perceived failure to achieve a desired instrumental end of punishment, the judicial response must be to fashion an appropriate sentence but to reject the defence as such. The only conceptual premise on which necessity as an excuse could rest is the inherent impossibility of a court's responding in any way to an act which, although wrongful, was the one act which any rational person would commit.

Where the defence of necessity is invoked as a justification the issue is simply whether the accused was right in pursuing the course of behaviour giving rise to the charge. Thus, where the act otherwise constitutes a criminal offence (*i.e.* it embodies both *mens rea* and the *actus reus*) the accused must show that he operated under a conflicting legal duty which made his seemingly wrongful act right. But such justification must be premised on a right or duty recognized by law. This excludes conduct attempted to be justified on the ground of an ethical duty internal to the conscience of the accused as well as conduct sought to be justified on the basis of a perceived maximization of social utility resulting from it. Rather, the conduct must stem from the accused's duty to satisfy his legal obligations and to respect the principle of the universality of rights.

I would dismiss the appeals.

Appeals dismissed.

Solicitors for the appellants: Turnham, Green, Higinbotham & Woodland, Victoria; Janice R. Dillon, Vancouver; Ruby & Edwardh, Toronto.

Solicitor for the respondent: Roger Tassé, Ottawa.

s'il l'a accompli dans une situation de nécessité où sa vie était en danger. Toutefois, si l'excuse invoquée comme moyen de défense repose sur la compassion pour l'accusé où sur le sentiment que l'imposition de la peine prévue n'aura pas l'effet souhaité, les juges doivent réagir en façonnant une sentence appropriée, mais en rejetant le moyen de défense comme tel. Au point de vue conceptuel, l'unique fondement que puisse avoir la nécessité en tant qu'excuse est l'impossibilité inhérente pour un tribunal de se prononcer de quelque manière sur un acte qui, quoique mauvais, aurait été commis par n'importe quelle personne raisonnable.

Lorsque le moyen de défense fondé sur la nécessité est invoqué comme une justification, il s'agit simplement de déterminer si l'accusé a eu raison de suivre la ligne de conduite à l'origine de l'accusation. Ainsi, lorsque l'acte constitue par ailleurs une infraction criminelle (c.-à-d. qu'il comporte à la fois la *mens rea* et l'*actus reus*), l'accusé doit démontrer qu'il a agi en raison d'obligations légales contradictoires, ce qui a fait de son acte apparemment mauvais un acte bon. Mais cette justification doit reposer sur un droit ou une obligation reconnus par la loi. Cela a pour effet d'exclure la conduite que l'on tente de justifier par une obligation morale que ressentait intérieurement l'accusé et celle que l'on cherche à justifier par ce qu'on croit être la réalisation d'un plus grand bien pour la société. La conduite doit plutôt découler de l'obligation qui incombe à l'accusé de s'acquitter des responsabilités que lui confère la loi et de respecter le principe de l'universalité des droits.

Je suis d'avis de rejeter les pourvois.

Pourvois rejetés.

Procureurs des appelants: Turnham, Green, Higinbotham & Woodland, Victoria; Janice R. Dillon, Vancouver; Ruby & Edwardh, Toronto.

Procureur de l'intimée: Roger Tassé, Ottawa.

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TAB 7

Pfizer Company Limited (*Appellant*)

v.

Deputy Minister of National Revenue for Customs and Excise (*Respondent*)

Court of Appeal, Jackett C.J., Thurlow J. and Choquette D.J.—Montreal, November 28, 1972; Ottawa, January 12, 1973.

Customs and Excise—Evidence—Statutes—Appeal—Exemption from duty of antibiotic chemical "and its derivatives"—Meaning of "derivatives"—Whether decision on question of law.

Pursuant to statutory authority the Governor in Council exempted certain antibiotics, except *viz.* "tetracycline and its derivatives" from customs duty for a certain period. The antibiotics, oxytetracycline and chlortetracycline, are of similar molecular structure to tetracycline, but neither of these can in fact be produced from tetracycline. Salts of oxytetracycline are manufactured by appellant in Canada but neither of the others is manufactured here. At a hearing before the Tariff Board testimony of expert witnesses as to the sense in which the word "derivatives" was used in the relevant scientific field was inconclusive, and so also were standard dictionaries, but from an examination of technical works, the Board concluded that in the field of antibiotics the word "derivatives" was used in the wider sense and accordingly held that all three antibiotics were thus within the exception to the exemption. Appellant appealed to this Court. The appeal was limited to a question of law.

Held (Choquette D.J. dissenting), the test applied by the Board in determining the meaning of the word was the proper test and the Board's determination of the meaning of the word was a decision on a question of law and therefore reviewable by this Court.

Per Choquette D.J. dissenting: The word "derivatives" in the order in council was ambiguous and it should therefore be interpreted in the sense most favourable to appellant.

APPEAL from the Tariff Board.

COUNSEL:

John Gomery and *Jack Miller* for appellant.

S. Froomkin for respondent.

SOLICITORS:

Martineau, Walker, Allison, Beaulieu, Phelan and *MacKell*, Montreal, for appellant.

Deputy Attorney General of Canada for respondent.

Pfizer Company Limited (*Appelante*)

c.

Le sous-ministre du Revenu national (Douanes et Accise) (*Intimé*)

Cour d'appel, le juge en chef Jackett, le juge Thurlow et le juge suppléant Choquette—Montréal, le 28 novembre 1972; Ottawa, le 12 janvier 1973.

Douanes et accise—Preuve—Statuts—Appel—Exemption de droits de douane pour un antibiotique «et ses dérivés»—Sens de «dérivés»—La décision porte-t-elle sur une question de droit?

Agissant en vertu du pouvoir que lui confère la loi, le gouverneur en conseil, a pour une période déterminée, exempté de droits de douane les antibiotiques, à l'exception entre autres de la «tétracycline et ses dérivés». L'oxytétracycline et la chlortétracycline sont des antibiotiques qui possèdent une structure moléculaire semblable à celle de la tétracycline mais qui ne peuvent ni l'une ni l'autre être fabriquées à partir de cette dernière. Seuls les sels d'oxytétracycline sont fabriqués au Canada par l'appelante. Lors de l'audience devant la Commission du tarif, les témoignages d'experts au sujet du sens pris par le terme «dérivé» dans le domaine scientifique concerné, de même que les définitions données par les dictionnaires courants, ne se sont pas révélés probants; mais la Commission, après avoir consulté les ouvrages techniques, a conclu que dans le domaine des antibiotiques, le terme «dérivé» était utilisé au sens large, ce qui l'a amenée à la conclusion que ces antibiotiques étaient tous les trois visés par l'exception à l'exemption. Appel a été interjeté devant cette Cour. L'appel était limité à une question de droit.

Arrêt (le juge suppléant Choquette étant dissident): Les critères appliqués par la Commission pour déterminer le sens du terme sont fondés et la détermination de ce sens par la Commission constitue une question de droit. Elle est donc susceptible d'être réformée par la Cour.

Le juge suppléant Choquette, dissident: Le terme «dérivé» figurant au décret est ambigu et il aurait donc dû être interprété dans le sens le plus favorable à l'appelante.

APPEL de la Commission du tarif.

AVOCATS:

John Gomery et *Jack Miller* pour l'appelante.

S. Froomkin pour l'intimé.

PROCUREURS:

Martineau, Walker, Allison, Beaulieu, Phelan et *MacKell*, Montréal, pour l'appelante.

Le sous-procureur général du Canada pour l'intimé.

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JACKETT C.J.—This is an appeal from a Declaration of the Tariff Board under the *Customs Act*, R.S., 1970, c. C-40.

Three chemicals have become important in the realm of therapeutic drugs in relatively recent times, namely, oxytetracycline, chlortetracycline and tetracycline. The similarity in the names of these drugs arises from the fact that their molecular structure is, in each case, based on four carbon rings. In practice each one is prepared without using either of the others as a commencement material. It is possible, according to the evidence, to use chlortetracycline in the preparation of tetracycline but neither tetracycline nor oxytetracycline can be used to prepare either of the others.

Certain salts of each of these chemicals have become of importance as therapeutic drugs.

The oxytetracycline drugs are highly competitive with the chlortetracycline drugs. The chlortetracycline salts are manufactured in Canada. Salts of the other drugs are not manufactured in Canada.

The three drugs and the salts in question are antibiotics.

In the context of the above facts, the Governor in Council, in pursuance of statutory authority, passed an order in council exempting from customs duty antibiotics with certain exceptions, and one class of exceptions was "Tetracycline and its derivatives".

The question is whether certain salts of oxytetracycline fall within the words "Tetracycline and its derivatives" so as to be excluded from that exemption.

It is common ground that the salts in question are derivatives of oxytetracycline.

Assuming that the word "derivative" was used in its ordinary common meaning, in this context it would seem to me that it means something that arises or is produced (is derived) from something else, either directly or indirectly. The result of such an interpretation here

LE JUGE EN CHEF JACKETT—Il s'agit d'un appel d'une décision de la Commission du tarif en vertu de la *Loi sur les douanes*, S.R., 1970, c. C-40.

Ces dernières années, trois produits chimiques ont pris une place importante parmi les substances thérapeutiques: l'oxytétracycline, la chlortétracycline et la tétracycline. La similarité des noms de ces trois médicaments vient de ce que la structure moléculaire de chacun d'entre eux est composée de quatre cycles de carbone. En pratique, chacun est obtenu sans que les autres soient utilisés comme matière première. Selon les témoignages, il est possible de préparer la tétracycline à partir de la chlortétracycline mais ni la tétracycline ni l'oxytétracycline ne peuvent servir de matière première à la préparation des deux autres.

Certains sels de chacun de ces produits chimiques ont pris de l'importance en tant que produits thérapeutiques.

Les remèdes à base d'oxytétracycline entrent en concurrence avec les remèdes à base de chlortétracycline. Les sels de chlortétracycline sont produits au Canada. Ceux des deux autres produits ne le sont pas.

Ces trois substances et leurs sels sont des antibiotiques.

Dans ce contexte, le gouverneur en conseil, en vertu du pouvoir que lui confère la loi, a pris un décret portant exemption de droits de douane pour les antibiotiques sous réserve de certaines exceptions, notamment, la «Tétracycline et ses dérivés».

Il s'agit donc de savoir si certains sels d'oxytétracycline sont compris dans la catégorie «Tétracycline et ses dérivés» et s'ils sont, par suite, exempts des droits de douane.

Il est admis de part et d'autre que les sels en question sont des dérivés de l'oxytétracycline.

Si l'on suppose que le terme «dérivé» est employé dans son sens courant, il me semble que, dans ce contexte, il désigne une substance produite à partir d'une autre (dérivée d'une autre), directement ou indirectement. Dans cette affaire, une telle interprétation aurait pour effet

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would be that the only protection afforded to the manufacturer in Canada of chlortetracycline and its salts would be against the importation of the salts of tetracycline. Not only would there be no protection against the importation of oxytetracycline or its salts but there would be no protection against the importation of chlortetracycline or its salts.

It does seem improbable that it would have been intended to afford a chlortetracycline manufacturer protection against tetracycline and its salts but not against chlortetracycline itself or its salts. However, if that is the meaning of the words used, the language must be interpreted accordingly no matter how improbable it may seem that that was what was intended.

Before the Tariff Board evidence was led as to the sense in which the word "derived" is used in the part of the world of science where these drugs are of concern. In the Board's Declaration, there is a summary of this evidence. As neither party has challenged the accuracy of that summary, I accept it as correctly representing the effect of that part of the evidence.

The witnesses for the appellant were a chemical engineer and a chemist. They were of the view that ". . . the term 'derivative' means that the substance is derived from something else. You have to have a biochemical or at least a chemical transformation . . . to transform one substance into its derivative."

One of the respondent's witnesses was a medicinal-organic chemist. In his view, the method of preparation was not the factor. The Board does not, however, appear to have understood him as expressing any opinion as to what the word "derivative" means in this context. They say that he was of the view that ". . . if, by reason of its chemical structure, one compound is a derivative of another compound, it is such a derivative whether it is produced by a living organism or is produced synthetically", and that, in his opinion, "there is a distinction to be made between 'derived from' and 'a derivative of': the first indicating a source of production and the second a matter of close and approde ne protéger les fabricants canadiens de chlortétracycline et de sels de chlortétracycline que contre les importations de sels de tétracycline. Ils ne seraient pas protégés non seulement contre l'importation d'oxytétracycline ou de ses sels mais encore contre l'importation de chlortétracycline ou de ses sels.

Il semble peu probable que l'on ait voulu protéger le fabricant de chlortétracycline contre la tétracycline et ses sels sans le faire contre la chlortétracycline et ses sels. Cependant, si tel est le sens véritable des mots employés, on doit les interpréter dans ce sens, quelque invraisemblable que l'intention du législateur puisse sembler.

Devant la Commission du tarif, des preuves ont été déposées aux fins d'établir le sens du terme «dérivé» dans le domaine de la science qui porte sur ces substances. La Commission a résumé ces preuves dans sa décision. Vu qu'aucune des parties n'a mis en doute l'exactitude de ce résumé, je tiens pour acquis qu'il expose la preuve sur ce point à la satisfaction des parties.

Les témoins de l'appelante sont respectivement ingénieur chimiste et chimiste. Leur position est que «. . . le terme «dérivé» suppose que la substance dérive d'une autre substance. Il faut que se produise une transformation biochimique ou tout au moins chimique . . . pour que l'on puisse parler de transformation d'une substance en son dérivé.»

L'un des témoins de l'intimé est un spécialiste en chimie médicale organique. A son avis, la méthode de préparation est sans importance. La Commission semble toutefois avoir considéré qu'il n'a exprimé aucune opinion sur le sens du mot «dérivé» dans ce contexte. Selon la Commission, le témoin a déclaré que «. . . si la structure chimique d'un composé établit qu'il est bien un dérivé d'un autre composé il importe peu de savoir si ce dérivé a été produit par un organisme vivant ou s'il a été produit synthétiquement», et que, à son avis, «il faut faire une distinction entre «*derived from*» (dérivé de) et «*a derivative of*» (un dérivé de): il s'agit dans le premier cas d'une source de production et dans

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priate relationship of chemical structure". The respondent's second witness was a veterinary surgeon. To him, a derivative is commonly known "as a substance of a similar class in structure". To indicate production from a source, he preferred "derived from" to "derivative of" which latter expression according to him "indicates appropriate similarity of structure, response and use rather than of origin or source".

The Board apparently took the view that it could make no finding on the evidence of the experts as to what the word "derivative" meant in the order in council and decided to resolve "the issue" by an examination of ordinary dictionaries and technical dictionaries and writings.

It is of interest to note that many of the ordinary dictionaries referred to by the Board give one or more senses of the word "derivative" in its application to chemical matters. One such sense is an application in this field of the ordinary sense of the word and so we find in the Oxford English Dictionary ". . . 5. Chem. A compound obtained from another, e.g. by partial replacement." On the other hand there is another, and presumably broader, sense that is differently expressed but of which a representative definition taken from Webster's Third New International Dictionary is:

> 4a: a chemical substance that is so related structurally to another substance as to be theoretically derivable from it even when not so obtainable in practice . . . .

There are also alternatives to this latter sense in some of the technical dictionaries such as "The theoretical connection between the molecular structures of related organic compounds" (Hackh's), and "In organic chemistry, a compound is considered a derivative of that hydrocarbon which contains the same number of carbon atoms in the same arrangements" (Stewart).

le second d'une substance liée étroitement à une structure chimique déterminée». Le deuxième témoin de l'intimé est médecin vétérinaire. D'après lui, un dérivé est, au sens usuel «une substance appartenant à une catégorie de substances reliées par une structure semblable». Pour désigner la production d'une substance à partir d'une source, ce témoin préfère l'expression «*derived from*» (dérivé de) à l'expression «*derivative of*» (un dérivé de), cette dernière se rapportant selon lui «à une réaction, une structure et une utilisation similaires et non à une source ou origine».

La Commission a apparemment considéré qu'elle ne pouvait tirer aucune conclusion des témoignages des experts en ce qui concerne le sens du terme «dérivé» employé dans le décret et a décidé de résoudre le problème en litige en s'en rapportant aux définitions des dictionnaires de langue générale ainsi qu'à celles des dictionnaires et ouvrages techniques.

Il est utile de souligner que de nombreux dictionnaires de langue générale cités par la Commission donnent une ou plusieurs définitions du terme «dérivé» pris dans le sens qu'il revêt en chimie. L'une de ces définitions techniques est l'application du sens usuel du terme à ce domaine particulier, comme c'est le cas dans l'*Oxford English Dictionary* «. . . [TRADUCTION] 5. Chim. Substance produite à partir d'une autre, par exemple, par substitution partielle.» D'autre part, il existe une définition probablement plus large et différemment exprimée: la définition du *Webster's Third New International Dictionary* en constitue un exemple:

> [TRADUCTION] 4a: une substance chimique dont la structure est tellement semblable à celle d'une autre substance qu'elle pourrait théoriquement être obtenue à partir de celle-ci même s'il n'est pas possible de le faire en pratique . . . .

Certains dictionnaires techniques donnent des définitions légèrement différentes, par exemple: [TRADUCTION] «ressemblance théorique entre les structures moléculaires de composés organiques semblables» (*Hackh's*), et [TRADUCTION] «en chimie organique, un composé est considéré comme le dérivé d'un hydrocarbure donné lorsqu'il contient le même nombre d'atomes de carbone et que ceux-ci sont disposés de la même façon» (*Stewart*).

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After their review of the definitions, the Board concluded that it was clear that "derivatives" in chemistry and allied fields is sometimes used with a broader and sometimes with a narrower meaning, and that "each of these meanings may be appropriate when used in its appropriate context".

However, when the Board turned to the application of the word "derivative" in technical works in the field of antibiotics, medicine and veterinary science dealing with the "tetracyclines", which word clearly includes all the three drugs in question and their salts, and the evidence of the experts from the fields of medicine, chemistry and veterinary science, they concluded that "The broader meaning of "derivative" appears to be consistent with the general usage and views in the field of antibiotics", and that "to allow only the narrower meaning is not".

In the result, the Board found oxytetracycline to be a derivative of tetracycline within the words of the order in council.

In legal theory, as I understand the law, the general rule is that a word in a document such as a statute or order in council having the effect of law is to be given its ordinary or popular meaning according to the context[1] and that meaning is a question of law to be determined by the Court with the aid of dictionaries and other legitimate aids to construction,[2] but where it is found that a word has been used in such a statute or other document in the jargon or vernacular of a particular area, part of the community, trade or field of learning, then it is to be given that meaning[3] and, in such a case, the Court may require the evidence of persons with knowledge of the sense in which the word is so used in order to determine the meaning, and, in such a case, its meaning becomes a question of fact.[4] It would seem, however, that, where the Court has sufficient familiarity with the words to take judicial knowledge,[5] such evidence is not necessary and the meaning of the word is a question of law for the Court.

Après un examen de ces définitions, la Commission conclut qu'il ressort nettement qu'en chimie de même que dans les domaines connexes le terme «dérivé» est pris parfois dans son sens large et parfois dans son sens restreint et que «chacune de ces significations peut convenir lorsque le mot est employé dans son contexte approprié».

Toutefois, la Commission a ensuite analysé l'emploi du terme «dérivé» dans les ouvrages techniques sur les antibiotiques, la médecine et la science vétérinaire traitant des «tétracyclines», terme qui comprend de toute évidence les trois produits en question ainsi que leurs sels, ainsi que les témoignages des experts de la médecine, de la chimie et de la science vétérinaire, et elle a conclu que «le sens large attribué au mot «dérivé» (*derivative*) est celui qui est conforme à l'usage et aux opinions courantes dans le domaine des antibiotiques», et que «vouloir ne lui donner que le sens restrictif serait contraire à cet usage et à ces opinions».

En conséquence, la Commission a jugé que l'oxytétracycline était un dérivé de la tétracycline, selon les termes mêmes du décret.

En droit, le principe général est qu'il y a lieu d'interpréter les textes de lois ou les décrets ayant force de loi, en donnant aux termes leur sens ordinaire et usuel dans le contexte[1] que le sens des mots est une question de droit qui doit être tranchée par la Cour à l'aide de dictionnaires ou d'autres moyens légitimes d'interprétation.[2] Toutefois, lorsque la Cour conclut qu'un terme donné a été ainsi employé dans le sens que lui donne le jargon ou la langue familière d'une région donnée, d'une certaine partie de la population, d'un secteur de l'industrie ou d'un domaine particulier, il doit être interprété dans ce sens.[3] En pareil cas, la Cour peut, aux fins de déterminer le sens de ce mot entendre les témoignages de personnes connaissant l'emploi particulier du terme dans ce contexte précis et dans ce cas, ce terme devient une question de fait.[4] Il semble cependant que lorsque la Cour connaît suffisamment le sens des termes elle peut en prendre connaissance d'office,[5] les témoignages sont inutiles et le sens du terme devient une question de droit.

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Whether, in any particular case, the meaning of a word is a question of law or a question of fact may be of no importance where the Court that has to deal with the matter has jurisdiction in relation to questions of law and of fact. This was the situation before the Tariff Board on this appeal.

However, in this Court, the matter becomes one of importance because this Court can review a decision of the Board on a question of law but cannot review a decision by it on a question of fact.

In my view, the Board did not make a finding of fact on the evidence that the word had a sense generally accepted in the field of antibiotics, medicine and veterinary science which was wide enough to make oxytetracycline a "derivative" of tetracycline. They did not expressly make such a finding as a finding of fact. Furthermore, if the matter was being dealt with by the Board as a question of fact, we are faced with a situation where a substantial and significant part of the material relied on was material that was not placed in evidence at the hearing so that the appellant would have had an opportunity to answer it.[6] [I think it is highly doubtful that literature is admissible as evidence on a question of fact as to usage of a word in a special domain except by way of the testimony of experts who testify that such literature is illustrative of a generally accepted usage of a word in a sense other than its ordinary meanings.]

What the Board did, in my view, is what any ordinary court would have had to do in the circumstances. In the absence of evidence on which they could find as a fact that there was general acceptance in a special domain of a use of the word in a sense other than its ordinary senses, they had to decide as a matter of law, with such assistance as they obtained from the facts as given in evidence, in what sense the word was being used in the context of an order in council dealing with chemicals in the field of antibiotics.[7] In doing so they referred to ordinary dictionaries as any other court might have

La question de savoir, dans un cas particulier, si le sens du terme est une question de droit ou une question de fait peut ne pas avoir beaucoup d'importance lorsque la Cour qui entend l'affaire est compétente à la fois sur les questions de droit et sur les questions de fait. Tel était le cas de la Commission du tarif dans cette affaire.

Par contre devant la présente Cour ce problème prend une importance considérable puisque cette Cour peut examiner la décision de la Commission sur une question de droit mais ne peut pas le faire sur une question de fait.

A mon avis, la Commission n'a pas tiré de la preuve une conclusion de fait portant que ce terme revêtait un sens généralement accepté dans l'industrie des antibiotiques, en médecine et en science vétérinaire et portant que ce sens était suffisamment large pour faire de l'oxytétracycline un «dérivé» de la tétracycline. La Commission n'a pas expressément indiqué qu'elle statuait sur une question de fait. D'autre part, si la Commission a considéré cette question comme une question de fait, nous aboutissons à une situation assez paradoxale, savoir qu'une partie importante des éléments de preuve sur lesquels est fondée la décision n'a pas été mise en preuve à l'audience de sorte que l'appelante n'a pas eu l'occasion de les contester.[6] [Je doute fort que des ouvrages de référence soient admissibles en preuve aux fins d'établir comme question de fait le sens d'un terme dans un domaine spécialisé, à moins que des experts viennent témoigner que ces ouvrages de référence sont représentatifs d'un emploi généralement reconnu d'un terme dans un sens autre que son sens usuel.]

A mon avis, la Commission a agi comme tout autre tribunal aurait agi dans les mêmes circonstances. En l'absence de preuve lui permettant de tirer une conclusion de fait sur la reconnaissance générale de l'emploi d'un terme dans un domaine particulier, dans un sens particulier autre que le sens usuel, elle a dû, en s'appuyant sur les faits mis en preuve, considérer comme une question de droit la question du sens qu'il y avait lieu de donner à ce mot dans le contexte d'un décret portant sur cette catégorie de produits chimiques que sont les antibiotiques.[7] A cette fin, elle s'est reportée aux dictionnaires de

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done. They also referred to the general use of the word in the literature of the subject, which it was proper for them to do provided that they were competent adequately to appraise such usage.[8]

There is no doubt in my mind that, having regard to the context, usage in the field of antibiotics was the proper test to be applied in determining the sense in which the word was used.

I have more doubt about the use of technical literature by a court consisting of non-technical persons as an aid to determining that sense. However, it is to be remembered here that the Tariff Board is a court specially created *inter alia* to interpret the words used in the *Customs Tariff* and I am of the view that that Board must be conceded the right, where it feels competent to do so, to use the literature of a technical subject as an aid to finding the sense in which words are used in connection with the subject.[9] Moreover, when the Board has indulged in such an exercise, while the resulting finding is a decision on a question of law that this Court has a duty to review, I am of the view that this Court should not interfere and substitute its own view so long as the Board's conclusion is one that is fairly open having regard to all the aids to construction available.

In my view, the Board's conclusion on the question involved here is one that could properly be reached and I am, therefore, of opinion that the appeal must be dismissed.

* * *

THURLOW J.—The question raised by this appeal is whether the Tariff Board erred in law in finding that three products imported by the appellant and known commercially as:

Terramycin Quaternary Salt TM 200;

Terramycin Hydrochloride Non-Sterile; and

Calcium Di-Terramycin Micronized Non-Sterile

langue générale comme l'aurait fait n'importe quel autre tribunal. Elle s'est aussi reportée à l'usage que l'on fait du terme dans les ouvrages spécialisées, ce qu'elle était fondée de faire vu qu'elle était compétente pour établir cet usage.[8]

Je suis convaincu que, dans ce contexte il était tout à fait approprié de déterminer le sens du terme employé en se fondant sur le sens qu'on donne à ce terme dans le domaine des antibiotiques.

Je suis moins certain que les tribunaux doivent faire appel à des ouvrages techniques comme moyen d'interprétation, vu qu'ils sont composés de membres qui ne sont pas des spécialistes. Il faut toutefois rappeler ici que la Commission du tarif est un tribunal créé spécialement, entre autres choses, pour interpréter les termes utilisés dans le *Tarif des douanes* et je suis d'avis que l'on doit lui reconnaître le pouvoir d'utiliser des ouvrages techniques pour déterminer le sens des mots employés dans un sens technique lorsqu'elle estime avoir compétence pour le faire.[9] En outre, lorsque la Commission a décidé de le faire, bien que la décision qu'elle rend soit une question de droit que la Cour fédérale a le pouvoir d'examiner, je suis d'avis que cette Cour ne doit intervenir et substituer sa propre décision à celle de la Commission que dans la mesure où la décision de cette dernière n'est pas raisonnable eu égard aux moyens d'interprétation dont elle disposait.

A mon avis, la Commission pouvait régulièrement rendre la décision qu'elle a rendue sur la question en cause et je suis d'avis que l'appel doit être rejeté.

* * *

LE JUGE THURLOW—La question soulevée dans cet appel est celle de savoir si la Commission du tarif a commis une erreur de droit en considérant que trois produits importés par l'appelante et connus dans le commerce sous les noms qui suivent,

Sel quaternaire de terramycine TM 200;

Chlorhydrate de terramycine non stérile; et

Diterramycine micronisée non stérile

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fell within the meaning of the expression "tetracycline and its derivatives" in Schedule A of the Chemicals and Plastics Tariff Reduction Order, P.C. 1968-2334. This Order in Council was made under what is now section 12 of the *Customs Tariff* which authorized the Governor in Council to reduce or remove any duty applicable under a list of tariff items including *inter alia* item number 92944-1, Antibiotics.

The Order in Council exempted from duty from January 1, 1969 to January 31, 1973 goods falling within item 92944-1, other than:

> Penicillin and its derivatives (not including crude penicillin and semi-synthetic penicillin); and
> Tetracycline and its derivatives.

The error in law alleged by the appellant is that the Tariff Board interpreted the last mentioned expression in a technical sense as referring to the single chemical compound known as tetracycline and all chemical substances theoretically derivable from it or with an appropriately close relation of chemical structure or similarity of numbers of carbon atoms in the same arrangement, whether, in the present state of knowledge, such compounds can be prepared or manufactured from tetracycline or not, rather than in an ordinary commercial sense embracing the antibiotic known as tetracycline in the forms in which it is marketed or produced and such other antibiotics of the class known as tetracyclines as can be prepared or manufactured from it.

The three products imported by the appellant are all basically oxytetracycline (the word "terramycin" being the appellant's brand name for it) the molecular formula and structure of which differ from tetracycline only in that a hydroxyl (OH) group is substituted for a hydrogen (H) atom at the particular point designated as 5 in the molecular structures of tetracycline and oxytetracycline as depicted in Exhibits A-9 and A-12. Oxytetracycline is not, however, pro-

entrent dans la catégorie définie par l'expression «tétracycline et ses dérivés» figurant au tableau A du décret sur la réduction du tarif des produits chimiques et des plastiques C.P. 1968-2334. Ce décret a été pris en application de ce qui est devenu l'article 12 du *Tarif des douanes* qui donne au gouverneur en conseil le pouvoir de réduire ou supprimer un droit d'entrée existant en établissant une liste de numéros tarifaires. Celle qui nous occupe contient entre autres le numéro tarifaire 92944-1 portant sur les antibiotiques.

Ce décret a institué une franchise douanière allant du 1er janvier 1969 au 31 janvier 1973 pour les articles visés par le numéro tarifaire 92944-1 à l'exception de:

> La pénicilline et ses dérivés, à l'exclusion de la pénicilline brute et de la pénicilline semi-synthétique;
> et la tétracycline et ses dérivés.

L'erreur de droit dont l'appelante cherche à se prévaloir est que la Commission du tarif a interprété l'expression citée dans un sens technique comme devant s'appliquer au produit chimique précis connu sous le nom de tétracycline ainsi qu'à tous les produits chimiques pouvant théoriquement en être tirés ou étant étroitement apparentés à ce produit ou contenant le même nombre d'atomes de carbone disposés dans un ordre similaire même si, dans l'état actuel des connaissances, ces produits ne peuvent pas être préparés ou fabriqués à partir de la tétracycline, plutôt que de lui donner le sens usuel qu'il reçoit dans le commerce. Dans ce dernier cas, ce terme comprend l'antibiotique connu sous le nom de tétracycline ainsi que les différentes formes sous lesquelles elle peut être commercialisée ou produite de même que les autres antibiotiques de la catégorie tétracyclines et les différents produits pouvant en être dérivés.

Les trois produits importés par l'appelante sont essentiellement de l'oxytétracycline (le terme «terramycine» étant l'appellation commerciale donnée par l'appelante à ce produit), leur formule moléculaire et leur structure ne différant de la tétracycline qu'en ce qu'un radical hydroxyle (OH) est remplacé par un atome d'hydrogène (H) dans la position 5 des structures moléculaires de la tétracycline et de l'oxytétracycline telles qu'elles sont représentées aux

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duced from tetracycline nor is there any known way of producing it from tetracycline. It is made by a fermentation process in which a species of micro-organisms known as streptomyces rimosus is employed and it is then extracted from the fermentation broth. Oxytetracycline, therefore, would not fall within the statutory expression as the appellant would have it interpreted. Indeed the only commercial products to which the expression would apply at the present time in the appellant's interpretation are the hydrochloride and phosphate salts of tetracycline.

At the hearing before the Tariff Board four witnesses gave evidence which is summarized in the Board's declaration. Two of these witnesses called by the appellant expressed the view that oxytetracycline was not a "derivative" of tetracycline. The other two, who were called by the respondent, expressed the contrary view. In the course of this evidence certain exhibits including R-1 and R-4 were produced. On the basis of this evidence the Board concluded that:

> From the foregoing summary it is clear that the expertise of the witnesses learned in this esoteric field is characterized by conflict rather than by consensus, leading to greater perplexity than the layman might expect.
>
> To resolve the issue, it is necessary to examine the relevant lexicography and orismology.

The Board then proceeded to consider the definitions of "derivative" found in twelve published dictionaries and glossaries, some of which had not been referred to in the course of the hearing, and concluded that there was a preponderance in the cited works for the broader meaning of the word. The Board also cited and considered nine other works referred to as "orismology" some of which had been referred to in the course of the hearing and some not and concluded that these works confirmed the broader interpretation. The Board concluded at page 7 of its declaration:

> Beyond any apparent mere preponderance of usage for the broader meaning, it is clear from the lexicography and the orismology that "derivative" in chemistry and allied fields is sometimes used with a broader and sometimes with a narrower meaning; whatever the predominance of support, each of these meanings may be appropriate when used in its appropriate context.

pièces A-9 et A-12. L'oxytétracycline n'est pas en fait produite à partir de la tétracycline et il n'existe actuellement aucun moyen de le faire. Elle est extraite du bouillon de culture résultant d'un processus de fermentation mettant en jeu un micro-organisme connu sous le nom de streptomyces rimosus. Par conséquent, selon l'interprétation de l'appelante, l'oxytétracycline n'entre pas dans la catégorie visée par la loi. Selon elle, les seuls produits vendus dans le commerce auxquels elle pourrait actuellement s'appliquer sont le chlorhydrate et le phosphate de tétracycline.

Lors de l'audience devant la Commission du tarif, quatre dépositions ont été enregistrées et résumées dans la décision de la Commission. Deux des témoins requis par l'appelante se sont accordés pour dire que l'oxytétracycline n'était pas un «*derivative*» (dérivé) de la tétracycline. Les deux autres, témoins de l'intimé, ont exprimé un avis contraire. Au cours de ces témoignages certaines pièces ont été produites, notamment les pièces R-1 et R-4. Sur la base de ces témoignages la Commission a conclu que:

> On voit bien par ce résumé que les connaissances techniques des témoins experts en ce domaine ésotérique sont caractérisées par le conflit plutôt que par l'unanimité, ce qui rend le problème encore plus complexe que le non-initié aurait cru possible.
>
> Pour résoudre cette question, il faut donc cerner la définition des termes généraux et des termes techniques.

La Commission a alors entrepris de relever les définitions du terme *derivative* (dérivé) dans douze dictionnaires et glossaires, dont certains n'ont pas été cités à l'audience, et elle a conclu qu'une majorité des ouvrages retenaient le sens large du terme. La Commission a aussi cité et examiné neuf autres ouvrages qualifiés «d'ouvrages techniques», dont certains ont été cités à l'audience, et est parvenue à la conclusion que ces ouvrages venaient confirmer l'interprétation large. La Commission a conclu à la page 7 de sa décision:

> Mise à part la simple prédominance apparente du sens large du mot «*derivative*», les définitions étudiées montrent clairement qu'en chimie et dans les domaines connexes on lui donne tantôt un sens large, tantôt un sens restrictif; quel que soit l'usage dominant, chacune de ces significations peut convenir lorsque le mot est employé dans son contexte approprié.

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Tariff item 92944 enumerates "antibiotics". Accordingly, particular importance attaches to the meanings attributed to the term "derivative" in the literature and evidence which deal with usage in the field of antibiotics, medicine and veterinary science. The British Medical Dictionary gives both the broader and the narrower meanings of derivative and Taber's Encyclopaedic Medical Dictionary defines Terramycin as the "proprietary name of the oxy derivative of tetracycline"; the Grand Larousse Encyclopédique, under the caption "Pharm.", describes oxytetracycline as a derivative of tetracycline; the witnesses with special knowledge in the fields of medicinal chemistry and veterinary science attributed to the word "derivative" its broader meaning and deemed oxytetracycline to be a derivative of tetracycline; the American Hospital Formulary Service and Antibiotic and Chemotherapy by Garrod and O'Grady list the terracyclines [*sic*] together as a group or class of antibiotics similar in chemical structure and in biological properties and uses. The broader meaning of "derivative" appears to be consistent with the general usage and views in the field of antibiotics; to allow only the narrower meaning is not.

Both generally and more particularly in the field most closely relevant to the item in issue, the preponderance of support for the broader meaning is such that the Board finds oxytetracycline to be a derivative of tetracycline.

As it is clear that oxytetracycline is a derivative of tetracycline in what has been referred to as the broader interpretation of the term "derivative", the problem raised by the appeal is whether the Tariff Board correctly interpreted the expression "tetracycline and its derivatives" in the Order in Council in question by giving the word "derivatives" therein such broader interpretation.

As the Board was unable to determine from the evidence of the witnesses and the exhibits produced in the course of the hearing the correct meaning of the word "derivatives" in the expression "tetracycline and its derivatives" it was, in my opinion, incumbent upon it to determine that meaning as best it could as a matter of law and (as no finding of fact as to the meaning of the word was made by the Board on that evidence) the problem appears to me to be the same for this Court, that is to say, to resolve as best it can as a matter of law the meaning of the expression in order to determine whether the Board erred in its interpretation. For this purpose, in my opinion, it is open to the Court, as it was also open to the Board, to make use of such

Le numéro tarifaire 92944 mentionne les «antibiotiques». Par conséquent, les significations attribuées au terme «*derivative*» (dérivé) dans les textes et les témoignages qui portent sur l'usage en vigueur dans les domaines des antibiotiques, de la médecine et de la science vétérinaire ont une importance particulière. *The British Medical Dictionary* donne au terme dérivé (*derivative*) un sens large et un sens restreint; *Taber's Encyclopaedic Medical Dictionary* définit terramycine (*Terramycin*) comme «*the proprietary name of the oxy derivative of tetracycline*»; le Grand Larousse Encyclopédique, sous la rubrique «Pharm.», décrit l'oxytétracycline comme un dérivé de la tétracycline; les témoins experts dans les domaines de la chimie médicale et de la science vétérinaire ont attribué au mot «dérivé» (*derivative*) un sens large et ont estimé que l'oxytétracycline était un dérivé de la tétracycline; l'*American Hospital Formulary Service* et l'*Antibiotic and Chemotherapy of Garrod and O'Grady* regroupent les térracyclines [*sic*] en un groupe ou une catégorie d'antibiotiques semblables en raison de leur structure chimique et de leurs propriétés et fonctions biologiques. Le sens large attribué au mot «dérivé» (*derivative*) est celui qui est conforme à l'usage et aux opinions courantes dans le domaine des antibiotiques; vouloir ne lui donner que le sens restrictif serait contraire à cet usage et à ces opinions.

Parce que c'est le sens large qui est surtout reconnu par l'usage dans le domaine particulier concernant les cas présents et en général dans d'autres domaines, la Commission affirme que l'oxytétracycline est un dérivé de la tétracycline.

Attendu qu'il est certain que l'oxytétracycline est un dérivé de la tétracycline au sens large du terme «dérivé», le problème soulevé dans cet appel est celui de savoir si la Commission du tarif a correctement interprété l'expression «tétracycline et ses dérivés» employée dans le décret en question en donnant un sens large au terme «dérivé».

Attendu que la Commission n'a pu déterminer, d'après les pièces déposées et les témoignages entendus à l'audience, le sens véritable du terme «dérivé» dans l'expression «tétracycline et ses dérivés», elle était fondée, à mon avis, à déterminer ce sens du mieux qu'elle le pouvait comme s'il s'agissait d'une question de droit. Vu que la Commission n'a tiré aucune conclusion de fait sur le sens de ce mot, le problème semble être le même devant cette Cour, savoir qu'elle doit statuer, du mieux qu'elle peut, comme question de droit, sur la question de savoir si l'interprétation de la Commission est erronée. A cet effet, je suis d'avis que la Cour est tout à fait fondée, de même que l'était la Commission, à faire appel à toutes les connaissances qu'elle

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knowledge as it has of the meaning of words, to consult dictionaries and glossaries and to have regard to such usage of the word "derivative" as is to be found in the exhibits in evidence if not in the other publications referred to by the Board.

In my view for the reasons that follow the conclusion of the Board as to the interpretation of the expression "tetracycline and its derivatives" is not erroneous.

Firstly, I agree with the Chief Justice, whose reasons I have had the opportunity of reading, that it is improbable that the intention of the Governor in Council was to protect chlortetracycline manufacture in Canada only from tetracycline and tetracycline salts, when the same manufacture had to face strong competition from oxytetracycline and salts thereof which were not manufactured in Canada. I regard this as a powerful reason for rejecting the appellant's interpretation.

Secondly, it is not disputed that the chemical known as tetracycline is not a subject of commerce. The substances that enter into commerce are the hydrochloride and the phosphate salts of tetracycline. It would be strange, therefore, if the expression "tetracycline and its derivatives" were used to refer only to salts, which would fall under the word "derivatives", rather than to refer to them by their own particular names or as "salts of tetracycline".

Thirdly, I think that the fact that the expression is found (1) in an order entitled "Chemicals and Plastics Tariff Reduction Order" and (2) in a long list which uses the chemical names of a great many substances, is a strong indication that the expression here in question is to be read as a person engaged in a chemical business and having some knowledge of chemical nomenclature would read it, though not necessarily as the most learned chemist might read it.

Fourthly, apart from any assistance obtainable from dictionaries or glossaries I would have had no difficulty in concluding not only

peut avoir du sens de ces mots, à consulter des dictionnaires et des glossaires et à tenir compte de tous les emplois que l'on peut trouver du terme «dérivé» dans les pièces du dossier, sinon dans les autres publications auxquelles la Commission se réfère.

Pour les motifs qui suivent, je suis convaincu que la conclusion à laquelle est parvenue la Commission en ce qui concerne l'interprétation de l'expression «tétracycline et ses dérivés» n'est pas erronée.

En premier lieu, j'ai eu l'occasion de lire les motifs du juge en chef et je souscris à son opinion. Il déclare en effet qu'il est peu probable que le gouverneur en conseil n'ait eu l'intention de protéger la fabrication de chlortétracycline au Canada que contre la tétracycline et les sels de tétracycline alors que les mêmes produits doivent faire face à une concurrence sévère de la part de l'oxytétracycline et de ses sels qui ne sont pas fabriqués au Canada. Je considère que ce motif est un argument solide contre la thèse de l'appelante.

En second lieu il n'est pas contesté que la substance chimique connue sous le nom de tétracycline n'est pas commercialisée. Les produits commercialisés sont les sels de tétracycline, c.-à-d. chlorhydrate et phosphate de tétracycline. Il serait donc étonnant que l'expression «tétracycline et ses dérivés» ne comprenne que les sels de tétracycline, et que ceux-ci soient désignés par le terme «dérivés» plutôt que de l'être expressément par le nom «sels de tétracycline», qui leur est propre.

Troisièmement, je crois que le fait que l'expression est employée (1) dans un décret intitulé «Décret sur la réduction du tarif des produits chimiques et des plastiques» et (2) parmi une longue liste de termes techniques désignant des substances chimiques, indique fortement qu'il y a lieu de donner à cette expression le sens que lui donnerait une personne liée à l'industrie chimique et possédant une certaine connaissance de la nomenclature, sans toutefois qu'il s'agisse nécessairement d'un chimiste très qualifié.

Quatrièmement, abstraction faite des renseignements que l'on trouve dans les dictionnaires et les glossaires, je conclurais sans hésitation

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that the word "derivatives" is capable of a broader and different meaning from that supported by the appellant, i.e., substances derived or capable of being derived from the substance referred to, but that it has that broader and different meaning in the expression "tetracycline and its derivatives" in the Order in Council in question. In the broader or different sense as I understand it, the word is used to refer conveniently to chemical substances, the molecular structures of which include a basic named chemical structure but in which there is some substitution of elements or radicals which differentiate such substances from the particular substance having the basic molecular structure. Examples of the usage of the term in this sense appeared in the patent specification under consideration in *C. H. Boehringer Sohn v. Bell Craig Limited* [1962] Ex.C.R. 201 in a passage cited at page 209 as follows:

> Processes for the production of morpholine derivatives are already known, whereby diethanolamines were treated e.g. by heating the temperatures to 160-180° C with 70% sulphuric acid, in order to acquire the morpholine ring closure.

and in the specification under consideration in *Société des Usines Chimiques Rhone-Poulenc et al v. Gilbert* (1967) 35 Fox P.C. 174 in a passage cited at pages 189 and 190.

Further examples of usage in the same sense also appear in Exhibit R-1 in the present case in the expression defining terramycin as:

> a proprietary name for the oxy derivative of tetracycline.

and in Exhibit R-4 in the sentence:

> Although one of the tetracyclines may be superior to the other derivatives in specific infections or in individual patients the close similarity of the chemical, microbiological, pharmacological, and therapeutic properties of these drugs permits their discussion as a class.

To my mind the last two references also show that the term can be and is used by at least some writers as a term of sufficient precision and breadth to refer to the whole class of tetracyclines, other than tetracycline itself, and not merely to the salts of tetracycline and such other substances as may be producible from tetracycline of which, as far as I am aware, there are none.

que non seulement le terme «dérivés» peut avoir un sens différent et plus large que celui que lui accorde l'appelante (substances réellement dérivées d'une substance principale, ou pouvant être dérivées d'une telle substance) mais encore que ce terme a, en fait, ce sens différent et plus large dans l'expression «tétracycline et ses dérivés» employée dans le décret en question. Si je comprend bien, il est commode d'employer ce terme dans ce sens différent ou plus large pour désigner des produits chimiques dont la structure moléculaire est essentiellement la même mais dans laquelle certains éléments ou radicaux viennent différencier la substance en cause du produit donné possédant la structure moléculaire de base. Le terme en question a été employé dans ce sens dans le mémoire descriptif en cause dans l'affaire *C. H. Boehringer Sohn c. Bell Craig Limited* [1962] R.C.É. 201 (page 209):

> [TRADUCTION] Les procédés de fabrication des dérivés de la morpholine sont déjà connus, ils consistent à traiter les diéthanolamines avec de l'acide sulphurique dilué à 70% à des températures de 160-180° C afin d'obtenir la fermeture du cycle de morpholine.

Il en est de même dans le mémoire descriptif étudié dans l'affaire *Société des Usines Chimiques Rhône-Poulenc et autres c. Gilbert* (1967) 35 Fox P.C. 174, aux pages 189 et 190.

On peut trouver d'autres exemples dans la pièce R-1 où le terme terramycine est défini comme suit:

> [TRADUCTION] marque brevetée d'un dérivé de la tétracycline à base d'hydroxyle.

ainsi que dans la pièce R-4 où l'on trouve:

> [TRADUCTION] Bien qu'une tétracycline puisse être supérieure aux autres dans le traitement de telle ou telle infection ou de tel ou tel malade, la grande ressemblance de leurs propriétés chimiques, microbiologiques, pharmacologiques et thérapeutiques permettent de les étudier en tant que groupe.

A mon avis, ces deux dernières citations prouvent que certains auteurs, au moins, emploient ce terme dans un sens suffisamment précis et étendu pour englober l'ensemble des tétracyclines autres que la tétracycline elle-même, qui ne comprend pas uniquement les sels de tétracycline ou les sels d'autres substances pouvant être produites à partir de la tétracycline, lesquelles, à ma connaissance, n'existent pas.

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In this sense of the word nothing turns on whether the substance referred to as a derivative can or can not be made from the substance of which it is a derivative. Nor is the usage or application of the word affected by the fact that the substance can be produced from the derivative, as in the case of tetracycline itself, which can be produced from chlortetracycline.

Finally, the meaning of the expression, "tetracycline and its derivatives", appears to me to be elucidated to some extent by reference to Exhibit R-3 in which the name tetracycline was proposed for the substance which was subsequently produced and now bears that name. The name is derived from tetra, meaning four, and cycline meaning rings, and of the tetracyclines then known and contemplated, i.e. chlortetracycline, oxytetracycline and tetracycline, the simple name tetracycline has been given, as I understand it, to the member of the group having the most basic or rudimentary molecular structure. The names given to the other similar but different substances of the group, i.e. chlortetracycline and oxytetracycline (there are now several more), embrace the same name with a reference to the difference. Tetracycline is thus the group or family name and in this sense the other members of the group or family are regarded as derivatives of the basic substance which bears the unembellished family name and are referred to as such. It is not disputed that the whole family or group would have been sufficiently referred to by the expression "the tetracyclines" and, as I see it, the whole family or group is equally well referred to by the expression "tetracycline and its derivatives".

As this interpretation is not dependent on any finding of fact made by the Board and is a conclusion of law as to the meaning of the word in its context it is, in my opinion, immaterial that the Board relied in part on literary materials not referred to at the hearing before it and there is no occasion to consider the appellant's submission that in this respect the requirements of natural justice were not observed in those proceedings.

I would dismiss the appeal with costs.

Si l'on retient ce sens du terme, il est sans importance que le produit appelé «dérivé» puisse ou ne puisse pas être fabriqué à partir de la substance dont il est dérivé. L'emploi ou le sens du terme ne varie pas, non plus, du fait que ce produit peut être fabriqué à partir de son dérivé, comme c'est le cas de la tétracycline en l'espèce, celle-ci pouvant être produite à partir de la chlortétracycline.

Enfin, le sens de l'expression «tétracycline et ses dérivés» semble être assez clair d'après la pièce R-3: le terme tétracycline y est en effet employé pour désigner la substance du même nom qui a été produite plus tard. Le terme est tiré du grec tetra, quatre, et de cycline, cycle, et parmi les tétracyclines qui nous intéressent, soit la chlortétracycline, l'oxytétracycline et la tétracycline, le terme tétracycline, dans le sens particulier, a été employé, si je comprends bien, pour désigner l'élément du groupe qui possédait la structure moléculaire de base la plus simple. Les noms donnés aux produits semblables mais cependant différents de ce groupe, chlortétracycline et oxytétracycline (il en existe maintenant plusieurs autres) reprennent ce même radical avec un préfixe indiquant leur caractéristique propre. Le terme tétracycline est donc un terme générique, qui désigne l'ensemble des substances du groupe. Dans ce sens, les autres produits de ce groupe sont considérés comme des dérivés de la substance de base dont le nom est l'élément commun à tous les autres et ils sont considérés comme tels. Il n'est pas contesté que la classe ou le groupe tout entier peut normalement être désigné par l'expression «les tétracyclines» et, à mon avis, cette classe ou ce groupe tout entier peut tout aussi bien être désigné par l'expression «la tétracycline et ses dérivés».

Considérant que l'interprétation de la Commission ne repose sur aucune conclusion de fait et qu'elle constitue une conclusion de droit portant sur le sens du mot dans un contexte donné, il est sans importance que la Commission se soit appuyée en partie sur une documentation livresque non citée à l'audience et il n'y a pas lieu de retenir l'argument de l'appelante selon lequel les principes de la justice naturelle n'ont pas été observés en l'espèce.

Je rejetterai donc l'appel avec dépens.

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* * *

CHOQUETTE D.J. (dissenting)—The question is whether the antibiotics imported by the appellant (Terramycin quaternary salt TM 200, Terramycin hydrochloride non-sterile and calcium diterramycin micronized non-sterile) which are derivatives of "oxytetracycline" can also be classified as derivatives of "Tetracycline" in the language of the Order in Council P.C. 1968-2334, 20th December 1968 respecting the reduction of Customs duties on Chemicals and Plastics, specially in the words "Tetracycline and its derivatives".

To solve this question, I would apply the rules stated in Craies on Statute Law, 6th Ed., in the following extracts:

(p. 162)

(1) According to their popular sense

There are two rules as to the way in which terms and expressions are to be construed when used in an Act of Parliament. The first rule is that general statutes will prima facie be presumed to use words in their popular sense . . .

(p. 163)

. . . In other words, as was said by Pollock B. in *Grenfell v. Inland Revenue Commissioners,* if a statute contains language which is capable of being construed in a popular sense, such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words "popular sense" that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it." But "if a word in its popular sense and read in an ordinary way is capable of two constructions, it is wise to adopt such a construction as is based on the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers." In other words the construction of the words is to be adapted to the fitness of the matter of the statute.

(p. 164)

(2) Scientific and technical language

The second rule is that if the statute is one passed with reference to a particular trade, business or transaction, words are used therein which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning which may differ from the ordinary or popular meaning.

* * *

LE JUGE SUPPLÉANT CHOQUETTE (étant dissident)—Dans la présente affaire, il s'agit de savoir si les antibiotiques importés par l'appelante (sel quaternaire de terramycine TM 200, chlorhydrate de terramycine non stérile et diterramycine micronisée non stérile), tous des dérivés de «l'oxytétracycline», peuvent aussi être considérés comme des dérivés de la «tétracycline» selon les termes du décret C.P. 1968-2334 en date du 20 décembre 1968 portant réduction des droits de douanes pour certains produits chimiques et certains plastiques et plus particulièrement selon l'expression «tétracycline et ses dérivés».

Pour trancher cette question, j'appliquerai les principes suivants, tirés de l'ouvrage *Craies on Statute Law,* 6e édition:

[TRADUCTION] (p. 162)

(1) Au sens usuel

Il existe deux principes quant à l'interprétation des termes et expressions d'une loi. Selon le premier, dans les lois d'application générale, les termes sont présumés prima facie être employés dans leur sens usuel . . .

(p. 163)

. . . En d'autres termes, ainsi que l'a déclaré le juge Pollock dans l'affaire *Grenfell c. Inland Revenue Commissioners,* s'il est possible de donner aux termes d'une loi leur sens usuel, le juge ne doit pas interpréter les termes de cette loi dans leur sens particulier et technique et il doit leur donner leur sens usuel, c'est-à-dire, bien sûr, le sens que les personnes liées à l'objet de la loi leur attribuent.» Toutefois, «si un terme employé dans son sens usuel peut normalement être interprété de deux façons différentes, il convient alors de l'interpréter en posant comme principe que le Parlement n'a voulu conférer que les pouvoirs nécessaires à l'application de la loi, sans plus». En d'autres termes, le juge doit interpréter les termes d'une loi en fonction de son objet.

(p. 164)

(2) Termes scientifiques et techniques

Le second principe porte que si la loi s'applique à une industrie donnée ou à un genre particulier d'entreprises ou d'opérations et que les termes de la loi sont employés dans un sens particulier que les personnes liées à ces industries, entreprises ou opérations comprennent, il y a lieu d'interpréter les termes de la loi dans ce sens particulier, bien que celui-ci puisse être différent du sens usuel.

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It is clear from the record that everybody conversant with chemicals and tetracycline does not know and understand the word "derivative" to have the broad meaning adopted by the Tariff Board, that is "theoretical derivability, appropriately close relation of chemical structure or similarity of number of carbon atoms in the same arrangement", instead of the natural, and also technical meaning of the word "derivative", that is a compound actually obtained from another by chemical reaction.

As a matter of fact, the appellant and the respondent each called "two well-qualified witnesses" to give their expert evidence on the technical issues involved. For the appellant, a chemical engineer and a chemist say that tetracycline and oxytetracycline are obtained from different micro-organisms (streptomyces aureofaciens and streptomyces rimosus) and that in the present state of technology, oxytetracycline cannot be produced from tetracycline. They say that "derivative" means that a substance is derived from something else.

For the respondent, a medicinal-organic chemist and a veterinary surgeon say that both products have the same basic structure, that they differ by having different groups or different atoms attached to different places, that "derivative" indicates appropriate similarity of structure, response and use rather than of origin and source. They distinguished between "derivative of" and "derived from".

After summarizing the evidence of these four witnesses, the Board concludes as follows: "it is clear that the expertise of the witnesses learned in this esoteric field is characterized by conflict rather than by consensus, leading to greater perplexity than the layman might expect. To resolve the issue, it is necessary to examine the relevant lexicography and orismology" (the underlining is mine; see App. Book, p. 12).

Then, the Board goes on citing dictionaries and technical literature on the point in issue. It

Il ressort clairement du dossier que les personnes familiarisées avec les produits chimiques et la tétracycline n'accordent pas toutes au terme «*derivative*» (dérivé) le sens large adopté par la Commission du tarif qui recouvre «la dérivation théorique et les composés ayant une structure chimique suffisamment rapprochée ou un même nombre d'atomes de carbone disposés dans un ordre similaire»; préférant ce sens au sens courant et technique désignant un composé effectivement obtenu d'un autre par une réaction chimique.

En réalité, l'appelante et l'intimé ont tous deux requis «deux experts en la matière» qui ont été amenés à déposer sur l'aspect technique du litige. Pour l'appelante, un ingénieur chimiste et un chimiste ont déclaré que la tétracycline et l'oxytétracycline sont produits par des micro-organismes différents (streptomyces aureofaciens et streptomyces rimosus) et qu'en l'état actuel de la science, l'oxytétracycline ne peut être obtenue à partir de la tétracycline. Ils affirment qu'un «dérivé» désigne une substance tirée d'une autre.

Pour l'intimé, un spécialiste en chimie médicale organique et un médecin vétérinaire ont déclaré que ces deux produits avaient la même structure de base, qu'ils ne se distinguaient que du fait que certains atomes ou groupes d'atomes différents étaient disposés différemment, et que le terme «dérivé» se rapporte à une réaction, une structure et une utilisation similaire et non à une source ou origine. Ils ont établi une distinction entre «*derivative of*» (un dérivé de) et «*derived from*» (dérivé de).

Après avoir résumé les témoignages de ces quatre témoins, la Commission conclut de la manière suivante: «on voit bien que les connaissances techniques des témoins experts en ce domaine ésotérique sont caractérisées par le conflit plutôt que par l'unanimité, ce qui rend le problème encore plus complexe que le non initié aurait cru possible. Pour résoudre cette question, il faut donc cerner la définition des termes généraux et des termes techniques» (les soulignés sont de moi; voir annexes, page 12).

La Commission passe ensuite aux citations de dictionnaires et d'ouvrages techniques sur le

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also quotes the following extract of its own report on Reference 120—Chemicals, vol. 9, p. 224; "The spokesman for the company (Cyanamid of Canada Limited, the intervenant in this appeal) said:

I would suggest that, because of their similar characteristics, all the tetracyclines be considered; that is, chlortetracycline, tetracycline itself, dimethyl chlortetracycline and oxytetracycline" (Transcript, Vol. 79, p. 12706).

The Board then concludes: "Both generally and more particularly in the field most closely relevant to the item in issue, the preponderance of support for the broader meaning is such that the Board finds oxytetracycline to be a derivative of tetracycline" (A.B. p. 17).

The Board holds therefore that the appellant's products to be derivatives of tetracycline within the meaning of the Order in Council.

I respectfully disagree with that conclusion.

First, I would set aside the above extract of the Board's report stating that the spokesman of the intervenant company suggested that all tetracyclines be considered on account of their similar characteristics (A.B., p. 14). This suggestion affords no evidence. Moreover, the Order in Council does not specify all the tetracyclines as suggested.

There remain the dictionaries and literature on which the Board relies to support its decision. Only well known and authoritative dictionaries and standard authors are admissible as guides for the legal interpretation of words or expressions. As pointed out elsewhere, a great part of the literature relied upon was not placed in evidence and cannot therefore be considered. At all events, the decision shows that not all the dictionaries and authors cited give to the word "derivative" the broader meaning stated by others and adopted by the Board. For instance, the Oxford Dictionary, Degering's Organic Chemistry, Flood and West's Dictionary of Scientific and Technical Words (and others cited below) tend to give to "derivative" the more restrictive meaning of a compound *actual-*

point en litige. Elle cite aussi un extrait d'un de ses rapports, renvoi nº 120—produits chimiques, vol. 9, p. 224: «Le porte-parole de la société (Cyanamid of Canada Limited, l'intervenante dans le présent appel) déclarait:

Je propose qu'à cause des caractéristiques semblables toutes les tétracyclines soient étudiées, c'est-à-dire, la chlortétracycline, la tétracycline elle-même, la chlortétracycline de diméthyle et l'oxytétracycline» (Compte rendu, vol. 79, p. 12706).

La Commission conclut alors: «Parce que c'est le sens large qui est surtout reconnu par l'usage dans le domaine particulier concernant le cas présent et en général dans d'autres domaines, la Commission affirme que l'oxytétracycline est un dérivé de la tétracycline» (A.B. p. 17).

La Commission décide alors que les produits de l'appelante sont des dérivés de la tétracycline au sens du décret.

Je ne peux malheureusement souscrire à cette décision.

Tout d'abord j'écarterai la référence à l'extrait précité du rapport de la Commission, précisant que le porte-parole de la société intervenante avait suggéré que toutes les tétracyclines soient étudiées ensemble compte tenu de leurs caractéristiques semblables (A.B. p. 14). Cette suggestion ne prouve rien. D'autre part, le décret ne vise pas toutes les tétracyclines, contrairement à ce que laisse entendre le porte-parole.

Restent les dictionnaires et les différents ouvrages sur lesquels la Commission fonde sa décision. Seuls les dictionnaires et les auteurs reconnus peuvent servir de moyens d'interprétation des mots ou expressions employés dans un texte juridique. Comme on l'a déjà indiqué, une grande partie de la documentation sur laquelle est fondée la décision n'a pas été mise en preuve et pour cette raison, il ne peut pas en être tenu compte. Qui plus est, la décision indique que les auteurs et les dictionnaires cités ne définissent pas tous le terme «dérivé» dans le sens large que la Commission a retenu. Par exemple, l'*Oxford Dictionary,* le *Degering's Organic Chemistry,* le *Flood and West's Dictionary of Scientific and Technical Words* (et certains autres cités plus loin) accordent plutôt

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ly obtained from another by chemical reaction; that others, like Webster's, Funk & Wagnall's and four others give to the word "derivative" the broader meaning which includes "theoretical derivability, appropriately close relation of chemical structure or similarity of number of carbon atoms in the same arrangement. (A.B., p. 157).

What is important is not the preponderance of support referred to by the Board, but the fact that some well known dictionaries and authors do not give to "derivative" the broader meaning that the Board adopted. This being so, it cannot be said that everybody conversant with the subject of chemicals and antibiotics knows and understands the word "derivative" to have the particular meaning given to it by the Board. (Craies; *supra*).

The question cannot either be solved by distinguishing between "derivative of" and "derived from". The French version of the Order in Council uses the word "*dérivés*" for "derivatives", which means or surely includes "derived from". The *Dictionnaire usuel Quillet et Flammarion* defines "*dérivé*" as follows:

[TRANSLATION] . . . Chem. Matter produced from other matter through distillation.

Le petit Robert defines it as follows:

[TRANSLATION] . . . Chem. Substance prepared from another substance, which retains the general structure of the original.

I find no particular help in the context of the Order in Council as to the meaning of "Tetracycline" (in the singular) and of its "derivatives". The document enumerates hundreds of chemicals and plastics. It does not do so for a scientific purpose but for a fiscal purpose, that is the reduction of Customs duties on the products enumerated, with the exception, *inter alia*, of "Tetracycline and its derivatives". The Governor in Council must have had in mind something concrete rather than theoretical, an actual derivability rather than a theoretical derivability, the latter including "appropriately close relation of

au terme «dérivé» le sens plus restreint de produit *réellement* obtenu à partir d'un autre par une réaction chimique; d'autres, comme le *Webster's* et le *Funk & Wagnall's* et quatre autres *a* accordent au terme «dérivé» le sens large qui inclut «la dérivation théorique et les composés ayant une structure chimique suffisamment rapprochée ou un même nombre d'atomes de carbone disposés dans un ordre similaire». (A.B., *b* page 157).

Ce qui importe, ce n'est pas que le sens large semble recevoir le plus d'appui comme le déclare la Commission mais que certains dictionnaires et auteurs reconnus n'accordent pas *c* au mot «dérivé» le sens large retenu par la Commission. On ne peut donc dire que les personnes liées au domaine des produits chimiques et des antibiotiques donnent au terme «*derivative*» *d* (dérivé) le sens que lui donne la Commission. (*Craies* précité).

De même, on ne peut résoudre le problème en faisant une distinction entre «*derivative of*» (un *e* dérivé de) et «*derived from*» (dérivé de). La version française du décret utilise pour «*derivatives*» le terme «dérivés» qui recouvre certainement le sens des deux expressions anglaises «*derivatives*» et «*derived from*». Le dictionnaire *f* usuel Quillet et Flammarion définit «dérivé» de la manière suivante:

«Dérivé . . . Chim. Corps qui provient d'un autre par distillation, par combinaison, etc.»

g Le petit Robert en donne la définition suivante:

«Dérivé . . . Chim. Substance préparée en partant d'une autre substance et qui conserve en général la structure de la première.»

h Le contexte du décret lui-même ne fournit pas beaucoup d'indications sur le sens du terme «tétracycline» (au singulier) et de ses «dérivés». Ce document énumère des centaines de produits chimiques et de matières plastiques. Il ne le fait *i* pas dans un but scientifique mais dans un but fiscal, savoir, réduire les droits d'entrée sur les produits énumérés à l'exception, entre autres, de la «tétracycline et de ses dérivés». Le gouverneur en conseil visait sûrement un objet con- *j* cret et non théorique, un dérivé qui peut être obtenu en pratique et non simplement en théorie, englobant des «composés ayant une struc-

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chemical structure or similarity of number of carbon atoms in the same arrangement". This meaning would lend itself to constant litigation and could lead to the conclusion that two different products are the derivative of each other.

Nothing shows that the members of the Board decided from their personal experience in the field of chemicals and antibiotics. It appears on the contrary, from the argument of counsel before the Board and from the remarks of its members, that the question was considered as a serious and debatable one (Official report of proceedings, pp. 147 to 184 and pp. 184 to 223). I find particularly true the following remark from Mr. Elliott: "It is difficult. Sometimes words mean different things to different people, even in a technical field" (p. 193).

It is common ground that no known formula actually permits oxytetracycline to be produced from tetracycline; in fact, the appellant's products were not obtained from tetracycline.

It is true that tetracyclines, in the plural, means a class or a group of antibiotics which includes oxytetracycline, chlortetracycline and tetracycline, but tetracycline in the singular is a product of its own distinct from the others and from which oxytetracycline cannot actually be produced. The intention of using the singular appears not only from the word as spelled, but also from the use of "its" in the words "Tetracycline and its derivatives". It is also true that the singular includes the plural (*Interpretation Act*, s. 26(7)) so as to mean two or more units of the same product, but not to the extent of changing the meaning of a word.

I would therefore give to the word "derivatives" in the Order in Council P.C. 1968-2334 its natural, logical and etymological meaning,

ture chimique suffisamment rapprochée ou un même nombre d'atomes de carbone disposés dans un ordre similaire». Une telle définition entraînerait des contestations constantes et pourrait aller jusqu'à laisser entendre que deux produits différents sont dérivés l'un de l'autre.

Rien n'indique que les membres de la Commission ont rendu leur décision en fonction de leurs connaissances personnelles sur les produits chimiques et les antibiotiques. Il semble au contraire, d'après les arguments de l'avocat devant la Commission ainsi que d'après les remarques des membres de celle-ci, que ce problème a été considéré comme étant tout à fait sérieux et susceptible de faire l'objet d'un débat (transcription officielle des procédures, pp. 147 à 184 et pp. 184 à 223). J'apprécie particulièrement la justesse de la remarque de M. Elliott: [TRADUCTION] «Le problème est difficile. Les mots ont parfois un sens différent pour plusieurs personnes même dans le domaine technique» (p. 193).

Il est admis de part et d'autre qu'aucune formule ne permet actuellement de produire de l'oxytétracycline à partir de la tétracycline et en fait, les produits de l'appelante n'étaient pas obtenus à partir de la tétracycline.

Il est vrai que le terme tétracyclines, employé au pluriel, s'applique à une classe ou à un groupe d'antibiotiques qui comprend l'oxytétracycline, la chlortétracycline et la tétracycline mais que le terme tétracycline, employé au singulier, est un produit bien précis, tout à fait distinct des autres et ne permettant pas actuellement de produire l'oxytétracycline. L'utilisation intentionnelle du singulier ressort non seulement de l'orthographe du mot lui-même mais aussi de l'utilisation dans la version anglaise du singulier «*its*» dans l'expression «*Tetracycline and its derivatives*». Il est vrai, bien sûr, que le singulier a valeur de pluriel (*Loi d'interprétation*, art. 26(7)) et qu'un terme singulier peut comprendre plusieurs quantités d'un même produit mais on ne peut pas s'appuyer sur cet argument pour changer le sens d'un mot.

J'attribuerais donc au terme «dérivé», employé dans le décret C.P. 1968-2334 son sens à la fois naturel, logique et étymologique qui est

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which is also a technical meaning for that term, that is "a compound actually obtained from another by chemical reaction."

Otherwise, the most I could say is that the word "derivatives" in the Order in Council is ambiguous and its meaning uncertain. In that case it should be interpreted in the sense most favourable to the alleged debtor. There is a more cogent reason to say so. Being antibiotics, the appellant's products should be admitted free of duties unless they are proven to fall within the exception of "Tetracycline and its derivatives". It is here the respondent who invokes that exception, an exception to exemption. He had therefore the onus to demonstrate that the appellant's products fell within that exception. Such exception, as all others, must be strictly interpreted. So I would not give to "derivatives" the broad and theoretical meaning that the Board attributed to that word, when it is not recognized by all those conversant with chemicals and antibiotics, but, as already said, I would give the word its natural meaning.

It pertains to the Governor in Council, not to the Board, to clarify its text so as to avoid any ambiguity or uncertainty, or to afford a better protection for chlortetracycline salts manufactured in Canada. As the text stands now, I do not feel justified to read "Tetracycline and its derivatives" as meaning "Oxytetracycline, chlortetracycline and tetracycline and their derivatives" or as meaning "Tetracyclines (in the plural) and their derivatives". It would have been too easy to say so.

However, I appreciate the carefulness with which the Board's decision has been prepared and the interest it affords in the field of theoretical derivability. I have also considered the strong reasons given by my two colleagues in support of that decision and it is with the greatest respect for their opinion that I differ and come to the conclusion that this appeal should be allowed with costs and that the appellant's products above described are not subject

aussi son sens technique soit: «un composé effectivement obtenu d'un autre par une réaction chimique.»

Dans le cas contraire, le moins que l'on puisse dire est que le terme «dérivé» figurant au décret est ambigu et d'un sens incertain. Dans ce cas, il doit être interprété dans le sens le plus favorable à l'assujetti, mais il existe une raison plus convaincante encore. Vu que les produits de l'appelante sont des antibiotiques, ils doivent être exemptés des droits de douanes sauf s'il est prouvé qu'ils rentrent dans l'exception «Tétracycline et ses dérivés». Dans cette affaire, c'est l'intimé qui invoque l'exception, qui est en l'espèce une exception à une exemption. Il avait donc la charge de prouver que les produits de l'appelante entrent dans le cadre de cette exception. Cette exception, comme toute exception, est d'interprétation stricte. Je n'accorderais donc pas au terme «dérivé» le sens large et théorique que la Commission lui a attribué lorsqu'il ne fait pas l'unanimité parmi les personnes liées au domaine des produits chimiques et des antibiotiques; je lui accorderai au contraire, comme je l'ai déjà indiqué, son sens naturel.

Il appartient au gouverneur en conseil, non à la Commission, de clarifier le texte du décret afin de faire disparaître toute ambiguïté ou obscurité ou d'accorder une meilleure protection aux sels de chlortétracycline fabriqués au Canada. Je ne pense pas qu'il soit justifié, à la lecture du texte actuel, de considérer que l'expression «tétracycline et ses dérivés» comprend «l'oxytétracycline, la chlortétracycline, la tétracycline et leurs dérivés» ou «les tétracyclines (au pluriel) et leurs dérivés», car si telle avait été l'intention du gouverneur en conseil, il lui aurait été trop facile d'employer les termes appropriés.

J'apprécie cependant le soin avec lequel la Commission a préparé sa décision et l'intérêt que cette décision présente au titre de la dérivation théorique. D'autre part, après avoir considéré les motifs sur lesquels mes deux savants collègues ont fondé leur décision j'exprime ma dissidence avec le plus grand respect et je conclus que cet appel doit être accordé avec dépens et que les produits de l'appelante mentionnés plus haut doivent être exemptés de droits de

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to duty and are free goods during the period from January 1, 1969, to January 31, 1973.

[1] *Grey v. Pearson*, (1857) 6 H.L.C. 61.

[2] *Bowes v. Shand*, (1877) L.R. 2 A.C. 455; *Great Western Railway Company v. Carpalla United China Clay Company*, [1909] 1 Ch. 218; *Great Western Railway v. Bater*, [1922] 2 A.C. 1, per Lord Atkinson at page 12; *The Township of Tisdale v. Hollinger Consolidated Gold Mines*, [1933] S.C.R. 321, per Cannon J. at page 322; *Edwards v. Bairstow*, [1956] A.C 14, per Viscount Simon at pages 30-32, and Lord Radcliffe at pages 33-36; *The Crow's Nest Pass Coal Company v. The Queen*, [1961] S.C.R. 750.

[3] *Alexander v. Vanderzee*, (1872) L.R. 7 C.P. 530; *North British Railway Company v. Budhill Coal and Sandstone*, [1910] A.C. 116; *The Caledonian Railway Company v. The Glenboig Union Fireclay Company*, [1911] A.C. 290; *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345; *Jenner v. Allen West & Co.*, [1959] 1 W.L.R. 554.

[4] *Ashforth v. Redford*, (1873) L.R. 9 C.P. 20; *Attorney-General for the Isle of Man v. Moore*, [1938] 3 All E.R. 263.

[5] See *Unwin v. Hanson*, [1891] 2 Q.B. 115, per Lord Esher, M.R. at pages 119-20:

> Now when we have to consider the construction of words such as this occurring in Acts of Parliament we must treat the question thus: If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. For instance, the "waist" or the "skin" are well-known terms as applied to a ship, and nobody would think of their meaning the waist or the skin of a person when they are used in an Act of Parliament dealing with ships. Now dealing with the cutting of trees in the country, is there not a language which all people in the country conversant with trees know and understand? It is not a question of mere forestry, but of what persons generally living in the country know and understand by the use of a particular term with respect to the cutting of trees there. Therefore, dealing with the cutting of trees in the country, this Act of Parliament uses language which everybody conversant with the cutting of trees in the country knows and understands. I think it would be mere pedantry in the present case not to take notice of the well-known meaning which persons in the country conversant with the cutting of trees would attach to the word used in this Act of Parliament. There was evidence given at the trial of its well-known meaning, though I think that evidence was unnecessary. Two words, "lopping" and "topping", which mean different things, are used in the country with respect to the cutting of trees. The Act gives directions with respect to cutting trees near a highway to the person who

douane et être admis en franchise pendant la période allant du 1er janvier 1969 au 31 janvier 1973.

[1] *Grey c. Pearson*, (1857) 6 H.L.C. 61.

[2] *Bowes c. Shand*, (1877) L.R. 2 A.C. 455; *Great Western Railway Company c. Carpalla United China Clay Company*, [1909] 1 Ch. 218; *Great Western Railway c. Bater*, [1922] 2 A.C. 1, Lord Atkinson à la page 12; *The Township of Tisdale c. Hollinger Consolidated Gold Mines*, [1933] R.C.S. 321, le juge Cannon à la page 322; *Edwards c. Bairstow*, [1956] A.C. 14, vicomte Simon aux pages 30-32 et Lord Radcliffe aux pages 33-36; *The Crow's Nest Pass Coal Company c. La Reine*, [1961] R.C.S. 750.

[3] *Alexander c. Vanderzee*, (1872) L.R. 7 C.P. 530; *North British Railway Company c. Budhill Coal and Sandstone*, [1910] A.C. 116; *The Caledonian Railway Company c. The Glenboig Union Fireclay Company*, [1911] A.C. 290; *Western Minerals Ltd. c. Gaumont*, [1953] 1 R.C.S. 345; *Jenner c. Allen West & Co.*, [1959] 1 W.L.R. 554.

[4] *Ashforth c. Redford*, (1873) L.R. 9 C.P. 20; *Attorney-General for the Isle of Man c. Moore*, [1938] 3 All E.R. 263.

[5] Voir *Unwin c. Hanson*, [1891] 2 Q.B. 115, le maître des rôles, Lord Esher, aux pages 119-120:

> [TRADUCTION] Lorsqu'il y a lieu d'interpréter des termes comme ceux qui nous occupent, employés dans une loi du Parlement, la Cour doit appliquer les principes qui suivent. S'il s'agit d'une loi d'application générale, les termes doivent être pris dans leur sens usuel. S'il s'agit d'une loi s'appliquant à une industrie donnée ou à un genre particulier d'entreprises ou d'opérations et que les termes de la loi sont employés dans un sens particulier que les personnes liées à ces industries, entreprises ou opérations comprennent, il y a lieu d'interpréter les termes de la loi dans ce sens particulier, bien que celui-ci puisse être différent du sens usuel. Par exemple, dans le domaine de la construction navale, le sens des termes «chevilles» et «genoux» est bien connu et il ne viendrait à l'esprit de personne que ces termes puissent désigner les chevilles ou les genoux d'une personne humaine lorsqu'ils sont employés dans une loi se rapportant aux navires. Pour ce qui concerne maintenant l'abattage des arbres à l'extérieur des villes, n'existe-t-il pas un langage que tous les gens de la campagne liés à l'exploitation forestière comprennent? Il ne s'agit pas d'une simple question de terminologie forestière: il s'agit de savoir quel sens les gens qui habitent habituellement la campagne attribuent à un terme donné lorsque celui-ci est employé relativement à l'abattage des arbres dans leur région. Par suite, vu qu'elle porte sur l'abattage des arbres à l'extérieur des villes, cette loi emploie des termes qui sont compris de toute personne liée à l'abattage des arbres à l'extérieur des villes. A mon avis, dans la présente affaire, ce serait faire preuve d'un purisme exagéré que de ne pas prendre connaissance de l'emploi répandu que les gens de la campagne liés à l'abattage des arbres font du terme en cause de cette loi. A l'audience, on a déposé des preuves visant à établir le sens répandu de ce terme, mais je crois qu'elles n'étaient pas nécessaires. Les termes [TRADUCTION] «émonder» et

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has to cut them, and to the magistrates who may order them to be cut, and uses only one of those words, namely, "lop". That word is well known in the country to mean cutting off the branches of a tree; "topping" is the cutting off its top. I think that the proper way to construe the Act, under those circumstances, is to say that it was only intended to give power to cut off the branches.

[6] Compare *Minister of National Revenue v. Wrights' Canadian Ropes, Ld.*, [1947] A.C. 109, per Lord Greene M.R. at pages 124-25.

[7] Compare *Borys v. C.P.R.*, [1953] A.C. 217, per Lord Porter at page 226:

> In these circumstances their Lordships, with such assistance as is to be obtained from the facts as given in evidence, must form their own opinion purely as a matter of construction as to the meaning which the word 'petroleum' bears when the substance referred to is in situ in a container below ground.

[8] See *Camden (Marquis) v. Inland Revenue Commissioners*, [1914] 1 K.B. 641, per Cozens-Hardy M.R. at pages 647 *et seq:*

> It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found.

[9] Compare *Canadian National Railway v. Bell Telephone*, [1939] S.C.R. 308, per Duff C.J.C. at page 317.

«étêter» désignent deux actions distinctes et ils sont employés à la campagne relativement à l'abattage des arbres. La loi contient des dispositions relatives à l'abattage des arbres aux abords des routes applicables aux personnes qui coupent les arbres et aux magistrats qui ont le pouvoir d'ordonner l'abattage de ces arbres. La loi n'emploie que l'un des deux termes mentionnés, le verbe «émonder». Il est bien connu à la campagne que ce verbe désigne l'action de couper les branches d'un arbre alors que le verbe «étêter» signifie l'action de couper la partie supérieure d'un arbre. A mon avis, ainsi qu'il y a lieu d'interpréter la loi, et compte tenu de ces circonstances, l'unique intention du législateur est d'accorder le pouvoir de couper les branches.

[6] Voir: *Le ministre du Revenu national c. Wrights' Canadian Ropes, Ld.*, [1947] A.C. 109, le maître des rôles Lord Greene aux pages 124-25.

[7] Voir: *Borys c. C.P.R.*, [1953] A.C. 217, Lord Porter à la page 226:

> [TRADUCTION] Dans de telles circonstances, leurs Seigneuries devront, en se servant des faits mis en preuve, se faire une opinion personnelle uniquement en interprétant le sens qu'il faut accorder au terme «pétrole» lorsque cette substance se trouve stockée dans un conteneur souterrain.

[8] Voir *Camden (Marquis) c. Inland Revenue Commissioners*, [1914] 1 K.B. 641, le maître des rôles Cozens-Hardy aux pages 647 et suivantes:

> [TRADUCTION] C'est à la Cour qu'il appartient d'interpréter la loi le mieux possible. Pour s'acquitter de cette tâche, la Cour est tout à fait fondée à se servir de toute la documentation dont elle peut disposer, et elle peut, bien sûr, consulter les grands auteurs et les dictionnaires sérieux qui citent les sources où ils ont puisé le sens des termes qu'ils donnent aux mots de la langue anglaise.

[9] Comparer *Canadian National Railway c. Bell Telephone*, [1939] R.C.S. 308, Duff J.C.C. à la page 317.

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TAB 8

Owen Lloyd Swain *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Lieutenant Governor's Board of Review of Ontario, the Canadian Disability Rights Council, the Canadian Mental Health Association and the Canadian Association of Community Living *Interveners*

INDEXED AS: R. *v.* SWAIN

File No.: 19758.

1990: February 19; 1991: May 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Jurisdiction — Division of powers — Acquittee on reasons of insanity to be held in strict custody pending Lieutenant Governor's pleasure — Provision to protect society and not to punish — Treatment a provincial responsibility — Whether provision ultra vires — Constitution Act, 1867, s. 91(27) — Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Arbitrary imprisonment — Equality before the law — Issue of insanity raised by Crown over objection of defence — Whether the common law criteria permitting the Crown to adduce evidence of an accused's insanity violated ss. 7, 9, and 15 of the Canadian Charter of Rights and Freedoms — If so, whether the common law criteria were justified by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 15.

* Chief Justice at the time of judgment.

Owen Lloyd Swain *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, la Commission d'examen du lieutenant-gouverneur de l'Ontario, le Conseil canadien des droits des personnes handicapées, l'Association canadienne pour la santé mentale et l'Association canadienne pour l'intégration communautaire *Intervenants*

RÉPERTORIÉ: R. *c.* SWAIN

N° du greffe: 19758.

1990: 19 février; 1991: 2 mai.

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

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

Droit constitutionnel — Compétence — Partage des compétences — Personne acquittée pour cause d'aliénation mentale devant être détenue sous garde rigoureuse jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu — Disposition qui vise à protéger la société et non à punir la personne — Traitement relevant de la responsabilité de la province — La disposition est-elle ultra vires? — Loi constitutionnelle de 1867, art. 91(27) — Code criminel, S.R.C. 1970, ch. C-34, art. 542(2).

Droit constitutionnel — Charte des droits — Droit à la liberté — Justice fondamentale — Emprisonnement arbitraire — Égalité devant la loi — Aliénation mentale soulevée par le ministère public contre le gré de la défense — Les critères de common law qui permettent au ministère public de produire des éléments de preuve de l'aliénation mentale de l'accusé violent-ils les art. 7, 9 et 15 de la Charte canadienne des droits et libertés? — Si oui, les critères de common law sont-ils justifiés en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 7, 9, 15.

* Juge en chef à la date du jugement.

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Criminal law — Defences — Right of accused to control own defence — Issue of insanity raised by Crown over objection of defence — Whether the common law criteria permitting the Crown to adduce evidence of an accused's insanity violated ss. 7, 9, and 15 of the Canadian Charter of Rights and Freedoms — If so, whether the common law criteria were justified by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 15.

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Arbitrary imprisonment — Whether the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the Criminal Code, violated ss. 7 and 9 of the Canadian Charter of Rights and Freedoms — If so, whether that power was justified by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9 — Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

Criminal law — Insanity — Statutory power to detain a person found not guilty by reason of insanity — Charter of Rights — Right to liberty — Fundamental justice — Arbitrary imprisonment — Whether statutory power violated ss. 7 and 9 of the Canadian Charter of Rights and Freedoms — If so, whether that power was justified by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9 — Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

Appellant was arrested and charged with assault and aggravated assault and was transferred from jail to a Mental Health Centre for the criminally insane. His condition improved rapidly with medication and he was conditionally released into the community. Appellant returned briefly to jail and was granted bail on conditions shortly thereafter. He remained on bail until June 10, 1985, and continued to take medication and to see a psychiatrist.

At trial, the Crown sought to adduce evidence with respect to insanity at the time of the offence; the appellant objected. After conducting a *voir dire*, the trial judge ruled that the Crown could adduce such evidence. Appellant was found not guilty by reason of insanity on all counts. Defence counsel then moved to have s. 542(2) of the *Criminal Code* (now s. 614), which provides for the automatic detention at the pleasure of the

Droit criminel — Moyens de défense — Droit de l'accusé de mener sa défense comme il l'entend — Aliénation mentale soulevée par le ministère public contre le gré de la défense — Les critères de common law qui permettent au ministère public de produire des éléments de preuve de l'aliénation mentale de l'accusé violent-ils les art. 7, 9 et 15 de la Charte canadienne des droits et libertés? — Si oui, les critères de common law sont-ils justifiés en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 7, 9, 15.

Droit constitutionnel — Charte des droits — Droit à la liberté — Justice fondamentale — Emprisonnement arbitraire — Le pouvoir que confère la loi de détenir une personne déclarée non coupable pour cause d'aliénation mentale conformément à l'art. 542(2) du Code criminel, viole-t-il les art. 7 et 9 de la Charte canadienne des droits et libertés? — Si oui, les critères de common law sont-ils justifiés en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 7, 9 — Code criminel, S.R.C. 1970, ch. C-34, art. 542(2).

Droit criminel — Aliénation mentale — Pouvoir conféré par la loi de détenir une personne déclarée non coupable pour cause d'aliénation mentale — Charte des droits — Droit à la liberté — Justice fondamentale — Emprisonnement arbitraire — Le pouvoir conféré par la loi viole-t-il les art. 7 et 9 de la Charte canadienne des droits et libertés? — Si oui, ce pouvoir est-il justifié en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 7, 9 — Code criminel, S.R.C. 1970, ch. C-34, art. 542(2).

L'appelant a été arrêté et accusé de voies de fait et de voies de fait graves et il a été transféré de la prison à un centre de traitement psychiatrique pour les criminels atteints d'aliénation mentale. Son état s'est rapidement amélioré grâce à des médicaments et il a été remis en liberté dans la société sous certaines conditions. L'appelant est retourné en prison pour un bref séjour et peu après il a été mis en liberté sous caution assortie de conditions. Il est demeuré en liberté sous caution jusqu'au 10 juin 1985 et il a continué de prendre ses médicaments et de consulter un psychiatre.

Au procès, le ministère public a cherché à produire une preuve relative à l'aliénation mentale de l'accusé au moment de l'infraction, ce à quoi l'appelant s'est opposé. Après un voir-dire, le juge du procès a conclu que le ministère public pouvait présenter ce genre de preuve. L'appelant a été déclaré non coupable pour cause d'aliénation mentale relativement à tous les chefs d'accusation. L'avocat de la défense a alors demandé

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Lieutenant Governor of an insanity acquittee, declared inoperative on the basis that it violated the *Canadian Charter of Rights and Freedoms*. The judge held that appellant's constitutional rights were not infringed by s. 542(2) and ordered that he be kept in strict custody until the Lieutenant Governor's pleasure was known. Appellant appealed and applied for bail pending appeal. This application was adjourned in order to permit an early hearing of the appellant's case by the Advisory Review Board which advised the Lieutenant Governor concerning the detention of insanity acquittees. The Lieutenant Governor issued a warrant further detaining the appellant in safe custody in a mental hospital for assessment and report to the Advisory Review Board within 30 days. Neither the appellant nor his counsel received prior notice of this decision and accordingly neither made submissions with respect to this decision.

Appellant was sent for psychiatric examination and assessment and remained a patient for 30 days. The Advisory Review Board held a review hearing, pursuant to s. 547 of the *Code*. Appellant and his counsel were present. The Board recommended that appellant should remain in safe custody and that the administrator of the mental facility in which he was detained have the discretion to permit him to re-enter the community with conditions as to supervision and follow-up treatment. Shortly thereafter, the Lieutenant Governor issued a warrant implementing those recommendations.

Appellant's counsel requested the right to appear and make submissions before the Lieutenant Governor at the time when the recommendation of the Advisory Review Board would be considered. This request was not granted. It was not until after the Lieutenant Governor's warrant for appellant's further detention had issued that the recommendation of the Advisory Review Board was released to the appellant's counsel.

A majority of the Ontario Court of Appeal dismissed the appeal.

The constitutional questions queried: (1) whether s. 542(2) of the *Criminal Code* was *intra vires*; (2) whether the common law criteria permitting the Crown

que le par. 542(2) du *Code criminel* (maintenant l'art. 614), qui prévoit la détention automatique d'une personne acquittée pour cause d'aliénation mentale au bon plaisir du lieutenant-gouverneur, soit déclaré invalide parce qu'il viole la *Charte canadienne des droits et libertés*. Le juge a conclu que le par. 542(2) ne portait pas atteinte aux droits reconnus par la Constitution à l'appelant et il a ordonné qu'il soit tenu sous une garde rigoureuse, jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu. L'appelant a interjeté appel et demandé d'être mis en liberté sous caution jusqu'à l'issue de l'appel. Cette demande a été ajournée afin de permettre un examen rapide du cas de l'appelant par la commission d'examen qui conseille le lieutenant-gouverneur relativement à la détention des personnes acquittées pour cause d'aliénation mentale. Le lieutenant-gouverneur a délivré un mandat ordonnant la mise sous bonne garde de l'appelant dans un hôpital psychiatrique à des fins d'évaluation dont il devait être fait rapport à la commission d'examen dans les 30 jours. En conséquence, ni l'appelant ni son avocat n'ont été informés au préalable de cette décision et ils n'ont pas pu présenter d'observations en rapport avec cette décision.

L'appelant a été envoyé dans un hôpital psychiatrique pendant trente jours pour examen et évaluation. La commission d'examen a procédé à un examen comme le prévoit l'art. 547 du *Code*. L'appelant et son avocat étaient présents. La commission a recommandé au lieutenant-gouverneur que l'appelant soit mis sous bonne garde et que l'administrateur de l'établissement où il serait détenu ait le pouvoir discrétionnaire de permettre sa réinsertion dans la société, sous réserve des conditions relatives à la surveillance et au suivi du traitement. Peu de temps après, le lieutenant-gouverneur a délivré un mandat selon ces recommandations.

L'avocat de l'appelant a demandé l'autorisation de comparaître et de présenter des observations devant le lieutenant-gouverneur au moment de l'étude de la recommandation de la commission d'examen. Cette demande n'a pas été accordée. Ce n'est qu'après la délivrance du mandat du lieutenant-gouverneur pour le maintien en détention de l'appelant que la recommandation de la commission d'examen a été communiquée à son avocat.

La Cour d'appel de l'Ontario, à la majorité, a rejeté l'appel.

Les questions constitutionnelles soulevées par l'espèce sont: (1) le paragraphe 542(2) du *Code criminel* est-il *intra vires*? (2) les critères de common law, qui

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to adduce evidence of an accused's insanity violated ss. 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms*; (3) and if so, whether the common law criteria were justified by s. 1 of the *Charter*; (4) whether the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code*, violated ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*, and (5) if so, whether that power was justified by s. 1 of the *Charter*.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed. The constitutional questions were answered as follows: (1) s. 542(2) of the *Criminal Code* was *intra vires*; (2) the common law criteria limited s. 7 of the *Charter*—it was not necessary to consider ss. 9 and 15 of the *Charter*—and (3) were not justified by s. 1; (4) s. 542(2) of the *Criminal Code* violated ss. 7 and 9 of the *Charter* and (5) was not justified by s. 1.

Per Lamer C.J. and Sopinka and Cory JJ.:

1. *Does it Violate the Charter for the Crown to Raise Evidence of Insanity Over and Above the Wishes of the Accused?*

The common law rule permitting the Crown to adduce evidence of insanity over and above the accused's wishes violates s. 7 of the *Charter*. The *Charter*, given that the litigation generally falls within the meaning of s. 32, applies to common law rules.

Given an actual or potential deprivation of life, liberty or security of the person, which must be established to invoke s. 7, the question becomes whether the deprivation is in accordance with the principles of fundamental justice. The liberty interest was readily apparent here.

The principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused person have the right to control his or her own defence. An accused will not be in the position of choosing whether to raise the defence of insanity at his or her trial unless he or she is fit to stand trial. If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried before matters proceed further. An accused who

permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, violent-ils les art. 7, 9 et 15 de la *Charte canadienne des droits et libertés*? (3) si oui, les critères de common law sont-ils justifiés par l'article premier de la *Charte*? (4) le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel*, viole-t-il les art. 7 et 9 de la *Charte*? et (5) si oui, ce pouvoir est-il justifié par l'article premier de la *Charte*?

Arrêt (le juge L'Heureux-Dubé est dissidente): Le pourvoi est accueilli. Les réponses aux questions constitutionnelles sont les suivantes: (1) le par. 542(2) du *Code criminel* est *intra vires*, (2) les critères de common law restreignent l'art. 7 de la *Charte*—il n'est pas nécessaire de répondre au sujet des art. 9 et 15 de la *Charte* —et (3) ne sont pas justifiés en vertu de l'article premier, (4) le par. 542(2) du *Code criminel* viole les art. 7 et 9 de la *Charte* et (5) il n'est pas justifié en vertu de l'article premier.

Le juge en chef Lamer et les juges Sopinka et Cory:

1. *La présentation d'une preuve d'aliénation mentale par le ministère public, contre le gré de l'accusé, viole-t-elle la Charte*?

La règle de common law qui permet au ministère public de présenter un preuve d'aliénation mentale contre le gré de l'accusé, viole l'art. 7 de la *Charte*. Puisque la question en litige relève, de manière générale, de l'art. 32, la *Charte* s'applique aux règles de common law.

Puisque, pour invoquer l'art. 7, il faut démontrer qu'il y a atteinte, réelle ou potentielle à la vie, à la liberté ou à la sécurité de la personne, il s'agit alors de déterminer si l'atteinte à la liberté ou à la sécurité de la personne est conforme aux principes de justice fondamentale. Il est évident que la question de la liberté est en cause en l'espèce.

Les principes de justice fondamentale reposent sur un système accusatoire et contradictoire de justice criminelle fondé sur le respect de l'autonomie et de la dignité humaines. Il faut également, en vertu des principes de justice fondamentale, qu'un accusé ait le droit de contrôler la conduite de sa propre défense. Un accusé ne sera pas en mesure de choisir s'il doit ou non présenter un moyen de défense fondé sur l'aliénation mentale lors de son procès à moins qu'il ne soit apte à subir ce procès. Si, à tout moment avant le verdict, la question de la capacité de l'accusé de conduire sa propre défense est soulevée, le juge du procès peut ordonner que cette

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has not been found unfit to stand trial must be considered capable of conducting his or her own defence.

The insanity defence is an exemption to criminal liability which is based on an incapacity for criminal intent. The decision whether or not to raise this exemption as a means of negating criminal culpability is part and parcel of the conduct of an accused's overall defence.

The ability of the Crown to raise evidence of insanity over and above the accused's wishes interferes with the accused's control over the conduct of his or her defence. The mere fact that the Crown is able to raise a defence which the accused does not wish to raise, and thereby to trigger a special verdict which the accused does not wish to trigger, means that the accused has lost a degree of control over the conduct of his or her defence. The Crown's ability to raise independently the issue of insanity could very well interfere with other defences being advanced by the accused and could irreversibly damage an accused's credibility.

An accused's right to control his or her own defence, while a principle of fundamental justice, is not "absolute". In circumstances where the accused's own evidence tends to put his or her mental capacity for criminal intent into question, the Crown will be entitled to put forward its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16 of the *Code*. Whether the accused's evidence does, in fact, put mental capacity for criminal intent in issue will be a matter for the trial judge to determine in the particular circumstances of each case.

The common law rule violates a principle of fundamental justice in that the Crown is not limited to raising insanity only in circumstances where an accused's own defence puts his or her mental capacity for criminal intent into issue but rather can raise it over and above the wishes of the accused.

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned

question soit tranchée avant d'aller plus loin. Ainsi, l'accusé qui n'a pas été jugé incapable de subir son procès doit être considéré comme capable de conduire sa propre défense.

La défense d'aliénation mentale constitue une exemption de responsabilité pénale fondée sur l'incapacité de former une intention criminelle. La question de savoir s'il y a lieu ou non de soulever cette exemption pour faire obstacle à la culpabilité criminelle fait partie intégrante de la conduite générale de la défense de l'accusé.

Le pouvoir du ministère public de présenter une preuve d'aliénation mentale, contre le gré de l'accusé, entrave le contrôle de l'accusé sur la conduite de sa propre défense. Le simple fait que le ministère public puisse soulever un moyen de défense que l'accusé n'a pas l'intention d'employer, et ainsi donner lieu à un verdict spécial que l'accusé ne désirait pas, signifie que l'accusé a perdu un certain degré de contrôle sur la conduite de sa propre défense. Le pouvoir du ministère public de soulever indépendamment la question de l'aliénation mentale pourrait très bien empêcher l'accusé de faire valoir d'autres moyens de défense et réduire sa crédibilité de façon irrémédiable.

Bien que le droit d'un accusé de contrôler sa défense soit un principe de justice fondamentale, ce droit n'est pas «absolu». Lorsque la preuve même de l'accusé tend à mettre en doute sa capacité mentale de former une intention criminelle, le ministère public aura le droit de présenter sa propre preuve d'aliénation mentale et le juge du procès sera fondé à donner des directives au jury relativement à l'art. 16 du *Code*. Il appartiendra au juge du procès de déterminer, dans les circonstances particulières de chaque espèce, si la preuve de l'accusé, en fait, met en cause la capacité mentale de former une intention criminelle.

La règle de common law contrevient à un principe de justice fondamentale parce qu'elle ne limite pas le ministère public à ne soulever l'aliénation mentale que lorsque la défense de l'accusé met en cause sa capacité mentale de former une intention criminelle, mais lui permet de le faire contre le gré de l'accusé.

Il n'est pas acceptable que l'État puisse contrecarrer l'exercice du droit de l'accusé en tentant de faire jouer les intérêts de la société dans l'application des principes de justice fondamentale, et restreindre ainsi les droits reconnus à l'accusé par l'art. 7. Les intérêts de la société doivent entrer en ligne de compte dans l'application de l'article premier de la *Charte*, lorsqu'il incombe au ministère public de démontrer que la justification de la

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law is demonstrably justified in a free and democratic society.

It was unnecessary to consider whether the common law rule also restricts the rights enunciated in ss. 9 and 15 of the *Charter*, unless the limitation on s. 7 were upheld under s. 1.

The *Charter* analysis here, because the appeal involved a *Charter* challenge to a common law, judge-made rule, involved somewhat different considerations than would apply to a challenge to a legislative provision. It was not strictly necessary to go on to consider the application of s. 1 after the existing common law rule was found to limit the s. 7 *Charter* rights. It would be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*.

The Court under s. 1, in an appeal involving judge-made law, must construe the overall objective of that common law rule. Here, the objective was two-fold: (1) avoiding the unfair treatment of the accused while maintaining the integrity of the criminal justice system itself by avoiding the conviction of an insane accused, and (2) protecting the public from presently dangerous persons requiring hospitalization. These objectives relate to pressing and substantial concerns in our society and are of sufficient importance to warrant overriding a constitutionally protected right or freedom.

There was a rational connection between the objectives and the means chosen to attain the objectives. Allowing the Crown to raise evidence of insanity in cases where the accused has chosen not to do so is one way of avoiding the conviction of individuals who were insane at the time the offence was committed, but who do not wish to raise the issue of insanity. It also is a way of protecting the public from people who may be pres-

règle de droit attaquée peut se démontrer dans le cadre d'une société libre et démocratique.

Il n'y a pas lieu de déterminer si la règle de common law restreint également les droits prévus aux art. 9 et 15 de la *Charte*, à moins que la restriction à l'art. 7 ne puisse être jugée acceptable par l'application de l'article premier.

Puisque le présent pourvoi comporte une contestation fondée sur la *Charte* d'une règle de common law, formulée par les tribunaux, l'analyse de la *Charte* fait intervenir des considérations différentes de celles qui s'appliquent à la contestation d'une disposition législative. Il n'était pas strictement nécessaire d'examiner l'application de l'article premier après avoir conclu que la règle de common law actuelle restreint le droit garanti par l'art. 7 de la *Charte*. Il conviendrait de déterminer, à ce stade-ci, s'il est possible de formuler une autre règle de common law qui ne serait pas contraire aux principes de justice fondamentale. S'il est possible de reformuler une règle de common law de façon qu'elle ne s'oppose pas aux principes de justice fondamentale, il faudrait le faire. Évidemment, s'il n'était pas possible de reformuler la règle de common law de sorte qu'il n'y ait pas violation d'une liberté ou d'un droit protégé par la Constitution, la Cour devrait alors déterminer si la règle de common law peut être maintenue parce qu'elle constitue une limite raisonnable en vertu de l'article premier de la *Charte*.

Dans un pourvoi où elle doit examiner, en vertu de l'article premier, une règle de common law formulée par les tribunaux, notre Cour doit déterminer l'objectif général de cette règle. En l'espèce, l'objectif de la règle comporte deux volets: (1) éviter que l'accusé soit traité de façon inéquitable, mais aussi protéger l'intégrité du système de justice criminelle en évitant qu'un accusé souffrant d'aliénation mentale soit déclaré coupable, et (2) protéger le public contre les personnes dangereuses à l'heure actuelle et qui devraient être hospitalisées. Ces objectifs se rapportent à des préoccupations urgentes et réelles dans notre société et sont suffisamment importants pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution.

Il existe un lien rationnel entre les objectifs et les mesures choisies pour les atteindre. Permettre au ministère public de produire une preuve d'aliénation mentale lorsque l'accusé a choisi de ne pas le faire est une façon d'éviter la déclaration de culpabilité de personnes qui étaient aliénées au moment où l'infraction a été commise, mais qui ne désirent pas soulever la question de l'aliénation mentale. C'est aussi une façon de protéger

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ently dangerous. These methods of achieving the first objective may raise certain problems and may not be the preferred method of achieving the objective, but they are nonetheless logical ways of achieving the desired objectives.

Parliament, because of judicial deference, need not always choose the absolutely least intrusive means to attain its objectives but must come within a range of means which impair *Charter* rights as little as is reasonably possible. There is no room for judicial deference, however, where a common law, judge-made rule is challenged under the *Charter*. The least intrusive common law rule which will attain the objectives without disproportionately affecting rights must be adopted by the court.

The dual objectives could be met without unnecessarily limiting *Charter* rights if the existing common law rule were replaced with a rule which would allow the Crown to raise independently the issue of insanity only after the trier of fact had concluded that the accused was otherwise guilty of the offence charged. Under this scheme, the issue of insanity would be tried after a verdict of guilty had been reached, but prior to a conviction being entered. If the trier of fact then subsequently found that the accused was insane at the time of the offence, the verdict of not guilty by reason of insanity would be entered. Conversely, if the trier of fact found that the accused was not insane at the time of the offence, within the meaning of s. 16, a conviction would then be entered.

This rule would safeguard an accused's right to control his or her defence and would achieve the objectives of avoiding the conviction of a person who was insane at the time of the offence and of protecting the public from a person who may be presently dangerous. Of course, an accused would also be entitled, under this scheme, to raise his s. 7 right not to be found guilty if he was insane at the time of the offence. An accused would, if he or she chose not to do so earlier, raise the issue of insanity after the trier of fact had concluded that he or she was guilty of the offence charged, but before a verdict of guilty was entered. This is consistent with the accused's right, under our criminal justice system, to force the Crown to discharge its full burden of proof on the elements of *actus reus* and *mens rea* before raising other matters. However, this does not mean that the accused can raise insanity only after both *actus reus* and *mens rea* have been proven. While the Crown would be

le public contre des personnes qui sont peut-être dangereuses à l'heure actuelle. Bien que ces méthodes d'atteindre le premier objectif puissent présenter certains problèmes et ne soient peut-être pas idéales, elles constituent tout de même un moyen logique d'atteindre les objectifs souhaités.

En raison de la retenue judiciaire, le législateur ne doit pas toujours adopter les mesures les moins envahissantes pour atteindre ses objectifs, mais il doit choisir dans un éventail de mesures qui portent le moins possible atteinte aux droits garantis par la *Charte*. La retenue judiciaire n'entre pas en jeu cependant lorsqu'une règle de common law formulée par les tribunaux, est contestée en vertu de la *Charte*. La cour doit adopter la règle de common law la moins envahissante, celle qui permettra d'atteindre les objectifs visés sans avoir une incidence disproportionnée sur les droits en cause.

Le double objectif susmentionné pourrait être atteint sans restreindre indûment les droits garantis par la *Charte* si la règle de common law actuelle était remplacée par une règle qui permettrait au ministère public de ne soulever indépendamment la question de l'aliénation mentale qu'après que le juge des faits a conclu que l'accusé est par ailleurs coupable de l'infraction reprochée. Sous ce régime, le tribunal pourrait juger de la question de l'aliénation mentale après avoir conclu à la culpabilité, mais avant d'inscrire la déclaration de culpabilité. Si le juge des faits concluait par la suite que l'accusé était aliéné au moment de l'infraction, le verdict de non-culpabilité pour cause d'aliénation mentale serait inscrit. À l'inverse, si le juge des faits concluait que l'accusé n'était pas aliéné, au sens de l'art. 16, au moment de l'infraction, une déclaration de culpabilité serait inscrite.

Cette règle protégerait le droit de l'accusé de contrôler sa défense et permettrait d'atteindre tant l'objectif visant à éviter la déclaration de culpabilité d'une personne qui était aliénée au moment de l'infraction que l'objectif visant à protéger le public contre une personne qui peut être dangereuse à l'heure actuelle. Il est bien entendu qu'en vertu de ce régime, l'accusé pourrait également invoquer son droit garanti par l'art. 7 de ne pas être reconnu coupable s'il était aliéné au moment de l'infraction. L'accusé pourrait, s'il ne l'a pas déjà fait, soulever la question de l'aliénation mentale après que le juge des faits a conclu qu'il est coupable de l'infraction reprochée, mais avant qu'un verdict de culpabilité ne soit inscrit. Ce serait compatible avec le droit de l'accusé, en vertu de notre système de justice criminelle, d'obliger le ministère public à s'acquitter de tout son fardeau de la preuve de l'*actus reus* et de la *mens rea* avant de soulever d'autres questions. Cependant, cela ne

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limited to raising evidence of insanity only after the trier of fact was satisfied that the full burden of proof on *actus reus* and *mens rea* had been discharged or after the accused's own defence has somehow put his or her mental capacity for criminal intent in issue, the accused would have the option of raising evidence of insanity at any time during the trial. Evidence of mental impairment will, in certain cases, tend to negate the element of *mens rea*. If during the course of the trial an accused raises evidence of mental impairment which (in the view of the trial judge) tends to put his or her mental capacity in issue, the Crown will be entitled to lead evidence of insanity and the trial judge will be entitled to charge the jury on the insanity defence within the meaning of s. 16. However, if such evidence of mental impairment is, in the view of the trier of fact, insufficient to meet the requirements of s. 16, the accused is still entitled to have such evidence considered with respect to the essential element of *mens rea*. This accords with the current practice wherein an accused has been able to deny the element of planning and deliberation or the specific intent required for murder despite the fact that s. 16 has not been satisfied. This new common law rule would give an accused the option of waiting until the Crown has discharged its full burden of proof to raise the issue of insanity, without removing the existing right of an accused to raise evidence of his or her mental condition during the course of the trial.

Since a common law rule which attains the original objectives but does not limit s. 7 can be fashioned, the existing rule cannot be said to infringe rights "as little as possible". It was therefore unnecessary to consider the third part of the proportionality test in *Oakes*.

The new common law rule replacing the one just struck must be considered in relation to all relevant aspects of the *Charter* and the only relevant provision of the *Charter* directly applicable to it was s. 15. (Section 9 was not applicable to the issue of the Crown's raising evidence of insanity.)

The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of

signifie pas que l'accusé ne peut soulever la question de l'aliénation mentale qu'après que l'*actus reus* et la *mens rea* ont tous deux été démontrés en preuve. Le ministère public ne pourrait soulever la preuve d'aliénation mentale qu'une fois le juge des faits convaincu que l'on s'est acquitté de tout le fardeau de la preuve de l'*actus reus* et de la *mens rea* ou après que la propre défense de l'accusé aurait d'une manière ou d'une autre mis en cause sa capacité mentale de former une intention criminelle, tandis que l'accusé pourrait le faire en tout temps au cours du procès. La preuve d'un déséquilibre mental peut, dans certains cas, écarter la *mens rea*. Si, au cours d'un procès, l'accusé présente une preuve de déséquilibre mental qui (de l'avis du juge du procès) tend à mettre sa capacité mentale en cause, le ministère public aura le droit de présenter la preuve d'aliénation mentale et le juge du procès pourra donner au jury des directives sur la défense d'aliénation mentale au sens de l'art. 16. Cependant, si, de l'avis du juge des faits, cette preuve de la déficience mentale ne répond pas aux exigences de l'art. 16, l'accusé aura encore le droit de voir cette preuve examinée en rapport avec l'élément essentiel que constitue la *mens rea*. Cela serait conforme à la pratique actuelle qui permet à l'accusé de nier l'élément de préméditation ou l'intention spécifique nécessaire à l'infraction de meurtre même si les exigences de l'art. 16 n'ont pas été réunies. Cette nouvelle règle de common law donnerait à l'accusé la possibilité d'attendre que le ministère public se soit acquitté de tout son fardeau de la preuve avant de présenter la question de l'aliénation mentale, sans pour autant enlever à l'accusé le droit déjà existant de présenter la preuve de sa condition mentale au cours du procès.

Puisqu'il est possible de formuler une règle de common law qui permette d'atteindre les objectifs initiaux, sans restreindre l'art. 7, on ne peut considérer que la règle actuelle porte «le moins possible» atteinte aux droits garantis. Il n'y a donc pas lieu d'examiner le troisième élément du critère de proportionnalité de l'arrêt *Oakes*.

La nouvelle règle de common law qui remplace celle qui vient à peine d'être annulée doit être examinée en fonction de tous les aspects pertinents de la *Charte* et seul l'art. 15 est directement applicable à cette nouvelle règle. (L'article 9 ne s'applique pas à la question de la production d'une preuve d'aliénation mentale par le ministère public.)

La cour doit d'abord déterminer si le plaignant a démontré que l'un des quatre droits fondamentaux à l'égalité a été violé (i.e. l'égalité devant la loi, l'égalité dans la loi, la même protection de la loi et le même

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the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Further, the Court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of remedying or preventing discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

bénéfice de la loi). Cette analyse portera surtout sur la question de savoir si la loi fait (intentionnellement ou non) entre le plaignant et d'autres personnes une distinction fondée sur des caractéristiques personnelles. Ensuite, la cour doit établir si la violation du droit donne lieu à une «discrimination». Cette seconde analyse portera en grande partie sur la question de savoir si le traitement différent a pour effet d'imposer des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres. De plus, la cour doit considérer si la caractéristique personnelle en cause est visée par les motifs énumérés dans cette disposition ou un motif analogue, afin de s'assurer que la plainte correspond à l'objectif général de corriger ou empêcher la discrimination contre des groupes victimes de stéréotypes, de désavantages historiques ou de préjugés politiques ou sociaux dans la société canadienne.

One aspect of the new common law rule draws a distinction between individuals based on the personal characteristic of insanity. If the Crown believes that an accused was insane at the time of the offence, that accused will not be convicted and will instead be subject to a trial on the issue of insanity (with the Crown's being able to lead its evidence of insanity over and above the accused's wishes). This aspect of the new common law rule does not impose the burden or disadvantage of interfering with the conduct of an accused's defence. Rather, it distinguishes between accuseds in that certain accuseds are not convicted and sentenced but, rather, are subject to a hearing on the issue of insanity in order to determine whether they too should be convicted or whether they should instead be subject to the Lieutenant Governor's Warrant system. Any further differences in treatment (i.e., between insanity acquittees and other acquittees) flow from the *Code* provisions which set out that system, not from the new common law rule.

Un aspect de la nouvelle règle de common law fait une distinction entre les individus, fondée sur la caractéristique personnelle qu'est la déficience mentale. Si le ministère public estime que l'accusé était aliéné au moment de l'infraction, l'accusé ne sera pas reconnu coupable et il devra plutôt subir un procès sur la question de l'aliénation mentale (au cours duquel le ministère public pourra produire sa preuve d'aliénation mentale contre le gré de l'accusé). Cet aspect de la nouvelle règle de common law n'impose pas le fardeau ou le désavantage que représenterait une intervention dans la conduite de la défense de l'accusé. Il fait plutôt une distinction entre les accusés en ce que certains accusés sont soustraits au processus de déclaration de culpabilité et de détermination de la peine; ils sont plutôt soumis à un examen de la question de l'aliénation mentale afin de déterminer s'ils devraient être reconnus coupables eux aussi ou s'ils devraient être assujettis au système de mandats du lieutenant-gouverneur. Toute autre différence de traitement (i.e. entre les personnes acquittées pour cause d'aliénation mentale et les autres personnes acquittées) tient aux dispositions du *Code* prévoyant ce système, et non à la nouvelle règle de common law.

A rule which allows the Crown to move an individual from the category of those who will surely be convicted and sentenced to those who may be acquitted, albeit on the grounds of insanity, cannot be said to impose a burden or a disadvantage on that individual. While one aspect of the new common law rule gives rise to differential treatment under the law based on a personal characteristic, it does not result in "discrimination". Accordingly, the new common law rule does not infringe s. 15(1) of the *Charter*. Given that the parties did not

On ne saurait considérer une règle permettant au ministère public de faire passer un individu de la catégorie de personnes qui seront certainement déclarées coupables et se verront infliger une peine, au groupe de personnes qui seront peut-être acquittées, quoique pour cause d'aliénation mentale, comme imposant un fardeau ou un désavantage à cet individu. Bien qu'un aspect de la nouvelle règle de common law donne lieu à un traitement différent dans la loi, fondé sur une caractéristique personnelle, elle n'entraîne pas une «discrimination». La

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submit argument regarding the application of s. 15(1) to the new common law rule, these reasons do not preclude a future s. 15(1) challenge to the new rule.

2. *Is s. 542(2) of the Criminal Code of Canada intra vires the Parliament of Canada?*

The insanity provisions fall within the preventative branch of the s. 91(27) criminal law power. They only relate to insane persons whose actions are proscribed by the *Criminal Code* and the system of Lieutenant Governor warrants protects society in that it prevents further dangerous criminal conduct. The protection of society is one of the aims of the criminal law.

The fact that the criminal committal provisions are not designed to punish the individual acquittee does not incontrovertibly lead to the conclusion that the object of the legislation is treatment and is outside the scope of Parliament's criminal law power. Treatment is not prescribed by the impugned provisions. Rather, treatment is the means to achieving the end of these provisions which is the protection of society.

"Treatment", narrowly defined, is a provincial responsibility. Parliament, however, does not lose its legislative competence by responding to criminal conduct in a manner more sensitive to rehabilitation. Parliament's sensitivity to individual rights also expands its competence to legislate with respect to procedures for review of the Lieutenant Governor's warrants. Although the protection of society rationale may not fully authorize such provisions, Parliament may balance individual rights against the interests of protecting society and provide for some system of review. As the individual becomes less of a threat to society, the criminal law progressively loses authority and the coercive aspects of the warrant are loosened until a point is reached at which the individual is free from any supervision provided under the *Criminal Code*.

3. *Does the Automatic Detention of a Person Found not Guilty by Reason of Insanity Required by s. 542(2) of the Criminal Code of Canada Violate the Canadian Charter of Rights and Freedoms?*

nouvelle règle de common law ne contrevient donc pas au par. 15(1) de la *Charte*. Les parties n'ont pas présenté d'argument visant à déterminer si le par. 15(1) s'appliquait à la nouvelle règle, mais les présents motifs ne sauraient empêcher une contestation future en vertu du par. 15(1).

2. *Le paragraphe 542(2) du Code criminel du Canada est-il intra vires du Parlement du Canada?*

Les dispositions relatives à l'aliénation mentale relèvent de l'aspect préventif du pouvoir en matière de droit criminel prévu au par. 91(27). Elles ne s'appliquent qu'aux personnes atteintes d'aliénation mentale dont les actes sont prohibés par le *Code criminel* et le système des mandats du lieutenant-gouverneur protège la société parce qu'il vise à prévenir la répétition de comportements criminels et dangereux. La protection de la société est clairement l'un des buts du droit criminel.

Le fait que les dispositions relatives au renvoi sous garde ne soient pas conçues pour punir la personne acquittée ne mène pas inéluctablement à la conclusion que leur objet est le traitement et qu'elles excèdent la compétence du Parlement en matière de droit criminel. Le traitement n'est pas prescrit par les dispositions contestées. Il ne constitue que le moyen d'atteindre l'objet de ces dispositions qu'est la protection de la société.

Le «traitement» au sens étroit relève des pouvoirs attribués aux provinces. Cependant, le Parlement ne perd pas sa compétence législative en répondant à une conduite criminelle d'une manière qui favorise davantage la réinsertion. La préoccupation du Parlement à l'égard des droits individuels lui donne également compétence pour légiférer quant à la procédure d'examen des mandats du lieutenant-gouverneur. Il est certes possible que l'adoption de ces dispositions ne soit pas entièrement justifiée par le motif de la protection de la société, mais il ne fait pas de doute que le Parlement peut, en soupesant les droits individuels et la nécessité de protéger la société, prévoir une certaine forme d'examen. À mesure que s'amenuise le danger que présentait l'individu pour la société, le droit criminel perd progressivement son emprise et les aspects coercitifs du mandat sont assouplis jusqu'au jour où l'individu est libéré de toute surveillance sous l'empire du *Code criminel*.

3. *La détention automatique, aux termes du par. 542(2) du Code criminel du Canada, d'une personne déclarée non coupable en raison de son aliénation mentale viole-t-elle la Charte canadienne des droits et libertés?*

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The automatic detention required under s. 542(2) deprives the appellant of his right to liberty. The procedural fairness required by the principles of fundamental justice cannot be simply "read in" to this legislation.

When legislation confers a precise discretion that limits a right or freedom under the *Charter*, the legislation is found to constitute an infringement and the court must proceed to s. 1.

Section 542(2) does not confer an imprecise discretion on the trial judge. Instead, it requires that the trial judge always act in a manner which would infringe the s. 7 rights of an insanity acquittee. The order of "strict custody" is automatically made immediately following the trial and before any hearing on the issue of current mental state. This is not a situation in which this Court can simply "read in" procedural safeguards to make the legislation accord with constitutional requirements.

The procedural requirements of s. 7 of the *Charter* are not met by ss. 545 and 547. Assuming, without deciding, that those subsequent provisions themselves accord with the principles of fundamental justice, any subsequent hearings or review cannot change the fact that the initial remand is ordered by the trial judge under s. 542(2) without any opportunity for a hearing.

The constitutional requirements are not met by the procedural fairness afforded during the trial itself. Procedural safeguards which an accused may have enjoyed during the trial cannot offer any protection in a post-acquittal committal process.

Section 9 is illustrative of s. 7, and since the central point of the substantive s. 7 arguments in this case was that the detention was arbitrary, a discussion of s. 9 was sufficient.

The substantive defects in the legislation restrict the appellant's right not to be arbitrarily detained under s. 9 of the *Charter*. The duty of the trial judge to detain is unqualified by any standards whatsoever.

Although criteria for the operation of s. 542(2) can be found in the statutory scheme and the jurisprudence, the mandatory detention order, even if applied only to persons meeting these criteria, is still arbitrary in the way that it operates with respect to them. Not all of these

La détention automatique exigée par le par. 542(2) porte atteinte au droit de l'appelant à la liberté. Il ne suffit pas de donner une interprétation large à ces dispositions pour que soit respectée l'équité en matière de procédure qu'exigent les principes de justice fondamentale.

Lorsque la disposition confère un pouvoir discrétionnaire précis qui restreint un droit ou une liberté garantis par la *Charte* on peut conclure qu'elle constitue une violation et que le tribunal doit alors procéder à l'examen en regard de l'article premier.

Le paragraphe 542(2) ne confère pas un pouvoir discrétionnaire imprécis au juge du procès. Au contraire, il exige qu'il agisse toujours de manière à enfreindre les droits que garantit l'art. 7 à la personne acquittée pour cause d'aliénation mentale. L'ordonnance de «garde rigoureuse» est donc rendue automatiquement tout de suite après le procès et avant toute audience sur la question de l'état mental actuel. Il ne suffirait pas en l'espèce à notre Cour d'interpréter largement le texte législatif pour y inclure les garanties procédurales qui le rendraient conforme aux exigences constitutionnelles.

Les exigences procédurales de l'art. 7 de la *Charte* ne sont pas satisfaites par les art. 545 et 547. À supposer, sans en décider, que ces dispositions subséquentes soient conformes aux principes de justice fondamentale, aucune audience ni aucun examen ultérieurs ne sauraient changer le fait que le renvoi initial sous garde est ordonné par le juge du procès, en vertu du par. 542(2), sans qu'il y ait eu possibilité d'une audience.

Les exigences constitutionnelles ne sont pas satisfaites par l'équité en matière de procédure assurée au cours du procès lui-même. Les garanties dont l'accusé a pu jouir pendant son procès ne peuvent le protéger dans le processus de renvoi sous garde postérieur à l'acquittement.

L'article 9 est une illustration de ce que prévoit l'art. 7, et vu qu'en l'espèce le point central des arguments de fond relatifs à l'art. 7 est le caractère arbitraire de la détention, il suffira d'examiner l'art. 9.

Les problèmes de fond que comporte le texte législatif restreignent le droit de l'appelant à la protection contre la détention arbitraire garanti par l'art. 9 de la *Charte*. L'obligation du juge du procès d'ordonner la détention n'est assujettie à aucune norme que ce soit.

On peut trouver les critères d'application du par. 542(2) dans le régime législatif et la jurisprudence mais, même si l'ordonnance de détention obligatoire ne vise que les personnes qui remplissent ces critères, elle n'est pas moins arbitraire dans la façon dont elle s'ap-

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individuals will be dangerous. Section 542(2), because it requires a trial judge to automatically order strict custody based on no criteria or standards and before any kind of hearing can be conducted on the issue of present mental condition, infringes the appellant's rights under ss. 7 and 9 of the *Charter*.

The objective of s. 542(2)—the protection of the public and the prevention of crime through the detention of those insanity acquittees who are dangerous because still insane, pending the decision of the Lieutenant Governor—was "pressing and substantial".

The lack of a hearing in s. 542(2) deprives the appellant of his s. 7 right to liberty in a way that is not in accordance with the principles of fundamental justice. His s. 9 right not to be detained arbitrarily is restricted because there are no criteria for the exercise of the trial judge's power to detain.

The assumption that persons found not guilty by reason of insanity pose a threat to society may well be rational but is not always valid. Not everyone acquitted by reason of insanity has a personal history of violent conduct and such conduct and previous mental disorder does not necessarily indicate a greater possibility of future dangerous conduct. The connection between the objective and means is nevertheless rational. By ordering the detention of all insane acquittees pending the decision of the Lieutenant Governor, Parliament is ensuring that society will be protected from the ones who are dangerous.

Whatever the actual length of time between court judgment and the issuance of a Lieutenant Governor's Warrant, s. 542(2) does not meet the minimal impairment component of the proportionality test and should be struck. The indeterminate nature of the strict custody order under s. 542(2) infringes on the right to liberty (in a manner that is not in accordance with the principles of fundamental justice) to an unacceptable degree.

A gap in time between the acquittal by reason of insanity and the decision whether to release or detain under a Lieutenant Governor's Warrant will necessarily occur given that the determination of present mental condition and dangerousness must be made prior to

plique à leur égard. En effet, ces personnes ne sont pas toutes dangereuses. Parce qu'il oblige le juge du procès à ordonner automatiquement la garde rigoureuse, sans qu'il puisse se fonder sur aucun critère ou aucune norme et avant la tenue d'une forme quelconque d'audience sur la question de la condition mentale présente de l'accusé, le par. 542(2) porte atteinte aux droits que possède l'appelant en vertu des art. 7 et 9 de la *Charte*.

L'objectif du par. 542(2) répond effectivement à des préoccupations «urgentes et réelles». Cet objectif est la protection du public et la prévention du crime par le biais de la détention, en attendant la décision du lieutenant-gouverneur, des personnes acquittées pour cause d'aliénation mentale qui constituent encore un danger parce qu'elles sont toujours aliénées.

Le fait qu'aucune audience ne soit prévue au par. 542(2) porte atteinte, de façon incompatible avec les principes de justice fondamentale, au droit à la liberté de l'appelant prévu à l'art. 7. La protection que lui garantit l'art. 9 contre la détention arbitraire est restreinte parce que l'exercice du pouvoir du juge du procès d'ordonner la détention ne repose sur aucun critère.

Le postulat voulant que les personnes déclarées non coupables en raison de leur aliénation mentale constituent une menace pour la société peut, certes, être rationnel, mais il n'est pas toujours valable. La violence passée et les troubles mentaux antérieurs des personnes acquittées pour cause d'aliénation mentale n'indiquent pas forcément une plus grande probabilité de conduite dangereuse dans l'avenir. Il reste qu'il existe un lien rationnel entre l'objectif et le moyen utilisé. En ordonnant la détention de tous les prévenus acquittés pour cause d'aliénation mentale en attendant la décision du lieutenant-gouverneur, le Parlement s'assure que la société sera protégée contre ceux qui sont dangereux.

Peu importe la durée réelle de la période écoulée entre le jugement du tribunal et la délivrance d'un mandat du lieutenant-gouverneur dans un cas donné, le par. 542(2) ne répond pas à l'exigence d'atteinte minimale que comporte le critère de proportionnalité et il est en conséquence inopérant. La nature indéterminée de l'ordonnance de garde rigoureuse rendue en vertu du par. 542(2) porte atteinte au droit à la liberté (de façon non conforme aux principes de justice fondamentale) dans une mesure inacceptable.

Il y aura toujours un laps de temps entre l'acquittement pour cause d'aliénation mentale et la décision de libérer ou de détenir le prévenu en vertu d'un mandat du lieutenant-gouverneur vu la nécessité de procéder à l'examen de la condition mentale et de la dangerosité

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release and given the nature of the issues to be determined. Automatic detention following an acquittal by reason of insanity is to some extent, then, a codification of practical reality. If individuals acquitted by reason of insanity are immediately ordered into custody, they cannot pose a threat to society in the short term. Further, if observation of the individual on an inpatient basis results in more accurate predictions of recurring mental illness, crime is prevented and society protected in the future.

Insanity acquittees, however, should be detained no longer than necessary to determine whether they are currently dangerous due to their insanity. Because s. 542(2) provides for indeterminate detention, the minimal impairment component of the *Oakes* test is not met and the s. 7 restriction cannot be justified.

The order of the trial judge would be no less arbitrary if it was only in effect for a limited period of time. The effect on an individual of a period of automatic and arbitrary detention without consideration of any criteria may not be disproportionate to the importance of achieving the objective. However, the fact that the means chosen by Parliament in s. 542(2) is a period of indeterminate detention tips the balance and renders the effect of the limitation disproportionate to the objective. Therefore, s. 542(2) cannot satisfy the *Oakes* test and therefore cannot be justified with respect to s. 9 of the *Charter* either.

A period of temporary validity will extend for a period of six months because of the serious consequences of striking s. 542(2). During this period, detention ordered under s. 542(2) will be limited to 30 days in most instances, or to a maximum of 60 days where the Crown establishes that a longer period is required in the particular circumstances of the case. Courts may choose to limit their orders under s. 542(2) to between 30 and 60 days. If they do not, the writ of *habeas corpus* will be available to the individual acquittee at the expiration of 30 days.

Per La Forest and Gonthier JJ.: The reasons of Lamer C.J. were substantially agreed with. Conformity of the existing common law rule to the *Charter* need not be assessed under the *Oakes* test particularly as neither of the two principles of freedom of the accused in the con-

actuelles avant la mise en liberté et vu la nature des questions à trancher. La détention automatique par suite d'un acquittement pour cause d'aliénation est donc, dans une certaine mesure, une codification d'une réalité pratique. Les personnes acquittées en raison de leur aliénation mentale, immédiatement soumises à une ordonnance de détention, ne constituent plus, à court terme, un danger pour la société. De plus, s'il résulte de l'observation de l'individu en clinique des prédictions plus exactes quant à la possibilité de récurrence de la maladie mentale, la prévention du crime et la protection de la société seront assurées pour l'avenir.

Cependant, les prévenus acquittés pour cause d'aliénation mentale ne devraient être détenus que le temps nécessaire pour déterminer si leur aliénation les rend toujours dangereux. Comme le par. 542(2) prévoit une détention pour une période indéterminée, il ne satisfait pas à l'aspect atteinte minimale du critère de l'arrêt *Oakes* et la restriction de l'application de l'art. 7 ne saurait être justifiée.

L'ordonnance du juge du procès ne perdrait pas son caractère arbitraire si elle n'était valable que pour une période limitée. L'effet qu'aurait sur un individu une période de détention automatique et arbitraire, ne reposant sur aucun critère, n'est pas nécessairement sans proportion avec l'importance de l'objectif poursuivi. Cependant, le moyen choisi par le Parlement au par. 542(2), savoir une période de détention indéterminée, contribue à mon avis à faire pencher la balance et à rendre l'effet de la restriction disproportionné à l'objectif. Le paragraphe 542(2) ne saurait donc satisfaire au critère de l'arrêt *Oakes* et, partant, ne saurait non plus être justifié, en regard de l'art. 9 de la *Charte*.

En raison des conséquences graves qu'entraînerait l'invalidation du par. 542(2), celui-ci jouira d'une période de validité temporaire de six mois. Pendant cette période, toutefois, toute détention ordonnée en vertu du par. 545(2) sera limitée à 30 jours dans la plupart des cas, ou à 60 jours au maximum si le ministère public établit qu'un délai plus long est nécessaire dans les circonstances de l'espèce. Les tribunaux pourront choisir de limiter à une période de 30 à 60 jours les ordonnances qu'ils prononceront sous l'empire du par. 542(2). À défaut, chaque personne acquittée pourra recourir au bref d'*habeas corpus* après 30 jours.

Les juges La Forest et Gonthier: Souscrivent pour l'essentiel aux motifs du juge en chef Lamer. Il n'est pas nécessaire d'évaluer la conformité de la règle de common law actuelle avec la *Charte*, selon les critères de l'arrêt *Oakes*, car ni le principe relatif à la liberté de

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duct of his defence and of sanity as an essential element to criminal responsibility was preeminent. Both are to be implemented to the greatest possible extent. The requirement of sanity, which is stated in mandatory terms in s. 16 of the *Criminal Code*, pertains to the integrity of the justice system itself. It must therefore enter into the determination of a breach of fundamental justice. While an accused in exercising his right to conduct his defence as he sees fit may choose not to invoke this principle, it remains incumbent upon the justice system to ensure that it is respected. It is not open to the accused to deny it effect.

To rely on the exercise of prosecutorial discretion to ensure respect for the principle that sanity is essential to criminal responsibility entails substituting such discretion to adjudication and is a denial of judicial process. The trial process itself must allow for the recognition and implementation of the principle.

The other reasons and conclusions of Lamer C.J. were agreed with, including those dealing with the present common law rule and the new common law rule.

Per Wilson J.: Section 542(2) of the *Criminal Code*, while a valid exercise of the federal criminal law power, infringes an accused's rights under both s. 7 and s. 9 of the *Charter* and is not saved by s. 1. The reasons of Lamer C.J. were agreed with subject to the reservation that discretionary powers conferred by statute should not be interpreted so as to comply with the *Charter* on the basis of a presumption of constitutionality.

It was unnecessary to deal with ss. 9 and 15 of the *Charter* since the common law rule infringes the accused's s. 7 right to liberty in that it deprives the accused of control over his own defences contrary to the principles of fundamental justice. To permit the Crown to tender evidence of insanity against the wishes of the accused is to countenance too great an interference with the fundamental right of an accused to advance whichever defences he considers to be in his best interests and to waive those which he considers are not. It could completely distort the trial process because of the impact it can have on other defences raised by the accused, on the jury's assessment of his credibility, and on the traditional role played by defence counsel in an adversary system.

l'accusé de mener sa défense ni celui de la santé mentale comme élément essentiel de la responsabilité criminelle ne l'emporte sur l'autre. L'un et l'autre doivent être appliqués dans toute la mesure du possible. Le principe relatif à la santé mentale, que l'art. 16 du *Code criminel* prescrit de façon impérative, relève de l'intégrité du système de justice lui-même. Il doit donc compter pour déterminer s'il y a eu violation de la justice fondamentale. Bien qu'un accusé puisse choisir de ne pas invoquer ce principe dans l'exercice de son droit de mener sa défense comme il l'entend, il incombe quand même au système de justice d'en assurer le respect. Il ne lui est pas loisible d'en écarter les conséquences.

S'en remettre au pouvoir discrétionnaire de poursuivre pour assurer le respect du principe que la santé mentale est une condition essentielle de la responsabilité criminelle équivaut à substituer ce pouvoir discrétionnaire à une décision judiciaire et écarte le recours en justice. Il faut que le procès lui-même permette de reconnaître et de mettre en œuvre ce principe.

Les juges La Forest et Gonthier souscrivent aux autres motifs et conclusions du juge en chef Lamer, y compris ce qui concerne la règle actuelle et la nouvelle règle de common law.

Le juge Wilson: Bien qu'il constitue un exercice valide du pouvoir fédéral en matière de droit criminel, le par. 542(2) du *Code criminel* porte atteinte aux droits que les art. 7 et 9 de la *Charte* garantissent à un accusé et il n'est pas sauvegardé par l'article premier. Il y a accord avec les motifs du juge en chef Lamer sous la réserve que les pouvoirs discrétionnaires conférés par la loi ne devraient pas être interprétés de manière à faire en sorte qu'ils soient conformes à la *Charte* en se fondant sur une présomption de constitutionnalité.

Il est inutile de traiter des art. 9 et 15 de la *Charte* puisque la règle de common law porte atteinte au droit à la liberté que confère l'art. 7 à l'accusé parce qu'elle lui enlève le contrôle de ses propres moyens de défense contrairement aux principes de justice fondamentale. Permettre au ministère public de présenter une preuve d'aliénation mentale contre le gré de l'accusé équivaut à admettre une atteinte trop importante au droit fondamental d'un accusé de présenter les moyens de défense qui, à son avis, sont dans son meilleur intérêt et de renoncer à ceux qu'il considère ne pas l'être. Cela pourrait fausser complètement le procès en raison de l'effet que cela peut avoir sur les autres moyens de défense soulevés par l'accusé, sur l'évaluation par le jury de sa crédibilité et sur le rôle traditionnel joué par l'avocat de la défense dans un système contradictoire.

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While it is a basic tenet of our criminal justice system that insane persons not be convicted of criminal offences, to permit the prosecution to introduce evidence of insanity in the course of the trial does not always promote this principle or promote it in a way which is in accord with the principles of fundamental justice. It may totally defeat the defence strategy and deprive the accused of the chance of an outright acquittal. The accused may well face consequences more harmful to him than a conviction. Society's interest in ensuring that persons who are not criminally responsible are not convicted cannot override the right of an accused to control his own defences and to forego the defence of insanity if this is in his interests. If an accused freely and with full knowledge of the alternatives and consequences waives the insanity defence, then the court cannot independently impose the defence.

Selon un précepte fondamental de notre système de justice criminelle, les personnes souffrant d'aliénation mentale ne doivent pas être déclarées coupables d'infractions criminelles, mais permettre à la poursuite d'introduire au procès une preuve d'aliénation mentale ne valorise pas toujours ce principe ni ne le fait valoir d'une manière conforme aux principes de justice fondamentale. Cela peut faire échouer complètement la stratégie adoptée par la défense et priver l'accusé de ses chances d'acquittement sans condition. L'accusé peut subir des effets plus néfastes pour lui qu'une déclaration de culpabilité. L'intérêt de la société à veiller à ce que les personnes qui ne sont pas criminellement responsables ne soient pas déclarées coupables ne peut l'emporter sur le droit d'un accusé de contrôler ses propres moyens de défense et de renoncer à la défense d'aliénation mentale si cela est dans son intérêt. Si, librement et en pleine connaissance des choix possibles et des conséquences, un accusé renonce à la défense d'aliénation mentale, alors le tribunal ne peut de lui-même l'imposer.

The goal that insane persons not be convicted of criminal offences is sufficiently important to warrant overriding a constitutionally guaranteed right and allowing the Crown to raise the issue of insanity during the trial is a rational means of furthering this objective. There are, however, alternative means of ensuring that the insane not be convicted which do not impinge as severely upon an accused's s. 7 rights. The present common law rule cannot constitute a reasonable limit because of the dramatic impact it has on defence strategy and the role of defence counsel.

L'objectif voulant que les personnes souffrant d'aliénation mentale ne soient pas déclarées coupables d'infractions criminelles a suffisamment d'importance pour justifier une dérogation à un droit garanti par la Constitution, et permettre au ministère public de soulever la question de l'aliénation mentale au cours du procès constitue un moyen rationnel pour atteindre cet objectif. Cependant, pour veiller à ce que l'aliéné ne soit pas déclaré coupable, il existe d'autres moyens qui ne portent pas aussi gravement atteinte aux droits que l'art. 7 confère à un accusé. La présente règle de common law ne peut constituer une limite raisonnable en raison de l'effet important qu'elle a sur la stratégie de la défense et sur le rôle de l'avocat de la défense.

There is no room for judicial deference in dealing with the common law: the task of making "difficult choices" falls squarely on the court.

La retenue judiciaire n'a pas sa place dans l'examen d'une règle de common law: il incombe directement à la cour de faire des «choix difficiles».

The state here was acting as the "singular antagonist" seeking to limit the accused's s. 7 interests. If a limit on a s. 7 right has been achieved through a violation of the principles of fundamental justice, the enquiry comes to an end and there is no need to consider the application of s. 1.

L'État agit en l'espèce à titre d'«adversaire singulier» qui cherche à restreindre les intérêts de l'accusé à l'égard de l'art. 7. Si une limite imposée au droit garanti par l'art. 7 résulte de la violation des principes de justice fondamentale, l'examen prend fin et il n'est pas nécessaire d'examiner l'application de l'article premier.

If the court, in applying the minimal impairment branch of *Oakes*, attempts to fashion a new common law rule, the new rule must itself meet all the tests of constitutionality. It must also comply with the *Criminal Code*. Section 16(1) of the *Code* mandates an inquiry into the sanity of the accused at some point prior to the entry of

Si, en appliquant le volet de l'atteinte minimale du critère énoncé dans l'arrêt *Oakes*, la cour tente d'élaborer une nouvelle règle de common law, cette nouvelle règle doit satisfaire à tous les critères constitutionnels. Elle doit également être conforme aux dispositions du *Code criminel*. Aux termes de l'al. 16(1) du *Code*, l'état

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a conviction. Permitting the Crown to raise insanity during the course of the trial, even if that permission is conditional, still infringes upon the accused's right to control his defences. Nor can it satisfy the minimal impairment branch of the *Oakes* test because, although it is a less intrusive means of accomplishing the government's objective, it is not the least intrusive means of doing so.

Conferring on the prosecution a conditional right to raise the issue of insanity during the course of the trial infringes upon the equality rights of the mentally disabled under s. 15 of the *Charter*. It denies the mentally disabled, a group in our society which has been negatively stereotyped and historically disadvantaged, the control over their defences reposed in other accused persons and does so in a way which is discriminatory. In denying the mentally disabled personal autonomy in decision-making it reinforces the stereotype that they are incapable of rational thought and the ability to look after their own interests. The prosecution's conditional right will only pass constitutional muster if it can be shown that there exists no alternative that achieves the same objective without limiting the accused's s. 7 or s. 15 rights or at least limiting them to a significantly lesser degree.

The issue of the accused's insanity should be raised at the conclusion of the trial in cases where the defences put forward by the accused have been rejected and the essential elements of the offence have been established by the prosecution beyond a reasonable doubt. At that point either party should be free to raise the issue of the accused's insanity. This approach respects the accused's right to waive the defence of insanity and ensures that any resultant prejudice he suffers in the finding of guilt flows from his own decision not to avail himself of the defence and not as a consequence of the prosecution's having raised the issue in the middle of the trial process.

Restricting the Crown's right to introduce the issue of insanity only after an accused has been found guilty may well result in some accuseds who are in fact insane being acquitted of criminal charges and thereby escaping incarceration under the *Criminal Code* entirely. The incarceration of those persons in institutes for the criminally insane is neither mandated by the principles of fundamental justice nor by the *Criminal Code*. The

de la santé mentale de l'accusé doit être vérifié à un certain moment avant qu'une déclaration de culpabilité soit inscrite. Permettre au ministère public de soulever la question de l'aliénation mentale au cours du procès, même si cette permission est conditionnelle, entraîne toujours la violation du droit de l'accusé de contrôler ses moyens de défense. Cette règle ne pourra pas non plus répondre au critère de l'atteinte minimale de l'arrêt *Oakes* parce que, bien que ce soit un moyen moins envahissant d'atteindre l'objectif du gouvernement, ce n'est pas le moyen le moins envahissant.

Accorder à la poursuite le droit conditionnel de soulever la question de l'aliénation mentale au cours du procès porte atteinte aux droits à l'égalité des déficients mentaux garantis à l'art. 15 de la *Charte*. Cela prive, et ce, de façon discriminatoire, les déficients mentaux, un groupe de notre société qui a souffert de stéréotypes et a toujours été défavorisé, du contrôle de leurs moyens de défense qui est accordé aux autres accusés. Enlever aux déficients mentaux l'autonomie de prendre leurs propres décisions vient renforcer le stéréotype voulant qu'ils soient incapables de penser de façon rationnelle et de s'occuper de leurs propres intérêts. Le droit conditionnel de la poursuite ne sera acceptable du point de vue constitutionnel que si l'on peut démontrer qu'il n'existe aucune autre solution qui permette d'atteindre le même objectif sans restreindre les droits conférés à l'accusé par les art. 7 et 15, ou du moins en leur imposant des limites sensiblement moins importantes.

La question de l'aliénation mentale de l'accusé devrait être soulevée à la conclusion du procès dans les cas où les moyens de défense présentés par l'accusé ont été rejetés et où les éléments essentiels de l'infraction ont été établis par la poursuite hors de tout doute raisonnable. À ce stade, l'une ou l'autre partie devrait être libre de soulever la question de l'aliénation mentale de l'accusé. Cette position respecte le droit de l'accusé de renoncer à la défense d'aliénation mentale et elle fait en sorte que tout préjudice qu'il pourrait subir en raison de la déclaration de culpabilité découle de sa propre décision de ne pas se prévaloir de ce moyen de défense et non du fait que la poursuite a soulevé la question au milieu du procès.

Restreindre le droit du ministère public en ne l'autorisant pas à présenter la question de l'aliénation mentale avant que l'accusé ait été déclaré coupable peut avoir pour effet que certains accusés qui, en fait, souffrent d'aliénation mentale seront acquittés et échapperont ainsi totalement à l'incarcération prévue au *Code criminel*. L'incarcération de ces personnes dans des établissements pour les criminels souffrant d'aliénation mentale

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potential risk of the criminally insane eluding the reach of the criminal law remains a matter for Parliament if it views the provincial civil commitment procedures as inadequate for the proper protection of the public.

A transitional period is required in order to deal with the consequences of a finding by this Court that s. 542(2) is of no force and effect.

Per L'Heureux-Dubé J. (dissenting): The common law rule allowing the Crown to raise evidence of insanity independently is a principle of fundamental justice consonant with and reflective of the values substantively embodied in s. 7 "principles of fundamental justice". Section 542(2) of the *Criminal Code* is *intra vires*, and, viewed within its legislative and operative context, is also fully consistent with *Charter* guarantees.

The common law rule was crafted with precision: it operates within strict parameters. The two distinct principles of fundamental justice—that of an accused's right to fully control his or her defence and the fundamental rule that insane persons not responsible for their conduct should not be convicted for otherwise criminal behaviour—find appropriate expression in the balance achieved through the proper application of the common law rule. These two principles are properly labelled "fundamental", in the language of s. 7, and are not violated by the common law rule at issue here. The principle that an individual should not be convicted absent fault is, in this case, not properly dealt with under s. 1. As the common law rule reflects an appropriate balance between the two principles, both of these principles will be addressed within s. 7.

A narrow approach is not warranted and should be avoided in a discussion of the principles of fundamental justice; these principles and their alleged violations should be viewed within the broader context of the legal system within which these principles have been found to repose. The principles of fundamental justice do not spring up independently of one another but evolve gradually in a mutually nourishing process. Any analysis requiring an examination of these principles must respect this integrity.

The two fundamental principles of justice combine to fashion a larger principle, one informed in appropriate

n'est requise ni par les principes de justice fondamentale ni par le *Code criminel*. Le risque qu'un criminel souffrant d'aliénation mentale se place hors de portée de la loi demeure une question qui relève du législateur s'il juge que les procédures civiles d'internement prévues par les législatures provinciales ne sont pas adéquates pour bien protéger le public.

Une période transitoire est nécessaire pour pallier aux conséquences d'une décision de notre Cour disposant que le par. 542(2) est inopérant.

Le juge L'Heureux-Dubé (dissidente): La règle de common law en vertu de laquelle le ministère public peut faire indépendamment une preuve d'aliénation mentale constitue un principe de justice fondamentale qui s'harmonise avec les valeurs qu'incarnent les «principes de justice fondamentale» de l'art. 7 et s'en veut le reflet. Le paragraphe 542(2) du *Code criminel* est *intra vires* et, analysé dans son contexte législatif et de mise en œuvre, est également tout à fait compatible avec les garanties accordées par la *Charte*.

La règle de common law a été formulée avec soin: son application obéit à des paramètres stricts. Les deux principes distincts de justice fondamentale—le droit de l'accusé de contrôler pleinement sa défense et la règle fondamentale selon laquelle les personnes atteintes d'aliénation mentale, non responsables de leur conduite, ne devraient pas être déclarées coupables d'un acte par ailleurs criminel—trouvent leur juste expression dans l'équilibre que permet d'atteindre l'application légitime de la règle de common law. Ces deux principes sont bel et bien, au sens de l'art. 7, de nature «fondamentale» et ne sont pas violés par la règle de common law en cause en l'espèce. Le principe selon lequel il n'y a pas de condamnation sans faute ne devrait pas, en l'espèce, faire l'objet d'un examen fondé sur l'article premier. Étant donné que la règle de common law reflète un juste équilibre entre les deux principes, ils seront examinés sous l'angle de l'art. 7.

Une approche étroite n'est pas justifiée dans l'examen des principes de justice fondamentale et il y a lieu de s'en garder. Ces principes, ainsi que leur violation qu'on allègue, doivent être analysés dans le cadre plus large du système juridique auquel ils se rattachent. Les principes de justice fondamentale ne s'élaborent pas indépendamment les uns des autres mais évoluent graduellement par un processus de fécondation mutuelle. Toute analyse comportant un examen de ces principes doit respecter cette intégrité.

Les deux principes fondamentaux de justice se combinent pour former un principe plus général, dont les

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measure by concerns underlying the principles that nourish it. When viewed within the broad context in which it operates, the common law rule, and its application in any given case, is consonant with the principles of fundamental justice.

The Crown's ability to raise evidence of insanity over and above the wishes of the accused will occur only in circumstances where the guilt of the accused is in no serious doubt, the evidence of insanity is overwhelming, the offence is of a serious nature and the accused represents a continuing threat to society due to his or her present dangerousness. In no small way does this rule avert to the right of an accused to control his or her defence as its potential application is strictly and severely limited. In light of the *Charter*, future courts will tread cautiously, endeavouring to apply the rule in the strict manner in which it was intended, and thus, apply it in a fashion consistent with the principles of fundamental justice.

The legislative scheme in issue here is consistent with the guarantees set out in ss. 7 and 9 of the *Charter*. It does not offend the principles of fundamental justice and, furthermore, s. 542(2) is not arbitrary within the meaning of s. 9 of the *Charter*. While the section presumes, in effect, that all those found not guilty by reason of insanity should be detained as they may still be dangerous and/or in need of treatment, this presumption is one of common, practical sense and one that Parliament is constitutionally empowered to act upon. While the impugned section confers the power to detain acquittees who may not be presently dangerous or in need of treatment, it does not do so arbitrarily. It operates in a restricted fashion and applies only to insane acquittees charged with an indictable offence. Moreover, the trial judge has a discretion as to the place and the manner of the initial detention. In determining whether or not a provision operates arbitrarily, one must look at the operation of the provision in its entire context.

In attempting to address the unique position of the insane acquittee, Parliament has set up a comprehensive system of assessment and review. Mere literal reference to the text of the *Criminal Code* goes only a short distance towards an understanding of its working and its practical complexity. While Parliament has not devised the best scheme, it has in the context of the issues raised here, made constitutionally permissable choices. In any evaluation of complex legislative schemes the judiciary has an obligation to respect the integrity of the scheme and to measure it against constitutional guarantees with

éléments traduisent de façon harmonieuse les considérations qui les sous-tendent. Considérée dans le vaste cadre dans lequel elle s'insère, la règle de common law, ainsi que son application concrète, est compatible avec les principes de justice fondamentale.

Le ministère public ne pourra présenter une preuve d'aliénation, contre le gré de l'accusé, que dans les cas où la culpabilité de celui-ci ne soulève pas de doute sérieux, où la preuve de l'aliénation est accablante, où il s'agit d'une infraction grave et où l'accusé présente toujours une menace pour la société en raison de sa dangerosité. Cette règle tient donc largement compte du droit de l'accusé de contrôler sa défense puisque l'application en est strictement et sévèrement limitée. À la lumière de la *Charte*, les tribunaux redoubleront dorénavant de prudence en s'efforçant d'appliquer la règle avec toute la rigueur voulue et, de ce fait, d'une manière compatible avec les principes de justice fondamentale.

Le régime législatif ici en cause est compatible avec les garanties qu'accordent les art. 7 et 9 de la *Charte*. Il ne porte pas atteinte aux principes de justice fondamentale et, en outre, le par. 542(2) n'est pas arbitraire au sens de l'art. 9 de la *Charte*. Bien que l'article présume, de fait, que toutes les personnes déclarées non coupables en raison de leur aliénation mentale devraient être détenues parce qu'elles peuvent encore présenter un danger ou avoir encore besoin de traitement, ou les deux, il s'agit d'une présomption logique dont le Parlement peut, dans le respect de la Constitution, se réclamer. L'article attaqué confère, certes, le pouvoir de détenir des personnes acquittées qui ne sont peut-être pas dangereuses à l'heure actuelle ou ne nécessitent peut-être pas de traitement, mais il ne le fait pas de façon arbitraire. Il joue de façon restreinte et ne s'applique qu'aux personnes acquittées pour cause d'aliénation mentale qui étaient accusées d'un acte criminel. De plus, le juge du procès possède un pouvoir discrétionnaire quant au lieu et aux conditions de la détention initiale. Pour déterminer si une disposition est arbitraire, on doit l'examiner dans son contexte globale.

En voulant s'attaquer à la position toute particulière de la personne acquittée pour cause d'aliénation mentale, le Parlement a mis en œuvre un mécanisme global d'évaluation et d'examen. Une simple lecture littérale du texte du *Code criminel* ne donne qu'une vague idée du fonctionnement de ce mécanisme et de la complexité de son application pratique. Le Parlement n'a pas conçu le meilleur régime, mais dans le contexte des questions soulevées en l'espèce, il a fait des choix que la Constitution lui permettait de faire. Dans toute évaluation de mécanismes législatifs complexes, le pouvoir judiciaire

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this integrity in mind. In the absence of some constitutional imperative, this Court cannot act as a "super-legislature" and tinker with a legitimate legislative scheme. In light of the complex structure provided by Parliament, any redrafting of the legislation is properly left to reform and legislative bodies.

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se doit d'en respecter l'intégrité et de tenir compte de cette intégrité pour apprécier un système donné au regard des garanties constitutionnelles. En l'absence d'impératif constitutionnel, notre Cour ne saurait se comporter comme une «super-législature» et jongler avec les pièces d'un mécanisme législatif légitime. Compte tenu de la complexité de la structure créée par le Parlement, toute velléité de réécrire la législation doit être laissée aux commissions de réforme et aux organismes législatifs.

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Arrêts écartés: *R. v. Simpson* (1977), 35 C.C.C. (2d) 337; *R. v. Saxell* (1980), 59 C.C.C. (2d) 176; **arrêts mentionnés:** *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Whalem v. United States*, 346 F.2d 812 (1965); *Frendak v. United States*, 408 A.2d 364 (1979); *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425.

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Renvoi: Motor Vehicle Act de la C.-B., [1985] 2 R.C.S. 486; *R. c. Corbett*, [1988] 1 R.C.S. 670; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337; *R. v. Saxell* (1980), 59 C.C.C. (2d) 176; *R. c. Beare*; *R. c. Higgins*, [1988] 2 R.C.S. 387; *R. c. Potvin*, [1989] 1 R.C.S. 525; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *R. c. Lyons*, [1987] 2 R.C.S. 309; *Re Abel and Advisory Review Board* (1980), 56 C.C.C. (2d) 153; *Re McCann and The Queen* (1982), 67 C.C.C. (2d) 180; *Re Egglestone and Mousseau and Advisory Review Board* (1983), 42 O.R. (2d) 268; *Jollimore v. Nova Scotia (A.G.)* (1986), 75 N.S.R. (2d) 191; *Attorney General of Ontario v. Grady* (1988), 34 C.R.R. 289; *R. c. Hufsky*, [1988] 1 R.C.S. 621; *R. c. Luxton*, [1990] 2 R.C.S. 711.

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APPEAL from a judgment of the Ontario Court of Appeal (1986), 53 O.R. (2d) 609, 24 C.C.C. (3d) 385, 50 C.R. (3d) 97, 13 O.A.C. 161, dismissing an appeal from an acquittal by reason of insanity. Appeal allowed, L'Heureux-Dubé J. dissenting. The constitutional questions were answered as follows: (1) s. 542(2) of the *Criminal Code* was *intra vires*; (2) the common law criteria limited s. 7 of the *Charter*—it was not necessary to consider ss. 9 and 15 of the *Charter*—and (3) were not justified by s. 1; (4) s. 542(2) of the *Criminal Code* violated ss. 7 and 9 of the *Charter* and (5) was not justified by s. 1.

Clayton Ruby, *Marlys Edwardh* and *Michael Code*, for the appellant.

Loi sur la preuve au Canada, S.R.C. 1970, ch. E-10, art. 12.
Loi sur la santé mentale, L.R.O. 1980, ch. 262, art. 32, formule 1.
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Butler, Brian T. «How Are Assessments Conducted?» in C. D. Webster, R. J. Menzies, M. A. Jackson, et al., *Clinical Assessment and the Mentally Disordered Offender*. Working Paper in Forensic Psychiatry, No. 27. Toronto: Metropolitan Toronto Forensic Service (Metfors), Clarke Institute of Psychiatry.
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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1986), 53 O.R. (2d) 609, 24 C.C.C. (3d) 385, 50 C.R. (3d) 97, 13 O.A.C. 161, qui a rejeté l'appel d'un acquittement pour cause d'aliénation mentale. Pourvoi accueilli, le juge L'Heureux-Dubé est dissidente. Les réponses aux questions constitutionnelles sont les suivantes: (1) le par. 542(2) du *Code criminel* est *intra vires*, (2) les critères de common law restreignent l'art. 7 de la *Charte*—il n'est pas nécessaire de répondre au sujet des art. 9 et 15 de la *Charte*—et (3) ne sont pas justifiés en vertu de l'article premier, (4) le par. 542(2) du *Code criminel* viole les art. 7 et 9 de la *Charte* et (5) il n'est pas justifié en vertu de l'article premier.

Clayton Ruby, *Marlys Edwardh* et *Michael Code*, pour l'appelant.

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Eric Siebenmorgen, for the respondent.

I. G. Whitehall, Q.C. and *B. Glendinning*, for the intervener the Attorney General of Canada.

Paul J. French, for the intervener the Lieutenant Governor's Board of Review of Ontario.

Gwen Brodsky and *Yvonne Peters*, for the interveners the Canadian Disability Rights Council, the Canadian Mental Health Association and the Canadian Association of Community Living.

The judgment of Lamer C.J. and Sopinka and Cory JJ. was delivered by

LAMER C.J.—This case raises a number of issues regarding the operation of the insanity defence and the manner in which insanity acquittees are dealt with under our criminal law. This Court has been asked to consider whether the provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, which set out the legislative scheme relating to insanity acquittees are within Parliament's criminal law power and whether these provisions are inconsistent with the *Canadian Charter of Rights and Freedoms*. This Court has also been asked to consider whether the common law rule which allows the Crown, in certain circumstances, to raise evidence of insanity over and above an accused's wishes is inconsistent with the *Charter*.

The Facts

In October of 1983, Owen Swain was arrested and charged with assault and aggravated assault, contrary to ss. 245 and 245.2(2) of the *Criminal Code* (now R.S.C., 1985, c. C-46, ss. 266 and 268). These charges arose from an incident in which the appellant, Mr. Swain, attacked his wife and two infant children in a bizarre manner. Fortunately, Mrs. Swain and the children sustained only superficial physical injuries. At trial, the appellant's wife testified that during the incident Swain appeared to be fighting with the air and talking about spirits. At the time of his arrest, the appellant was very excited and spoke in

Eric Siebenmorgen, pour l'intimée.

I. G. Whitehall, c.r., et *B. Glendinning*, pour l'intervenant le procureur général du Canada.

Paul J. French, pour l'intervenante la Commission d'examen du lieutenant-gouverneur de l'Ontario.

Gwen Brodsky et *Yvonne Peters*, pour les intervenants le Conseil canadien des droits des personnes handicapées, l'Association canadienne pour la santé mentale et l'Association canadienne pour l'intégration communautaire.

Version française du jugement du juge en chef Lamer et des juges Sopinka et Cory rendu par

LE JUGE EN CHEF LAMER—Le présent pourvoi soulève plusieurs questions relatives au fonctionnement du moyen de défense d'aliénation mentale et à la façon dont notre droit criminel traite les personnes acquittées pour cause d'aliénation mentale. La Cour doit répondre à la question de savoir si les dispositions du *Code criminel*, S.R.C. 1970, ch. C-34, qui établissent le régime législatif concernant les personnes acquittées pour cause d'aliénation mentale relèvent des pouvoirs du Parlement en matière de droit criminel et si ces dispositions sont incompatibles avec la *Charte canadienne des droits et libertés*. On a également demandé à la Cour de décider si la règle de common law qui permet au ministère public, dans certaines circonstances, de présenter une preuve d'aliénation mentale, contre le gré de l'accusé, est incompatible avec la *Charte*.

Les faits

En octobre 1983, Owen Swain a été arrêté et accusé de voies de fait et de voies de fait graves en vertu de l'art. 245 et du par. 245.2(2) du *Code criminel* (maintenant les art. 266 et 268, L.R.C. (1985), ch. C-46). Ces accusations faisaient suite à un incident au cours duquel l'appelant, M. Swain, a attaqué de façon étrange sa femme et ses deux enfants en bas âge. Heureusement, M^me^ Swain et les enfants n'ont subi que des blessures superficielles. Au procès, l'épouse de l'appelant a témoigné qu'au cours de l'incident, Swain semblait se battre contre l'air et parler d'esprits. Au moment de son arrestation, l'ap-

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a "dialect" about religious themes. Mr. Swain testified at trial that, during the incident, he felt his family was being attacked by devils and that he had to protect them by carrying out certain acts.

On November 1, 1983, the appellant was transferred from the Toronto Jail to the Penetanguishene Mental Health Centre pursuant to a Form 1 application under the *Mental Health Act*, R.S.O. 1980, c. 262 (Form 1). While at the Centre, Swain behaved in a bizarre and regressive manner. Two anti-psychotic drugs were prescribed and administered to him and his condition improved rapidly. By December 19, 1983, the appellant was released into the community (on the condition that he would continue to see a psychiatrist) on the recommendation of Dr. Fleming, the Director of the forensic unit at the Penetanguishene Mental Health Centre. Mr. Swain returned briefly to jail and was granted bail on conditions shortly thereafter. The appellant remained on bail until June 10, 1985, and continued to take medication and to see a psychiatrist.

On May 3, 1985, Mr. Swain's trial took place in the District Court of Ontario before O'Connell Dist. Ct. J. At trial, the Crown sought to adduce evidence with respect to insanity at the time of the offence, to which the appellant objected. After conducting a *voir dire*, the trial judge ruled that the Crown could adduce such evidence. At the conclusion of the trial, Mr. Swain was found not guilty by reason of insanity on all counts. Defence counsel then moved to have s. 542(2) of the *Code* (now s. 614), which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, declared inoperative on the basis that it violated the *Charter*. O'Connell Dist. Ct. J. reserved judgment and on June 10, 1985, held that Mr. Swain's constitutional rights were not infringed by s. 542(2) and ordered that the appellant be kept in strict custody at the Queen Street Mental Health Centre in Toronto until the Lieutenant Governor's pleasure was known. Mr. Swain filed a notice of appeal in the Ontario Court of Appeal and applied for bail pending appeal. Martin J.A., in Chambers, adjourned this application in order to permit an early hearing of the appellant's

pelant était très excité et employait une sorte de «dialecte» pour parler de thèmes religieux. M. Swain a déclaré au procès que, pendant l'incident, il croyait que sa famille était attaquée par des démons et qu'il devait accomplir certains gestes pour les protéger.

Le 1er novembre 1983, l'appelant a été transféré de la prison de Toronto au Penetanguishene Mental Health Centre, conformément à une demande faite en vertu de la *Loi sur la santé mentale*, L.R.O. 1980, ch. 262 (formule 1). Pendant qu'il était au Centre, Swain a agi de façon étrange et régressive. Deux médicaments antipsychotiques lui ont été prescrits et administrés, et son état s'est rapidement amélioré. Le 19 décembre 1983, l'appelant a été remis en liberté (à la condition qu'il continue de consulter un psychiatre), sur la recommandation du Dr Fleming, directeur du département de médecine légale du Penetanguishene Mental Health Centre. Monsieur Swain est retourné en prison pour un bref séjour et peu après a été mis en liberté sous caution assortie de conditions. L'appelant est demeuré en liberté sous caution jusqu'au 10 juin 1985, et il a continué de prendre ses médicaments et de consulter un psychiatre.

Le 3 mai 1985, M. Swain a subi son procès devant le juge O'Connell de la Cour de district de l'Ontario. Le ministère public a cherché à produire une preuve relative à l'aliénation mentale au moment de l'infraction, ce à quoi l'appelant s'est opposé. Après un voir-dire, le juge du procès a conclu que le ministère public pouvait présenter ce genre de preuve. À la conclusion du procès, M. Swain a été déclaré non coupable relativement à tous les chefs d'accusation pour cause d'aliénation mentale. L'avocat de la défense a alors demandé que le par. 542(2) du *Code* (maintenant l'art. 614), qui prévoit la détention automatique d'une personne acquittée pour cause d'aliénation mentale au bon plaisir du lieutenant-gouverneur, soit déclaré invalide parce qu'il viole la *Charte*. Le juge O'Connell a mis l'affaire en délibéré et, le 10 juin 1985, il a conclu que le par. 542(2) ne portait pas atteinte aux droits reconnus par la Constitution à M. Swain et ordonné que l'appelant soit tenu sous une garde rigoureuse, au Queen Street Mental Health Centre de Toronto, jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu. Monsieur Swain a déposé un avis d'appel en Cour d'appel de l'Ontario

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case by the Advisory Review Board (the body which may be appointed to advise the Lieutenant Governor concerning the detention of insanity acquittees). On June 12, 1985, the Lieutenant Governor issued a warrant further detaining the appellant in safe custody in a mental hospital for assessment and report to the Advisory Review Board within 30 days. Neither the appellant nor his counsel received prior notice of this decision, although it would appear that some attempts were made to notify the appellant's counsel. Accordingly, neither the appellant nor his counsel made submissions with respect to this decision.

Pursuant to the above-mentioned warrant, Mr. Swain was sent for psychiatric examination and assessment to the Clarke Institute of Psychiatry, where he remained a patient in the forensic unit until July 12, 1985. The Advisory Review Board held a review hearing on July 26, 1985, pursuant to the provisions of s. 547 of the *Code* (now s. 619). The appellant and his counsel were present at this hearing. On August 6, 1985, the Advisory Review Board recommended to the Lieutenant Governor that Mr. Swain should remain in safe custody at the Queen Street Mental Health Centre. Shortly thereafter, the Lieutenant Governor issued a warrant for the further detention of Mr. Swain. The Lieutenant Governor accepted the recommendations of the Board which provided, *inter alia*, that the administrator of the Queen Street Mental Health Centre have the discretion to permit the appellant to re-enter the community with conditions as to supervision and follow-up treatment.

On two occasions (July 30, 1985 and August 20, 1985), the appellant's counsel wrote to the Lieutenant Governor requesting the right to appear and make submissions before the Lieutenant Governor at the time when the recommendation of the Advisory Review Board would be considered. This request was not granted. It was not until after the Lieutenant Governor's warrant for the further detention of Mr.

et demandé d'être mis en liberté sous caution jusqu'à l'issue de l'appel. Le juge Martin, en chambre, a ajourné cette demande afin de permettre à la commission d'examen (l'organisme qui peut être nommé pour conseiller le lieutenant-gouverneur en ce qui concerne la détention des personnes acquittées pour cause d'aliénation mentale) de procéder rapidement à l'audition du cas de l'appelant. Le 12 juin 1985, le lieutenant-gouverneur a délivré un mandat ordonnant la mise sous bonne garde de l'appelant dans un hôpital psychiatrique, à des fins d'évaluation dont il devait être fait rapport à la commission d'examen dans les 30 jours suivants. Ni l'appelant ni son avocat n'ont été informés au préalable de cette décision, même s'il semble qu'on ait tenté d'en aviser l'avocat de l'appelant. Par conséquent, ni l'appelant ni son avocat n'ont présenté d'observations en rapport avec cette décision.

En vertu du mandat susmentionné, M. Swain a été envoyé au Clarke Institute of Psychiatry afin d'y subir un examen et une évaluation psychiatriques; il a été hospitalisé au département de médecine légale jusqu'au 12 juillet 1985. Le 26 juillet 1985, la commission d'examen a procédé à un examen comme le prévoit l'art. 547 du *Code* (maintenant l'art. 619). L'appelant et son avocat étaient présents. Le 6 août 1985, la commission d'examen a recommandé au lieutenant-gouverneur la mise sous bonne garde de M. Swain, au Queen Street Mental Health Centre. Peu après, le lieutenant-gouverneur a délivré un mandat pour le maintien en détention de M. Swain. Le lieutenant-gouverneur a accepté les recommandations de la commission qui prévoyaient notamment que l'administrateur du Queen Street Mental Health Centre ait le pouvoir discrétionnaire de permettre la réinsertion de l'appelant dans la société, sous réserve de conditions relatives à la surveillance et au suivi du traitement.

L'avocat de l'appelant a écrit au lieutenant-gouverneur à deux reprises (le 30 juillet et le 20 août 1985), pour obtenir le droit de comparaître et de présenter des observations devant le lieutenant-gouverneur au moment de l'étude de la recommandation de la commission d'examen. Cette demande n'a pas été accordée. Ce n'est qu'après la délivrance du mandat du lieutenant-gouverneur pour le maintien en détention

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Swain had issued that the recommendation of the Advisory Review Board was released to the appellant's counsel.

The appeal to the Ontario Court of Appeal was heard in early September, 1985. A majority of the Court of Appeal (*per* Thorson J.A.) dismissed the appeal, Brooke J.A. dissenting. The appellant sought leave to appeal to this Court, which application was granted on March 26, 1987. At the time that the application for leave to appeal was filed, the appellant was in safe custody. However, on September 4, 1986, the Lieutenant Governor of Ontario ordered that his warrant detaining the appellant be vacated and that the appellant be discharged absolutely.

The Legislative Scheme

Criminal Code, R.S.C. 1970, c. C-34:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

. . .

542. (1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted,

(*a*) the jury, or

(*b*) the judge or magistrate, where there is no jury,

shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

de M. Swain que la recommandation de la commission d'examen a été communiquée à l'avocat de l'appelant.

La Cour d'appel de l'Ontario a entendu l'appel au début de septembre 1985. Le juge Thorson, au nom de la majorité, l'a rejeté, le juge Brooke étant dissident. L'appelant a demandé l'autorisation de se pourvoir contre cette décision, et notre Cour lui a accordé l'autorisation le 26 mars 1987. Au moment de la demande d'autorisation de pourvoi, l'appelant était sous bonne garde. Cependant, le 4 septembre 1986, le lieutenant-gouverneur de l'Ontario a ordonné la levée de son mandat de détention et la libération inconditionnelle de l'appelant.

Le régime législatif

Code criminel, S.R.C. 1970, ch. C-34:

16. (1) Nul ne doit être déclaré coupable d'une infraction à l'égard d'un acte ou d'une omission de sa part alors qu'il était aliéné.

(2) Aux fins du présent article, une personne est aliénée lorsqu'elle est dans un état d'imbécillité naturelle ou atteinte de maladie mentale à un point qui la rend incapable de juger la nature et la qualité d'un acte ou d'une omission, ou de savoir qu'un acte ou une omission est mauvais.

(3) Une personne qui a des hallucinations sur un point particulier, mais qui est saine d'esprit à d'autres égards, ne doit pas être acquittée pour le motif d'aliénation mentale, à moins que les hallucinations ne lui aient fait croire à l'existence d'un état de choses qui, s'il eût existé, aurait justifié ou excusé son acte ou omission.

(4) Jusqu'à preuve du contraire, chacun est présumé être et avoir été sain d'esprit.

. . .

542. (1) Si, lors du procès d'un accusé inculpé d'un acte criminel, il est déposé que l'accusé était aliéné au moment où l'infraction a été commise et s'il est acquitté,

a) le jury, ou

b) le juge ou magistrat, quand il n'y a pas de jury,

doit constater si l'accusé était aliéné lors de la perpétration de l'infraction et déclarer s'il est acquitté pour cause d'aliénation mentale.

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(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known. [Emphasis added.]

. . .

545. (1) Where an accused who is, pursuant to this Part, found to be insane, the lieutenant governor of the province in which he is detained may make an order

(*a*) for the safe custody of the accused in a place and manner directed by him, or

(*b*) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes.

(2) An accused to whom paragraph (1)(*a*) applies may, by warrant signed by an officer authorized for that purpose by the lieutenant governor of the province in which he is detained, be transferred for the purposes of his rehabilitation to any other place in Canada specified in the warrant with the consent of the person in charge of such place.

(3) A warrant mentioned in subsection (2) is sufficient authority for any person who has custody of the accused to deliver the accused to the person in charge of the place specified in the warrant and for such last mentioned person to detain the accused in the manner specified in the order mentioned in subsection (1).

. . .

547. (1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which

(2) S'il est constaté que l'accusé était aliéné au moment où l'infraction a été commise, la cour, le juge ou le magistrat devant qui le procès s'instruit doit ordonner que l'accusé soit tenu sous une garde rigoureuse dans le lieu et de la manière que la cour, le juge ou le magistrat ordonne, jusqu'à ce que le bon plaisir du lieutenant-gouverneur de la province soit connu.

. . .

545. (1) Lorsque, en application de la présente Partie, un accusé est déclaré atteint d'aliénation mentale, le lieutenant-gouverneur de la province où l'accusé est détenu peut

a) rendre une ordonnance pour la bonne garde de l'accusé dans le lieu et de la manière qu'il prescrit, ou

b) s'il est d'avis que la mesure est dans l'intérêt véritable de l'accusé sans nuire à l'intérêt public, rendre une ordonnance portant libération de l'accusé, soit inconditionnellement, soit aux conditions qu'il prescrit.

(2) Le prévenu visé à l'alinéa (1)*a*) peut être transféré aux fins de sa réhabilitation à tout endroit au Canada que précise le mandat signé par l'agent qu'autorise à cette fin le lieutenant-gouverneur de la province où il est détenu, sous réserve du consentement du responsable de l'établissement de l'endroit.

(3) Le mandat visé au paragraphe (2) donne à toute personne qui a la garde du prévenu le pouvoir de le remettre à la personne responsable du lieu indiqué dans ce mandat et à cette dernière de le détenir de la manière indiquée dans l'ordonnance mentionnée au paragraphe (1).

. . .

547. (1) Le lieutenant-gouverneur d'une province peut nommer une commission pour examiner le cas de chaque personne qui est sous garde dans un lieu de ladite province en vertu d'une ordonnance rendue en conformité de l'article 545 ou du paragraphe 546(1) ou (2).

(2) La commission mentionnée au paragraphe (1) se compose de trois à cinq membres qui choisissent parmi eux un président lorsque le lieutenant-gouverneur n'en a pas désigné.

(3) Au moins deux membres de la commission doivent être des psychiatres dûment qualifiés et autorisés à exercer la médecine en conformité des lois de la pro-

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the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(*a*) not later than six months after the making of the order referred to in that subsection relating to that person, and

(*b*) at least once in every twelve month period following the review required pursuant to paragraph (*a*) so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

. . .

(*d*) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

. . .

(*f*) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act.

vince pour laquelle la commission est nommée et un membre au moins de la commission doit appartenir au barreau de la province.

(4) Trois membres de la commission d'examen, dont au moins un psychiatre visé au paragraphe (3) et un membre du barreau de la province, constituent un quorum de la commission.

(5) La commission doit examiner le cas de chaque personne mentionnée au paragraphe (1),

a) au plus tard six mois après qu'a été rendue l'ordonnance visée dans ce paragraphe relativement à cette personne, et

b) au moins une fois tous les douze mois après l'examen exigé à l'alinéa *a*), aussi longtemps que cette personne reste sous garde en vertu de l'ordonnance,

et la commission doit, immédiatement après chaque examen, faire un rapport au lieutenant-gouverneur énonçant en détail les résultats de cet examen et indiquant,

. . .

d) lorsque la personne sous garde a été trouvée non coupable, pour cause d'aliénation mentale, si, de l'avis de la commission, cette personne est rétablie et, dans l'affirmative, si à son avis, il est dans l'intérêt du public et dans l'intérêt de cette personne que le lieutenant-gouverneur ordonne qu'elle soit libérée absolument ou sous réserve des conditions que le lieutenant-gouverneur peut prescrire,

. . .

f) les conclusions qu'elle estime souhaitables afin de réhabiliter la personne dont le cas a été examiné et compatibles avec l'intérêt public.

(6) En plus de tout examen qui doit être effectué en vertu du paragraphe (5), la commission doit examiner tout cas mentionné au paragraphe (1) lorsque le lieutenant-gouverneur le lui demande et elle doit, immédiatement après un tel examen, faire rapport au lieutenant-gouverneur en conformité du paragraphe (5).

(7) Aux fins de l'examen prévu par le présent article, le président de la commission peut exercer tous les pouvoirs, mentionnés aux articles 4 et 5 de la *Loi sur les enquêtes*, d'un commissaire nommé en vertu de la Partie I de cette loi. [Je souligne.]

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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.

. . .

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. Everyone has the right not to be arbitrarily detained or imprisoned.

. . .

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

. . .

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Constitution Act, 1982

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.

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.

. . .

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. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

. . .

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

. . .

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Loi constitutionnelle de 1982

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

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Lower Court Judgments

District Court of Ontario (O'Connell Dist. Ct. J.)

The appellant was tried by O'Connell Dist. Ct. J. in the District Court of Ontario. During the trial the Crown sought to adduce evidence of insanity. Mr. Swain objected to the issue of insanity being raised and a *voir dire* was held to determine the admissibility of the evidence. O'Connell Dist. Ct. J. referred to both *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, and *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, and stated:

> . . . in dealing with the first issue, I must be satisfied that there was what I would indicate the cases refer to as convincing evidence that these offences are of a serious nature and that the evidence that has been adduced satisfies the seriousness of the nature of the offences.

O'Connell Dist. Ct. J. was satisfied that the alleged offences were of a serious nature and that "this is not a trivial matter in any sense of the word". He went on to state that he was satisfied that Mr. Swain suffered from "legal insanity". In concluding that the Crown was entitled to lead evidence of insanity over and above the appellant's wishes, O'Connell Dist. Ct. J. stated that there was convincing evidence that there was conduct which may have endangered the lives of the children and that Mr. Swain was a danger to the public at the time of the alleged incident.

After hearing the Crown's evidence with respect to insanity, O'Connell Dist. Ct. J. discussed the essential elements of the offence of aggravated assault and concluded that this offence had been sufficiently proven. He stated that "[a]s to Mrs. Swain, there is no issue as to the act of common assault".

The trial judge then turned to the issue of insanity and held that Mr. Swain did have a disease of the mind which rendered him incapable of appreciating the nature and quality of the acts on the night in question. Consequently, he found the appellant not guilty by reason of insanity on each of the counts.

Jugements des juridictions inférieures

Cour de district de l'Ontario (Le juge O'Connell)

L'appelant a subi son procès devant le juge O'Connell de la Cour de district de l'Ontario. Au procès, le ministère public a voulu produire une preuve d'aliénation mentale. Monsieur Swain s'est opposé à ce que la question de l'aliénation mentale soit soulevée et la cour a procédé à un voir-dire pour établir l'admissibilité de la preuve. Le juge O'Connell a mentionné les arrêts *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, et *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, et a affirmé ce qui suit:

> [TRADUCTION] . . . quant à la première question, je dois être convaincu qu'il y avait ce que j'appellerais, d'après mon interprétation des décisions, une preuve convaincante que ces infractions sont graves et que la preuve produite correspond au caractère grave des infractions.

Le juge O'Connell était convaincu que les infractions reprochées étaient graves et que ce n'était pas [TRADUCTION] «une question futile dans quelque sens du mot». Il a ajouté qu'il était convaincu que M. Swain souffrait d'aliénation mentale, au sens légal du terme. Le juge O'Connell a déclaré qu'il y avait une preuve convaincante d'une conduite qui aurait pu mettre la vie des enfants en danger et que M. Swain constituait un danger pour le public au moment de l'incident allégué, et il a conclu que le ministère public avait le droit de présenter une preuve d'aliénation mentale, contre le gré de l'appelant.

Après avoir entendu la preuve du ministère public concernant l'aliénation mentale, le juge O'Connell a analysé les éléments essentiels de l'infraction de voies de fait graves et conclu qu'il y avait une preuve suffisante de cette infraction. Il a déclaré que [TRADUCTION] «[q]uant à M^me^ Swain, la question des voies de fait simples ne fait aucun doute».

Le juge du procès a ensuite abordé la question de l'aliénation mentale et il a conclu que M. Swain était atteint d'une maladie mentale qui le rendait incapable de juger la nature et la qualité des actes commis cette nuit-là. Par conséquent, il a déclaré l'appelant non coupable pour cause d'aliénation mentale relativement à chacun des chefs d'accusation.

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Counsel for Mr. Swain then made a motion pursuant to the *Charter* that s. 542(2) was inconsistent with the provisions of the *Charter* and should be "read down" so as to allow the Court to inquire into whether Mr. Swain required a custodial setting rather than simply making an order for safe custody. The trial judge took this matter under consideration and gave reasons on June 10, 1985.

L'avocat de M. Swain a ensuite présenté une requête en vertu de la *Charte*, dans laquelle il soutenait que le par. 542(2) était incompatible avec les dispositions de la *Charte* et devrait recevoir une «interprétation atténuée» de façon à permettre à la cour d'examiner si M. Swain avait besoin d'être placé en milieu surveillé plutôt que de rendre tout simplement une ordonnance de bonne garde. Le juge du procès a mis la question en délibéré et a rendu son jugement le 10 juin 1985.

O'Connell Dist. Ct. J. held that Mr. Swain's constitutional rights were not infringed by s. 542(2) and ordered that the appellant be kept in strict custody at the Queen Street Mental Health Centre in Toronto until the pleasure of the Lieutenant Governor was known. The trial judge considered ss. 7, 9, 12 and 15 of the *Charter* and found that none of these constitutional guarantees was infringed by s. 542(2). O'Connell Dist. Ct. J. placed considerable emphasis on the holding in *Saxell* to the effect that the s. 542(2) was not contrary to the *Canadian Bill of Rights*, R.S.C. 1970, App. III. He went on to state:

Le juge O'Connell a conclu que le par. 542(2) ne portait pas atteinte aux droits constitutionnels de M. Swain et il a ordonné que l'appelant soit tenu sous une garde rigoureuse au Queen Street Mental Health Centre de Toronto, jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu. Le juge du procès a examiné les art. 7, 9, 12 et 15 de la *Charte* et conclu que le par. 542(2) ne portait atteinte à aucune de ces garanties constitutionnelles. Le juge O'Connell a beaucoup insisté sur la conclusion de l'arrêt *Saxell* selon lequel le par. 542(2) ne contrevenait pas à la *Déclaration canadienne des droits*, S.R.C. 1970, app. III. Il a ensuite ajouté:

If there is any deprivation in fairness by reason of the actions of the Lieutenant Governor or of the review board, remedies exist at law, in my view, by way of application for the protection of his rights and freedoms under the *Charter* and in particular under sections 7, 9, 12 and 15 because the sections of the *Code*, in my view, as submitted by the Crown are a system or scheme flowing from the section of the *Code* which allows for exceptional cases such as the one we have before us, that is, for complete assessment, observation, consultation and possible speedy releast [*sic*] into the community. S. 542(2) must be read in conjunction with ss. 545 and 547. The section must deal with insane persons so found and the treatment of such persons considered by law to be ill and considered not to be serving a sentence, that is, not being punished.

[TRADUCTION] Si les gestes du lieutenant-gouverneur ou de la commission d'examen portent atteinte à l'équité, il existe des recours en droit, par voie de demande de protection des droits et libertés garantis par la *Charte*, notamment par les art. 7, 9, 12 et 15, parce qu'à mon avis, les articles du *Code*, comme le soutient le ministère public, constituent un régime ou un système fondé sur l'article du *Code* qui prévoit des cas exceptionnels comme celui en l'espèce, c'est-à-dire un système qui prévoit l'évaluation, l'observation, la consultation et même, le cas échéant, la réinsertion rapide dans la collectivité. Le paragraphe 542(2) doit être interprété en corrélation avec les art. 545 et 547. Cette disposition doit traiter des personnes déclarées aliénées et du traitement de ces personnes considérées en droit comme des malades et non comme des personnes qui purgent une peine, des personnes punies.

O'Connell Dist. Ct. J. then stated that if the section were unconstitutional under the aforementioned provisions of the *Charter*, it would be saved under s. 1 of the *Charter*.

Le juge O'Connell a ensuite affirmé que si la disposition était inconstitutionnelle en vertu des dispositions susmentionnées de la *Charte*, elle serait sauvegardée en vertu de l'article premier de la *Charte*.

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Ontario Court of Appeal (*per* Thorson J.A.; Brooke J.A. dissenting) (1986), 24 C.C.C. (3d) 385

Mr. Swain appealed the judgment of the trial judge on the grounds that the trial judge erred in permitting the Crown to adduce evidence of insanity over the defence's objections, in finding the appellant not guilty by reason of insanity, and in finding that s. 542(2) of the *Code* did not violate the *Charter* (either in general or in this particular case). Furthermore, Mr. Swain appealed on the grounds that s. 542(2) was not a valid exercise of the criminal law power under s. 91(27) of the *Constitution Act, 1867*.

The majority first dealt with the issue of the Crown's independently raising evidence of insanity. Thorson J.A. noted that a trial judge has a discretion as to whether or not to permit the Crown to introduce evidence of insanity and cited extensively from the Ontario Court of Appeal judgment in *Saxell*. The majority was of the view that the circumstances of the case at bar strongly suggested that the appellant was insane at the time of the offences. Thorson J.A. also stated that the trial judge had not erred in finding a strong *prima facie* case of aggravated assault. The majority saw no reason to disagree with the finding of the trial judge that the offences in question were of a serious nature. The majority concluded at p. 401:

To forbid the Crown to adduce psychiatric evidence, and thereby risk convicting a man who lacked the capacity to appreciate the nature and quality of his acts, would not accord with the interests of justice.

The majority went on to consider whether the trial judge had erred in finding Mr. Swain not guilty by reason of insanity and held that the appellant had been properly acquitted on the basis of insanity. Thorson J.A. stated that this Court's judgment in *Kjeldsen v. The Queen*, [1981] 2 S.C.R. 617, established that one who understands the physical character of an act but lacks the normal emotional response (as with a psychopath) still appreciates the nature and quality of the act. However, this did not mean that whenever a person knows the physical characteristics

Cour d'appel de l'Ontario (le juge Thorson; le juge Brooke, dissident) (1986), 24 C.C.C. (3d) 385

Monsieur Swain a interjeté appel de la décision du juge du procès, invoquant qu'il avait commis une erreur en permettant au ministère public d'introduire une preuve d'aliénation mentale, malgré les objections de la défense, en déclarant l'appelant non coupable pour cause d'aliénation mentale et en concluant que le par. 542(2) du *Code* ne violait pas la *Charte* (ni en général ni en l'espèce). En outre, M. Swain a allégué en appel que le par. 542(2) ne constituait pas un exercice valable des pouvoirs conférés par le par. 91(27) de la *Loi constitutionnelle de 1867* en matière de droit criminel.

La majorité a tout d'abord traité de la preuve d'aliénation mentale présentée indépendamment par le ministère public. Le juge Thorson a souligné que le juge du procès a le pouvoir discrétionnaire de permettre au ministère public de produire une preuve d'aliénation mentale et a cité de longs extraits de l'arrêt *Saxell* de la Cour d'appel de l'Ontario. D'après la majorité, les circonstances de l'espèce indiquaient clairement que l'appelant était aliéné au moment où il a commis les infractions. Le juge Thorson a ajouté que le juge du procès n'avait pas commis d'erreur en constatant une solide preuve *prima facie* de voies de fait graves. La majorité n'a pas jugé bon d'écarter la conclusion du juge du procès selon laquelle les infractions en cause étaient de nature grave. La cour a conclu à la majorité, à la p. 401:

[TRADUCTION] Il serait contraire aux intérêts de la justice d'interdire au ministère public de produire des preuves psychiatriques et de risquer ainsi de déclarer coupable un homme qui n'avait pas la capacité de juger la nature et la qualité de ses actes.

La majorité a ensuite examiné la question de savoir si le juge du procès avait commis une erreur en déclarant M. Swain non coupable pour cause d'aliénation mentale et elle a conclu que l'appelant avait été acquitté pour ce motif avec raison. Le juge Thorson a affirmé que, dans l'arrêt *Kjeldsen c. La Reine*, [1981] 2 R.C.S. 617, notre Cour a établi que quiconque comprend le caractère matériel d'un acte mais n'a pas de réactions émotives normales (comme dans le cas d'un psychopathe), apprécie tout de même la nature et la qualité de l'acte. Toutefois, cela ne signifie pas

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of an act he or she therefore appreciates the nature and quality of the act within the meaning of s. 16(2).

The majority then considered the *Charter* issues with respect to s. 542(2). Thorson J.A. stated that the impugned provision should not be viewed in isolation, but rather should be considered in light of the entire *Criminal Code* scheme dealing with insanity acquittees (hereinafter referred to as the "L.G.W. system"). The majority noted that the procedural safeguards contained in s. 32 of the *Mental Health Act* applied to the detention reviews conducted by the Advisory Review Board.

With respect to s. 7 of the *Charter*, the majority held (citing *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177) that the scheme itself could not be challenged under s. 7 if procedural fairness (an aspect of fundamental justice) is not excluded by it and can be read into the scheme. The majority was of the view that procedural fairness was not excluded by the *Criminal Code* scheme and could be read into it. Thorson J.A., at p. 410, cited a statement in *Saxell*, *supra*, to the effect that permissive language was used in the *Code* provisions relating to the authority of the Lieutenant Governor to make a custody or discharge order because:

> It would be unseemly for Parliament to use imperative language when conferring power on a representative of the Sovereign. . . . [Emphasis deleted.]

The majority went on to note that it was not disputed that procedural fairness was accorded to Mr. Swain in the case at bar. If an individual felt that he or she had not been accorded procedural due process, the majority was of the view that he or she could seek the remedy of *certiorari* or could seek a remedy under s. 24(1) of the *Charter*.

With respect to s. 9 of the *Charter*, the majority held that the automatic detention provided for in

que quiconque connaît les caractéristiques matérielles d'un acte, est nécessairement en mesure de juger la nature et la qualité de l'acte au sens du par. 16(2).

Par la suite, la majorité a étudié les questions relatives à la *Charte* au regard du par. 542(2). Le juge Thorson a déclaré qu'il ne faut pas examiner isolément la disposition attaquée, mais plutôt dans le cadre de tout le régime du *Code criminel* portant sur les personnes acquittées pour cause d'aliénation mentale (ci-après «le régime des mandats du lieutenant-gouverneur ou M.L.-G.»). La majorité a souligné que les protections procédurales que prévoit l'art. 32 de la *Loi sur la santé mentale* s'appliquent également aux examens de détention faits par la commission d'examen.

Quant à l'art. 7 de la *Charte*, la majorité a conclu (invoquant *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177) que le régime en soi ne peut être contesté en vertu de l'art. 7 si l'équité procédurale (un volet des principes de justice fondamentale) n'en est pas exclue et, par interprétation large, peut être considérée faire partie de ce régime. La majorité a estimé que les règles d'équité procédurale n'étaient pas exclues du régime du *Code criminel* et que, par interprétation large, elles pouvaient être considérées en faire partie. Le juge Thorson a cité, à la page 410, une affirmation faite dans l'arrêt *Saxell*, précité, selon laquelle le pouvoir du lieutenant-gouverneur en matière d'ordonnance de garde ou de libération était exprimé comme une faculté dans les dispositions du *Code* parce que:

> [TRADUCTION] Il serait inopportun que le Parlement emploie un langage impératif pour conférer des pouvoirs à un représentant du souverain. . . [Italiques omis.]

Puis, la majorité a souligné que personne ne prétendait que M. Swain n'avait pas bénéficié des règles d'équité en matière de procédure. Si une personne croit qu'elle n'a pas bénéficié de l'application régulière des règles de procédure, elle peut, d'après la majorité, procéder par voie de *certiorari* ou demander réparation en vertu du par. 24(1) de la *Charte*.

En ce qui a trait à l'art. 9 de la *Charte*, la majorité a conclu que la détention automatique en vertu du

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s. 542(2) does not amount to arbitrary detention. Thorson J.A. stated, at pp. 415-16:

In my opinion, the detention authorized by s. 542(2) is not arbitrary. Some period of time is required before an assessment can be made by the authorities of the acquittee's dangerousness and his therapeutic needs. No such assessment is made at his trial. . . .

Further, the finding of not guilty by reason of insanity raises what I accept to be a reasonable concern that the accused may remain a danger to the public and in need of further treatment. Under the statute, it is only after such a finding has been made that the State acquires the right to deprive him for the time being of his liberty in order that these matters may be properly assessed, under conditions that ensure the protection of the public.

With respect to s. 12 of the *Charter*, the majority held that s. 542(2) did not authorize indeterminate confinement because, in its view, the Lieutenant Governor was required to act "forthwith" to terminate a s. 542(2) order and substitute his or her own order for custody or discharge.

With respect to s. 15, the majority stated, at p. 422:

As was held by this Court in *Re McDonald and The Queen*, s. 15(1) of the Charter requires that those who are similarly situated be treated similarly. [Citations omitted.]

In the view of the majority, an insane acquittee and a person who has been acquitted *simpliciter* are not similarly situated, nor are an insane acquittee and a mentally disordered civil committee similarly situated. Furthermore the fact that the L.G.W. system may be administered differently in different provinces did not mean that s. 542(2) violated s. 15. Referring to the Ontario Court of Appeal decision in *R. v. Morgentaler* (1985), 22 C.C.C. (3d) 353, Thorson J.A. stated at p. 424:

par. 542(2) ne constitue pas une détention arbitraire. Le juge Thorson a déclaré ce qui suit aux pp. 415 et 416:

[TRADUCTION] À mon avis, la détention autorisée par le par. 542(2) n'est pas arbitraire. L'évaluation par les autorités du caractère dangereux de la personne acquittée et de ses besoins en matière de traitement prend un certain temps. Aucune évaluation de ce genre n'est faite lors de son procès. . .

En outre, la déclaration de non-culpabilité pour cause d'aliénation mentale soulève, à mon avis, une préoccupation raisonnable que l'accusé demeure peut-être un danger pour le public et a besoin de traitements additionnels. En vertu de la loi, ce n'est qu'après cette déclaration que l'État a le droit de le priver de sa liberté pour le moment afin de bien évaluer ces questions, dans des conditions qui permettent d'assurer la protection du public.

En ce qui concerne l'art. 12 de la *Charte*, la majorité a conclu que le par. 542(2) n'autorisait pas une détention indéterminée puisque, à son avis, le lieutenant-gouverneur était tenu d'agir «immédiatement» pour lever l'ordonnance rendue en vertu du paragraphe 542(2) et y substituer sa propre ordonnance de garde ou de remise en liberté.

Quant à l'art. 15, la majorité a affirmé ce qui suit, à la page 422:

[TRADUCTION] Comme l'a décidé cette cour dans *Re McDonald and The Queen*, le par. 15(1) de la Charte exige que les personnes qui sont dans une situation semblable soient traitées de façon semblable. [Références omises.]

De l'avis de la majorité, la situation d'une personne acquittée pour cause d'aliénation mentale et celle d'une personne acquittée purement et simplement ne sont pas semblables, pas plus que ne le sont la situation d'une personne acquittée pour cause d'aliénation mentale et celle des personnes atteintes de déséquilibre mental internées à la suite de procédures civiles. De plus, le fait que le système des mandats du lieutenant-gouverneur puisse être administré différemment d'une province à l'autre ne signifie pas que le par. 542(2) contrevient à l'art. 15. Après avoir mentionné l'arrêt de la Cour d'appel de l'Ontario *R. v. Morgentaler* (1985), 22 C.C.C. (3d) 353, le juge Thorson a affirmé ce qui suit, à la p. 424:

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By the same token, s. 542(2) does not violate s. 15, since the subsection, of itself, does not discriminate. The alleged uneven administration of the system into which the insane acquittee is placed by virtue of s. 542(2) is not a matter to be redressed by this Court on an appeal challenging the constitutionality of the subsection.

The majority noted that, if s. 542(2) did violate any of the relevant sections of the *Charter*, the provision was a reasonable limit which could be justified under s. 1.

In determining whether s. 542(2) was *intra vires* Parliament's criminal law power, the majority noted that one must consider the purpose and object of the impugned legislation. Thorson J.A. stated, at p. 429:

The initial detention pursuant to s. 542(2) is to give the authorities the opportunity to assess the mental condition of the accused and decide on appropriate medical treatment. The detention is also based on the notion of protecting the public from someone who has committed an act which would have been a criminal act, had he not been insane when the act was committed. As in *Pattison*, the legislation in the case at bar has the twofold purpose of preventing crime and protecting the public, and is therefore, in my opinion, a valid exercise of the criminal law power under s. 91(27).

Brooke J.A. dissented from the judgment of the majority. In his view, at p. 434, following the *Code*'s scheme for insanity acquittees in the case at bar was "tantamount to using the criminal process to obtain a certification which could not be obtained through the civil process because the individual's condition would not justify it".

Brooke J.A. stated that he would have found s. 542(2) inoperative with respect to Mr. Swain and would have made an order discharging the appellant on the condition that he continue with treatment. He stated at p. 436:

In my respectful view, the learned trial judge erred in refusing the motion which was brought pursuant to s. 24

[TRADUCTION] De la même façon, le par. 542(2) ne contrevient pas à l'art. 15 puisque ce paragraphe, en soi, ne comporte aucune discrimination. L'administration apparemment inégale du système où sont placées les personnes acquittées pour cause d'aliénation mentale selon le par. 542(2), ne relève pas de cette cour dans le cadre d'un appel portant sur la constitutionnalité du paragraphe en cause.

La majorité a conclu que, si le par. 542(2) contrevenait à l'une des dispositions pertinentes de la *Charte*, il s'agirait d'une limite raisonnable dont la justification pourrait se démontrer en vertu de l'article premier.

Pour déterminer si le par. 542(2) est *intra vires* du Parlement en matière de droit criminel, la majorité a conclu qu'il fallait examiner le but et l'objet de la règle attaquée. Le juge Thorson a déclaré ce qui suit, à la p. 429:

[TRADUCTION] La première détention en vertu du par. 542(2) a pour but de donner aux autorités la possibilité d'évaluer la condition mentale de l'accusé et de décider du traitement médical qui lui convient. La détention est également fondée sur le concept de la protection du public contre celui qui a commis un acte qui serait considéré comme un acte criminel, si l'auteur n'avait pas été aliéné au moment de sa perpétration. Comme dans *Pattison*, le but de la règle attaquée en l'espèce comporte deux volets: la prévention du crime et la protection du public; elle constitue donc, à mon avis, un exercice valable du pouvoir conféré par le par. 91(27) en matière de droit criminel.

Le juge Brooke a exprimé une opinion dissidente. À son avis, à la p. 434, maintenir le régime établi par le *Code* en ce qui a trait aux personnes acquittées pour cause d'aliénation mentale, en l'espèce, [TRADUCTION] «équivaut à employer le système de justice criminelle pour obtenir une décision qu'on ne pourrait obtenir par voie civile parce que l'état de l'individu ne le justifie pas».

Le juge Brooke a affirmé qu'il aurait conclu que le par. 542(2) était inopérant en ce qui a trait à M. Swain et qu'il aurait remis l'appelant en liberté, à condition qu'il poursuive ses traitements. Il a déclaré ce qui suit, à la p. 436:

[TRADUCTION] Avec égards, j'estime que le juge du procès a commis une erreur lorsqu'il a rejeté la requête

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of the Charter. . . . He should have held that s. 542(2) offended the appellant's rights guaranteed by s. 7 of the Charter. To sentence the appellant to be held in strict custody until the Lieutenant Governor's pleasure was known, was to deny him his liberty in a way that did not accord with the principles of fundamental justice.

Brooke J.A. noted that the Lieutenant Governor does not hear evidence and hears no submissions from the person whose liberty is at stake. Furthermore the decision-making process takes place after the fact of incarceration. Brooke J.A. concluded from this that an insanity acquittee does not receive a fair, public hearing before losing his or her liberty.

Issues

The following constitutional questions were stated by former Chief Justice Dickson on September 25, 1987:

1. Is s. 542(2) of the *Criminal Code* of Canada *intra vires* the Parliament of Canada?

2. Do the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, violate ss. 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to question 2 is affirmative, are the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

4. Does the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code* of Canada violate ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*?

5. If the answer to question 4 is affirmative, is the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code* of Canada, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

qui lui était présentée conformément à l'art. 24 de la Charte . . . Il aurait dû conclure que le par. 542(2) portait atteinte aux droits garantis à l'appelant par l'art. 7 de la Charte. Ordonner que l'appelant soit tenu sous une garde rigoureuse jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu constitue une entrave à sa liberté d'une manière non conforme aux principes de justice fondamentale.

Le juge Brooke a souligné que le lieutenant-gouverneur n'entend pas d'éléments de preuve, ni d'observations venant de la personne dont la liberté est en jeu. De plus, le processus décisionnel a lieu après l'incarcération. Il en a conclu que la personne acquittée pour cause d'aliénation mentale ne bénéficie pas d'un procès public et équitable avant de perdre sa liberté.

Les questions en litige

Le juge en chef Dickson a formulé, le 25 septembre 1987, les questions constitutionnelles suivantes:

1. Le paragraphe 542(2) du *Code criminel* du Canada est-il *intra vires* du Parlement du Canada?

2. Les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, violent-ils les art. 7, 9 et 15 de la *Charte canadienne des droits et libertés*?

3. Si la réponse à la 2e question est affirmative, les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

4. Le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel* du Canada, viole-t-il les art. 7 et 9 de la *Charte canadienne des droits et libertés*?

5. Si la réponse à la 4e question est affirmative, le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel* du Canada, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

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Analysis

Given that there are two separate constitutional challenges to s. 542(2), I will deal with constitutional questions 1, 4 and 5 following my analysis of questions 2 and 3.

1. *Does it Violate the Charter for the Crown to Raise Evidence of Insanity Over and Above the Wishes of the Accused?*

The appellant argues that the common law rule for permitting the Crown to adduce evidence of insanity over and above the accused's wishes, which was enunciated by the Ontario Court of Appeal in *R. v. Simpson*, *supra*, and *R. v. Saxell*, *supra*, violates s. 7 of the *Charter*. The interveners, the Canadian Disability Rights Council et al. (hereinafter "C.D.R.C."), support the appellant in challenging the constitutionality of the common law rule under s. 15 of the *Charter*.

It should be noted that this Court has indicated, in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 592-93, that in cases where the *Charter* is generally applicable to the litigation in question (within the meaning of s. 32), the *Charter* applies to common law rules as well as to statutes and regulations. Furthermore, in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645, Le Dain J. (dissenting, although not on this point) made the following statement with respect to s. 1 of the *Charter*:

> The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule. [Emphasis added.]

Therefore, if a common law rule is inconsistent with the provisions of the Constitution, it is, to the extent of the inconsistency, of no force or effect (s. 52(1)). Having said that, I will begin by considering the appellant's argument under s. 7.

Section 7

For ease of reference, I have reproduced the text of s. 7 below:

Analyse

Puisque le par. 542(2) fait l'objet de deux contestations distinctes sur le plan constitutionnel, je traiterai des questions constitutionnelles 1, 4 et 5 après avoir analysé les questions 2 et 3.

1. *La présentation d'une preuve d'aliénation mentale par le ministère public, contre le gré de l'accusé, viole-t-elle la Charte?*

L'appelant prétend que la règle de common law qui permet au ministère public de présenter une preuve d'aliénation mentale, contre le gré de l'accusé, énoncée par la Cour d'appel de l'Ontario dans *R. v. Simpson* et *R. v. Saxell*, précités, viole l'art. 7 de la *Charte*. Les intervenants, le Conseil canadien des droits des personnes handicapées (ci-après le «C.C.D.P.H.») et les autres, appuient l'appelant dans sa contestation de la constitutionnalité de la règle de common law en vertu de l'art. 15 de la *Charte*.

Il convient de souligner que notre Cour a indiqué dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, aux pp. 592 et 593, que, dans les cas où la *Charte* s'applique de manière générale au litige en cause (au sens de l'art. 32), elle s'applique aux règles de la common law aussi bien qu'aux lois et aux règlements. De plus, dans l'arrêt *R. c. Therens*, [1985] 1 R.C.S. 613, à la p. 645, le juge Le Dain (dissident, mais non sur ce point) a fait l'affirmation suivante relativement à l'article premier de la *Charte*:

> Une restriction est prescrite par une règle de droit au sens de l'art. 1 si elle est prévue expressément par une loi ou un règlement, ou si elle découle nécessairement des termes d'une loi ou d'un règlement, ou de ses conditions d'application. La restriction peut aussi résulter de l'application d'une règle de *common law*. [Je souligne.]

Par conséquent, si certains éléments d'une règle de common law sont incompatibles avec les dispositions de la Constitution, ils sont alors inopérants (par. 52(1)). Cela dit, j'examinerai tout d'abord les arguments présentés par l'appelant en vertu de l'art. 7.

L'article 7

Pour plus de commodité, je reproduis ici le texte de l'art. 7:

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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.

In order to invoke the protection of s. 7, an individual must establish an actual or potential deprivation of life, liberty or security of the person. Once a life, liberty, or security of the person interest is established, the question becomes whether the deprivation of liberty or security of the person is or is not in accordance with the principles of fundamental justice.

In my view, the liberty interest of Mr. Swain is readily apparent in the case at bar. The common law rule allows the Crown, in certain circumstances, to raise evidence of the accused's insanity over and above the wishes of the accused. If the Crown is successful in establishing that the accused is insane, within the meaning of s. 16 of the *Code*, the accused will be subject to the legislative scheme, contained in ss. 542-547 of the *Code*, which provides for warrants of the Lieutenant Governor of the province. This means that the accused will be detained in strict custody until the pleasure of the Lieutenant Governor of the province is known. Depending on the order of the Lieutenant Governor, the accused may continue to be detained indefinitely, subject to periodic reviews (where a board of review has been appointed). The details of the L.G.W. system will be discussed in greater length below. I have given this brief overview simply to illustrate that when the Crown raises the issue of insanity, the liberty of the accused is clearly imperilled. That being so, it is necessary to address the issue of whether the deprivation of liberty is in accordance with the principles of fundamental justice.

In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, it was stated (at pp. 503 and 513):

. . . the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

. . .

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.

Pour invoquer la protection accordée par l'art. 7, une personne doit démontrer qu'il y a atteinte, réelle ou potentielle, à sa vie, à sa liberté ou à sa sécurité. Une fois démontré l'intérêt à cet égard, il s'agit alors de déterminer si l'atteinte à la liberté ou à la sécurité de la personne est conforme ou non aux principes de justice fondamentale.

À mon avis, il est évident que la question de la liberté de M. Swain est en cause en l'espèce. La règle de common law permet au ministère public, dans certaines circonstances, de présenter une preuve de l'aliénation mentale de l'accusé, contre le gré de celui-ci. Si le ministère public réussit à faire la preuve de l'aliénation mentale de l'accusé, au sens de l'art. 16 du *Code*, celui-ci sera assujetti au régime législatif, établi par les art. 542 à 547 du *Code*, qui prévoit la délivrance de mandats par le lieutenant-gouverneur de la province. Cela signifie que l'accusé sera tenu sous une garde rigoureuse jusqu'à ce que le bon plaisir du lieutenant-gouverneur soit connu. Selon l'ordonnance rendue par le lieutenant-gouverneur, l'accusé peut être détenu indéfiniment, sous réserve d'examens périodiques (lorsqu'une commission d'examen a été nommée). Nous analyserons plus loin les caractéristiques du système des mandats du lieutenant-gouverneur. J'ai fait ce bref exposé tout simplement pour montrer que lorsque le ministère public soulève la question de l'aliénation mentale, la liberté de l'accusé est nettement en péril. Par conséquent, il faut déterminer si l'entrave à la liberté est conforme aux principes de justice fondamentale.

Dans *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, notre Cour a dit (aux pp. 503 et 513):

. . . les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique. Ils relèvent non pas du domaine de l'ordre public en général, mais du pouvoir inhérent de l'appareil judiciaire en tant que gardien du système judiciaire.

. . .

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Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

It is therefore necessary to consider whether it is inconsistent with the basic tenets of our legal system for the Crown to be able to adduce evidence of insanity over and above the wishes of the accused.

The appellant argues that it is a principle of fundamental justice that an accused person be able to participate in a meaningful way in his or her defence and to make fundamental decisions about the conduct of his or her defence—such as waiving the defence of insanity. (I pause here to note that I will use the term "defence" in the broad sense of "any answer which defeats a criminal charge"; see my reasons for judgment in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1318.) It is argued that the functioning of the adversarial system is premised on the autonomy of an accused to make fundamental decisions about his or her defence which require certain consequences and risks to be weighed. The appellant's argument is reflected in the words of Stewart J. in *Faretta v. California*, 422 U.S. 806 (Calif. C.A., 1975), at p. 834:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law".

This Court has, on numerous occasions, acknowledged that the basic principles underlying our legal system are built on respect for the autonomy and intrinsic value of all individuals. In *Re B.C. Motor Vehicle Act*, *supra*, at p. 503, I referred to the principles of fundamental justice as:

... essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the

La question de savoir si un principe donné peut être considéré comme un principe de justice fondamentale au sens de l'art. 7 dépendra de l'analyse de la nature, des sources, de la raison d'être et du rôle essentiel de ce principe dans le processus judiciaire et dans notre système juridique à l'époque en cause.

Il est donc nécessaire d'examiner si les préceptes fondamentaux de notre système juridique permettent au ministère public de présenter une preuve d'aliénation mentale, contre le gré de l'accusé.

L'appelant soutient que l'un des principes de justice fondamentale dispose que l'accusé peut participer de façon significative à sa défense et prendre des décisions fondamentales quant à la conduite de sa défense, comme celle de renoncer à la défense d'aliénation mentale. (Je m'arrête pour souligner que j'utiliserai le terme «défense» au sens large d'«argument qu'une personne peut opposer à une accusation criminelle»; voir mes motifs de jugement dans l'arrêt *R. c. Chaulk*, [1990] R.C.S. 1303 à la p. 1318.) Il prétend que le fonctionnement de notre système contradictoire est fondé sur l'autonomie de l'accusé qui peut prendre des décisions fondamentales concernant sa défense, après avoir évalué certains risques et conséquences. On retrouve l'argument de l'appelant dans le jugement du juge Stewart, dans *Faretta v. California*, 422 U.S. 806 (Calif. C.A., 1975), à la p. 834:

[TRADUCTION] Le droit de se défendre est personnel. C'est le défendeur, et non son avocat ni l'État, qui supportera les conséquences personnelles d'une déclaration de culpabilité. C'est donc le défendeur qui doit être libre de décider s'il est avantageux d'être représenté par un avocat dans son cas. Et bien qu'il puisse mener sa propre défense, à son détriment peut-être, il faut accepter sa décision par «respect pour la personne, élément vital du droit».

Notre Cour a reconnu, à de nombreuses occasions, que les principes fondamentaux de notre système juridique sont fondés sur le respect de l'autonomie et de la valeur intrinsèque de chacun. Dans *Renvoi: Motor Vehicle Act de la C.-B.*, précité, à la p. 503, je dis que les principes de justice fondamentale sont:

... des éléments essentiels d'un système d'administration de la justice fondé sur la foi en «la dignité et la valeur de la personne humaine» (préambule de la *Déclaration canadienne des droits*, S.R.C. 1970, app. III) et

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rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

Similarly, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. stated, at p. 171:

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter*. Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*".

This Court has also recognized the constructs of the adversarial system as a fundamental part of our legal system. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, Sopinka J., in analyzing the doctrine of mootness, stated, at pp. 358-59:

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

Similarly, in *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 195, Sopinka J. referred to "our accusatorial and adversarial system of criminal justice". The Ontario Court of Appeal has also acknowledged the adversarial process as an integral part of our system of justice. In *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641, Evans J.A. stated, at p. 661:

A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants.

Professor Weiler, in "Two Models of Judicial Decision-Making" (1968), 46 *Can. Bar Rev.* 406, at p. 412, has characterized the adversarial process as follows:

An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute

en «la primauté du droit» (préambule de la *Charte canadienne des droits et libertés*).

De même, le juge Wilson a dit dans l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, à la p. 171:

À mon avis, le respect du pouvoir décisionnel de l'individu dans des domaines d'importance personnelle aussi fondamentaux que traduit la jurisprudence américaine nous renseigne aussi sur la *Charte* canadienne. D'ailleurs, comme le Juge en chef le rappelle dans l'arrêt *R. c. Big M Drug Mart Ltd.*, la foi en la valeur et en la dignité humaines «constitue [. . .] le fondement même de la tradition politique dans laquelle s'insère la *Charte*».

Notre Cour a également reconnu que la structure de notre système contradictoire fait partie intégrante de notre régime juridique. Dans l'arrêt *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, le juge Sopinka a dit, aux pp. 358 et 359, dans son analyse de la doctrine du caractère théorique:

La première raison d'être de la politique ou de la pratique en question tient à ce que la capacité des tribunaux de trancher des litiges a sa source dans le système contradictoire. L'exigence du débat contradictoire est l'un des principes fondamentaux de notre système juridique et elle tend à garantir que les parties ayant un intérêt dans l'issue du litige en débattent complètement tous les aspects.

De même, dans l'arrêt *R. c. Hebert*, [1990] 2 R.C.S. 151, à la p. 195, le juge Sopinka a traité de «notre système accusatoire et contradictoire de justice criminelle». La Cour d'appel de l'Ontario a également reconnu le processus contradictoire comme une partie intégrante de notre système de justice. Dans *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641, le juge Evans a affirmé ce qui suit à la page 661:

[TRADUCTION] Le procès n'est pas censé être une exploration scientifique où le juge joue le rôle de directeur des recherches; c'est un forum créé en vue d'exercer la justice pour les parties en cause.

Dans «Two Models of Judicial Decision-Making» (1968), 46 *R. du B. can.* 406, à la p. 412, le professeur Weiler a ainsi qualifié le processus contradictoire:

[TRADUCTION] Le processus contradictoire est celui qui répond plus ou moins à cette description: en prélude

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being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments. This is by contrast with the public processes of decision by "legitimated power" and "mediation-agreement", where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved.

Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence. The appellant has properly pointed out that an accused will not be in the position of choosing whether to raise the defence of insanity at his or her trial unless he or she is fit to stand trial. If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried before matters proceed further (see *Criminal Code*, s. 543, now s. 615). Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defence.

An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system. In *R. v. Chaulk*, *supra*, I indicated that the insanity defence is best characterized as an exemption to criminal liability which is based on an incapacity for criminal intent. In my view, the decision whether or not to raise this exemption as a means of negating criminal culpability is part and parcel of the conduct of an accused's overall defence.

The question remains, does the ability of the Crown to raise evidence of insanity over and above

au règlement du litige, les parties intéressées ont la possibilité de produire des éléments de preuve et de présenter des arguments devant un arbitre impartial non intéressé qui tranche l'affaire d'après la preuve et les arguments. Ceci s'oppose au processus décisionnel public fondé sur le «pouvoir légitime» ou sur la «médiation/convention» où les modes respectifs de participation garantie sont le vote et la négociation. La décision judiciaire se distingue en ce qu'elle garantit à chaque partie touchée le droit de préparer et de présenter des observations sur lesquelles le règlement du litige sera fondé.

Puisque les principes de justice fondamentale reposent sur un système accusatoire et contradictoire de justice criminelle fondé sur le respect de l'autonomie et de la dignité humaines, il me semble évident qu'il faut également, en vertu des principes de justice fondamentale, qu'un accusé ait le droit de contrôler la conduite de sa propre défense. L'appelant a souligné avec raison qu'un accusé ne sera pas en mesure de choisir s'il doit ou non présenter un moyen de défense fondé sur l'aliénation mentale lors de son procès à moins qu'il ne soit apte à subir ce procès. Si, à tout moment avant le verdict, la question de la capacité de l'accusé de conduire sa propre défense est soulevée, le juge du procès peut ordonner que cette question soit tranchée avant d'aller plus loin (voir l'art. 543 (maintenant l'art. 615) du *Code criminel*). Ainsi, l'accusé qui n'a pas été jugé incapable de subir son procès doit être considéré comme capable de conduire sa propre défense.

L'accusé décide lui-même s'il sera représenté par un avocat, s'il témoignera ou non en sa propre défense et quels témoins il citera à comparaître. Cela traduit le respect qu'a toujours eu notre société pour l'autonomie de l'individu dans un système contradictoire. Dans l'arrêt *R. c. Chaulk*, précité, j'ai souligné qu'il faut définir la défense d'aliénation mentale comme une exemption de responsabilité pénale fondée sur l'incapacité de former une intention criminelle. À mon avis, la question de savoir s'il y a lieu ou non de soulever cette exemption pour faire obstacle à la culpabilité criminelle fait partie intégrante de la conduite générale de la défense de l'accusé.

La question demeure la suivante: le pouvoir du ministère public de présenter une preuve d'aliénation

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the accused's wishes interfere with the accused's control over the conduct of his or her defence?

The mere fact that the Crown is able to raise a defence which the accused does not wish to raise, and thereby to trigger a special verdict which the accused does not wish to trigger, means that the accused has lost a degree of control over the conduct of his or her defence. In my view, this in itself is sufficient to answer the question posed above. However, the appellant has argued that an accused's control over his or her defence is threatened in a more immediate sense when the Crown is able to raise independently the issue of insanity. The appellant contends that the Crown's ability to raise insanity permits the prosecution to place an accused in a position where inconsistent defences must be advanced, discredits and undermines the accused's credibility so that other defences are prejudiced, and has a tendency to leave the jury with the impression that the accused is, because of mental illness, the "type of person" who would have committed the offence.

It is not difficult to see that the Crown's ability to raise independently the issue of insanity could very well interfere with other defences being advanced by the accused. For example, an accused who wishes to defend on the basis of alibi could very well be thwarted in this approach by the Crown's raising the inconsistent defence of insanity. It is also apparent that the Crown's ability to raise insanity could undermine an accused's credibility with the jury and could give rise to the inference that the accused is someone who would likely commit a crime. The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging. The intervener, C.D.R.C., describes the historical treatment of the mentally ill as follows:

For centuries, persons with a mental disability have been systematically isolated, segregated from the mainstream of society, devalued, ridiculed, and excluded from participation in ordinary social and political processes.

mentale, contre le gré de l'accusé, entrave-t-il le contrôle de l'accusé sur la conduite de sa propre défense?

Le simple fait que le ministère public puisse soulever un moyen de défense que l'accusé n'a pas l'intention d'employer, et ainsi donner lieu à un verdict spécial que l'accusé ne désire pas, signifie que l'accusé a perdu un certain degré de contrôle sur la conduite de sa propre défense. À mon avis, cela suffit à répondre à la question déjà posée. Toutefois, l'appelant a prétendu que le contrôle de l'accusé sur sa propre défense est menacé de façon plus immédiate lorsque le ministère public peut soulever indépendamment la question de l'aliénation mentale. Il soutient que ce pouvoir permet au ministère public d'obliger l'accusé à présenter des moyens de défense incompatibles, discrédite et attaque la crédibilité de l'accusé, ce qui désavantage d'autres moyens de défense, et a tendance à laisser au jury l'impression que, en raison d'une maladie mentale, l'accusé est «le genre de personne» qui aurait commis l'infraction reprochée.

Il n'est pas difficile de voir que le pouvoir du ministère public de soulever indépendamment la question de l'aliénation mentale pourrait très bien empêcher l'accusé de faire valoir d'autres moyens de défense. Par exemple, le prévenu qui veut présenter une défense d'alibi peut très bien voir ses efforts contrariés si le ministère public soulève le moyen de défense incompatible d'aliénation mentale. Il est également évident que la possibilité que le ministère public soulève la question de l'aliénation mentale peut réduire la crédibilité de l'accusé face au jury et mener ce dernier à conclure qu'il est une personne susceptible de commettre un crime. De tout temps, les malades mentaux ont été l'objet d'abus, de négligence et de discrimination dans notre société. L'opprobre de la maladie mentale peut être très lourd à porter. L'intervenant le C.C.D.P.H. décrit ainsi la façon dont les malades mentaux ont été traités dans l'histoire:

[TRADUCTION] Pendant des siècles, les personnes souffrant de déficience mentale ont été systématiquement isolées, placées en marge de la société, dévalorisées, ridiculisées et exclues des processus social et politique normaux.

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The above description is, in my view, unfortunately accurate and appears to stem from an irrational fear of the mentally ill in our society. While I have a very high regard for the intelligence and good faith of Canadian juries, it is nonetheless apparent that an accused's credibility could be irreversibly damaged by the Crown's raising evidence of insanity.

The Crown has argued that the right of an accused to control the conduct of his or her defence is adequately safeguarded by the exercise of judicial discretion which was contemplated in both *Simpson* and *Saxell*, *supra*. In *Saxell*, the Ontario Court of Appeal held that the Crown may adduce evidence of insanity only with leave of the trial judge, who may first require that a *voir dire* be held. The court indicated that the exercise of discretion should be based on the following factors, at pp. 188-89:

The overriding consideration is that the interest of justice demands that the accused should not be convicted of the offence charged. There must be convincing evidence that the accused has committed the act alleged. Manifestly, it would be wrong if evidence of insanity were to influence the jury's decision on that issue, either by affecting his credibility in case he testified, or by leading to the conclusion that the accused was the sort of person likely to have committed the act.

The evidence of insanity at the time of commission of the act must be sufficiently substantial, and create such a grave question whether the accused had the capacity to commit the offence, that the interests of justice require it to be adduced.

Although not expressly so stated in the reasons for judgment in *R. v. Simpson*, *supra*, I consider that in exercising his discretion whether to permit the Crown to adduce evidence of the insanity of the accused, the Judge ought to have regard to the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public.

I agree that it would be "manifestly" wrong if evidence of insanity were to influence the jury's decision on the issue of whether the accused committed the alleged act, but, with respect, I fail to see how the discretion of the trial judge to refuse to allow the

J'estime que cette description est malheureusement exacte; elle semble venir d'une peur irrationnelle de notre société face au malade mental. Bien que j'aie beaucoup d'estime pour l'intelligence et la bonne foi des jurés canadiens, il me semble toutefois que la crédibilité d'un accusé pourrait être irrémédiablement atteinte si le ministère public présente une preuve d'aliénation mentale.

Le ministère public prétend que le droit d'un accusé de contrôler sa défense est bien protégé par l'exercice du pouvoir judiciaire discrétionnaire qui était envisagé dans les arrêts *Simpson* et *Saxell*, précités. Dans *Saxell*, la Cour d'appel de l'Ontario a conclu que le ministère public ne peut présenter une preuve d'aliénation mentale qu'avec l'autorisation du juge du procès, qui peut d'abord exiger la tenue d'un voir-dire. La cour a signalé que l'exercice de ce pouvoir devrait être fondé sur les facteurs suivants, aux pp. 188 et 189:

[TRADUCTION] La considération la plus importante est que l'intérêt de la justice exige que l'accusé ne soit pas déclaré coupable de l'infraction qui lui est reprochée. Il doit y avoir des éléments de preuve convaincants que l'accusé a commis l'acte allégué. De toute évidence, il ne faudrait pas que la preuve d'aliénation mentale influence la décision du jury sur cette question, soit en attaquant sa crédibilité, s'il décide de témoigner, soit en entraînant la conclusion selon laquelle l'accusé est le genre de personne susceptible de commettre cet acte.

La preuve de l'aliénation mentale au moment de la perpétration de l'acte doit être suffisamment substantielle et soulever une question si sérieuse, à savoir si l'accusé était capable de commettre l'infraction, qu'il est dans l'intérêt de la justice de la produire.

Même si les motifs du jugement dans *R. v. Simpson*, précité, ne le précisent pas expressément, j'estime que dans l'exercice de son pouvoir discrétionnaire de décider s'il doit autoriser le ministère public à produire une preuve de l'aliénation mentale de l'accusé, le juge devrait tenir compte de la nature et de la gravité de l'infraction reprochée et de la mesure dans laquelle l'accusé peut présenter un danger pour le public.

Je partage l'avis que, «de toute évidence», il ne faudrait pas que la preuve d'aliénation mentale influence la décision du jury sur la question de savoir si l'accusé a bel et bien commis l'acte reproché; mais, avec égards, je ne vois pas comment le pouvoir discrétion-

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Crown to raise insanity unless there is "convincing evidence" that the accused committed the alleged act will prevent this from happening. In my opinion, while the Ontario Court of Appeal has recognized the prejudicial effect of allowing the Crown to raise evidence of insanity, it has not formulated a mechanism which adequately safeguards the right of the accused to control his or her defence.

In my view, the ability of the Crown to raise evidence of insanity over and above the accused's wishes, under the existing common law rule, does interfere with the accused's control over the conduct of his or her defence. However, this is not to say that if an accused chooses to raise evidence which tends to put his or her mental capacity for criminal intent into question but falls short of raising the defence of insanity (within s. 16), the Crown will be unable to raise its own evidence of insanity. In circumstances where the accused's own evidence tends to put his or her mental capacity for criminal intent into question, the Crown will be entitled to put forward its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16. Whether the accused's evidence does, in fact, put mental capacity for criminal intent in issue will be a matter for the trial judge to determine in the particular circumstances of each case. The Crown's ability to raise evidence of insanity in these circumstances is necessary because, otherwise, the jury could well be left with an incomplete picture of the accused's mental capacity. If an accused were able to raise some evidence of mental incapacity (short of an insanity defence) and, at the same time, able to preclude the Crown from raising any evidence of insanity that it may have in its possession, the possibility would arise that the accused could be acquitted by a jury which was deprived of the "full story" surrounding the accused's mental incapacity. Such a result is clearly undesirable. Furthermore, the Crown's ability to raise evidence of insanity only after an accused has put his or her mental capacity for criminal intent in issue does not raise the problem, discussed above, of the Crown's

naire du juge du procès, qui peut refuser de permettre au ministère public de soulever la question de l'aliénation mentale sauf s'il y a des «éléments de preuve convaincants» que l'accusé a commis l'acte reproché, pourra faire obstacle à cette conséquence. À mon avis, bien que la Cour d'appel de l'Ontario ait reconnu les effets néfastes que peut avoir la décision de laisser le ministère public présenter une preuve d'aliénation mentale, elle n'a pas formulé de mécanisme qui protège adéquatement le droit de l'accusé de contrôler sa défense.

Selon moi, le fait que le ministère public puisse présenter une preuve d'aliénation mentale, contre le gré de l'accusé, en vertu de la règle de common law existante, entrave effectivement le contrôle de l'accusé sur la conduite de sa défense. Cependant, cela ne veut pas dire que si un accusé choisit de présenter des éléments de preuve qui tendent à mettre en doute sa capacité mentale de former une intention criminelle, sans toutefois soulever la défense d'aliénation mentale (au sens de l'art. 16), le ministère public sera incapable de présenter sa propre preuve d'aliénation mentale. En effet, lorsque la preuve même de l'accusé tend à mettre en doute sa capacité mentale de former une intention criminelle, le ministère public aura le droit de présenter sa propre preuve d'aliénation mentale et le juge du procès sera fondé à donner des directives au jury relativement à l'art. 16. Il appartiendra au juge du procès de déterminer, dans les circonstances particulières de chaque espèce, si la preuve de l'accusé, en fait, met en cause la capacité mentale de former une intention criminelle. Il est nécessaire que le ministère public puisse présenter une preuve d'aliénation mentale dans ces circonstances parce que, si ce n'était pas le cas, le jury pourrait bien n'avoir qu'une image incomplète de la capacité mentale de l'accusé. Si l'accusé pouvait présenter certains éléments de preuve d'incapacité mentale (sans aller jusqu'à une défense d'aliénation mentale) et pouvait en même temps empêcher le ministère public de présenter tout élément de preuve d'aliénation mentale qu'elle peut avoir en sa possession, il se pourrait bien que l'accusé puisse être acquitté par un jury privé du «tableau complet» de l'incapacité mentale de l'accusé. Un tel résultat est évidemment peu souhaitable. De plus, la possibilité pour le ministère public de présenter une preuve

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being able to place an accused in a position where inconsistent defences must be advanced.

Thus, although it is a principle of fundamental justice that an accused has the right to control his or her own defence, this is not an "absolute" right. If an accused chooses to conduct his or her defence in such a way that that accused's mental capacity for criminal intent is somehow put into question, then the Crown will be entitled to "complete the picture" by raising its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16.

The common law rule which was enunciated in *R. v. Simpson*, *supra* and *R. v. Saxell*, *supra*, does not limit the Crown to raising insanity only in circumstances where an accused's own defence puts his or her mental capacity for criminal intent into issue. Thus, the existing common law rule which allows the Crown to raise evidence of insanity over and above the wishes of the accused does violate a principle of fundamental justice.

The Crown has indicated, however, that the Crown's ability to raise independently evidence of insanity conforms with a second principle of fundamental justice; namely, that a person who was insane at the time of the offence (and was therefore incapable of having criminal intent) ought not to be convicted under the criminal law. In other words, it is argued that the Crown must have the ability to raise evidence of insanity when the accused chooses not to do so, because it would violate the principles of fundamental justice for the accused to be convicted of a criminal offence when there is a real question about the accused's criminal culpability (and, therefore, about the accused's guilt).

I agree that it is a principle of fundamental justice that the criminal justice system not convict a person who was insane at the time of the offence. To the extent that it is a principle protected by the *Charter*, it is one of the individual rights included in s. 7. However, this principle of fundamental justice is not

d'aliénation mentale seulement après que l'accusé a mis en cause sa capacité mentale de former une intention criminelle ne soulève pas le problème, analysé précédemment, de la possibilité pour le ministère public de placer un accusé dans une situation où il doit avancer des moyens de défense incompatibles.

Ainsi, bien que le droit d'un accusé de contrôler sa défense soit un principe de justice fondamentale, ce droit n'est pas «absolu». Si un accusé choisit de mener sa défense de telle manière que sa capacité mentale de former une intention criminelle est d'une manière ou d'une autre mise en doute, le ministère public aura alors le droit de «compléter le tableau» en présentant sa propre preuve d'aliénation mentale et le juge du procès sera fondé à donner au jury des directives relativement à l'art. 16.

La règle de common law énoncée dans les arrêts *R. v. Simpson* et *R. v. Saxell*, précités, ne limite pas le ministère public à ne soulever l'aliénation mentale que lorsque la défense de l'accusé met en cause sa capacité mentale de former une intention criminelle. Par conséquent, la règle de common law qui permet au ministère public de présenter une preuve d'aliénation mentale, contre le gré de l'accusé, contrevient bien à un principe de justice fondamentale.

Le ministère public a toutefois souligné que sa capacité de présenter indépendamment une preuve d'aliénation mentale est compatible avec un second principe de justice fondamentale, savoir qu'une personne qui était aliénée au moment de la perpétration de l'infraction (et donc incapable d'avoir une intention criminelle) ne devrait pas être déclarée coupable en droit criminel. Autrement dit, on prétend que le ministère public doit pouvoir présenter la preuve d'aliénation mentale lorsque l'accusé décide de ne pas le faire, parce qu'il serait contraire aux principes de justice fondamentale de déclarer l'accusé coupable d'une infraction criminelle lorsqu'il existe un doute véritable quant à la culpabilité criminelle de l'accusé.

Je suis d'accord qu'il relève d'un des principes de justice fondamentale de notre système de justice pénale qu'une personne qui était aliénée au moment de l'infraction ne doit pas être déclarée coupable. Dans la mesure où ce principe est protégé par la *Charte*, il fait partie des droits individuels que prévoit

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triggered by the accused's claim to his s. 7 rights under the *Charter* in this case. Here, the accused has proved that his liberty was denied in a manner which does not accord with the principle of fundamental justice that an accused must have control over the conduct of his or her defence. In my view, this concludes the matter. As I indicated in *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1247-48, with respect to s. 11(*b*), the legal rights set out therein were enacted for the benefit of individuals. In this case, the accused chose not to invoke the principle of fundamental justice that the criminal justice system not convict a person who was insane at the time of the offence. Therefore, in this case, this principle cannot be a part of the s. 7 analysis.

l'art. 7. Cependant, en l'espèce, ce principe de justice fondamentale n'entre pas en jeu du fait que l'accusé demande la reconnaissance des droits que lui reconnaît l'art. 7 de la *Charte*. L'accusé a démontré qu'il y avait eu atteinte à sa liberté d'une façon qui est incompatible avec le principe de justice fondamentale selon lequel l'accusé doit avoir le contrôle de la conduite de sa défense. À mon avis, cela règle la question. Comme je le dis dans l'arrêt *R. c. Askov*, [1990] 2 R.C.S. 1199, aux pp. 1247 et 1248, en ce qui concerne l'al. 11*b*), les garanties juridiques mentionnées dans cet arrêt ont été adoptées au profit des particuliers. En l'espèce, l'accusé a choisi de ne pas invoquer le principe de justice fondamentale selon lequel, dans notre système de justice criminelle, on ne déclare pas coupable une personne qui était aliénée au moment de l'infraction. Par conséquent, ce principe ne peut, en l'espèce, servir à l'analyse fondée sur l'art. 7.

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by s. 7 should take place within the confines of s. 1 of the *Charter*. Accordingly, while I agree that it is a basic tenet of our legal system that a person who was insane at the time of the offence ought not to be convicted, I prefer to deal with this concern, in this case, under s. 1 of the *Charter*.

Il n'est pas acceptable que l'État puisse contrecarrer l'exercice du droit de l'accusé en tentant de faire jouer les intérêts de la société dans l'application des principes de justice fondamentale, et restreindre ainsi les droits reconnus à l'accusé par l'art. 7. Les intérêts de la société doivent entrer en ligne de compte dans l'application de l'article premier de la *Charte*, lorsqu'il incombe au ministère public de démontrer que la justification de la règle de droit attaquée peut se démontrer dans le cadre d'une société libre et démocratique. En d'autres termes, j'estime que l'évaluation des intérêts de la société par rapport au droit individuel garanti par l'art. 7 ne devrait se faire que dans le contexte de l'article premier de la *Charte*. Par conséquent, bien que j'admette que l'un des préceptes fondamentaux de notre système juridique soit qu'une personne aliénée au moment de l'infraction ne doit pas être déclarée coupable, je préfère traiter de cette question, en l'espèce, dans le cadre de l'examen de l'article premier de la *Charte*.

Thus, it is my view that the common law rule which allows the Crown to raise evidence of insanity over and above the accused's wishes is a denial of liberty which is not in accordance with the principles of fundamental justice. Accordingly, the common law rule limits an accused's rights under s. 7 of the *Charter*.

J'estime donc que la règle de common law qui permet au ministère public de présenter une preuve d'aliénation mentale contre le gré de l'accusé constitue une entrave à la liberté, incompatible avec les principes de justice fondamentale. En conséquence, la règle de common law restreint les droits reconnus à l'accusé par l'art. 7 de la *Charte*.

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Given that I have found a limitation of an accused's rights under s. 7, it will be unnecessary to consider whether the common law rule which allows the Crown to raise evidence of insanity over and above the accused's wishes also restricts the rights enunciated in ss. 9 and 15 of the *Charter*, unless the limitation on s. 7 can be upheld under s. 1. It is my view that s. 9 has no application to this issue and I note that the parties directed no argument to this section despite its inclusion in the constitutional question.

Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an

Puisque j'ai conclu qu'il existe une restriction des droits que l'art. 7 reconnaît à l'accusé, il n'y aura pas lieu de déterminer si la règle de common law qui permet au ministère public de présenter une preuve d'aliénation mentale contre le gré de l'accusé restreint également les droits prévus aux art. 9 et 15 de la *Charte*, à moins que la restriction à l'art. 7 puisse être jugée acceptable par l'application de l'article premier. Je suis d'avis que l'art. 9 ne s'applique pas en l'espèce et je remarque que les parties n'ont présenté aucun argument eu égard à cet article, bien qu'il ait été inclus dans la question constitutionnelle.

Avant de passer à l'article premier, j'aimerais toutefois souligner que, puisque le présent pourvoi comporte une contestation fondée sur la *Charte* d'une règle de common law, formulée par les tribunaux, l'analyse de la *Charte* fait intervenir des considérations différentes de celles qui s'appliquent à la contestation d'une disposition législative. Par exemple, la cour ayant conclu que la règle de common law actuelle restreint les droits que l'art. 7 de la *Charte* reconnaît à l'accusé, il n'est peut-être pas strictement nécessaire d'examiner la pertinence de l'application de l'article premier. Après avoir conclu que la règle de common law énoncée par la Cour d'appel de l'Ontario restreint le droit à la liberté de l'accusé d'une façon non conforme aux principes de justice fondamentale, j'estime qu'il conviendrait peut-être de déterminer, à ce stade-ci, s'il est possible de formuler une autre règle de common law qui ne serait pas contraire aux principes de justice fondamentale.

S'il est possible d'énoncer une nouvelle règle de common law qui ne contrevienne pas au droit de l'accusé de contrôler la conduite de sa défense, je n'ai aucune difficulté à imaginer que la Cour puisse simplement la formuler, en remplacement de l'ancienne, sans chercher à savoir si l'ancienne règle pourrait néanmoins être maintenue en vertu de l'article premier de la *Charte*. Vu que la règle de common law a été créée par des juges et non par le législateur, l'égard que les tribunaux doivent avoir envers les organismes élus n'est pas en cause. S'il est possible de reformuler une règle de common law de façon qu'elle ne s'oppose pas aux principes de justice fondamentale, il faudrait le faire. Évidemment, s'il n'était pas possible de reformuler la règle de common

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infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*. As was noted at the outset of this analysis, this Court has stated that a limit "prescribed by law" within the meaning of s. 1 may arise from the application of a common law rule as well as from a statute or regulation. Thus, I do not wish to be taken as having held that s. 1 can never have application when a common law rule is challenged under the *Charter*.

In a sense, this stage of the analysis is similar to that which would arise if the challenge to the common law rule had not been brought under the *Charter*. Had the parties chosen to approach this issue from the standpoint that the common law rule was simply contrary to basic principles of criminal law, the Court would have been in the position of considering whether the rule could be reformulated so as to remove any inconsistency with basic criminal law principles (principles of fundamental justice), while still obtaining the original objectives. In other words, it is not strictly necessary to invoke s. 52(1) of the *Constitution Act, 1982* in order to challenge a common law, judge-made rule on the basis of the rights and values guaranteed by the *Charter*—if a common law rule can be reformulated so as to attain its objectives while removing any inconsistency with basic principles, a judge is entitled to undertake such a reformulation and is not obliged to seek jurisdiction for this action under s. 52(1).

However, this appeal does involve a s. 52(1) challenge to the existing common law rule and, in my view, there are good reasons to go on to consider the application of s. 1 in this case, within the guidelines enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103. The *Oakes* test provides a familiar structure through which the objectives of the common law rule can be kept in focus and alternative means of attaining these objectives can be considered. Furthermore, the constitutional questions were stated with s. 1 in mind. While this is not, in and of itself, determinative, the Court has had the benefit of considered argument

law de sorte qu'il n'y ait pas violation d'une liberté ou d'un droit protégé par la Constitution, la Cour devrait alors déterminer si la règle de common law peut être maintenue parce qu'elle constitue une limite raisonnable en vertu de l'article premier de la *Charte*. Comme je l'ai souligné au début de cette analyse, notre Cour a affirmé qu'une restriction «prescrite par une règle de droit», au sens de l'article premier, peut découler de l'application tant d'une règle de common law que d'une disposition législative ou réglementaire. Or, je ne voudrais pas que l'on croie que j'ai conclu que l'article premier n'est jamais applicable lorsqu'une règle de common law est contestée en vertu de la *Charte*.

D'une certaine façon, cette étape de l'analyse ressemble à l'examen qu'aurait soulevé la contestation de la règle de common law si elle n'avait pas été fondée sur la *Charte*. Si les parties avaient allégué que la règle de common law était tout simplement contraire aux principes fondamentaux du droit criminel, la Cour aurait été en mesure d'apprécier si elle pouvait être reformulée de façon à être compatible avec les principes fondamentaux de droit criminel (principes de justice fondamentale), tout en atteignant ses objectifs originaux. En d'autres termes, il n'est pas strictement nécessaire d'invoquer le par. 52(1) de la *Loi constitutionnelle de 1982* pour contester une règle de common law, formulée par les tribunaux, sur le fondement des droits et valeurs garantis par la *Charte*; si une règle de common law peut être reformulée de sorte qu'elle soit compatible avec les principes fondamentaux tout en atteignant ses objectifs, un juge a le droit de procéder à cette reformulation et il n'est pas tenu de s'autoriser du par. 52(1).

Cependant, le présent pourvoi comporte bel et bien une contestation, en vertu du par. 52(1), de la règle de common law actuelle et, à mon avis, il y a de bonnes raisons de poursuivre l'analyse de l'application de l'article premier en l'espèce, selon les lignes directrices énoncées dans *R. c. Oakes*, [1986] 1 R.C.S. 103. Le critère de l'arrêt *Oakes* offre une structure bien connue permettant de se concentrer sur les objectifs visés par la règle de common law et d'envisager d'autres façons d'atteindre ces objectifs. En outre, les questions constitutionnelles ont été formulées en fonction de l'article premier. Bien que cela ne

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under s. 1 both from the immediate parties and from a number of interveners. In my view, it would be both appropriate and helpful for the Court to take advantage of these submissions in considering the objective of the existing rule and in considering whether an alternative common law rule could be fashioned which would be less intrusive to the conduct of an accused's defence. Finally, earlier in these reasons I stated that any consideration of societal interests in not convicting a person who was insane at the time of the offence ought to be left to the s. 1 analysis and ought not to be brought into the s. 7 analysis of the principles of fundamental justice. Having said this, I feel compelled to address these interests under s. 1 of the *Charter*.

For the reasons given above, I will now consider whether the existing common law rule can be upheld as a reasonable limit under s. 1 of the *Charter*.

Section 1

Like the other rights and freedoms set out in the *Charter*, s. 7 is subject to limitations under s. 1 of the *Charter*. The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 was set out by this Court in *R. v. Oakes*, *supra*:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

soit pas déterminant en soi, la Cour a pu entendre les arguments réfléchis que les parties immédiatement concernées et un certain nombre d'intervenants ont fondés sur l'article premier. À mon avis, il serait à la fois pertinent et utile que la Cour profite de ces présentations pour apprécier l'objectif visé par la règle actuelle et déterminer s'il est possible d'énoncer une nouvelle règle de common law qui serait moins envahissante au regard de la façon dont l'accusé conduit sa défense. Enfin, j'ai déjà affirmé dans les présents motifs que l'évaluation de l'intérêt que représente pour la société la décision de ne pas déclarer coupable une personne qui était aliénée au moment de l'infraction devrait relever de l'analyse de l'article premier et non des principes de justice fondamentale en vertu de l'art. 7. Cela dit, je me sens tenu d'étudier cet intérêt en vertu de l'article premier de la *Charte*.

Pour les motifs qui précèdent, j'examinerai maintenant la question de savoir si la règle de common law actuelle constitue une limite raisonnable en vertu de l'article premier de la *Charte*.

L'article premier

Comme tous les droits et libertés garantis par la *Charte*, l'art. 7 est assujetti aux restrictions prévues à l'article premier de la *Charte*. Notre Cour a établi la procédure à suivre lorsque l'État tente de justifier, en vertu de l'article premier, une restriction apportée à un droit ou à une liberté, dans l'arrêt *R. c. Oakes*, précité.

1. L'objectif de la disposition attaquée doit être suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution; il doit se rapporter à des préoccupations urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important.

2. S'il est reconnu qu'un objectif est suffisamment important, les moyens choisis pour atteindre l'objectif doivent respecter un critère de proportionnalité; c'est-à-dire qu'ils doivent:

a) avoir un «lien rationnel» avec l'objectif et n'être ni arbitraires, ni inéquitables, ni fondés sur des considérations irrationnelles;

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(b) impair the right or freedom in question as "little as possible"; and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

(i) *Objective*

Given that this appeal involves a common law, judge-made rule, the task of the Court under this part of the *Oakes* test is not to construe the objective of Parliament or of a legislature, but rather to construe the overall objective of the common law rule which has been enunciated by the courts.

In my view, the objective of the common law rule which allows the Crown, in some cases, to raise evidence of insanity over and above the accused's wishes is twofold. One of the objectives was identified by Martin J.A. in *Simpson*, *supra*, at p. 362:

> ... to avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane.

The common law rule is aimed not only at avoiding the unfair treatment of the accused but also at maintaining the integrity of the criminal justice system itself. The accused is not the only person who has an interest in the outcome of the trial; society itself has an interest in ensuring that the system does not incorrectly label insane people as criminals.

The second objective was aptly characterized by the appellant as the protection of the public from presently dangerous persons requiring hospitalization. This objective arises from the fact that the Crown's option to simply discontinue the prosecution of an accused, whom it suspects was insane at the time of the offence, does not address the concern that such a person may well be presently dangerous and may therefore bring him or herself into contact with the criminal justice system once again.

In my view, the dual objectives outlined above relate to pressing and substantial concerns in our society and are of sufficient importance to warrant

b) porter «le moins possible» atteinte au droit ou à la liberté en question;

c) être de nature à ce que leurs effets sur la restriction des droits et libertés soient proportionnels à l'objectif.

(i) *L'objectif*

Puisque le présent pourvoi porte sur une règle de common law, formulée par les tribunaux, le rôle de la Cour, selon cette partie des critères de l'arrêt *Oakes*, n'est pas d'interpréter l'objectif du législateur, mais bien d'interpréter l'objectif général que visait la règle de common law énoncée par les tribunaux.

À mon avis, l'objectif de la règle de common law qui permet au ministère public, dans certains cas, de présenter une preuve d'aliénation mentale contre le gré de l'accusé comporte deux volets. Le juge Martin a dégagé l'un de ces objectifs dans l'arrêt *Simpson*, précité (à la p. 362):

> [TRADUCTION] ... éviter que soit déclaré coupable un accusé qui n'est peut-être pas responsable de l'infraction, pour cause d'aliénation mentale, mais qui refuse de produire une preuve forte du fait qu'il était aliéné.

La règle de common law n'a pas seulement pour but d'éviter que l'accusé soit traité de façon inéquitable, mais aussi de protéger l'intégrité du système de justice criminelle. L'accusé n'est pas le seul à avoir un intérêt dans l'issue du procès; la société elle-même a intérêt à s'assurer que le système ne considère pas erronément des personnes aliénées comme des criminels.

L'appelant estime avec justesse que le second objectif est la protection du public contre des personnes dangereuses à l'heure actuelle et qui devraient être hospitalisées. Cet objectif tient au fait que la décision d'abandonner tout simplement la poursuite d'un accusé, soupçonné d'avoir été aliéné au moment de l'infraction, ne règle pas la question de l'accusé qui peut être dangereux à l'heure actuelle et qui, par conséquent, risque d'être de nouveau en contact avec le système de justice criminelle.

À mon avis, les objectifs susmentionnés se rapportent à des préoccupations urgentes et réelles dans notre société et sont suffisamment importants pour

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overriding a constitutionally protected right or freedom. Accordingly, I turn now to consider whether the common law rule passes the proportionality test set out in *Oakes*.

(ii) *Proportionality Test*

1. Rational Connection

The question to be addressed at this stage of the *Oakes* analysis is whether there is a rational connection between the objectives, which were identified above under the first branch of the test, and the means which have been chosen to attain these objectives—namely the common law rule allowing the Crown to raise independently evidence of insanity in certain circumstances.

Allowing the Crown to raise evidence of insanity in cases where the accused has chosen not to do so is one way of avoiding the conviction of individuals who were insane at the time the offence was committed, but who do not wish to raise the issue of insanity. While this method of achieving the first objective may raise certain problems and may not be the preferred method of achieving the objective, it is nonetheless a logical means of achieving the desired objective.

Similarly, allowing the Crown to raise insanity in cases where the accused has chosen not to do so is one way of protecting the public from people who may be presently dangerous. If the Crown is able to prove insanity, the accused will be subject to detainment and review under the L.G.W. system. While this method may again raise certain problems, it is nonetheless a logical means of achieving the second objective.

Thus, in my view, there is a rational connection between the objectives and the means chosen to attain the objectives, and the common law rule therefore passes the first part of the proportionality test in *Oakes*.

justifier la suppression d'un droit ou d'une liberté garantis par la Constitution. Par conséquent, j'examinerai maintenant la question de savoir si la règle de common law répond au critère de proportionnalité énoncé dans l'arrêt *Oakes*.

(ii) *Le critère de proportionnalité*

1. Le lien rationnel

À cette étape-ci de l'analyse fondée sur l'arrêt *Oakes*, il s'agit de déterminer s'il existe un lien rationnel entre les objectifs, déjà relevés dans la première partie de l'analyse, et les mesures choisies pour les atteindre, savoir la règle de common law qui permet au ministère public de présenter indépendamment une preuve d'aliénation mentale dans certaines circonstances.

Permettre au ministère public de produire une preuve d'aliénation mentale lorsque l'accusé a choisi de ne pas le faire est une façon d'éviter la déclaration de culpabilité de personnes qui étaient aliénées au moment où l'infraction a été commise, mais qui ne désirent pas soulever la question de l'aliénation mentale. Bien que cette façon d'atteindre le premier objectif puisse présenter certains problèmes et ne soit peut-être pas idéale, elle constitue tout de même un moyen logique d'atteindre l'objectif souhaité.

De même, permettre au ministère public de soulever l'aliénation mentale lorsque l'accusé a choisi de ne pas le faire est une façon de protéger le public contre des personnes qui sont peut-être dangereuses à l'heure actuelle. Si le ministère public fait la preuve de l'aliénation mentale, l'accusé sera soumis à une détention et à des examens comme le prévoit le système de mandats du lieutenant-gouverneur. Bien que cette méthode puisse également soulever certains problèmes, elle constitue néanmoins un moyen logique d'atteindre le second objectif.

Par conséquent, je suis d'avis, qu'il existe un lien rationnel entre les objectifs et les mesures choisies pour les atteindre; la règle de common law respecte donc la première partie du critère de proportionnalité établi dans l'arrêt *Oakes*.

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2. As Little as Possible

The question under this part of the proportionality test is whether the impugned law (in this case, the common law rule and criteria enunciated by the Ontario Court of Appeal) violates *Charter* rights as little as possible in order to achieve the "pressing and substantial" objective. In other words while the means chosen may be rationally connected to the objective, they may, at the same time, be unnecessarily intrusive on constitutional rights in light of alternative means. This Court has stated on a number of occasions that the absolutely least intrusive means need not be chosen in order for a law to pass the "as little as possible" test (see: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123). However, as I have indicated above, it is my view that the *Oakes* analysis requires somewhat different considerations when, as here, a judge-made rule is being challenged under the *Charter*.

In cases where legislative provisions have been challenged under s. 52(1) of the *Constitution Act, 1982* this Court has been cognizant of the fact that such provisions are enacted by an elected body which must respond to the competing interests of different groups in society and which must always consider the polycentric aspects of any given course of action. For this reason, this Court has indicated that Parliament need not always choose the absolutely least intrusive means to attain its objectives, but must come within a range of means which impair *Charter* rights as little as is reasonably possible. However, as was indicated above, in cases where a common law, judge-made rule is challenged under the *Charter*, there is no room for judicial deference.

In my view, the existing common law rule which allows the Crown, in certain circumstances, to raise evidence of insanity over and above the accused's wishes and which thereby interferes with the princi-

2. L'atteinte minimale

Dans cette partie du critère de proportionnalité, il s'agit de déterminer si la règle de droit attaquée (en l'espèce, la règle et les critères de common law énoncés par la Cour d'appel de l'Ontario) viole le moins possible les droits garantis par la *Charte* afin d'atteindre l'objectif «urgent et réel». En d'autres termes, même s'il existe un lien rationnel entre les mesures choisies et l'objectif visé, ces mesures peuvent également être inutilement attentatoires aux droits garantis par la Constitution, compte tenu des autres solutions possibles. À plusieurs reprises, notre Cour a dit qu'il n'était pas nécessaire que la mesure choisie soit celle qui est la moins envahissante pour qu'une règle de droit réponde aux critères de l'atteinte minimale aux droits ou aux libertés (voir *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; et *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123). Cependant, comme je l'ai déjà indiqué, j'estime que l'analyse de l'arrêt *Oakes* fait appel à des considérations quelque peu différentes lorsque, comme en l'espèce, une règle formulée par les tribunaux est contestée en vertu de la *Charte*.

Dans des affaires où des dispositions législatives sont contestées en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*, notre Cour a pris en considération le fait que ces dispositions sont adoptées par un organisme élu qui doit tenir compte des intérêts conflictuels de différents groupes de la société et toujours considérer les aspects polycentriques des mesures envisagées. C'est pour cette raison que notre Cour a avancé que le législateur ne doit pas toujours adopter les mesures les moins envahissantes pour atteindre ses objectifs, mais qu'il doit choisir dans un éventail de mesures qui portent le moins possible atteinte aux droits garantis par la *Charte*. Cependant, comme je l'ai déjà indiqué, lorsqu'une règle de common law, formulée par les tribunaux, est contestée en vertu de la *Charte*, la retenue judiciaire n'entre pas en jeu.

À mon avis, la règle de common law actuelle qui permet au ministère public, dans certaines circonstances, de soulever une preuve d'aliénation mentale contre le gré de l'accusé et qui contrevient ainsi aux

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ple of fundamental justice that an accused must have control over the conduct of his or her defence, must be subjected to a rigorous examination under s. 1. In other words, the least intrusive common law rule which will attain the objectives without disproportionately affecting rights must be adopted by the Court.

As stated above, I agree that it is a basic tenet of our legal system that the criminal law ought not to convict a person who was insane at the time of the offence. However, I do not agree that this principle and the corresponding objective require that the Crown have the ability to raise evidence of insanity over and above the accused's wishes and thereby to interfere with the conduct of his or her defence. If the Crown is of the view that the accused was insane at the time of the offence, it need not prosecute the accused. The Crown can always exercise the option of dropping the charge or of entering a stay of proceedings. Such action on the part of the Crown would be consistent both with the accused's right to control his or her own defence and with the principle that a person who was insane at the time of the offence ought not to be convicted under the criminal law.

However, the second pressing and substantial objective of protecting the public from a person who may well be presently dangerous would not be met by the Crown's dropping charges. Thus, while a rule requiring the Crown to drop charges or enter a stay of proceedings in cases where the Crown is of the view that the accused was insane at the time of the offence would be less intrusive than the existing common law rule, such an alternative rule would fall short of attaining the dual objectives identified above. Both objectives could be met, in some cases, *via* civil commitment procedures. The provincial Mental Health Acts do provide an alternative course of action to the Crown when the Crown is in possession of evidence which suggests that the accused may well be dangerously mentally ill but does not wish to pursue the conviction of the accused because he or she may well

principes de justice fondamentale selon lesquels l'accusé doit avoir plein contrôle de la conduite de sa défense, doit être étudiée rigoureusement en vertu de l'article premier. En d'autres termes, la Cour doit adopter la règle de common law la moins envahissante, celle qui permettra d'atteindre les objectifs visés sans avoir une incidence disproportionnée sur les droits en cause.

Comme je l'ai déjà souligné, j'admets que, selon l'un des préceptes fondamentaux de notre système de droit, on ne doit pas déclarer coupable, en droit criminel, une personne qui était aliénée au moment de l'infraction. Cependant, je ne crois pas que ce principe et l'objectif correspondant exigent que le ministère public puisse soulever la question de l'aliénation mentale, contre le gré de l'accusé, intervenant ainsi dans la conduite de sa défense. S'il estime que l'accusé était aliéné au moment de l'infraction, le ministère public n'est pas tenu de poursuivre l'accusé. Il peut toujours choisir d'abandonner l'accusation ou d'arrêter les procédures. Ce genre de décision de la part du ministère public serait compatible tant avec le droit de l'accusé de contrôler sa propre défense qu'avec le principe selon lequel une personne qui était aliénée au moment de l'infraction ne devrait pas être déclarée coupable en droit criminel.

Toutefois, l'abandon des accusations par le ministère public ne répond pas au second objectif urgent et réel qu'est la protection du public contre une personne qui est peut-être dangereuse à l'heure actuelle. Ainsi, même si une règle exigeant du ministère public qu'il abandonne les accusations ou qu'il arrête les procédures lorsqu'il est d'avis que l'accusé était aliéné au moment de l'infraction serait moins envahissante que la règle de common law actuelle, cette nouvelle règle ne permettrait pas d'atteindre le double objectif déjà mentionné. Dans certains cas, les deux objectifs pourraient être réalisés par la voie des procédures civiles d'internement. Il est vrai que les lois provinciales en matière de santé mentale offrent des solutions de rechange au ministère public lorsqu'il est en possession de preuves indiquant que l'accusé souffre probablement d'aliénation mentale grave mais qu'il ne désire pas intenter des poursuites contre l'accusé parce qu'il était probablement aliéné au

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have been insane at the time of the offence. Moreover, as the appellant has argued:

The provisions of the various provincial Mental Health Acts provide a plethora of substantive and procedural protection for mentally ill persons that are lacking under the indefinite detention regime of the *Criminal Code* which allows the Crown to achieve indeterminate confinement without proof beyond a reasonable doubt. [Emphasis added.]

I do not wish to be taken, however, as having ruled on the constitutionality of the various provincial Mental Health Acts. I simply wish to make the point that these provincial statutes generally provide more procedural protection than does the system of Lieutenant Governor warrants and, in that sense, they provide an alternative to the Crown when it believes that an accused was insane at the time of the offence and may be presently insane and dangerous. Whether any particular provincial statute dealing with civil commitment is consistent with the provisions of the *Charter* will have to be decided when the facts of the case raise the issue and the matter is fully argued before the Court. In any event, I have raised the possibility of the Crown having recourse to the provincial civil commitment procedures merely to point out that, no matter what the state of the common law rule, the Crown need never be in the position of having to choose between prosecuting an accused who it believes was insane at the time of the offence, and allowing someone it believes to be presently dangerous and insane to remain at large.

I do not wish to suggest, however, that it would be appropriate to fashion a new common law rule requiring the Crown to commence civil commitment proceedings whenever it believes that an accused may well have been insane at the time of the offence and is presently dangerously insane. In my view, it would be unacceptable for this Court to fashion a common law rule which makes the outcome of a criminal matter dependant upon the existence and validity of legislation presumably falling within a provincial head of power.

moment de l'infraction. En outre, comme l'appelant l'a prétendu:

[TRADUCTION] Les dispositions des différentes lois provinciales en matière de santé mentale offrent une myriade de dispositions de fond et de procédure conçues pour la protection des malades mentaux que ne prévoit pas le régime de détention indéterminée du *Code criminel*, qui permet au ministère public d'obtenir la détention d'une durée indéterminée sans preuve hors de tout doute raisonnable. [Je souligne.]

Cependant, je ne voudrais pas que l'on conclue que j'ai statué sur la constitutionnalité des différentes lois provinciales en matière de santé mentale. J'aimerais tout simplement souligner que ces lois provinciales offrent en général plus de protection en matière de procédure que ne le fait le système des mandats du lieutenant-gouverneur et que, en ce sens, elles constituent une solution de rechange lorsque le ministère public croit qu'un accusé était aliéné au moment de l'infraction et est peut-être dangereux à l'heure actuelle. Quant à la question de savoir si une loi provinciale donnée portant sur l'internement civil est compatible avec les dispositions de la *Charte*, elle devra être tranchée lorsque les faits d'une espèce le justifieront et que la question aura fait l'objet d'un débat complet devant notre Cour. De toute façon, j'ai soulevé la possibilité que le ministère public ait recours aux procédures civiles d'internement adoptées par les provinces, dans l'unique but de souligner que, peu importe l'état de la règle de common law, le ministère public n'aura jamais à choisir entre poursuivre un accusé qui, à son avis, était aliéné au moment de l'infraction et permettre à quelqu'un qui, à son avis, est dangereux et aliéné à l'heure actuelle de demeurer en liberté.

Toutefois, je ne voudrais pas laisser entendre qu'il conviendrait de formuler une nouvelle règle de common law qui obligerait le ministère public à entreprendre des procédures civiles d'internement dès qu'il croit qu'un accusé était peut-être bien aliéné au moment de l'infraction et est dangereusement aliéné à l'heure actuelle. À mon avis, il serait inacceptable que notre Cour énonce une règle de common law qui fasse dépendre l'issue d'une instance criminelle à l'existence et à la validité de textes législatifs qui relèvent vraisemblablement de la compétence provinciale.

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In light of the above reasoning, it is necessary to consider whether a new common law rule can be fashioned which does not limit constitutionally protected rights and freedoms; in my view it is possible to do so.

The dual objectives discussed above could be met without unnecessarily limiting *Charter* rights if the existing common law rule were replaced with a rule which would allow the Crown to raise independently the issue of insanity only after the trier of fact had concluded that the accused was otherwise guilty of the offence charged. Under this scheme, the issue of insanity would be tried after a verdict of guilty had been reached, but prior to a conviction being entered. If the trier of fact then subsequently found that the accused was insane at the time of the offence, the verdict of not guilty by reason of insanity would be entered. Conversely, if the trier of fact found that the accused was not insane, within the meaning of s. 16, at the time of the offence a conviction would then be entered.

Such a rule would safeguard an accused's right to control his or her defence and would achieve both the objective of avoiding the conviction of a person who was insane at the time of the offence and the objective of protecting the public from a person who may be presently dangerous. Of course, an accused would also be entitled, under this scheme, to raise his s. 7 right not to be found guilty if he was insane at the time of the offence. An accused would, if he chooses not to do so earlier, raise the issue of insanity after the trier of fact has concluded that he or she was guilty of the offence charged, but before a verdict of guilty was entered. This is consistent with the accused's right, under our criminal justice system, to force the Crown to discharge its full burden of proof on the elements of *actus reus* and *mens rea* before raising other matters. However, this does not mean that the accused can raise insanity only after both *actus reus* and *mens rea* have been proven. While the Crown would be limited to raising evidence of insanity only after the trier of fact was satisfied that the full burden of proof on *actus reus* and *mens rea* had been discharged or after the accused's own defence has somehow put his or her mental capacity

Compte tenu du raisonnement qui précède, il faut déterminer s'il est possible de formuler une nouvelle règle de common law qui ne restreigne pas les droits et libertés protégés par la Constitution; j'estime que c'est possible.

Le double objectif susmentionné pourrait être atteint sans restreindre indûment les droits garantis par la *Charte* si la règle de common law actuelle était remplacée par une règle qui permettrait au ministère public de ne soulever indépendamment la question de l'aliénation mentale qu'après que le juge des faits a conclu que l'accusé est par ailleurs coupable de l'infraction reprochée. Sous ce régime, le tribunal pourrait juger de la question de l'aliénation mentale après avoir conclu à la culpabilité, mais avant d'inscrire la déclaration de culpabilité. Si le juge des faits concluait par la suite que l'accusé était aliéné au moment de l'infraction, le verdict de non-culpabilité pour cause d'aliénation mentale serait inscrit. À l'inverse, si le juge des faits concluait que l'accusé n'était pas aliéné, au sens de l'art. 16, au moment de l'infraction, une déclaration de culpabilité serait inscrite.

Cette règle protégerait le droit de l'accusé de contrôler sa défense et permettrait d'atteindre tant l'objectif visant à éviter la déclaration de culpabilité d'une personne qui était aliénée au moment de l'infraction que l'objectif visant à protéger le public contre une personne qui peut être dangereuse à l'heure actuelle. Il est bien entendu qu'en vertu de ce régime, l'accusé pourrait également invoquer son droit garanti par l'art. 7 de ne pas être reconnu coupable s'il était aliéné au moment de l'infraction. L'accusé pourrait, s'il ne l'a pas déjà fait, soulever la question de l'aliénation mentale après que le juge des faits aurait conclu qu'il était coupable de l'infraction reprochée, mais avant qu'un verdict de culpabilité ne soit inscrit. Ce serait compatible avec le droit de l'accusé, en vertu de notre système de justice criminelle, d'obliger le ministère public à s'acquitter de tout son fardeau de la preuve de l'*actus reus* et de la *mens rea* avant de soulever d'autres questions. Cependant, cela ne signifie pas que l'accusé ne peut soulever la question d'aliénation mentale qu'après que l'*actus reus* et la *mens rea* ont tous deux été démontrés en preuve. Le ministère public ne pourrait soulever la preuve d'aliénation mentale qu'une fois le juge des faits con-

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for criminal intent in issue, the accused would have the option of raising evidence of insanity at any time during the trial. As I have indicated in *R. v. Chaulk*, *supra*, evidence of mental impairment will, in certain cases, tend to negate the element of *mens rea*. As I have stated earlier, and I think it useful to reiterate here, if during the course of the trial an accused raises evidence of mental impairment which (in the view of the trial judge) tends to put his or her mental capacity in issue, the Crown will be entitled to lead evidence of insanity and the trial judge will be entitled to charge the jury on the insanity defence within the meaning of s. 16. However, if such evidence of mental impairment is, in the view of the trier of fact, insufficient to meet the requirements of s. 16, the accused is still entitled to have such evidence considered with respect to the essential element of *mens rea*. This accords with the current practice wherein an accused has been able to deny the element of planning and deliberation or the specific intent required for murder despite the fact that s. 16 has not been satisfied. This new common law rule would give an accused the option of waiting until the Crown has discharged its full burden of proof to raise the issue of insanity, without removing the existing right of an accused to raise evidence of his or her mental condition during the course of the trial.

In my view, the new common law rule achieves the dual objectives enunciated above without limiting an accused's rights under s. 7 of the *Charter*. Under the new common law rule, there will only be two instances in which the Crown will be entitled to lead evidence of insanity. First, the Crown may raise evidence of insanity after the trier of fact has concluded that the accused is otherwise guilty of the offence charged. In these circumstances the Crown's ability to raise evidence of insanity cannot interfere with the conduct of the accused's defence because the Crown's ability to do so will not be triggered until after the accused has concluded his or her defence. Second, the Crown may raise evidence of insanity if the accused's own defence has (in the view of the

vaincu que l'on s'est acquitté de tout le fardeau de la preuve de l'*actus reus* et de la *mens rea* ou après que la propre défense de l'accusé aurait d'une manière ou d'une autre mis en cause sa capacité mentale de former une intention criminelle, tandis que l'accusé pourrait le faire en tout temps au cours du procès. Comme je l'ai dit dans *R. c. Chaulk*, précité, la preuve d'un déséquilibre mental peut, dans certains cas, écarter la *mens rea*. Comme je l'ai dit précédemment, et je crois utile de le répéter ici, si, au cours d'un procès, l'accusé présente une preuve de déséquilibre mental qui (de l'avis du juge du procès) tend à mettre sa capacité mentale en cause, le ministère public aura le droit de présenter la preuve d'aliénation mentale et le juge du procès pourra donner au jury des directives sur la défense d'aliénation mentale au sens de l'art. 16. Cependant, si, de l'avis du juge des faits, cette preuve de déficience mentale ne répond pas aux exigences de l'art. 16, l'accusé aura encore le droit de voir cette preuve examinée en rapport avec l'élément essentiel que constitue la *mens rea*. Cela serait conforme à la pratique actuelle qui permet à l'accusé de nier l'élément de préméditation ou l'intention spécifique nécessaire à l'infraction de meurtre même si les exigences de l'art. 16 n'ont pas été réunies. Cette nouvelle règle de common law donnerait à l'accusé la possibilité d'attendre que le ministère public se soit acquitté de tout son fardeau de la preuve avant de présenter la question de l'aliénation mentale, sans pour autant enlever à l'accusé le droit déjà existant de présenter la preuve de sa condition mentale au cours du procès.

À mon avis, la nouvelle règle de common law permettrait d'atteindre les objectifs susmentionnés sans restreindre les droits garantis à l'accusé par l'art. 7 de la *Charte*. En vertu de la nouvelle règle de common law, le ministère public ne pourra produire une preuve d'aliénation mentale que dans deux cas. Le premier survient après que le juge des faits a conclu que l'accusé est par ailleurs coupable de l'infraction dont il est inculpé. Dans ces circonstances, le pouvoir du ministère public de soulever la question de l'aliénation mentale n'interviendra pas dans la conduite de la défense de l'accusé puisque ce pouvoir n'entrera en jeu qu'après la clôture de la défense de l'accusé. Le second survient si (de l'avis du juge du procès) l'accusé a soulevé, dans sa propre défense, la ques-

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trial judge) put the accused's capacity for criminal intent in issue. In these circumstances the Crown's ability to raise evidence of insanity is not inconsistent with the accused's right to control the conduct of his or her defence because the very issue has been raised by the accused's conduct of his or her defence. Furthermore, as was stated above, the Crown's ability to raise evidence of insanity only after an accused has put his or her mental capacity for criminal intent in issue does not raise the problem of the Crown's being able to place an accused in a position where inconsistent defences must be advanced.

In light of the reasons given above, it can be seen that it is indeed possible to fashion a new common law rule which does not limit s. 7 of the *Charter*. Surely, if it is possible to fashion a common law rule which attains the original objectives but does not limit s. 7, it follows that the existing rule cannot be said to infringe rights "as little as possible". Thus, it is clear to me that the existing common law rule enunciated in *R. v. Simpson*, *supra*, and *R. v. Saxell*, *supra*, which allows the Crown to raise independently evidence of insanity, does not limit an accused's s. 7 rights as little as possible. It is therefore unnecessary to consider the third part of the proportionality test in *Oakes*. The existing common law rule does not meet the proportionality test enunciated in *Oakes* and cannot be upheld as a reasonable limit which is demonstrably justified in a free and democratic society.

Given the findings reached above, it is my view that the common law rule enunciated in *Simpson*, *supra* and *Saxell*, *supra*, is inconsistent with the provisions of the Constitution and, pursuant to s. 52(1), is of no force or effect. It is, therefore, unnecessary to consider whether this rule also limits s. 15 of the *Charter*.

However, given that a new common law rule has been constructed to take the place of the rule which has just been struck down, I believe it is appropriate to consider whether the new rule would offend s. 15 of the *Charter*. The old common law rule was chal-

tion de sa capacité de former une intention criminelle. Dans ces circonstances, le pouvoir qu'a le ministère public de présenter une preuve d'aliénation mentale n'est pas incompatible avec le droit de l'accusé de conduire sa propre défense puisque c'est justement la conduite de la défense par l'accusé qui a soulevé cette question. En outre, comme je l'ai déjà mentionné, n'autoriser le ministère public à présenter une preuve d'aliénation mentale qu'après que l'accusé a mis en cause sa capacité mentale de former une intention criminelle évite le problème que constitue la possibilité pour le ministère public d'obliger l'accusé à présenter des moyens de défense incompatibles.

Vu les motifs qui précèdent, il appert qu'il est donc possible de formuler une nouvelle règle de common law qui ne restreigne pas l'art. 7 de la *Charte*. S'il est possible de formuler une règle de common law qui permette d'atteindre les objectifs initiaux, sans restreindre l'art. 7, il s'ensuit certainement que l'on ne peut considérer que la règle actuelle porte «le moins possible» atteinte aux droits garantis. Il m'apparaît donc évident que la règle de common law actuelle énoncée dans les arrêts *R. v. Simpson* et *R. v. Saxell*, précités, permettant au ministère public de présenter indépendamment une preuve d'aliénation mentale ne restreint pas le moins possible les droits garantis à l'accusé par l'art. 7. Il n'y a donc pas lieu d'examiner le troisième élément du critère de proportionnalité de l'arrêt *Oakes*. La règle de common law actuelle ne respecte pas le critère de proportionnalité énoncé dans l'arrêt *Oakes* et ne constitue pas une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Compte tenu de ces conclusions, je suis d'avis que la règle de common law énoncée dans les arrêts *Simpson* et *Saxell*, précités, est incompatible avec les dispositions de la Constitution et inopérante en vertu du par. 52(1). Il n'y a donc pas lieu de déterminer si cette règle restreint également l'application de l'art. 15 de la *Charte*.

Cependant, comme une nouvelle règle de common law a été formulée pour remplacer celle qui vient à peine d'être annulée, je crois qu'il convient de déterminer si la nouvelle contreviendrait à l'art. 15 de la *Charte*. La validité de l'ancienne règle de common

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lenged under s. 15, but having found that the old rule violated s. 7 of the *Charter*, could not be upheld as a reasonable limit under s. 1 and was therefore of no force or effect pursuant to s. 52(1), it was unnecessary to consider whether the old rule also violated s. 15 of the *Charter*. The same cannot be said of the new common law rule. As was mentioned above, when the constitutionality of a judge-made rule is in issue, the *Charter* analysis differs from that which is applied to a legislative provision. It is not enough to say that the newly formulated common law rule is less intrusive than the previous rule or even to say that the new common law rule does not limit s. 7 of the *Charter*. If this Court is to enunciate a new common law rule to take the place of the old rule, it is obliged to consider the status of that new rule in relation to all relevant aspects of the *Charter*. In my view, the only other provision of the *Charter* which is directly applicable to the new common law rule is s. 15. As was stated earlier, I do not think that s. 9 is applicable to the issue of the Crown raising evidence of insanity. Accordingly, I will now consider whether the new common law rule limits s. 15 of the *Charter*.

law était contestée en vertu de l'art. 15. La Cour ayant conclu qu'elle contrevenait à l'art. 7 de la *Charte*, qu'elle ne pouvait être maintenue à titre de limite raisonnable en vertu de l'article premier et qu'elle était donc considérée comme inopérante conformément au par. 52(1), il était inutile d'examiner si elle contrevenait également à l'art. 15 de la *Charte*. Ce n'est pas le cas de la nouvelle règle de common law. Comme je l'ai déjà mentionné, lorsque la constitutionnalité d'une règle formulée par les tribunaux est en cause, l'analyse de la *Charte* est différente de celle qui s'applique à une disposition législative. Il ne suffit pas de dire que la règle de common law nouvellement énoncée est moins envahissante que l'ancienne règle ou même de dire que la nouvelle règle de common law ne restreint pas l'application de l'art. 7 de la *Charte*. Si notre Cour doit énoncer une nouvelle règle de common law en remplacement de l'ancienne, elle est tenue d'examiner la situation de cette nouvelle règle au regard de tous les aspects pertinents de la *Charte*. À mon avis, seul l'art. 15 de la *Charte* pourrait être directement applicable à la nouvelle règle de common law. Comme je l'ai déjà mentionné, je ne crois pas que l'art. 9 s'applique à la question de la production d'une preuve d'aliénation mentale par le ministère public. Par conséquent, j'examinerai maintenant la question de savoir si la nouvelle règle de common law restreint l'application de l'art. 15 de la *Charte*.

Section 15

For ease of reference, I have reproduced the text of s. 15(1) below:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court considered the meaning and content of the s. 15(1) guarantee in considerable detail. Justice McIntyre (writing for the majority on s. 15(1), but dissenting as to the application of

L'article 15

Pour plus de commodité, je reproduis ici le texte du par. 15(1):

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Dans *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, notre Cour a étudié de façon très détaillée le sens et le contenu de la garantie prévue au par. 15(1). Le juge McIntyre (au nom de la majorité au sujet du par. 15(1), mais dissident quant à

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s. 1) noted that equality was a "comparative concept" and stated, at p. 164:

It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

McIntyre J. went on to reject the prevailing "similarly situated test" as "seriously deficient" and stated, at p. 168:

Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

McIntyre J. noted that the right to equality before and under the law, and the rights to the equal protection and benefit of the law were granted with the direction, contained in s. 15 itself, that they be "without discrimination". He went on to describe "discrimination" as follows, at p. 174:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

This description of "discrimination" was affirmed by this Court in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

In *R. v. Turpin*, [1989] 1 S.C.R. 1296, this Court reiterated and expanded on the approach to s. 15(1) described by McIntyre J. in *Andrews*, *supra*. Justice Wilson (writing for the Court) stated, at p. 1331:

The internal qualification in s. 15 that the differential treatment be "without discrimination" is determinative of whether or not there has been a violation of the section. It is only when one of the four equality rights has

l'application de l'article premier) a souligné que l'égalité était un «concept comparatif» et a affirmé, à la p. 164:

Il faut cependant reconnaître dès le départ que toute différence de traitement entre des individus dans la loi ne produira pas forcément une inégalité et, aussi, qu'un traitement identique peut fréquemment engendrer de graves inégalités.

Le juge McIntyre a ensuite rejeté le «critère de la situation analogue» alors répandu parce qu'il comportait «un grave défaut» et il a affirmé, à la p. 168:

Il faut tenir compte du contenu de la loi, de son objet et de son effet sur ceux qu'elle vise, de même que sur ceux qu'elle exclut de son champ d'application. Les questions qui seront soulevées d'un cas à l'autre sont telles que ce serait une erreur que de tenter de restreindre ces considérations à une formule limitée et figée.

Le juge McIntyre a souligné que l'art. 15 prévoit lui-même que le droit à l'égalité devant la loi et dans la loi ainsi que les droits à la même protection et au même bénéfice de la loi qu'il confère doivent exister «indépendamment de toute discrimination». Il a alors défini le terme «discrimination» de la façon suivante, à la p. 174:

J'affirmerais alors que la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société.

Notre Cour a confirmé cette définition de «discrimination» dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229.

Dans *R. c. Turpin*, [1989] 1 R.C.S. 1296, notre Cour a repris et élargi le point de vue adopté par le juge McIntyre, dans *Andrews*, précité, à l'égard du par. 15(1). Le juge Wilson, au nom de la Cour, a affirmé ce qui suit, à la p. 1331:

La réserve intrinsèque de l'art. 15 portant que la différence de traitement doit se faire «indépendamment de toute discrimination» est déterminante quant à savoir s'il y a eu violation de l'article. Ce n'est que si l'un des

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been denied with discrimination that the values protected by s. 15 are threatened and the court's legitimate role as the protector of such values comes into play.

Wilson J. went on to state that in determining whether the requirement of discrimination is present in a particular case, it is important to look not only at the impugned legislation which has created a distinction, but also to the "larger social, political and legal context". Thus, in determining whether an individual or group falls into a category analogous to those specifically enumerated in s. 15, courts must examine "the place of the group in the entire social, political and legal fabric of our society".

Accordingly, this Court held in *Turpin*, *supra*, that a law which differentiated for mode of trial purposes between those persons accused of certain offences in Alberta and those accused of the same offences elsewhere in Canada, did not infringe s. 15(1) because the group which had invoked s. 15 did not constitute a disadvantaged group in Canadian society, in the sense that it suffered from social, political and legal disadvantage in our society. Wilson J. stated, at p. 1333:

A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case because what we are comparing is the position of those accused of the offences listed in s. 427 in the rest of Canada to the position of those accused of the offences listed in s. 427 in Alberta. To recognize the claims of the appellants under s. 15 of the *Charter* would, in my respectful view, "overshoot the actual purpose of the right or freedom in question": see *R. v. Big M Drug Mart Ltd.*, at p. 344

In analyzing the developing jurisprudence of this Court on s. 15(1), I am mindful of the words of Wilson J. in *Turpin*, *supra*, at p. 1326:

I note at the outset that in these early days of interpreting s. 15 it would be unwise, if not foolhardy, to attempt to provide exhaustive definitions of phrases which by their nature are not susceptible of easy definition and which are intended to provide a framework for the

quatre droits à l'égalité a été violé de manière discriminatoire que les valeurs protégées par l'art. 15 sont menacées et que le rôle légitime de la cour à titre de protecteur de ces valeurs entre en jeu.

Le juge Wilson a ensuite affirmé que pour déterminer si la question de la discrimination est pertinente dans un cas particulier, il importe d'examiner non seulement la disposition législative contestée qui établit une distinction, mais aussi «l'ensemble des contextes social, politique et juridique». Pour déterminer si un individu ou un groupe relève d'une catégorie analogue à celles qui sont expressément énumérées à l'art. 15, les tribunaux doivent donc examiner «la place occupée par le groupe dans les contextes social, politique et juridique de notre société».

Par conséquent, notre Cour a conclu dans *Turpin*, précité, qu'une loi qui établissait une distinction, pour les fins du mode de procès, entre les personnes accusées de certaines infractions en Alberta et celles qui sont accusées des mêmes infractions ailleurs au Canada, ne contrevenait pas au par. 15(1) parce que le groupe ayant invoqué l'art. 15 ne constituait pas un groupe défavorisé dans la société canadienne, au sens qu'il souffrait de désavantages sociaux, politiques et juridiques dans notre société. Le juge Wilson a affirmé, à la p. 1333:

Il serait inutile de chercher des signes de discrimination tel que des stéréotypes, des désavantages historiques ou de la vulnérabilité à des préjugés politiques ou sociaux en l'espèce parce que ce qui est comparé c'est la situation de personnes qui sont accusées, ailleurs au Canada, d'une des infractions énumérées à l'art. 427, avec celle des personnes ainsi accusées en Alberta. À mon avis, faire droit aux demandes des appelants en vertu de l'art. 15 de la *Charte* serait «aller au-delà de l'objet véritable du droit ou de la liberté en question»; voir *R. c. Big M Drug Mart Ltd.*, à la p. 344.

Dans l'analyse de la jurisprudence de notre Cour, relativement au par. 15(1), je tiens compte des propos du juge Wilson, dans *Turpin*, précité, à la p. 1326:

Je fais d'abord remarquer que puisque nous en sommes aux premières interprétations de l'art. 15, nous serions mal avisés et peut-être même téméraires d'essayer de définir de manière exhaustive des expressions qui, de par leur nature même, se prêtent difficilement à une

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"unremitting protection" of equality rights in the years to come.

At the same time, I think that the cases mentioned above convey a basic framework within which particular s. 15(1) claims can be analyzed. The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15—namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

Keeping these basic points in mind, I turn now to consider whether the newly formulated common law rule infringes s. 15(1) of the *Charter*.

The interveners, C.D.R.C., argued that the old rule infringed s. 15(1) because it took away decision-making autonomy from one particular group of accused persons—those perceived to have been insane, within the meaning of s. 16(2) of the *Criminal Code*, at the time of the offence. C.D.R.C. argued that the old common law rule distinguished between accuseds on the basis of a personal characteristic (the enumerated ground of mental disability) and thereby imposed a burden or disadvantage on certain accused by inter-

définition et qui visent à fournir un cadre à la «protection constante» des droits à l'égalité pour les années à venir.

Aussi, j'estime que les arrêts susmentionnés offrent un cadre fondamental d'analyse des plaintes fondées sur le par. 15(1). La cour doit d'abord déterminer si le plaignant a démontré que l'un des quatre droits fondamentaux à l'égalité a été violé (i.e. l'égalité devant la loi, l'égalité dans la loi, la même protection de la loi et le même bénéfice de la loi). Cette analyse portera surtout sur la question de savoir si la loi fait (intentionnellement ou non) entre le plaignant et d'autres personnes une distinction fondée sur des caractéristiques personnelles. Ensuite, la cour doit établir si la violation du droit donne lieu à une «discrimination». Cette seconde analyse portera en grande partie sur la question de savoir si le traitement différent a pour effet d'imposer des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres. De plus, pour déterminer s'il y a eu atteinte aux droits que le par. 15(1) reconnaît au plaignant, la cour doit considérer si la caractéristique personnelle en cause est visée par les motifs énumérés dans cette disposition ou un motif analogue, afin de s'assurer que la plainte correspond à l'objectif général de l'art. 15, c'est-à-dire corriger ou empêcher la discrimination contre des groupes victimes de stéréotypes, de désavantages historiques ou de préjugés politiques ou sociaux dans la société canadienne.

Gardant ces éléments fondamentaux à l'esprit, j'examine maintenant la question de savoir si la nouvelle règle de common law contrevient au par. 15(1) de la *Charte*.

Les intervenants, le C.C.D.P.H. et les autres, ont prétendu que l'ancienne règle contrevenait au par. 15(1) parce qu'elle enlevait toute autonomie décisionnelle à un groupe particulier d'accusés, soupçonnés d'avoir été aliénés, au sens du par. 16(2) du *Code criminel*, au moment de la perpétration de l'infraction. Le C.C.D.P.H. a prétendu que l'ancienne règle de common law faisait une distinction entre les accusés en se fondant sur une caractéristique personnelle (le motif énuméré de la déficience mentale),

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fering with the conduct of their defence and by removing decision-making autonomy.

Whatever the merits of this argument, it is clear to me that the new common law rule cannot be attacked on these grounds. As I have indicated above, the new common law rule does not interfere with an accused's right to control the conduct of his or her defence. This is because the new rule allows the Crown to raise evidence of insanity only where the accused's own defence has put mental capacity for criminal intent into issue or where the accused has concluded his or her defence. Thus, the new rule cannot be said to impose a burden or disadvantage by interfering with the conduct of an accused's defence or by removing decision-making autonomy with respect to the conduct of an accused's defence. Although an accused who puts his or her mental capacity for criminal intent into issue will be exposed to the added risk of a not guilty by reason of insanity verdict by virtue of the Crown's ability to raise evidence of insanity during the trial in this circumstance, this risk flows not from a perception of mental disability by the Crown, but rather from the accused's own choice of defence. No matter how much evidence of the accused's insanity is possessed by the Crown, it cannot raise this evidence until the accused puts his or her mental capacity for criminal intent into issue (or, if the accused does not do so, until the trier of fact has concluded that the accused is otherwise guilty of the offence charged). Thus any difference in treatment of accuseds is based not on a perception of mental disability, but on the accused's choice as to the conduct of his or her defence.

It must be acknowledged, however, that part of the new common law rule does distinguish between individuals on the basis of a personal characteristic which falls within the enumerated ground of mental disability. The new common law rule allows the Crown to raise evidence of insanity after the trier of fact has

imposant ainsi un fardeau ou un désavantage à certains accusés en intervenant dans la conduite de leur défense et en leur retirant toute autonomie décisionnelle.

Quel que soit le bien-fondé de cet argument, j'estime qu'il est évident que la nouvelle règle de common law ne peut être attaquée pour ces motifs. Comme je l'ai déjà souligné, la nouvelle règle de common law ne contrevient pas au droit de l'accusé de contrôler la conduite de sa défense et ce, parce qu'elle permet au ministère public de présenter une preuve d'aliénation mentale seulement lorsque la propre défense de l'accusé a mis en doute sa capacité mentale de former une intention criminelle ou lorsque l'accusé a terminé sa défense. On ne peut donc reprocher à la nouvelle règle d'imposer un fardeau ou un désavantage en intervenant dans la conduite de la défense d'un accusé ou en retirant toute autonomie décisionnelle à l'égard de la conduite de la défense d'un accusé. Bien qu'un accusé qui soulève la question de sa capacité mentale de former une intention criminelle s'expose au risque additionnel d'un verdict de non-culpabilité pour cause d'aliénation mentale en raison de la possibilité qu'a alors le ministère public de présenter une preuve d'aliénation mentale, ce risque ne découle pas du fait que le ministère public estime qu'il y a aliénation mentale, mais plutôt des moyens de défense que l'accusé lui-même a choisis. Quels que soient les éléments de preuve de l'aliénation mentale que le ministère public a à sa disposition, il ne peut les produire tant que l'accusé ne soulève pas lui-même la question de sa capacité mentale de former une intention criminelle (ou, si l'accusé ne le fait pas, tant que le juge des faits n'a pas conclu que l'accusé est par ailleurs coupable de l'infraction reprochée). Par conséquent, toute différence dans la façon dont les accusés sont traités est fondée non pas sur une perception de l'incapacité mentale, mais sur la manière que l'accusé a choisie de mener sa défense.

Il faut toutefois reconnaître qu'une partie de la nouvelle règle de common law fait bien une distinction entre les individus, fondée sur une caractéristique personnelle qui correspond au motif énuméré qu'est la déficience mentale. La nouvelle règle de common law permet au ministère public de présenter

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concluded that the accused is otherwise guilty of the offence charged in cases where the Crown believes that the accused was insane at the time of the offence. If the Crown holds no such belief about an accused, that accused will be convicted and sentenced. It is only when the Crown believes that an accused was insane at the time of the offence that the accused will not be convicted and will instead be subject to a trial on the issue of insanity (with the Crown's being able to lead its evidence of insanity over and above the accused's wishes). Thus, in my view, it is clear that this aspect of the new common law rule draws a distinction between individuals such as Mr. Swain and others based on a personal characteristic; namely, insanity.

une preuve d'aliénation mentale après que le juge des faits a conclu que l'accusé est par ailleurs coupable de l'infraction reprochée lorsque le ministère public estime que l'accusé était aliéné au moment de l'infraction. Si le ministère public n'en est pas convaincu, l'accusé sera déclaré coupable et se verra infliger une peine. Ce n'est que lorsque le ministère public estime que l'accusé était aliéné au moment de l'infraction, que l'accusé ne sera pas reconnu coupable et qu'il devra plutôt subir un procès sur la question de l'aliénation mentale (au cours duquel le ministère public pourra produire sa preuve d'aliénation mentale contre le gré de l'accusé). J'estime donc qu'il est évident que cet aspect de la nouvelle règle de common law établit une distinction entre les personnes comme M. Swain et les autres, en se fondant sur une caractéristique personnelle, savoir, l'aliénation mentale.

Furthermore, the fact that the claim involves the personal characteristic of insanity (which falls within the enumerated ground of mental disability) leaves no doubt in my mind that, if the differential treatment is "discriminatory" (which remains to be seen), the s. 15(1) claim fits within the overall purpose of remedying or preventing discrimination against groups suffering social, political and legal disadvantage in Canadian society. There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice. However, the question remains: does this aspect of the new common law rule give rise to differential treatment under the law which is discriminatory? In other words, can it be said that part of the new common law rule imposes a differential burden, obligation or disadvantage or that it withholds or limits access to opportunities, benefits and advantages?

En outre, le fait que la plainte porte sur la caractéristique personnelle de l'aliénation mentale (qui est visée par le motif énuméré qu'est la déficience mentale) me convainc absolument que, si le traitement différent est «discriminatoire» (ce qui n'est pas encore établi), la plainte fondée sur le par. 15(1) correspond à l'objectif général de corriger ou d'empêcher la discrimination contre des groupes victimes de désavantages sociaux, politiques et juridiques dans la société canadienne. Il est indéniable que, dans notre société, les malades mentaux ont de tout temps souffert de désavantages et de stéréotypes négatifs et que, de façon générale, ils sont victimes de préjugés. Cependant, la question demeure: cet aspect de la nouvelle règle de common law donne-t-elle lieu à un traitement différent dans la loi qui soit discriminatoire? En d'autres termes, peut-on dire qu'une partie de la nouvelle règle de common law impose un fardeau, une obligation ou un désavantage différent, ou qu'elle empêche ou restreint l'accès à des possibilités, des bénéfices et des avantages?

I stated previously that it is my view that this aspect of the new common law rule does not impose the burden or disadvantage of interfering with the conduct of an accused's defence. This part of the new common law rule distinguishes between accuseds in that it takes certain accuseds (those whom the Crown believes to have been insane at the time of the

J'ai déjà déclaré qu'à mon avis, cet aspect de la nouvelle règle de common law n'impose pas le fardeau ou le désavantage que représenterait une intervention dans la conduite de la défense de l'accusé. Cette partie de la nouvelle règle de common law fait une distinction entre les accusés en ce qu'elle retire certains accusés (ceux qui, de l'avis du ministère

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offence) out of the larger group of accuseds for whom the trier of fact is satisfied (but for the question of insanity) that the Crown has discharged its full burden on *actus reus* and *mens rea*, and allows the Crown to subject those accuseds to a further "trial" on the issue of insanity. If the Crown does not exercise its ability to raise evidence of insanity at this point, the accused will be convicted and sentenced. Thus, the differential treatment flowing from this part of the new common law rule is that certain accuseds are not convicted and sentenced but, rather, are subject to a hearing on the issue of insanity in order to determine whether they too should be convicted or whether they should instead be subject to the L.G.W. system. Any further differences in treatment (i.e., between insanity acquittees and other acquittees) flow from the *Code* provisions which set out the L.G.W. system, not from the new common law rule. These *Code* provisions will be addressed further on in these reasons.

public, étaient aliénés au moment de l'infraction) du groupe d'accusés pour lesquels le juge des faits est convaincu (sauf pour la question de l'aliénation mentale) que le ministère public s'est acquitté de toute la preuve de l'*actus reus* et de la *mens rea* qui lui incombait, et permet au ministère public de faire subir à ces accusés un autre «procès» sur la question de l'aliénation mentale. Si le ministère public n'exerce pas son pouvoir de présenter une preuve d'aliénation mentale à ce moment-là, l'accusé sera déclaré coupable et se verra infliger une peine. Cette partie de la nouvelle règle de common law impose donc un traitement différent en ce que certains accusés sont soustraits au processus de déclaration de culpabilité et de détermination de la peine; ils sont plutôt soumis à un examen de la question de l'aliénation mentale afin de déterminer s'ils devraient être reconnus coupables eux aussi ou s'ils devraient être assujettis au système des mandats du lieutenant-gouverneur. Toute autre différence de traitement (i.e. entre les personnes acquittées pour cause d'aliénation mentale et les autres personnes acquittées) tiennent aux dispositions du *Code* prévoyant le système des mandats du lieutenant-gouverneur, et non à la nouvelle règle de common law. Il sera question de ces dispositions du *Code* plus loin.

I cannot see how a rule which allows the Crown to move an individual from the category of those who will surely be convicted and sentenced to those who may be acquitted, albeit on the grounds of insanity, can be said to impose a burden or a disadvantage on that individual. In my view, to say otherwise is tantamount to saying that an accused has a right to be convicted and punished even though he or she does not have the mental capacity for criminal intent. This cannot be the case. As I have stated above, and think it useful to reiterate here, it is a principle of fundamental justice that the criminal justice system not convict a person who was insane at the time of the offence. That this is so dispels any suggestion that an accused somehow has a right to be wrongfully convicted.

Je ne vois pas comment une règle permettant au ministère public de faire passer un individu de la catégorie de personnes qui seront certainement déclarées coupables et se verront infliger une peine, au groupe de personnes qui seront peut-être acquittées, quoique pour cause d'aliénation mentale, puisse être considérée comme imposant un fardeau ou un désavantage à cet individu. À mon avis, l'opinion contraire équivaudrait à dire qu'un accusé a le droit d'être reconnu coupable et puni même s'il n'a pas la capacité mentale de former une intention criminelle. Il ne saurait en être ainsi. Comme je l'ai déjà affirmé, et j'estime qu'il est utile de le répéter, il relève d'un des principes de justice fondamentale de notre système pénale qu'une personne qui était aliénée au moment de l'infraction ne doit pas être déclarée coupable. Cela permet d'écarter toute proposition selon laquelle un accusé aurait de quelque façon un droit d'être déclaré coupable à tort.

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In light of the above reasoning, it is my view that while one aspect of the new common law rule gives rise to differential treatment under the law based on a personal characteristic, it does not result in "discrimination". Accordingly, in my view, the new common law rule does not infringe s. 15(1) of the *Charter*. This view is, of course, based on the arguments and evidence before the Court in this appeal. At the hearing of this appeal, no argument was specifically directed at the new common law rule for the simple reason that the new rule was not in existence at the time of the hearing and no such rule was postulated by the parties. Accordingly, while I have felt it necessary to examine the newly formulated rule under s. 15(1) of the *Charter*, these reasons should not preclude an accused who wishes to raise different arguments and evidence from challenging the new common law rule under s. 15(1) in the future.

I pause here to note that, until the new common law rule becomes widely known, it might well be appropriate for trial judges to remind the jury that the Crown is raising insanity after a finding of guilt has been made but before a conviction is entered because this is what the law requires, not because the Crown has chosen to conduct its case in this manner. Without such a direction, a jury may perceive the Crown to be raising inconsistent theories and may believe that the Crown is raising evidence of insanity at this time for "strategic reasons". I have a high regard for the intelligence and common sense of Canadian juries and for the ability of trial judges to explain difficult concepts of law to the jury. In my view, a clear direction from the trial judge will be sufficient to remove any confusion which may arise with respect to the new common law rule.

I also wish to point out that, throughout my reasons on this issue, I have been careful to speak of the old common law rule as limiting the s. 7 *Charter* right and as violating the Constitution only after having reached the conclusion that the limitation is not justified under s. 1 of the *Charter*. This choice of language is deliberate but does not depend on the fact that this case involves a *Charter* challenge to a common law rule as opposed to a legislative provision.

Compte tenu du raisonnement qui précède, à mon avis, bien qu'un aspect de la nouvelle règle de common law donne lieu à un traitement différent dans la loi, fondé sur une caractéristique personnelle, elle n'entraîne pas une «discrimination». J'estime donc que la nouvelle règle de common law ne contrevient pas au par. 15(1) de la *Charte*. Cette opinion est évidemment fondée sur les arguments et la preuve dont disposait la Cour dans le présent pourvoi. Aucun argument visant directement la nouvelle règle de common law n'a été présenté à l'audience pour la simple raison que la nouvelle règle n'existait pas encore et que les parties n'en avaient proposé aucune. Par conséquent, même si j'ai jugé bon d'examiner la nouvelle règle en regard du par. 15(1) de la *Charte*, les présents motifs ne sauraient empêcher un accusé de soulever d'autres arguments et éléments de preuve en vue de la contester en vertu du par. 15(1).

Je m'arrête un instant pour faire remarquer que, jusqu'à ce que la nouvelle règle de common law soit bien connue, il faudrait peut-être que les juges du procès rappellent au jury que le ministère public soulève la question de l'aliénation mentale après qu'un verdict de culpabilité a été rendu, mais avant qu'une déclaration de culpabilité soit inscrite, parce que c'est ce qu'exige la loi et non parce que le ministère public a choisi de présenter sa preuve de cette façon. Sans cette directive, le jury pourrait penser que le ministère public soulève des théories incompatibles et croire qu'il présente une preuve d'aliénation mentale à ce moment précis pour des «raisons de stratégie». Je respecte beaucoup l'intelligence et le bon sens des jurés canadiens et la capacité des juges du procès de leur expliquer des concepts juridiques complexes. À mon avis, une directive claire de la part du juge du procès suffira à éliminer toute confusion que pourrait soulever la nouvelle règle de common law.

J'aimerais également souligner que, tout au long de mes motifs sur cette question, j'ai pris soin de dire que l'ancienne règle de common law restreignait le droit garanti par l'art. 7 de la *Charte* et ce n'est qu'après avoir conclu que la restriction n'était pas justifiée en vertu de l'article premier de la *Charte* que j'ai dit que la règle violait la Constitution. Ce choix de terme est délibéré mais ne repose pas sur le fait que ce pourvoi porte sur la contestation, en vertu de

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Whether one is speaking of a legislative provision or a common law rule it is not, in my view, correct to speak of a law violating a particular provision of the *Charter* (such as s. 7) prior to having gone through a s. 1 analysis. The *Charter* guarantees the particular rights and freedoms set out in it subject to reasonable limits which can be, under s. 1, demonstrably justified in a free and democratic society. Thus a law which limits a right set out in the *Charter* will only violate the Constitution if it is not justified under s. 1. In this instance, the law will either be struck down (to the extent of the inconsistency) under s. 52(1) or it will be reinterpreted so as not to violate the Constitution. If a law which limits a right set out in the *Charter* is justified under s. 1, that law does not violate the Constitution.

Conclusion

In the case at bar, the accused was acquitted on the basis of insanity after the Crown raised evidence of insanity, during the trial, over and above his wishes. It is impossible to say whether Mr. Swain would have been convicted or acquitted had evidence of insanity not been raised by the Crown in this manner. In these circumstances, I would normally be of the view that a new trial is in order. However, in this case, Mr. Swain has been through the trial process, has been acquitted on account of insanity, has been detained on a warrant of the Lieutenant Governor, and has subsequently been absolutely discharged by order of the Lieutenant Governor. To order a new trial now on the basis that his constitutional rights were violated at the first trial would, in my view, be unfair. At the same time, it would be inappropriate to enter an acquittal in these circumstances. In my view, the proper disposition in these circumstances is a judicial stay of proceedings. Consequently, I would allow the appeal and enter a stay of proceedings.

2. *Is s. 542(2) of the Criminal Code of Canada intra vires the Parliament of Canada?*

The appellant submits that s. 542(2) and the surrounding legislative scheme, including ss. 545 and

la *Charte*, d'une règle de common law plutôt que d'une disposition législative. Peu importe qu'il s'agisse d'une disposition législative ou d'une règle de common law, j'estime qu'il est faux d'affirmer qu'une règle de droit viole une disposition donnée de la *Charte* (comme l'art. 7) avant d'avoir procédé à l'examen de l'article premier. La *Charte* garantit les droits et libertés qui y sont énoncés, sous réserve de limites raisonnables dont la justification peut se démontrer dans le cadre d'une société libre et démocratique en vertu de l'article premier. Ainsi, une règle de droit qui restreint un droit énoncé dans la *Charte* ne violera la Constitution que si elle n'est pas justifiée en vertu de l'article premier. Dans un tel cas, les parties incompatibles de la règle de droit seront abrogées en vertu du par. 52(1) ou reformulées de façon à ne pas violer la Constitution. Si une règle de droit qui restreint un droit énoncé dans la *Charte* est justifiée en vertu de l'article premier, elle ne viole pas la Constitution.

Conclusion

En l'espèce, l'accusé a été acquitté pour cause d'aliénation mentale après que le ministère public eut présenté une preuve d'aliénation mentale contre son gré. On ne saura jamais si M. Swain aurait été reconnu coupable ou acquitté si le ministère public n'avait pas présenté la preuve d'aliénation mentale. Dans ces circonstances, je serais normalement d'avis d'ordonner la tenue d'un nouveau procès. Cependant, en l'espèce, M. Swain a déjà subi un procès; il a été acquitté pour cause d'aliénation mentale, détenu en vertu d'un mandat du lieutenant-gouverneur, puis libéré inconditionnellement suivant une ordonnance du lieutenant-gouverneur. J'estime qu'il serait injuste d'ordonner maintenant la tenue d'un nouveau procès en invoquant la violation de ses droits constitutionnels au cours du premier procès. De même, il serait tout aussi inapproprié d'inscrire un acquittement. À mon avis, dans ces circonstances, il convient d'arrêter les procédures. Par conséquent, je suis d'avis d'accueillir le pourvoi et d'ordonner l'arrêt des procédures.

2. *Le paragraphe 542(2) du Code criminel du Canada est-il intra vires du Parlement du Canada?*

L'appelant soutient que le par. 542(2) ainsi que le régime législatif dans lequel il s'insère, notamment

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547, are *ultra vires* Parliament's criminal law power. These provisions are set out above.

Whenever an issue of federalism arises, the first step in the analysis must be to characterize the "pith and substance" of the impugned legislation. In order to determine the pith and substance of any particular legislative provision, it is necessary to examine that provision in its overall legislative context. The appellant submits that the pith and substance of this legislative scheme is to treat and cure the mentally ill, not to punish them. Therefore, this Court should find that these provisions are *ultra vires* the criminal law power of Parliament under s. 91(27) and, instead, fall within the scope of the provincial powers of s. 92(7) (The Establishment, Maintenance, and Management of Hospital, Asylums... in and for the Province), s. 92(13) (Property and Civil Rights in the Province) and s. 92(16) (Matters of a merely local or private Nature in the Province).

I cannot agree with this characterization. In determining the "pith and substance" of the legislation, "it is necessary to identify the dominant or most important characteristic of the challenged law." (See Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 313, (emphasis added.)) It is true that the dominant characteristic of these provisions is not punishment; however, neither is it treatment. The "pith and substance" of the legislative scheme dealing with individuals acquitted by reason of insanity is the protection of society from dangerous people who have engaged in conduct proscribed by the *Criminal Code* through the prevention of such acts in the future. While treatment may be incidentally involved in the process, it is not the dominant objective of the legislation.

A statute that includes a prohibition and a penalty and is enacted to serve a public purpose commonly recognized as being criminal in nature will fall within the scope of Parliament's criminal law power (*Canadian Federation of Agriculture v. Attorney-General*

les art. 545 et 547, excèdent le pouvoir du Parlement en matière de droit criminel. Le texte de ces dispositions est reproduit plus haut.

Dans tout litige portant sur le partage des compétences en régime fédéral, la première étape de l'analyse consiste à découvrir le «caractère véritable» du texte de loi attaqué. Pour déterminer le caractère véritable d'une disposition donnée, il faut examiner cette disposition dans l'ensemble de son contexte législatif. L'appelant fait valoir que, de par son caractère véritable, le régime législatif en cause vise le traitement et la guérison des malades mentaux, non leur châtiment. Notre Cour devrait donc en conclure que ces dispositions excèdent le pouvoir du Parlement en matière de droit criminel en vertu du par. 91(27) et qu'elles relèvent plutôt de la compétence provinciale en vertu du par. 92(7) (l'établissement, l'entretien et l'administration des hôpitaux, asiles [. . .] dans la province), du par. 92(13) (la propriété et les droits civils dans la province) et du par. 92(16) (toutes les matières d'une nature purement locale ou privée dans la province).

Je ne puis souscrire à cette qualification. Pour déterminer le «caractère véritable» du texte législatif attaqué, [TRADUCTION] «il convient d'en identifier la caractéristique dominante ou la plus importante». (Voir Hogg, *Constitutional Law of Canada* (2e éd. 1985), à la p. 313, je souligne.) Il est vrai que la caractéristique dominante de ces dispositions n'est pas le châtiment; mais ce n'est pas non plus le traitement. Le «caractère véritable» du régime législatif auquel sont assujetties les personnes acquittées pour cause d'aliénation mentale est la protection de la société contre les individus dangereux qui ont eu un comportement prohibé par le *Code criminel* et ce, par le biais de la prévention de tels actes dans l'avenir. Ce processus peut certes comporter accessoirement une phase de traitement, mais là n'est pas l'objectif dominant des dispositions législatives.

La loi qui comporte une prohibition et une peine et qui vise une fin publique communément reconnue comme étant de nature criminelle relèvera du pouvoir du Parlement en matière de droit criminel (*Canadian Federation of Agriculture v. Attorney-General for*

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for Quebec, [1951] A.C. 179). Such public purposes include public peace, order, security, health and morality (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at p. 50).

It is true that the insanity provisions do not include a "penalty", in that individuals acquitted by reason of insanity are not held responsible for their actions and are not punished. Nevertheless, it has long been recognized that there also exists a preventative branch of the criminal law power:

> A law may be validly enacted "in relation to" the criminal law, although the law itself does not have the characteristics of a criminal law. This would be true, for example, of a law which simply repealed a criminal law. Its most important application, however, is in support of laws aimed at the prevention of crime, for example, binding over a person to keep the peace, or detaining a person who has not been able to stand trial by reason of insanity. There is no doubt that laws of this kind are valid although they depart from the traditional format of criminal law. [Emphasis added.]
>
> Hogg, *Constitutional Law of Canada*, 2nd ed., at p. 411.
>
> In other words, federal criminal legislation may be absolute or conditional in operation, may be punitive after the event and also preventive. . . .
>
> [Parliament has the authority] to legislate in relation to preventive criminal law; as, for example, by binding over a person to keep the peace. Parliament's power extends more obviously to the detention of an accused who has been acquitted on the ground of insanity at the time the offence charged was committed. [Emphasis added.]
>
> Finkelstein, *Laskin's Canadian Constitutional Law*, vol. 2, 5th ed., at p. 850.

This preventative aspect to the criminal law power was recognized by this Court in *Goodyear Tire and Rubber Company of Canada Limited v. The Queen*, [1956] S.C.R. 303, at p. 308, by Locke J.:

Quebec, [1951] A.C. 179). Sont considérés comme fins publiques la paix publique, l'ordre, la sécurité, la santé et la moralité (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1, à la p. 50).

Il est vrai que les dispositions relatives à l'aliénation mentale ne sont pas assorties d'une «peine», en ce sens que les personnes acquittées en raison de leur aliénation mentale ne sont pas tenues responsables de leurs actes et ne sont pas soumises à un châtiment. Il est néanmoins reconnu depuis longtemps que le pouvoir en matière de droit criminel comporte aussi un aspect préventif:

> [TRADUCTION] Il est possible d'adopter validement une loi «relative» au droit criminel même si cette loi ne possède pas en soi les caractéristiques d'une loi pénale. Ce serait le cas, par exemple, d'une loi qui ne ferait qu'abroger une loi pénale. Son domaine d'application privilégié, toutefois, est la législation visant la prévention du crime, obligeant par exemple une personne à garder la paix, ou prévoyant la détention d'une personne incapable de subir son procès pour cause d'aliénation mentale. Bien que les lois de ce type s'éloignent du droit criminel classique, leur validité ne fait aucun doute. [Je souligne.]
>
> Hogg, *Constitutional Law of Canada*, 2e éd., à la p. 411.
>
> En d'autres termes, la législation fédérale en matière criminelle peut être absolue ou conditionnelle dans son application, elle peut être punitive après le fait et préventive . . .
>
> [Le Parlement a le pouvoir] de légiférer relativement au droit criminel préventif; en obligeant, par exemple, quelqu'un à garder la paix. Le pouvoir du Parlement s'étend de façon plus manifeste à la détention de l'accusé qui a été acquitté pour cause d'aliénation mentale au moment de la perpétration de l'infraction alléguée. [Je souligne.]
>
> Finkelstein, *Laskin's Canadian Constitutional Law*, vol. 2, 5e éd., à la p. 850.

Cet aspect préventif du pouvoir en matière de droit criminel a été reconnu par notre Cour dans l'arrêt *Goodyear Tire and Rubber Company of Canada Limited v. The Queen*, [1956] R.C.S. 303. Le juge Locke y affirme, à la p. 308:

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The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime.

[TRADUCTION] Le pouvoir de légiférer relativement au droit criminel n'est pas restreint, à mon avis, à la définition des infractions et à l'imposition de peines en sanctionnant la contravention. Le pouvoir du Parlement s'étend aussi bien à la prévention du crime qu'à son châtiment.

More recently, in *R. v. Lyons*, [1987] 2 S.C.R. 309, this Court again approved of this preventative branch of the criminal law power in its discussion of the dangerous offender provisions, at p. 329:

Plus récemment, notre Cour a eu l'occasion de confirmer à nouveau cet aspect préventif du pouvoir en matière de droit criminel en examinant, dans l'arrêt *R. c. Lyons*, [1987] 2 R.C.S. 309, à la p. 329, les dispositions relatives aux délinquants dangereux:

It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction.

D'où l'importance de reconnaître la nature précise des objectifs pénologiques de la partie XXI. Il est clair que la détention pour une période indéterminée répond à des fins à la fois punitives et préventives. L'une et l'autre constituent des buts légitimes de la sanction pénale.

Although both of those cases recognized the preventative branch in the context of sentencing provisions, a conviction is not necessary before Parliament can legislate pursuant to this particular aspect of s. 91(27). On this point, I agree with the determination of the Alberta Court of Appeal in *Attorney General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138. The court, at p. 142, was of the opinion that a conviction was not necessary for legislation to come within s. 91(27) and found that s. 101 of the *Code* which provided for the search, seizure and forfeiture of firearms if possession of such was not in the interests of safety was *intra vires* Parliament's criminal law power:

Bien que, dans ces deux arrêts, l'aspect préventif soit reconnu dans le contexte de dispositions sur la détermination de la peine, il n'est pas nécessaire qu'il y ait déclaration de culpabilité pour que le Parlement puisse légiférer en vertu de cet aspect particulier du par. 91(27). Sur ce point, je souscris à la conclusion de la Cour d'appel de l'Alberta dans l'arrêt *Attorney General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138. La cour y a exprimé l'avis, à la p. 142, qu'une déclaration de culpabilité n'était pas nécessaire pour que le texte législatif relève du par. 91(27). Elle a conclu que l'art. 101 du *Code* visant la perquisition, la saisie et la confiscation des armes à feu dont la possession ne serait pas souhaitable pour des motifs de sécurité était *intra vires* du Parlement en matière de droit criminel:

The legislation may be preventative of crime. The legislation may be preventative of death or injury as a result of shootings which are not crimes because of the insanity of the shooter. It may take a criminal trial, however, to determine that result. To say that because it may turn out that a killing or an injury is not the result of crime precludes the section from being criminal legislation, to my mind is untenable. When the object is to reduce the incidence of injury or death to the citizens of the country by the type of violence made possible by the destructive power of a firearm, it becomes clearly within the legislative competence of the Government of Canada under the head of criminal law to so enact.

[TRADUCTION] La disposition législative peut viser à prévenir le crime. Elle peut viser à prévenir la mort ou les blessures corporelles résultant de coups de feu qui ne sont pas des crimes parce que le tireur souffrait d'aliénation mentale. Il peut toutefois être nécessaire de tenir un procès criminel pour en décider. Affirmer que l'article n'est pas de nature pénale, puisqu'il pourrait s'avérer que la mort ou les blessures ne sont pas le résultat d'actes criminels, est à mon avis insoutenable. Si l'objet d'une disposition est de réduire l'incidence des blessures ou des décès attribuables à la force destructrice d'une arme à feu, cette disposition relève clairement de la compétence législative du gouvernement du Canada de légiférer en matière de droit criminel.

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While this Court in *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134, at p. 146, suggested that legislation under the preventative branch of the criminal law power must relate in some way to criminal proceedings, it did not require an actual conviction before provisions aimed at prevention could be considered *intra vires* the criminal law power:

This Court's judgment in *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen*, upholding the validity of federal legislation authorizing the issue of prohibitory order in connection with a conviction of a combines offence, illustrates the preventive side of the federal criminal law power to make a conviction effective. It introduced a supporting sanction in connection with the prosecution of an offence. It does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction. [Emphasis added.]

Since the insanity provisions only relate to persons whose actions are proscribed by the *Criminal Code*, the required connection with criminal law is present. The system of Lieutenant Governor warrants, through the supervision of persons acquitted by reason of insanity, serves to prevent further dangerous conduct proscribed by the *Criminal Code* and thereby protects society. The protection of society is clearly one of the aims of the criminal law.

While I am aware of the potential danger of eroding provincial power if "protection of society" is characterized too broadly, I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere.

For this reason, I disagree with the appellant's submission that this Court's decision in *Fowler v. The Queen*, [1980] 2 S.C.R. 213, applies in the case at

Notre Cour a mentionné, dans l'arrêt *MacDonald c. Vapour Canada Ltd.*, [1977] 2 R.C.S. 134, à la p. 146, qu'une mesure relevant de l'aspect préventif de la compétence en matière de droit criminel doit être reliée de quelque façon à une procédure criminelle, mais elle n'a pas statué qu'il devait y avoir, de fait, déclaration de culpabilité pour que les dispositions visant la prévention puissent être considérées comme relevant du pouvoir en matière de droit criminel:

L'arrêt de cette Cour dans *Goodyear Tire and Rubber Co. of Canada Ltd. c. La Reine*, qui a maintenu la validité d'une loi fédérale autorisant l'émission d'une ordonnance d'interdiction à l'occasion d'une déclaration de culpabilité d'infraction relative aux coalitions, fait voir que le pouvoir fédéral en matière de droit criminel permet l'adoption de mesures préventives pour renforcer une déclaration de culpabilité. À la poursuite pour une infraction, on a joint une sanction effective. Cela ne favorise aucunement une législation fédérale qui, en l'absence de toute procédure criminelle, prévoit des procédures purement civiles en dommages-intérêts avec demande d'injonction. [Je souligne.]

Étant donné que les dispositions relatives à l'aliénation mentale ne s'appliquent qu'aux personnes dont les actes sont prohibés par le *Code criminel*, le lien requis avec le droit criminel est présent. Par le biais de la surveillance des individus acquittés pour cause d'aliénation mentale, le système des mandats du lieutenant-gouverneur vise à prévenir la répétition de comportements dangereux prohibés par le *Code criminel* et protège par conséquent la société. La protection de la société est clairement l'un des buts du droit criminel.

Tout en étant conscient du danger qu'il y a d'éroder les compétences provinciales en donnant à la notion de «protection de la société» une portée trop large, j'aimerais souligner qu'en l'espèce, le Parlement protège la société contre des individus dont le comportement est prohibé par le *Code criminel*. Ce ne sont pas tous les aliénés mentaux qui sont visés, mais seulement ceux qui, par suite de leurs actions, se voient assujettis au droit criminel.

Pour ce motif, je ne puis me rendre à l'argument de l'appelant selon lequel l'arrêt de notre Cour *Fowler c. La Reine*, [1980] 2 R.C.S. 213, s'applique en l'es-

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bar. In *Fowler*, Martland J. writing for the Court, held that s. 33(3) of the *Fisheries Act*, R.S.C. 1970, c. F-14, was *ultra vires* Parliament's authority under s. 91(12) of the *British North America Act* to legislate with respect to "Sea Coast and Inland Fisheries". Subsection 33(3) prohibited the dumping of certain debris into waters believed inhabited by fish. This Court held that the Parliament could not rely on an ancillary power to effect legislation which was overbroad and which, therefore, only might relate to a subject matter of federal competence (at p. 226):

> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.

In my respectful opinion, there is a strong connection between the L.G.W. provisions and the prevention of crime. As I have already mentioned, the only insane individuals who come within the scope of the provisions are those who have committed acts proscribed by the *Criminal Code*. Without supervision and treatment of these individuals, the potential for harm to other members of society is great.

I agree with the submissions of the appellant that, while the legislation does provide for supervision or confinement of individuals, it does not aim to punish them. Parliament has recognized that, as a matter of public policy, individuals suffering from legal insanity should not be held criminally responsible for their actions nor be punished. However, the fact that the criminal committal provisions are not designed to punish the individual acquittee does not incontrovert-

pèce. Dans cet arrêt, le juge Martland a conclu, au nom de la Cour, que le par. 33(3) de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, excédait le pouvoir du Parlement de légiférer, en vertu du par. 91(12) de l'*Acte de l'Amérique du Nord britannique*, à l'égard des «pêcheries des côtes de la mer et de l'intérieur». Le paragraphe 33(3) interdisait le dépôt de certains débris dans des eaux fréquentées par le poisson. Notre Cour a jugé que le Parlement ne pouvait se fonder sur un pouvoir accessoire pour adopter des mesures législatives trop larges et qui, par conséquent, pouvaient au plus être reliées à un sujet de compétence fédérale (à la p. 226):

> Le paragraphe 33(3) ne cherche pas à établir un lien entre la conduite prohibée et les dommages, réels ou probables, que les pêcheries pourraient subir. C'est une interdiction générale d'exercer certaines activités de compétence provinciale; ce paragraphe ne fixe pas les éléments de l'infraction de manière à établir un lien entre l'interdiction et les dommages vraisemblables aux pêcheries. De plus, aucune preuve produite devant la Cour n'indique que l'ensemble des activités visées par le paragraphe cause effectivement des dommages aux pêcheries. À mon avis, l'interdiction, dans ses termes généraux, n'est pas nécessairement accessoire au pouvoir fédéral de légiférer sur les pêcheries des côtes de la mer et de l'intérieur et elle excède les pouvoirs du Parlement fédéral.

Avec égards, je suis d'avis qu'il existe une forte relation entre les dispositions relatives aux mandats du lieutenant-gouverneur et la prévention du crime. Comme je l'ai souligné précédemment, les seuls aliénés mentaux qui tombent dans le champ d'application des dispositions sont ceux qui ont commis des actes prohibés par le *Code criminel*. Laissés sans surveillance et sans traitement, ces individus peuvent présenter un grand danger pour les autres membres de la société.

Je suis d'accord avec l'appelant pour dire que, même si les mesures législatives prévoient effectivement la surveillance et la détention des individus, elles ne visent pas à les punir. Le Parlement reconnaît que, pour des raisons d'intérêt public, les personnes atteintes d'aliénation mentale au sens légal ne devraient être ni tenues criminellement responsables de leurs actions ni punies. Toutefois, le fait que les dispositions relatives au renvoi sous garde ne soient

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ibly lead to the conclusion that, therefore, the object of the legislation is treatment and is outside the scope of Parliament's criminal law power.

In *Schneider v. The Queen*, [1982] 2 S.C.R. 112, this Court found a statutory scheme which provided for the involuntary detention of heroin addicts to be *intra vires* the Province of British Columbia, pursuant to its competence over health matters under s. 92(16). In that case, Dickson J. (as he then was) found that the detention provisions were not punitive, but were instead necessary for the treatment of these people, at pp. 132-33:

I think, on balance, however, it was open to the Court of Appeal of British Columbia to conclude, as it did, that the provisions of the impugned statute for the examination, apprehension and detention of dependent persons or patients are in no way intended to be punitive. They are provided for as ancillary to "treatment" as defined. The legislative plan is not to punish users of narcotics. It is to provide facilities and other means designed to assist in terminating or diminishing a "patient's" use of or dependency on the defined narcotic.

I do not take this statement to mean, however, that if legislation providing for involuntary detention is not punitive, it is necessarily outside the criminal sphere. It is important to note that in *Schneider*, this Court unanimously emphasized that subjects related to "health" do not exclusively come within either federal or provincial competence, at pp. 114, 142 and 132:

This conclusion must not be taken as excluding the Parliament of Canada from legislating in relation to public health, viewed as directed to protection of the national welfare. In the present case, there is no preclusive or superseding federal legislation.

. . .

In sum "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or

pas conçues pour punir les personnes acquittées ne mène pas inéluctablement à la conclusion que leur objet est le traitement et qu'elles excèdent la compétence du Parlement en matière de droit criminel.

Dans l'arrêt *Schneider c. La Reine*, [1982] 2 R.C.S. 112, notre Cour a statué que des mesures législatives prévoyant la détention forcée des héroïnomanes étaient *intra vires* de la province de la Colombie-Britannique car elles relevaient de sa compétence en matière de santé en vertu du par. 92(16). Le juge en chef Dickson (alors juge puîné) a conclu que les dispositions imposant la détention n'étaient pas punitives, mais au contraire nécessaires au traitement des héroïnomanes, aux pp. 132 et 133:

Tout bien considéré, je crois qu'il était loisible à la Cour d'appel de la Colombie-Britannique de conclure, comme elle l'a fait, que les dispositions de la loi contestée relatives à l'examen, à l'arrestation et à la détention de personnes ou de patients qui souffrent de toxicomanie ne visent aucunement à être punitives. Elles sont accessoires à la «cure» définie dans la Loi. Le but de la Loi n'est pas de punir ceux qui font usage de stupéfiants. Elle vise à fournir des services et d'autres moyens permettant d'aider un «patient» à supprimer ou à réduire son usage du stupéfiant qui y est défini ou sa dépendance à son égard.

Ce passage ne signifie cependant pas, à mon avis, qu'une loi imposant la détention forcée mais sans intention punitive excède nécessairement le domaine criminel. Il importe de faire remarquer que dans l'arrêt *Schneider*, notre Cour a souligné à l'unanimité que les sujets reliés à la «santé» ne relèvent pas exclusivement de la compétence fédérale ou provinciale, aux pp. 114, 142 et 132:

Cette conclusion ne doit pas s'interpréter comme empêchant le Parlement du Canada d'adopter des lois sur la santé publique, qui viseraient à protéger le bien-être national. En l'espèce, il n'y a pas de loi fédérale pour l'écarter ou la remplacer.

. . .

Somme toute, la «santé» n'est pas l'objet d'une attribution constitutionnelle spécifique, mais constitue plutôt un sujet indéterminé que les lois fédérales ou provin-

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provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.

. . .

It is not an easy matter, I confess, to determine whether the *Heroin Treatment Act* is a valid provincial health law with what-might-be-regarded-as-punitive features or whether the pith and substance of the Act is criminal law and therefore invalid.

In conclusion, Dickson J. determined that the most important characteristic of the *Heroin Treatment Act*, S.B.C. 1978, c. 24, was the treatment aspect of the scheme, and that the coercion was simply incidental to its effectiveness. The legislative scheme in issue in the case at bar is very different from the one considered in *Schneider*, *supra*. In that case, it was clear even from the title of the Act that the main object of the legislation was treatment. The Act focussed on the individual heroin addicts. In contrast, the impugned provisions dealing with the criminal committal of persons acquitted by reason of insanity focus on society and the role which the criminal law plays in its protection and in the prevention of crime. While treatment or cure of the individual may be incidentally achieved, this consideration is secondary and simply a means to achieving the ends of protection and prevention.

This distinction between the objective of the L.G.W. system and the means by which it is achieved was described by Macfarlane J.A. of the British Columbia Court of Appeal in *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154, at p. 171:

The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. The objective is to be achieved by treatment of the patient in a hospital, rather than in a prison environment. [Emphasis added.]

In *R. v. Saxell*, *supra*, at p. 186, the Ontario Court of Appeal also recognized that while the insanity provisions may encompass treatment and cure, these elements merely constitute the means by which to

ciales valides peuvent aborder selon la nature ou la portée du problème de santé en cause dans chaque cas.

. . .

J'avoue qu'il n'est pas facile de déterminer si l'*Heroin Treatment Act* est une loi provinciale valide en matière de santé, qui comporte ce qu'on pourrait appeler des aspects punitifs, ou si, de par son caractère véritable, elle constitue du droit pénal et est par conséquent invalide.

Le juge Dickson a conclu que la caractéristique la plus marquante de l'*Heroin Treatment Act*, S.B.C. 1978, ch. 24, était son aspect traitement et que la coercition était simplement accessoire à son efficacité. Or, le régime législatif en cause en l'espèce est très différent de celui dont il était question dans l'arrêt *Schneider*, précité. Dans cette affaire, le titre même de la Loi indiquait que son objet principal était le traitement. Cette loi mettait l'accent sur les héroïnomanes en tant qu'individus. Par contre, les dispositions contestées relatives au renvoi sous garde des personnes acquittées pour cause d'aliénation mentale visent avant tout la société et la fonction de protection et de prévention qu'y remplit le droit criminel. Bien que ce régime puisse permettre accessoirement le traitement ou la participation d'un individu à une cure, il s'agit là d'une considération secondaire et d'un simple moyen pour atteindre les fins de protection et de prévention.

Cette distinction entre l'objectif du système des mandats du lieutenant-gouverneur et les moyens choisis pour l'atteindre a été énoncée en ces termes par le juge Macfarlane de la Cour d'appel de la Colombie-Britannique dans l'arrêt *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154, à la p. 171:

[TRADUCTION] L'objectif de la mesure législative est la protection de la société et de l'accusé jusqu'au rétablissement de la santé mentale de ce dernier. Le moyen choisi pour l'atteindre est le traitement du patient dans un hôpital, plutôt que dans un environnement carcéral. [Je souligne.]

Dans l'arrêt *R. v. Saxell*, précité, à la p. 186, la Cour d'appel de l'Ontario a également reconnu que si les dispositions relatives à l'aliénation mentale peuvent comporter des éléments de traitement et de cure,

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achieve the end of public protection. Society will be safer for every individual cured:

But these provisions of the *Code* are not designed to punish the accused; they are for the protection of the public and the treatment of the accused. Manifestly, the public is best protected by the cure of the accused. Indeed, the original statute from which ss. 542 and 545 were derived recited that "it may be dangerous to permit persons so acquitted to go at large. . . ": the *Criminal Lunatics Act*, 1800 (U.K.), c. 94.

As our understanding of mental illness has grown through the years, providing treatment for persons held under L.G.W. has come to be accepted, indeed expected, for both humanitarian and pragmatic reasons. However, this treatment is not prescribed by the impugned provisions; rather, it constitutes the means to achieving their end, the protection of society.

The *Criminal Code* provisions do not speak directly of the administration of medical treatment. They simply stipulate the procedures for a criminal committal, procedures designed to protect society, not to treat the individual. Parliament has developed a scheme by which to protect society through the neutralization of potentially dangerous persons who have brought themselves within the criminal sphere by committing acts proscribed by the criminal law. The removal of these persons from society, in the interest of protecting society, flows from the federal power. For humanitarian reasons, Parliament has determined that these individuals will be transferred into the hands of the provincial authorities for treatment. However, the impugned provisions themselves deal primarily with the removal of these people from society and only relate to treatment in a secondary, ancillary way. Rather than prescribing "treatment", the provisions provide for an alternative to simple incarceration, based on a humanitarian concern for persons acquitted by reason of insanity.

The actual wording of the *Code* provisions reveals that their focus is on societal interests. For example, the entire section of the *Criminal Code* dealing with

ces éléments ne sont que le moyen d'atteindre le but de la protection publique. Chaque guérison contribuera à accroître la sécurité de la société:

[TRADUCTION] Mais ces dispositions du *Code* ne visent pas à punir les accusés; elles visent la protection du public et le traitement des accusés. Manifestement, le public est mieux protégé par le traitement des accusés. De fait, la loi initiale dont dérivent les articles 542 et 545 disposait qu'«il peut être dangereux de permettre aux personnes ainsi acquittées de recouvrer leur liberté . . .»: *Criminal Lunatics Act*, 1800 (R.-U.), ch. 94.

Notre compréhension de la maladie mentale s'étant approfondie avec les années, on en est venu, pour des motifs à la fois humanitaires et pragmatiques, à accepter et même à préconiser le traitement des personnes détenues sous le système des mandats du lieutenant-gouverneur. Ce traitement, toutefois, n'est pas prescrit par les dispositions contestées; il ne constitue que le moyen d'atteindre les fins visées, soit la protection de la société.

Les dispositions du *Code criminel* ne prévoient pas directement l'administration d'un traitement médical. Elles énoncent simplement la procédure à suivre aux fins du renvoi sous garde, procédure visant la protection de la société et non le traitement de l'individu. Le Parlement a mis en œuvre un système de protection de la société par le biais de la neutralisation des personnes potentiellement dangereuses qui, par suite des actes prohibés qu'elles ont commis, ont été assujetties au droit criminel. Le retrait de ces personnes de la société, au nom de la protection collective, découle de la compétence fédérale. Pour des motifs humanitaires, le Parlement a décidé que ces individus seraient remis aux autorités provinciales, à des fins de traitement. En soi, cependant, les dispositions contestées visent avant tout le retrait de ces personnes de la société et ne sont reliées au traitement que d'une manière secondaire, accessoire. Au lieu de prescrire un «traitement», les dispositions fournissent aux personnes acquittées pour cause d'aliénation mentale une solution de rechange à la simple incarcération, fondée sur des préoccupations d'ordre humanitaire.

Le libellé même des dispositions du *Code* révèle que ce sont les intérêts de la société qui en sont l'axe principal. Par exemple, tout l'article du *Code crimi-*

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the detention of insanity acquittees is entitled "Supervision of Insane Persons", not "Treatment of Insane Persons". The statutory powers of the Lieutenant Governor provided for in s. 545(1) of the *Code* are limited to ordering either the custody or release of the individual and do not extend to specific aspects of treatment. The Lieutenant Governor may order a discharge, either absolute or with conditions, "... if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public". (Emphasis added.)

Similarly, before an individual held under these provisions can be released, the Board of Review must consider, "... whether, in the opinion of the board, that person has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions" (s. 547(5)*(d)*, emphasis added.). The definition of "recovered" was considered by the Federal Court in *Lingley v. New Brunswick Board of Review* (1973), 13 C.C.C. (2d) 303, at p. 308, and clearly found to encompass societal interests:

> It is clear from a reading of ss. 545 and 547 that the public interest and the interest of an accused himself were of paramount importance in the minds of Parliament when these sections were passed. I am satisfied from a reading of s. 547(5)*(d)* that, in addressing itself to the question of whether an accused has recovered, the Board is entitled to interpret "recovery" as full recovery and to find that if an accused can no longer be said to be legally insane as defined in s. 16, he is, nevertheless, "not recovered" in a case like this where there is strong evidence of continuing psychopathic disorders which would render the accused "dangerous" to members of the public were he to be released.

The provisions providing for confinement and the criteria for the decision to release or not, therefore, do not focus on treatment as much as on the protection of society. Of course Parliament is sympathetic to persons suffering from psychological illnesses and it will not hold them responsible for their actions or punish them. However, it is not Parliament's respon-

nel qui traite de la détention des personnes acquittées pour cause d'aliénation mentale est intitulé: «Surveillance des aliénés», et non «Traitement des aliénés». Les pouvoirs qui sont conférés au lieutenant-gouverneur par le par. 545(1) du *Code* se limitent à ordonner soit la garde, soit la mise en liberté de l'individu et ne s'étendent pas à des aspects précis du traitement. Le lieutenant-gouverneur peut ordonner la libération, soit inconditionnellement soit avec conditions, «... s'il est d'avis que la mesure est dans l'intérêt véritable de l'accusé sans nuire à l'intérêt public». (Je souligne.)

De même, avant qu'un individu détenu en application de ces dispositions puisse être remis en liberté, la commission d'examen doit déterminer «... si, de l'avis de la commission, cette personne est rétablie et, dans l'affirmative, si à son avis, il est dans l'intérêt du public et dans l'intérêt de cette personne que le lieutenant-gouverneur ordonne qu'elle soit libérée absolument ou sous réserve des conditions» (al. 547(5)*d*)). (Je souligne.) La Cour fédérale a examiné la définition du mot «rétablie» dans l'affaire *Lingley c. Commission d'examen du Nouveau-Brunswick*, [1973] C.F. 861. Elle a clairement dit, aux pp. 866 et 867, que ce terme englobait les intérêts de la société:

> Il ressort clairement à la lecture des articles 545 et 547 que l'intérêt public et l'intérêt de l'accusé lui-même étaient d'importance primordiale dans l'esprit du législateur quand il a adopté ces articles. La lecture de l'article 547(5)*d*) me convainc qu'en se posant la question de savoir si un accusé est rétabli, la Commission est fondée à interpréter le «rétablissement» comme étant le rétablissement total et à décider que si l'on ne peut plus dire qu'un accusé est aliéné mental d'un point de vue légal, selon la définition de l'article 16, il n'est néanmoins «pas rétabli» dans un cas comme celui-ci, où des preuves solides démontrent que l'accusé souffre de désordres psychopathiques qui le rendraient «dangereux» pour le public si on le libérait.

Les dispositions prévoyant la réclusion, ainsi que les critères devant servir à déterminer s'il doit y avoir remise en liberté ou non, s'attachent donc moins au traitement qu'à la protection de la société. Le Parlement fait bien sûr preuve de compassion envers les personnes souffrant de maladies psychologiques et il ne les tiendra pas responsables de leurs actes pas plus

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sibility to treat these people; Parliament must concern itself with the consequences for society if these individuals are released while dangerous. The fact that the *Code* provisions themselves do not focus on treatment is not callousness on the part of Parliament, but simply a recognition of the responsibilities and priorities assigned to it by the division of powers provisions in the Constitution.

It should be noted that while "treatment" in a narrow sense falls under provincial heads of power, Parliament may have competence over certain subjects which may appear to be "treatment" in certain aspects. For example, no one disputes that criminal law sentencing may deal with considerations of rehabilitation. The criminal law power authorizes Parliament to provide for conditional discharges just as well as unconditional discharges, even though some of the conditions may involve a treatment program. If Parliament chooses to respond to conduct proscribed by the *Criminal Code* in a manner more sensitive to rehabilitation concerns, it does not thereby lose its legislative competence.

For example, this Court found in *Attorney General of British Columbia v. Smith*, [1967] S.C.R. 702, that the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, was *intra vires* Parliament's criminal law power. In that case, it was argued that the Act, which provided an alternative system under which to deal with children committing acts which—but for their age—would constitute crimes under the *Criminal Code*, was *ultra vires* Parliament because it related to the welfare of children. While recognizing an incidental effect on the provincial subject area of welfare of children, this Court nevertheless found the Act related primarily to criminal law (at pp. 710 and 712-13):

Briefly, and in scope, the Act deals with *juvenile delinquency* in its relation to crime and crime prevention, a human, social and living problem of public interest, in the constituent elements, alleviation and solution of which jurisdictional distinctions of constitutional order

qu'il ne les punira. Cependant, ce n'est pas au Parlement qu'il appartient de les traiter; son attention doit plutôt se porter sur les conséquences que pourrait avoir sur la société la libération d'individus dangereux. Que les dispositions mêmes du *Code* ne soient pas axées sur le traitement ne témoigne pas d'un manque de sensibilité de la part du Parlement, mais simplement de la reconnaissance des responsabilités et des priorités qui lui sont attribuées par les dispositions de la Constitution sur le partage des pouvoirs.

Notons que, même si le «traitement» au sens étroit relève des pouvoirs attribués aux provinces, le Parlement peut avoir compétence sur des sujets qui, par certains aspects, s'apparentent à des formes de «traitement». Ainsi, personne ne conteste que la condamnation à une peine peut toucher à la question de la réinsertion. Le pouvoir que le Parlement possède en matière de droit criminel l'autorise en effet à accorder aussi bien la libération inconditionnelle que la libération sous condition, encore que certaines de ces conditions puissent inclure un programme de traitement. Si le Parlement choisit de répondre à une conduite prohibée par le *Code criminel* en se préoccupant davantage de la réinsertion, il ne perd pas de ce fait sa compétence législative.

À titre d'exemple, notre Cour a conclu dans l'arrêt *Attorney General of British Columbia v. Smith*, [1967] R.C.S. 702, que la *Loi sur les jeunes délinquants*, S.R.C. 1952, ch. 160, était *intra vires* du Parlement en matière de droit criminel. Dans cette affaire, on a fait valoir que la Loi, qui prévoyait la mise en place d'un système de rechange pour les enfants ayant commis des actes qui—n'eût été leur âge—auraient constitué des crimes en vertu du *Code criminel*, était *ultra vires* du Parlement parce qu'elle traitait du bien-être des enfants. Bien que reconnaissant l'effet accessoire de cette loi sur la compétence provinciale en matière de bien-être des enfants, notre Cour a néanmoins conclu qu'elle se rapportait principalement au droit criminel (aux pp. 710, 712 et 713):

[TRADUCTION] En bref, et dans son ensemble, l'objet de la Loi est la *délinquance juvénile* dans ses rapports avec le crime et la prévention du crime, un problème courant d'intérêt public, à la fois humain et social, dont l'aspect de partage des compétences sur le plan constitutionnel,

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are obviously and genuinely deemed by Parliament, to be of no moment.

. . .

Obviously, one can say that the Act gives a special kind of protection to misguided children and that it should incidentally operate to ultimately enhance their welfare.

. . .

[The judge must consider the]. . . child's interest or own good, the community's best interest and the proper administration of justice. This, I think, qualifies the nature of the protection which the Act is meant to give to juveniles alleged or found to be delinquents and supports the proposition that the Act is not legislation in relation to protection and welfare of children within the meaning envisaged in the *Adoption Act* case, *supra*. . . . [It] is genuine legislation in relation to criminal law in its comprehensive sense.

Parliament's sensitivity to individual rights also expands its competence to legislate with respect to procedures for review of the Lieutenant Governor warrants. Although the protection of society rationale may not fully authorize such provisions, Parliament surely may balance individual rights against the interests of protecting society and provide for some system of review. As the individual becomes less of a threat to society, the criminal law progressively loses authority and the coercive aspects of the warrant are loosened until a point is reached at which the individual is free from any supervision provided under the *Criminal Code*.

3. *Does the Automatic Detention of a Person Found not Guilty by Reason of Insanity Required by s. 542(2) of the Criminal Code of Canada Violate the Canadian Charter of Rights and Freedoms*?

Following a verdict of not guilty by reason of insanity, s. 542(2) requires that the trial judge automatically order the acquittee into strict custody until the pleasure of the Lieutenant Governor of the province is known. The appellant submits that this provi-

pour ce qui est de ses éléments constitutifs, de son atténuation et de sa solution, est manifestement et véritablement considéré par le Parlement comme étant sans importance.

. . .

On peut manifestement affirmer que la Loi accorde une protection spéciale aux enfants mal dirigés et qu'elle devrait avoir accessoirement pour effet d'améliorer en fin de compte leur bien-être.

. . .

[Le juge doit prendre en considération] . . . l'intérêt ou le bien de l'enfant, le meilleur intérêt de la collectivité et la bonne administration de la justice. Cela, je crois, qualifie la nature de la protection que la Loi vise à apporter aux jeunes dont la délinquance est alléguée ou constatée, et étaye la proposition selon laquelle la Loi n'est pas une législation relative à la protection et au bien-être des enfants au sens où on l'envisageait dans l'affaire de la *Loi de l'adoption*, précitée, [. . .] mais une véritable législation relative au droit criminel au sens large.

La préoccupation du Parlement à l'égard des droits individuels lui donne également compétence pour légiférer quant à la procédure d'examen des mandats du lieutenant-gouverneur. Il est certes possible que l'adoption de ces dispositions ne soit pas entièrement justifiée par le motif de la protection de la société, mais il ne fait pas de doute que le Parlement peut, en soupesant les droits individuels et la nécessité de protéger la société, prévoir une certaine forme d'examen. À mesure que s'amenuise le danger que présentait l'individu pour la société, le droit criminel perd progressivement son emprise et les aspects coercitifs du mandat sont assouplis jusqu'au jour où l'individu est libéré de toute surveillance sous l'empire du *Code criminel*.

3. *La détention automatique, aux termes du par. 542(2) du Code criminel du Canada, d'une personne déclarée non coupable en raison de son aliénation mentale viole-t-elle la Charte canadienne des droits et libertés*?

À la suite d'un verdict de non-culpabilité pour cause d'aliénation mentale, le juge du procès doit, aux termes du par. 542(2), ordonner automatiquement que la personne acquittée soit tenue sous une garde rigoureuse jusqu'à ce que le bon plaisir du lieu-

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sion of the *Criminal Code* restricts his rights under ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1. First, he submits that s. 542(2) of the *Criminal Code* restricts his procedural rights under s. 7 because there is no opportunity for a hearing before the trial judge orders the insanity acquittee into "strict custody". Since any evidence of insanity adduced during the trial only relates to insanity at the time of the offence, there is no evidence before the trial judge as to whether such detention is necessary because the patient is dangerous.

tenant-gouverneur de la province soit connu. L'appelant soutient que cette disposition du *Code criminel* restreint les droits que lui reconnaissent les art. 7 et 9 de la *Charte canadienne des droits et libertés* et ne peut être sauvegardée par l'article premier. Il fait valoir, en premier lieu, que le par. 542(2) du *Code criminel* restreint les droits procéduraux que lui garantit l'art. 7 parce qu'il ne prévoit aucune possibilité d'audition avant que le juge du procès n'ordonne la mise sous «garde rigoureuse» de la personne acquittée en raison de son aliénation mentale. Étant donné que la preuve d'aliénation mentale présentée au procès n'a trait qu'à l'aliénation au moment de l'infraction, le juge ne dispose d'aucun élément lui permettant de déterminer si la détention est nécessaire en raison du danger que présente le patient.

Additionally, the appellant submits that s. 542(2) infringes his substantive rights under s. 7 and his right to be free from arbitrary detention under s. 9, because it imposes a duty on the trial judge to order "strict custody" automatically and arbitrarily, without providing any standards for the exercise of this power. The provision substitutes an overly inclusive assumption that all accused persons acquitted by reason of insanity are presently dangerous and require hospitalization, for an actual determination on the facts of each case as to whether or not that assumption is valid.

L'appelant soutient, de plus, que le par. 542(2) contrevient aux droits substantiels que lui garantit l'art. 7 et à son droit à la protection contre la détention arbitraire en vertu de l'art. 9, parce qu'il oblige le juge du procès à ordonner la «garde rigoureuse» de façon automatique et arbitraire, sans que l'exercice de ce pouvoir soit soumis à certaines normes. La disposition applique la présomption trop globale selon laquelle tous les prévenus acquittés en raison de leur aliénation mentale sont dangereux à l'heure actuelle et que leur état nécessite l'hospitalisation, au lieu de prévoir un examen véritable qui permettrait, selon les faits de chaque espèce, de vérifier la validité de cette présomption.

Section 7

The automatic detention required under s. 542(2) clearly deprives the appellant of his right to liberty. However, if this deprivation is in accordance with the principles of fundamental justice, there will be no limitation of his rights under s. 7 of the *Charter*. As was stated in *Re B.C. Motor Vehicle Act*, *supra*, at pp. 503-4, the principles of fundamental justice, while not limited to "natural justice", require at least those procedural safeguards. Because s. 542(2) provides for no hearing or other procedural safeguards whatsoever, I need not proceed any further to conclude that the deprivation of liberty is not in accordance with the principles of fundamental justice.

L'article 7

La détention automatique exigée par le par. 542(2) porte clairement atteinte au droit de l'appelant à la liberté. Cependant, si cette atteinte est conforme aux principes de justice fondamentale, il n'y aura pas de restriction des droits que lui reconnaît l'art. 7 de la *Charte*. Comme il a été dit dans *Renvoi: Motor Vehicle Act de la C.-B.*, précité, aux pp. 503 et 504, les principes de justice fondamentale, quoique non limités à la «justice naturelle», exigent à tout le moins ces garanties en matière de procédure. Or, le par. 542(2) ne prévoyant aucune audition ou autre forme quelconque de garantie procédurale, il est inutile d'aller plus loin pour conclure que l'atteinte à la liberté n'est pas conforme aux principes de justice fondamentale.

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With respect, I do not accept the position of the majority of the Court of Appeal that the procedural fairness required by the principles of fundamental justice can be simply "read in" to this legislation. For this point, they relied on this Court's decision in *Singh v. Minister of Employment and Immigration*, *supra*, and particularly the words of Wilson J., at p. 188:

If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the *Charter*. The issue may be resolved on other grounds.

While I agree with this statement, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, I explained the process of reading constitutional requirements into legislation which confers a discretion. When legislation confers a precise discretion that limits a right or freedom under the *Charter* the legislation is found to constitute an infringement and the Court must proceed to s. 1 (at p. 1078):

As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. [Emphasis added.]

Applying this approach to the situation in the case at bar, I find that s. 542(2) does not confer an imprecise discretion on the trial judge. Instead, it requires

Avec égards, je ne puis me rendre à l'opinion de la majorité de la Cour d'appel, selon laquelle il suffit de donner une interprétation large à ces dispositions pour qu'elles soient considérées comme respectant l'équité procédurale qu'exigent les principes de justice fondamentale. Sur ce point, l'opinion majoritaire se fonde sur l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, précité et, en particulier, sur le passage suivant du juge Wilson, à la p. 188:

Si, sur le plan de l'interprétation législative, l'équité en matière de procédure demandée par les appelants n'est pas exclue par l'économie de la Loi, il va sans dire qu'il n'y a aucune raison de recourir à la *Charte*. Le litige peut être tranché par d'autres moyens.

Bien que je sois d'accord avec cet énoncé, j'ai expliqué, dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, la façon d'introduire par interprétation large des exigences constitutionnelles dans des dispositions législatives attributives de pouvoirs discrétionnaires. Lorsque la disposition confère un pouvoir discrétionnaire précis qui restreint un droit ou une liberté garantis par la *Charte* on peut conclure qu'elle constitue une violation et que le tribunal doit alors procéder à l'examen en vertu de l'article premier (aux pp. 1077 et 1078):

La Constitution étant la loi suprême du pays et rendant inopérantes les dispositions incompatibles de toute autre règle de droit, il est impossible d'interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte* à moins, bien sûr, que ce pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. Une telle interprétation nous obligerait en effet, à défaut de pouvoir justifier cette disposition législative aux termes de l'article premier, à la déclarer inopérante. Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte*, elle ne doit pas par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante. Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte*. [Je souligne.]

Appliquant cette méthode d'analyse en l'espèce, je constate que le par. 542(2) ne confère pas un pouvoir discrétionnaire imprécis au juge du procès. Au con-

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that the trial judge always act in a manner which would infringe the s. 7 rights of an insanity acquittee in that it states that the trial judge "shall order that [the acquittee] be kept in strict custody... until the pleasure of the lieutenant governor of the province is known". (Emphasis added.) This order of "strict custody" is thus automatically made immediately following the trial and before any hearing on the issue of current mental state. Even attempting to interpret s. 542(2) within the bounds of the Constitution, it is impossible to conclude that Parliament did not intend to authorize such conduct on the part of the trial judge. Because the wording of s. 542(2) is precise and requires the trial judge to order the insanity acquittee into strict custody immediately following the trial, this is not a situation in which this Court can simply "read in" procedural safeguards to make the legislation accord with constitutional requirements.

While I accept that the statutory scheme in question must be looked at in its entirety, I respectfully disagree with the majority position in the Court of Appeal that although s. 542(2) alone may infringe s. 7, the procedural requirements are met by ss. 545 and 547. Assuming, without deciding, that those subsequent provisions themselves accord with the principles of fundamental justice, any subsequent hearings or review cannot change the fact that the initial remand is ordered by the trial judge without any opportunity for a hearing.

Neither can I accept the submissions of the respondent that the constitutional requirements are met by the procedural fairness afforded during the trial itself. With respect, I do not understand how any procedural safeguards which an accused may have enjoyed during the trial offer any protection in a post-acquittal committal process.

It is the position of the appellant that his arguments with respect to s. 9 also apply to the substantive (as

traire, il exige qu'il agisse toujours de manière à enfreindre les droits que garantit l'art. 7 à la personne acquittée pour cause d'aliénation, en ce qu'il dispose que le juge «doit ordonner que [la personne acquittée] soit tenu[e] sous une garde rigoureuse [...] jusqu'à ce que le bon plaisir du lieutenant-gouverneur [...] soit connu». (Je souligne.) Cette ordonnance de «garde rigoureuse» est donc rendue automatiquement tout de suite après le procès et avant toute audience sur la question de l'état mental actuel. Même si on tente de donner au par. 542(2) une interprétation qui le garde dans les limites de la constitutionnalité, il est impossible de conclure que le Parlement n'avait pas l'intention d'autoriser une telle conduite de la part du juge du procès. Étant donné que le par. 542(2) est rédigé de façon précise et qu'il oblige le juge du procès à ordonner la mise sous garde rigoureuse, immédiatement après le procès, de la personne acquittée pour cause d'aliénation mentale, ce n'est pas un cas où il suffirait à notre Cour d'interpréter largement le texte législatif pour y inclure les garanties procédurales qui le rendraient conforme aux exigences constitutionnelles.

Bien que je sois prêt à reconnaître la nécessité d'analyser globalement le régime en cause en l'espèce, je ne puis, avec égards, souscrire à l'opinion majoritaire de la Cour d'appel suivant laquelle, si le par. 542(2), pris isolément, enfreint l'art. 7, les exigences procédurales sont néanmoins satisfaites par les art. 545 et 547. À supposer, sans en décider, que ces dispositions subséquentes soient conformes aux principes de justice fondamentale, aucune audience ni aucun examen ultérieurs ne sauraient changer le fait que le renvoi initial sous garde est ordonné par le juge du procès sans qu'il y ait eu possibilité d'une audience.

Je ne puis non plus accepter l'argument de l'intimée suivant lequel les exigences constitutionnelles sont satisfaites par l'équité en matière de procédure assurée au cours du procès lui-même. Avec égards, je ne vois pas en quoi les garanties dont l'accusé a pu jouir pendant son procès peuvent le protéger dans le processus de renvoi sous garde postérieur à l'acquittement.

L'appelant soutient que les arguments qu'il a fait valoir à l'égard de l'art. 9 s'appliquent également à

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opposed to procedural) aspects of s. 7. Since s. 9 is illustrative of s. 7, and since the central point of the substantive s. 7 arguments in this case is that the detention is ordered on the basis of no criteria (i.e., arbitrary detention), a discussion of s. 9 is sufficient and I will proceed with that forthwith.

Section 9

The appellant submits that it would be pointless to address the procedural defects in s. 542(2) if this Court were not also to deal with the substantive defects. I agree that the substantive defects in the legislation restrict the appellant's right not to be arbitrarily detained under s. 9 of the *Charter*.

The detention order is automatic, without any rational standard for determining which individual insanity acquittees should be detained and which should be released. I need not determine at this point what standard would be required by s. 9 in order to detain an insanity acquittee. The duty of the trial judge to detain is unqualified by any standards whatsoever. I cannot imagine a detention being ordered on a more arbitrary basis. As La Forest J. stated in *R. v. Lyons, supra*, at p. 348, adopting the submission of the Crown in finding that the Crown's discretion with respect to dangerous offender applications was not "arbitrary" and did not infringe s. 9:

> . . . it is the absence of discretion which would, in many cases, render arbitrary the law's application.

Denying that the provision is "arbitrary" and without standards, the respondent submits that there are criteria for the operation of s. 542(2) which can be found in both the statutory scheme and the jurisprudence: s. 542(2) only applies to indictable offences (s. 542(1)); the trier of fact must have been satisfied that the insane acquittee did commit the act charged, even if incapable of the mental requirement; the

l'égard des aspects substantiels (par opposition à procéduraux) de l'art. 7. Étant donné que l'art. 9 est une illustration de ce que prévoit l'art. 7, et vu qu'en l'espèce le point central des arguments de fond relatifs à l'art. 7 est l'absence de critères servant à fonder l'ordonnance de détention (c.-à-d. détention arbitraire), il suffira d'examiner l'art. 9, ce que je vais faire à l'instant.

L'article 9

L'appelant prétend qu'il serait vain de parler des défauts que comporte le par. 542(2) d'un point de vue procédural sans en aborder également les problèmes de fond. Je conviens avec l'appelant que les problèmes de fond que comporte le texte législatif restreignent son droit à la protection contre la détention arbitraire garanti par l'art. 9 de la *Charte*.

L'ordonnance de détention est rendue automatiquement, sans critère rationnel permettant de déterminer, parmi les personnes acquittées pour cause d'aliénation mentale, lesquelles devraient être détenues et lesquelles devraient être libérées. Il n'y a pas lieu à ce stade d'établir la norme qu'exigerait l'art. 9 pour la détention d'une personne ainsi acquittée. L'obligation du juge du procès d'ordonner la détention n'est assujettie à aucune norme que ce soit. Je ne puis imaginer fondement plus arbitraire pour une détention. Comme l'a dit le juge La Forest dans l'arrêt *R. c. Lyons*, précité, à la p. 348, qui fait siennes les observations du ministère public en concluant que le pouvoir discrétionnaire du ministère public à l'égard des demandes visant à faire déclarer un délinquant dangereux n'était pas «arbitraire» et n'enfreignait pas l'art. 9:

> [TRADUCTION] . . . c'est l'absence de pouvoir discrétionnaire qui, bien souvent, rendrait arbitraire l'application de la loi.

Niant que la disposition soit «arbitraire» et ne comporte aucune norme, l'intimée fait valoir que les critères d'application du par. 542(2) existent tant dans l'économie des dispositions en cause que dans la jurisprudence: ainsi, le par. 542(2) ne vise que les actes criminels (par. 542(1)); le juge des faits doit être convaincu que la personne acquittée pour cause d'aliénation mentale a bel et bien commis l'acte

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mental disorder must be particularly severe so as to meet the test of s. 16(2); and the condition of insanity must have been established on a balance of probabilities (s. 16(4)). With respect, while I agree that the mandatory detention order authorized under s. 542(2) only applies to people who have met these four criteria, it is still arbitrary in the way that it operates with respect to them. Not all of these individuals will be dangerous.

In conclusion, because s. 542(2) requires a trial judge to automatically order strict custody based on no criteria or standards and before any kind of hearing can be conducted on the issue of present mental condition, this provision infringes the appellant's rights under ss. 7 and 9 of the *Charter*. I turn now to the issue of whether the provision can be saved under s. 1.

Section 1

Objective

As I have already stated above, the test for whether legislation which has been found to limit a right or freedom guaranteed by the *Charter* can be saved is that set out by this Court in *Oakes*, *supra*. All of the parties to this appeal seem to agree that the objective of s. 542(2)—the protection of the public and the prevention of crime through the detention of those insanity acquittees who are dangerous because still insane, pending the decision of the Lieutenant Governor—is indeed "pressing and substantial".

Proportionality Test

Before embarking on the proportionality test of the s. 1 inquiry, it is necessary to specify which particular aspect of the impugned legislation has limited the *Charter* rights in question and therefore must be balanced against the importance of the objective. In the case at bar, the lack of a hearing in s. 542(2) deprives the appellant of his right to liberty in a way that is not

allégué même si elle était incapable d'avoir l'élément moral requis; le désordre mental doit être suffisamment grave pour satisfaire au critère du par. 16(2); et enfin l'aliénation doit avoir été établie suivant la prépondérance des probabilités (par. 16(4)). Avec égards, tout en convenant que l'ordonnance de détention obligatoire rendue sous le régime du par. 542(2) ne vise que les personnes qui remplissent ces quatre critères, je ne l'en estime pas moins arbitraire dans la façon dont elle s'applique à leur égard. En effet, ces personnes ne sont pas toutes dangereuses.

En conclusion, étant donné que le par. 542(2) oblige le juge du procès à ordonner automatiquement la garde rigoureuse, sans qu'il puisse se fonder sur aucun critère ni aucune norme et avant la tenue d'une forme quelconque d'audience sur la question de la condition mentale présente de l'accusé, cette disposition porte atteinte aux droits que possède l'appelant en vertu des art. 7 et 9 de la *Charte*. Voyons maintenant si la disposition peut être sauvegardée par l'article premier.

L'article premier

L'objectif

Comme je l'ai indiqué précédemment, le critère suivant lequel une disposition législative dont on a jugé qu'elle restreint un droit ou une liberté garantis par la *Charte* peut être sauvegardée est celui que notre Cour a établi dans l'arrêt *Oakes*, précité. Toutes les parties au présent pourvoi semblent reconnaître que l'objectif du par. 542(2) répond effectivement à des préoccupations «urgentes et réelles». Cet objectif est la protection du public et la prévention du crime par le biais de la détention, en attendant la décision du lieutenant-gouverneur, des personnes acquittées pour cause d'aliénation mentale qui constituent un danger parce qu'elles sont toujours aliénées.

Le critère de la proportionnalité

Avant d'aborder l'élément proportionnalité de l'enquête menée en vertu de l'article premier, il convient de préciser l'aspect de la disposition législative contestée qui restreint les droits garantis par la *Charte* et qui, par conséquent, doit être soupesé par rapport à l'importance de l'objectif poursuivi. En l'espèce, le fait qu'aucune audience ne soit prévue au

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in accordance with the principles of fundamental justice, thereby infringing his rights under s. 7 of the *Charter*. His right under s. 9 of the *Charter* not to be detained arbitrarily is also restricted in that there are no criteria for the exercise of the trial judge's power to detain.

1. Rational Connection

In order to satisfy the first part of the proportionality test, there must be a rational connection between the objective of protecting the public and preventing crime through the detention of dangerous insanity acquittees pending the decision of the Lieutenant Governor and the means chosen to obtain this objective, which has been found to limit the appellant's right. The means chosen by Parliament in s. 542(2) which infringes ss. 7 and 9 is the automatic and arbitrary order of detention, issued in the absence of any procedural safeguards and without any governing standards.

I accept the submissions of the respondent and of the Attorney General of Canada that there is a rational connection between the objective and the means because it is reasonable to assume that some insanity acquittees will continue to represent a danger to the public. While I recognize that not every individual will pose a continued threat to society, I do agree that this assumption, while certainly not irrefutable, is reasonable.

We know that individuals who have been found not guilty by reason of insanity have, in the past, committed an act proscribed by the *Criminal Code*. At that time, they were either incapable of appreciating the nature and quality of that act or were not aware that it was morally wrong (*R. v. Chaulk*, *supra*). It seems reasonable to assume that these individuals could still be legally "insane" and that this incapacity to appreciate the nature and quality of their actions or their amorality could result in future dangerous conduct.

par. 542(2) porte atteinte, de façon incompatible avec les principes de justice fondamentale, au droit à la liberté de l'appelant et, partant, enfreint ses droits prévus à l'art. 7 de la *Charte*. La protection que lui garantit l'art. 9 contre la détention arbitraire est également restreinte en ce que l'exercice du pouvoir du juge du procès d'ordonner la détention ne repose sur aucun critère.

1. Le lien rationnel

Pour que soit respecté le premier volet du critère de proportionnalité, il doit y avoir un lien rationnel entre l'objectif visant à protéger le public et à prévenir le crime grâce à la détention des personnes dangereuses acquittées pour cause d'aliénation mentale en attendant la décision du lieutenant-gouverneur, et le moyen choisi pour atteindre cet objectif, considéré comme restreignant le droit de l'appelant. Le moyen choisi par le Parlement au par. 542(2) et qui porte atteinte aux art. 7 et 9 est l'ordonnance automatique et arbitraire de détention, prononcée sans qu'il existe de garantie procédurale ni de norme la régissant.

Je conviens avec l'intimée et avec le procureur général du Canada qu'il existe un lien rationnel entre l'objectif et le moyen choisi pour y parvenir étant donné qu'il est raisonnable de présumer qu'un certain nombre de prévenus acquittés pour cause d'aliénation continueront de présenter un danger pour le public. Même si je ne suis pas prêt à reconnaître qu'il en sera ainsi pour chaque individu, je suis d'accord pour dire que cette présomption, bien qu'elle ne soit certes pas irréfutable, est raisonnable.

Nous savons que les individus qui ont été déclarés non coupables en raison de leur aliénation mentale ont, dans le passé, commis un acte prohibé par le *Code criminel*. Ils étaient alors incapables soit de juger la nature et la qualité de cet acte, soit de savoir qu'il était moralement répréhensible (*R. c. Chaulk*, précité). Il semble raisonnable de présumer que ces personnes pourraient être encore «aliénées» d'un point de vue légal et que cette incapacité à juger la nature et la qualité de leurs actions, ou leur amoralité, pourrait se traduire par une conduite dangereuse dans l'avenir.

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The United States Supreme Court reached a similar conclusion in *Jones v. United States*, 463 U.S. 354 (1983), at p. 366 and p. 365 (note 13):

Nor can we say that it was unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment.

. . .

... We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ." The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments. [References omitted.]

Of course, while the assumption that persons found not guilty by reason of insanity pose a threat to society may well be rational, I hasten to add that I recognize that it is not always valid. While past violent conduct and previous mental disorder may indicate a greater possibility of future dangerous conduct, this will not necessarily be so. Furthermore, not every individual found not guilty by reason of insanity will have such a personal history. Nevertheless, the connection between the objective and means is a rational one. By ordering the detention of all insane acquittees pending the decision of the Lieutenant Governor, Parliament is ensuring that society will be protected from the ones who are dangerous.

2. Minimal Impairment

Because s. 542(2) affects the appellant's rights under ss. 7 and 9 differently, I will deal with each

La Cour suprême des États-Unis est arrivée à une conclusion analogue dans l'arrêt *Jones v. United States*, 463 U.S. 354 (1983), à la p. 366 et à la p. 365 (note 13):

[TRADUCTION] Nous ne croyons pas davantage qu'il était déraisonnable de la part du Congrès de tirer de l'acquittement pour cause d'aliénation mentale une inférence quant à la persistance de la maladie mentale. Le bon sens enseigne qu'une personne que la maladie mentale a conduite à commettre un acte criminel est susceptible d'être encore malade et de nécessiter des soins.

. . .

... Nous avons eu à plusieurs reprises l'occasion de reconnaître «le caractère incertain du diagnostic posé dans ce domaine et l'imprécision des opinions professionnelles. Tout ce qu'on peut affirmer quant à l'état actuel des connaissances et des thérapies en matière de maladie mentale, c'est que la science ne peut encore porter de jugements définitifs. . .» La leçon que nous en tirons n'est pas que le gouvernement, confronté à cette incertitude, ne peut agir, mais plutôt que les tribunaux doivent faire montre d'une retenue particulière à l'égard des jugements raisonnables émanant des textes législatifs. [Références omises.]

Le postulat voulant que les personnes déclarées non coupables en raison de leur aliénation mentale constituent une menace pour la société peut, certes, être rationnel, mais je m'empresse toutefois d'ajouter que je reconnais qu'il n'est pas toujours valable. Bien que la violence passée et les troubles mentaux antérieurs puissent accroître la possibilité de conduite dangereuse dans l'avenir, il n'en sera pas nécessairement ainsi. De plus, ce ne sont pas tous les individus déclarés non coupables en raison de leur aliénation mentale qui auront connu ce cheminement. Néanmoins il reste qu'il existe un lien rationnel entre l'objectif et le moyen utilisé. En ordonnant la détention de tous les prévenus acquittés pour cause d'aliénation mentale en attendant la décision du lieutenant-gouverneur, le Parlement s'assure que la société sera protégée contre ceux qui sont dangereux.

2. L'atteinte minimale

Étant donné que le par. 542(2) entrave de façon différente les droits que garantissent à l'appelant les

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separately, beginning with his right to liberty under s. 7.

The order of strict custody required by s. 542(2) remains in effect until the pleasure of the Lieutenant Governor of the province is known. The pleasure of the Lieutenant Governor is "known" once the patient is released or an L.G.W. is issued either imposing a conditional release or detention. There is no time requirement within which the Lieutenant Governor must act: no time limit is placed on the order under s. 542(2) and the language of s. 545, pursuant to which the L.G.W. is issued, is discretionary. In fact, the wording of the legislation does not require the Lieutenant Governor to ever make an order.

The following statistics taken from the Canadian Data Base: Patients Held on Lieutenant Governors' Warrants, A Description of Patients Under Lieutenant Governors' Warrant (1988), demonstrate that the duration of this initial remand by the trial judge following a verdict of not guilty by reason of insanity can be quite lengthy:

Mean Length of Time Between the Court Judgment and the Issuance of the L.G.W.:

British Columbia:	0.1 months
Alberta:	5.4 months
Saskatchewan:	3.2 months
Manitoba:	1.9 months
Ontario:	2.3 months
Quebec:	1.2 months
New Brunswick:	1.4 months
Nova Scotia:	2.2 months
Newfoundland:	1.5 months
Canada:	1.8 months

Whatever the actual length of time between court judgment and the issuance of an L.G.W. in any particular case, s. 542(2) does not meet the minimal impairment component of the proportionality test. Parliament could easily employ a means which would still meet its objective and yet not limit the appellant's liberty under s. 7 to such a great extent. The Attorney General of Canada submits that s. 542(2) is simply a bridging provision to ensure the protection

art. 7 et 9, je vais traiter séparément chacun de ces articles, en commençant par le droit à la liberté consacré par l'art. 7.

L'ordonnance de garde rigoureuse exigée par le par. 542(2) reste valable jusqu'à ce que le bon plaisir du lieutenant-gouverneur de la province soit connu. Le bon plaisir du lieutenant-gouverneur est «connu» par la libération du patient ou l'émission d'un mandat de détention ou de libération sous condition. Rien n'oblige le lieutenant-gouverneur à agir à l'intérieur d'un laps de temps donné: l'ordonnance rendue en vertu du par. 542(2) n'est assujettie à aucun délai et l'art. 545, conformément auquel est décerné le mandat du lieutenant-gouverneur, est formulé en termes discrétionnaires. En fait, il ressort du libellé des dispositions que le lieutenant-gouverneur n'est pas même tenu de rendre une ordonnance.

Les statistiques suivantes, tirées de la Base de données canadiennes: Personnes détenues en vertu d'un mandat du lieutenant-gouverneur (1988), montrent que la durée du renvoi initial sous garde ordonné par le juge du procès à la suite d'un verdict de non-culpabilité pour cause d'aliénation mentale peut être assez longue:

Temps moyen écoulé entre le jugement du tribunal et la délivrance du mandat du lieutenant-gouverneur:

Colombie-Britannique:	0,1 mois
Alberta:	5,4 mois
Saskatchewan:	3,2 mois
Manitoba:	1,9 mois
Ontario:	2,3 mois
Québec:	1,2 mois
Nouveau-Brunswick:	1,4 mois
Nouvelle-Écosse:	2,2 mois
Terre-Neuve:	1,5 mois
Canada:	1,8 mois

Peu importe la durée réelle de la période écoulée entre le jugement du tribunal et la délivrance d'un mandat du lieutenant-gouverneur dans un cas donné, le par. 542(2) ne répond pas à l'exigence d'atteinte minimale que comporte le critère de proportionnalité. Le Parlement pourrait aisément employer un moyen qui atteindrait le même objectif sans restreindre de façon aussi considérable la liberté garantie à l'appelant par l'art. 7. Le procureur général du Canada pré-

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of society until a decision is made with respect to an L.G.W. under s. 545 of the *Code*. I find nothing wrong with having a "bridging" provision. However, the indeterminate nature of the strict custody order under s. 542(2) infringes on the right to liberty (in a manner that is not in accordance with the principles of fundamental justice) to an unacceptable degree.

Given that the determination of present mental condition and dangerousness must be made prior to release and given the nature of the issues to be determined, there will necessarily be a gap in time between the acquittal by reason of insanity and the decision whether to release or detain under an L.G.W. The delay in making the dangerousness determination is inevitable because evidence adduced at trial with respect to the s. 16 defence only relates to mental condition at the time of the offence. Automatic detention following an acquittal by reason of insanity is to some extent, then, a codification of practical reality.

In addition to furthering the legislative objective in the short-term, automatic detention also serves to prevent crime and protect society in the future. While prediction of recidivism and recurring mental illness is always difficult, there is evidence before this Court that the opportunity for psychiatrists to observe and evaluate the individual on an inpatient basis often results in a more accurate assessment:

It might be helpful to examine inpatient assessment, when at its most productive, through the eyes of a clinician. Such a clinician might argue that, although it is true that many accused initially present themselves as model patients, such a veneer drops quickly. . . .

It is not unusual for an individual to give one impression during brief assessment and another quite different one after a few days within an inpatient unit. Consider, for example, the case of Leonard S., charged with a relatively minor offence. He was sullen and silent in the initial interview. He spoke in a flat monotone with a quiet undertone of anger. At brief assessment the psychiatrist

tend que le par. 542(2) n'est qu'une disposition de transition qui vise à assurer la protection de la société jusqu'à ce qu'une décision soit prise quant à la délivrance d'un mandat du lieutenant-gouverneur conformément à l'art. 545 du *Code*. Il n'y a rien de mal à ce genre de disposition. Cependant, la nature indéterminée de l'ordonnance de garde rigoureuse rendue en vertu du par. 542(2) porte atteinte au droit à la liberté (de façon non conforme aux principes de justice fondamentale) dans une mesure inacceptable.

Vu la nécessité de procéder à l'examen de la condition mentale et de la dangerosité actuelles avant la mise en liberté et vu la nature des questions à trancher, il y aura toujours un laps de temps entre l'acquittement pour cause d'aliénation mentale et la décision de libérer ou de détenir le prévenu en vertu d'un mandat du lieutenant-gouverneur. Ce délai est inévitable puisque la preuve présentée au procès à l'appui de la défense fondée sur l'art. 16 ne se rapporte qu'à la condition mentale au moment de l'infraction. La détention automatique par suite d'un acquittement pour cause d'aliénation mentale est donc, dans une certaine mesure, une codification d'une réalité pratique.

Outre qu'elle favorise, à court terme, l'atteinte de l'objectif législatif visé, la détention automatique sert également à prévenir le crime et à protéger la société pour l'avenir. Bien qu'il soit toujours difficile de prévoir les cas de récidive et de récurrence de la maladie mentale, la preuve devant notre Cour indique que la possibilité qu'ont ainsi les psychiatres d'observer l'individu en milieu hospitalier et de l'y évaluer conduit souvent à une évaluation plus exacte:

[TRADUCTION] Il peut être utile d'examiner l'évaluation des patients gardés en milieu hospitalier, là où elle donne les meilleurs résultats, à travers les yeux d'un clinicien. Ce dernier pourrait expliquer que s'il est vrai que de nombreux accusés se présentent de prime abord comme des patients modèles, ce masque tombe rapidement . . .

Il n'est pas rare qu'une personne donne, après quelques jours passés en observation, une impression fort différente de celle qu'elle avait laissée après une évaluation sommaire. Examinons, à titre d'exemple, le cas de Leonard S., accusé d'une infraction relativement mineure. Lors de l'entrevue initiale, il était renfrogné et silencieux. Il parlait d'un débit monotone sur un ton de

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initially entertained a number of diagnostic hypotheses with regard to this young man. These ranged from passive aggressive personality disorder to depression to schizophrenia. It was decided to admit him to the inpatient unit where within weeks he showed all the signs of being schizophrenic and did so consistently till the end of his period of remand.

Butler, B., *Clinical Assessment and the Mentally Disordered Offender*, Working Paper in Forensic Psychiatry Number 27, p. 52 at pp. 75-76.

A defence witness, Sheila Hodgins (Research Director at l'Institut Philippe Pinel in Quebec), also testified under cross-examination to the benefits of observation on an inpatient basis:

> . . . it is very difficult to do an assessment of a patient on a one shot or a two shot or even three interviews. The treatment staff have observed the patient over longer periods of time in many different situations, twenty-four hours a day and, myself, I trust their observations more than somebody who just interviews him one or two or three times.

In the long term, then, crime is prevented and society protected as dangerous individuals in need of treatment will be held in custody under an L.G.W.

Therefore, the means chosen by Parliament, automatic detention, furthers the objective in two important ways. First, if individuals acquitted by reason of insanity are immediately ordered into custody, they cannot pose a threat to society in the short term. Secondly, if observation of the individual on an inpatient basis results in more accurate predictions of recurring mental illness, crime is prevented and society protected in the future.

However, the minimal impairment component of the *Oakes*, test requires that insanity acquittees be detained no longer than necessary to determine whether they are currently dangerous due to their insanity. Parliament has provided for remands of a

colère rentrée. À l'évaluation sommaire, le psychiatre a formulé initialement à son égard un certain nombre d'hypothèses de diagnostic qui allaient d'un désordre de la personnalité passive agressive à la schizophrénie, en passant par la dépression. Il fut décidé de l'admettre dans l'unité d'observation et en l'espace de quelques semaines, il montra tous les signes de la schizophrénie et ce, de façon constante, jusqu'à la fin de sa période d'internement.

Butler, B. *Clinical Assessment and the Mentally Disordered Offender*, Working Paper in Forensic Psychiatry, numéro 27, p. 52, aux pp. 75 et 76.

Un témoin de la défense, Sheila Hodgins (directrice de la recherche à l'Institut Philippe Pinel du Québec), s'est également exprimée en contre-interrogatoire sur les avantages de l'observation en clinique:

> [TRADUCTION] . . . il est très difficile de faire l'évaluation d'un patient après une, deux ou même trois entrevues. Le personnel soignant a eu l'occasion d'observer le patient dans plusieurs situations différentes et sur de longues périodes, vingt-quatre heures par jour. Quant à moi, je me fie davantage à leurs observations qu'à celles de quelqu'un qui ne l'aurait interviewé qu'à une, deux ou trois reprises.

À long terme donc, la prévention du crime et la protection de la société sont assurées par le maintien sous garde, en vertu d'un mandat du lieutenant-gouverneur, des individus dangereux ayant besoin de traitement.

Le moyen choisi par le Parlement, soit la détention automatique, favorise donc l'atteinte de l'objectif de deux façons principales. En premier lieu, les personnes acquittées en raison de leur aliénation mentale, immédiatement soumises à une ordonnance de détention, ne constituent plus, à court terme, un danger pour la société. En second lieu, s'il résulte de l'observation de l'individu en clinique des prédictions plus exactes quant à la possibilité de récurrence de la maladie mentale, la prévention du crime et la protection de la société seront assurées pour l'avenir.

Cependant, le volet atteinte minimale du critère de l'arrêt *Oakes*, exige que les prévenus acquittés pour cause d'aliénation mentale ne soient détenus que le temps nécessaire pour déterminer si leur aliénation les rend toujours dangereux. Le Parlement a prévu,

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fixed duration for psychiatric observation elsewhere in the *Criminal Code* which indicates that they are aware of the constitutional concerns raised by indeterminate detention.

For example, remands for psychiatric observation can be ordered at the time of a preliminary hearing (s. 465); at the time of trial to determine fitness (s. 543); at the time of a dangerous offender application (s. 691); or at the time of an appeal (s. 608.2). The language in all of these other provisions of the *Code* is consistent: the remand is limited to a 30-day period in most instances, except in exceptional cases when it can be extended to 60 days. Without pronouncing on the constitutionality of these other remands, the fact that the indeterminate remand provided for in s. 542(2) is an anomaly clearly demonstrates that the means chosen by Parliament does not impair the appellant's s. 7 right to liberty as little as possible.

In conclusion, s. 542(2) cannot be justified as a reasonable limit on the appellant's rights under s. 7 and is accordingly of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

While I need not proceed further, I would note that a detention of limited duration would not impair the appellant's rights under s. 9 any less than the current s. 542(2). The order of the trial judge would be no less arbitrary if it was only in effect for a limited period of time. Given that there will be no evidence on this issue adduced during the trial, I am willing to accept that the effect on an individual of a period of automatic and arbitrary detention without consideration of any criteria may not be disproportionate to the importance of achieving the objective. However, the fact that the means chosen by Parliament in s. 542(2) is a period of indeterminate detention tips the balance, in my opinion, and renders the effect of the limitation disproportionate to the objective. Therefore, s. 542(2) cannot satisfy the *Oakes*, test and therefore

dans d'autres dispositions du *Code criminel*, le renvoi sous garde à des fins d'observation psychiatrique pour une période déterminée, ce qui témoigne de sa préoccupation au sujet des problèmes d'ordre constitutionnel que soulève la détention pour une période indéterminée.

À titre d'exemple, le renvoi sous garde aux fins d'observation psychiatrique peut être ordonné au moment de l'enquête préliminaire (art. 465); au moment du procès, pour déterminer la capacité de l'accusé (art. 543); au moment de la demande visant à faire déclarer un accusé délinquant dangereux (art. 691); ou au moment de l'appel (art. 608.2). Le libellé de ces dispositions du *Code* obéit à la même logique: le renvoi sous garde est limité à une période de 30 jours dans la plupart des cas, sauf circonstances exceptionnelles où il peut y avoir prolongation à 60 jours. Sans me prononcer sur la constitutionnalité de ces mesures, l'anomalie que constitue le renvoi sous garde pour une période indéterminée au par. 542(2) démontre clairement que le moyen choisi par le Parlement ne porte pas atteinte aussi peu que possible au droit à la liberté que possède l'appelant en vertu de l'art. 7.

En conclusion, le par. 542(2) ne peut être justifié comme étant une restriction raisonnable imposée aux droits que l'art. 7 garantit à l'appelant et il est, en conséquence, inopérant conformément au par. 52(1) de la *Loi constitutionnelle de 1982*.

Même s'il n'est pas nécessaire de poursuivre l'analyse, j'aimerais souligner qu'une période de détention limitée ne porterait pas moins atteinte aux droits de l'appelant en vertu de l'art. 9 que l'actuel par. 542(2). L'ordonnance du juge du procès n'en perdrait pas en effet son caractère arbitraire. Vu l'absence de preuve présentée à ce sujet au procès, je suis certes prêt à reconnaître que l'effet qu'aurait sur un individu une période de détention automatique et arbitraire, ne reposant sur aucun critère, ne serait pas nécessairement sans proportion avec l'importance de l'objectif poursuivi. Cependant, le moyen choisi par le Parlement au par. 542(2), savoir une période de détention indéterminée, contribue à mon avis à faire pencher la balance et à rendre l'effet de la restriction disproportionnée à l'objectif. Le paragraphe 542(2) ne saurait

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cannot be justified with respect to s. 9 of the *Charter* either.

Because of my conclusion that s. 542(2) infringes ss. 7 and 9 of the *Charter* and cannot be saved under s. 1, I need not deal with the issue of s. 15 which was raised by some interveners.

The Rest of the Legislative Scheme

Although the appellant has referred in his arguments to the "surrounding legislative scheme", ss. 545 and 547 were not included in his application to state the constitutional questions. Rule 32(1) of the *Rules of the Supreme Court of Canada*, SOR/83-74, states:

> **32.** (1) When a party to an appeal
>
> (*a*) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder, or
>
> . . .
>
> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question. . . .

The reason for requiring that a constitutional question be stated when the constitutionality of a statute is being challenged, is to ensure that the Attorney General of Canada and the Attorneys General of all of the provinces will be notified and have the opportunity to intervene as of right. Rule 32(4) imposes a duty on the Chief Justice or Judge of this Court who is stating the constitutional question to direct that this notice be served:

> **32.** . . .
>
> (4) Upon a motion, the Chief Justice or a Judge shall state the question or questions and direct service of the question or questions upon the Attorney General of Canada and the attorneys general of all the provinces within the time fixed by the Chief Justice or Judge together with notice that any of them who intends to

donc satisfaire au critère de l'arrêt *Oakes* et, partant, ne saurait non plus être justifié en regard de l'art. 9 de la *Charte*.

Étant donné ma conclusion que le par. 542(2) porte atteinte aux art. 7 et 9 de la *Charte* et ne peut être sauvegardé par l'article premier, il n'y a pas lieu d'aborder la question de l'art. 15, soulevée par certains intervenants.

Les autres dispositions du régime législatif

Bien que l'appelant ait fait référence dans ses arguments au [TRADUCTION] «régime législatif dans lequel s'insère le par. 542(2)», il n'a pas, dans sa requête pour que soient formulées les questions constitutionnelles, fait mention des art. 545 et 547. Le paragraphe 32(1) des *Règles de la Cour suprême du Canada*, DORS/83-74, dispose:

> **32.** (1) Lorsque, dans le cas d'un pourvoi [. . .] une partie
>
> *a*) entend contester la validité ou l'applicabilité constitutionnelle d'une loi du Parlement du Canada ou d'une loi de la législature d'une province, ou de l'un de leurs règlements d'application, ou
>
> . . .
>
> elle doit, après avoir donné avis aux autres parties [. . .] s'adresser au Juge en chef ou à un juge pour que soit formulée la question.

C'est pour faire en sorte que le procureur général du Canada ainsi que les procureurs généraux de toutes les provinces soient avisés et aient la possibilité d'intervenir de plein droit qu'on exige la formulation d'une question constitutionnelle lorsque la constitutionnalité d'une loi est contestée. Le paragraphe 32(4) impose au Juge en chef ou à un juge de notre Cour qui formule la question constitutionnelle l'obligation d'en ordonner la signification:

> **32.** . . .
>
> (4) Sur requête, le Juge en chef ou un juge formule la question et en ordonne la signification, dans le délai qu'il fixe, au procureur général du Canada et aux procureurs généraux de toutes les provinces, avec avis que ceux qui veulent intervenir—qu'ils désirent ou non plaider—doivent déposer dans le délai précisé dans l'avis,

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intervene, whether or not the attorney general wishes to be heard, shall, within a time fixed in the notice that is not less than four weeks after the date of the notice, file a notice of intervention in Form C.

Although the Attorney General of Canada and the Attorneys General of Ontario and British Columbia intervened in this case, we have no way of knowing whether the Attorneys General of other provinces would have also intervened, if they had been aware that the constitutional validity of the L.G.W. system itself (ss. 545 and 547) was also being challenged. Because these provisions were not included in the constitutional question, I am declining at this point in time to deal with the issues relating to them. However, I do note in passing that the lack of procedural safeguards provided for in ss. 545 and 547 do, in my opinion, attract suspicion.

Transitional Period

If, based on the reasons given above, s. 542(2) is simply declared to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, it will mean that as of the date this judgment is released, judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public. Because of the serious consequences of finding s. 542(2) to be of no force and effect, there will be a period of temporary validity which will extend for a period of six months. During this period, however, any detention ordered under s. 542(2) will be limited to 30 days in most instances, or to a maximum of 60 days where the Crown establishes that a longer period is required in the particular circumstances of the case. This seems a sufficient duration for the remand in light of the other provisions of the *Criminal Code* providing for detention for psychiatric observation and given that a warrant can issue in some provinces within a period of approximately this length. Courts may choose to limit their orders under s. 542(2) to between 30 and 60 days. If they do not, the individual acquittee will have the writ of *habeas corpus* available to him or her at the expiration of 30 days.

non inférieur à quatre semaines à compter de la date de l'avis, un avis d'intervention conforme à la formule C.

Bien que le procureur général du Canada ainsi que les procureurs généraux de l'Ontario et de la Colombie-Britannique soient intervenus en l'espèce, il nous est impossible de savoir si les procureurs généraux des autres provinces seraient aussi intervenus dans le cas où ils auraient su que la contestation portait également sur l'applicabilité constitutionnelle du système des mandats du lieutenant-gouverneur (art. 545 et 547). Ces dispositions n'ayant pas fait l'objet d'une question constitutionnelle, je me refuse à les examiner à ce stade. Je soulignerai toutefois, incidemment, que l'absence de garanties procédurales aux art. 545 et 547 fait, à mon avis, naître des soupçons.

Période transitoire

Si, pour les motifs donnés précédemment, le par. 542(2) est simplement déclaré inopérant conformément au par. 52(1) de la *Loi constitutionnelle de 1982*, il s'ensuivra qu'à compter de la date du présent jugement, les juges seront obligés de libérer dans la société toutes les personnes acquittées pour cause d'aliénation mentale, y compris celles qui pourraient fort bien présenter un danger pour le public. En raison des conséquences graves d'une telle déclaration, le par. 542(2) jouira d'une période de validité temporaire de six mois. Pendant cette période, toutefois, toute détention ordonnée en vertu du par. 542(2) sera limitée à 30 jours dans la plupart des cas, ou à 60 jours au maximum si le ministère public établit qu'un délai plus long est nécessaire dans les circonstances de l'espèce. Cette durée semble suffisante dans le contexte des autres dispositions du *Code criminel* visant la détention aux fins d'observation psychiatrique et compte tenu du fait qu'un mandat peut être délivré dans certaines provinces dans un délai à peu près équivalent. Les tribunaux pourront choisir de limiter à une période de 30 à 60 jours les ordonnances qu'ils prononceront sous l'empire du par. 542(2). À défaut, chaque personne acquittée pourra recourir au bref d'*habeas corpus* après 30 jours.

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Any of the parties hereto, may, in the case of necessity upon further application, supported by such evidence as may be required, return to this Court to show cause for such further extension of the transitional period or for modification of the regimen therein, as this Court may decide.

In light of the transitional period, which has been outlined above, there are only two circumstances in which a judge would be compelled to release a possibly dangerous insanity acquittee into the community. First, this unfortunate result would arise during the transitional period if the Lieutenant Governor of a province were unable to issue either a warrant for further detention or a discharge order within 30 to 60 days. This contingency is unlikely given the information which was supplied to this Court by the intervener, the Lieutenant Governor's Board of Review of Ontario. Second, such a result would arise after the expiration of the transitional period if Parliament neither enacted a replacement for s. 542(2) within the six-month period nor returned to this Court to apply for an extension of the transitional period for that purpose.

I note that this Court has provided for a similar transitional period in previous cases: see *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and *R. v. Brydges*, [1990] 1 S.C.R. 190. Furthermore, the availability of a transitional period in appropriate circumstances was recognized by the majority judgment of Cory J. in *Askov*, *supra*.

Disposition

For the reasons given above, the appropriate disposition in the circumstances of this case is a judicial stay of proceedings. Accordingly, I would allow the appeal and enter a stay of proceedings. I would answer the constitutional questions as follows:

Question 1: Is s. 542(2) of the *Criminal Code* of Canada *intra vires* the Parliament of Canada?

Answer: Yes.

Chacune des parties aux présentes pourra, en cas de nécessité et sur requête appuyée des éléments de preuve requis, revenir devant notre Cour pour justifier toute prolongation de la période transitoire ou toute modification de ses conditions, selon ce qu'en décidera la Cour.

Vu cette période transitoire, il n'y a que deux circonstances dans lesquelles un juge serait contraint de libérer dans la société une personne acquittée pour cause d'aliénation mentale et constituant un danger potentiel. En premier lieu, ce résultat malheureux se produirait si, pendant la période transitoire, le lieutenant-gouverneur d'une province ne pouvait ni délivrer un mandat prolongeant la détention ni rendre une ordonnance de mise en liberté dans un délai de 30 à 60 jours. Mais cette éventualité est improbable vu les données qu'a fournies à notre Cour l'un des intervenants, la Commission d'examen du lieutenant-gouverneur de l'Ontario. En second lieu, un résultat analogue se produirait après l'expiration de la période transitoire si le Parlement soit n'adoptait pas une nouvelle disposition pour remplacer le par. 542(2) avant l'expiration de la période de six mois, soit ne revenait pas devant notre Cour pour demander à cette fin une prolongation de la période transitoire.

Je remarque que notre Cour a déjà prévu des périodes transitoires semblables, notamment dans *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721 et *R. c. Brydges*, [1990] 1 R.C.S. 190. En outre, la possibilité d'une période transitoire dans des circonstances appropriées a été reconnue dans le jugement rendu par le juge Cory pour la majorité dans *Askov*, précité.

Dispositif

Pour les motifs qui précèdent, il convient, dans les circonstances de l'espèce, d'ordonner l'arrêt des procédures. En conséquence, je suis d'avis d'accueillir le pourvoi et de prononcer l'arrêt des procédures. Je suis d'avis de répondre comme suit aux questions constitutionnelles:

Question 1: Le paragraphe 542(2) du *Code criminel* du Canada est-il *intra vires* du Parlement du Canada?

Réponse: Oui.

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Question 2: Do the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, violate ss. 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, the common law criteria limit s. 7 of the *Canadian Charter of Rights and Freedoms*. It is not necessary to answer this question with respect to ss. 9 and 15 of the *Canadian Charter of Rights and Freedoms*.

Question 3: If the answer to question 2 is affirmative, are the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: No.

Question 4: Does the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code* of Canada violate ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

Question 5: If the answer to question 4 is affirmative, is the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code* of Canada, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: No. However, during the six-month transitional period, an order issued pursuant to s. 542(2) will be valid, but for no longer than 30 to 60 days.

Question 2: Les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, violent-ils les art. 7, 9 et 15 de la *Charte canadienne des droits et libertés*?

Réponse: Oui, les critères de common law restreignent l'art. 7 de la *Charte canadienne des droits et libertés*. Il n'y a pas lieu de répondre à cette question en ce qui concerne les art. 9 et 15 de la *Charte canadienne des droits et libertés*.

Question 3: Si la réponse à la 2e question est affirmative, les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Réponse: Non.

Question 4: Le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel* du Canada, viole-t-il les art. 7 et 9 de la *Charte canadienne des droits et libertés*?

Réponse: Oui.

Question 5: Si la réponse à la 4e question est affirmative, le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel* du Canada, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

Réponse: Non. Cependant, pendant une période transitoire de six mois, une ordonnance rendue conformément au par. 542(2) sera valide, mais seulement pour une durée n'excédant pas 30 à 60 jours.

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The following are the reasons delivered by

WILSON J.—I have had the benefit of reading Chief Justice Lamer's reasons in this appeal and wish to address one or two issues on which I am not fully in agreement with his position.

Let me say first, however, that I agree with the Chief Justice that, from the jurisdictional point of view, s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, is a valid exercise of the federal criminal law power.

I also agree with the Chief Justice for the reasons given by him that s. 542(2) infringes an accused's rights under both s. 7 and s. 9 of the *Canadian Charter of Rights and Freedoms* and is not saved by s. 1. I have one reservation, however, about the Chief Justice's discussion of this aspect of the appeal. I cannot agree with him that discretionary powers conferred by statute should be interpreted in such a way as to ensure their compliance with the *Charter*. My own view is that this approach is tantamount to a presumption of constitutionality, a presumption which I believe has no application in *Charter* cases. While I recognize that the efficacy of "reading down" in the *Charter* context has not as yet been finally decided (see *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 125), I prefer the view expressed in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, that:

> ... it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements.

In this case, however, the issue simply does not arise since the section does not confer a discretion, imprecise or otherwise, but rather constitutes a directive. Accordingly, I prefer to leave the important question of whether statutes conferring discretionary powers should be judicially interpreted in such a way as to avoid conflict with the *Charter*'s guarantees to a day when the issue is clearly before the Court. I turn now to a consideration of the constitutionality of the common law rule.

Version française des motifs rendus par

LE JUGE WILSON—J'ai eu l'avantage de lire les motifs du juge en chef Lamer en l'espèce et je veux traiter d'une ou deux questions à l'égard desquelles je ne souscris pas entièrement à son opinion.

Toutefois, je tiens d'abord à souligner que je suis d'accord avec le Juge en chef, qui estime que, du point de vue de la compétence, le par. 542(2) du *Code criminel*, S.R.C. 1970, ch. C-34, constitue un exercice valide du pouvoir fédéral en matière de droit criminel.

Je souscris également aux motifs du Juge en chef selon lesquels le par. 542(2) porte atteinte aux droits que les art. 7 et 9 de la *Charte canadienne des droits et libertés* garantissent à l'accusé et n'est pas sauvegardé par l'article premier. Toutefois, j'exprime une réserve quant à l'analyse que fait le Juge en chef à l'égard de cet aspect du pourvoi. Je ne puis être d'accord avec lui que les pouvoirs discrétionnaires conférés par la loi devraient être interprétés de manière à faire en sorte qu'ils soient conformes à la *Charte*. Je suis d'avis que cette position équivaut à présumer la constitutionnalité, une présomption qui, selon moi, ne s'applique pas dans les affaires portant sur la *Charte*. Bien que je reconnaisse que l'efficacité de «l'interprétation atténuée» dans le contexte de la *Charte* n'a pas été déterminée de façon définitive (voir *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, à la p. 125), je préfère l'opinion exprimée dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 169, selon laquelle:

> ... il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution.

Toutefois, en l'espèce, la question ne se pose simplement pas étant donné que le paragraphe ne confère pas un pouvoir discrétionnaire, imprécis ou autre, mais constitue plutôt une directive. Par conséquent, je préfère attendre que soit clairement posée à notre Cour la question importante de savoir si les lois qui confèrent des pouvoirs discrétionnaires doivent être interprétées par les tribunaux de manière à éviter les conflits avec les garanties que confère la *Charte*. J'examine maintenant la constitutionnalité de la règle de common law.

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The Common Law Rule

Like the Chief Justice, I find it unnecessary to deal with ss. 9 and 15 of the *Charter* since I agree with him that the common law rule as enunciated in *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, and *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, infringes the accused's s. 7 right to liberty in that it deprives the accused of control over his own defences contrary to the principles of fundamental justice. I accept the appellant's submission that to permit the Crown to tender evidence of insanity against the wishes of the accused is to countenance too great an interference with the fundamental right of an accused to advance whichever defences he considers to be in his best interests and to waive those which he considers are not. I agree with the appellant that to allow the prosecution to raise the issue of insanity can completely distort the trial process because of the impact it can have on other defences raised by the accused, on the jury's assessment of his credibility, and on the traditional role played by defence counsel in an adversary system. The appellant gave some illustrations of this distortion:

(a) the unfairness of imposing upon an accused who does not wish to raise the defence of insanity the burden of proving, among other things, that he is not presently dangerous;

(b) permitting the prosecution to place an accused in a position where inconsistent defences must be advanced. This may well negate the advice of counsel;

(c) discrediting or undermining the accused's credibility so that other potential defences such as alibi or accident are prejudiced. This reduces the accused's chance of obtaining an unqualified acquittal;

(d) leaving the accused to combat the inevitable inference that he or she is, because of mental illness, the type of person who would have likely committed the offence.

(e) giving to the [Crown] a strategic tool whereby a person may be deprived of his liberty upon proof to a

La règle de common law

Comme le Juge en chef, j'estime qu'il est inutile de traiter des art. 9 et 15 de la *Charte* puisque je suis d'accord avec lui que la règle de common law énoncée dans les arrêts *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, et *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, porte atteinte au droit à la liberté que confère l'art. 7 à l'accusé parce qu'elle lui enlève le contrôle de ses propres moyens de défense contrairement aux principes de justice fondamentale. Je souscris à l'argument de l'appelant selon lequel permettre au ministère public de présenter une preuve d'aliénation mentale contre le gré de l'accusé équivaut à admettre une atteinte trop importante au droit fondamental d'un accusé de présenter les moyens de défense qui, à son avis, sont dans son meilleur intérêt et de renoncer à ceux qu'il considère ne pas l'être. Je conviens avec l'appelant que permettre à la poursuite de soulever la question de l'aliénation mentale peut fausser complètement le procès en raison de l'effet que cela peut avoir sur les autres moyens de défense soulevés par l'accusé, sur l'évaluation par le jury de sa crédibilité et sur le rôle traditionnel joué par l'avocat de la défense dans un système contradictoire. L'appelant a donné certains exemples de cette déformation:

[TRADUCTION]

a) Imposer à un accusé, qui ne désire pas soulever la défense d'aliénation mentale, le fardeau de démontrer, notamment, qu'il n'est pas dangereux à l'heure actuelle constitue une injustice.

b) Permettre à la poursuite de placer un accusé dans une situation où il doit présenter des moyens de défense incompatibles. Cela peut très bien être contraire aux avis donnés par l'avocat.

c) Discréditer un accusé ou diminuer sa crédibilité de manière à l'empêcher de présenter d'autres moyens de défense possibles, comme l'alibi ou l'accident. Cette situation diminue les chances de l'accusé d'obtenir un acquittement sans réserve.

d) Imposer à l'accusé la tâche de réfuter la conclusion inévitable qu'il est, en raison d'une aliénation mentale, le genre de personne susceptible d'avoir commis l'infraction.

e) Accorder au [ministère public] un outil stratégique au moyen duquel une personne peut être privée de sa

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standard that is less than beyond a reasonable doubt. In *R. v. Simpson*, *supra*, Martin J.A. [stated at p. 364]:

> Since the evidence of insanity is directed to an acquittal the standard of proof should be on the balance of probabilities, whether the evidence of insanity is led by the prosecution or the defence. It would be strange indeed to have a different standard of proof of insanity leading to the acquittal of the accused depending upon who introduced the evidence. In my view, the learned trial Judge in the present case was correct in charging the jury that the prosecution must prove on a balance of probability that the accused was insane.

(f) permitting the Crown the strategic advantage of urging what may be a compromise verdict where all the jury is not convinced of guilt beyond a reasonable doubt but is satisfied the accused is mentally ill and perhaps dangerous;

(g) permitting the Crown under the auspices of seeking an "acquittal" to press for what in reality is indefinite detention at the pleasure of the Lieutenant-Governor of the province. Thus, a greater period of incarceration may be effected through this vehicle than if the accused were convicted and punished. As insanity constitutes a true defence, which negates *mens rea*, the prosecutor convinced of the validity of the defence need not prosecute the "innocent". If future dangerousness is the Crown's concern which causes them to continue the prosecution of an innocent person for the purpose or raising an insanity defence, then provincial mental health laws are more than adequate to protect that public interest.

The Crown submits, however, that permitting the prosecution to raise the issue of insanity against the wishes of the accused gives effect to another basic tenet of our criminal justice system, one which is embodied in s. 16(1) of the *Criminal Code*, namely that insane persons who are not criminally responsible for their conduct should not be convicted of criminal offences. The Crown contends that, if evidence of the accused's insanity at the time of the commission of the offence is not adduced by either the accused or the prosecution, this principle will be violated.

liberté à la suite d'une preuve établie selon une norme inférieure à celle du doute raisonnable. Dans l'arrêt *R. v. Simpson*, précité, le juge Martin a dit [à la p. 364]:

> Étant donné que la preuve de l'aliénation mentale vise à obtenir un acquittement, la norme de preuve devrait être celle de la prépondérance des probabilités, que la preuve d'aliénation mentale soit présentée par la poursuite ou par la défense. Il serait en fait étrange d'appliquer une norme de preuve différente en matière d'aliénation mentale qui entraînerait un acquittement de l'accusé selon la partie qui a présenté l'élément de preuve. À mon avis, le juge du procès en l'espèce était fondé à exposer au jury que la poursuite doit démontrer selon la prépondérance des probabilités que l'accusé souffrait d'aliénation mentale.

f) Accorder au ministère public l'avantage stratégique d'obtenir ce qui peut être considéré comme un verdict de compromis lorsque tous les jurés ne sont pas convaincus de la culpabilité hors de tout doute raisonnable mais sont convaincus que l'accusé souffre d'aliénation mentale et qu'il est peut-être dangereux.

g) Permettre au ministère public tout en cherchant à obtenir un «acquittement» de demander ce qui en réalité est une détention d'une durée indéterminée selon le bon plaisir du lieutenant-gouverneur de la province. Par conséquent, on peut obtenir par ce moyen une plus longue période d'incarcération que si l'accusé était déclaré coupable et puni. Étant donné que l'aliénation mentale constitue un véritable moyen de défense qui nie la *mens rea*, la poursuite convaincue de la validité du moyen de défense n'a pas à poursuivre l'«innocent». Dans le cas où le ministère public continue à poursuivre un innocent dans le but de soulever la défense d'aliénation mentale, par crainte qu'un accusé puisse être dangereux à l'avenir, les lois provinciales sur la santé mentale sont plus qu'adéquates pour protéger cet intérêt public.

Toutefois, le ministère public soutient que permettre à la poursuite de soulever la question de l'aliénation mentale contre le gré de l'accusé permet d'appliquer un autre précepte fondamental de notre système de justice criminelle, qui est formulé dans le par. 16(1) du *Code criminel*, c'est-à-dire que les personnes souffrant d'aliénation mentale qui ne sont pas criminellement responsables de leur conduite ne devraient pas être déclarées coupables d'infractions criminelles. Le ministère public prétend que si une preuve de l'aliénation mentale de l'accusé au moment de la perpétration de l'infraction n'est pas présentée soit par l'accusé soit par la poursuite, ce principe sera

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lated and an illegal conviction, i.e., one which flies in the face of s. 16(1), may result.

While I agree that it is a basic tenet of our criminal justice system that insane persons not be convicted of criminal offences, I am not persuaded that to permit the prosecution to introduce evidence of insanity in the course of the trial always promotes this principle or promotes it in a way which is in accord with the principles of fundamental justice.

Under s. 16(4) of the *Criminal Code* the accused is presumed to have been sane at the time he or she committed the offence. The accused who elects not to defend on the basis of insanity relies on this statutory presumption. If I am correct in what I have said about the impact of the common law rule, allowing the prosecution to raise the issue of insanity may substantially reduce the chances of an accused's outright acquittal. It may totally defeat the strategy adopted by the defence and deprive the accused, particularly an accused who turns out to be sane, of the fair trial the adversarial process was designed to ensure. This is a high price to pay to protect the relatively small number of persons going through the criminal justice system who are truly insane and do not wish to raise it in their defence. In cases where the Crown is permitted to introduce evidence of insanity over the accused's objection and does not succeed in proving it, the defence's case may have been destroyed to no avail. His election is simply proved to have been sound but this is cold comfort to him and to his counsel.

I think it should be borne in mind also that another consequence of allowing the prosecution to adduce evidence of insanity is that the accused may well face consequences more harmful to him than a conviction. An insane acquittee is detained at the pleasure of the Lieutenant Governor, often for a period exceeding that which would have been possible upon conviction. He must also live with the stigma of being held to be both a criminal and insane and may face condi-

violé et il peut en résulter une déclaration de culpabilité illégale, c'est-à-dire qui va à l'encontre du par. 16(1).

Je conviens que, selon un précepte fondamental de notre système de justice criminelle, les personnes souffrant d'aliénation mentale ne doivent pas être déclarées coupables d'infractions criminelles, mais je ne suis pas convaincue que permettre à la poursuite d'introduire au procès une preuve d'aliénation mentale valorise toujours ce principe ou le fasse valoir d'une manière conforme aux principes de justice fondamentale.

Aux termes du par. 16(4) du *Code criminel*, l'accusé est présumé avoir été sain d'esprit au moment où il a commis l'infraction. L'accusé qui choisit de ne pas se défendre en invoquant l'aliénation mentale se fonde sur cette présomption établie par la loi. Si ce que j'ai dit au sujet de l'effet de la règle de common law est correct, permettre à la poursuite de soulever la question de l'aliénation mentale peut réduire de façon importante les chances d'acquittement sans condition d'un accusé. Cela peut faire échouer complètement la stratégie adoptée par la défense et priver l'accusé, particulièrement un accusé sain d'esprit, du procès équitable que le système contradictoire était destiné à lui assurer. C'est un prix élevé à payer pour protéger le nombre relativement restreint de personnes qui passent dans le système de justice criminelle et qui souffrent véritablement d'aliénation mentale mais qui ne désirent pas le soulever dans leur défense. Dans les cas où le ministère public peut présenter une preuve d'aliénation mentale contre le gré de l'accusé et où il ne réussit pas à la démontrer, les arguments de la défense peuvent avoir été annihilés pour rien. Il en ressort simplement que le choix de l'accusé était judicieux, mais c'est une maigre consolation pour lui ou pour son avocat.

Je suis d'avis qu'il faut également se rappeler que permettre à la poursuite de présenter une preuve d'aliénation mentale a aussi pour conséquence que l'accusé peut en subir des effets plus néfastes que s'il était déclaré coupable. La personne acquittée pour cause d'aliénation mentale est détenue selon le bon plaisir du lieutenant-gouverneur, souvent pour une période excédant celle qui aurait été possible à la suite de la déclaration de culpabilité. Elle doit égale-

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tions worse than those obtaining in prison. The intervener, the Canadian Disability Rights Council, described the Penetanguishene Mental Health Centre in which the appellant initially spent some time and in which 130 of Canada's inmates on Lieutenant Governor's warrants are detained as:

> . . . a highly coercive environment emphasizing rules and regulations rather than personal rights. At Oak Ridge, there are steel gates which are double locked. The gates are deadlocked from the end of the corridor, from 10:30 at night to 6:30 or 7:00 in the morning. The windows in the inmates' rooms have bars. One-third of the patients sleep on concrete slabs. The rooms want for cleanliness. There is no cleaning staff. There are metal detectors, a closed circuit television, and an x-ray machine. At night all inmates are locked in individual rooms. Inmates are also locked in their rooms during the day if the staff is short, which is often the case. Inmates who are in the assessment unit are subjected to intense lighting which is left on twenty-four hours a day. In some parts of the facility, there are no temperature controls. There is one psychiatrist for all the inmates at Oak Ridge and he spends one-fifth of his time away from the facility. Consequently the facility uses inmates on LGW's to act as therapists for one another. In the name of treatment, inmates of one of the units are forbidden to speak to each other during the course of an ordinary day.

It is my view that society's interest in ensuring that persons who are not criminally responsible are not convicted cannot override the right of an accused to control his own defences and to forego the defence of insanity if this is in his interests. As I stated in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1313 and 1316:

> To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit

ment vivre avec l'opprobre d'être considérée à la fois comme criminelle et aliénée et peut devoir faire face à des conditions pires que celles vécues en prison. L'intervenant le Conseil canadien des droits des personnes handicapées a décrit de la manière suivante le Penetanguishene Mental Health Centre où l'appelant a initialement passé quelque temps et où 130 détenus canadiens sont gardés en vertu de mandats du lieutenant-gouverneur:

> [TRADUCTION] . . . un environnement hautement coercitif qui met l'accent sur les règles et les règlements plutôt que sur les droits de la personne. À Oak Ridge, il y a des grilles d'acier qui sont fermées à double tour. Les grilles sont cadenassées au bout du corridor, de 22 h 30 à 6 h 30 ou 7 h. Les fenêtres des chambres des détenus sont munies de barreaux. Le tiers des patients dorment sur des dalles de béton. La propreté des chambres laisse à désirer. Il n'y a pas de personnel d'entretien. Il y a des détecteurs de métal, un système de télévision en circuit fermé et un appareil à rayons X. La nuit, tous les détenus sont enfermés dans des chambres individuelles. Les détenus sont également enfermés dans leur chambre le jour s'il n'y a pas suffisamment de personnel, ce qui est souvent le cas. Les détenus gardés dans l'unité d'évaluation sont soumis à un éclairage intense 24 heures par jour. Dans certaines parties de l'établissement, il n'y a pas de thermostat. Il y a un seul psychiatre pour tous les détenus à Oak Ridge et il passe le cinquième de son temps hors de l'établissement. En conséquence, on demande aux détenus en vertu d'un mandat du lieutenant-gouverneur d'agir comme thérapeutes les uns des autres. Sous prétexte de traitement, les détenus de l'une des unités n'ont pas le droit de parler entre eux au cours d'une journée ordinaire.

Je suis d'avis que l'intérêt de la société à veiller à ce que les personnes qui ne sont pas criminellement responsables ne soient pas déclarées coupables ne peut l'emporter sur le droit d'un accusé de contrôler ses propres moyens de défense et de renoncer à la défense d'aliénation mentale si c'est dans son intérêt. Comme je l'ai dit dans l'arrêt *R. c. Turpin*, [1989] 1 R.C.S. 1296, aux pp. 1313 et 1316:

> Obliger l'accusé à subir un procès avec jury quand il considère qu'un tel procès constitue un fardeau plutôt qu'un avantage semblerait revenir, pour reprendre l'expression du juge Frankfurter, [TRADUCTION] «à enchaî-

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would appear, in Frankfurter J.'s words, "to imprison a man in his privileges and call it the Constitution".

. . .

. . . in the case of individual constitutional rights . . . an accused cannot be compelled to take advantage of rights intended for his or her benefit even if such rights may have a public interest aspect.

A number of writers in the United States have expressed the same view. Cohn in "Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection" (1988), 15 *Hastings Const. L.Q.* 295, states at p. 313:

The Constitution does not explicitly guarantee the right to select personally one's available defenses to criminal prosecution. However, the imposition of an unwanted defense contravenes the very nature of our criminal justice system. Even if the wresting of control from an accused does not violate due process per se, it violates our basic notion of a fair trial. The enumerated rights of trial by jury, confrontation of witnesses, assistance of counsel, and the right against self-incrimination, as well as the vaguer notion of due process, are all simply accoutrements to the basic Anglo-American concept of a fair trial as it has developed over the centuries. The right to select personally one's defenses, though not an enumerated right, is central to this idea of a fair trial. Indeed, it is inherent in our constitutional framework of criminal jurisprudence.

Cohn concludes that, subject to the traditional limitation under American law that waivers be intelligent and voluntary, a competent defendant should be able to waive a viable insanity defence just as he or she may enter a guilty plea or waive his or her constitutional right to counsel. Singer in "The Imposition of the Insanity Defense on an Unwilling Defendant" (1980), 41 *Ohio St. L.J.* 637, shares Cohn's opinion and also states, at p. 660, that an accused's right to enter a guilty plea or choose his or her own defences is tied in with the right to counsel. She states that if counsel for the accused has advised him or her to avoid an insanity plea for pragmatic or tactical reasons and the court refuses to accept this decision, then the accused's right to effective assistance from counsel is compromised because the court's decision

ner un homme à ses privilèges et [à] qualifier cela de Constitution».

. . .

. . . dans le cas de droits constitutionnels protégeant l'individu . . . un accusé ne saurait être forcé de se prévaloir de droits destinés à le favoriser même si ces droits peuvent présenter un intérêt pour la société.

Un certain nombre d'auteurs américains ont exprimé la même opinion. Cohn dans «Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection» (1988), 15 *Hastings Const. L.Q.* 295, dit à la p. 313:

[TRADUCTION] La Constitution ne garantit pas de façon explicite à une personne le droit de choisir ses moyens de défense contre une poursuite criminelle. Toutefois, l'imposition d'un moyen de défense indésiré porte atteinte à la nature même de notre système de justice criminelle. Même si le fait de retirer le contrôle à un accusé ne viole pas en soit l'application régulière de la loi, il viole notre notion fondamentale d'un procès équitable. Les droits énumérés à un procès par jury, à l'interrogatoire des témoins, à l'assistance d'un avocat, et le droit contre l'auto-incrimination, de même que la notion plus vague de l'application régulière de la loi, ne sont que des façons d'appliquer le concept anglo-américain fondamental du procès équitable tel qu'il a été élaboré au cours des siècles. Le droit de choisir personnellement ses propres moyens de défense, bien qu'il ne soit pas un droit énuméré, est essentiel à cette conception d'un procès équitable. En fait, il est inhérent à notre cadre constitutionnel de jurisprudence en matière criminelle.

Monsieur Cohn conclut que, sous réserve de la restriction traditionnelle aux termes du droit américain selon laquelle les renonciations doivent être réfléchies et volontaires, un défendeur habile devrait être en mesure de renoncer à un moyen de défense viable fondé sur l'aliénation mentale tout comme il peut présenter un plaidoyer de culpabilité ou renoncer à son droit constitutionnel à l'assistance d'un avocat. Singer dans «The Imposition of the Insanity Defense on an Unwilling Defendant» (1980), 41 *Ohio St. L.J.* 637, partage l'opinion de M. Cohn et dit également que le droit d'un accusé de présenter un plaidoyer de culpabilité ou de choisir ses propres moyens de défense est lié au droit à l'assistance d'un avocat. Elle ajoute que si l'avocat de l'accusé lui a conseillé d'éviter de plaider l'aliénation mentale pour des rai-

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negates and overrides any expert advice that counsel has given.

Also of interest in these two articles is the examination of the American case law on the subject. Both writers identify two lines of American authority. The first is found in *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965), where the court held that since society only has an interest in punishing those who are morally culpable, trial judges have a discretion to raise the defence over the objections of the defendant. On the other hand in *Frendak v. United States*, 408 A.2d 364 (D.C. Ct. App. 1979), the court held that the trial judge must defer to the wishes of an accused if the defence is waived "intelligently and voluntarily". If an accused freely and with full knowledge of the alternatives and consequences waives the insanity defence, then the court cannot independently impose the defence. Other courts' responses to these two conflicting authorities have been mixed. Some jurisdictions follow *Whalem* and others *Frendak*.

I am of the view that the proper approach under our *Charter* is the one adopted in *Frendak*. I conclude, therefore, that the Court of Appeal erred in deciding that the trial judge properly allowed the Crown to raise the insanity defence over the objections of the accused. I find that doing so infringed the accused's rights under s. 7.

Section 1 of the *Charter*

In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, this Court summarized the criteria enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103, which a proponent of a limitation on *Charter* rights must address. At page 768, Dickson C.J. said:

sons pragmatiques ou tactiques et que le tribunal refuse d'accepter cette décision, alors le droit de l'accusé à l'assistance efficace d'un avocat est compromis parce que la décision de la cour annihile ou neutralise les conseils d'expert que l'avocat a donnés.

De plus, ce qui est intéressant dans ces deux articles, c'est l'examen de la jurisprudence américaine sur le sujet. Les deux auteurs font ressortir deux courants jurisprudentiels américains. Le premier découle de l'arrêt *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965), dans lequel la cour a conclu que, puisque la société n'est intéressée à punir que ceux qui sont moralement coupables, les juges du procès ont le pouvoir discrétionnaire de soulever le moyen de défense malgré les objections du défendeur. Par ailleurs, dans l'arrêt *Frendak v. United States*, 408 A.2d 364 (D.C. Ct. App. 1979), la cour a conclu que le juge du procès doit respecter le choix d'un accusé s'il renonce au moyen de défense [TRADUCTION] «volontairement et en connaissance de cause». Si, librement et en pleine connaissance des choix possibles et des conséquences, un accusé renonce à la défense d'aliénation mentale, alors le tribunal ne peut de lui-même l'imposer. Les réponses des autres tribunaux à l'égard de ces deux arrêts contraires ont été diverses. Certains tribunaux appliquent l'arrêt *Whalem* et d'autres l'arrêt *Frendak*.

Je suis d'avis que la position qui convient aux termes de notre *Charte* est celle qui a été adoptée dans l'arrêt *Frendak*. Par conséquent, je conclus que la Cour d'appel a commis une erreur lorsqu'elle a décidé que le juge du procès avait, à bon droit, permis au ministère public de soulever la défense d'aliénation mentale contre le gré de l'accusé. Je suis d'avis que cette façon de procéder a porté atteinte aux droits que l'art. 7 confère à l'accusé.

L'article premier de la *Charte*

Dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, notre Cour a résumé le critère énoncé dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, dont doit tenir compte celui qui propose une restriction aux droits conférés par la *Charte*. À la page 768, le juge en chef Dickson a dit:

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Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux exigences. En premier lieu, l'objectif législatif que la restriction vise à promouvoir doit être suffisamment important pour justifier la suppression d'un droit garanti par la Constitution. Il doit se rapporter à des «préoccupations urgentes et réelles». En second lieu, les moyens choisis pour atteindre ces objectifs doivent être proportionnels ou appropriés à ces fins. La proportionnalité requise, à son tour, comporte normalement trois aspects: les mesures restrictives doivent être soigneusement conçues pour atteindre l'objectif en question, ou avoir un lien rationnel avec cet objectif; elles doivent être de nature à porter le moins possible atteinte au droit en question et leurs effets ne doivent pas empiéter sur les droits individuels ou collectifs au point que l'objectif législatif, si important soit-il, soit néanmoins supplanté par l'atteinte aux droits. La Cour a affirmé que la nature du critère de proportionnalité pourrait varier en fonction des circonstances.

It is my view that the common law rule cannot be saved under s. 1 of the *Charter* as a reasonable and justified limit on the accused's right to control his own defences. I fully acknowledge the importance of the concern to which the common law rule is directed, namely that insane persons not be convicted of criminal offences. I agree with Lamer C.J. that this goal is of sufficient magnitude to warrant overriding a constitutionally guaranteed right or freedom and that allowing the Crown to raise the issue of insanity during the trial is a rational means of furthering this objective. I agree with him also that there are alternative means of ensuring that the insane not be convicted which do not impinge as severely upon an accused's s. 7 rights. In my view, the present common law rule cannot constitute a reasonable limit because of the dramatic impact it has on defence strategy and the role of defence counsel. I would respectfully agree with Professor Stuart who, commenting on the decision in *Simpson* in *Canadian Criminal Law: A Treatise* (2nd ed. 1987), states at pp. 344-45:

Je suis d'avis que la règle de common law ne peut être sauvegardée en vertu de l'article premier de la *Charte* en tant que limite raisonnable et justifiée imposée au droit de l'accusé de contrôler sa propre défense. Je reconnais tout à fait l'importance de la préoccupation que vise la règle de common law, c'est-à-dire que les personnes souffrant d'aliénation mentale ne soient pas déclarées coupables d'infractions criminelles. Je souscris à l'opinion du juge en chef Lamer que ce but a suffisamment d'importance pour justifier une dérogation à un droit ou à une liberté garantis par la Constitution et que permettre au ministère public de soulever la question de l'aliénation mentale au cours du procès constitue un moyen rationnel pour atteindre cet objectif. Je suis également d'accord avec lui que, pour veiller à ce que l'aliéné mental ne soit pas déclaré coupable, il existe d'autres moyens qui ne portent pas aussi gravement atteinte aux droits que l'art. 7 confère à un accusé. À mon avis, la présente règle de common law ne peut constituer une limite raisonnable en raison de l'effet important qu'elle a sur la stratégie de la défense et sur le rôle de l'avocat de la défense. Avec égards, je souscris à l'opinion du professeur Stuart qui, dans le cadre d'observations sur la décision *Simpson* dans *Canadian Criminal Law: A Treatise* (2e ed. 1987), dit aux pp. 344 et 345:

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Although this decision represents a most conscientious attempt to reach a wise compromise, it is submitted that the decision to allow a prosecutor to adduce the insanity evidence is unfortunate. It is difficult to understand the concern that otherwise a conviction will be registered without the appropriate defence having been tendered. Where evidence has not been led, it seems inappropriate for the judge and certainly for the prosecutor, to speculate as to what the appropriate defence should be. Allowing the prosecutor or even the judge to call evidence might well prejudice another valid defence and betray the adversary system. Surely any possibility that this might be so should be resolved by a rule in favour of the defence rather than conferring an uncertain discretion on the trial judge? There is something decidedly odd and thoroughly confusing about a prosecutor seeking to have an accused acquitted and the accused fighting strenuously to be convicted. [Citations omitted.]

[TRADUCTION] Bien que cette décision représente une tentative des plus consciencieuses pour parvenir à un compromis judicieux, je soutiens que la décision de permettre à la poursuite de présenter la preuve de l'aliénation mentale est regrettable. Il est difficile de comprendre la crainte que, dans le cas contraire, une déclaration de culpabilité ne soit inscrite sans que le moyen de défense approprié n'ait été présenté. Lorsque la preuve n'a pas été produite, il ne semble pas convenable que le juge, et à plus forte raison la poursuite, fasse des conjectures sur le moyen de défense approprié. Permettre à la poursuite ou même au juge de présenter des éléments de preuve peut très bien causer un préjudice à un autre moyen de défense valide et porter atteinte au système contradictoire. Assurément, toute possibilité qu'une telle situation se produise ne devrait-elle pas être résolue par une règle favorable à la défense plutôt que par l'attribution d'un pouvoir discrétionnaire aléatoire au juge du procès? Décidément, il y a quelque chose d'étrange et de tout à fait troublant à ce que la poursuite cherche à faire acquitter un accusé et que celui-ci s'efforce avec acharnement d'être déclaré coupable. [Références omises.]

I part company with the Chief Justice over the application of the minimal impairment branch of the *Oakes* test in the circumstances of this case. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court adopted a less rigorous standard of review under this branch of the proportionality test. In doing so, the Court explained why this softening of the *Oakes* requirement that the limit "impair as little as possible" the right in question was simply not appropriate in all cases. At page 993 Dickson C.J., Lamer J. (as he then was) and I stated:

Toutefois, je ne puis souscrire à l'opinion du Juge en chef quant à l'application du volet sur l'atteinte minimale du critère énoncé dans l'arrêt *Oakes* dans les circonstances de l'espèce. Dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, notre Cour a adopté une norme d'examen moins rigoureuse en application de ce volet du critère de la proportionnalité. Elle a alors expliqué pour quelle raison cet adoucissement de l'exigence de l'arrêt *Oakes* selon laquelle la restriction doit «porter atteinte le moins possible» au droit en question ne convenait tout simplement pas dans tous les cas. À la page 993, le juge en chef Dickson, le juge Lamer (maintenant Juge en chef) et moi-même avons dit:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. [Emphasis added.]

Pour trouver le point d'équilibre entre des groupes concurrents, le choix des moyens, comme celui des fins, exige souvent l'évaluation de preuves scientifiques contradictoires et de demandes légitimes mais contraires quant à la répartition de ressources limitées. Les institutions démocratiques visent à ce que nous partagions tous la responsabilité de ces choix difficiles. Ainsi, lorsque les tribunaux sont appelés à contrôler les résultats des délibérations du législateur, surtout en matière de protection de groupes vulnérables, ils doivent garder à l'esprit la fonction représentative du pouvoir législatif. [Je souligne.]

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Though regard had to be paid to the vital role the legislature plays in a representative democracy, the Court nonetheless made it clear that it would not be in all cases that such deference should prevail over exacting scrutiny. At page 994 it was said:

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions.

Both of the principles articulated in *Irwin Toy* have been brought to bear in a unique way in this appeal. We are dealing here, not with a rule of law developed through the legislative process, but rather a common law rule created by the judiciary. In such circumstances, there is no room for deference to the legislature: the task of making "difficult choices" falls squarely on the court. It is also important to bear in mind the nature of the right at stake in this appeal. Inasmuch as this dispute centres around the right of the prosecution to raise insanity against the wishes of the accused, we are dealing here with a situation in which the state is acting as the "singular antagonist" seeking to limit the accused's s. 7 interests.

Section 7 of the *Charter* guarantees everyone the right to life, liberty and security of the person and the right not to be deprived of that right except in accordance with the principles of fundamental justice. The section guarantees rights which are fundamental to any free and democratic society and, as such, cannot be easily overridden. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, I expressed the view that if a

Bien qu'il faille tenir compte du rôle vital du législateur dans une démocratie représentative, la Cour a néanmoins établi clairement que ce n'est pas dans tous les cas qu'un tel respect devrait prévaloir sur un examen exigeant. À la page 994, la Cour a dit:

Il arrive parfois qu'au lieu d'arbitrer entre des groupes différents, le gouvernement devienne plutôt ce qu'on pourrait appeler l'adversaire singulier de l'individu dont le droit a été violé. Par exemple, pour justifier une atteinte à des droits consacrés par les art. 7 à 14 de la *Charte*, l'État fera valoir, au nom de toute la société, sa responsabilité de poursuivre les criminels alors que la personne fera valoir le caractère prépondérant des principes de justice fondamentale. Il est possible qu'il n'y ait pas de demandes contradictoires venant de différents groupes. Dans de tels cas, et d'ailleurs chaque fois que l'objet du gouvernement se rapporte au maintien de l'autorité et de l'impartialité du système judiciaire, les tribunaux peuvent décider avec un certain degré de certitude si les [TRADUCTION] «moyens les moins radicaux» ont été choisis pour parvenir à l'objectif compte tenu de la somme d'expérience acquise dans le règlement de ces questions.

Les deux principes énoncés dans l'arrêt *Irwin Toy* s'appliquent au présent pourvoi de façon très particulière. Nous traitons en l'espèce, non pas d'une règle de droit élaborée par le pouvoir législatif, mais plutôt d'une règle de common law créée par le pouvoir judiciaire. Dans ces circonstances, il n'y a pas lieu de s'en remettre au législateur: il incombe directement à la cour de faire des «choix difficiles». Il importe également de ne pas oublier la nature du droit en jeu dans le présent pourvoi. Dans la mesure où le présent litige porte sur le droit de la poursuite de présenter la défense d'aliénation mentale contre le gré de l'accusé, nous traitons en l'espèce d'une situation dans laquelle l'État agit à titre d'«adversaire singulier» qui cherche à restreindre les intérêts de l'accusé à l'égard de l'art. 7.

L'article 7 de la *Charte* garantit à chacun le 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. Il garantit des droits qui sont fondamentaux dans toute société libre et démocratique et, à ce titre, on ne peut y déroger facilement. Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, j'ai exprimé l'opinion

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limit on a s. 7 right has been achieved through a violation of the principles of fundamental justice, the enquiry comes to an end and there is no need to consider the application of s. 1. At page 523 I explained:

I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1.

Similarly, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, I stated that it would be a rare provision which violated the principles of fundamental justice and could nevertheless be justified under s. 1.

It seems to me that in a case such as this where what is at issue is a common law rule which impinges upon a *Charter* guarantee central to the proper administration of the criminal justice system, it is incumbent upon the court, in applying the minimal impairment branch of *Oakes* and attempting to fashion a new common law rule, to select the most constitutionally sound means possible for furthering the government's objective. This does not, of course, mean that the court should adjudicate in a definitive way upon complex constitutional questions which are not properly before it. In practical terms, however, it does mean that it is not enough for the court to proffer alternatives which, although they may impair the right to a lesser extent than the existing common law rule, can not themselves meet the minimal impairment test or satisfy the other branches of the *Oakes* inquiry. Nor will it suffice to settle upon a new common law rule which seems *prima facie* to fall foul of other *Charter* guarantees and not be justifiable as a reasonable limit under s. 1. In other words, it is my view that in a case such as the present the court is charged with the responsibility of modifying the common law so as to make it constitutional in all its dimensions.

que si une limite imposée au droit garanti par l'art. 7 résulte de la violation des principes de justice fondamentale, l'examen prend fin et il n'est pas nécessaire d'examiner l'application de l'article premier. À la page 523, j'ai expliqué:

J'affirme cela parce que je ne crois pas qu'une limite au droit garanti par l'art. 7, qui a été imposée contrairement aux principes de justice fondamentale puisse être «raisonnable» ni que sa «justification puisse se démontrer dans le cadre d'une société libre et démocratique». L'exigence, que l'on trouve à l'art. 7, d'observer les principes de justice fondamentale me semble restreindre le pouvoir du législateur d'imposer des limites au droit garanti par l'art. 7, que lui confère l'article premier.

De même, dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, j'ai dit qu'une disposition qui viole les principes de justice fondamentale pourrait rarement être justifiée aux termes de l'article premier.

Il me semble que dans un cas comme l'espèce, où la question vise une règle de common law qui porte atteinte à l'une des garanties de la *Charte* les plus essentielles à la bonne administration de la justice, il incombe à la cour, en appliquant le volet de l'atteinte minimale du critère énoncé dans l'arrêt *Oakes* et en tentant d'élaborer une nouvelle règle de common law, de choisir les moyens les plus valables possibles du point de vue constitutionnel pour favoriser les objectifs du gouvernement. Il va sans dire que cela ne signifie pas que la cour devrait statuer de façon définitive sur des questions constitutionnelles complexes dont elle n'est pas saisie de façon régulière. En termes pratiques, cela signifie qu'il ne suffit pas que la cour présente des solutions qui, bien qu'elles soient susceptibles de porter atteinte aux droits dans une moindre mesure que la règle de common law actuelle, ne peuvent satisfaire au critère de l'atteinte minimale ou aux autres critères de l'arrêt *Oakes*. Il ne suffit pas non plus de convenir d'une nouvelle règle de common law qui semble de prime abord porter atteinte à d'autres garanties de la *Charte* et ne pas se justifier en vertu de l'article premier. En d'autres termes, je suis d'avis que, dans un cas comme l'espèce, la cour est chargée de modifier la common law de façon à la rendre conforme à la Constitution dans tous ses aspects.

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Before turning to alternatives to the present common law rule, there is one other aspect of this appeal which deserves mention. As noted earlier, s. 16(1) of the *Code* by its terms mandates an inquiry into the sanity of the accused at some point prior to the entry of a conviction. The constitutionality of this provision has not been challenged in this case. The Court must, therefore, in this case seek a modification of the common law rule which will not only be constitutional but comply with the provisions of the *Criminal Code* as well.

While I agree with the Chief Justice that modifying the existing common law rule so as to give the prosecution only a conditional right to introduce evidence of insanity during the course of the trial, i.e., in circumstances where the accused has himself put his mental capacity in issue, is a less intrusive means of achieving the government objective, I am not sure that such modified common law rule can itself survive full *Charter* scrutiny. In my view, permitting the Crown to raise insanity during the course of the trial, even if that permission is conditional, still infringes upon the accused's right to control his defences for the reasons expressed earlier. Nor can it satisfy the minimal impairment branch of the *Oakes* test because, although it is a less intrusive means of accomplishing the government's objective, it is not the least intrusive means of doing so.

I believe, moreover, that conferring on the prosecution a conditional right to raise the issue of insanity during the course of the trial infringes upon the equality rights of the mentally disabled under s. 15 of the *Charter*. It denies the mentally disabled, a group in our society which has been negatively stereotyped and historically disadvantaged, the control over their defences reposed in other accused persons and does so in a way which is discriminatory. In denying the mentally disabled personal autonomy in decision-making it reinforces the stereotype that they are incapable of rational thought and the ability to look after their own interests. In a word, it denies them equality

Avant de passer aux solutions de rechange à la règle de common law actuelle, il convient de mentionner un autre aspect du présent pourvoi. Comme je l'ai déjà signalé, aux termes du par. 16(1) du *Code*, l'état de la santé mentale de l'accusé doit être vérifié à un certain moment avant qu'une déclaration de culpabilité soit inscrite. La constitutionnalité de cette disposition n'est pas contestée en l'espèce. Par conséquent, la Cour doit tenter de trouver à la règle de common law une modification qui sera non seulement constitutionnelle, mais également conforme aux dispositions du *Code criminel*.

Bien que je souscrive à l'opinion du Juge en chef que le fait de modifier la règle de common law actuelle de manière à accorder à la poursuite seulement un droit conditionnel de présenter une preuve d'aliénation mentale au cours du procès, c'est-à-dire, dans les circonstances où l'accusé a lui-même soulevé la question de sa capacité mentale, constitue un moyen moins envahissant d'atteindre l'objectif du gouvernement, je ne suis pas certaine qu'une telle règle de common law modifiée soit pleinement conforme à la *Charte*. À mon avis, le fait de permettre au ministère public de soulever la question de l'aliénation mentale au cours du procès, même si cette permission est conditionnelle, entraîne toujours la violation du droit de l'accusé de contrôler ses moyens de défense, pour les mêmes motifs que j'ai mentionnés précédemment. Cette règle ne pourra pas non plus répondre au critère de l'atteinte minimale de l'arrêt *Oakes* parce que, bien que ce soit un moyen moins envahissant d'atteindre l'objectif du gouvernement, ce n'est pas le moyen le moins envahissant.

Je crois, en outre, que le fait d'accorder à la poursuite le droit conditionnel de soulever la question de l'aliénation mentale au cours du procès porte atteinte aux droits à l'égalité des déficients mentaux garantis à l'art. 15 de la *Charte*. Cela prive, et ce, de façon discriminatoire, les déficients mentaux, un groupe de notre société qui a souffert de stéréotypes et a toujours été défavorisé, du contrôle de leurs moyens de défense qui est accordé aux autres accusés. Enlever aux déficients mentaux l'autonomie de prendre leurs propres décisions vient renforcer le stéréotype voulant qu'ils soient incapables de penser de façon rationnelle et de s'occuper de leurs propres intérêts.

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with other accused persons under the guise, putting it at its best, of a benign paternalism. The prosecution's conditional right will only pass constitutional muster, in my view, if it can be shown that there exists no alternative that achieves the same objective without limiting the accused's s. 7 or s. 15 rights or at least limiting them to a significantly lesser degree.

Autrement dit, ils sont ainsi privés de l'égalité avec les autres accusés sous le couvert, au mieux, d'un paternalisme bienveillant. Le droit conditionnel de la poursuite ne sera acceptable du point de vue constitutionnel, à mon avis, que si l'on peut démontrer qu'il n'existe aucune autre solution qui permette d'atteindre le même objectif sans restreindre les droits conférés à l'accusé par les art. 7 et 15, ou du moins en leur imposant des limites sensiblement moins importantes.

It seems to me that the principle advanced in support of the prosecution's right to introduce evidence of insanity can be effectively implemented by having the issue of the accused's insanity raised at the conclusion of the trial in cases where the defences put forward by the accused have been rejected and the essential elements of the offence have been established by the prosecution beyond a reasonable doubt. At that point I think either party should be free to raise the issue of the accused's insanity. I realize, of course, that there is an element of circularity involved in this approach in that insanity has a direct bearing on proof of *mens rea*. However, I prefer this approach since it both respects the accused's right to waive the defence of insanity and ensures that any resultant prejudice he suffers in the finding of guilt flows from his own decision not to avail himself of the defence and not as a consequence of the prosecution's having raised the issue in the middle of the trial process.

Il me semble que le principe avancé pour appuyer le droit de la poursuite de présenter une preuve d'aliénation mentale peut être pleinement respecté en autorisant que la question de l'aliénation mentale de l'accusé soit soulevée à la conclusion du procès suite au rejet des moyens de défense de l'accusé et alors que les éléments essentiels de l'infraction ont été établis par la poursuite hors de tout doute raisonnable. À ce stade, je suis d'avis que l'une ou l'autre partie devrait être libre de soulever la question de l'aliénation mentale de l'accusé. Évidemment, je me rends compte que cette position comporte un aspect tautologique étant donné que l'aliénation mentale a un effet direct sur la preuve de la *mens rea*. Toutefois, je préfère adopter cette position étant donné qu'à la fois elle respecte le droit de l'accusé de renoncer à la défense d'aliénation mentale et elle fait en sorte que tout préjudice qu'il pourrait subir en raison de la déclaration de culpabilité découle de sa propre décision de ne pas se prévaloir de ce moyen de défense et non du fait que la poursuite a soulevé la question au milieu du procès.

In my view, if the prosecution's right to raise the issue of the accused's insanity is confined as I have suggested, the requirements of s. 16(1) are satisfied and no infringement of the accused's trial rights under either s. 7 or s. 15 are involved. I express no opinion as to whether any other constitutional rights of the accused, other than his trial rights, are infringed by such a rule or by s. 16(1) of the *Code* and, if so, whether any such infringement would be saved by s. 1 since this is not, for obvious reasons, before us.

À mon avis, si le droit de la poursuite de soulever la question de l'aliénation mentale de l'accusé est restreint, comme je le propose, les exigences du par. 16(1) sont satisfaites et il n'est pas porté atteinte aux droits dont jouit l'accusé au cours du procès en vertu de l'art. 7 ou l'art. 15. Je ne formule pas d'opinion sur la question de savoir si d'autres droits constitutionnels de l'accusé sont violés par une telle règle ou le par. 16(1) du *Code* et, s'ils le sont, si cette atteinte serait justifiée en vertu de l'article premier, car nous ne sommes pas, pour des raisons évidentes, saisis de cette question.

I should add that I recognize that restricting the Crown's right to introduce the issue of insanity only

Il convient d'ajouter que je reconnais que le fait de restreindre le droit du ministère public en ne l'autori-

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after an accused has been found guilty may well result in some accuseds who are in fact insane being acquitted of criminal charges and thereby escaping incarceration under the *Criminal Code* entirely. To some, no doubt, this would amount to a failure of our criminal justice system. In my view, however, the incarceration of those persons in institutes for the criminally insane is neither mandated by the principles of fundamental justice nor by the *Criminal Code*. Section 16(1) of the *Code* only makes it illegal to convict an insane person of a criminal offence. The potential risk of the criminally insane eluding the reach of the criminal law remains, in other words, a matter for Parliament if it views the civil commitment procedures instituted by the provincial legislatures as inadequate for the proper protection of the public.

In conclusion, it is my view that while preventing insane persons from being convicted of criminal offences is an important objective, it is not of sufficient importance to justify overriding such a fundamental constitutional right of the accused as is in issue here, particularly where the objective can be achieved by the less intrusive means I have suggested. I would therefore allow the appeal and enter a stay of proceedings. I would answer the constitutional questions in the manner indicated by the Chief Justice.

I agree with Lamer C.J's conclusion for the reason given by him that a transitional period in the terms he has outlined is required in order to deal with the consequences of a finding by this Court that s. 542(2) of the *Criminal Code* is of no force or effect.

The reasons of La Forest and Gonthier JJ. were delivered by

GONTHIER J.—I have had the benefit of the opinions of Chief Justice Lamer and Justices Wilson and

sant pas à présenter la question de l'aliénation mentale avant que l'accusé n'ait été déclaré coupable peut avoir pour effet que certains accusés qui, en fait, souffrent d'aliénation mentale seront acquittés et échapperont ainsi totalement à l'incarcération prévue au *Code criminel*. Il va sans dire que, pour certaines personnes, cette situation équivaudrait à un échec de notre système de justice criminelle. À mon avis toutefois l'incarcération de ces personnes dans des établissements pour les criminels souffrant d'aliénation mentale n'est requise ni par les principes de justice fondamentale ni par le *Code criminel*. Le paragraphe 16(1) du *Code* prévoit seulement qu'il est illégal de déclarer coupable d'une infraction criminelle une personne souffrant d'aliénation mentale. Le risque qu'un criminel souffrant d'aliénation mentale se place hors de portée de la loi demeure en d'autres termes une question qui relève du législateur s'il juge que les procédures civiles d'internement prévues par les législatures provinciales ne sont pas adéquates pour bien protéger le public.

En conclusion, je suis d'avis qu'empêcher des personnes souffrant d'aliénation mentale d'être déclarées coupables d'infractions criminelles constitue un objectif important, mais il ne l'est pas suffisamment pour justifier une dérogation à un droit constitutionnel de l'accusé aussi fondamental que celui en l'espèce, particulièrement lorsque l'objectif peut être atteint par les moyens moins envahissants que j'ai proposés. Par conséquent, je suis d'avis d'accueillir le pourvoi et d'ordonner l'arrêt des procédures. Je suis d'avis de répondre aux questions constitutionnelles de la manière indiquée par le Juge en chef.

Je souscris à la conclusion du juge en chef Lamer, pour les motifs qu'il mentionne, qu'il faut prévoir une période transitoire selon les modalités qu'il a énoncées pour pallier aux conséquences d'une décision de notre Cour disposant que le par. 542(2) du *Code criminel* est inopérant.

Version française des motifs des juges La Forest et Gonthier rendus par

LE JUGE GONTHIER—J'ai eu l'avantage de prendre connaissance des motifs du juge en chef Lamer et de

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L'Heureux-Dubé. I share the conclusions of the Chief Justice and substantially agree with his reasons.

I am in agreement that what has become known as the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103) provides a useful analytical framework to assess conformity of the existing common law rule to the *Canadian Charter of Rights and Freedoms*, but it is not a necessary one particularly as neither of the two principles of freedom of the accused in the conduct of his defence and of sanity as an essential element to criminal responsibility is pre-eminent. Both are to be implemented to the greatest possible extent.

I would however depart from the analysis made by the Chief Justice inasmuch as he considers that the latter principle should not necessarily enter into the determination of a breach of fundamental justice under s. 7 of the *Charter*. This principle which is stated in mandatory terms in s. 16 of the *Criminal Code*, R.S.C. 1970, c. C-34, pertains to the integrity of the justice system itself. While an accused in exercising his right to conduct his defence as he sees fit may choose not to invoke this principle, it remains incumbent upon the justice system to ensure that it is respected. In other words, even though this principle benefits the accused, it is not open to him to deny it effect, any more than he is entitled to assume guilt when he is innocent.

I also respectfully differ with the Chief Justice's statement that the objective of non-interference with the defence of the accused may be met by the Crown's not prosecuting. While this is factually correct, I am of the view that this answer is inappropriate. To rely on the exercise of prosecutorial discretion to ensure respect for the principle that sanity is essential to criminal responsibility entails substituting such discretion to adjudication and is a denial of judicial process. This is particularly significant where the issue is clouded with uncertainty and can therefore best be resolved through the judicial process. It is akin to saying that the deficiencies, let alone the unconstitutionality of a law, can be remedied by not resorting to it. Rather, the trial process itself must allow for the recognition and implementation of the principle. I agree with the Chief Justice that this need

ceux des juges Wilson et L'Heureux-Dubé. J'arrive aux mêmes conclusions que le Juge en chef et je souscris à la majeure partie de ses motifs.

Je suis d'accord que ce que l'on appelle maintenant le critère de l'arrêt *Oakes* (*R. c. Oakes*, [1986] 1 R.C.S. 103) fournit un cadre d'analyse utile pour déterminer si la règle de common law actuelle est conforme à la *Charte canadienne des droits et libertés*, mais ce cadre n'est pas essentiel, ceci d'autant plus que ni le principe relatif à la liberté de l'accusé de mener sa défense ni celui de la santé mentale comme élément essentiel de la responsabilité criminelle ne l'emporte sur l'autre. L'un et l'autre doivent être appliqués dans toute la mesure du possible.

Je m'écarte toutefois de l'analyse que fait le Juge en chef lorsqu'il considère que ce dernier principe ne devrait pas nécessairement compter pour déterminer s'il y a eu violation de la justice fondamentale garantie par l'art. 7 de la *Charte*. Ce principe que l'art. 16 du *Code criminel*, S.R.C. 1970, ch. C-34, prescrit de façon impérative relève de l'intégrité du système de justice lui-même. Bien qu'un accusé puisse choisir de ne pas invoquer ce principe dans l'exercice de son droit de mener sa défense comme il l'entend, il incombe quand même au système de justice d'en assurer le respect. En d'autres termes, même si ce principe profite à l'accusé, il ne lui est pas loisible d'en écarter les conséquences, pas plus qu'il n'a le droit d'assumer la culpabilité quand il est innocent.

Avec égards, je ne suis pas de l'avis du Juge en chef non plus quand il dit qu'il est possible de réaliser l'objectif de non-intervention dans la défense de l'accusé par l'abstention du ministère public de poursuivre. Bien que ce soit vrai dans les faits, je suis d'avis que cette solution ne convient pas. S'en remettre au pouvoir discrétionnaire de poursuivre pour assurer le respect du principe que la santé mentale est une condition essentielle de la responsabilité criminelle équivaut à substituer ce pouvoir discrétionnaire à une décision judiciaire et écarte le recours en justice. La chose est particulièrement importante lorsque la question en litige est entourée d'incertitude et pourrait donc être mieux tranchée par le processus judiciaire. Cela revient à soutenir qu'il est possible d'obvier aux déficiences d'une loi et même à son inconstitutionnalité en ne l'appliquant pas. Il faut plu-

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not interfere with the conduct of the accused's defence.

I am likewise in agreement with the Chief Justice as to the flaws in the present common law rule and as to the "new common law rule" which he sets forth as best reconciling and giving effect to these two principles in a manner consistent with s. 15 of the *Charter*.

I also concur in his reasons and conclusions regarding the other issues in appeal. Accordingly, I would allow the appeal and enter a stay of proceedings and would answer the constitutional questions as he does.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting)—I have had the benefit of the reasons of Chief Justice Lamer and Justice Wilson but, with respect, cannot agree with them nor with the conclusion they reach. At issue in this case is the constitutionality of the legislative scheme which provides for the detention of insane acquittees (ss. 542-547 of the *Criminal Code*, R.S.C. 1970, c. C-34), as well as the common law rule which allows the Crown to raise evidence of insanity independently.

It is my view that the common law rule allowing the Crown to raise evidence of insanity independently is a principle of fundamental justice consonant with, and indeed, reflective of the values substantively embodied in s. 7 "principles of fundamental justice". Further, I agree with the majority of the Ontario Court of Appeal that s. 542(2) of the *Criminal Code*, viewed within its legislative and operative context, is also fully consistent with *Charter* guarantees. I am, however, in agreement with both of my colleagues' conclusion that s. 542(2) of the *Criminal Code* is *intra vires* the Parliament of Canada.

tôt prévoir la mise en œuvre de ce principe dans le cadre du procès lui-même. Je suis d'accord avec le Juge en chef que son application ne comporte pas forcément d'entrave à la liberté de l'accusé de mener sa défense.

Je partage aussi l'avis du Juge en chef au sujet des failles de la règle de common law actuelle et quant à la «nouvelle règle de common law» qu'il énonce et qu'il considère comme pouvant le mieux concilier l'application de ces deux principes de façon conforme à l'art. 15 de la *Charte*.

Je souscris aussi à ses motifs et à ses conclusions au sujet des autres questions en litige dans le présent pourvoi. En conséquence, je suis d'avis d'accueillir le pourvoi et d'ordonner l'arrêt des procédures et de répondre aux questions constitutionnelles comme il le fait.

Version française des motifs rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—J'ai eu l'avantage de prendre connaissance des motifs du juge en chef Lamer et de ceux du juge Wilson mais, avec déférence, je ne puis être d'accord ni souscrire à leur conclusion. Les questions en litige dans ce pourvoi-ci touchent la constitutionnalité du régime législatif qui prévoit la détention des personnes acquittées pour cause d'aliénation mentale (art. 542 à 547 du *Code criminel*, S.R.C. 1970, ch. C-34), ainsi que de la règle de common law qui permet au ministère public de présenter indépendamment une preuve d'aliénation mentale.

J'estime que la règle de common law en vertu de laquelle le ministère public peut faire indépendamment une preuve d'aliénation mentale constitue un principe de justice fondamentale qui non seulement s'harmonise avec les valeurs qu'incarnent les «principes de justice fondamentale» de l'art. 7, mais s'en veut le reflet. De plus, je conviens avec la majorité de la Cour d'appel de l'Ontario que le par. 542(2) du *Code criminel*, analysé dans son contexte législatif et de mise en œuvre, est également tout à fait compatible avec les garanties accordées par la *Charte*. Je partage toutefois la conclusion de mes deux collègues selon laquelle le par. 542(2) du *Code criminel* est *intra vires* du Parlement du Canada.

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As I am in substantial agreement with the reasons of Thorson J.A., writing for the majority of the Ontario Court of Appeal, with respect to the alleged s. 7 and s. 9 violations arising out of the legislative scheme, I will focus my remarks on the constitutionality of the common law rule with but brief comments directed to the constitutionality of the legislative provisions.

Relevant Statutory Provisions

For ease of reference, I will reproduce the law in effect at the time of trial.

Criminal Code, R.S.C. 1970, c. C-34:

542. (1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted,

(*a*) the jury, or

(*b*) the judge or magistrate, where there is no jury,

shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known.

. . .

545. (1) Where an accused who is, pursuant to this Part, found to be insane, the lieutenant governor of the province in which he is detained may make an order

(*a*) for the safe custody of the accused in a place and manner directed by him, or

(*b*) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes.

(2) An accused to whom paragraph (1)(*a*) applies may, by warrant signed by an officer authorized for that purpose by the lieutenant governor of the province in which he is detained, be transferred for the purposes of

Comme je souscris, pour l'essentiel, aux motifs du juge Thorson qui a rédigé l'opinion majoritaire de la Cour d'appel de l'Ontario en ce qui concerne les violations alléguées des art. 7 et 9 résultant du régime législatif en cause, mes remarques porteront principalement sur la constitutionnalité de la règle de common law, quitte à ajouter de brefs commentaires sur la constitutionnalité des dispositions législatives.

Dispositions législatives pertinentes

Pour plus de commodité, je reproduis ici les dispositions en vigueur au moment du procès.

Code criminel, S.R.C. 1970, ch. C-34:

542. (1) Si, lors du procès d'un accusé inculpé d'un acte criminel, il est déposé que l'accusé était aliéné au moment où l'infraction a été commise et s'il est acquitté,

a) le jury, ou

b) le juge ou magistrat, quand il n'y a pas de jury,

doit constater si l'accusé était aliéné lors de la perpétration de l'infraction et déclarer s'il est acquitté pour cause d'aliénation mentale.

(2) S'il est constaté que l'accusé était aliéné au moment où l'infraction a été commise, la cour, le juge ou le magistrat devant qui le procès s'instruit doit ordonner que l'accusé soit tenu sous une garde rigoureuse dans le lieu et de la manière que la cour, le juge ou le magistrat ordonne, jusqu'à ce que le bon plaisir du lieutenant-gouverneur de la province soit connu.

. . .

545. (1) Lorsque, en application de la présente Partie, un accusé est déclaré atteint d'aliénation mentale, le lieutenant-gouverneur de la province où l'accusé est détenu peut

a) rendre une ordonnance pour la bonne garde de l'accusé dans le lieu et de la manière qu'il prescrit, ou

b) s'il est d'avis que la mesure est dans l'intérêt véritable de l'accusé sans nuire à l'intérêt public, rendre une ordonnance portant libération de l'accusé, soit inconditionnellement, soit aux conditions qu'il prescrit.

(2) Le prévenu visé à l'alinéa (1)*a*) peut être transféré aux fins de sa réhabilitation à tout endroit au Canada que précise le mandat signé par l'agent qu'autorise à cette fin le lieutenant-gouverneur de la province où il est

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his rehabilitation to any other place in Canada specified in the warrant with the consent of the person in charge of such place.

(3) A warrant mentioned in subsection (2) is sufficient authority for any person who has custody of the accused to deliver the accused to the person in charge of the place specified in the warrant and for such last mentioned person to detain the accused in the manner specified in the order mentioned in subsection (1).

. . .

547. (1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(*a*) not later than six months after the making of the order referred to in that subsection relating to that person, and

(*b*) at least once in every twelve month period following the review required pursuant to paragraph (*a*) so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

. . .

(*d*) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in

détenu, sous réserve du consentement du responsable de l'établissement de l'endroit.

(3) Le mandat visé au paragraphe (2) donne à toute personne qui a la garde du prévenu le pouvoir de le remettre à la personne responsable du lieu indiqué dans ce mandat et à cette dernière de le détenir de la manière indiquée dans l'ordonnance mentionnée au paragraphe (1).

. . .

547. (1) Le lieutenant-gouverneur d'une province peut nommer une commission pour examiner le cas de chaque personne qui est sous garde dans un lieu de ladite province en vertu d'une ordonnance rendue en conformité de l'article 545 ou du paragraphe 546(1) ou (2).

(2) La commission mentionnée au paragraphe (1) se compose de trois à cinq membres qui choisissent parmi eux un président lorsque le lieutenant-gouverneur n'en a pas désigné.

(3) Au moins deux membres de la commission doivent être des psychiatres dûment qualifiés et autorisés à exercer la médecine en conformité des lois de la province pour laquelle la commission est nommée et un membre au moins de la commission doit appartenir au barreau de la province.

(4) Trois membres de la commission d'examen, dont au moins un psychiatre visé au paragraphe (3) et un membre du barreau de la province, constituent un quorum de la commission.

(5) La commission doit examiner le cas de chaque personne mentionnée au paragraphe (1),

a) au plus tard six mois après qu'a été rendue l'ordonnance visée dans ce paragraphe relativement à cette personne, et

b) au moins une fois tous les douze mois après l'examen exigé à l'alinéa *a*), aussi longtemps que cette personne reste sous garde en vertu de l'ordonnance,

et la commission doit, immédiatement après chaque examen, faire un rapport au lieutenant-gouverneur énonçant en détail les résultats de cet examen et indiquant,

. . .

d) lorsque la personne sous garde a été trouvée non coupable, pour cause d'aliénation mentale, si, de l'avis de la commission, cette personne est rétablie et,

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its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

. . .

(*f*) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act.

The relevant provisions of the *Canadian Charter of Rights and Freedoms* are:

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. Everyone has the right not to be arbitrarily detained or imprisoned.

Analysis

The Common Law Rule

Pivotal to the determination of the validity of the common law rule which allows the Crown to raise evidence of insanity independently, is a full discussion of what the rule is intended to achieve and the internal limits which govern its operation. The common law rule was crafted with precision: it does not operate willy-nilly in allowing the Crown to raise such evidence but, rather, operates within strict

dans l'affirmative, si à son avis, il est dans l'intérêt du public et dans l'intérêt de cette personne que le lieutenant-gouverneur ordonne qu'elle soit libérée absolument ou sous réserve des conditions que le lieutenant-gouverneur peut prescrire,

. . .

f) les conclusions qu'elle estime souhaitables afin de réhabiliter la personne dont le cas a été examiné et compatibles avec l'intérêt public.

(6) En plus de tout examen qui doit être effectué en vertu du paragraphe (5), la commission doit examiner tout cas mentionné au paragraphe (1) lorsque le lieutenant-gouverneur le lui demande et elle doit, immédiatement après un tel examen, faire rapport au lieutenant-gouverneur en conformité du paragraphe (5).

(7) Aux fins de l'examen prévu par le présent article, le président de la commission peut exercer tous les pouvoirs, mentionnés aux articles 4 et 5 de la *Loi sur les enquêtes*, d'un commissaire nommé en vertu de la Partie I de cette loi.

Les articles suivants de la *Charte canadienne des droits et libertés* sont pertinents:

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. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Analyse

La règle de common law

Pour déterminer la validité de la règle de common law qui permet au ministère public de présenter indépendamment une preuve d'aliénation mentale, il est essentiel de procéder à un examen complet des buts visés par cette règle et des limites internes qui en régissent la mise en œuvre. Il s'agit d'une règle qui a été formulée avec soin: ce n'est pas un effet du hasard qu'elle permette au ministère public de présenter ce genre de preuve, son application obéissant au contraire à des paramètres stricts. Son fondement

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parameters. It is both informed and, conversely, limited by two principles of fundamental justice.

The two distinct principles of fundamental justice that my colleagues identify, i.e., that of an accused's right to fully control his or her defence and the fundamental rule that insane persons not responsible for their conduct should not be convicted for otherwise criminal behaviour, find appropriate expression in the balance achieved through the proper application of the common law rule. There can be no doubt that the two principles identified above are properly labelled, in the language of s. 7, "fundamental". This Court has, on numerous occasions, addressed the fundamental nature of these principles.

In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. (as he then was), discussed the principle that criminal law should not punish the innocent in these terms, at p. 492:

> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice...

And at p. 513:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.

Neither can there be any doubt as to the "fundamental" nature of the principle that an accused has the right to control and make meaningful decisions about the manner in which he or she defends. As my colleague the Chief Justice notes, it is founded on respect for the autonomy of the individual as well as on the adversarial nature of our criminal justice system. The common law rule at issue here does not, in my view, violate either of these fundamental principles.

Regardless of how one chooses to label or characterize the principle that an individual should not be convicted absent fault, i.e., as one adhering to the

repose sur deux principes de justice fondamentale qui, inversement, en constituent les limites.

Les deux principes de justice fondamentale que mes collègues ont identifiés—le droit de l'accusé de contrôler pleinement sa défense et la règle fondamentale selon laquelle les personnes atteintes d'aliénation mentale, non responsables de leur conduite, ne devraient pas être déclarées coupables d'un acte par ailleurs criminel—trouvent leur juste expression dans l'équilibre que permet d'atteindre l'application légitime de la règle de common law. Il ne fait aucun doute que ces deux principes sont bel et bien, au sens de l'art. 7, de nature «fondamentale». Notre Cour en a, à plusieurs reprises, analysé le caractère fondamental.

Dans l'arrêt *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, le juge Lamer (alors juge puîné) a analysé en ces termes, à la p. 492, le principe suivant lequel le droit criminel ne devrait pas servir à punir un innocent:

> Une loi qui permet de déclarer coupable une personne qui n'a véritablement rien fait de mal viole les principes de justice fondamentale ...

Il ajoute, à la p. 513:

> Depuis des temps immémoriaux, il est de principe dans notre système juridique qu'un innocent ne doit pas être puni. Ce principe est depuis longtemps reconnu comme un élément essentiel d'un système d'administration de la justice fondé sur la foi en la dignité et la valeur de la personne humaine et en la primauté du droit.

La nature «fondamentale» du principe suivant lequel l'accusé a le droit de contrôler sa défense et de prendre les décisions pertinentes à cet égard ne fait non plus aucun doute. Comme le souligne mon collègue le Juge en chef, ce principe est fondé sur le respect de l'autonomie individuelle ainsi que sur la nature contradictoire de notre système de justice criminelle. Or, la règle de common law ici en cause ne viole, à mon avis, aucun de ces principes fondamentaux.

Quelle que soit la façon que l'on choisisse de cataloguer ou de caractériser le principe selon lequel il n'y a pas de condamnation sans faute—comme un

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accused or as a purely societal interest, I am not convinced that it is properly dealt with under s. 1. Since, in my view, the common law rule reflects an appropriate balance between the two principles identified above, I will necessarily address the concerns raised by them within s. 7.

In my respectful opinion, a narrow approach is not warranted and should be avoided in a discussion of the principles of fundamental justice; these principles and their alleged violations should be viewed within the broader context of the legal system within which these principles have been found to repose. I find it difficult to engage in the sifting process advocated by my colleagues. The principles of fundamental justice do not spring up independently of one another but evolve gradually in what can be seen to be a mutually nourishing process. Our legal system is not a system of rules and principles operating singly, each within its own limited sphere. Any analysis requiring an examination of these principles, be it mandated constitutionally or otherwise, must respect this integrity. In this regard, I adopt the words of La Forest J. (dissenting on other grounds) in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 745 that "the principles of fundamental justice operate to protect the integrity of the system itself. . . ." I thus respectfully disagree with the Chief Justice's approach (at p. 977), that:

> . . . the accused chose not to invoke the principle of fundamental justice that the criminal justice system not convict a person who was insane at the time of the offence. Therefore, in this case, this principle cannot be a part of the s. 7 analysis.

The common law rule in issue here has evolved in precisely the fashion alluded to above. The fundamental principles of justice that my colleagues prefer to separate from its mix, combine to fashion a larger principle, one informed in appropriate measure by concerns underlying the principles that nourish it. When viewed within the broad context in which it operates, the common law rule, and its application in

droit inhérent à l'accusé ou comme une règle dictée par des impératifs purement sociaux—, je ne suis pas convaincue qu'il y ait lieu de procéder à un examen fondé sur l'article premier. Étant donné qu'à mon avis, la règle de common law reflète un juste équilibre entre les deux principes dégagés précédemment, je les examinerai sous l'angle de l'art. 7.

J'estime que, dans l'examen des principes de justice fondamentale, une approche étroite n'est pas justifiée et qu'il y a lieu de s'en garder. Ces principes, ainsi que leur violation qu'on allègue, doivent être analysés dans le cadre plus large du système juridique auquel ils se rattachent. Il m'apparaît difficile de s'engager dans le processus de tamisage préconisé par mes collègues. Les principes de justice fondamentale ne s'élaborent pas indépendamment les uns des autres mais évoluent graduellement par un processus qu'on pourrait qualifier de fécondation mutuelle. Notre système juridique ne se veut pas simplement un ensemble de règles et de principes qui opèrent de façon autonome, chacun dans les limites de sa sphère propre. Toute analyse comportant un examen de ces principes, qu'elle réponde à des exigences d'ordre constitutionnel ou autre, doit respecter cette intégrité. À cet égard, je fais miens les propos du juge La Forest (dissident pour d'autres motifs) qui affirme, dans l'arrêt *R. c. Corbett*, [1988] 1 R.C.S. 670, à la p. 745, que «les principes de justice fondamentale ont pour effet de protéger l'intégrité du système lui-même». Avec égards, je ne partage donc pas le point de vue du Juge en chef lorsqu'il dit à la p. 977:

> . . . l'accusé a choisi de ne pas invoquer le principe de justice fondamentale selon lequel, dans notre système de justice criminelle, on ne déclare pas coupable une personne qui était aliénée au moment de l'infraction. Par conséquent, ce principe ne peut, en l'espèce, servir à l'analyse fondée sur l'art. 7.

La règle de common law ici en litige a connu précisément une évolution semblable à celle que je viens d'évoquer. Les principes de justice fondamentale que mes collègues préfèrent dissocier se combinent pour former un principe plus général, dont les éléments traduisent de façon harmonieuse les considérations qui les sous-tendent. Considérée dans le vaste cadre dans lequel elle s'insère, la règle de common law,

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any given case, is, in my view, consonant with the principles of fundamental justice.

The ability of the Crown to raise evidence of insanity independently appears to have been first challenged, at the appellate level, in *R. v. Simpson* (1977), 35 C.C.C. (2d) 337. The rule at issue here has its genesis in the reasons of Martin J.A., for a unanimous five-member panel of the Ontario Court of Appeal. Martin J.A. prefaced and based his articulation of the rule upon a careful analysis of the arguments for and against it. He noted the concerns of defence counsel that allowing the Crown to raise evidence of insanity would prejudice an accused, concerns that are discussed at length in my colleagues' reasons. Martin J.A. also noted the fundamental tenet of criminal law that those that ought not to be held responsible for their actions should not be convicted. However, as I have mentioned above, he also recognized at p. 359 that the criminal justice system can accommodate divergent interests and that "a balance must frequently be sought and maintained between them". Moreover, he doubted, as I do, that "drastic" prejudicial consequences would ensue upon allowing the Crown to raise evidence of insanity, and he held at p. 359 that "the prosecution, in appropriate circumstances, is entitled to lead evidence that the accused was insane at the time of the act". (Emphasis added.) Martin J.A. was also well aware in his framing of the rule, that while giving voice to the principle that the criminal justice system cannot convict without fault, the rule must also protect the interests of the accused and the adversarial nature of the system in general. He addressed these concerns at p. 361:

The adversary system, in general, has served us well and I, for one, would not like to contemplate the erosion of its essential features, but I am not persuaded that the inflexible application of a rule which debars the prosecution from adducing cogent evidence of insanity in its

ainsi que son application concrète, est, à mon avis, compatible avec les principes de justice fondamentale.

La capacité pour le ministère public de présenter indépendamment une preuve d'aliénation mentale paraît avoir été contestée pour la première fois, en appel, dans l'arrêt *R. v. Simpson* (1977), 35 C.C.C. (2d) 337. La règle en cause ici tire d'ailleurs son origine des motifs qu'a prononcés le juge Martin dans cette affaire au nom d'un banc unanime de cinq juges de la Cour d'appel de l'Ontario. Le juge Martin a formulé cette règle après avoir soigneusement pesé le pour et le contre. Il a pris note du point soulevé par la défense, soit que de permettre au ministère public de présenter une preuve d'aliénation mentale causerait préjudice à l'accusé, point que mes collègues examinent en détail dans leurs motifs. Le juge Martin a également souligné le précepte fondamental de notre système de justice criminelle voulant que ceux qui ne devraient pas être tenus responsables de leurs actes ne devraient pas être déclarés coupables. Cependant, comme je l'ai indiqué précédemment, il a également reconnu, à la p. 359, la capacité du système de justice criminelle de concilier des intérêts divergents entre lesquels [TRADUCTION] «il est souvent nécessaire d'établir un équilibre». Au surplus, il a mis en doute, comme je le fais, la possibilité qu'il résulte de la preuve d'aliénation mentale présentée par le ministère public des conséquences préjudiciables [TRADUCTION] «draconiennes». Il a conclu, à la p. 359, que [TRADUCTION] «la poursuite a, dans les circonstances appropriées, le droit de présenter une preuve démontrant que l'accusé était aliéné au moment de la perpétration de l'acte» (je souligne). En formulant la règle, le juge Martin s'est aussi montré très conscient de la nécessité, parallèlement à la reconnaissance du principe selon lequel le système de justice criminelle ne peut prononcer de déclaration de culpabilité en l'absence de faute, de protéger les intérêts de l'accusé ainsi que le caractère contradictoire du système en général. Il a abordé ainsi la question, à la p. 361:

[TRADUCTION] De façon générale, le système contradictoire nous a bien servis et je ne voudrais pas, quant à moi, en voir s'éroder les caractéristiques essentielles. Mais je ne suis pas convaincu que l'application inflexible d'une règle qui interdit à la poursuite de pro-

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possession, where the accused refuses to adduce it, is an essential concomitant of that system.

On the other hand, the prosecution, clearly, ought not to be entitled to bolster a weak case that the accused committed the act by weak evidence that the accused was insane, where the admission of such evidence might deprive the accused of a fair trial on the issue whether he committed the act by leading the jury to conclude that he is the sort of person likely to have committed the act charged.

Martin J.A.'s articulation of the rule, at pp. 362-63, takes into account these seemingly divergent concerns and reflects the careful balance discussed at the outset:

[A trial judge's discretion] is broad enough to permit him to exclude evidence of insanity when tendered by the prosecution unless he is satisfied that the evidence of insanity proposed to be tendered is sufficiently substantial that the interest of justice requires that it be adduced. In no case would the interest of justice require the prosecution to adduce such evidence until evidence had been previously adduced which would warrant a jury being satisfied beyond a reasonable doubt that the accused committed the act charged with the requisite criminal intent, apart from a condition of insanity.

Where the prosecution seeks to adduce that the accused was insane at the time of the act, the proper test, in my view, is not whether, if advanced by the accused, the evidence would be sufficient to require the defence of insanity to be submitted to the jury by the trial Judge, but whether it is sufficiently substantial and creates such a grave question whether the accused had the capacity to commit the offence that the interest of justice requires it to be adduced.

. . .

In any case where the prosecution adduces evidence of insanity and the accused denies the commission of the act, it is incumbent upon the trial Judge to direct the jury that they are not to consider the evidence of insanity unless and until they are satisfied beyond a reasonable doubt that the accused committed the act charged with the requisite criminal intent. [Emphasis added.]

Notably, in a revisiting of the issue in *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, the Ontario Court of

duire la preuve pertinente d'aliénation mentale dont elle dispose lorsque l'accusé refuse de le faire, constitue un élément essentiel de ce système.

Par contre, il est clair que la poursuite ne devrait pas pouvoir étayer une preuve faible de la perpétration de l'acte par une preuve faible de l'aliénation, lorsque l'admission d'une telle preuve risquerait de priver l'accusé d'un procès équitable quant à la question de savoir s'il a commis l'acte, en amenant le jury à conclure qu'il est le genre de personne susceptible d'avoir commis l'acte dont il est inculpé.

La façon dont le juge Martin articule la règle, aux pp. 362 et 363, tient compte de ces préoccupations en apparence divergentes et reflète l'équilibre prudent dont j'ai discuté dès le départ:

[TRADUCTION] [Le pouvoir discrétionnaire du juge du procès] est suffisamment large pour lui permettre d'exclure une preuve d'aliénation mentale offerte par la poursuite à moins que le juge ne soit convaincu que cette preuve est suffisamment importante pour que l'intérêt de la justice en exige la présentation. En aucun cas l'intérêt de la justice n'obligera la poursuite à produire une telle preuve s'il n'a pas été présenté antérieurement des éléments de preuve susceptibles de convaincre un jury hors de tout doute raisonnable que l'accusé a commis l'acte reproché avec l'intention criminelle requise, indépendamment de tout état d'aliénation.

Si la poursuite veut prouver que l'accusé était aliéné au moment de la perpétration de l'acte, le test approprié n'est pas, à mon avis, si cette preuve, présentée par l'accusé, serait suffisante pour obliger le juge du procès à soumettre la défense d'aliénation mentale au jury, mais plutôt si elle est assez importante et soulève une question à ce point sérieuse quant à savoir si l'accusé était capable de commettre l'infraction, que l'intérêt de la justice exige qu'elle soit produite.

. . .

Dans tous les cas où la poursuite présente une preuve d'aliénation mentale et où l'accusé nie avoir commis l'acte, il incombe au juge du procès de dire au jury qu'il n'a pas à tenir compte de cette preuve à moins qu'il ne soit convaincu hors de tout doute raisonnable que l'accusé a commis l'acte reproché avec l'intention criminelle requise. [Je souligne.]

Notons que dans un nouvel examen de la question dans l'arrêt *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, la

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Appeal further tightened the rule by requiring that the trial judge also direct his or her mind to "the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public", *(per* Weatherston J.A., for the majority, at p. 189).

Thus, it is plain that the Crown's ability to raise evidence of insanity over and above the wishes of the accused will occur only in circumstances where the guilt of the accused is in no serious doubt, the evidence of insanity is overwhelming, the offence is of a serious nature and the accused represents a continuing threat to society due to his or her present dangerousness. In no small way, then, does this rule avert to the right of an accused to control his or her defence as its potential application is strictly and severely limited. It is not lightly that a court will proceed to consider evidence of insanity raised at the behest of the Crown and it is always in its discretion to exclude such evidence if it feels that the resultant prejudice to the accused would be too great. While the original formulation of the rule occurred prior to the *Charter*, the balance achieved by the rule is harmonious with the dictates of the *Charter* and, surely, in light of the *Charter*, future courts will tread cautiously, endeavouring to apply the rule in the strict manner in which it was intended, and thus, apply it in a fashion consistent with the principles of fundamental justice.

This is certainly not the first time that this Court has introduced a consideration of the trial judge's discretion into the balance, in its examination of a substantive *Charter* guarantee, and weighed this along with the relevant "competing interests". In *R. v. Corbett*, *supra*, the issue was whether s. 12 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, which allows cross-examination of an accused on his or her prior criminal record, was inconsistent with the guarantee in s. 11(*d*) of the *Charter*. In concluding that no inconsistency existed, Dickson C.J., for the majority on this point, held at pp. 691-92:

The balance struck by the combination of the *Canada Evidence Act*, s. 12, and the requirement for a clear

Cour d'appel de l'Ontario, s'exprimant à la majorité par la voix du juge Weatherston, a resserré l'application de la règle, à la p. 189, en exigeant que le juge du procès tienne également compte de [TRADUCTION] «la nature et de la gravité de l'infraction reprochée et de la mesure dans laquelle l'accusé peut présenter un danger pour le public».

Ainsi, il est clair que le ministère public ne pourra présenter une preuve d'aliénation, contre le gré de l'accusé, que dans les cas où la culpabilité de celui-ci ne soulève pas de doute sérieux, où la preuve de l'aliénation est accablante, où il s'agit d'une infraction grave et où l'accusé présente toujours une menace pour la société en raison de sa dangerosité. Cette règle tient donc largement compte du droit de l'accusé de contrôler sa défense puisque l'application en est strictement et sévèrement limitée. Ce n'est pas à la légère qu'une cour prendra en considération la preuve d'aliénation mentale présentée à l'initiative du ministère public et elle aura toujours le pouvoir discrétionnaire d'écarter cette preuve si elle estime qu'il en résulterait un préjudice trop grand pour l'accusé. Bien que la règle originale ait été formulée avant la *Charte*, l'établissement de l'équilibre des intérêts en cause en respecte les impératifs et il ne fait pas de doute qu'à la lumière de la *Charte*, les tribunaux redoubleront dorénavant de prudence en s'efforçant d'appliquer la règle avec toute la rigueur voulue et, de ce fait, d'une manière compatible avec les principes de justice fondamentale.

Ce n'est certes pas la première fois que notre Cour aborde, dans l'examen d'une règle de fond consacrée par la *Charte*, la question du pouvoir discrétionnaire du juge du procès dans l'établissement de cet équilibre et qu'elle doit, pour ce faire, peser des «intérêts contradictoires». Dans l'arrêt *R. c. Corbett*, précité, il s'agissait de savoir si l'art. 12 de la *Loi sur la preuve au Canada*, S.R.C. 1970, ch. E-10, permettant le contre-interrogatoire de l'accusé sur ses antécédents criminels, était incompatible avec la garantie qu'accorde l'al. 11*d*) de la *Charte*. En concluant à l'absence d'incompatibilité, le juge en chef Dickson qui s'est fait le porte-parole de la majorité sur ce point, a dit aux pp. 691 et 692:

L'équilibre atteint par la conjugaison de l'art. 12 de la *Loi sur la preuve au Canada* et de l'exigence que le juge

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direction from the judge is admirably summed up in the following passage from the judgment of Martin J.A. in *R. v. Davison, DeRosie and MacArthur* at pp. 441-42:

> An accused who gives evidence has a dual character. As an accused he is protected by an underlying policy rule against the introduction of evidence by the prosecution tending to show that he is a person of bad character, subject, of course, to the recognized exceptions to that rule. As a witness, however, his credibility is subject to attack.
>
> . . .
>
> In my view the policy rule which protects an accused against an attack upon his character lest it divert the jury from the issue which they are called upon to decide, namely, the guilt or innocence of the accused on the specific charge before the Court, is not wholly subordinated to the rule which permits an accused who elects to give evidence to be cross-examined on the issue of his credibility. In this area of the law, as in so many areas, a balance has been struck between competing interests, which endeavours so far as possible to recognize the purpose of both rules and does not give effect to one to the total exclusion of the other.
>
> One can now add on the accused's side of the balance the discretion in the trial judge to exclude evidence of prior convictions in those unusual circumstances where a mechanical application of s. 12 would undermine the right to a fair trial. [Emphasis added; citations omitted.]

Similar considerations were brought to bear in *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387, wherein La Forest J., for the Court, in his discussion of the relevance of the existence of discretion in the application of the statute, stated at p. 410 that, "[t]he existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice".

Also pertinent to any conclusion as to the proper balance to be struck under s. 7 are considerations of the scope of the impugned rule or law. In *R. v. Potvin*, [1989] 1 S.C.R. 525, Wilson J., for the majority, in considering whether s. 643 of the *Criminal*

donne des directives claires est admirablement résumé dans l'extrait suivant des motifs du juge Martin dans l'affaire *R. v. Davison, DeRosie and MacArthur* aux pp. 441 et 442:

> [TRADUCTION] L'accusé qui témoigne a deux qualités. En tant qu'accusé il est protégé par une règle fondamentale de politique générale qui interdit à la poursuite de produire des éléments de preuve tendant à démontrer sa mauvaise moralité, sous réserve évidemment des exceptions reconnues à cette règle. En sa qualité de témoin, cependant, sa crédibilité peut être attaquée.
>
> . . .
>
> À mon avis, la règle de politique générale qui met un accusé à l'abri de toute contestation de sa bonne moralité, de crainte que le jury ne soit détourné de la question qu'il est appelé à trancher, savoir celle de la culpabilité ou de l'innocence de l'accusé relativement à l'accusation précise dont la cour se trouve saisie, n'est pas complètement subordonnée à la règle permettant qu'un accusé qui choisit de témoigner soit contre-interrogé sur la question de sa crédibilité. Dans ce domaine du droit, comme dans bien d'autres, un équilibre a été établi entre des intérêts contradictoires, équilibre par lequel on essaie autant que possible de reconnaître l'objet des deux règles sans appliquer l'une à l'exclusion totale de l'autre.
>
> On peut maintenant ajouter dans la balance, en faveur de l'accusé, le pouvoir discrétionnaire qu'a le juge du procès d'écarter la preuve de ses condamnations antérieures dans les cas exceptionnels où l'application automatique de l'art. 12 minerait son droit à un procès équitable. [Je souligne; références omises.]

Des considérations similaires ont été exprimées dans l'arrêt *R. c. Beare*; *R. c. Higgins*, [1988] 2 R.C.S. 387, où, en examinant la pertinence de l'existence d'un pouvoir discrétionnaire dans l'application de la loi, le juge La Forest a, au nom de la Cour, affirmé, à la p. 410, que «[l]'existence d'un pouvoir discrétionnaire conféré par ces dispositions législatives ne porte pas atteinte, à mon avis, aux principes de justice fondamentale».

Dans tout examen du juste équilibre à maintenir en vertu de l'art. 7, il faut aussi tenir compte du champ d'application de la règle ou de la loi attaquée. Dans l'arrêt *R. c. Potvin*, [1989] 1 R.C.S. 525, où il s'agissait de déterminer si l'art. 643 du *Code criminel* était

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Code was inconsistent with s. 7 of the *Charter* in so far as it allowed the reading in of evidence given at the preliminary inquiry, found that the provision was consistent with the principles of fundamental justice as long as the accused had a full opportunity to cross-examine the witness when the previous testimony was given. She further noted at p. 545:

> In any event, because s. 643(1) can only be invoked when its stringent pre-requisites are met by the party seeking to introduce the previous testimony, it is not a provision that the Crown can use at will to its advantage or as a device to protect Crown witnesses who may not prove to be credible before the trier of fact.

The same can be said of the common law rule in issue here.

Some of the Chief Justice's concerns with the scope and operation of the rule can perhaps be traced to the fact that his reasons refer exclusively to the reasons of the Ontario Court of Appeal in *Saxell*, *supra*, wherein the Court restated the rule originally formulated in *Simpson*, *supra*. To the extent that the Court in *Saxell*, *supra*, was only restating the rule (with the added requirements discussed above), it was wrong in asserting that the prosecution need only show "convincing evidence" that the accused committed the act, notwithstanding evidence of insanity. The Court in *Simpson*, *supra*, at p. 362, emphatically stated that the standard is higher and that the prosecution must adduce sufficient evidence "which would warrant a jury being satisfied beyond a reasonable doubt that the accused committed the act charged." Any other reading of the rule does not do justice to the sensitive balance achieved by the Court of Appeal in *Simpson*, *supra*. As I have made clear previously, properly interpreted and applied, the rule reflects fundamental values inherent in our system of criminal justice and balances them in a way that passes constitutional muster. This conclusion is necessarily threatened by any attempt to detract from the weight accorded to the various interests in this balance.

incompatible avec l'art. 7 de la *Charte* dans la mesure où il permettait la lecture en preuve d'une déposition faite à l'enquête préliminaire, le juge Wilson a conclu, au nom de la majorité, que la disposition était compatible avec les principes de justice fondamentale pourvu que l'accusé ait eu l'occasion voulue de contre-interroger le témoin au moment où le témoignage antérieur a été donné. Elle a ajouté, à la p. 545:

> Quoi qu'il en soit, puisque le par. 643(1) ne peut être invoqué que lorsque des conditions préalables strictes sont remplies par la partie qui veut produire en preuve le témoignage antérieur, ce n'est pas une disposition que le ministère public peut utiliser à volonté à son avantage ou comme un moyen de protéger des témoins à charge qui pourraient se révéler non crédibles devant le juge des faits.

La même remarque vaut pour la règle de common law ici en cause.

Certains points que soulève le Juge en chef quant au champ d'application et à la mise en œuvre de la règle tiennent peut-être au fait qu'il se réfère exclusivement aux motifs de la Cour d'appel de l'Ontario dans l'arrêt *Saxell*, précité, où se trouve reformulée la règle initialement énoncée dans l'arrêt *Simpson*, précité. Dans la mesure où, dans l'arrêt *Saxell*, la cour ne faisait que reformuler la règle (en y ajoutant les exigences indiquées précédemment), elle a eu tort d'affirmer que la poursuite n'avait qu'à démontrer, par une «preuve convaincante», que l'accusé avait commis l'acte, nonobstant la preuve d'aliénation. Dans l'arrêt *Simpson*, la cour a souligné avec insistance, à la p. 362, que la norme était plus élevée et que la poursuite devait produire une preuve [TRADUCTION] «susceptible de convaincre un jury hors de tout doute raisonnable que l'accusé a commis l'acte reproché». Toute autre interprétation de la règle ne rend pas justice au délicat équilibre qu'a établi la Cour d'appel dans l'arrêt *Simpson*. Ainsi que je l'ai déjà clairement indiqué, la règle, correctement interprétée et appliquée, fait ressortir les valeurs fondamentales inhérentes à notre système de justice criminelle et établit entre elles un équilibre qui satisfait aux exigences constitutionnelles. Or, cette conclusion se trouve forcément menacée par toute tentative de modifier l'importance accordée aux différents intérêts qui composent cet équilibre.

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Thus, while an accused may be deprived of his or her liberty upon the Crown's independently raising evidence of insanity, for the above reasons this deprivation is fully consonant with principles of fundamental justice and thus no s. 7 violation is made out. Since the common law rule survives s. 7 scrutiny, there is no need to embark upon a s. 1 analysis.

Although the constitutional question was framed in reference to ss. 9 and 15 as well as s. 7 of the *Charter*, neither the appellant nor the respondent have addressed these additional sections in their argument and thus I will not consider these alternative grounds of constitutional invalidity.

The Legislative Scheme

As I stated at the outset, I am in agreement with the majority of the Court of Appeal that the legislative scheme in issue here is consistent with the guarantees set out in ss. 7 and 9 of the *Charter*. Therefore, I will limit myself to but brief remarks in this respect.

The legislative scheme, it will be recalled, is embodied in ss. 542-547 of the *Criminal Code*. In commenting upon the constitutionality of the legislative scheme, as regards s. 7 and s. 9 of the *Charter*, I will follow the analysis of the Chief Justice and address the issue of arbitrariness under the s. 9 *Charter* guarantee although the same result would necessarily obtain if the question of arbitrariness was discussed under s. 7 and measured against the principles of fundamental justice. I will deal first with the argument that the legislative scheme is procedurally unfair and thus violates the principles of fundamental justice.

In interpreting the legislative scheme in an attempt to determine its constitutionality, the words of Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 188, are particularly appropriate:

The appellants allege that the procedural mechanisms set out in the *Immigration Act, 1976*, as opposed to the application of those procedures to their particular cases,

Ainsi, quoiqu'il puisse y avoir atteinte à la liberté d'un accusé lorsque le ministère public présente indépendamment une preuve d'aliénation mentale, cette atteinte est, pour les raisons indiquées précédemment, entièrement compatible avec les principes de justice fondamentale et, partant, aucune violation de l'art. 7 n'a été démontrée. La règle de common law ne contrevenant pas à l'art. 7, point n'est besoin de procéder à une analyse en vertu de l'article premier.

Bien que la question constitutionnelle mentionne les art. 9 et 15, en plus de l'art. 7 de la *Charte*, ni l'appelant ni l'intimée n'ont présenté d'arguments à l'égard de ces autres articles. Je n'examinerai donc pas ces motifs subsidiaires d'invalidité constitutionnelle.

Le régime législatif

Comme je l'ai mentionné au départ, je partage l'avis de la Cour d'appel à la majorité selon lequel le régime législatif ici en cause est compatible avec les droits garantis par les art. 7 et 9 de la *Charte*. Je me bornerai donc à de brèves remarques à cet égard.

Le régime législatif, on se rappellera, est prévu aux art. 542 à 547 du *Code criminel*. Dans les observations que je ferai sur la constitutionnalité de ce régime au regard des art. 7 et 9 de la *Charte*, j'adopterai la démarche suivie par le Juge en chef. J'examinerai donc la question du caractère arbitraire en fonction de la garantie prévue à l'art. 9 de la *Charte*, bien qu'on en viendrait nécessairement au même résultat si cette question était examinée sous l'angle de l'art. 7 et des principes de justice fondamentale. Voyons d'abord l'argument selon lequel le régime législatif est inéquitable au plan de la procédure et porte ainsi atteinte aux principes de justice fondamentale.

Dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, le juge Wilson a tenu, à la p. 188, des propos particulièrement appropriés pour qui veut interpréter le régime législatif afin d'en déterminer la constitutionnalité:

Les appelants allèguent que les mécanismes de procédure énoncés dans la *Loi sur l'immigration de 1976*, indépendamment de l'application de cette procédure à

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have deprived them of their rights under the *Charter*. It is important, therefore, to understand these provisions in the context of the Act as a whole. If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the *Charter*. [Emphasis added.]

Regard should also be had to the reasons of La Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309. La Forest J., for the majority, discussed the impact of s. 7 on traditional notions of procedural fairness and observed at pp. 361-62:

It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness . . . . It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

. . .

It seems to me that s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined. [Emphasis added.]

While the majority of the Court of Appeal followed the blueprint outlined in these cases it did not, in coming to its conclusion that the legislative scheme was procedurally fair, direct its attention at any length to the large body of case law discussing the duties and obligations resting upon the Lieutenant Governor and the Advisory Review Board at the various points in the *Code* procedure. I will, therefore, refer specifically to a number of cases in this regard with a summary discussion of their findings.

While the Court of Appeal, in this case, held that the duty of the Lieutenant Governor to make an order under s. 545 arises "forthwith", as soon as is feasible in the circumstances, other courts have held, for example, that: (*Saxell*, *supra*) although the permissive word "may" is used, the Lieutenant Governor is under an obligation to make one of the orders con-

leurs cas particuliers, ont porté atteinte aux droits qui leur sont reconnus par la *Charte*. Il est donc important de situer ces dispositions dans le contexte de l'ensemble de la Loi. Si, sur le plan de l'interprétation législative, l'équité en matière de procédure demandée par les appelants n'est pas exclue par l'économie de la Loi, il va sans dire qu'il n'y a aucune raison de recourir à la *Charte*. [Je souligne.]

Il convient également de se reporter aux motifs du juge La Forest dans l'arrêt *R. c. Lyons*, [1987] 2 R.C.S. 309. Au nom de la Cour à la majorité, le juge La Forest a examiné les répercussions de l'art. 7 sur les notions traditionnelles d'équité procédurale. Il fait remarquer, aux pp. 361 et 362:

Évidemment, les exigences de la justice fondamentale englobent tout au moins l'équité en matière de procédure [. . .] Il est également clair que les exigences de la justice fondamentale ne sont pas immuables; elles varient selon le contexte dans lequel on les invoque. Ainsi, certaines garanties en matière de procédure pourraient être requises par la Constitution dans une situation donnée et ne pas l'être dans une autre.

. . .

Il me semble que l'art. 7 de la *Charte* reconnaît à l'appelant le droit à un procès équitable; il ne lui donne pas le droit de bénéficier des procédures les plus favorables que l'on puisse imaginer. [Je souligne.]

Bien que la Cour d'appel à la majorité ait suivi, dans le cas qui nous occupe, le canevas tracé dans ces arrêts, elle ne s'est pas, dans sa conclusion que le régime législatif était équitable sur le plan de la procédure, arrêtée à l'abondante jurisprudence touchant les devoirs et obligations qui incombent au lieutenant-gouverneur et à la commission d'examen aux différentes étapes procédurales prévues au *Code*. Je me référerai donc spécifiquement à un certain nombre d'arrêts pertinents à cet égard dont j'examinerai brièvement les conclusions.

Bien que la Cour d'appel ait, en l'espèce, conclu que le devoir du lieutenant-gouverneur de rendre une ordonnance aux termes de l'art. 545 prenait naissance «immédiatement», dès que possible dans les circonstances, il a par ailleurs été décidé, par exemple, que: (*Saxell*, précité) en dépit de l'expression permissive «peut», le lieutenant-gouverneur est tenu de rendre

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templated by s. 545(1); (*Re Abel and Advisory Review Board* (1980), 56 C.C.C. (2d) 153 (Ont. C.A.)) the Advisory Review Board is under a duty to act fairly and must supply to the patient and his or her counsel the facts to which it will apply its mind; (*Re McCann and The Queen* (1982), 67 C.C.C. (2d) 180 (B.C.C.A.)) the Order in Council Patients' Review Board, a Board analogous in function to that of the Advisory Review Board, is required to observe the requirements of procedural fairness and, therefore, must inform the patient of changes in their recommendations and the reasons therefor and give him or her a fair opportunity to address them; (*Re Egglestone and Mousseau and Advisory Review Board* (1983), 42 O.R. (2d) 268 (Div. Ct.)) the Board must act fairly and the patient must have the main body of facts to which the Board "is going to apply its mind", therefore, the patient and his or her counsel must be present when the psychiatric members of the Board present their findings to the Board and, further, the Board is under a duty to disclose the information obtained by the psychiatric members of the Board; (*Jollimore v. Nova Scotia (A.G.)* (1986), 75 N.S.R. (2d) 191 (N.S.S.C.)) the Lieutenant Governor is under a duty to act fairly and must advise the patient of an intended decision not to follow the recommendation of the Advisory Review Board and the patient or his or her counsel must be given an opportunity to make representations to the Lieutenant Governor in this regard; (*Attorney General of Ontario v. Grady* (1988), 34 C.R.R. 289 (Ont. H.C.)) the patient's right to procedural fairness was denied in that there was no evidence before the Board, falling within its jurisdiction, that would justify its conclusions and because the Board failed to provide an opportunity to speak to a disposition that did not reasonably flow from the evidence and materials before it and by appearing partial through allowing a representative of the Attorney General to make inflammatory and irrelevant remarks. Further, the patient should have been allowed to speak to an expert's proposed disposition and the Lieutenant Governor may only rely on the recommendations of the Advisory Board to the extent that they have been the product of a fair hearing.

l'une des ordonnances prévues par le par. 545(1); (*Re Abel and Advisory Review Board* (1980), 56 C.C.C. (2d) 153 (C.A. Ont.)) la commission d'examen est tenue d'agir équitablement et de fournir au patient et à l'avocat de celui-ci les faits sur lesquels elle portera son attention; (*Re McCann and The Queen* (1982), 67 C.C.C. (2d) 180 (C.A.C.-B.)) la Order in Council Patients' Review Board, une commission dont la fonction est analogue à celle de la commission d'examen, est tenue d'observer les exigences de l'équité procédurale et donc d'informer le patient de tout changement dans ses recommandations et des motifs de ce changement, en plus de lui donner l'occasion voulue de faire des observations à ce sujet; (*Re Egglestone and Mousseau and Advisory Review Board* (1983), 42 O.R. (2d) 268 (C. div.)) la commission doit agir équitablement et le patient doit avoir à sa disposition les principaux faits sur lesquels la commission [TRADUCTION] «fera porter son attention», aussi le patient et son avocat doivent-ils être présents lorsque les membres psychiatres livrent leurs conclusions à la commission, laquelle est tenue de divulguer les renseignements obtenus par les membres psychiatres; (*Jollimore v. Nova Scotia* (A.G.) (1986), 75 N.S.R. (2d) 191 (C.S.N.-É.)) le lieutenant-gouverneur a l'obligation d'agir équitablement et il doit aviser le patient de son intention de ne pas suivre la recommandation de la commission d'examen, et le patient ou son avocat doivent avoir l'occasion de faire des observations à cet égard au lieutenant-gouverneur; (*Attorney General of Ontario v. Grady* (1988), 34 C.R.R. 289 (H.C. Ont.)) il y a eu violation du droit du patient à l'équité procédurale en ce que la commission n'était saisie d'aucune preuve, relevant de sa compétence, susceptible de justifier ses conclusions et en ce qu'elle n'a pas donné l'occasion de présenter des observations sur une décision qui ne découlait pas raisonnablement de la preuve et des documents soumis et qu'elle a fait montre de partialité en permettant à un représentant du procureur général de faire des remarques enflammées et non pertinentes. De plus, le patient aurait dû être autorisé à présenter ses observations concernant la recommandation de l'expert, et le lieutenant-gouverneur ne peut se fonder sur les recommandations de la commission d'examen que dans la mesure où ces recommandations ont été le fruit d'une audience équitable.

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In light of the authorities canvassed above, I agree with the reasons of the Court of Appeal on this point, that the legislative scheme does not offend the principles of fundamental justice. In this respect, Thorson J.A., for the majority of the Court of Appeal held, at pp. 408-9:

I do not accept, however, that a failure of procedural due process occurred in this case. More generally, I do not accept that either s. 542(2) or the process which it set in motion in this case does or did countenance, in the circumstances of this case, a deprivation of the right to liberty of the person, otherwise than in accordance with principles of fundamental justice.

Furthermore, should an individual be denied procedural fairness in any given case, recourse can be had to both *Charter* and private law remedies.

I am also in agreement with the majority of the Court of Appeal's conclusion that s. 542(2) is not arbitrary within the meaning of s. 9 of the *Charter*. Again, Thorson J.A. considers this matter at length and at pp. 415-16 asserts:

In my opinion, the detention authorized by s. 542(2) is not arbitrary. Some period of time is required before an assessment can be made by the authorities of the acquittee's dangerousness and his therapeutic needs. No such assessment is made at his trial. . . .

Further, the finding of not guilty by reason of insanity raises what I accept to be a reasonable concern that the accused may remain a danger to the public and in need of further treatment. Under the statute, it is only after such a finding has been made that the State acquires the right to deprive him for the time being of his liberty in order that these matters may be properly assessed, under conditions that ensure the protection of the public.

As a result of the lengthy consideration given the matter by the Court of Appeal, my comments will be limited. While the section presumes, in effect, that all those found not guilty by reason of insanity should be detained as they may still be dangerous and/or in need of treatment, this presumption is one of com-

Compte tenu de la jurisprudence que je viens de passer en revue, je souscris aux motifs de la Cour d'appel suivant lesquels le régime législatif en cause ne porte pas atteinte aux principes de justice fondamentale. À cet égard, le juge Thorson, au nom de la majorité de la Cour d'appel, a conclu ainsi aux pp. 408 et 409:

[TRADUCTION] Je ne puis accepter, toutefois, qu'il y ait eu, en l'espèce, manquement à l'équité procédurale. De façon plus générale, je ne puis accepter que le par. 542(2) ou le processus qu'il a mis en marche en l'espèce comporte ou comportait, dans les circonstances de l'espèce, une atteinte à la liberté de la personne, d'une façon non conforme aux principes de justice fondamentale.

Au surplus, s'il y avait violation de l'équité procédurale dans un cas donné, la victime pourrait recourir tant à la *Charte* qu'aux redressements de droit privé.

Je me range également à la conclusion de la Cour d'appel à la majorité suivant laquelle le par. 542(2) n'est pas arbitraire au sens de l'art. 9 de la *Charte*. Après un examen détaillé de la question, le juge Thorson affirme aux pp. 415 et 416:

[TRADUCTION] À mon avis, la détention autorisée par le par. 542(2) n'est pas arbitraire. L'évaluation par les autorités du caractère dangereux de la personne acquittée et de ses besoins en matière de traitement prend un certain temps. Aucune évaluation de ce genre n'est faite lors de son procès. . .

En outre, la déclaration de non-culpabilité pour cause d'aliénation mentale soulève, à mon avis, une préoccupation raisonnable que l'accusé demeure peut-être un danger pour le public et a besoin de traitements additionnels. En vertu de la loi, ce n'est qu'après cette déclaration que l'État a le droit de le priver de sa liberté pour le moment afin de bien évaluer ces questions, dans des conditions qui permettent d'assurer la protection du public.

En raison de l'examen approfondi que la Cour d'appel a fait de cette question, mes remarques seront brèves. Bien que l'article présume, de fait, que toutes les personnes déclarées non coupables en raison de leur aliénation mentale devraient être détenues parce qu'elles peuvent encore présenter un danger ou avoir

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mon, practical sense and one that Parliament is constitutionally empowered to act upon.

In addition, although the Court of Appeal lacked the guidance of recent decisions of this Court, this Court has not, in its consideration of the s. 9 *Charter* guarantee, articulated standards that cast doubt on the conclusion reached by the majority of the Court of Appeal in the present case. While the impugned section confers the power to detain acquittees who may not be presently dangerous or in need of treatment, it does not do so arbitrarily.

In *R. v. Lyons*, *supra*, La Forest J., in determining whether or not Part XXI of the *Criminal Code* was arbitrary, examined, at p. 347, the scope of the legislation and the relationship between the legislative provisions and their objectives:

> However, even giving the word "arbitrary" its broadest signification, it is readily apparent that not only is the incarceration statutorily authorized, but that the legislation narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions under which an offender may be designated as dangerous. . . . Moreover, implicit in my discussion of the s. 12 issue is the common sense conclusion that the criteria in Part XXI are anything but arbitrary in relation to the objectives sought to be attained; they are clearly designed to segregate a small group of highly dangerous criminals . . . . [Emphasis added.]

In *R. v. Hufsky*, [1988] 1 S.C.R. 621, Le Dain J., for the Court, framed the inquiry in these words at p. 633:

> Although authorized by statute and carried out for lawful purposes, the random stop for the purposes of the spot check procedure nevertheless resulted, in my opinion, in an arbitrary detention because there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise. [Emphasis added.]

encore besoin de traitement, ou les deux, il s'agit d'une présomption logique dont le Parlement peut, dans le respect de la Constitution, se réclamer.

En outre, bien que la Cour d'appel n'ait pu s'inspirer des récents arrêts de notre Cour, nous n'avons pas, dans l'examen de la garantie qu'accorde l'art. 9 de la *Charte*, énoncé de normes permettant de mettre en doute la conclusion à laquelle elle est arrivée à la majorité, en l'espèce. L'article attaqué confère, certes, le pouvoir de détenir des personnes acquittées qui ne sont peut-être pas dangereuses à l'heure actuelle ou ne nécessitent peut-être pas de traitement, mais il ne le fait pas de façon arbitraire.

Dans l'arrêt *R. c. Lyons*, précité, le juge La Forest, en cherchant à déterminer si la partie XXI du *Code criminel* était arbitraire, a examiné, à la p. 347, le champ d'application des dispositions législatives et leur relation avec l'objectif poursuivi:

> Toutefois, même si l'on donne au mot «arbitraire» son sens le plus large, on se rend vite compte que non seulement l'incarcération est-elle autorisée par la loi, mais que les dispositions pertinentes définissent une catégorie restreinte de délinquants à l'égard desquels ces dispositions peuvent être légitimement invoquées, et qu'elles prescrivent en des termes on ne peut plus précis à quelles conditions un délinquant peut être désigné comme dangereux. [. . .] De surcroît, mon étude de la question concernant l'art. 12 comporte implicitement la conclusion, commandée par le bon sens, que les critères énoncés à la partie XXI sont loin d'être arbitraires compte tenu des objectifs visés; ils sont nettement conçus pour isoler un petit groupe de criminels extrêmement dangereux . . . [Je souligne.]

Dans l'arrêt *R. c. Hufsky*, [1988] 1 R.C.S. 621, le juge Le Dain, parlant au nom de la Cour, a formulé en ces termes, à la p. 633, la question que l'on doit se poser:

> Bien qu'autorisé par la loi et exécuté pour des fins légitimes, l'arrêt au hasard, effectué dans le but de procéder à un contrôle routier ponctuel, a néanmoins entraîné, à mon avis, une détention arbitraire parce qu'il n'y avait aucun critère de sélection des conducteurs à qui on demanderait de s'arrêter et de se soumettre au contrôle routier ponctuel. La sélection était laissée à l'entière discrétion de l'agent de police. Un pouvoir discrétionnaire est arbitraire s'il n'y a pas de critère, exprès ou tacite, qui en régit l'exercice. [Je souligne.]

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Regard should also be had to the words of La Forest J. in *R. v. Beare*; *R. v. Higgins*, *supra*. La Forest J. addressed the question of whether, due to their arbitrary operation, certain provisions respecting fingerprinting, found in the *Identification of Criminals Act* and the *Criminal Code*, violated the principles of fundamental justice. Important in his analysis were considerations of the scope of the legislation and the nature of the individuals subject to it. At pages 408-9 La Forest J. held:

The legislation is not arbitrary in its scope. The *Identification of Criminals Act* and ss. 453.3(3) and 455.5(5) of the *Criminal Code* do not create an arbitrary or irrational statutory scheme. They apply only with respect to three categories of accused persons who have not been convicted of an indictable offence:

. . .

The impugned provisions, therefore, operate only with respect to indictable offences which, obviously, constitute the most serious category of criminal offences. Moreover, with respect to each class of accused there must be reasonable and probable grounds to believe that the persons involved have committed an indictable offence. [Emphasis added.]

Similarly, the impugned legislation in the instant case operates in a restricted fashion and applies only to insane acquittees charged with an indictable offence. Further, the trial judge, has a discretion as to the place and the manner of the initial detention.

The last case I will mention in this regard is *R. v. Luxton*, [1990] 2 S.C.R. 711, wherein Lamer C.J., for the majority, found, at pp. 722-23, that s. 669 of the *Criminal Code*, which imposed a mandatory term of imprisonment for those convicted of first degree murder, was not arbitrary because:

. . . Parliament has narrowly defined a class of murderers under an organizing principle of illegal domination and has specifically defined the conditions under which the offender can be found guilty of first degree murder. . . . The decision of Parliament to attach a minimum 25-year sentence without eligibility for parole in cases

Il convient également de souligner les propos du juge La Forest dans l'arrêt *R. c. Beare*; *R. c. Higgins*, précité. Le juge La Forest a analysé la question de savoir si certaines dispositions relatives à la prise d'empreintes digitales contenues dans la *Loi sur l'identification des criminels* et dans le *Code criminel* violaient, par la façon arbitraire dont elles entrent en jeu, les principes de justice fondamentale. Les éléments importants de son examen portaient sur le champ d'application des dispositions législatives et la catégorie d'individus visés. Le juge La Forest a conclu ainsi, aux pp. 408 et 409:

La législation n'est pas arbitraire dans son champ d'application. La *Loi sur l'identification des criminels* et les par. 453.3(3) et 455.5(5) du *Code criminel* n'instaurent pas de structure légale arbitraire ou irrationnelle. Ils ne s'appliquent qu'à trois catégories d'inculpés non reconnus coupables d'un acte criminel . . .

. . .

Les dispositions contestées, par conséquent, ne jouent que dans le cas des actes criminels qui, évidemment, constituent la catégorie des infractions criminelles les plus graves. De plus, dans le cas de chaque catégorie d'accusés, il doit y avoir des motifs raisonnables et probables de croire que les personnes visées ont commis l'acte criminel. [Je souligne.]

De même en l'espèce, les mesures législatives attaquées jouent de façon restreinte et ne s'appliquent qu'aux personnes acquittées pour cause d'aliénation mentale qui étaient accusées d'un acte criminel. De plus, le juge du procès possède un pouvoir discrétionnaire quant au lieu et aux conditions de la détention initiale.

Le dernier arrêt que je mentionnerai à cet égard est l'arrêt *R. c. Luxton*, [1990] 2 R.C.S. 711, dans lequel le juge en chef Lamer a conclu au nom de la majorité, aux pp. 722 et 723, que l'art. 669 du *Code criminel*, qui impose une période obligatoire d'emprisonnement aux accusés déclarés coupables de meurtre au premier degré, n'était pas arbitraire parce que:

. . . le Parlement a donné une définition restreinte d'une catégorie de meurtriers en vertu d'un principe directeur fondé sur la domination illégale et a défini spécifiquement les conditions auxquelles le délinquant peut être reconnu coupable de meurtre au premier degré. [. . .] On ne peut pas dire que la décision du Parlement d'assortir

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of first degree murder, having regard to all these circumstances, cannot be said to be arbitrary. . . . The incarceration is statutorily authorized, it narrowly defines a class of offenders with respect to whom the punishment will be invoked and it prescribes quite specifically the conditions under which an offender may be found guilty of first degree murder. [Emphasis added.]

It is clear then, that one must look at the operation of the provision in question in its entire context. In this light, contrary to the assertions of the Chief Justice, the criteria, that the Crown respondent contends inform the s. 542(2) detention decision, are not irrelevant to the s. 9 inquiry. Indeed, these criteria typify the kinds of considerations that this Court has determined to be important in assessing whether the government has acted arbitrarily. "[H]aving regard to all these circumstances", (*per* Lamer C.J. in *Luxton*, *supra*), and, for the reasons expressed by Thorson J.A. for the majority of the Court of Appeal, the impugned legislative provision does not operate arbitrarily and, consequently, the detention of the appellant here was not arbitrary.

Before finally disposing of this case, I would like to make some brief comments about the legislation challenged in this case. In attempting to address the unique position of the insane acquittee, Parliament has set up a comprehensive system of assessment and review. Mere literal reference to the text of the *Criminal Code* goes only a short distance towards an understanding of its working and its practical complexity. While I am by no means suggesting that Parliament has devised the best or the most sophisticated scheme, and while the reform suggestions made by the Law Reform Commission may have merit, Parliament has, in the context of the issues raised in this case, made constitutionally permissable choices. In any evaluation of complex legislative schemes, such as the one here, the judiciary has an obligation to respect the integrity of the scheme and to measure it against constitutional guarantees with this integrity in mind. This is especially the case in situations where, as here, difficult predictive and treatment decisions are involved. In the absence of some constitutional imperative, and there is none here, and however

le meurtre au premier degré d'une peine minimale de 25 ans d'emprisonnement sans possibilité de libération conditionnelle est, compte tenu de toutes ces circonstances, arbitraire [. . .] La loi autorise l'emprisonnement, elle donne une définition restreinte d'une catégorie de délinquants contre qui on invoquera la peine et elle prescrit de manière très précise les conditions auxquelles un délinquant peut être reconnu coupable de meurtre au premier degré. [Je souligne.]

Il ne fait donc aucun doute que l'on doit examiner la disposition en cause dans son contexte global. Cela dit, contrairement aux affirmations du Juge en chef, les critères qui, d'après le ministère public intimé, éclairent la décision relative à la détention en vertu du par. 542(2), ne sont pas étrangers à un examen fondé sur l'art. 9. De fait, ces critères servent à catégoriser le genre d'éléments que notre Cour a jugé importants pour apprécier si le gouvernement a agi arbitrairement. «[C]ompte tenu de toutes ces circonstances» (le juge en chef Lamer dans l'arrêt *Luxton*, précité), et pour les motifs qu'a exprimés le juge Thorson pour la Cour d'appel à la majorité, la disposition législative attaquée ne s'applique pas arbitrairement et, par conséquent, la détention de l'appelant en l'espèce n'était pas arbitraire.

Enfin, avant de conclure, j'aimerais faire quelques brèves remarques au sujet de la législation contestée. En voulant s'attaquer à la position toute particulière de la personne acquittée pour cause d'aliénation mentale, le Parlement a mis en œuvre un mécanisme global d'évaluation et d'examen. Une simple lecture littérale du texte du *Code criminel* ne donne qu'une vague idée du fonctionnement de ce mécanisme et de la complexité de son application pratique. Je n'ai pas, loin de là, la prétention d'affirmer qu'il s'agit du régime le meilleur ou le plus sophistiqué que le Parlement ait pu concevoir et il se peut que les propositions de réforme de la Commission de réforme du droit aient quelque mérite. Mais, dans le contexte des questions soulevées en l'espèce, le Parlement a fait des choix que la Constitution lui permettait de faire. Dans toute évaluation de mécanismes législatifs complexes, comme celui ici en cause, le pouvoir judiciaire se doit d'en respecter l'intégrité et de tenir compte de cette intégrité pour apprécier un système donné au regard des garanties constitutionnelles. C'est particulièrement le cas dans des situations qui,

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desirable certain changes may be, this Court cannot act as a "super legislature" and tinker with a legitimate legislative scheme. In light of the complex structure provided by Parliament, any redrafting of the legislation is properly left to reform and legislative bodies.

Disposition

In light of the above, I would dismiss the appeal and answer the constitutional questions as follows:

Question 1: Is s. 542(2) of the *Criminal Code* of Canada *intra vires* the Parliament of Canada?

Answer: Yes.

Question 2: Do the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, violate ss. 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms*?

Answer: No, the common law criteria do not limit s. 7 of the *Canadian Charter of Rights and Freedoms*. It is not necessary to answer this question with respect to ss. 9 and 15 of the *Canadian Charter of Rights and Freedoms*.

Question 3: If the answer to question 2 is affirmative, are the common law criteria, enunciated by the Ontario Court of Appeal, permitting the Crown to adduce evidence of an accused's insanity, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: This question does not have to be answered.

Question 4: Does the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code*

comme en l'espèce, impliquent des décisions difficiles en matière de traitement et de pronostic. En l'absence d'impératif constitutionnel, comme en l'espèce, et quelque souhaitables que puissent s'avérer certains changements, notre Cour ne saurait se comporter comme une «super-législature» et jongler avec les pièces d'un mécanisme législatif légitime. Compte tenu de la complexité de la structure créée par le Parlement, toute velléité de réécrire la législation doit être laissée aux commissions de réforme et aux organismes législatifs.

Dispositif

Compte tenu de ce qui précède, je suis d'avis de rejeter le pourvoi et de répondre aux questions constitutionnelles de la manière suivante:

Question 1: Le paragraphe 542(2) du *Code criminel* du Canada est-il *intra vires* du Parlement du Canada?

Réponse: Oui.

Question 2: Les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, violent-ils les art. 7, 9 et 15 de la *Charte canadienne des droits et libertés*?

Réponse: Non, les critères de common law ne restreignent pas l'art. 7 de la *Charte canadienne des droits et libertés*. Il n'y a pas lieu de répondre à cette question en ce qui concerne les art. 9 et 15 de la *Charte canadienne des droits et libertés*.

Question 3: Si la réponse à la 2e question est affirmative, les critères de common law, énoncés par la Cour d'appel de l'Ontario, qui permettent à la poursuite de produire une preuve de l'aliénation mentale d'un accusé, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Réponse: Il n'y a pas lieu de répondre à cette question.

Question 4: Le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformé-

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of Canada violate ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 5: If the answer to question 4 is affirmative, is the statutory power to detain a person found not guilty by reason of insanity, pursuant to s. 542(2) of the *Criminal Code* of Canada, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: This question does not have to be answered.

Appeal allowed, L'HEUREUX-DUBÉ J. *dissenting. The constitutional questions were answered as follows: (1) s. 542(2) of the Criminal Code was intra vires; (2) the common law criteria limited s. 7 of the Charter—it was not necessary to consider ss. 9 and 15 of the Charter—and (3) were not justified by s. 1; (4) s. 542(2) of the Criminal Code violated ss. 7 and 9 of the Charter and (5) was not justified by s. 1.*

Solicitors for the appellant: Ruby & Edwardh, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitors for the intervener the Lieutenant Governor's Board of Review of Ontario: Hughes, Amys, Toronto.

Solicitors for the interveners the Canadian Disability Rights Council, the Canadian Mental Health Association and the Canadian Association of Community Living: British Columbia Public Interest Advocacy Centre, Vancouver.

ment au par. 542(2) du *Code criminel* du Canada, viole-t-il les art. 7 et 9 de la *Charte canadienne des droits et libertés*?

Réponse: Non.

Question 5: Si la réponse à la 4e question est affirmative, le pouvoir que confère la loi de détenir une personne déclarée non coupable en raison de son aliénation mentale conformément au par. 542(2) du *Code criminel* du Canada, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

Réponse: Il n'y a pas lieu de répondre à cette question.

Pourvoi accueilli, le juge L'HEUREUX-DUBÉ *est dissidente. Les réponses aux questions constitutionnelles sont les suivantes: (1) le par. 542(2) du Code criminel est intra vires, (2) les critères de common law restreignent l'art. 7 de la Charte—il n'est pas nécessaire de répondre au sujet des art. 9 et 15 de la Charte—et (3) ne sont pas justifiés en vertu de l'article premier, (4) le par. 542(2) du Code criminel viole les art. 7 et 9 de la Charte et (5) il n'est pas justifié en vertu de l'article premier.*

Procureurs de l'appelant: Ruby & Edwardh, Toronto.

Procureur de l'intimée: Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: John C. Tait, Ottawa.

Procureurs de l'intervenante la Commission d'examen du lieutenant-gouverneur de l'Ontario: Hughes, Amys, Toronto.

Procureurs des intervenants le Conseil canadien des droits des personnes handicapées, l'Association canadienne pour la santé mentale et l'Association canadienne pour l'intégration communautaire: British Columbia Public Interest Advocacy Centre, Vancouver.

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TAB 9

2021 SCC 11 (CanLII)

SUPREME COURT OF CANADA

CITATION: References re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

APPEALS HEARD: September 22, 23, 2020
JUDGMENT RENDERED: March 25, 2021
DOCKETS: 38663, 38781, 39116

BETWEEN:

Attorney General of Saskatchewan
Appellant

and

Attorney General of Canada
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Progress Alberta Communications Limited, Canadian Labour Congress, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, National Association of Women and the Law, Friends of the Earth, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick

Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation
Interveners

AND BETWEEN:

Attorney General of Ontario
Appellant

and

Attorney General of Canada
Respondent

- and -

Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Progress Alberta Communications Limited, Anishinabek Nation, United Chiefs and Councils of Mnidoo Mnising, Canadian Labour Congress, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, National Association of Women and the Law, Friends of the Earth, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation
Interveners

2021 SCC 11 (CanLII)

AND BETWEEN:

Attorney General of British Columbia
Appellant

and

Attorney General of Alberta
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of Saskatchewan, Progress Alberta Communications Limited, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab and Thunderchild First Nation
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 221)	Wagner C.J. (Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)
REASONS DISSENTING IN PART: (paras. 222 to 295)	Côté J.

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DISSENTING REASONS: Brown J.
(paras. 296 to 456)

DISSENTING REASONS: Rowe J.
(paras. 457 to 616)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

2021 SCC 11 (CanLII)

RE: *GREENHOUSE GAS POLLUTION PRICING ACT*

IN THE MATTER OF References to the Court of Appeal for Saskatchewan, the Court of Appeal for Ontario and the Court of Appeal of Alberta respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186

Attorney General of Saskatchewan *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Alberta,
Progress Alberta Communications Limited,
Canadian Labour Congress,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
National Association of Women and the Law,
Friends of the Earth,
International Emissions Trading Association,

2021 SCC 11 (CanLII)

David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Centre québécois du droit de l'environnement,
Équiterre,
Generation Squeeze,
Public Health Association of British Columbia,
Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab,
Assembly of Manitoba Chiefs,
City of Richmond,
City of Victoria,
City of Nelson,
District of Squamish,
City of Rossland,
City of Vancouver and
Thunderchild First Nation *Interveners*

- and -

Attorney General of Ontario *Appellant*

v.

Attorney General of Canada *Respondent*

2021 SCC 11 (CanLII)

and

Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
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Anishinabek Nation,
United Chiefs and Councils of Mnidoo Mnising,
Canadian Labour Congress,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
National Association of Women and the Law,
Friends of the Earth,
International Emissions Trading Association,
David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Centre québécois du droit de l'environnement,
Équiterre,
Generation Squeeze,
Public Health Association of British Columbia,

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Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab,
Assembly of Manitoba Chiefs,
City of Richmond,
City of Victoria,
City of Nelson,
District of Squamish,
City of Rossland,
City of Vancouver and
Thunderchild First Nation *Interveners*

- and -

Attorney General of British Columbia *Appellant*

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Attorney General of Alberta *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
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2021 SCC 11 (CanLII)

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Saskatchewan Coalition for Sustainable Development,
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Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Generation Squeeze,
Public Health Association of British Columbia,
Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab and
Thunderchild First Nation *Interveners*

Indexed as: References re *Greenhouse Gas Pollution Pricing Act*

2021 SCC 11

File Nos.: 38663, 38781, 39116.

2020: September 22, 23; 2021: March 25.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

2021 SCC 11 (CanLII)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

2021 SCC 11 (CanLII)

Constitutional law — Division of powers — Greenhouse gas emissions — Federal legislation setting minimum national standards of greenhouse gas pricing — Whether greenhouse gas pricing is matter of national concern falling within Parliament's power to legislate in respect of peace, order and good government of Canada — Constitution Act, 1867, s. 91 "preamble" — Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186.

In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*"). The *GGPPA* comprises four parts and four schedules. Part 1 establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial greenhouse gas ("GHG") emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the *GGPPA* and have it tabled in Parliament.

Saskatchewan, Ontario and Alberta challenged the constitutionality of the first two parts and the four schedules of the *GGPPA* by references to their respective

courts of appeal, asking whether the *GGPPA* is unconstitutional in whole or in part. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. The Attorney General of British Columbia, who had intervened in the Court of Appeal of Alberta, the Attorney General of Saskatchewan and the Attorney General of Ontario now appeal as of right to the Court.

Held (Côté J. dissenting in part and Brown and Rowe JJ. dissenting): The appeals by the Attorney General of Saskatchewan and the Attorney General of Ontario should be dismissed, and the appeal by the Attorney General of British Columbia should be allowed. The reference questions are answered in the negative.

Per **Wagner** C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ.: The *GGPPA* is constitutional. It sets minimum national standards of GHG price stringency to reduce GHG emissions. Parliament has jurisdiction to enact this law as a matter of national concern under the peace, order, and good government ("POGG") clause of s. 91 of the *Constitution Act, 1867*.

Federalism is a foundational principle of the Canadian Constitution. Its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local and regional level and foster cooperation between Parliament and the provincial legislatures for the common good. Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures. Under the

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division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity. Federalism recognizes that within their spheres of jurisdiction, provinces have autonomy to develop their societies. Federal power cannot be used in a manner that effectively eviscerates provincial power.

Courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, the Court has favoured a flexible view of federalism, best described as a modern cooperative federalism, that accommodates and encourages intergovernmental cooperative efforts. However, the Court has also always maintained that flexibility and cooperation, while important, cannot override or modify federalism and the constitutional division of powers.

The review of legislation on federalism grounds consists of the well-established two-stage analytical approach. At the first stage, a court must consider the purpose and effects of the challenged statute or provision with a view to characterizing the subject matter or "pith and substance". A court must then classify the subject matter with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid.

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At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance" or its main thrust or dominant or most important characteristic. In determining the purpose of the challenged statute or provision, a court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees. In considering the effects of the challenged legislation, a court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the side effects that flow from the application of the statute. Where a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as at the words used in it.

Three points with respect to the identification of the pith and substance are important to clarify. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction. However, precision should not be confused with narrowness. A court must focus on the law itself and what it is really

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about. The pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow. Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In some cases, the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance. Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. The pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence.

At the second stage of the division of power analysis, a court must classify the matter by reference to the heads of power set out in the Constitution. Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. Section 91 does not provide in the context of the POGG power that Parliament can make laws in relation to classes of subjects; instead, it states that Parliament can make laws for the peace, order, and good government of Canada in relation to "Matters". National concern is a well-established but rarely applied doctrine of Canadian constitutional law derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament to make laws for the peace, order, and good government of Canada, in

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relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. A matter that falls under the POGG power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92.

Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The effect of finding that a matter is one of national concern is permanent and confers exclusive jurisdiction over that matter on Parliament. However, the scope of the federal power is defined by the nature of the national concern itself and only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power.

A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power. The doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine. Such an approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power. It is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction. However, the fact that the double aspect doctrine can apply does not mean that it will apply in a given case. It may apply if a fact situation can be regulated from different federal and provincial perspectives and each level of

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government has a compelling interest in enacting legal rules in relation to that situation. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy.

The double aspect doctrine takes on particular significance where Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation but the federal law is paramount. In such a case, even if the national concern test would otherwise be met, a cautious approach to the double aspect doctrine should act as an additional check. The court must be satisfied that Canada in fact has a compelling interest in enacting legal rules over the federal aspect of the activity at issue and that the multiplicity of aspects is real and not merely nominal.

Turning to the national concern test, there are two points worth noting about the framework as a whole. First, the recognition of a matter of national concern must be based on evidence. An onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction. Second, there is no requirement that a matter be historically new in order to be found to be one of national concern. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. The term “new”, as used in the

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jurisprudence, refers to matters that could satisfy the national concern test and includes both “new” matters that did not exist in 1867 and matters that are “new” in the sense that the understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character. Thus, the critical element of the analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new.

Finding that a matter is one of national concern involves a three-step analysis. First, as a threshold question, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. Second, the matter must have a singleness, distinctiveness and indivisibility. Third, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the division of powers. The purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces.

The analysis begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine. This invites a common-sense inquiry into the national importance of the proposed matter. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is important; it operates to limit the application of the national concern doctrine and provides essential context for the analysis that follows.

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The second step of the analysis requires that a matter have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. Two principles underpin this requirement: first, to prevent federal overreach, jurisdiction should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

Under the first principle of the singleness, distinctiveness and indivisibility analysis, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction. International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. However, the existence of treaty obligations is not determinative of federal jurisdiction as there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers. Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters. The federal legislative role must be distinct from and not duplicative of that of the

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provinces. Federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

The second principle underpinning the singleness, distinctiveness, and indivisibility analysis is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. In order for provincial inability to be established both of these factors are required: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. And there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. The requirement for grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine and can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient. Evaluating extraprovincial harm helps to determine whether a national law

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is not merely desirable, but essential, in the sense that the problem is beyond the power of the provinces to deal with it. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

At the third and final step of the national concern analysis, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. The purpose of the scale of impact analysis is to protect against unjustified intrusions on provincial autonomy and prevent federal overreach. At this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

In this case, the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Both the short and long titles of the *GGPPA* confirm that its true subject matter is not just to mitigate climate change, but to do so through the pan-Canadian application of pricing mechanisms to a broad set of GHG emission sources. Likewise, it is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. In Parliament's eyes, the relevant mischief is the effects of the failure of some provinces

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to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards of GHG pricing that apply across Canada, setting a GHG pricing floor across the country.

Similarly, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. This is supported by evidence of the legislative debates. Both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

The legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature. In jurisdictions where Parts 1 and 2 of the *GGPPA* apply, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Part 1 of the *GGPPA* directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. The *GGPPA* does not require those to whom it applies to perform or refrain from

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performing specified GHG emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all it does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. The *GGPPA* leaves individual consumers and businesses free to choose how they will respond, or not, to the price signals sent by the marketplace. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally.

Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed GHG pricing scheme — apply only if the Governor in Council has listed a province or territory. The *GGPPA* provides that the Governor in Council may make listing decisions for Parts 1 and 2 of the statute only for the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, taking into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions. As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature gives legal effect to the federal government's commitment to give the provinces and territories the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances, as well as to recognize carbon pricing policies already implemented or in development by provinces and territories.

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Although evidence of practical effects is not helpful in this case given the dearth of such evidence, the evidence of practical effects to date is consistent with providing flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for provinces and territories not to implement a GHG pricing mechanism or one that is not sufficiently stringent.

Applying the threshold question, Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. There is also a broad consensus among expert international bodies that carbon pricing is a critical measure for the reduction of GHG emissions. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it passes the threshold test and warrants consideration as a possible matter of national concern.

Minimum national standards of GHG price stringency, which are implemented by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. GHGs are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global

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warming potential of the gases. GHG emissions are also predominantly extraprovincial and international in their character and implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. Moreover, the regulatory mechanism of GHG pricing is also specific and limited. GHG pricing operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. It is a distinct form of regulation that does not amount to the regulation of GHG emissions generally or encompass regulatory mechanisms that do not involve pricing. The Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing.

Provincial inability is established in this case. First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. While the provinces could choose to cooperatively establish a uniform carbon pricing scheme, doing so would not assure a sustained approach because the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal

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standard — a national GHG pricing floor — that applies in all provinces and territories at all times. Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage. Third, a province's failure to act or refusal to cooperate would have grave consequences for extraprovincial interests. It is well established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, coastal regions and on Indigenous peoples.

Although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of life that would fall under provincial heads of power is qualified and limited. First, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory mechanism. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. Second, the matter's impact on areas of life that would generally fall under provincial heads of power is also limited. The discretion of the Governor in Council is necessary in order

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to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionality by vulnerable communities and regions in Canada. The impact on those interests justify the limited constitutional impact on provincial jurisdiction.

As a final matter, the fuel and excess emission charges imposed by the *GGPPA* have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges. To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme; if such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself. Influencing behaviour is a valid purpose for a regulatory charge and regulatory charges need not reflect the cost of the scheme. The amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, the required nexus with the scheme will exist where the

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charges themselves have a regulatory purpose. There is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. They cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour.

Per **Côté** J. (dissenting in part): There is agreement with the majority with respect to the formulation of the national concern test. There is also agreement that Parliament has the power to enact constitutionally valid legislation establishing minimum national standards of price stringency to reduce GHG emissions. However, the *GGPPA* is, in its current form, unconstitutional. It cannot be said to accord with the matter of national concern formulated by the majority because the breadth of the discretion that it confers on the Governor in Council results in no meaningful limits on the power of the executive. Minimum standards are set by the executive, not the *GGPPA*. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law and the separation of powers. Clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional.

The *GGPPA*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing scheme. The critical feature of the fuel levy established in Part 1, that being what fuels are covered under the *GGPPA*, is so open-ended, allowing any substance, if prescribed

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by the Governor in Council, to fall within the ambit of the fuel charge regime. The operative provisions of Part 1 similarly prescribe vast law-making power to the executive such that the very nature of the regime can be altered. The full breadth of executive powers can be seen most notably within ss. 166 and 168. The only limit whatsoever on the expansive regulation-making powers set out in s. 166 is that, in amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs (s. 166(3)). No such factor applies to the Governor in Council's regulation-making powers under Part 1's provisions, thus, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *GGPPA*. Sections 168(2) and (3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1. Most notably, s. 168(4) states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, the regulation prevails to the extent of the conflict. This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation.

Further, it is clear from a review of Part 2's provisions that the broad powers accorded to the executive permit the Governor in Council to regulate GHG emissions broadly or regulate specific industries in other ways than by setting GHG

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emissions limits and pricing excess emissions across the country, despite the majority's assertion to the contrary. The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2): when amending Part 2 of Schedule 1 to modify the list of provinces where the output-based pricing system applies, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs. Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions. There is agreement with Brown and Rowe JJ. that Part 2's skeletal framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

Therefore, minimum standards are set by the executive, not the *GGPPA*. Accordingly, the *GGPPA* cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. Rather than establishing minimum national standards, Part 2 empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. The fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. The *GGPPA*, as it is currently written, employs a discretionary scheme that knows no bounds. While it is agreed that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *GGPPA* does not reflect this crucial restriction.

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Moreover, certain parts of the *GGPPA* are so inconsistent with our system of democracy that they are independently unconstitutional. Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *GGPPA*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns.

Sections 17 and 91 of the *Constitution Act, 1867*, both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means that every exercise of the federal legislative power must have the consent of all three elements of Parliament. The fundamental principles of the Constitution support this reading of ss. 17 and 19.

First, although Parliamentary sovereignty could appear to support Parliament's ability to delegate whatever they want to whomever they wish, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is that Parliament has the ability to create any law. The negative aspect, however, is that no institution is competent to override the requirements of an Act of Parliament. Henry VIII clauses, as found in the *GGPPA*, run afoul of the negative aspect of parliamentary sovereignty, as they give the executive the authority to override the requirements of primary legislation and create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. Henry VIII clauses are also incompatible with the conception

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of parliamentary sovereignty that demands an impartial, independent and authoritative body to interpret Parliament's acts, as they limit the availability of judicial review by providing no meaningful limits against which a court could review.

Second, the rule of law, which provides a shield for individuals from arbitrary state action, requires that all legislation be enacted in the manner and form prescribed by law. This includes the requirements that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law. There are other additional rule of law concerns with the delegation of legislative power to the executive: the delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the statute book, which gives rise to confusion and uncertainty; Henry VIII clauses endow the executive with authority to act arbitrarily by permitting it to act contrary to the empowering statute, creating an authority without meaningful limits enforceable through judicial review and thus an absolute discretion; and given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly.

Lastly, the Constitution insists on a separation of powers according to the separation of function among the three branches of government — the legislature, the executive and the judiciary. The executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite

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the important role played by the executive in the legislative process. The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers: the legislature is the institution best suited to set policy down into legislation, and limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

Per **Brown** J. (dissenting): The *Greenhouse Gas Pollution Pricing Act* ("*Act*") cannot be supported by any source of federal authority, and it is therefore wholly *ultra vires* Parliament. The *Act*'s subject matter falls squarely within provincial jurisdiction. The fact that the *Act*'s structure and operation is premised on provincial legislatures having authority to enact the same scheme is fatal to the constitutionality of the *Act* under Parliament's residual authority to legislate with respect to matters of national concern for the peace, order, and good government of Canada under the *Constitution Act, 1867*.

There is agreement with Rowe J.'s reasons, and therefore Rowe J.'s review of the jurisprudence on the residual POGG power is adopted. To determine whether an enactment falls within the legislative authority of its enacting body, a reviewing court must apply two steps: first, it must characterize the enactment to determine its pith and

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substance or dominant subject matter and, secondly, it must classify the identified subject matter, with reference to the classes of subjects or heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*. Where an enumerated head of power is relied upon, the pith and substance of the impugned law is identified at the characterization step, and that pith and substance is then classified under a head of power or class of subjects. Where Parliament relies upon the national concern branch of POGG as the source of its authority to legislate, the analytical process differs. If it is decided that the pith and substance of the impugned law does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements of singleness, distinctiveness and indivisibility as stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction.

The dominant subject matter of an enactment is determined by considering its purpose and effects. The purpose of characterization is to facilitate classification so as to determine whether the Constitution grants the enacting body legislative authority over the subject matter. The legislation's dominant subject matter must therefore be characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. If an enactment's subject matter could be classified under different heads of power listed under both ss. 91 and 92 of the *Constitution Act, 1867*, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof.

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As a sufficiently precise description may well refer to why and how the law operates, it can be appropriate to include reference to the legislative means in the pith and substance analysis. However, it is not appropriate to do so where describing legislation only in terms of its means would not accurately capture its dominant subject matter or where the description of the means is something that only federal legislative authority can undertake, such as minimum national standards. The determinative consideration in identifying an appropriate level of abstraction should be facilitating the subject matter's classification among the classes of subjects described in the Constitution's heads of power so far as necessary to resolve the case.

In this case, describing the *Act*'s pith and substance as relating to the regulation of GHG emissions is too broad because it does not facilitate classification under a federal or provincial head of power. Greater specificity in describing how the legislation proposes to regulate GHG emissions is required so as to determine whether the Constitution grants Parliament legislative authority over the subject matter. However, the inclusion of minimum national standards in the pith and substance of the *Act* is equally unhelpful. It adds nothing to the pith and substance of a matter, which is directed not to the fact of a standard, but to the subject matter to which the standard is to be applied. The inclusion of minimum national standards in the pith and substance of a federal statute also effectively decides the jurisdictional dispute, given that only Parliament is capable of imposing minimum national standards — only federally enacted standards can apply nationwide, and, by operation of paramountcy, only federally enacted standards can be a minimum. Furthermore, reference to "integral"

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standards also has no relevance to identifying the *Act*'s pith and substance because such a determination would require the Court to consider whether the standards set out in the *Act* are effective, which is not a valid consideration in the pith and substance analysis.

In order to characterize the *Act*'s pith and substance appropriately, its purpose and effects must be determined. In this case, the pith and substance of Parts 1 and 2 of the *Act* must be characterized separately. While the two parts share a purpose — the reduction of GHG emissions — they are otherwise not remotely similar to each other. They each have distinct operational features and the legislative means they employ are mutually distinct. The pith and substance of Part 1 is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

Once identified, the subject matter must be classified, with reference to the classes of subjects or heads of power described in ss. 91 and 92 of the *Constitution Act, 1867*. Courts should look first to the enumerated powers, rather than immediately considering whether a statute's dominant subject matter fits within the residual POGG authority.

In this case, provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all

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within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as the law of property and of contracts. In the alternative, the provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorize Parts 1 and 2. Part 2, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 is s. 92A, which gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation and management of non-renewable natural resources in the province.

The identification of several applicable provincial heads of power should be the end of the matter, since all such heads of power are, by the terms of ss. 92 and 92A(1), matters over which the provincial legislatures may exclusively make laws. By the terms of s. 91, the POGG power applies only in relation to matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. This exclusivity of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of the Constitution who were concerned about federal overreach via the POGG power. The federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but exclusively so. The *Act*'s entire scheme is premised on the provinces having jurisdiction to do precisely

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what Parliament has presumed to do in the *Act* — it operates only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet. The *Act*'s backstop model is therefore constitutionally impossible: if the provinces have jurisdiction to do what the *Act* does, then the *Act* cannot be constitutional under the national concern branch of POGG. This demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority.

Even so, given the majority's acceptance that some aspect of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction, the question of whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach* must be considered. The POGG jurisprudence offers little guidance on the question of whether the pith and substance of the impugned legislation can or should be coextensive with the matter of national concern, or whether the matter of national concern can or should be broader than the pith and substance of the legislation. It would be unprecedented and undesirable to accept that the matter of national concern must always be the same as the pith and substance of the statute under review, which can include legislative means, because this would effectively confine Parliament to that particular legislative means in responding to the matter of national concern.

It is not possible for a matter formerly under provincial jurisdiction to be transformed, when minimum national standards are invoked, into a matter of national

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concern. To accept that allocating national targets or minimum national standards can serve as a basis for recognizing that some aspect of an area of provincial jurisdiction is distinctly national in scope, and therefore lies outside provincial jurisdiction, would be to accept a model of supervisory federalism by which the provinces can exercise their jurisdiction only as long as they do so in a manner that the federal legislation authorizes. This would open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides to legislate uniform treatment.

In this case, a broad characterization of the national concern is unavoidable in order to encompass the pith and substance of both Part 1 and Part 2. The matter said to be of national concern can therefore be identified as the purpose of the *Act* as a whole: the reduction of GHG emissions. This matter does not meet the requirements of *Crown Zellerbach* for a valid national concern: it fails to meet the requirements of singleness and indivisibility. The fact that harms may cross borders is not enough to make out indivisibility. The matter is divisible because GHGs emissions can be connected to the source province. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of the emissions. Nationwide GHG emissions are nothing more than the sum of provincial and territorial GHG emissions. The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is insufficient to meet the requirement of indivisibility in *Crown Zellerbach*.

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Even if each of the pith and substance of Parts 1 and 2 as proposed matters of national concern are considered on their own, the pith and substance of each part is not distinct from matters falling under provincial jurisdiction under s. 92; they therefore do not meet the requirements of *Crown Zellerbach*. The reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) does not have the requisite distinctiveness to be recognized as a matter of national concern because the *Act* encourages provinces to enact substantially the same scheme to serve the same regulatory purpose. The provinces clearly have jurisdiction to establish standards of GHG price stringency in the province.

The double aspect doctrine has no application in this case. While this doctrine allows for the concurrent application of both federal and provincial legislation, it does not create concurrent jurisdiction. The *Act* purports to do exactly what the provinces can do, and for precisely the same reason. There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. The imposition of minimum national standards cannot be described as the distinctly federal aspect of the matter.

Even were the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is irreconcilable with the division of powers. Because the power to legislate to reduce GHG emissions effectively authorizes an array of regulations and extends to the

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regulation of any activity that requires carbon-based fuel, it has the potential to undo Canada's division of powers. GHG emissions simply cannot be treated as a single regulatory matter. While the *Act* does not forbid any activity, the charges it imposes will affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed activities. These charges thereby stand to have a profound effect on provincial jurisdiction and the division of powers. The division of powers analysis allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867*, sets out spheres of exclusive jurisdiction so that within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act or not act as they see fit, not as long as they do so in a manner that finds approval at the federal Cabinet table.

The delegation granted by the *Act* to the Cabinet is breathtakingly broad. On this point, the guidance provided by Rowe J. is endorsed, both as to the imperative that the division of powers confines the exercise by the federal Cabinet of Parliament's delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

The long-established principles set down in *Crown Zellerbach* should not be departed from. The doctrine of *stare decisis* establishes a high threshold for departing from precedents and that threshold is not met in this case. There is disagreement with the majority's modernization of the national concern doctrine and with the three-step framework it adopts, which dilutes the national concern test set

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down in *Crown Zellerbach*. The framework adopted results in a new, distinctly hierarchical and supervisory model of Canadian federalism that subjects provincial legislative authority to Parliament's overriding authority to establish national standards of how such authority may be exercised and replaces the constitutionally mandated division of powers with a judicially struck balance of power, which must account for other interests. No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects the Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into all areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways.

Per **Rowe** J. (dissenting): The national concern doctrine is a residual power of last resort. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the POGG power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act* ("*Act*"). Accordingly, there is agreement with Brown J.'s analysis and with his conclusion that the *Act* is *ultra vires* in whole.

Federalism is one of the fundamental underlying principles animating the Canadian Constitution. The primary textual expression of the principle of federalism

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can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867*. An essential characteristic of the division of powers is its exhaustiveness, which precludes legislative voids and reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign. The exhaustive nature of the division of powers means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial. The federal residual clause, the POGG power, comes from the opening words of s. 91 of the *Constitution Act, 1867*. The provincial residual clause is in s. 92(16), and provides that the provincial legislatures may exclusively make laws relating to matters of "a merely local or private Nature in the Province". The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92, as s. 91 confers the power to legislate for peace, order and good government "in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces". Further, every conferral of provincial legislative jurisdiction is qualified by words such as "in the Province", including s. 92(16). The result is that the POGG power is limited to only those matters that are not of a provincial nature, as the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power. The scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. The POGG power is also residual to the federal heads of power, as the normal

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process of constitutional interpretation is to rely first on a more specific provision before resorting to a more general one.

Since the POGG power is residual to both the enumerated provincial and federal heads of power, matters that come within enumerated federal or provincial heads of power should be located in those enumerated heads and the POGG power accommodates the matters which do not come within any of the enumerated federal or provincial heads. There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction and it is not possible for a matter to fall both within the POGG power and within a federal enumerated head of power at the same time. If a matter cannot fit within any enumerated head, only then may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

Courts have long struggled to define the contours of the POGG power in a way that preserves the division of powers. Early POGG cases suffered from a series of twists and turns, with various national concern statements infusing them at various points. The common theme of these cases, however, is that courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. The POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power.

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What some commentators have named "gap" and "national concern" are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the test set out in *Crown Zellerbach*. However, the analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG.

The national concern doctrine, when properly applied, plays an essential role in achieving the goal that the division of powers be collectively exhaustive, in a way that respects provincial jurisdiction. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government do not fit comfortably within the division of powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their distinctiveness from matters under provincial jurisdiction and their indivisibility between various heads of jurisdiction. But when the national concern doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority. Courts must be careful in recognizing matters of national concern, because the national concern branch has great potential to upset the division of powers. Once a matter is qualified as of national concern, Parliament has exclusive jurisdiction over the matter, including its intra-

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provincial aspects. Thus, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences. Courts should never start a division of powers analysis by looking to the federal residual power. To preserve the federal balance, courts should treat POGG as a power of last resort. The scope of the national concern doctrine must be limited to matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of national concern, as opposed to matters of a merely local or private nature that fall under s. 92(16).

The national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e., it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible. The requirements of singleness, distinctiveness and indivisibility serve the purpose of identifying matters that are truly residual in two ways. The matter must be distinct from provincial matters and must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both new matters and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

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Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize important matters that can be legislated upon by the provinces or by both orders of government. First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92. This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters in the province. This inquiry includes consideration of the provincial residuum: if the matter is of a merely local or private nature, it would fall under s. 92(16). The matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Second, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction. The fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum.

In evaluating whether the matter has a singleness, distinctiveness and indivisibility, it is relevant to consider what is known as the provincial inability test, that is, what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspect of the matter. The provincial inability inquiry has been designed to control the centralization

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of powers and to limit the extension of the national concern doctrine to matters that are beyond the power of the provinces to deal with and that must be legislated upon by Parliament, exclusively. Extra-provincial effects, on their own, are insufficient to satisfy the provincial inability test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem. If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity. Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. Further, provincial inability is no more than an indicium of singleness, distinctiveness and indivisibility. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

When determining if a matter can pass muster as a subject matter falling under POGG, the final consideration is whether it has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

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under the Constitution. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers. This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does not ask whether the importance of the proposed new federal power outweighs the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Courts must also be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or matter may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective. This doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. The double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy.

The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not

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strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would disappear not gradually but rapidly.

Canada's proposed doctrinal expansion of national concern should be rejected because it departs in a marked and unjustified way from the jurisprudence of the Court and, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction. In the instant case, Canada's proposed pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide GHG emissions" has not attained national dimensions. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern analysis. Furthermore, the distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Singleness, distinctiveness and indivisibility should not be collapsed into provincial inability, and provincial inability should not be informed by tests for enumerated heads of power, because this approach fails to give effect to the residual nature of the POGG power.

The device of "minimum national standards" makes wider still the pathway for enhancement of federal jurisdiction. "By means of minimum national standards" could be applied to any matter, and therefore adds nothing to the description of a matter

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and has no place. Including "minimum national standards" in the matter of national concern short-circuits the analysis and opens the door to federal "minimum standards" with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision. Finally, the *Act*'s scale of impact on provincial jurisdiction is not reconcilable with the distribution of powers. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. It is not an exercise in cooperative federalism; rather, it is the means to enforce supervisory federalism. The problem is not cured by the double aspect doctrine: since the federal matter is defined in terms of the extent to which it can limit the provinces' discretion to legislate (the backstop mechanism), this is not two aspects of the same fact situation — it is one aspect, and it gives the federal government the upper hand and the final say. Parliament did not have jurisdiction to enact the *Act* under its general residual power.

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concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J.O., Hoy A.C.J.O. and MacPherson, Sharpe and Huscroft JJ.A.), 2019 ONCA 544, 146 O.R. (3d) 65, 2019 D.T.C. 5090, 436 D.L.R. (4th) 1, 29 C.E.L.R. (4th) 113, [2019] O.J. No. 3403 (QL), 2019 CarswellOnt 10495 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Watson, Wakeling, Hughes and Feehan JJ.A.), 2020 ABCA 74, 3 Alta. L.R. (7th) 1, 2020 D.T.C. 5025, [2021] 1 W.W.R. 1, 446 D.L.R. (4th) 1, 35 C.E.L.R. (4th) 1, [2020] A.J. No. 234 (QL), 2020 CarswellAlta 328 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal allowed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

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THE CHIEF JUSTICE —

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I. Overview

[1] In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*GGPPA*"). Three provinces challenged the constitutionality of the *GGPPA* by references to their respective courts of appeal. The question divided the courts. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. Those decisions have now been appealed to this Court.

[2] The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions. In the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, states around the world undertook to drastically reduce their greenhouse gas emissions in order to mitigate the effects of climate change. In Canada, Parliament enacted the *GGPPA* as part of the country's effort to implement its commitment.

[3] However, none of these facts answer the question in these appeals. The issue here is whether Parliament had the constitutional authority to enact the *GGPPA*.

To answer this question, the Court must identify the true subject matter of the *GGPPA* and then classify that subject matter with reference to the division of powers set out in the *Constitution Act, 1867* ("Constitution"). In doing so, the Court must give effect to the principle of federalism, a foundational principle of the Canadian Constitution, which requires that an appropriate balance be maintained between the powers of the federal government and those of the provinces.

[4] Below, I conclude that the *GGPPA* sets minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions, pollutants that cause serious extraprovincial harm. Parliament has jurisdiction to enact this law as a matter of national concern under the "Peace, Order, and good Government" clause of s. 91 of the Constitution. National concern is a well-established but rarely applied doctrine of Canadian constitutional law. The application of this doctrine is strictly limited in order to maintain the autonomy of the provinces and respect the diversity of Confederation, as is required by the principle of federalism. However, Parliament has the authority to act in appropriate cases, where there is a matter of genuine national concern and where the recognition of that matter is consistent with the division of powers. In this case, Parliament has acted within its jurisdiction.

[5] I also conclude that the levies imposed by the *GGPPA* are constitutionally valid regulatory charges. In the result, the *GGPPA* is constitutional.

II. Reference Question

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[6] The reference question in each of the three appeals is substantially the same: Is the *Greenhouse Gas Pollution Pricing Act* unconstitutional in whole or in part?

III. Background

A. *The Global Climate Crisis*

[7] Global climate change is real, and it is clear that human activities are the primary cause. In simple terms, the combustion of fossil fuels releases greenhouse gases ("GHGs") into the atmosphere, and those gases trap solar energy from the sun's incoming radiation in the atmosphere instead of allowing it to escape, thereby warming the planet. Carbon dioxide is the most prevalent and recognizable GHG resulting from human activities. Other common GHGs include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and nitrogen trifluoride.

[8] At appropriate levels, GHGs are beneficial, keeping temperatures around the world at levels at which humans, animals, plants and marine life can live in balance. And the level of GHGs in the atmosphere has been relatively stable over the last 400,000 years. Since the 1950s, however, the concentrations of GHGs in the atmosphere have increased at an alarming rate, and they continue to rise. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels, and that increase is expected to reach 1.5°C by 2040 if the current rate of warming continues.

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[9] These temperature increases are significant. As a result of the current warming of 1.0°C, the world is already experiencing more extreme weather, rising sea levels and diminishing Arctic sea ice. Should warming reach or exceed 1.5°C, the world could experience even more extreme consequences, including still higher sea levels and greater loss of Arctic sea ice, a 70 percent or greater global decline of coral reefs, the thawing of permafrost, ecosystem fragility and negative effects on human health, including heat-related and ozone-related morbidity and mortality.

[10] The effects of climate change have been and will be particularly severe and devastating in Canada. Temperatures in this country have risen by 1.7°C since 1948, roughly double the global average rate of increase, and are expected to continue to rise faster than that rate. Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus.

[11] The Canadian Arctic faces a disproportionately high risk from climate change. There, the average temperature has increased at a rate of nearly three times the global average, and that increase is causing significant reductions in sea ice, accelerated permafrost thaw, the loss of glaciers and other ecosystem impacts. Canada's coastline, the longest in the world, is also being affected disproportionately by climate change, as it experiences changes in relative sea level and rising water temperatures, as well as

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increased ocean acidity and loss of sea ice and permafrost. Climate change has also had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life.

[12] Climate change has three unique characteristics that are worth noting. First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions. In 2016, for example, Alberta, Ontario, Quebec, Saskatchewan and British Columbia accounted for approximately 90.5 percent of Canada's total GHG emissions, while the approximate percentages were 9.1 percent for the other five provinces and 0.4 percent for the territories. Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories. Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.

B. *Canada's Efforts to Address Climate Change*

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[13] Canada's history of international commitments to address climate change began in 1992 with its ratification of the *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1, May 15, 1992 ("*UNFCCC*"). After failing to meet its commitments under multiple *UNFCCC* agreements, including the *Kyoto Protocol*, U.N. Doc. FCCC/CP/1997/L.7/Add.1, December 10, 1997, and the *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1, December 18, 2009, Canada agreed to the *Paris Agreement* in 2015. Recognizing that "climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries", the participating states agreed to hold the global average temperature increase to well below 2.0°C above pre-industrial levels and to pursue efforts to limit that increase to 1.5°C: United Nations, Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session*, U.N. Doc. FCCC/CP/2015/10/Add.1, January 29, 2016, at p. 2; *Paris Agreement*, art. 2(1)(a). Canada ratified the *Paris Agreement* in 2016, and the agreement entered into force that same year. Canada committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030.

[14] Under the *Paris Agreement*, states are free to choose their preferred approaches for meeting their nationally determined contributions. In Canada, the provinces and the federal government agreed to work together in order to meet the country's international commitments. In March 2016, before Canada had ratified the *Paris Agreement*, all the First Ministers met in Vancouver and adopted the *Vancouver*

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Declaration on clean growth and climate change ("*Vancouver Declaration*"): Canadian Intergovernmental Conference Secretariat, March 3, 2016 (online). In that declaration, the First Ministers recognized the call in the *Paris Agreement* for significant reductions in GHG emissions and committed to "[i]mplement[ing] GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives": *ibid*, at p. 3. In the *Vancouver Declaration*, the First Ministers also recognized the importance of a collaborative approach between provincial and territorial governments and the federal government to reducing GHG emissions and noted that "the federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets": *ibid*.

[15] The *Vancouver Declaration* resulted in the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms ("Working Group") to study the role of carbon pricing mechanisms in meeting Canada's emissions reduction targets. The Working Group included at least one representative from each provincial and territorial government as well as the federal government. Its final report identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and outlined three carbon pricing options: (1) a single form broad-based carbon pricing mechanism that would apply across Canada, an option that would not be supportive of existing or planned provincial or territorial pricing policies; (2) broad-based carbon pricing mechanisms across Canada, an option that would give each

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province and territory flexibility as to the choice of instruments; and (3) a range of broad-based carbon pricing mechanisms in some jurisdictions, while the remaining jurisdictions would implement other mechanisms or policies designed to meet GHG emissions reduction targets within their borders: Working Group on Carbon Pricing Mechanisms, *Final Report*, 2016 (online), at pp. 1, 44-47 and 50.

[16] Carbon pricing, or GHG pricing, is a regulatory mechanism that, in simple terms, puts a price on GHG emissions in order to induce behavioural changes that will lead to widespread reductions in emissions. By putting a price on GHG emissions, governments can incentivize individuals and businesses to change their behaviour so as to make more environmentally sustainable purchasing and consumption choices, to redirect their financial investments, and to reduce their GHG emissions by substituting carbon-intensive goods for low-GHG alternatives. Generally speaking, there are two different approaches to GHG pricing: (1) a carbon tax that entails setting a price on GHG emissions directly, but not setting a cap on emissions; and (2) a cap-and-trade system that prices emissions indirectly by placing a cap on GHG emissions, allocating emission permits to businesses and allowing businesses to buy and sell emission permits from and to other businesses. A carbon tax sets an effective price per unit of GHG emissions. In a cap-and-trade system, the market sets an effective price per unit of GHG emissions, but a cap is placed on permitted emissions. Both approaches put a price on GHG emissions. I also find it worthwhile to note that while "carbon tax" is the term used among policy experts to describe GHG pricing approaches that directly price

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GHG emissions, it has no connection to the concept of taxation as understood in the constitutional context.

[17] Building on the Working Group's final report, the federal government released the *Pan-Canadian Approach to Pricing Carbon Pollution* ("*Pan-Canadian Approach*") in October 2016: Environment and Climate Change Canada, October 3, 2016 (online). In it, the federal government introduced a pan-Canadian benchmark for carbon pricing and stated the benchmark's underlying principles, two of which were that carbon pricing should be a central component of the pan-Canadian framework and that the overall approach should be flexible and recognize carbon pricing policies already being implemented or developed by provinces and territories. The *Pan-Canadian Approach* also set out the criteria for the pan-Canadian benchmark that would be used for determining acceptable minimum carbon pricing systems. Provinces and territories would have the flexibility to implement, by 2018, one of two carbon pricing systems with a common broad scope and legislated increases in stringency. A federal backstop carbon pricing system would be implemented in jurisdictions that either requested it or failed to implement a system that met the benchmark.

[18] In December 2016, based on the *Pan-Canadian Approach*, the federal government released the *Pan-Canadian Framework on Clean Growth and Climate Change* ("*Pan-Canadian Framework*"): Environment and Climate Change Canada, December 9, 2019 (online). In it, the federal government reaffirmed the principles expounded in the *Vancouver Declaration* and the *Pan-Canadian Approach*, and

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outlined in greater detail the criteria of the pan-Canadian benchmark for carbon pricing. As in the *Pan-Canadian Approach*, the *Pan-Canadian Framework* required every province and territory to have one of two carbon pricing systems in place by 2018: a carbon tax or carbon levy system similar to the ones that had already been implemented in British Columbia and Alberta, or a cap-and-trade system similar to the ones that had been implemented in Ontario and Quebec. All carbon pricing systems had to have a common broad scope and to increase in stringency over time. All revenues from the carbon pricing system would remain in the jurisdiction of origin. A federal backstop pricing system would apply only in jurisdictions that requested it, that had no carbon pricing system or that had an insufficiently stringent carbon pricing system. All revenues from the federal system would be returned to the jurisdiction of origin.

[19] On the day the federal government released the *Pan-Canadian Framework*, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories. Manitoba adopted the framework in February 2018, but Saskatchewan has not done so yet. Later in 2018, Ontario, Alberta and Manitoba withdrew their support from the *Pan-Canadian Framework*.

[20] In May 2017, after the release of the *Pan-Canadian Framework*, the federal government published the *Technical Paper on the Federal Carbon Pricing Backstop*: Environment and Climate Change Canada, May 18, 2017 (online). This paper provided further details, outlined the components of the proposed federal carbon pricing system and sought feedback from stakeholders. The federal government then

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published documents entitled *Guidance on pan-Canadian carbon pollution pricing benchmark*, in August 2017, and *Supplemental benchmark guidance*, in December 2017, which further detailed the scope of the GHG emissions to which the carbon pricing system would apply as well as the minimum legislated increases in stringency: Environment and Climate Change Canada, *Guidance on the pan-Canadian Carbon pollution pricing benchmark*, August 2017 (online); Environment and Climate Change Canada, *Supplemental benchmark guidance*, December 20, 2017 (online).

[21] On the day the *Supplemental benchmark guidance* document was released, the federal Minister of Finance and Minister of Environment and Climate Change wrote to their provincial and territorial counterparts to reaffirm Canada's commitment to carbon pricing under the *Pan-Canadian Framework*. The letter requested the provincial and territorial ministers to explain how they would be implementing carbon pricing and also outlined the next steps in the federal government's process to price carbon.

[22] In the context of this process, the *GGPPA* was introduced in Parliament as Part 5 of Bill C-74, *An Act to implement certain provisions of the budget*, 1st Sess., 42nd Parl., on March 27, 2018, and it received royal assent on June 21, 2018. In the lead-up to the introduction of the *GGPPA*, the federal government had published further guidance on the components of the proposed federal carbon pricing system.

C. *Provincial Action on Climate Change*

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[23] At the time the *Pan-Canadian Framework* was released, most of the provinces and territories had already taken significant actions to address climate change, including rehabilitating forests, developing low carbon fuels, capping emissions for oil sands projects and the electricity sector, regulating methane emissions, closing fossil-fuelled and coal-fired electricity generating stations, and investing in renewable energy and transportation. British Columbia, Alberta, Ontario and Quebec were the only provinces with carbon pricing systems. All the other provinces and territories, except Saskatchewan and Manitoba, had indicated that they planned to implement either a carbon tax or levy system or a cap-and-trade system.

[24] Despite the actions that had been taken, Canada's overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan. Canada's remaining emissions reduction between 2005 and 2016 came from two of Canada's remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well

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above Canada's 3.8 percent overall GHG emissions reduction — in New Brunswick, Nova Scotia, Prince Edward Island and Yukon.

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IV. The *GGPPA*

[25] The *GGPPA* came into force on June 21, 2018.

A. *Basic Architecture of the GGPPA*

[26] The *GGPPA* comprises four parts and four schedules. Part 1 of the *GGPPA* establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. And Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the *GGPPA* and have it tabled in Parliament. Only the first two parts and the four schedules are at issue in these appeals. The parties do not challenge the constitutionality of Parts 3 and 4 of the *GGPPA*.

[27] Because the *GGPPA* operates as a backstop, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* does not automatically apply in all provinces and territories. A province or territory will only be subject to Part 1 or 2 of the *GGPPA*

if the Governor in Council determines that its GHG pricing mechanism is insufficiently stringent. However, the *GGPPA* itself always applies in the sense that provincial and territorial GHG pricing mechanisms are always subject to assessment to ensure they are sufficiently stringent. At the time of the hearing of these appeals, Ontario, New Brunswick, Manitoba, Saskatchewan, Yukon and Nunavut were subject to both Parts 1 and 2 of the *GGPPA*. Alberta was subject only to Part 1, and Prince Edward Island only to Part 2. After the hearing, the *GGPPA* was amended such that Part 1 no longer applies to New Brunswick: *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act and the Fuel Charge Regulations*, SOR/2020-261. The federal government has also announced that Ontario will be subject only to Part 1, but the *GGPPA* has not yet been amended to reflect this announcement.

B. *The Preamble*

[28] The *GGPPA* has a 16-paragraph preamble that sets out the background to and purpose of the legislation. This preamble can helpfully be divided into five parts in which the following points are articulated: (1) GHG emissions contribute to global climate change, and that change is already affecting Canadians and poses a serious risk to the environment, to human health and safety and to economic prosperity both in Canada and internationally (at paras. 1-5); (2) Canada has committed internationally to reducing its GHG emissions by ratifying the *UNFCCC* and the *Paris Agreement* (at paras. 6-8); (3) it is recognized in the *Pan-Canadian Framework* that climate change

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requires immediate action by the federal, provincial and territorial governments, and GHG pricing is a core element of that framework (at paras. 9-10); (4) behavioural change that leads to increased energy efficiency is necessary to take effective action against climate change (at para. 11); and (5) the purpose of the *GGPPA* is to implement stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change (paras. 12-16).

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[29] In the fifth part of the preamble, it is recognized that some provinces are developing or have implemented GHG pricing systems: para. 14. However, it is also acknowledged that the absence of such systems in some provinces and a lack of stringency in some provincial pricing systems could contribute to significant harm to the environment, to human health and safety and to economic prosperity: para. 15. The preamble concludes with a statement that it is accordingly necessary to create a federal GHG pricing system in order to ensure that GHG pricing applies broadly in Canada: para. 16.

C. *Part 1: Fuel Charge*

[30] Part 1 of the *GGPPA* establishes a charge on prescribed types of fuel that applies to fuel produced, delivered or used in a listed province, fuel brought into a listed province from another place in Canada and fuel imported into Canada at a location in a listed province: ss. 17(1), 18(1), 19(1) and (2) and 21(1). Part 1 of Sch. 1 contains the list of provinces to which Part 1 of the *GGPPA* applies. The fuel charge applies to 22 types of carbon-based fuel that release GHG emissions when burned, including

gasoline, diesel fuel and natural gas, as well as to combustible waste. Schedule 2 lists the types of fuel to which the fuel charge applies and indicates the applicable rates of charge for each one. Although the fuel charge is paid by fuel producers, distributors and importers, and not directly by consumers, it is anticipated that retailers will pass the fuel charge on to consumers in the form of higher energy prices. The fuel charge is not payable on qualifying fuel delivered to farmers and fishers (s. 17(2)) or on fuel used at prescribed facilities, including industrial facilities to which the pricing mechanism in Part 2 of the *GGPPA* applies (ss. 3 and 18(4)). The fuel charge is administered by the Minister of National Revenue acting through the Canada Revenue Agency.

[31] Section 165 of the *GGPPA* concerns the distribution of the proceeds of the fuel charge. Section 165(2) provides that the Minister of National Revenue must distribute the amount collected in respect of the fuel charge in any listed province less amounts that are rebated, refunded or remitted in respect of those charges, but that the Minister of National Revenue has discretion whether to distribute the net amount to the province itself, other prescribed persons or classes of persons or a combination of the two. The federal government's present policy is to give 90 percent of the proceeds of the fuel charge directly to residents of the province of origin in the form of "Climate Action Incentive" payments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as provided for in s. 13 of the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27. The Climate Action Incentive is a deemed rebate under the *GGPPA* that reduces the amount that must be distributed under s. 165: *Income Tax Act*, s. 122.8(6). The remaining 10 percent of the proceeds is paid out to schools, hospitals, colleges and

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universities, municipalities, not-for-profit organizations, Indigenous communities and small and medium-sized businesses in the province of origin. Simply put, the net amount collected from a listed province is returned to persons and entities in that province.

[32] Part 1 of the *GGPPA* also provides the Governor in Council with considerable power to make regulations. For example, s. 166 authorizes the Governor in Council to make regulations to list or delist provinces in relation to the application of the fuel charge under Part 1 of the *GGPPA*. Any such regulations must be made "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (s. 166(2)), and the Governor in Council must, in making them, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (s. 166(3)).

[33] In addition, the Governor in Council is authorized to make regulations prescribing anything that is to be prescribed or determined by regulation under Part 1: s. 166(1)(a). Specifically, the Governor in Council can make regulations in relation to the fuel charge system (s. 168(2)) by, for example, modifying the listed types of fuel and the applicable rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), or defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). In the event of a conflict between a regulation and Part 1 of the *GGPPA*, s. 168(4) provides that the regulation prevails to the extent of the conflict.

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D. *Part 2: Industrial Greenhouse Gas Emissions*

[34] Part 2 of the *GGPPA* establishes an output-based pricing system ("OBPS") for industrial GHG emissions by large emissions-intensive industrial facilities. The OBPS applies only to a "covered facility" in a province listed in Part 2 of Sch. 1: ss. 169 and 174. Covered facilities include facilities that meet the criteria set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 ("*OBPS Regulations*"): *GGPPA*, s. 169. Under the *OBPS Regulations*, a covered facility is one that meets a specified emissions threshold and is engaged in specific industrial activities: s. 8. The Minister of the Environment may also, upon request, designate an industrial facility located in a backstop jurisdiction (i.e., one listed in Part 2 of Sch. 1) as a covered facility even if it does not meet the criteria in the regulations: *GGPPA*, s. 172. A covered facility is exempt from the fuel charge (ss. 18(3) and 18(4)), but it must pay for any GHG emissions that exceed its applicable emissions limits on the basis of sector-specific output-based standards. This can be done in one of three ways: (1) by remitting surplus compliance units earned by the facility at a time when its GHG emissions were below its annual limit, or surplus credits purchased from other facilities; (2) paying an excess emissions charge; or (3) a combination of the two (ss. 174(1) and (2) and 175). The *OBPS Regulations* require that a covered facility's emissions limit be generally calculated on the basis of the facility's production from each industrial activity and an output-based emissions standard in respect of that activity expressed in units of emissions per unit of product: s. 36; Sch. 1. If the efficiency of a facility's industrial processes meets the applicable efficiency standards, the facility will not exceed its

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emissions limit. It is only where an industrial process is not sufficiently efficient in terms of its production per unit of emissions that a person responsible for a covered facility must provide compensation for the facility's excess emissions. A facility whose efficiency exceeds the standards earns surplus credits: *GGPPA*, s. 175. Schedule 3 lists 33 GHGs and sets out the global warming potential of each one as defined in accordance with the OBPS, while Sch. 4 sets out the charges for excess emissions. The OBPS is administered by the Minister of the Environment.

[35] Section 188 of the *GGPPA*, which concerns the distribution of revenues from excess emission charge payments, works similarly to s. 165 of Part 1. Section 188(1) provides that the Minister of National Revenue must distribute all revenues from excess emissions charge payments, but that the Minister has discretion whether to distribute them to the province itself, to persons specified in the regulations or that meet criteria set out in the regulations, or to a combination of both. The federal government has indicated that these revenues will be used to support carbon pollution reduction in the jurisdictions in which they were collected, but has not yet provided further details.

[36] Part 2 of the *GGPPA* — like Part 1 — also provides the Governor in Council with considerable power to make regulations and orders. For example, s. 189 authorizes the Governor in Council to make orders to list or delist provinces in relation to the application of the OBPS in Part 2 of the *GGPPA*. As with s. 166, any such order must be made "[f]or the purpose of ensuring that the pricing of greenhouse gas

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emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (s. 189(1)), and the Governor in Council must, in making it, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (s. 189(2)).

[37] As well, the Governor in Council is authorized to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas; in doing so, the Governor in Council may take into account any factor it considers appropriate: ss. 190(1) and (2). The Governor in Council also has the authority to amend Sch. 4 by amending an excess emissions charge or by adding calendar years: s. 191. Finally, the Governor in Council is authorized to make regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units: s. 192.

[38] It is important to understand that Parts 1 and 2 of the *GGPPA* together create a single GHG pricing scheme. Part 1 of the *GGPPA* directly prices GHG emissions. The OBPS created by the *OBPS Regulations* made under Part 2 of the *GGPPA* constitutes a complex exemption to Part 1. The OBPS exempts covered facilities from the blunt fuel charge under Part 1, creating a more tailored GHG pricing scheme that lowers the effective GHG price such facilities would otherwise have to pay under Part 1. Part 2 thus also directly prices GHG emissions, but only to the extent that

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covered facilities exceed applicable efficiency standards. Parts 1 and 2 of the *GGPPA* therefore function together to price GHG emissions throughout the Canadian economy.

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V. Judicial History

A. *Court of Appeal for Saskatchewan, 2019 SKCA 40, 440 D.L.R. (4th) 398*

[39] The majority of the Court of Appeal for Saskatchewan (Richards C.J.S., Jackson and Schwann JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority identified the pith and substance of the *GGPPA* as "the establishment of minimum national standards of price stringency for GHG emissions": para. 125. Applying the framework from *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, they found that the establishment of minimum national standards of price stringency for GHG emissions is a matter of national concern. This matter is of genuine national importance and has the requisite singleness, distinctiveness and indivisibility. GHGs are readily identifiable and distinguishable from other gases, and minimum pricing standards are distinguishable from other forms of regulation. Each province is vulnerable to another province's failure to adequately price GHG emissions. Interprovincial cooperation could not be a basis for a sustainable approach to minimum GHG pricing, because provinces are free to withdraw from cooperative arrangements. As well, recognizing federal authority over minimum national standards of price stringency for GHG emissions would have an acceptable impact on provincial jurisdiction, because it would limit Parliament's

role to pricing and would not threaten the constitutional validity of provincial initiatives to regulate GHGs.

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[40] Ottenbreit and Caldwell JJ.A. dissented. They concluded that Part 1 of the *GGPPA* is the result of an unconstitutional exercise of Parliament's taxation power and that the *GGPPA* as a whole is *ultra vires* Parliament. GHG emissions do not represent a constitutionally distinct matter, and the concepts of "stringency" and "national standards" should not be used to tease an abstraction out of recognizable matters within provincial jurisdiction. The asserted need for a national standard of stringency is based not on a genuine provincial inability to set such a standard, but simply on a policy dispute. Finally, the dissent concluded that the matter's scale of impact on provincial jurisdiction is not reconcilable with the balance of federalism. The *GGPPA* would deprive provinces of the ability to regulate GHGs within their borders. Furthermore, it would be possible for the power delegated to the executive branch by the *GGPPA* to be exercised so as to widen the scope of the statute, thus further eroding provincial authority.

B. *Court of Appeal for Ontario, 2019 ONCA 544, 146 O.R. (3d) 65*

[41] The majority of the Court of Appeal for Ontario (Strathy C.J.O., MacPherson and Sharpe JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority characterized the pith and substance of the *GGPPA* as "establishing minimum national standards to reduce greenhouse gas emissions": para. 77. Applying the framework from *Crown Zellerbach,*

they reasoned that this matter is new as it was not recognized at Confederation. It is a matter of national concern, as evidenced by the *GGPPA*'s relationship to Canada's international obligations and by the fact that the statute was the product of extensive efforts to achieve a national response to climate change. The matter meets the singleness, distinctiveness and indivisibility requirement. GHGs are a chemically distinct form of pollution with international and interprovincial impacts. The provinces cannot establish minimum national standards to reduce GHG emissions. No province can control the deleterious effects of GHGs emitted in other provinces or require other provinces to take steps to do so. In assessing the matter's scale of impact on provincial jurisdiction, the majority found that the *GGPPA* strikes an appropriate balance between Parliament and the provincial legislatures. Finally, the majority rejected the Attorney General of Ontario's argument that the levies imposed by the *GGPPA* are unconstitutional regulatory charges. The majority found the levies to be valid because they have a sufficient connection to the regulatory scheme based on their purpose of behaviour modification.

[42] Hoy A.C.J.O. concurred with Strathy C.J.O.'s national concern analysis, although she characterized the pith and substance of the *GGPPA* more narrowly as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions": paras. 165-66 (emphasis added). In her view, including the means — carbon pricing — in the description of the pith and substance is legally permissible and desirable. In some cases, as here, Parliament's choice of means may

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be so central to the legislative objective that the main thrust of the law, properly understood, is to achieve a result in a particular way.

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[43] Huscroft J.A. dissented. He characterized the pith and substance of the *GGPPA* broadly as the regulation of GHG emissions. At the classification stage, he reasoned that the national concern doctrine requires the identification of a new subject matter that is independent of the means adopted in the relevant law. In this case, the proposed matter of national concern is federal authority over GHG emissions, which fails to meet the singleness, distinctiveness and indivisibility requirement from *Crown Zellerbach*. In addition, recognizing federal jurisdiction on the basis of provincial inability to establish a national standard would allow any matter to be transformed into a matter of national concern by just adding the word "national" to it. The fact that one province's inaction could undermine another province's carbon pricing efforts does not establish provincial inability either; this simply reflects a legitimate policy disagreement. Finally, Huscroft J.A. concluded that the matter's scale of impact on provincial jurisdiction is incompatible with the federal-provincial division of powers. For a matter to be one of national concern, it must have ascertainable and reasonable limits in order to contain its reach.

C. *Court of Appeal of Alberta, 2020 ABCA 74, 3 Alta. L.R. (7th) 1*

[44] The majority of the Court of Appeal of Alberta (Fraser C.J.A., Watson and Hughes JJ.A.) held that the *GGPPA* is unconstitutional. They reasoned that the national concern doctrine can apply only to matters that would originally have fallen within the

provincial power respecting matters of a merely local or private nature under s. 92(16) of the Constitution. The doctrine has no application to matters that would originally have fallen under other enumerated provincial heads of power. The majority characterized the pith and substance of the *GGPPA* as "at a minimum, regulation of GHG emissions": paras. 211 and 256. This subject falls under various enumerated provincial powers, and in particular the power relating to the development and management of natural resources under s. 92A of the Constitution. Accordingly, the majority reasoned, the national concern doctrine has no application in this case. The majority went on to apply the framework from *Crown Zellerbach*. They found that the regulation of GHG emissions is not a single, distinctive and indivisible matter and that it would have an unacceptable impact on provincial jurisdiction. The *GGPPA* intrudes significantly into the provinces' exclusive jurisdiction over the development and management of natural resources, thereby depriving provinces of their right to balance environmental concerns with economic sustainability.

[45] Wakeling J.A., writing separately, questioned the need for the national concern doctrine and proposed a significant reformulation of the *Crown Zellerbach* framework. He concluded that the *GGPPA* is *ultra vires* Parliament. Canada was in fact seeking judicial approbation of the "environment" or "climate change" as a new federal head of power. Recognition of such a broad federal power would fundamentally destabilize Canadian federalism. The provinces are already taking action to reduce GHG emissions, and the country is better served when governments at both levels work to reduce GHG emissions within their own areas of jurisdiction.

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[46] Feehan J.A., dissenting, found that the *GGPPA* is valid on the basis of the national concern doctrine. He identified the pith and substance of the law as follows: "To effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions" (para. 1056). He found that this is a new matter or a matter of national concern, and that it is single, distinctive and indivisible. The *GGPPA* has a small scale of impact on provincial jurisdiction, since it accommodates existing provincial systems and is designed merely to set minimum national standards in order to ensure equity as between provinces. The provincial inability test is also met, given that one province's failure to address GHG emissions would have an adverse effect on other provinces.

VI. Analysis

[47] Alberta, Ontario and Saskatchewan challenge the constitutionality of the *GGPPA* on federalism-related grounds. Ontario further argues that the levies imposed by the *GGPPA* are unconstitutional. Canada and British Columbia argue that the *GGPPA* is constitutional on the basis of the national concern doctrine. Below, I will begin by briefly discussing the foundational principle of federalism. I will then undertake the well-established two-stage analytical approach to the review of legislation on federalism grounds: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 ("*2018 Securities Reference*"), at para. 86. I will first consider the purpose and effects of the *GGPPA* with a view to characterizing the

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subject matter — the pith and substance — of the statute. Then I will classify the subject matter of the *GGPPA* with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid. Finally, independently of the jurisdiction issue, I will consider the constitutionality of the levies imposed by the *GGPPA*.

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A. *Principle of Federalism*

[48] Federalism is a foundational principle of the Canadian Constitution. It was a legal response to the underlying political and cultural realities that existed at Confederation, and its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 43; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22.

[49] Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), at para. 54. Under the division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity: *Canadian Western Bank*, at para. 22. Importantly, the

principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to "Property and Civil Rights" under s. 92(13). Federal power cannot be used in a manner that effectively eviscerates provincial power: *Secession Reference*, at para. 58; *2011 Securities Reference*, at para. 7. A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament's jurisdiction: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 82.

[50] As this Court observed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124, courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism — what is best described as a modern form of cooperative federalism — that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers

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out to sea, nor erode the constitutional balance inherent in the Canadian federal state": para. 62. It is in light of this conception of federalism that I approach this case.

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B. *Characterization of the GGPPA*

(1) Overarching Principles

[51] At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance", or true subject matter: *2018 Securities Reference*, at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 28 and 166. The court does so with a view to identifying the statute's or provision's main thrust, or dominant or most important characteristic: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 31. To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53; *Canadian Western Bank*, at para. 27. In considering the effects of the challenged legislation, the court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the "side" effects that flow from the application of the statute: *Kitkatla*, at para. 54; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 480. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as

at the words used in it: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18.

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[52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490.

[53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In the courts below, a central issue was the permissibility of including the means of the statute in the definition of the

subject matter of the *GGPPA*. In *Ward* and other cases, this Court cautioned against "confus[ing] the purpose of the legislation with the means used to carry out that purpose": *Ward*, at para. 25; see also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 24. However, those cases did not establish a blanket prohibition on considering the means in characterizing the pith and substance of a law. Rather, they stand for the basic proposition that Parliament's or a provincial legislature's choice of means is not determinative of the legislation's true subject matter, although it may sometimes be permissible to consider the choice of means in defining a statute's purpose. This Court has in fact frequently included references to legislative means when defining the pith and substance of laws: *Ward*, at para. 28; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("*Firearms*"), at paras. 4 and 19; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2002] 2 S.C.R. 669, at para. 34; *2011 Securities Reference*, at para. 106. And there may be cases in which an impugned statute's dominant characteristic or main thrust is so closely tied to its means that treating the means as irrelevant to the identification of the pith and substance would make it difficult to define the matter of a statute or a provision precisely. In such a case, a broad pith and substance that does not include the means would be the very type of vague and general characterization, like "health" or "the environment", that this Court described as unhelpful in *Desgagnés Transport*, at paras. 35 and 167 (citing *Assisted Human Reproduction Act*, at para. 190).

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[54] Even this Court's jurisprudence on the national concern doctrine illustrates that there is nothing impermissible about defining a matter with reference to the legislative means. In *Munro v. National Capital Commission*, [1966] S.C.R. 663, the Court defined the matter in terms of both the overarching objective — ensuring that "the nature and character of the seat of the Government of Canada may be in accordance with its national significance" — and the legislative means for achieving this objective — "development, conservation and improvement of the National Capital Region": pp. 669 and 671. Similarly, in *Crown Zellerbach*, the Court did not define the matter of the statute broadly in terms of marine pollution. The definition of the matter was in fact a combination of the overarching purpose — controlling marine pollution — and the particular means that had been chosen — controlling the dumping of substances into the sea: pp. 436-37. La Forest J., dissenting, pointed out that regulating the dumping of substances into the sea was only one of multiple means to control marine pollution, given that pollution could also enter the sea through fresh water and through the air: p. 457.

[55] I therefore agree with Hoy A.C.J.O.'s statement in the case at bar that in some cases the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance: para. 179.

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[56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create "a danger that the whole exercise will become blurred and overly oriented towards results". The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.

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(2) Application to the *GGPPA*

[57] In this case, the judges in the courts below, the parties and the interveners have proposed various formulations of the *GGPPA*'s pith and substance. These formulations can be grouped in three basic categories: (1) a broad formulation to the effect that the *GGPPA*'s pith and substance is the regulation of GHG emissions; (2) a national standards-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards to reduce GHG emissions; and (3) a national standards pricing-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards of GHG price stringency to reduce GHG emissions. I would adopt a national standards pricing-based formulation of the pith and substance of the *GGPPA*. In my view, the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Allow me to explain why.

(a) *Intrinsic Evidence*

[58] This Court has frequently used a statute's title as a tool for the purposes of characterization: *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1077; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1004; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 21. However, a statute's title is not determinative in the pith and substance analysis: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 451. In the case at bar, the statute is titled "*Greenhouse Gas Pollution Pricing Act*". Its long title is "*An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts*". Both of these titles confirm that the purpose of the *GGPPA* is more precise than the regulation of GHG emissions. As the long title makes clear, the true subject matter of the *GGPPA* is not just "*to mitigate climate change*", but to do so "*through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources*". The short title also makes it clear that the *GGPPA* is concerned not simply with regulating GHG emissions, but with pricing them, as the statute is titled the "*Greenhouse Gas Pollution Pricing Act*". Just as Lamer C.J. found in *Swain*, it is in the instant case clear even from the title of the *GGPPA* that its main thrust is national GHG pricing, not, more broadly, the reduction of GHG emissions.

[59] Likewise, the preamble of the *GGPPA* confirms that its subject matter is national GHG pricing. In general, preambles are useful in constitutional litigation in

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order to illustrate the "mischief" the legislation is designed to cure and the goals Parliament sought to achieve: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 14.25; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at pp. 15-14 to 15-15. Although a preamble is not conclusive or determinative, it can be a useful tool in interpreting the purpose of a statute or a provision.

[60] It is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. The preamble begins with a review of the contribution of GHG emissions to global climate change, of the impact of climate change on — and the risks it poses to — Canada and Canadians (at paras. 1-5), and of the international commitments made by Canada in the *UNFCCC* and the *Paris Agreement* to reduce GHG emissions (paras. 6-8). It then focuses on establishing a minimum national standards GHG pricing scheme. It identifies GHG pricing as "a core element" of the *Pan-Canadian Framework* (at para. 10), and recognizes that climate change requires immediate collective action to promote behavioural change which leads to increased energy efficiency (paras. 9 and 11). After that, pricing mechanisms are commented on at length (at paras. 12-16): in particular, it is noted that some provinces are developing or have implemented GHG pricing systems (at para. 14), but that the absence of such systems or a lack of stringency in some provincial GHG pricing systems could contribute to significant harm to the environment and to human health (para. 15). The preamble concludes with a statement that a national GHG pricing scheme is accordingly necessary in order to ensure that, taking provincial pricing

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systems into account, "greenhouse gas emissions pricing applies broadly in Canada": para. 16.

[61] Furthermore, the "mischief" the *GGPPA* is intended to address is clearly identified in the preamble: the profound nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions. In *Firearms*, the Court stated that the mischief approach — one in which a court considers the problem a statute is intended to address — is one way to determine the purpose of impugned legislation: para. 21. In the instant case, the preamble shows that the law is intended to address the "significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity" that could result from "the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems": para. 15. In Parliament's eyes, the relevant mischief is not GHG emissions generally, but rather the effects of the failure of some provinces to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards for GHG pricing that apply across Canada, setting a GHG pricing "floor" across the country.

(b) *Extrinsic Evidence*

[62] In considering extrinsic evidence, a court may consider the statute's legislative history — the events leading up to its enactment, for example, as well as

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government policy papers and legislative debates — in order to determine what the legislative purpose is: Hogg, at pp. 15-14 to 15-15; *Kitkatla*, at para. 53. In the case at bar, the extrinsic evidence confirms that the main thrust of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions.

[63] First, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing a national GHG pricing benchmark, and that GHG pricing is a distinct portion of the field of governmental responses to climate change. In the *Paris Agreement*, states made general international commitments to reduce GHG emissions. They are not required to adopt GHG pricing systems; rather, they are free to choose their preferred means. Immediately after the adoption of the *Paris Agreement*, however, the First Ministers endorsed the *Vancouver Declaration*, in which they recognized that governments in Canada and around the world were using carbon pricing mechanisms to combat climate change, and Canada and the provinces committed to adopting "a broad range of domestic measures, including carbon pricing mechanisms" in order to reduce GHG emissions: at p. 3 (emphasis added). Moreover, the signers of the *Vancouver Declaration* clearly recognized carbon pricing as a distinct aspect of the field of governmental responses to climate change by establishing a working group on carbon pricing mechanisms that was independent of other working groups on clean technology, innovation and jobs, on specific opportunities for mitigation of climate change, and on adaptation to climate change and climate resilience.

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[64] The Working Group on Carbon Pricing Mechanisms was established to explore the role of carbon pricing mechanisms in meeting Canada's GHG emissions reduction targets under the *Paris Agreement*. In its final report, the Working Group identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and advocated for broad-based carbon pricing mechanisms across Canada that would give each province and territory flexibility on instrument choice. The federal government then endorsed this recommendation in both the *Pan-Canadian Approach* and the *Pan-Canadian Framework*, and the *Pan-Canadian Approach* introduced a federal benchmark for carbon pricing. Each province and territory would have flexibility to implement either a direct or an indirect carbon pricing system that would have a common scope to ensure effectiveness and minimize interprovincial competitiveness impacts, while a federal backstop, a direct carbon pricing system, would apply only in jurisdictions that did not meet the federal benchmark. This approach would ensure that GHG pricing would be applied across the Canadian economy, and it would recognize GHG pricing policies already implemented or being developed by provinces or territories. The *Pan-Canadian Framework* reaffirmed the *Pan-Canadian Approach* and outlined the federal benchmark for carbon pricing in greater detail. In the *Pan-Canadian Framework*, the federal government reiterated the need for a regulatory framework for carbon pricing that priced GHG emissions across the Canadian economy, highlighted the federal commitment to "ensuring that the provinces and territories have the flexibility to design their own policies and programs to meet emission-reductions targets" and stated that the purpose of the federal benchmark was to preserve the flexibility of the provinces and territories to design their

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own GHG pricing policies: Foreword and pp. 7-8. Each province or territory would have flexibility to implement a direct or indirect GHG pricing system within its borders. A federal direct GHG pricing backstop would apply in jurisdictions that did not meet the benchmark.

[65] In my view, it is clear from the Working Group's final report, the *Pan-Canadian Approach* and the *Pan-Canadian Framework* that the federal government's intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. Courts should generally hesitate to attribute to Parliament an intention to occupy an entire field: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 20. In the instant case, this statement rings all the more true because the extrinsic evidence of the lead-up to the enactment of the *GGPPA* reveals a process of federal-provincial-territorial cooperation in which the federal government's goal was a system where the provincial and territorial governments would be free to design and implement their own GHG pricing programs.

[66] Second, it can also be seen from the legislative debates leading up to the *GGPPA* that the focus of the statute was not broadly on regulating GHG emissions or establishing minimum national standards to reduce GHG emissions, but was, rather, on

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establishing minimum national standards of GHG price stringency. During the parliamentary debate on the *GGPPA*, the then Minister of Environment and Climate Change, the Hon. Catherine McKenna, indicated that pricing carbon pollution was "[c]entral to any credible climate plan" and was "a major contribut[or] to helping Canada meet its climate targets under the Paris Agreement": *House of Commons Debates*, vol. 148, No. 289, 1st Sess., 42nd Parl., May 1, 2018, at p. 18958. The then Parliamentary Secretary to the Minister of the Environment and Climate Change, Jonathan Wilkinson, echoed these comments. He observed that, "[t]o ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon": *House of Commons Debates*, vol. 148, No. 294, 1st Sess., 42nd Parl., May 8, 2018, at p. 19213 (emphasis added). What is more, he identified carbon pricing as a distinct part of the field of governmental responses to climate change, stating that "the focus of the pricing of carbon pollution is to actually incent choices that drive people toward more efficient use of hydrocarbon resources so that we will reduce our GHG emissions over time. It is an important piece of a broader approach to addressing climate change and to achieving our Paris targets": p. 19214 (emphasis added).

[67] Similarly, before the House of Commons Standing Committee on Finance, Judy Meltzer, the then Director General, Carbon Pricing Bureau, Department of the Environment, observed that the *GGPPA* was "a step in the development of a federal carbon pricing backstop system" and that "[t]he key purpose of the [*GGPPA*] is to help reduce [GHG] emissions by ensuring that a carbon price applies broadly throughout

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Canada, with increasing stringency over time": House of Commons, Standing Committee on Finance, *Evidence*, No. 146, 1st Sess., 42nd Parl., April 25, 2018, at p. 6 (emphasis added). And finally, before the same Standing Committee, John Moffet, the then Associate Assistant Deputy Minister, Environmental Protection Branch, Department of the Environment, expressed the opinion that "the government's goal was to ensure that carbon pricing applied throughout Canada" as well as "to send a signal to other countries and businesses planning to invest in Canada that Canada was committed to carbon pricing": House of Commons, Standing Committee on Finance, *Evidence*, No. 148, 1st Sess., 42nd Parl., May 1, 2018, at p. 5 (emphasis added). He also mentioned another goal of the *GGPPA*, that is, to "make a contribution, but not be the sole contributor to attaining the [*Paris*] target": House of Commons, Standing Committee on Finance, *Evidence*, No. 152, 1st Sess., 42nd Parl., May 8, 2018, at p. 8.

[68] Although statements made in the course of parliamentary debates should be viewed with caution, given that the purpose of the statute is that of Parliament, not that of its individual members, such statements can nonetheless be helpful in discerning Parliament's purpose: *Genetic Non-Discrimination*, at paras. 40 and 194; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.), at p. 131; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47. In the case at bar, it is notable that both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

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[69] As an aside, I note that in finding that the *GGPPA* is *ultra vires* Parliament, the majority of the Court of Appeal of Alberta did not deny that Parliament was concerned with setting a minimum national GHG pricing standard in enacting the legislation. But they found that Parliament's focus on GHG pricing was merely a means to achieve its ultimate purpose of reducing GHG emissions and mitigating the effects of climate change: paras. 213-14. As I explained above, however, a court should characterize the pith and substance — including the purpose being pursued by Parliament or the provincial legislature — precisely. The fact that Parliament's purpose can be stated at multiple levels of generality does not mean that the most general purpose is the true one, or the one that most accurately reflects the thrust of the legislation. This Court has in fact often declined to attribute the broadest possible purpose to Parliament: see *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 130. When characterizing a matter, a court must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do. Here, that means not denying that Parliament ultimately intended to reduce GHG emissions but, rather, recognizing that its goal in enacting this particular statute was to establish minimum national standards of GHG price stringency to reduce GHG emissions.

(c) *Legal Effects*

[70] A law's legal effects are discerned from its provisions by asking "how the legislation as a whole affects the rights and liabilities of those subject to its terms":

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Morgentaler, at p. 482. In my view, the legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature.

[71] In jurisdictions where Parts 1 and 2 of the *GGPPA* are applied, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Certain fuel producers, distributors and importers are required to pay a charge for fuel and for combustible waste under Part 1. And as I explained earlier, the OBPS created by the *OBPS Regulations* made under Part 2 creates a complex exemption to Part 1: covered industrial facilities are exempt from the flat fuel charge under Part 1 of the *GGPPA*, but must pay a charge that applies to the extent that they fail to meet applicable GHG efficiency standards. Both Part 1 and Part 2 of the *GGPPA* thus directly price GHG emissions. Part 1 directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. Significantly, the *GGPPA* does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all the *GGPPA* does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. As the majority of the Court of Appeal for Saskatchewan observed, the *GGPPA* leaves "individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace": para. 160. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally. The *GGPPA* does not

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represent an attempt to occupy other areas of the field of GHG emissions reduction that were discussed in the *Pan-Canadian Framework*, such as tightening energy efficiency standards and codes, taking sector-specific action with respect to electricity, buildings, transportation, industry, forestry, agriculture, waste and the public sector, and promoting clean technology innovation: pp. 2-3 and 7-25.

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[72] Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed national GHG pricing scheme — apply only if the Governor in Council has listed a province or territory pursuant to s. 166 for Part 1 or s. 189 for Part 2. The *GGPPA* provides that the Governor in Council may make decisions with respect to listing only "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (ss. 166(2) and 189(1)) and must, in making them, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (ss. 166(3) and 189(2)). As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature of the statute gives legal effect to the federal government's commitment in the *Pan-Canadian Framework* to give the provinces and territories "the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances", as well as to "recognize carbon

pricing policies already implemented or in development by provinces and territories": pp. 7-8.

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[73] It is notable that the *GGPPA* does not itself define the word "stringency" used in ss. 166 and 189. But this does not mean that the Governor in Council's discretion with respect to listing is "open-ended and entirely subjective": Alta. C.A. reasons, at para. 221. Rather, the Governor in Council's discretion is limited both by the statutory purpose of the *GGPPA* and by specific guidelines set out in the statute for listing decisions: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 108; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24. Specifically, the discretion to list a province or territory must be exercised in a way that is consistent with the statutory purpose of reducing GHG emissions by putting a price on them. And any decision of the Governor in Council with respect to listing would have to be consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor: preamble, para. 16, and ss. 166 and 189. Moreover, because the *GGPPA* provides for a legal standard to be applied in assessing provincial and territorial pricing mechanisms, any decision of the Governor in Council in this regard would be open to judicial review to ensure that it is consistent with the purpose of the *GGPPA* and with the specific constraints set out in ss. 166(2) and (3) and 189(1) and (2). In other words, although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance

with the purpose for which it was given. The Governor in Council certainly does not, therefore, have "absolute and untrammelled 'discretion'": *Vavilov*, at para. 108, quoting *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140.

[74] Similarly, the Governor in Council's discretion under the *GGPPA* to make regulations modifying the schedules and, in some cases, provisions of the statute itself does not make the pith and substance of the *GGPPA* broader. Nor does it permit the Governor in Council to include "any substance, material or thing known to mankind" in the system under Part 1 or to boundlessly change the coverage of Part 2 of the *GGPPA* by adding gases or redefining what qualifies as a covered facility in a way that is unrelated to the underlying purpose of the statute: Alta. C.A. reasons, at paras. 227 and 237.

[75] Under Part 1 of the *GGPPA*, the Governor in Council has the discretion to make regulations prescribing anything that is to be prescribed or determined by regulation under that Part (s. 166(1)(a)), including regulations in relation to the fuel charge system (s. 168(2)), regulations modifying the listed types of fuel and the rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), and regulations defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). First, no aspect of this discretion permits the Governor in Council to regulate GHG emissions broadly in any way other than by implementing a GHG pricing scheme. Second, any exercise of the power to make regulations under Part 1 of the *GGPPA* is constrained by that Part's own words and statutory purpose. Part 1, as its

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very title indicates, establishes a "Fuel Charge". Any exercise of the regulation-making power that prescribed substances other than fuel or combustible waste would be open to judicial review and could be found to be *ultra vires* the *GGPPA*. Similarly, the Governor in Council could not list a fuel or substance that does not emit GHGs when burned; any regulation to that effect would be *ultra vires* the *GGPPA*, whose purpose is to reduce GHG emissions by putting a price on GHGs.

[76] The Governor in Council also has a discretion under Part 2 of the *GGPPA*, that is, the discretion to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas while taking into account any factor the Governor in Council considers appropriate (ss. 190(1) and (2)), amending an excess emissions payments charge in, or adding calendar years to, Sch. 4 (s. 191), or making regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units (s. 192). First, as with Part 1 of the *GGPPA*, no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country. Instead, the OBPS uses GHG intensity standards to set emissions limits and price emissions beyond those limits in order to create incentives for behavioural change across industries. Industrial entities can determine whether to increase their efficiency or to pay to exceed their applicable efficiency standard emission limits. Second, the power to make orders

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concerning which gases Part 2 applies to is also limited by the statutory purpose of reducing GHG emissions through GHG pricing. If the Governor in Council were to list a gas that does not contribute to GHG emissions or to indicate a figure for the global warming potential of a gas that was unsupported by scientific evidence, the regulation would be open to judicial review. As for the power to redefine what qualifies as a covered facility, it must be understood in light of the title of Part 2, which specifies that the focus is on "Industrial Greenhouse Gas Emissions". Any attempt to extend Part 2 to a facility other than an industrial facility would also be *ultra vires* the *GGPPA* and open to judicial review.

(d) *Practical Effects*

[77] A law's practical effects are "'side' effects flow[ing] from the application of the statute which are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54. Where, as here, a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, "any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation": *Morgentaler*, at p. 486.

[78] In my view, the evidence of practical effects in the case at bar is not particularly helpful for characterizing the *GGPPA*. Given the dearth of such evidence, it would be unwise to attempt to predict the economic consequences of the *GGPPA*. It is, moreover, not for the Court to assess how effective the *GGPPA* is at reducing GHG emissions: *Firearms*, at para. 18.

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[79] Nonetheless, it should be noted that the evidence of practical effects to date is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent. The federal backstop GHG pricing regime in Parts 1 and 2 of the *GGPPA* does not have a legal effect to the extent that there is a provincial system of comparable stringency in place, whatever its design. For example, the Governor in Council has declined to list Alberta under Part 2 of the *GGPPA*, because Alberta's self-designed Technology Innovation and Emissions Reduction ("TIER") system is considered to meet federal stringency requirements: Alberta, *TIER Regulation Fact Sheet*, July 2020 (online). The government of Alberta has itself described the TIER system as one "that is cost-efficient and tailored to Alberta's industries and priorities": *TIER Regulation Fact Sheet*. Similarly, Part 2 applies only partially in Saskatchewan, because that province has implemented its own output-based performance standards system for large industrial facilities. Part 2 applies only to electricity generation and natural gas transmission pipelines, which are exempt from Saskatchewan's self-designed system: Sask. C.A. reasons, at para. 50; see also Environment and Climate Change, *Saskatchewan and pollution pricing*, February 21, 2019 (online).

(e) *Conclusion on Pith and Substance*

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[80] For the foregoing reasons, I conclude that the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. With respect, I cannot accept the broader characterizations of the *GGPPA* advanced by the majorities of the Court of Appeal for Ontario and the Court of Appeal of Alberta. Not only is GHG pricing central to the *GGPPA*, but Parts 1 and 2 of the statute operate as a backstop by creating a national GHG pricing floor. In my view, a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions. Rather, it is the entire matter to which the *GGPPA* is directed, as is evident from the analysis of the purpose and effects of the statute. It is also the most precise characterization of the subject matter of the *GGPPA*, as it accurately reflects both what the statute does — imposing a minimum standard of GHG price stringency — and why the statute does what it does — reducing GHG emissions in order to mitigate climate change: see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 ("*COPA*"), at para. 17.

[81] I would pause here to note that my colleague Brown J. argues that the phrase "minimum national standards" is an artifice that adds nothing to the pith and substance of the *GGPPA*. I respectfully disagree. Here, "minimum national standards" gives expression to the national backstop nature of the *GGPPA*. In my view, this phrase adds something essential to the pith and substance that goes to the true subject matter of the *GGPPA*, because the statute operates as a national backstop that gives effect to Parliament's purpose of ensuring that GHG pricing applies broadly across Canada.

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"Minimum national standards" expresses the fact that the *GGPPA* functions through the imposition of an outcome-based minimum legal standard on all provinces and territories at all times. This contrasts with the proposed federal legislation the Court considered in *2011 Securities Reference*, which had not been enacted to impose a unified system of securities regulation for Canada that would apply in all the provinces and territories, but would instead have permitted provinces to opt in, in the hope that this would create an effective unified national securities regulation system: para. 31. By contrast, the *GGPPA* applies in all the provinces at all times. It is "national" in scope. At the same time, the backstop system set out in the *GGPPA* also gives the provinces flexibility by allowing them to implement their own GHG pricing mechanisms, provided they meet the federally determined standard of stringency. It imposes "minimum standards". In this way, the *GGPPA* does not create a blunt unified national system. The national GHG pricing system provided for in it is limited to the imposition of minimum national standards of stringency.

[82] Moreover, the legislation in this case is distinguishable from the equivalency provision of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), that was considered in *Hydro-Québec*. In that case, the equivalency provision was but one feature of the federal legislation at issue, which had a broader pith and substance of prohibiting acts causing the entry of certain toxic substances into the environment: para. 130. In the instant case, as I have mentioned, the *GGPPA* operates as a backstop. The intrinsic evidence, the extrinsic evidence, the legal effects and the practical effects all illustrate that operation as a backstop is the main thrust and

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dominant characteristic of the *GGPPA*. In my view, a mechanism that may be a mere feature of one law can be the defining feature of another law such that it goes to that other law's pith and substance. The evidence in this case clearly shows that Parliament acted with a remedial mindset in order to address the risks of provincial non-cooperation on GHG pricing by establishing a national GHG pricing floor.

[83] I also note here that my colleague Côté J. finds that ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional delegations of power to the Governor in Council (at para. 242). I respectfully disagree.

[84] First, it is necessary to review the concept of delegation. As this Court explained in *2018 Securities Reference*, the principle of parliamentary sovereignty "means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations": para. 73 (emphasis in original). Delegation is common in the administrative state: *ibid*. As this Court further explained, "a delegated power is rooted in and limited by the governing statute . . . . [T]he sovereign legislature always ultimately retains the complete authority to revoke any such delegated power": para. 74.

[85] This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. In *Hodge v. The Queen*, (1883) 9 App. Cas. 117, the starting point of the jurisprudence on delegated

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authority, the Privy Council found that the Ontario legislature's delegation of power to a board to regulate and license taverns was constitutional. The Privy Council held that delegating the power to make "important regulations" did not amount to an abdication of the legislature's role and that the choice and the extent of any such delegation were matters for the legislature, not the courts. Next, in *Re George Edwin Gray* (1918), 57 S.C.R. 150, this Court affirmed the constitutionality of a very broad grant of law-making power by Parliament to the Governor in Council that included a "Henry VIII clause", that is, a clause by which Parliament delegates to the executive the power to make regulations that amend an enabling statute: see also *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), in which a broad delegation to the provincial executive by way of a provincial skeletal statute was upheld. This Court affirmed and applied *Re Gray* in *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1. And in *R. v. Furtney*, [1991] 3 S.C.R. 89, Stevenson J., writing for a unanimous Court, commented in obiter that "[t]he power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in relation to Chemicals*. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn": p. 104 (citations omitted). This governing law has been consistently applied by courts of appeal: see, e.g., *R. v. P. (J.)* (2003), 67 O.R. (3d) 321, at paras. 20-23 (C.A.); *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2010 FCA 334, [2012] 2 F.C.R. 618, at para. 63; *House of Sga'nisim v. Canada (Attorney General)*, 2013 BCCA 49, 41 B.C.L.R. (5th) 23, at paras. 89-91.

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[86] None of the impugned provisions are unconstitutional delegations of power to the Governor in Council. Sections 166(2), 166(4) and 192 of the *GGPPA* are permissible delegations of law-making power to the Governor in Council to implement Parliament's policy choice to legislate a nationwide GHG pricing backstop. Section 166(2) and s. 166(4) allow the Governor in Council to determine where and to what the fuel charge established and detailed in Part 1 of the statute applies. Section 192 permits the Governor in Council to make regulations to implement the OBPS established in Part 2 of the *GGPPA*. Legislatures frequently include provisions with a similar regulation-making scope to that of s. 192 in complex environmental legislative schemes: see, e.g., *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 175.1 to 177 (provisions that have been used to develop a scheme equivalent to the OBPS in *Greenhouse Gas Emissions Performance Standards*, O. Reg. 241/19); *Carbon Tax Act*, S.B.C. 2008, c. 40, s. 84; *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29, ss. 46 to 53; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 37(1), 59, 86, 120, 122(1), 133, 146, 162, 166, 175, 187, 193 and 239; *Environment Quality Act*, CQLR, c. Q-2, s. 46.5 (a provision used to develop Quebec's cap-and-trade system in *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*, CQLR, c. Q-2, r. 46.1). Indeed, it is common for a statute to "set out the legislature's basic objects and provisions", while "most of the heavy lifting [is] done by regulations, adopted by the executive branch of government under orders-in-council": B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online).

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[87] To the extent that the *GGPPA* delegates to the executive the power to make regulations that amend the statute, such as in s. 168(4), this too, constitutes a permissible delegation to the Governor in Council. As I explained above, the constitutionality of Henry VIII clauses is settled law, and I would decline to revisit the issue in this case. Furthermore, the power to make regulations under a Henry VIII clause is not exempted from the general rules of administrative law. Any regulation that is made must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266 (B.C.S.C.), at p. 292, quoted in *Katz Group*, at para. 24), and it must be "within the scope [of] and subject to the conditions prescribed" by that statute (*Re Gray*, at p. 168). Therefore, the scope of the authority delegated in s. 168(4) is limited by and subject to the provisions of the *GGPPA*. The Governor in Council cannot use s. 168(4) of the *GGPPA* to alter the character of Part 1 of the statute, since any exercise of this authority to make regulations that are inconsistent with either the general purpose of reducing GHG emissions through the specific means of establishing minimum national standards of GHG price stringency would be *ultra vires* the *GGPPA* and open to judicial review. Moreover, the Governor in Council's power under s. 168(4) can be revoked by Parliament.

[88] In the case at bar, Parliament, far from abdicating its legislative role, has in the *GGPPA* instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency. Sections 166(2), 166(4), 168(4) and 192 of the *GGPPA* simply delegate to the executive a power to implement this

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policy. This delegation of power is within constitutionally acceptable limits and the general rules of administrative law apply to constrain the Governor in Council's discretion under all of these provisions.

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C. *Classification of the GGPPA*

(1) National Concern Doctrine

[89] Canada argues that the *GGPPA* is constitutional on the basis of the national concern doctrine. This doctrine is derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" ("POGG power"). According to the doctrine, the federal government has jurisdiction over matters that are found to be of inherent national concern. As Professor Hogg explains, it "is residuary in its relationship to the provincial heads of power": at p. 17-1 to 17-2. Therefore, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces under s. 92. The national concern test is the mechanism by which matters of inherent national concern, which transcend the provinces, can be identified.

[90] The effect of finding that a matter is one of national concern is permanent: see *Re: Anti-Inflation Act*, at pp. 460-61. For this reason, a finding that the federal

government has authority on the basis of the national concern doctrine raises special concerns about maintaining the constitutional division of powers. As La Forest J. put it in *Crown Zellerbach*, when the federal government asserts its authority on this basis, "[t]he challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution" (p. 448). By grappling with this challenge over time, the courts have developed a workable framework for identifying federal authority on the basis of the national concern doctrine in appropriate, exceptional cases *and* for adequately constraining federal power in accordance with the principle of federalism.

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[91] Below, I will trace the development of this framework, beginning with a discussion of the origins of the doctrine in Privy Council cases. I will then review how this Court has dealt with the doctrine, consistently taking a restrained approach to applying it while gradually developing its legal framework. Next, I will identify and clarify some areas of ongoing uncertainty with respect to the national concern doctrine and review the test for applying it. Lastly, I will apply the test to determine whether the *GGPPA* represents a valid exercise of a federal power based on the national concern doctrine.

(a) *Origins of the National Concern Doctrine*

[92] The first two cases in which the Privy Council dealt with the national concern doctrine, *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), and *Attorney-*

General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348 (P.C.) ("*Local Prohibition Reference*"), speak to the potential for expansion of federal power on the basis of the doctrine and to the importance of placing adequate constraints on that power.

[93] The issue in *Russell* was the constitutionality of the *Canada Temperance Act, 1878*, S.C. 1878, c. 16, a federal statute establishing a local-option prohibition scheme, that is, one that required local action in order to come into force in a given county or city. Sir Montague Smith noted that the scope and objects of the law were general — "to promote temperance by means of a uniform law throughout the Dominion" — and that intemperance was "assumed to exist throughout the Dominion": pp. 841-42. He concluded that the law fell within federal jurisdiction: "Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it" (p. 841). As commentators have noted, the reasoning in *Russell* appeared to open the door to a potentially unlimited scope of federal power: A. S. Abel, "What Peace, Order and Good Government?" (1968), 7 *West. Ont. L. Rev.* 1, at pp. 4-5; Hogg, at pp. 17-8 to 17-12.

[94] The next time the Privy Council considered the national concern doctrine, it recognized the potential breadth of the federal power as defined in *Russell* and sounded a strong note of caution. *Local Prohibition Reference* concerned the constitutionality of a provincial local-option prohibition scheme. The Privy Council accepted "that some matters, in their origin local and provincial, might attain such

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dimensions as to affect the body politic of the Dominion" and therefore to fall under federal jurisdiction on the basis of the national concern doctrine: p. 361. However, Lord Watson recognized the risk the national concern doctrine represented for the division of powers in no uncertain terms: a failure to properly confine its application "would practically destroy the autonomy of the provinces": p. 361. He stressed that federal authority based on the national concern doctrine must be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (p. 360) and urged courts to exercise "great caution . . . in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become [a] matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada" (p. 361). The Privy Council upheld the provincial legislation at issue in that case. Applying the double aspect doctrine, it held that provinces could regulate traffic in alcohol from a local point of view where there was no issue with respect to federal paramountcy: pp. 365-70; see also Hogg, at pp. 17-8 to 17-9.

[95] The cautious approach urged in *Local Prohibition Reference* was reflected in the rejection of federal jurisdiction over the regulation of insurance in *In Re "Insurance Act, 1910"* (1913), 48 S.C.R. 260 ("*Insurance Reference SCC*"), aff'd *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 ("*Insurance Reference PC*"). In a majority opinion that was subsequently affirmed by the Privy Council, Duff J. rejected the idea that the growth of the insurance business to "great proportions" across Canada should ground the application of the POGG power:

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p. 304. Duff J. was alive to the risk that an unconstrained approach to that power could result in a continual expansion of federal jurisdiction over the provincial private sector simply as a consequence of business growth.

[96] As Professor G. Le Dain wrote before being appointed to this Court, although it had been decided in the Insurance References that "mere growth and extent was not to be the criterion for the application of the general power", the criterion that should be applied was not yet clear: "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261, at p. 277. The need to be cautious in applying the national concern doctrine followed from *Local Prohibition Reference*, but the limits on the federal power were not fully defined. In a series of cases over the next few decades, the Privy Council, searching for a "concrete, specific and restrictive criterion" in order to limit federal power based on the POGG clause, sought to restrict its application of that clause to emergencies: Le Dain, at pp. 277-81; see also Hogg, at p. 17-9.

[97] These cases did not satisfactorily reconcile the emergency requirement with the reasoning in *Russell* and *Local Prohibition Reference*. The Privy Council ultimately confronted this problem in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 ("*Canada Temperance Federation*"). In that case, the issue was the constitutionality of a substantially similar successor to the temperance statute that had been considered in *Russell*. Viscount Simon rejected an argument that the POGG power could apply only in an emergency. In the critical passage of his reasons, he stated the test as follows:

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> . . . the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. [Citations omitted; pp. 205-6.]

Some of the examples Viscount Simon listed, such as war, would of course satisfy an emergency requirement. The precise distinction between emergency cases and national concern cases was ultimately clarified some decades later: see *Re: Anti-Inflation Act*, at pp. 459-461. But the holding of *Canada Temperance Federation* with respect to national concern is clear: an emergency is not required for a case to meet the national concern test; instead, the test is whether the real subject matter of the legislation goes beyond provincial concern and is, from its inherent nature, the concern of the country as a whole. On this basis, Viscount Simon firmly established national concern as a distinct branch of the POGG power that grounded federal jurisdiction over matters that were inherently of national concern.

(b) *Early Application of the National Concern Doctrine by the Court*

[98] This Court stepped into its role as the final court of appeal for Canada in 1949. Over the next two decades, there were only two matters that the Court, relying on the *Canada Temperance Federation* test and heeding the concern for provincial

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autonomy highlighted in *Local Prohibition Reference*, found to come within federal jurisdiction on the basis of national concern. The first was aeronautics (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292). The second was the development of the National Capital Region: *Munro*, at p. 671. In the same period, Canadian lower courts identified a third matter of national concern, the control of atomic energy: *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.); *Denison Mines Ltd. v. Attorney-General of Canada*, [1973] 1 O.R. 797 (H.C.).

[99] Ten years after *Munro*, the Court applied the national concern doctrine again, for the first time in the environmental context: *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477. The issue was whether Manitoba could legislate in relation to pollution that originated outside its provincial boundaries but caused damage within them. The majority in the result, in reasons written by Pigeon J., held that a province has no authority to legislate in relation to acts done outside the province, even if those acts cause damaging pollution to enter the province. Pigeon J. recognized that the federal government can legislate in relation to the pollution of interprovincial rivers, which he described as "a pollution problem that is not really local in scope but truly interprovincial": p. 514. The concurring and dissenting judges also endorsed the view that the federal government has jurisdiction over interprovincial rivers: pp. 499, 520 and 525-26. Although none of the judges explicitly referenced the POGG power, the application of that power explains the result: *Crown Zellerbach*, at pp. 445-46, per La Forest J. (dissenting, but not on this point); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1099; W. R. Lederman, "Unity and

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Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 614.

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[100] In applying *Canada Temperance Federation* in its decisions, this Court confirmed that an emergency is not needed in order for a matter to be of national concern, and offered some incremental guidance on the criteria for identifying a matter that is inherently of national concern. Moreover, although the Court did find that the federal government had jurisdiction in a small number of cases in that period, it "exhibited the caution and restraint" displayed in the Privy Council's approach to the doctrine: Lederman, at p. 609.

(c) *Development of the National Concern Test*

[101] The specific parameters of the limits on the federal power began to take shape in *Re: Anti-Inflation Act*, which marked the Court's first serious effort to wrestle with the national concern doctrine. The issue was the constitutionality of the federal *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, the purpose of which was to comprehensively contain and reduce inflation. A majority of the Court upheld the law as a valid exercise of Parliament's POGG power on the basis of the existence of an emergency. Although Beetz J. dissented in the result, his views on the national concern doctrine were endorsed by a majority of the Court.

[102] As in the cases discussed above, Beetz J. stressed the threat the national concern doctrine poses to provincial autonomy. In an emergency case, federal

jurisdiction on the basis of the POGG power is temporary, but the national concern doctrine involves a finding of federal jurisdiction that is permanent: p. 461. Beetz J. emphasized that federal jurisdiction over a matter of national concern is exclusive. Thus, if the federal government were found to have jurisdiction over the proposed matter of "containment and reduction of inflation", then "the provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction": pp. 444-45. If broad subjects such as "inflation", "economic growth" or "protection of the environment" were found to be matters of national concern, the federal-provincial balance "would disappear not gradually but rapidly": p. 445.

[103] In Beetz J.'s view, the national concern doctrine does not allow for an erosion of provincial autonomy such as that. After reviewing the jurisprudence, he explained that the doctrine applies only to "clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern": p. 457. Elaborating on the framework for identifying a matter that is inherently of national concern, he found that federal authority based on the national concern doctrine had rightly been reserved for "cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form": p. 458. The Court also had to consider the scale upon which the new matter permitted Parliament to affect provincial matters so as to preserve the federal-

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provincial division of powers. The containment and reduction of inflation failed these tests. It lacked specificity and was instead an aggregate of several subjects, such as monetary policy, public spending and restraint of profits, prices and wages, many of which fell under provincial jurisdiction. Moreover, because its scope was so broad, finding that it was a federal matter "would render most provincial powers nugatory": p. 458. Although Beetz J.'s views on the national concern doctrine were not determinative in *Re: Anti-Inflation Act*, they were subsequently adopted by Le Dain J. in *Crown Zellerbach*, in which the Court gave further structure to the national concern doctrine.

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[104] There were several cases after *Re: Anti-Inflation Act* in which another consideration was applied to limit the application of the national concern doctrine: provincial inability. This test took centre stage in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, in which Estey J. endorsed the following statement by Professor Hogg:

> . . . the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.
>
> (p. 945, quoting *Constitutional Law of Canada* (1977), at p. 261)

In *Labatt Breweries*, the brewing and labelling of beer failed the provincial inability test. It was not "a matter of national concern transcending the local authorities' power to meet and solve it by legislation": p. 945. Indeed, the proposed matter did not even

concern the extraprovincial distribution of beer, but instead related to the brewing process itself: pp. 943-45. Likewise, in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, the Court explained that the treatment of drug dependency was not a matter of national concern, because, unlike the illegal trade in drugs, one province's failure to provide treatment facilities would not endanger other provinces' interests: p. 131. Bookending this group of cases is *R. v. Wetmore*, [1983] 2 S.C.R. 284, in which Dickson J., dissenting but not on this point, rejected regulation of the pharmaceutical industry as a matter of national concern. Dickson J. referred both to Beetz J.'s framework and to Professor Hogg's formulation of the provincial inability test, and concluded that the matter failed to meet both standards: p. 296.

[105] *Crown Zellerbach* afforded this Court an opportunity to give structure to the national concern doctrine. At issue was the validity of s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, which prohibited the dumping of any substance at sea without a permit. The definition of the word "sea" in that Act excluded fresh waters but included internal marine waters within provincial boundaries. In a split decision, the Court found that the law was valid on the basis of the national concern doctrine. Le Dain J., writing for the majority, restated that doctrine. After surveying the jurisprudence, he set out a framework that now serves as a touchstone for analyzing proposed matters of national concern, determining that the following four conclusions were "firmly established":

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power,

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> which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. [pp. 431-32]

Le Dain J. elaborated on the final point, the provincial inability test. He reasoned that provincial inability would be established where a "provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests": p. 434. He characterized provincial inability as "one of the indicia" of singleness or indivisibility: *ibid*.

[106] Applying this framework to the federal ocean dumping law at issue in that case, Le Dain J. held that the law was valid on the basis of the national concern doctrine. He found that marine pollution in general is clearly a matter of concern to Canada as a whole because of its predominantly extraprovincial and international character. Focusing specifically on "the control of pollution by the dumping of substances in

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marine waters, including provincial marine waters", Le Dain J. concluded that this matter is single and distinctive: p. 436. In a relevant international convention, marine pollution by dumping was treated as a distinct and separate form of water pollution. Marine pollution has its own characteristics and scientific considerations that distinguish it from fresh water pollution. It is indivisible, because there is a close relationship between pollution in provincial internal waters and pollution in the federal territorial sea, and because it is difficult to ascertain by visual observation the boundary between these waters. The distinction in the statute between fresh water and salt water ensured that the matter would have "ascertainable and reasonable limits" so that its impact on provincial jurisdiction would be acceptable: p. 438.

[107] In the more than 30 years since *Crown Zellerbach*, the Court has not found that the federal government has jurisdiction over any new matters of national concern. However, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, the Court accepted the earlier finding by lower courts that atomic energy is a matter of national concern: see *Pronto*; *Denison*. In accepting the applicability of the national concern doctrine in that case, this Court was unanimous on the point that federal jurisdiction over atomic energy is grounded in the potential for catastrophic interprovincial and international harm. At issue was whether labour relations comprised part of the matter of atomic energy. A majority of the Court held that labour relations falls within that matter of national concern, finding that labour relations is "integral" to the federal interests that make atomic energy a national concern: pp. 340, 352 and 379-80.

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[108] Finally, the most recent case in which the Court considered the national concern doctrine was *Hydro-Québec*. At issue was the constitutional validity of Part II of the *Canadian Environmental Protection Act*, which empowered federal ministers to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions. La Forest J., writing for the majority, upheld the law on the basis of the criminal law power and declined to apply the national concern doctrine. He cautioned against an "enthusiastic adoption" of that doctrine, but acknowledged that a "discrete area of environmental legislative power" can form a matter of national concern if it meets the *Crown Zellerbach* test: paras. 115-16.

[109] From the infancy of the national concern doctrine in *Local Prohibition Reference* to the Court's most recent consideration of the doctrine in *Hydro-Québec*, the jurisprudence reviewed above shows that the Court has been responsive to the legitimate concern that the doctrine poses a threat to provincial autonomy. The national concern test, properly understood, adequately addresses this risk. The test places a clear limit on the federal POGG power and ensures that the national concern doctrine can be applied only in exceptional cases, where doing so is necessary in order for the federal government to discharge its duty to address truly national problems and is consistent with the division of powers.

(2) Clarifying the National Concern Doctrine

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[110] The case law reviewed above firmly establishes the national concern doctrine in Canadian law and explains the fundamental principles underlying its application. This doctrine applies only to matters that transcend the provinces owing to their inherently national character. In *Crown Zellerbach*, this Court explained that a proposed matter of national concern must have a "singleness, distinctiveness and indivisibility". Furthermore, a finding that the matter is one of national concern must be reconcilable with the division of powers.

[111] As can be seen from the decisions of the courts below and from the parties' arguments, there is significant uncertainty regarding a number of issues that are central to the national concern doctrine. This is unsurprising, given that there are very few recent cases concerning the doctrine, which in turn flows from the fact that one of its defining features is its restrictive application. This case presents an opportunity to clarify these issues.

[112] In particular, each of the steps of the national concern test requires further discussion. Before turning to those steps, however, I must address two preliminary issues with respect to the "matter" in question in the analysis. First, there is some uncertainty about what the "matter" to which the national concern test applies actually is. Second, this case raises the question of the scope and nature of the federal power over a matter of national concern, and in particular whether the double aspect doctrine can apply in this context. In other words, what are the consequences for the division of powers of identifying a new matter of national concern? The answer to this question

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will have a significant impact on the analysis undertaken at the final step of the test, at which the court must determine whether finding that the proposed matter is one of national concern is reconcilable with the division of powers.

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[113] Throughout my analysis on these issues, I will be relying in part on this Court's trade and commerce jurisprudence, and in particular on *2011 Securities Reference* and *2018 Securities Reference*. As the Court has observed, the national concern doctrine and the trade and commerce power pose similar challenges to federalism. In both contexts, the Court has interpreted the federal power narrowly to ensure that it does not overwhelm provincial jurisdiction and undermine the federal-provincial division of powers: *Re: Anti-Inflation Act*, at p. 458; *Wetmore*, at p. 294. Although the Court has not addressed the national concern doctrine in any detail for many years, the more recent cases of *2011 Securities Reference* and *2018 Securities Reference*, in which it applied the general branch of the trade and commerce power, offer useful insight and are consistent with the modern approach to federalism. However, my citing these cases should not be taken as an invitation to conflate the two powers. They are distinct, and, as Beetz J. warned in *Re: Anti-Inflation Act*, courts should be "all the more careful" when applying the residual POGG power than when interpreting the enumerated trade and commerce power: p. 458.

(a) *"Matter" of National Concern*

[114] As I explained above, the division of powers analysis follows a familiar pathway. The first stage is to characterize the pith and substance, or matter, of the

impugned statute or provision. The second stage is to classify that matter by reference to the heads of power set out in the Constitution. Having identified the pith and substance of the *GGPPA*, I come now to the classification analysis in relation to the national concern doctrine. The Attorney General of Saskatchewan argues that the classification analysis in this context must depart from the usual framework. Rather than assessing whether the matter of the statute can be classified on the basis of the national concern doctrine, Saskatchewan submits that the classification analysis must be applied to a different "proposed head of power" based on the POGG power, one cast at a level of generality that is broader than the matter of the statute: A.F., at para. 58. This approach cannot be accepted. There is no principled basis for departing from the ordinary division of powers analysis to require that the matter of national concern analyzed by the court at the classification stage be broader than the matter of the statute as identified by the court at the characterization stage. Applying the classification analysis to the matter of the statute in the context of the national concern doctrine is consistent with the constitutional text, with the jurisprudence and with the principle of judicial restraint.

[115] First, as to the constitutional text, s. 91 does not provide in the context of the POGG power that Parliament can make laws in relation to *classes of subjects*. Instead, it states that Parliament can make laws for the peace, order, and good government of Canada "in relation to . . . Matters". Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. A matter that falls under the POGG

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power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92. This does not mean, however, that the word "matter" has a different meaning in the context of the POGG power. "Matter" is used in ss. 91 and 92 to refer to the pith and substance of legislation: *Firearms*, at para. 16. Nothing in the words of the Constitution supports the construction of a class of subjects under the POGG power that is broader than the matter of the statute. Instead, the text of the Constitution supports the approach of applying the national concern test to the matter of the statute as identified by the court at the characterization stage.

[116] Second, this approach is consistent with the jurisprudence. In the leading cases on the national concern doctrine, the Court focused on the matter of the statute in considering the classification issue. In *Re: Anti-Inflation Act*, the broad matter of containment and reduction of inflation that Beetz J. rejected was not based on a statute whose real focus was narrower, but was in fact what the Attorney General of Canada identified as the matter of the statute at issue: p. 450. In *Crown Zellerbach*, the majority did not find that marine pollution generally was a matter of national concern, but instead found that the specific matter of the *Ocean Dumping Control Act* — the control of marine pollution by the dumping of substances — was one: see p. 436. In those cases, the pith and substance of the legislation itself determined the breadth and content of the matter to which the national concern test was applied.

[117] Third, this approach is consistent with the principle of judicial restraint. In *Munro*, Cartwright J. emphasized on the subject of the national concern doctrine that

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the court should "confine itself to the precise question raised in the proceeding which is before it": p. 672. Similarly, in *Canadian Western Bank*, this Court stated that courts should not attempt to "define the possible scope of [broad] powers in advance and for all time", but should instead "procee[d] with caution on a case-by-case basis": para. 43. The Attorney General of Saskatchewan proposes that the court go beyond the precise question asked. In fact, however, a more cautious approach is appropriate in the context of the national concern doctrine, given its potential to disrupt the federal-provincial balance. Put simply, if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter.

[118] Finally, I respectfully reject the suggestion that this approach somehow conflates the characterization and classification stages: see Ont. C.A. reasons, at para. 224. It does not. As I explained above, the analyses at the two stages are distinct. At the first stage, a court must follow the accepted approach to the pith and substance analysis in order to characterize the matter of the statute. As both Karakatsanis J. and Kasirer J. recently stated in *Genetic Non-Discrimination*, the court must focus on "the law itself and what it is really about": paras. 31 and 165. Only then does it proceed to the classification analysis, which in the case at bar involves consideration of the national concern doctrine. If the matter is not legally viable as a matter of national concern, then, as was the case in *Re: Anti-Inflation Act*, the statute cannot be upheld on the basis of that doctrine. If, on the other hand, the matter meets the national concern test, then the statute will be valid. Respectfully, this does not "constitutionalize" the

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statute: see Ont. C.A. reasons, at para. 224. It simply determines the validity of the law and resolves the question before the court.

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[119] Therefore, the matter to consider in this national concern analysis is establishing minimum national standards of GHG price stringency to reduce GHG emissions. I agree with the majority of the Court of Appeal for Saskatchewan that stringency in this context is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge: para. 139.

(b) *Exclusive Federal Jurisdiction Based on the National Concern Doctrine*

[120] There is no doubt that a finding that a matter is of national concern confers exclusive jurisdiction over that matter on Parliament: *Re: Anti-Inflation Act*, at p. 444; *Crown Zellerbach*, at pp. 433 and 455; *Hydro-Québec*, at para. 115. However, the nature and consequences of this exclusive federal jurisdiction is contested by the parties in this case and requires clarification. Understanding the consequences of the recognition of a new matter of national concern is critical in order to properly undertake the scale of impact analysis at the third step of the national concern test.

[121] Uncertainty about the nature of exclusive federal jurisdiction based on the national concern doctrine may be rooted in the use of the word "plenary" to describe the power in certain cases. In *Crown Zellerbach*, Le Dain J. characterized Beetz J.'s

views in *Re: Anti-Inflation Act* as follows: ". . . where a matter falls within the national concern doctrine . . . Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (p. 433). However, Le Dain J. went on to reject the proposition that there must be "plenary jurisdiction . . . to deal with any legislative problem": p. 434. In *Ontario Hydro*, a majority of this Court concluded that federal jurisdiction based on the national concern doctrine is *not* plenary and does not give Parliament jurisdiction over "all aspects" of, in that case, atomic energy. Instead, the Court had to determine whether the regulation of labour relations falls within the national concern aspects of atomic energy: pp. 340 and 425; see also M. Olsynski, N. Bankes, and A. Leach, "Breaking Ranks (and Precedent): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74" (2020), 33 *J. Env. Law & Prac.* 159, at pp. 180-81; A. Leach, and E. M. Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020), 29 *Const. Forum* 1, at n. 71.

[122] In my view, describing the power as "plenary" is unhelpful. The word "plenary" speaks to the scope of the power: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 28 and 32. As can be seen from *Ontario Hydro*, in the context of the national concern doctrine, the scope of the federal power is defined by the nature of the national concern itself. Only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power. It was not a foregone conclusion that labour relations at a

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nuclear generating station would fall within the federal government's jurisdiction over atomic energy, as one might expect if the national concern doctrine grounded a "plenary" federal power. Rather, the question was whether the safety concerns that make atomic energy a matter of inherent national concern had a sufficient connection to labour relations to bring labour relations within the scope of the federal power.

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[123] The Attorney General of Ontario asserts, as a general proposition, that "[t]he consequences of recognizing a new matter of national concern are sweeping": A.F., at para. 64. It is true that the recognition of any new matter of national concern has consequences for federalism. However, the scope of such consequences is case-specific because, as I have just explained, the scope of the federal power in the context of the national concern doctrine depends on the nature of the national concern at issue in the case in question.

[124] Thus, there is some truth to Ontario's submission in the case of, for example, the national concern matter of aeronautics. But this flows from the particular nature of the matter of aeronautics and not from the general nature of the national concern doctrine. The siting of aerodromes falls within the federal power over aeronautics, not because aeronautics has some predetermined breadth flowing from its status as a matter of national concern, but because the nature of the matter is such that it must include "terrestrial installations that facilitate flight": *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 27. Moreover, in its early case law on aeronautics, this Court held that the siting of aerodromes is not merely

within the scope of the federal power, but is essential to that power, such that the doctrine of interjurisdictional immunity applies: *Johannesson*, at p. 295; *COPA*, at para. 37. The application of interjurisdictional immunity to any federal power has an obvious impact on provincial jurisdiction. But interjurisdictional immunity does not automatically apply to matters of national concern. It was applied in *COPA* because there was a precedent that compelled its application, not because the national concern doctrine required that it be applied. Today's restrained approach to interjurisdictional immunity suggests that it would not apply to a newly identified matter of national concern: *Canadian Western Bank*, at paras. 47 and 77. The example of aeronautics therefore tells us little about the consequences of identifying any other matter of national concern. Sensibly, the national concern test requires a case-specific inquiry into whether the recognition of a particular matter of national concern is reconcilable with the division of powers in the scale of impact analysis.

[125] A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power": *Desgagnés Transport*, at para. 84. If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply: *ibid.*, at para. 85.

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[126] In my view, the double aspect doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine, but whether or not it does apply will vary from case to case. This approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power, including the general branch of the trade and commerce power (e.g., *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 682; *2018 Securities Reference*, at para. 114. See also S. Choudhry, "Recasting social Canada: A reconsideration of federal jurisdiction over social policy" (2002), 52 *U.T.L.J.* 163, at p. 231, fn. 212; S. Elgie, "Kyoto, The Constitution, and Carbon Trading: Waking A Sleeping *BNA* Bear (Or Two)" (2007), 13 *Rev. Const. Stud.* 67, at p. 88), and can also apply in respect of POGG matters (e.g., *Munro*; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). Applying the double aspect doctrine to the national concern doctrine is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction: *Desgagnés Transport*, at para. 4; see also N. J. Chalifour, P. Oliver and T. Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Pricing Act* Appeals" (2020), 40 *N.J.C.L.* 153, at pp. 204-6; Leach and Adams, at p. 6.

[127] The National Capital Region provides a helpful example of the application of the double aspect doctrine in the national concern context. The finding in *Munro* that the development, conservation and improvement of the National Capital Region is a matter of national concern has not displaced municipal planning and development,

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which is based on a provincially delegated authority. Instead, the National Capital Commission and the cities of Ottawa and Gatineau each regulate land use planning, the Commission from the federal perspective of the national nature and character of the national capital and the municipalities from a local perspective: J. Poirier, "Choix, statut et mission d'une capitale fédérale: Bruxelles au regard du droit comparé", in E. Witte et al., eds., *Bruxelles et son statut* (1999), 61, at pp. 73-74; N. J. Chalifour, "Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019), 50 *Ottawa L. Rev.* 197, at p. 234; Leach and Adams, at p. 7.

[128] However, as I noted above, the fact that the double aspect doctrine *can* apply does not mean that it *will* apply in a given case. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy in this Court's jurisprudence. Beetz J. cautioned that it can be applied only "in clear cases where the multiplicity of aspects is real and not merely nominal": *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766. In some cases, the double aspect doctrine has not been applied where federal jurisdiction fell under the national concern doctrine: e.g., *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 51.

[129] The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter

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of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation — in this case by imposing GHG pricing — but the federal law is paramount.

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[130] I recognize that it might be argued that Canada and the provinces are exercising their jurisdiction in relation to different matters rather than to different aspects of the same matter, that is, that Canada's authority is limited to minimum national standards of GHG pricing stringency and that this is obviously different than the matters in relation to which provinces might exercise jurisdiction over GHG pricing. This view finds support in some of the language used by this Court, such as the comment in *Canadian Western Bank* that the double aspect doctrine concerns "the various 'aspects' of the 'matter'": para. 30. However, I do not read *Canadian Western Bank* that narrowly, given this Court's recent guidance in *Desgagnés Transport*, in which it stated that the double aspect doctrine concerns "fact situations". Moreover, the fact that Canada can be understood to be empowered to deal only with a different matter than the provinces does not change the resulting jurisdictional reality that where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount. From the perspective of provincial autonomy, the corrosive effect is the same. Therefore, courts must recognize that this amounts to an invitation to identify a

previously unidentified double aspect, with clear consequences for provincial autonomy.

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[131] Beetz J.'s caution about the double aspect doctrine thus applies with particular force where Canada asserts jurisdiction over a matter that involves a minimum national standard. In such a case, even if the national concern test would otherwise be met, Beetz J.'s caution should act as an additional check. The court must be satisfied that Canada in fact has a "compelling interest" in enacting legal rules over the federal aspect of the activity at issue and that the "multiplicity of aspects is real and not merely nominal": *Desgagnés Transport*, at para. 85; *Bell Canada*, at p. 766. As I will explain in greater detail below, the court must be satisfied at the scale of impact step that the consequences of finding that the proposed matter is one of national concern are reconcilable with the division of powers.

(3) National Concern Test

[132] I will now turn to the specifics of the test for identifying matters that are inherently of national concern. As I will explain below, the applicable framework involves a three-step process: the threshold question; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. Before detailing these steps, there are two points worth noting about the framework as a whole.

[133] First, the recognition of a matter of national concern must be based on evidence: see K. Swinton, "Federalism under Fire: The Role of the Supreme Court of

Canada" (1992), 55 *Law & Contemp. Probs.* 121, at p. 134; J. Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005), 38 *U.B.C. L. Rev.* 353, at p. 370. I find the Court's trade and commerce power jurisprudence instructive in this regard. In the *2011 Securities Reference*, Canada argued that securities trading had once been primarily a local matter, but that it had since evolved to become a "matter of transcendent national concern" that brought it within the trade and commerce power: para. 114. For this argument to succeed, Canada had to "present the Court with a factual matrix" supporting its assertion of jurisdiction: para. 115. In other words, the onus was on Canada to show that the statute at issue "addresses concerns that transcend local, provincial interests" by producing "not mere conjecture, but evidentiary support": para. 116. Similarly, an onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction.

[134] Second, there is no requirement that a matter be historically new in order to be found to be one of national concern: *Crown Zellerbach*, at p. 432. Moreover, it is not helpful to link historical newness to a finding of federal jurisdiction. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. As LeBel and Deschamps JJ. wrote in *Assisted Human Reproduction Act* in the context of the federal criminal law power, reasoning that novelty alone justifies federal jurisdiction would upset the federal-provincial balance: paras. 255-56. I agree with scholars who have characterized newness as an unhelpful or neutral factor in the national concern analysis: Hogg, at p. 17-18; K. Lysyk,

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"Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), 57 *Can. Bar Rev.* 531, at pp. 571-72.

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[135] Given that historical newness is irrelevant to the analysis, it may be helpful to explain certain references to "newness" in the jurisprudence. In *Re: Anti-Inflation Act*, Beetz J. spoke of the application of the national concern doctrine only to "new matters" (p. 458), whereas in *Crown Zellerbach*, Le Dain J. spoke of its applying to both "new matters" *and* matters that had "become" matters of national concern (p. 432). Some commentators suggest that *Crown Zellerbach* therefore represents a departure from Beetz J.'s approach: J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411, at p. 429; E. Brouillet, *La Négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 295.

[136] In my view, all this confusion stems from what is meant by the word "new". In *Re: Anti-Inflation Act*, Beetz J. intended "new" to refer to matters that could satisfy the national concern test. This included both "new" matters that did not exist in 1867 and matters that are "new" in the sense that our understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character: see also Hogg, at pp. 17-17 to 17-18. The critical element of this analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new. The use of the word "become" in *Crown Zellerbach* served to articulate that the newness of the matter can also refer to our belated

understanding of a matter's true or inherent nature: see pp. 427-28 and 430-31. This is what Beetz J. meant when he explained that these matters are ones "which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern": *Re: Anti-Inflation Act*, at p. 457 (emphasis added). There is no inconsistency between *Re: Anti-Inflation Act* and *Crown Zellerbach* on this point. To be clear, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces. The purpose of the analysis is strictly to determine whether a matter is by nature one of national concern.

[137] It follows that the majority of the Court of Appeal of Alberta erred in adding, as a threshold restriction, that matters that originally fell under provincial heads of power other than s. 92(16) of the Constitution are incapable of acquiring national dimensions: para. 185. Instead, the possibility that an existing matter may be found to be one of national concern provides a principled basis for courts to be responsive to new evidence in their application of the constitutional text. This is as it should be: "Constitutional texts must be interpreted in a broad and purposive manner. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they 'must continually adapt to cover new realities'": *Comeau*, at para. 52 (citations omitted).

[138] Let us consider atomic energy, the matter of national concern that this Court identified in *Ontario Hydro*. This matter encompasses the mining of raw

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materials such as uranium — materials that existed and were mined prior to the discovery of atomic energy. Before World War II, the dominant characteristic of uranium mining would likely have been the management of natural resources within the province, which would have come within various enumerated provincial classes of subjects: ss. 92(5), 92(9), 92(10) and 92(13) (s. 92A, while also relevant, did not come into being until the Constitution was amended in 1982). But that did not prevent atomic energy, including the production of its raw materials, from being found to be a matter which is, by nature, of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial harm: see *Pronto*; *Denison*; *Ontario Hydro*. In other words, the discovery of atomic energy brought out the inherently national character of uranium mining. The fact that uranium mining would have fallen under provincial heads of power other than s. 92(16) prior to this discovery is irrelevant to the analysis and did not preclude the finding that atomic energy is a matter of national concern. The "historical newness" of atomic energy is equally irrelevant; the dispositive feature of the cases in question was instead that the discovery of atomic energy had led to evidence grounding a new understanding of the inherent nature of the matter as one of national concern.

[139] It also follows that I do not agree with my colleague Rowe J.'s articulation of the national concern test, which consists of two requirements as follows: first, the matter must not come within the enumerated powers; and second, the matter "must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum" (Rowe J.'s

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reasons, at para. 545). With great respect, I see a jurisprudential barrier to my colleague's approach, which I find myself unable to resolve. I am not persuaded that the matters of national concern this Court has recognized, such as the development of the National Capital Region (*Munro*; see also: *Re: Anti-Inflation Act*, at p. 457) or the control of marine pollution by dumping (*Crown Zellerbach*), would necessarily meet his test if it were applied in the manner he proposes. Nor, in my view, can *Munro* or *Crown Zellerbach* be read as an application of my colleague's methodology. In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern.

[140] Thus, *Munro* and *Crown Zellerbach* can be explained in light of a more conventional understanding of the national concern doctrine that was articulated in *Crown Zellerbach* itself and which I will explain in greater detail below. Marine pollution is predominantly extraprovincial and international in character, while the development of the national capital is of concern to Canada as a whole. The matters proposed in those cases were specific and identifiable and had ascertainable and reasonable limits. The requirement of provincial inability, understood in the sense of serious extraprovincial harm, was met: ". . . the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital", and ". . . the failure of one province to protect its waters would probably lead to the pollution of the waters of other provinces as well as the (federal) territorial sea and high sea" (Hogg, at p. 17-14).

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Lastly, the recognition of these matters was compatible with the division of powers. The result of this analysis leads to the conclusion that these matters, by their nature, transcend the provinces. They were thus shown to fall outside of s. 92 and were appropriate matters for recognition under the national concern doctrine. I therefore respectfully disagree with my colleague's articulation of the national concern test.

[141] To sum up, the purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces. "Historical newness" is irrelevant to this analysis, and there is no threshold question whether the matter can be characterized as being new. Instead, the analysis has three steps: the threshold question, which relates not to newness but to whether the matter is of sufficient concern to Canada as whole; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. The onus is on Canada to adduce evidence to satisfy the court that a matter of inherent national concern is made out. I will now discuss each of these three steps in detail.

(a) *Threshold Question*

[142] Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The analysis therefore begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine. This invites a common-sense inquiry into the national importance of the proposed matter.

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[143] This Court's analysis in key national concern decisions has begun with an assessment of whether the matter at issue is one "of concern to Canada as a whole": *Crown Zellerbach*, at p. 436. In *Munro*, Cartwright J. began with an observation that the matter was "the concern of Canada as a whole": p. 671. The reasons of the majorities of the Saskatchewan and Ontario courts of appeal in the instant case reflect this approach: Richards C.J.S. began his analysis on this subject with the "broad starting point" of "whether this matter is something of genuine national importance" (para. 146); Strathy C.J.O. first asked whether "the matter is both 'national' and a 'concern'" before proceeding to the analysis of singleness, distinctiveness and indivisibility (para. 106). Although this inquiry was not identified as a distinct step of the analysis in *Crown Zellerbach*, it serves an important purpose. The threshold question ensures that the national concern doctrine cannot be invoked too lightly and provides essential context for the analysis that follows. Requiring that this question be asked as the first step of the test is an appropriate, incremental development in the law to ensure that federal power under the national concern doctrine is properly constrained.

[144] At the threshold step, Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine. If Canada discharges this burden, the analysis proceeds. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is "important"; it operates to limit the application of the national concern doctrine.

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(b) *Singleness, Distinctiveness and Indivisibility*

[145] The second step of the analysis was explained by Le Dain J. as follows in *Crown Zellerbach*: the matter "must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (p. 432). Le Dain J. added that this inquiry includes the provincial inability test: "In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter" (p. 432).

[146] The phrase "singleness, distinctiveness and indivisibility" requires some explanation. On its own, this phrase does not amount to a readily applicable legal test. Rather, in my view, two principles underpin the singleness, distinctiveness and indivisibility requirement and must be satisfied in order to determine that a matter is one of national concern. In Le Dain J.'s formulation, these characteristics are essential because they are features that *clearly distinguish* a matter of national concern from matters of provincial concern. This is the first principle underpinning the singleness, distinctiveness and indivisibility inquiry: to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The recognition of "provincial inability" as a marker of singleness, distinctiveness and

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indivisibility points to a second principle animating the inquiry: federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This means that the matter at issue is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* that a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[147] Regarding the first principle, the proposed federal matter must be specific and readily identifiable. As Beetz J. made clear in *Re: Anti-Inflation Act*, a matter that is "lacking in specificity" or is boundless cannot pass muster as a matter of national concern: p. 458. The specific and identifiable matter must also be qualitatively different from matters of provincial concern. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction: *Insurance Reference SCC*; see also Le Dain, at pp. 277-78; *Wetmore*, at p. 296. The case law points to several factors that properly inform this analysis.

[148] One key consideration for determining whether the matter is qualitatively different from matters of provincial concern is whether it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects. The case law demonstrates that this inquiry is central to the national concern doctrine. The finding that marine pollution is extraprovincial and international

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in its character and implications was critical to the recognition of a matter of national concern in *Crown Zellerbach*: p. 436; see also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 64. In *Ontario Hydro*, the judges were unanimous in grounding the federal government's jurisdiction over atomic energy based on the POGG power in the potential for catastrophic interprovincial and international harm. By contrast, in *Hydro-Québec*, the judges who considered the issue concluded that the fact that the statute regulated substances whose effects were entirely intraprovincial and localized was a barrier to its recognition as a matter of national concern. However, they accepted that a matter dealing with toxic substances that originate in a particular province may nonetheless be predominantly extraprovincial and international in character if the substances in question have serious effects that can cross provincial boundaries: paras. 68, 74 and 76.

[149] International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. Consideration of international agreements figured into the Court's national concern analysis in *Johannesson* and in *Crown Zellerbach*: see also G. van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (2020), 43 *Dalhousie L.J.* 901, at p. 920. Significantly, the existence of treaty obligations is not determinative of federal jurisdiction: there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers: *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Treaty obligations and international

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agreements can be relevant to the national concern analysis, however. Depending on their content, they may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.

[150] Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters: *Re: Anti-Inflation Act*, at p. 458. The federal legislative role must be distinct from and not duplicative of that of the provinces. Once again, the Court's trade and commerce jurisprudence is helpful in this regard. The Court's opinions with respect to securities regulation show that a regulatory field with an international or extraprovincial dimension can also have local features. While there are aspects of securities regulation that are national in character and have genuine national goals, much of this sphere is primarily focused on local concerns related to investor protection and market fairness: *2011 Securities Reference*, at paras. 115 and 124-28; *2018 Securities Reference*, at paras. 105-6. As the *2011 Securities Reference* and the *2018 Securities Reference* confirm, federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

[151] Thus, the first principle underpinning the requirement of singleness, distinctiveness and indivisibility is that federal jurisdiction may only be recognized over a specific and identifiable matter that is qualitatively different from matters of

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provincial concern. At this stage, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces.

[152] I will now turn to the second principle, that is, that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This Court's jurisprudence in relation to the general branch of the trade and commerce power is helpful on this point, too. The starting point for this analysis should be the provincial inability test expressed through the fourth and fifth indicia discussed in *General Motors*, at p. 662: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. For provincial inability to be established for the purposes of the national concern doctrine, both of these factors are required.

[153] But there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. Professor Hogg explains that evaluating extraprovincial harm helps to determine whether a national law "is not merely desirable, but essential, in the sense that the problem 'is beyond the

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power of the provinces to deal with it'": p. 17-14, quoting D. Gibson, "Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 33. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

[154] The need for "grave consequences for the residents of other provinces" was adopted by this Court in *Labatt Breweries* (at p. 945) and can be seen woven throughout its national concern jurisprudence. In *Local Prohibition Reference*, the Privy Council suggested arms trafficking as an example of a potential matter of national concern, which is consistent with this requirement of grave extraprovincial consequences flowing from provincial inaction in relation to the matter: *Local Prohibition Reference*, at p. 362. And in *Johannesson*, Locke J. of this Court had emphasized that one province's failure to provide space for aerodromes could have the "intolerable" extraprovincial consequence of isolating northern regions of Canada: pp. 326-27. Although the extraprovincial harm at issue in *Munro* was of a different nature, it was nonetheless meaningful, as it would have resulted in the denial of a suitable national capital to all Canadians. In *Ontario Hydro*, La Forest J. reasoned that one province's failure to effectively regulate atomic energy "could invite disaster", endangering "the safety of people hundreds of miles from a nuclear facility": p. 379. In contrast, the majority in *Schneider* reasoned that one province's failure to provide treatment facilities for heroin users "will not endanger the interests of another province": p. 131. This conception of provincial inability was reaffirmed in *Crown Zellerbach*.

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[155] The requirement of grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine. This requirement can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient: *Wetmore*, at p. 296. Moreover, as I noted above, the onus is on Canada to establish that provincial inability is made out, and evidence is required, "for the questions of provincial inability and the harm that flows therefrom are both factual in part": Swinton, at p. 134; see also Leclair (2005), at p. 370.

[156] In *Crown Zellerbach*, Le Dain J. characterized provincial inability as an indicium of singleness and indivisibility. But in much of this Court's national concern jurisprudence, it has been treated as a strict requirement rather than as a mere optional indicium. Provincial inability has been used on this basis to reject national concern arguments and limit the doctrine's application: *Labatt Breweries*; *Schneider*; *Wetmore*. In my view, provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. Treating provincial inability as merely an optional indicium "rob[s] it of its initial, necessity-based, narrowing effect and opens doors for national concern": G. Baier, "Tempering Peace, Order and Good Government: Provincial Inability and Canadian Federalism" (1998), 9 *N.J.C.L.* 277, at p. 291; see also Leclair (2005), at p. 360.

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[157] In conclusion, there are two principles that apply in relation to singleness, distinctiveness and indivisibility: first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability will be established only if the matter is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* if a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[158] A few further words about indivisibility are in order, because my colleagues Brown and Rowe JJ. say that it has been written out of the national concern test in these reasons. The requirement of indivisibility is given effect through both of the principles I have discussed. The first of these principles requires a specific and identifiable matter which is not a boundless aggregate. The second principle requires provincial inability, as it is clearly defined in *Crown Zellerbach* and, indeed, throughout the Court's national concern jurisprudence, which is a marker of indivisibility.

[159] I respectfully disagree with my colleagues' understanding of indivisibility, according to which "interrelatedness" is a criterion for establishing indivisibility (Rowe J.'s reasons, at paras. 545 and 548, citing *Crown Zellerbach*, at p. 434). Le Dain J. referred to interrelatedness only once, in his explanation of why the provincial inability

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test helps the court determine whether a matter has the "character of singleness or indivisibility": p. 434. Thus, if a province's approach to the intraprovincial aspects of a matter could cause grave extraprovincial harm — that is, if the provincial inability test is met — the matter can be said to have an interrelatedness, which supports a finding of indivisibility. One difficulty with my colleagues' approach, in my view, is that they treat interrelatedness (a situation in which the provincial inability test is met) as sufficient to establish indivisibility, while at the same time maintaining that meeting the provincial inability test cannot establish indivisibility (Rowe J.'s reasons, at paras. 545 and 560; see also Brown J.'s reasons, at para. 383). Respectfully, I would favour giving effect to the requirement of indivisibility on the basis of the two principles I have set out, which is consistent both with Le Dain J.'s treatment of interrelatedness and with the national concern jurisprudence as a whole, and presents no such analytical difficulties.

(c) *Scale of Impact*

[160] At the final step of the national concern test, Canada must show that the proposed matter has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution": *Crown Zellerbach,* at p. 432; *Hydro-Québec,* at para. 66, per Lamer C.J. and Iacobucci J. (dissenting, but not on this point). Determining whether the matter's scale of impact is reconcilable with the division of powers requires the Court to balance competing interests. As Professor Elgie writes, it does not make sense to treat the acceptable

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impact on provincial authority as a static threshold; instead, the effect on provincial jurisdiction should be assessed in the context of the matter at issue: pp. 85-86.

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[161] The purpose of the scale of impact analysis is to prevent federal overreach: S. Choudhry, *Constitutional Law and the Politics of Carbon Pricing in Canada* (2019), IRPP Study 74, at p. 15; *2011 Securities Reference*, at para. 61. In other words, it is designed to protect against unjustified intrusions on provincial autonomy. In accordance with this purpose, at this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

(d) *Summary of the Framework*

[162] In summary, finding that a matter is one of national concern involves a three-step analysis.

[163] First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. This question arises in every case, regardless of whether the matter can be characterized as historically new. If Canada discharges its burden at the step of this threshold inquiry, the analysis will proceed.

[164] Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of "singleness, distinctiveness and indivisibility". More important than this terminology, however, are the principles underpinning the inquiry. The first of these principles is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

[165] If these two principles are satisfied, the court will proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.

[166] The onus is on Canada throughout this analysis, and evidence is required. Where a proposed federal matter satisfies the requirements of all three steps of the framework, there is a principled basis to conclude that the matter is one that, by its nature, transcends the provinces and should be recognized as a matter of national concern.

(4) Application to the *GGPPA*

(a) *Threshold Question*

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[167] Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. To begin, this matter's importance to Canada as a whole must be understood in light of the seriousness of the underlying problem. All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. This context, on its own, provides some assurance that in the case at bar, Canada is not seeking to invoke the national concern doctrine too lightly. The undisputed existence of a threat to the future of humanity cannot be ignored.

[168] That being said, the matter at issue here is not the regulation of GHG emissions generally, and Canada is not seeking to have all potential forms of GHG regulation classified as matters of national concern. Rather, the specific question before the Court is whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern.

[169] The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. As discussed above, Canada and all the provinces committed, in the *Vancouver Declaration*, to including carbon pricing in the country's efforts to reduce GHG emissions. The subsequently established Working Group on Carbon Pricing Mechanisms recognized in its final report that many experts regard carbon pricing as a

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necessary tool for efficiently reducing GHG emissions: p. 5. The Working Group's final report had the support of all provinces and of Canada at the time it was published, and its affirmation of the importance of carbon pricing is supported by the record in this case. Similarly, the Specific Mitigation Opportunities Working Group, one of the other three working groups established under the *Vancouver Declaration*, listed, in its final report, "broad, economy-wide carbon pricing" as one of "three essential elements of a comprehensive approach to mitigating GHG emissions": Specific Mitigation Opportunities Working Group, *Final Report*, 2016 (online), at p. 17.

[170] Furthermore, there is a broad consensus among expert international bodies such as the World Bank, the Organization for Economic Cooperation and Development and the International Monetary Fund that carbon pricing is a critical measure for the reduction of GHG emissions. For example, the High-Level Commission on Carbon Prices' *Report of the High-Level Commission on Carbon Prices*, May 29, 2017 (online), states: "A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way" (p. 1). And an International Monetary Fund Staff Discussion Note entitled *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change* states: "The central problem is that no single firm or household has a significant effect on climate, yet collectively there is a huge effect — so pricing is necessary to force the factoring of climate effects into individual-level decisions" (M. Farid, et al., *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change*, January 11, 2016 (online), at p. 6). In my view, the

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evidence reflects a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions.

[171] In summary, the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.

(b) *Singleness, Distinctiveness and Indivisibility*

[172] As I explained above, the first principle to be considered in the singleness, distinctiveness and indivisibility inquiry is that federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. Recognizing minimum national standards of GHG price stringency to reduce GHG emissions as a matter of national concern satisfies this requirement.

[173] Given that the matter at issue is establishing minimum national standards of GHG price stringency to reduce GHGs, it is important to begin by observing that these gases are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global warming potential of the gases (see Sch. 3 of the *GGPPA*). Moreover, GHG emissions are predominantly extraprovincial and international in their character and

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implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects that the dissent in *Hydro-Québec* suggested might appropriately be regulated on the basis of the national concern doctrine: para. 76. In *Interprovincial Co-operatives*, a case concerning one province's emission of pollutants into an interprovincial river, Pigeon J. observed that the Court was "faced with a pollution problem that is not really local in scope but truly interprovincial": p. 514. GHG emissions represent a pollution problem that is not merely interprovincial, but global, in scope.

[174] The international response to GHG emissions over the past three decades confirms this. As early as 1992, the preamble to the *UNFCCC* recognized climate change as "a common concern of humankind", and also acknowledged its "global nature". The acknowledgment that climate change is a common concern of humankind was reiterated in the *Paris Agreement*. As well, the need for an effective international response to climate change was recognized in both agreements. Specifically, the *Paris Agreement* identifies imperatives of holding the increase in the global average temperature to well below 2.0°C above pre-industrial levels and achieving net zero emissions in the second half of the 21st century: arts. 2(1)(a) and 4(1). States parties are therefore required to make nationally determined contributions that are increasingly ambitious and to implement domestic mitigation measures for the purpose of ensuring that those contributions are achieved: arts. 4(2) and (3). Both the *UNFCCC* and the *Paris Agreement* help illustrate the predominantly extraprovincial and international

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nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern.

[175] Not only is the type of pollutant to which the matter applies identifiable and qualitatively different from matters of provincial concern, but the regulatory mechanism of GHG pricing is a specific, and limited, one. It operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. The *Vancouver Declaration* and the Working Group on Carbon Pricing Mechanisms that it established reflect the status of carbon pricing as a distinct form of regulation. GHG pricing does not amount to the regulation of GHG emissions generally. It is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste.

[176] Minimum national standards of GHG price stringency, which are implemented in this case by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. The *2011 Securities Reference* and *2018 Securities Reference* illustrate this point. The proposed legislation at issue in the *2011 Securities Reference* did not have a distinctly national focus; it ran afoul of the division of powers by replicating existing provincial schemes: para. 116. However, the Court held that "[l]egislation aimed at imposing minimum standards applicable throughout the country

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and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole" and could be a matter of national importance to which the federal general trade and commerce power applies: para. 114. This was the approach the federal government took in the proposed legislation at issue in the *2018 Securities Reference*. The focus of that legislation was on controlling systemic risks that represented a threat to the stability of the country's financial system as a whole. Its effect was "to address any risk that 'slips through the cracks' and poses a threat to the Canadian economy": para. 92. Rather than displacing provincial securities legislation by ensuring the day-to-day regulation of securities trading, it sought to complement provincial legislation by addressing national economic objectives: para. 96.

[177] The backstop approach taken in the *GGPPA* is analogous to the approach taken in the proposed legislation that was at issue in the *2018 Securities Reference*. The *GGPPA* establishes minimum national standards of price stringency to reduce GHG emissions in order to ensure that Canada's nationally determined contribution under the *Paris Agreement* is achieved. It does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.

[178] Moreover, the Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent: ss. 166 and 189. This is similar to the situation in the *2018 Securities Reference*, in which the

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legislation required the federal regulator to consider the adequacy of existing provincial regulations before designating a benchmark or prescribing a product or practice: para. 92. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. In other words, the *GGPPA*'s pricing system comes into play only to address the risk of increased GHG emissions that would otherwise "slip through the cracks" as a result of one province's failure to implement a sufficiently stringent pricing mechanism.

[179] The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing. While it is true that the administrative pricing mechanism set out in the *GGPPA* is detailed, it can apply only to provinces that fail to meet the federal stringency standard. Thus, the *GGPPA*'s fundamental role is a distinctly federal one: evaluating provincial pricing mechanisms against an outcome-based legal standard in order to address national risks posed by insufficient carbon pricing stringency in any part of the country. The *GGPPA* does not prescribe any rules for provincial pricing mechanisms as long as they meet the federally designated standard. Even if the *GGPPA* were to apply so as to supplement an insufficiently stringent provincial pricing scheme, the prior existence of similar provincial legislation is not, as this Court confirmed in the *2018 Securities Reference*, a constitutional bar to federal legislation that pursues a qualitatively different national concern: para. 114; see also *General Motors*, at pp. 680-82.

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[180] Unlike the proposed legislation that was at issue in the *2011 Securities Reference*, the *GGPPA* does not depend on provinces "opt[ing] in": para. 31. The *GGPPA* imposes minimum standards of price stringency on all provinces at all times. If a province is not listed, it is because the Governor in Council has determined that the province's system meets the federally determined standard, not because the province has opted out. Thus, like the *2018 Securities Reference*, the instant case involves the distinctly federal role of setting national targets and stepping in to make up for an absence of provincial legislation or to supplement insufficient provincial legislation. The *GGPPA* deals with the specific regulatory mechanism of GHG pricing in a way that is qualitatively different than how the provinces do so.

[181] The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. I find that provincial inability is established in this case.

[182] First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The situation here is much like the one in the *2018 Securities Reference*, in which the provinces would be able to enact legislation to address national goals relating to systemic risk but could not do so on a sustained basis, because any province could choose to withdraw at any time: para. 113; see also *2011 Securities Reference*, at paras. 119-21. In the instant case, while the provinces could choose to cooperatively

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establish a uniform carbon pricing scheme, doing so would not assure a sustained approach to minimum national standards of GHG price stringency to reduce GHG emissions: the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard — a national GHG pricing floor — that applies in all provinces and territories at all times.

[183] Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. It is true that a cooperative scheme might continue to *exist* if one province withdrew from it, but the issue here is whether it would be successful. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage.

[184] The evidence in the instant case shows that even significant emissions reductions in some provinces have failed to further the goals of any cooperative scheme, because they were offset by increased emissions in other provinces. Between 2005 and 2016, Canada's total GHG emissions declined by only 3.8 percent: Environment and Climate Change, *National Inventory Report 1990-2016: Greenhouse Gas Sources and Sinks in Canada — Executive Summary*, 2018 (online), at p. 13. In that period, emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1

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percent in British Columbia, three of the five provinces with the highest levels of emissions in Canada, as well as by over 10 percent in New Brunswick, Nova Scotia, Prince Edward Island and Yukon. But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan, the other two provinces among the five with the highest levels of GHG emissions: p. 13. As a result, Canada failed to honour its commitment under the *Kyoto Protocol* before withdrawing from that agreement in 2011, and it is not currently on track to honour its *Copenhagen Accord* commitment.

[185] More recently, even though all the provinces made a commitment in the *Vancouver Declaration* in March 2016 to work collectively to significantly reduce GHG emissions, Saskatchewan had withdrawn by the time of the *Pan-Canadian Framework* seven months later, and Ontario and Alberta also subsequently withdrew. Together, these three provinces accounted for 71 percent of Canada's total GHG emissions in 2016: see *National Inventory Report*, at p. 13; Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act — 2007*, 2007 (online), at p. 17. It is true that their withdrawal from the *Pan-Canadian Framework* does not mean that Saskatchewan, Ontario and Alberta will necessarily fail to reduce their GHG emissions. But when provinces that are collectively responsible for more than two thirds of Canada's total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach. The participating provinces can only reduce their own emissions — less than one third of

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Canada's total — and are vulnerable to the consequences of the lion's share of the emissions being generated by the non-participating provinces.

[186] What is more, any province's refusal to implement a sufficiently stringent GHG pricing mechanism could undermine GHG pricing everywhere in Canada because of the risk of carbon leakage. Carbon leakage is a phenomenon by which businesses in sectors with high levels of carbon emissions relocate to jurisdictions with less stringent carbon pricing policies: *Report of the High-Level Commission on Carbon Prices*, at p. 23. To be clear, the concern here is not with the economic extraprovincial consequences of carbon leakage. Jurisdictions routinely compete for business, and mere economic effects are not among the grave consequences that would support a finding of provincial inability in the national concern context. Rather, I am referring to the environmental consequences, and the resulting harm to humans, of carbon leakage — the risk that any emissions reductions achieved by pricing in one province would be offset by an increase in emissions in another province as a result of the relocation of businesses. Thus, provincial cooperation may not result in national emissions reductions, as businesses could simply relocate to non-cooperating provinces, leaving Canada's net emissions unchanged and people across Canada vulnerable to the consequences of those emissions.

[187] Third, a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate

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change do not have a direct connection to the source of GHG emissions; every province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.

[188] Furthermore, I reject the notion that because climate change is "an inherently global problem", each individual province's GHG emissions cause no "measurable harm" or do not have "*tangible* impacts on other provinces": Alta. C.A. reasons, at para. 324; I.F., Attorney General of Alberta, at para. 85 (emphasis in original). Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

[189] I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government's

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argument that projected increases in other countries' emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. The Supreme Court reasoned that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere": p. 526. Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that "[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere" and thus contributes to the global harms of climate change: para. 4.6. The Hague District Court's finding that "any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change" was thus confirmed on appeal: *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para. 4.79. In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project's proponent that the project's GHG emissions would not make a meaningful contribution to climate change. The court noted that many courts have recognized that "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources": para. 516 (AustLII).

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[190] While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.

[191] I am accordingly unpersuaded by Huscroft J.A.'s observation in his dissenting reasons in the Court of Appeal for Ontario that "[t]here are many ways to address climate change and the provinces have ample authority to pursue them, whether alone or in partnership with other provinces": para. 230. The underlying premise of this position is that the provinces will implement sufficient controls on their GHG emissions, using GHG pricing or some other mechanism. But in the absence of a federal law binding the provinces, there is nothing whatsoever to protect individual provinces or the country as a whole from the consequences of one province's decision, in exercising its authority, to take insufficient action to control GHGs, or to take no steps at all. In short, federal action is indispensable, and GHG pricing in particular is an integral aspect of any scheme to reduce GHG emissions.

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[192] In my view, the principles underpinning the singleness, distinctiveness and indivisibility inquiry clearly support a finding that the federal government has jurisdiction over the matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The matter is specific, identifiable and qualitatively different from any provincial matters. As well, federal jurisdiction is necessitated by the provinces' inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent.

[193] I therefore respectfully disagree with my colleague Brown. J.'s view that the requirement of indivisibility is not met in this case. My colleague places great weight on "the difficulty of knowing the source and physical location" of pollution in *Crown Zellerbach*, asserting that because "no question arises as to physical location" in the case at bar, indivisibility cannot be made out: paras. 380-81. Even if it is assumed that this represents a valid distinction between *Crown Zellerbach* and the case at bar, Le Dain J. clearly confined this aspect of his reasoning to "the matter of marine pollution by the dumping of substances": p. 437. He did not purport to lay down the only way to determine whether indivisibility is made out. This makes sense. A matter can be of inherent national concern even if it does not relate to something that is "difficult" to locate. There is no "difficulty" in determining the location of the National Capital Region, but the matter in *Munro* meets the requirement of indivisibility: pp. 671-72; *Re: Anti-Inflation Act*, at pp. 457-58; see also Rowe J.'s reasons, at para. 548. Likewise, there is no "difficulty" in identifying the sites of atomic energy generation, but atomic energy, too, is a matter of inherent national concern: *Ontario*

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Hydro; *Pronto*; *Denison*. In the instant case, the indivisibility of the matter — establishing minimum national standards of GHG price stringency — is made out, as my application of the two principles underpinning the singleness, distinctiveness and indivisibility inquiry shows. This is so regardless of the "difficulty" of locating the source or physical location of GHG emissions. "GHG emissions" are not the matter in this case, and the "difficulty" of identifying the source and location of what a matter relates to is not the test for indivisibility.

[194] The analogy between this case and *Crown Zellerbach* is clear. Le Dain J. emphasized the international character of marine pollution; GHG emissions represent a truly global pollution problem that demands a coordinated international response. Le Dain J. focused on the unique scientific characteristics of marine pollution that distinguish it from fresh water pollution; GHG emissions, like marine pollution, are a precisely identifiable form of pollution that can readily be scientifically distinguished from other atmospheric pollutants.

[195] But the case for finding that the matter is of national concern is even stronger here than in *Crown Zellerbach*. This is true for two reasons. First, in the case at bar, there is uncontested evidence of grave extraprovincial harm as a result of one province's failure to cooperate. In other words, this is a true interprovincial pollution problem of the highest order. This Court's decisions have consistently reflected the view that interprovincial pollution is constitutionally different from local pollution and that it may fall within federal jurisdiction on the basis of the national concern doctrine:

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Interprovincial Co-operatives; *Crown Zellerbach*, at pp. 445-46; *Hydro-Québec*, at para. 76; see also *Morguard Investments*, at p. 1099; Lederman, at p. 614. Second, the proposed federal matter in the instant case relates only to the risk of non-cooperation that gives rise to this threat of grievous extraprovincial harm. In other words, this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

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(c) *Scale of Impact*

[196] At this step of the analysis, as I explained above, the court must determine whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that will be affected if Parliament is unable to constitutionally address the matter at a national level. This determination is made in light of the jurisdictional consequences of accepting the proposed matter of national concern. I conclude that, while it is true that finding that the federal government has jurisdiction over this matter will have a clear impact on provincial autonomy, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level.

[197] I accept that finding that this matter is one of national concern has a clear impact on provincial jurisdiction. It leads to the recognition of a previously unidentified area of double aspect in which the federal law is paramount. Provinces can regulate

GHG pricing from a local perspective (e.g., under ss. 92(13) and (16) and 92A), but legislation enacted on the basis of these provincial powers would apply concurrently in a field also occupied by a paramount federal law that establishes minimum standards of GHG price stringency. There is a clear impact on provincial autonomy. Provincial governments and their residents may well wish to pursue GHG pricing standards lower than those set by the federal government in order to protect the vitality of local industries, or may wish to choose policies that do not involve GHG pricing.

[198] However, I am persuaded that there is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing. This is manifestly not the "same aspect of the same matter". On the contrary, the compelling federal interest is in doing precisely — and only — what the provinces cannot do: protect themselves from the risk of grave harm if some provinces were to adopt insufficiently stringent GHG pricing standards. Moreover, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[199] First, the matter's impact on the provinces' freedom to legislate is minimal. It is important to mention that the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally. Here, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory

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mechanism. Any legislation that related to non-carbon pricing forms of GHG regulation — legislation with respect to roadways, building codes, public transit and home heating, for example — would not fall under the matter of national concern.

[200] Nor is the freedom of the provinces and territories to legislate in relation to all methods of pricing GHG emissions at issue. Even where the specific regulatory mechanism of GHG pricing is concerned, the extent to which the matter interferes with provincial jurisdiction is strictly limited. Under the *GGPPA*, provinces and territories are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency. If a province wants to exceed the federal standards, it is free to do so without fear of federal legislation rendering its legislation inoperative, because the federal matter concerns minimum standards, not maximum standards. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation in order to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. In Saskatchewan, for example, the provincially designed industrial GHG pricing scheme applies to many industrial emitters, but Part 2 of the *GGPPA* applies to electricity generation and natural gas transmission pipelines, the emissions of which Saskatchewan declined to price: see *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, ss. 2(b)(ii), 3(a) and (c)(x). The federal matter thus deals with GHG pricing stringency in a way that relates only to the risk of non-cooperation and the attendant risk of grave

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extraprovincial harm and has the ascertainable and reasonable limits required by *Crown Zellerbach* so as to ensure that provincial jurisdiction is not eroded more than necessary.

[201] Second, the matter's impact on areas of provincial life that would generally fall under provincial heads of power is also limited. Although the identified matter of national concern could arguably apply to types of fuel and to industries to which the *GGPPA* does not apply at present, that matter is, crucially, restricted to standards for GHG pricing stringency. As the majority of the Court of Appeal for Saskatchewan pointed out, it leaves "individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace": para. 160. Indeed, the federal power recognized in this case is significantly less intrusive than the one at issue in *Crown Zellerbach*, in which, as La Forest J. noted, the effect of finding that the federal government has jurisdiction over ocean pollution caused by the dumping of waste was to "virtually preven[t] a province from dealing with certain of its own public property without federal consent": p. 458.

[202] Nor does the federal "supervisory" jurisdiction of the *GGPPA* increase the matter's scale of impact on provincial jurisdiction. As I explained above, the Governor in Council's discretion under the *GGPPA* is limited by the purpose of the statute, by specific guidelines set out in it and by administrative law principles. The Governor in Council does not have an unfettered discretion to determine whether a provincial GHG

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pricing system is desirable, but is confined to determining whether it meets results-based standards.

[203] Moreover, the Governor in Council's decision-making role in the *GGPPA* is an incident of the flexibility the provinces retain in relation to GHG pricing within their borders. If provincial pricing systems are to be taken into account and federal intervention is to be limited to remedying deficiencies in those systems, the *GGPPA* must include a mechanism for determining whether provincial pricing systems meet federal standards. It would not be feasible for the statute itself to indicate which provincial pricing systems meet federal standards, as provincial pricing schemes and policies frequently change. The Governor in Council's decision-making role thus seems to be an incident of a flexible model designed to preserve provincial regulation. Furthermore, the discretion of the Governor in Council is necessary in order to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards.

[204] Indeed, the design of the *GGPPA* to ensure provincial flexibility is consistent with the *2018 Securities Reference*. In that case, the proposed law also involved a "supervisory" aspect, given that the federal regulator's intervention was contingent upon there being a risk that "slips through the cracks" of a provincial scheme that posed a threat to the Canadian economy: para. 92. The Court found that this feature weighed in favour of constitutionality, because the statute was a "carefully tailored" response to "this provincial incapacity": para. 113.

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[205] In summary, although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[206] On the whole, I am of the view that the scale of impact of this matter of national concern on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. The *GGPPA* puts a Canada-wide price on carbon pollution. Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing. They are free to design any GHG pricing system they choose as long as they meet the federal government's outcome-based targets. The result of the *GGPPA* is therefore not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

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(d) *Conclusion on the National Concern Doctrine*

[207] In conclusion, the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. Canada has adduced evidence that shows that the proposed matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions is of clear concern to Canada as a whole and that the two principles underpinning the "singleness, distinctiveness and indivisibility" inquiry are satisfied. Considering the impact on the interests that would be affected if Canada were unable to address this matter at a national level, the matter's scale of impact on provincial jurisdiction is reconcilable with the division of powers.

[208] I wish to emphasize that nothing about this conclusion flows inevitably from the fact that this matter of national concern involves a minimum national standard. My colleague Brown J. warns that my analysis opens the floodgates to federal "minimum national standards" in all areas of provincial jurisdiction. Respectfully, this concern is entirely misplaced. As can be seen from the foregoing reasons, the test for finding that a matter is of national concern is an exacting one. Canada must establish not just that the matter is of concern to Canada as a whole, but also that it is specific and identifiable and is qualitatively different from matters of provincial concern, and that federal jurisdiction is necessitated by provincial inability to deal with the matter. Each of these requirements, as well as the final scale of impact analysis, represents a meaningful barrier to the acceptance of *any* matter of national concern that might be proposed in the future.

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[209] This Court's decision in *Schneider* demonstrates that where one province's failure to deal with health care "will not endanger the interests of another province", the national concern doctrine cannot apply: p. 131. This central insight from *Schneider* has application beyond the field of health care, and in my view precludes the application of the national concern doctrine to many of the fields my colleague suggests would be vulnerable to federal encroachment as a result of the case at bar. Many fields my colleague points to are ones in which the effects of one province's approach are in fact primarily felt in that province only. I note as well that this Court recently emphasized that education is an area of exclusive provincial jurisdiction that has a uniquely intraprovincial character: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 7. *Schneider* itself confirmed that "[the] view that the general jurisdiction over health matters is provincial . . . has prevailed and is now not seriously questioned": p. 137.

[210] Moreover, nothing in these reasons should be understood to diminish the significant place of s. 92(13), the provincial power over "Property and Civil Rights", in the Canadian constitutional order. Historically and jurisprudentially, it is well known that this head of power serves as a means to accommodate regional and cultural diversity in law, and that it is of particular importance in this regard to the province of Quebec: see *Citizens Insurance Co. v. Parsons (Canada)* (1881), 7 App. Cas. 96, at pp. 109-12; *Secession Reference*, at paras. 38 and 58-60. As a result, this Court has continued to affirm that this provincial power should be carefully protected: see, e.g., *Re: Anti-Inflation Act*, at pp. 440-41; *2018 Securities Reference*, at para. 100;

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Desgagnés Transport, at para. 57. In light of this, the rigorous national concern test represents a meaningful constraint on federal power.

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[211] Even in a case in which a matter can be connected to climate change, a truly global pollution problem with grave extraprovincial consequences, I emphasize that much of the reasoning in this decision turns on the evidence before the Court with respect to GHG pricing itself: the critical value of GHG pricing as a tool for the mitigation of climate change, its nature as a distinct and limited regulatory mechanism, how it operates across the economy, and the risk of carbon leakage. Furthermore, finding that this matter is of national concern is appropriate only because the matter amounts to a real, and compelling, federal perspective on GHG pricing, focused on addressing only the well-established risk of grave extraprovincial harm, and doing so in a way that has a qualified and limited impact on provincial jurisdiction.

VII. Validity of the Levies as Regulatory Charges

[212] Finally, I must address Ontario's argument that the fuel and excess emission charges imposed by the *GGPPA* do not have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges.

[213] To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 43; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1

S.C.R. 131, at para. 24. In *Westbank*, Gonthier J. set out a two-step approach for determining whether a governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. If such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself: *Westbank*, at para. 44; *620 Connaught*, at paras. 25-27.

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[214] Ontario does not dispute that the *GGPPA* creates a regulatory scheme. Its argument instead focuses on the second step of the *Westbank* analysis: determining whether the levy has a sufficient nexus with the regulatory scheme. The *GGPPA* does not require that revenues collected under Parts 1 and 2 be expended in a manner connected to the regulatory purpose of the *GGPPA*. Ontario argues that this undermines the levies' characterization as regulatory charges; in its view, the nexus requirement cannot be met solely by showing that the regulatory purpose of a charge is to influence behaviour. It submits that, for there to be a nexus with the regulatory scheme, the revenues that are collected must be used to recover the cost of the scheme or be spent in a manner connected to a particular regulatory purpose, and that a conclusion to the contrary would undermine the "no taxation without representation" principle that underlies s. 53 of the Constitution: A.F., at para. 97.

[215] It is well-established that influencing behaviour is a valid purpose for a regulatory charge. As Rothstein J. put it in *620 Connaught*, a regulatory charge may be intended to "alter individual behaviour", in which case "the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour": para. 20. Two

examples Gonthier J. mentioned in *Westbank* were that "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [and that a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles": para. 29. However, the case law on the required nexus in the *Westbank* framework for a behaviour-modifying charge is not settled. In *620 Connaught*, the Court explicitly left the question "[w]hether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct," for another day: para. 48.

[216] I agree with Strathy C.J.O. that regulatory charges need not reflect the cost of the scheme: paras. 159-60; see also *Canadian Assn. of Broadcasters v. Canada (F.C.A.)*, 2008 FCA 157, [2009] 1 F.C.R. 3. As contemplated in *620 Connaught*, the amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Canada rightly observes that limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature: R.F., at para. 138. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, as Gonthier J. suggested in *Westbank*, the required nexus with the scheme will exist "where the charges themselves have a regulatory purpose": para. 44. Where, as in the instant case, the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective, the nexus between the scheme and the levy inheres in the charge itself.

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[217] This Court's decision in *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, is of no assistance to Ontario. Ontario seizes on an aspect of *Allard* that Iacobucci J. specifically framed as an effort "to determine the scope of s. 92(9) rather than to define 'taxation' as such": p. 398. The provincial licensing power under s. 92(9) raised specific questions about its interplay with the s. 92(2) limitation on provincial taxation to direct, as opposed to indirect, taxation, as well as about its relationship to other provincial heads of power. It had been argued that to give s. 92(9) a meaning independent of the other provincial heads of power, it ought not to be limited to raising money to support a regulatory scheme. In that context, very different from the one in the case at bar, Iacobucci J. remarked in *obiter* that a finding that there was "a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless": pp. 404-5 (emphasis in original). It was unnecessary to decide the point, however, because the levy in *Allard* was intended only to cover the costs of the regulatory scheme: p. 412.

[218] It does not follow from *Allard* that a finding that there is a nexus with the regulatory scheme where the levy is a regulatory mechanism would, as Ontario asserts, "render s. 53 meaningless": A.F., at para. 100. Section 53 codifies the principle of no taxation without representation by requiring any bill that imposes a tax to originate with the legislature: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 30. Section 53 applies expressly to taxation. The *Westbank* approach remains adequate for the purpose of distinguishing between taxes and regulatory charges in order to determine whether s. 53 applies. Holding that the required nexus can be found to exist by establishing that the

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charge itself is a regulatory mechanism does not open the door to disguised taxation. Instead, in every case, the court must scrutinize the scheme in order to identify the primary purpose of the levy on the basis of *Westbank*. An attempt to circumvent s. 53 by disguising a tax as a regulatory charge without a sufficient nexus to a regulatory scheme would be colourable.

[219] In the instant case, there is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. Ontario does not assert, nor would such an assertion be supportable, that the levies in this case amount to disguised taxation. The *GGPPA* as a whole is directed to establishing minimum national standards of GHG price stringency to reduce GHG emissions, not to the generation of revenue. As Richards C.J.S. aptly observed, the *GGPPA* "could fully accomplish its objectives . . . without raising a cent": para. 87. This is true of both Part 1 and Part 2. The levies imposed by Parts 1 and 2 of the *GGPPA* cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour. The levies are constitutionally valid regulatory charges.

VIII. A Final Matter

[220] In this case, I have identified the pith and substance of the *GGPPA* having regard to the statute and the regulations in force at the time of these appeals. My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. Although the underlying

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premise of my colleague's comments — that regulations made pursuant to an enabling statute must be consistent with the division of powers and further the purpose of the statute — is uncontroversial, his speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable. I would leave the matter of the validity of regulations under the *GGPPA* for a future case should the issue arise. It is not this Court's role to express opinions about the substance, arguments or merits of future challenges.

IX. Conclusion

[221] In conclusion, I would answer the reference questions in the negative. The *Greenhouse Gas Pollution Pricing Act* is constitutional. Accordingly, the Attorney General of Saskatchewan's appeal is dismissed, the Attorney General of Ontario's appeal is dismissed, and the Attorney General of British Columbia's appeal is allowed.

The following are the reasons delivered by

CÔTÉ J. —

[222] I have read the carefully crafted reasons of the Chief Justice, and I am in agreement with his formulation of the national concern branch analysis. However, I must respectfully part company with the Chief Justice's ultimate conclusion that the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*GGPPA*" or "*Act*")

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is, in its current form, constitutional. In my view, the *GGPPA*, as presently drafted, cannot be said to accord with the matter of national concern properly formulated by the Chief Justice because the breadth of the discretion conferred by the *Act* on the Governor in Council results in the absence of any meaningful limits on the power of the executive. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* itself violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers.

[223] This Court must decide the constitutionality of the *GGPPA* based on the totality of the measures it authorizes, and not simply the steps currently taken under the *Act*. Thus, when I consider what the *GGPPA* authorizes, irrespective of whether it has in fact been implemented, it is clear that the *Act*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing schemes.

[224] Although delegation of legislative power is not inherently problematic, as discretion provides flexibility and makes it possible to overcome the practical difficulties associated with amending provisions and enacting regulations at the legislative level, when an Act endows a select few with the power to re-write, and thus reengineer, a law which affects virtually every aspect of individuals' daily lives and provincial industrial, economic, and municipal activities, it goes too far.

[225] I would therefore find that the *Act* is unconstitutional in part.

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I. The *GGPPA* Vests a Considerable Amount of Discretion in the Executive

[226] A detailed review of the provisions of the *Act* leads to the conclusion that a considerably high degree of discretion has been vested in the Governor in Council.

A. *Part 1 of the Act*

[227] Part 1 of the *Act* establishes a fuel charge against certain producers, distributors, and importers of various greenhouse gas ("GHG") producing fuels named in Schedule 2 (which includes aviation gasoline, aviation turbo fuel, butane, ethane, gas liquids, gasoline, heavy and light fuel oils, kerosene, methanol, naphtha, petroleum coke, pentanes plus, propane, coke oven gas, marketable and non-marketable natural gas, still gas and coal) and on combustible waste. In s. 3 of the *Act*, the critical feature of the fuel levy — that being, what fuels are covered by the *Act* — is so open-ended, allowing any substance, if prescribed by the Governor in Council, to fall within the ambit of the fuel charge regime:

> ***combustible waste*** means
>
> **(a)** tires or asphalt shingles whether in whole or in part; or
>
> **(b)** a prescribed substance, material or thing. (*déchet combustible*)
>
> . . .
>
> ***fuel*** means
>
> **(a)** a substance, material or thing set out in column 2 of any table in Schedule 2, other than
>
> **(i)** combustible waste,

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(ii) a substance, material or thing that is prepackaged in a factory sealed container of 10 L or less, or

(iii) a prescribed substance, material or thing; and

(b) a prescribed substance, material or thing. (*combustible*)

[228] The operative provisions of Part 1 similarly prescribe vast legislative law-making power to the executive such that the very nature of the regime can be altered. For example:

Covered facility of a person
5 For the purposes of this Part, a covered facility is a covered facility of a person if

. . .

(b) the person is a prescribed person, a person of a prescribed class or a person meeting prescribed conditions in respect of the covered facility.

. . .

Delivery of marketable natural gas — distribution system
14 For the purposes of this Part, if marketable natural gas is delivered to a particular person by means of a distribution system, the person that is considered to deliver the marketable natural gas is

. . .

(b) if prescribed circumstances exist or prescribed conditions are met, the person that is a prescribed person, a person of a prescribed class or a person meeting prescribed conditions.

. . .

Charge — regulations
26 Subject to this Part, a prescribed person, a person of a prescribed class or a person meeting prescribed conditions must pay to Her Majesty in right of Canada a charge in respect of a type of fuel or combustible waste in the amount determined in prescribed manner if prescribed circumstances exist

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or prescribed conditions are met. The charge becomes payable at the prescribed time.

Charge not payable — regulations
27 A charge under this Part in respect of a type of fuel or combustible waste is not payable

(a) by a prescribed person, a person of a prescribed class or a person meeting prescribed conditions; or

(b) if prescribed circumstances exist or prescribed conditions are met.

. . .

Charge amount — mixture
40(2) Despite subsection (1), if a manner is prescribed in respect of a mixture that is deemed to be fuel of a prescribed type under subsection 16(2), the amount of a charge payable under this Division in respect of such a mixture is equal to the amount determined in prescribed manner.

Charge amount — regulations
40(3) Despite subsection (1), if prescribed circumstances exist or prescribed conditions are met, the amount of a charge payable under this Division in respect of fuel and a listed province is equal to the amount determined in prescribed manner.

. . .

Charge amount — regulations
41(2) Despite subsection (1), if prescribed circumstances exist or prescribed conditions are met, the amount of a charge payable in respect of combustible waste and a listed province is equal to the amount determined in prescribed manner.

. . .

Amount of rebate — regulations
47(3) Despite subsection (2), if prescribed circumstances exist or prescribed conditions are met, the amount of a rebate payable under this section is equal to the amount determined in prescribed manner.

[229] The full breadth of executive powers can be seen most notably within ss. 166 and 168 of the *Act*. Section 166(1)(a) states that the Governor in Council may

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make regulations "prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation". The only limit whatsoever on s. 166's expansive regulation-making powers is that s. 166(3) stipulates that in making a regulation under subsection (2) — that is, amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable — "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". No such factor applies to the Governor in Council's regulation-making powers under Part 1's provisions. Most importantly, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *Act*:

> **166(4)** The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.

[230] Sections 168(2) and 168(3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1 of the *Act*:

> **168(2)** The Governor in Council may make regulations, in relation to the fuel charge system,
>
> > **(a)** prescribing rules in respect of whether, how and when the fuel charge system applies and rules in respect of other aspects relating to the application of that system, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this

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Part is required to be reported and accounted for and when any period begins and ends;

(b) prescribing rules in respect of whether, how and when a change in a rate, set out in any table in Schedule 2 for a type of fuel and for a province or area, applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to such a fuel or province or area, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(c) prescribing rules in respect of whether, how and when a change to the provinces or areas listed in Part 1 of Schedule 1 or referenced in Schedule 2 applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to a province or area or to a type of fuel, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(d) if an amount is to be determined in prescribed manner in relation to the fuel charge system, specifying the circumstances or conditions under which the manner applies;

(e) providing for rebates, adjustments or credits in respect of the fuel charge system;

(f) providing for rules allowing persons, which elect to have those rules apply, to have the provisions of this Part apply in a manner different from the manner in which those provisions would otherwise apply, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported or accounted for and when any period begins and ends;

(g) specifying circumstances and any terms or conditions that must be met for the payment of rebates in respect of the fuel charge system;

(h) prescribing amounts and rates to be used to determine any rebate, adjustment or credit that relates to, or is affected by, the fuel charge system, excluding amounts that would otherwise be included in determining any such rebate, adjustment or credit, and specifying

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> circumstances under which any such rebate, adjustment or credit must not be paid or made;
>
> **(i)** respecting information that must be included by a specified person in a written agreement or other document in respect of specified fuel or a specified substance, material or thing and prescribing charge-related consequences in respect of such fuel, substance, material or thing, and penalties, for failing to do so or for providing incorrect information;
>
> **(j)** deeming, in specified circumstances, a specified amount of charge to be payable by a specified person, or a specified person to have paid a specified amount of charge, for specified purposes, as a consequence of holding fuel at a specified time;
>
> **(k)** prescribing compliance measures, including anti-avoidance rules; and
>
> **(l)** generally to effect the transition to, and implementation of, that system in respect of fuel or a substance, material, or thing and in respect of a province or area.

[231] Most notably, s. 168(4) of the *Act* states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, "the regulation prevails to the extent of the conflict". This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation. Section 168(4), along with ss. 166(2) and 166(4), all constitute what are known as "Henry VIII clauses". Their name, Henry VIII clauses, is inspired by the King whose lust for power included the Statute of Proclamations (*An Act that Proclamations made by the King shall be obeyed* (Eng.), 1539, 31 Hen. 8, c. 8), which elevated the King's proclamations to have the same legal force as Acts of Parliament (J. W. F. Allison, "The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective" (2017), 34 *Journal of Constitutional History* 57, at pp. 62-63).

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B. *Part 2 of the Act*

[232] The output-based pricing system ("OBPS") created under Part 2 of the *Act* exempts certain industrial enterprises, defined as "covered facilities", from Part 1's fuel charge regime. I have concerns about the Chief Justice's assertion that "no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country" (para. 76). In my view, and with respect, it is clear from a review of Part 2's provisions that the broad powers accorded to the executive allow for this very result.

[233] Section 192 contains a Henry VIII clause and empowers the Governor in Council to make regulations for a variety of matters, including regulations:

> **(a)** defining *facility*;
>
> **(b)** respecting covered facilities, including the circumstances under which they cease to be covered facilities;
>
> **(c)** allowing for the determination of the persons that are responsible for a facility or covered facility;
>
> **(d)** respecting designations and cancellations of designations under section 172;
>
> **(e)** respecting compliance periods and the associated regular-rate compensation deadlines and increased-rate compensation deadlines;
>
> **(f)** respecting the reports and verifications referred to in section 173 and subsections 176(2) and 177(2);
>
> **(g)** respecting greenhouse gas emissions limits referred to in sections 173 to 175, subsection 178(1), section 182 and subsection 183(1);
>
> **(h)** respecting the quantification of greenhouse gases that are emitted by a facility;

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> **(i)** respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility;
>
> **(j)** respecting the methods, including sampling methods, and equipment that are to be used to gather information on greenhouse gas emissions and activities related to those emissions;
>
> **(k)** respecting the compensation referred to in sections 174 and 178;
>
> **(l)** respecting compliance units, including transfers of compliance units, the circumstances under which transfers of compliance units are prohibited and the recognition of units or credits issued by a person other than the Minister as compliance units;
>
> **(m)** respecting the tracking system referred to in section 185 and the accounts in that system;
>
> **(n)** providing for user fees;
>
> **(o)** respecting the rounding of numbers;
>
> **(p)** respecting the retention of records referred to in section 187; and
>
> **(q)** respecting the correction or updating of information that has been provided under this Division.

[234] Additionally, a number of provisions in Part 2 allow the executive, in accordance with the regulations crafted by said executive, to: designate a facility as a covered facility, thus making it exempt from paying the fuel charge (s. 172(1)), cancel the designation of a covered facility (s. 172(3)), suspend or revoke compliance units (s. 180(1)), recover compensation owing in compliance units (s. 182), or close an account (s. 186(3)). The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2); when amending Part 2 of Schedule 1 to modify the list of provinces where the OBPS applies, "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions.

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[235] While the Governor in Council's powers in this regard are ostensibly exercisable to allow for ongoing review, I am in agreement with both Justices Brown and Rowe that Part 2's "skeletal" framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

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II. "Minimum" Standards Are Set By the Executive, Not the *Act*

[236] As noted above, I agree with the Chief Justice that the use of minimum national standards of price stringency to reduce GHG emissions is legally viable as a matter of national concern. However, the *Act*, as it is currently written, cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. In my view, it is not the *Act*, but the executive, who sets, constrains, or expands, the standards.

[237] The legislative decision to transfer law and policy-making power to the executive is central to the contours of the *GGPPA*. In his article "The Case for a Canadian Nondelegation Doctrine" (2019), 52 *U.B.C. L. Rev.* 817, (Alyn) James Johnson, a constitutional and administrative law scholar, notes the deleterious consequences of this excessive delegation:

> Legislatures are high-profile bodies where law and policy making on contentious issues can occur with a degree of public awareness, scrutiny, and input. Courts and executive bodies, on the other hand, while themselves institutionally distinct, both lack the open and broadly-

> deliberative character that gives legislatures their unique position in a democratic society. [Footnote omitted; pp. 825-26.]

This excessively broad delegation of power removes the regulation of GHGs from the legitimizing forum of the legislature and places it into the hands of the few.

[238] The Chief Justice emphasizes that regulation-making power is conscribed to the statutory purpose of reducing GHG emissions through GHG pricing — such as imposing a fuel charge and industrial GHG emissions pricing regimes. But, in my view, this is not a meaningful limitation to the executive's power. As Justice Brown has helpfully outlined, rather than establishing minimum national standards, Part 2 of the *Act* empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. For instance, the executive could decide to impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated. According to the majority's reasoning, this example, regardless of its improbability, would fulfill the statutory purpose of reducing GHG emissions through GHG pricing and therefore be a valid use of the executive's regulatory powers accorded by the *GGPPA*. This cannot be so.

[239] I recognize that in response, one may argue that Canadian citizens can simply make their displeasure known at election time. However, the fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. This results in provinces having applicable regimes one day, and being

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under the federal scheme the next. The meaningful check on the legislation ought to be the separation of powers analysis, not simply a further delegation to the ballot box.

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[240] The *Act*, as it is currently written, employs a discretionary scheme that knows no bounds. While I agree with the Chief Justice's reasons that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *Act* does not reflect this crucial restriction. Given the boundless discretion that is contained within the provisions, including the ability to expand the ambit of both Parts to fundamentally change the nature of the fuel charge regime or target specific industries, the *Act* cannot be said to accord with the matter.

III. Constitutional Restrictions on Delegated Power

[241] Moreover, I am of the view that certain parts of the *Act* are so inconsistent with our system of democracy that they are independently unconstitutional. I explain why below.

[242] Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *Act*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Scholars have long warned that executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns (see Hewart L.C.J., *The New Despotism* (1929); D. J. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality", in M. J. Mossman and G. Otis, eds., *The Judiciary as Third Branch of*

Government: Manifestations and Challenges to Legitimacy (1999), 313, at p. 375; L. Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J.* 519, at p. 545; Johnson; see also M. Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020), 83 *Sask. L. Rev.* 45). The time has come to acknowledge that clauses that purport to empower a body other than Parliament to amend primary legislation are contrary to ss. 17 and 91 of the *Constitution Act, 1867*. Therefore, ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional.

A. *The Architecture of the Constitution of Canada*

[243] The Constitution of Canada is a "comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The rules and principles that compose the Constitution of Canada "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning" (*Secession Reference*, at para. 32). They include both written and unwritten elements (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 92; *Secession Reference*, at para. 32). The question here is whether these rules and principles permit Parliament to authorize the Governor in Council to amend an Act of Parliament.

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[244] One of the core features of the Constitution of Canada is the identification and definition of three constituent elements of the state: the executive, the legislative and the judicial (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 23; *Provincial Judges Reference*, at para. 108). The *Constitution Act, 1867*, plays a critical role in defining these three constituent elements. Part III of the *Constitution Act, 1867*, defines the Executive Power, Part IV the Legislative Power and Part VII the Judicature. Additionally, Part V establishes the executive and legislative powers for provinces and Part VI establishes the distribution of legislative powers between the Parliament of Canada and provincial legislatures.

[245] Constitutional documents must be interpreted in a broad and purposive manner, informed by not only the proper linguistic, philosophic and historical contexts but also by the foundational principles of the Constitution (*Senate Reference*, at para. 25; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). They must also be read in light of the broader architecture of the Constitution (*Senate Reference*, at para. 26; *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57).

[246] We must thus begin with the actual text of the *Constitution Act, 1867*. Under Part IV, the first provision declares that "[t]here shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons" (s. 17). Under Part VI, the first provision provides:

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> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . .

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[247] A linguistic or ordinary and grammatical reading of these sections leads me to conclude that they simultaneously confer the federal legislative power upon the Parliament of Canada and constrain how the Parliament of Canada may exercise the legislative power. Section 17 begins by emphasizing "[t]here shall be One Parliament for Canada", meaning that all of the legislative power conferred upon the federal state shall reside in a single Parliament. Then comes the constraint on how legislative power must be exercised, arising from the decision of the Fathers of Confederation to "particularize the participants in the law making process" (*Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 74). Sections 17 and 91 both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means, at the federal level, every exercise of legislative power — every enactment, amendment and repeal of a statute — must have the consent of all three elements of Parliament: the Queen, the Senate and the House of Commons. In contrast, under Part III "Executive Power", s. 9 vests the "Executive Government and Authority of and over Canada" exclusively upon the Queen alone.

[248] Our case law also supports this interpretation. In *Hodge v. The Queen* (1883), 9 App. Cas. 117, the Privy Council held that a province could lawfully delegate the power to set regulations regarding liquor licensees to License Commissioners. However, Sir Barnes Peacock for the panel noted that "[i]t is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail" and that there were an "abundance of precedents for this legislation, entrusting a limited discretionary authority to others" (p. 132 (emphasis added)). He also noted that the provincial legislature "retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands" (p. 132).

[249] In *In re Initiative and Referendum Act*, [1919] A.C. 935, the Privy Council reviewed the constitutionality of Manitoba's *Initiative and Referendum Act*, S.M. 1916, c. 59. This Act provided that laws may be made and repealed by referendum, and that such laws would have the same effect as laws made by an Act of the Legislature (s. 7). The Manitoba Court of Appeal had found that s. 92 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) vested the power of law making exclusively with the Legislature and the Legislature could not confer that power upon any other body (*Re The Initiative and Referendum Act* (1916), 27 Man. R. 1).

[250] For the Privy Council, Viscount Haldane found that "[t]he language of s. 92 is important. That section commences by enacting that 'in such Province the

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Legislature may exclusively make laws in relation to matters' coming within certain classes of subjects" (p. 943). Although he went on to dismiss the appeal on the basis that Manitoba did not have jurisdiction to interfere with the office of Lieutenant-Governor, in "a deliberate and important *obiter*" (*OPSEU*, at p. 47), Viscount Haldane continued on to discuss the limits of legislative power:

> Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. 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*, 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. [Emphasis added; footnote omitted; p. 945.]

[251] In *Re: Authority of Parliament in relation to the Upper House*, the Court reiterated this finding that "s. 92 of the Act vests the power to make or repeal laws exclusively in the Legislature and that it did not contemplate the creation of a new legislative body to which the Legislature could delegate its powers of legislation or with which it would share them" (p. 72).

[252] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court affirmed the Constitution requires that each part of a legislature — in the case of Manitoba, both the Legislative Assembly and the Lieutenant-Governor — consent to a bill in order to validly exercise legislative power. Section 4(1) of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, S.M. 1980, c. 3,

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provided that statutes could be enacted in one official language and subsequently be translated into the other official language. It authorized the translation to merely be deposited with the Clerk of the House in order to become law. The Court found this to be "an unconstitutional attempt to interfere with the powers of the Lieutenant-Governor. Royal assent is required of all enactments" (*Manitoba Language Rights*, at p. 777).

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[253] There is, however, one authority that presents a different view of Parliament's ability to delegate legislative power. In *Re George Edwin Gray* (1918), 57 S.C.R. 150, a majority of the Supreme Court upheld an Order in Council which contradicted a statute. *Re Gray* was an application for *habeas corpus*. George Gray was a young farmer who had been exempted from military service under *The Military Service Act, 1917*, S.C. 1917, c. 19, because of his farming duties. Section 6 of *The War Measures Act, 1914*, S.C. 1914, c. 2, provided that "[t]he Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada". Section 13(5) of *The Military Service Act, 1917*, correspondingly provided: "Nothing in this Act contained shall be held to limit or affect . . . the powers of the Governor in Council under *The War Measures Act, 1914*."

[254] On April 19, 1918, the Senate and House of Commons passed a joint resolution: "That in the opinion of this House, it is expedient that regulations respecting

Military Service shall be made and enacted by the Governor in Council in manner and form and in the words and figures following, that is to say . . .” (*Votes and Proceedings of the House of Commons of the Dominion of Canada*, No. 22, 1st Sess., 13th Parl., April 19, 1918, at p. 242; *Journals of the Senate of Canada*, vol. 54, 1st Sess., 13th Parl., April 19, 1918, at p. 100). The resolution went on to repeat verbatim a set of regulations that the Governor in Council made the next day. These regulations altered the exemptions from military service such that Mr. Gray was no longer exempt. The Order in Council’s military service requirements were contrary to *The Military Service Act, 1917*.

[255] The sole question before the Court was whether there was authority for the Order in Council nullifying the exemption. Writing in the majority, Fitzpatrick C.J. found that while it was argued that Parliament alone may make laws, Parliament could delegate legislative powers so long as it did not amount to abdicating its role (*Re Gray*, at pp. 156-57). He then turned to *The War Measures Act, 1914*, to determine whether the Order in Council was *intra vires*. *The War Measures Act, 1914*, did not expressly authorize the Governor in Council to promulgate orders inconsistent with statutes, but according to Fitzpatrick C.J. express language was not necessary:

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and

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> they must be understood to have employed words in their natural sense, and to have intended what they have said. [Emphasis added; pp. 158-59.]

[256] In finding that the statute conferred unlimited power, Fitzpatrick C.J. was most certainly influenced by the urgency of war: "Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention" (p. 160 (emphasis added)). Justices Duff and Anglin were similarly concerned, with Anglin J. even noting that thousands of men had already been drafted and were on their way to Europe under the authority of this Order in Council (pp. 169, 174 and 180). Were it not for the urgency of war, it is difficult to see any justice agreeing to permit the Governor in Council to exercise what appears to be unlimited power, as such power is the very antithesis to the rule of law. As Lord Bingham wrote:

> The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.
>
> (*The Rule of Law* (2010), at p. 54)

[257] In contrast, the dissenting judges refused to accept the "bald proposition" that *The Military Service Act, 1917*, "was liable to be repealed or nullified by an order in council" (*Re Gray*, at p. 164). Even with the emergency of war, overruling statutes by Order in Council was not cognizable, "such conceptions of law as within the realm

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of legislation assigned by the 'British North America Act' to the Dominion have no existence" (p. 165).

[258] The Chief Justice cites *Re Gray* as establishing the constitutionality of Henry VIII clauses (para. 85). With great respect, I do not read *Re Gray* as being conclusive of the constitutionality of Henry VIII clauses. First, the comments of the majority justices in *Re Gray*, particularly with respect to the unlimited powers of the Governor in Council, demonstrate that their findings are not in accord with our contemporary understandings of core constitutional principles. The justices in *Re Gray* were clearly moved by the great emergency of war. In the case before us, Parliament did not pass the impugned legislation under the emergency branch. Second, *Re Gray* is distinguishable from the present case in that all three of the bodies charged under ss. 17 and 91 with the exclusive authority to make legislation agreed with the Order in Council. Although not passed as an Act of Parliament, the joint resolution of the Senate and House of Commons along with the Order in Council may adequately meet the demands of ss. 17 and 91 in the urgent situation of war. There was no consent of the House of Commons or Senate to the regulations promulgated by the Governor in Council under the *GGPPA*. Third, this reading is inconsistent with our most recent pronouncement on delegation of law-making powers.

[259] The Chief Justice also cites *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1, and *R. v. Furtney*, [1991] 3 S.C.R. 89, as cases relying upon the findings in *Re Gray* (Chief Justice's reasons, at para. 85).

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Neither of these cases concerned Henry VIII clauses. In the *Chemicals Reference*, the Governor in Council had established various boards to assist with the Second World War effort. The question at issue was whether the Governor in Council could delegate its power under *The War Measures Act, 1914*, to these other bodies. Not only was there no Henry VIII clause at issue, but the Court unanimously ruled that part of the Order in Council was *ultra vires* for being contrary to the enabling statute (pp. 7, 21, 27, 32 and 37). Despite the broad statements about Parliament's ability to delegate "legislative" power in time of emergency, Duff C.J. also recognized that the *British North America Act, 1867*, may impose limits upon Parliament's ability to commit legislative powers to the executive (p. 10). I use the word "legislative" in quotation marks because Duff C.J. spoke of actions that are legislative in character (p. 12). For the purpose of the present appeals, I define legislative power more narrowly, referring specifically to the formal power to enact, amend or repeal an Act of Parliament. On this definition, no legislative power was at issue in the *Chemicals Reference*.

[260] *Furtney* is part of a different line of jurisprudence regarding inter-governmental delegation that, in my view, only lends support to the unconstitutionality of Henry VIII clauses. In *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, this Court held that Parliament could not delegate its legislative powers to a provincial legislature and similarly, the provincial legislature could not delegate its legislative powers to Parliament. Although Rinfret C.J. distinguished this from cases where a delegation is made to a body subordinate to Parliament, his focus on the word "exclusively" in both ss. 91 and 92, along with the

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lack of an express delegation power, supports my reading of ss. 17 and 91 (pp. 34-35). In the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, we affirmed that the *Constitution Act, 1867*, prohibits Parliament from delegating legislative powers to another legislature (para. 75). Throughout the judgment we repeatedly emphasize the ability of Parliament to delegate the power to make "*subordinate*" regulations (paras. 73 and 75-76 (emphasis in original)) or exercise "*administrative*" powers (paras. 123 and 125 (emphasis in original)). At no point do we support the delegation of primary legislative authority.

[261] I thus cannot take *Re Gray* to be conclusive of the issue. I turn now to the fundamental principles of the Constitution which further support my reading of ss. 17 and 91.

B. *Fundamental Principles of the Constitution of Canada*

[262] This Court's recent jurisprudence demonstrates that the unwritten principles of our Constitution help to inform the written text (*Manitoba Language Rights*, at pp. 750-51; *Secession Reference*, at para. 53; *Provincial Judges Reference*, at paras. 94-95 and 104; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 44 and 57; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 54).

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[263] In my view, there are three fundamental principles that must inform the interpretation of ss. 17 and 91: parliamentary sovereignty, rule of law and the separation of powers.

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(1) Parliamentary Sovereignty

[264] Parliamentary sovereignty is a foundational principle in the Westminster system of government that the Constitution of Canada employs. Parliamentary sovereignty is generally thought to mean that Parliament has "the right to make or unmake any law whatever" (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 39-40). Of course, in Canada the sovereignty of Parliament has always been qualified by the written constitution (*Pan-Canadian Securities Reference*, at para. 56). For that reason, the Court has said that it may be more useful to refer to our system of government as one of constitutional supremacy, rather than parliamentary supremacy (*Secession Reference*, at para. 72). Nonetheless, parliamentary sovereignty remains an important constitutional principle, as absent constitutional restraint, Parliament may make or unmake any law.

[265] At first glance, parliamentary sovereignty supports Parliament's ability to delegate whatever they want to whomever they wish. If Parliament can make or unmake any law whatever, then Parliament can make a law empowering the Governor in Council to amend Acts of Parliament. However, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is, as we have seen, that Parliament has the ability to create any law. The negative aspect,

however, is that no institution is competent to override the requirements of an Act of Parliament. Dicey covered both of these aspects in his definition:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. [Footnote omitted; pp. 39-40.]

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[266] It is this negative aspect of parliamentary sovereignty that Henry VIII clauses run afoul of. Henry VIII clauses "give the executive the authority to override the requirements of primary legislation and thereby directly violate the principle of parliamentary sovereignty" (A. Tucker, "Parliamentary Scrutiny of Delegated Legislation", in A. Horne and G. Drewry, eds., *Parliament and the Law* (2018), 347, at p. 359). In the 2010 Mansion House Speech to the Lord Mayor of London, the Lord Chief Justice of England and Wales agreed, declaring that "proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature . . . Henry VIII clauses should be confined to the dustbin of history" (Lord Judge, July 13, 2010 (online), at p. 6; see also Lord Judge, "Ceding Power to the Executive; the Resurrection of Henry VIII", speech delivered at King's College London, April 12, 2016 (online), at p. 3).

[267] In *Pan-Canadian Securities Reference*, this Court emphasized the negative aspect of parliamentary sovereignty in its definition of parliamentary sovereignty:

". . . the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and . . . there is no matter in respect of which it may not make laws" (para. 54 (emphasis in original)). The Court unanimously found that it was consistent with parliamentary sovereignty to limit Parliament's ability to delegate its legislative powers to provincial legislatures:

> To put it simply: while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government. [Emphasis added; para. 76.]

[268] Even if one were to reject the idea that parliamentary sovereignty entails accepting that no other body can enact, amend or repeal statutes, the concept of parliamentary sovereignty has other inherent limitations. For instance, in order for Parliament to be sovereign it cannot be limited by the actions of previous Parliaments and therefore "neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action" (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 119). Similarly, logic limits Parliament from achieving two contradictory purposes simultaneously. For instance, Parliament cannot create a body of limited jurisdiction and simultaneously insulate that body from judicial review because "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited" (*R. v. Shoreditch*

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Assessment Committee, [1910] 2 K.B. 859 (C.A.), at p. 880). Henry VIII clauses create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. For instance, in the *GGPPA*, s. 168(2) empowers the Governor in Council to regulate several specific subjects relating to the fuel charge, such as "providing for rebates, adjustments or credits in respect of the fuel charge system" (s. 168(2)(e)). However s. 168(4) provides that the Governor in Council can act contrary to any provision in Part 1. Therefore, Parliament simultaneously attempts to limit the Governor in Council to regulating specific subjects whilst also attempting to permit the Governor in Council to regulate anything they want.

[269] Recently, some of the senior judiciary in England and Wales have accepted that another inherent limit is that parliamentary sovereignty demands an impartial, independent and authoritative body to interpret Parliament's acts. Because Parliament can only speak through written texts, its work can only be effective when interpreted by such a body (*R. (Cart) v. Upper Tribunal*, [2009] EWHC 3052 (Admin.), [2011] Q.B. 120, at paras. 37-39, per Laws L.J.; *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 189-90 and 208-10). Henry VIII clauses are incompatible with this conception of sovereignty. Henry VIII clauses limit the availability of judicial review by providing no meaningful limits against which a court could review. This is a problem that equally affects the rule of law, a principle to which I now turn.

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(2) The Rule of Law

[270] The rule of law is one of the fundamental principles of the Constitution, lying "at the root of our system of government" (*Secession Reference*, at para. 70; see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). It is also expressly recognized in the preamble to the *Canadian Charter of Rights and Freedoms*: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

[271] The rule of law embraces three related principles (*Imperial Tobacco*, at para. 58). First, "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power" (*Manitoba Language Rights*, at p. 748). 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" (*Manitoba Language Rights*, at p. 749). Third, "the exercise of all public power must find its ultimate source in a legal rule" (*Provincial Judges Reference*, at para. 10). In other words, "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action" (*Secession Reference*, at para. 70).

[272] Even in its most formal sense, the rule of law requires that all legislation be enacted in the manner and form prescribed by law (*Imperial Tobacco*, at para. 60). This includes the requirements that legislation receive three readings in the Senate and

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House of Commons and that it receive Royal Assent (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 37-41). When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law.

[273] There are two additional rule of law concerns with the delegation of legislative power to the executive. The first, as Professor Elmer A. Driedger noted, the "delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the statute book" (*The Composition of Legislation: Legislative Forms and Precedents* (2nd rev. ed. 1976), at p. 198). This gives rise to confusion and uncertainty, which are inimical to the rule of law (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 72).

[274] The second additional concern is that Henry VIII clauses endow the executive with authority to act arbitrarily. They do so by permitting the executive to act contrary to the empowering statute, creating an authority without meaningfully enforceable limits and thus an absolute discretion. Dicey articulated the rule of law's concern with preventing arbitrary power:

> [The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. [p. 202]

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[275] In the Canadian context, Justice Rand's famous reasons in *Roncarelli* also warn against absolute power:

> . . . there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. [p. 140]

[276] The Chief Justice says that the Governor in Council will be bound by the express terms and overall purpose and object of the *GGPPA* (para. 87). I agree with Brown J. when he says that Henry VIII clauses cannot merely be treated as a matter of administrative law (para. 414). My concerns are constitutional in nature because I do not see the Governor in Council as being constrained by meaningful limits that can be enforced through judicial review. For example, s. 168(4) expressly authorizes the Governor in Council to act contrary to the provisions of Part 1. Further, the overall purpose and object of the *Act* is so broad that the only limit on the Governor in Council is to act within the matter of national concern identified by the Chief Justice. When executive action is only limited by the division of powers and not by its empowering statute, then we can no longer call it executive action. Review for constitutional compliance with the division of powers is not enough. When an empowering Act contains a privative clause, the rule of law is not satisfied merely by judicial review for constitutional compliance.

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[277] In order to protect the rule of law, and prevent arbitrary conduct, courts have a constitutional duty to judicially review actions of the executive (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21). In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the majority affirmed that "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes" (para. 28).

[278] Given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly (*Crevier*, at p. 238; *Dunsmuir*, at para. 31). When the Governor in Council is given the power to amend an Act, or to act in a manner inconsistent with the Act, it cannot be said that they are meaningfully limited by the Act. In the words of Campbell J.:

> This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.
>
> (*Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 363)

(3) The Separation of Powers

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[279] Like parliamentary sovereignty and the rule of law, the separation of powers is "a fundamental principle of the Canadian Constitution" (*Provincial Judges Reference*, at para. 138). Although it is often said that Canada does not have a strict separation of powers, time and time again this Court has recognized the separation of powers as "an essential feature of our constitution", "a cornerstone of our constitutional regime", "[o]ne of the defining features of the Canadian Constitution" and a "backbone of our constitutional system" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at paras. 52 and 54; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 107; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 3 and 10).

[280] As an abstract theory, the separation of powers may embody three dimensions: the same persons should not form part of more than one branch, one branch should not control or intervene in the work of another, and one branch should not exercise the functions of another (E. C. S. Wade and G. G. Phillips, *Constitutional Law* (3rd ed. 1946), at p. 18).

[281] In Canada, the first two dimensions of the separation of powers are not always met. For instance, it is well accepted that "the same individuals control both the executive and the legislative branches of government" (*Wells*, at paras. 53-54; see also *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at pp. 320-21). However, this does not mean that our Constitution fuses the legislative and executive powers (*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*,

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[1989] 2 S.C.R. 49, at p. 103). Instead, the Constitution of Canada insists on a separation of powers according to the third dimension — the separation of function. In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, Dickson C.J. described the basic functions of each of the three branches:

> 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. [pp. 469-70]

[282] The separation of powers does not strictly require that all of these functions remain exclusive. Our Constitution permits one branch to exercise some of the functions of another branch, when it does so in a way that respects both roles. These appeals provide a perfect example. We, members of the judiciary, are called upon to provide advice to three Lieutenant Governors in Council on the constitutionality of the *GGPPA* — something that would typically be an executive function (*Secession Reference,* at para. 15). However, our jurisprudence also clearly establishes that "[t]he separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies" (*Provincial Judges Reference*, at para. 139).

[283] In *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, my colleague, Karakatsanis J., confirmed the importance of identifying and protecting each branch's core functions:

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> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. [Emphasis added; paras. 28-29.]

[284] Justice Karakatsanis's reasons aptly articulate one of the normative goals underlying the separation of powers: ensuring that power is allocated according to skillset and institutional capacities. Another reason was provided by McLachlin J. (as she then was) in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, where she emphasized the importance of maintaining the balance of power established between the three branches, finding that "[i]t 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" (p. 389). Maintaining this balance prevents an accumulation of power in any one branch.

[285] The Court's concern for protecting the core functions of each branch from intrusion is perhaps most well developed in the judicial sphere. Grounded in the

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judicature provisions of the *Constitution Act, 1867*, both legislative and executive bodies are incapable of intruding upon the core jurisdiction of superior courts or infringing upon the independence of the judiciary (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 2 and 15; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56; *Criminal Lawyers' Association of Ontario*, at paras. 19 and 26; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31). This core judicial function includes the duty to maintain the rule of law and protect citizens from arbitrary action by supervising state action (*MacMillan Bloedel*, at paras. 32-35; *Crevier*, at pp. 234-38).

[286] There are also well developed doctrines to protect core executive functions from judicial intrusion. For instance, our jurisprudence demonstrates the importance of restraint when reviewing certain exercises of royal prerogative (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Secession Reference*, at paras. 26-28; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 36-37; see also *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737). The doctrine of cabinet privilege similarly serves to protect core executive functions (*Carey v. Ontario*, [1986] 2 S.C.R. 637; *Babcock*, at paras. 18-19 and 60).

[287] The Court has also established limits on judicial interference with essential legislative functions, most notably through acknowledging the existence of

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parliamentary privilege over core legislative activities. As Binnie J. said, "[e]ach of the branches of the State is vouchsafed a measure of autonomy from the others"; "[p]arliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; see also *New Brunswick Broadcasting Co.*, at p. 377). Parliamentary privilege provides immunity "necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business" (*Vaid*, at para. 41; see also *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R 687, at paras. 27 and 127).

[288] In addition to respecting the bounds of parliamentary immunity, courts have refrained from imposing procedural fairness requirements on legislating, other than requiring that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent (*Authorson*, at paras. 37-41). Recently, a majority of this Court held that the duty to consult does not apply to ministers of the Crown engaged in drafting bills, as this is a legislative function: "Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 2; see also paras. 117, 122, 148, 163-64 and 167).

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[289] Most of these protections are against judicial intrusion. However, the Court has also recognized that the executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite the important role played by the executive in the legislative process (*Pan-Canadian Securities Reference*, at para. 53). Chief Justice Lamer noted that "there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form" (*Provincial Judges Reference*, at para. 139).

[290] The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers.

[291] First, the legislature is the institution best suited to set policy down into legislation. The constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate. The legislative process provides equally for high-level policy debates and line-by-line technical edits. Most importantly, legislating through legislatures requires, by "its very nature, the need to build majorities [and] necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top" (*Secession Reference*, at para. 68).

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This is why "the role of the legislature is to decide upon and enunciate policy" (*Fraser*, at p. 470).

[292] Second, limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is no doubt that the executive branch wields great power in this country. In practice, the executive can control the day-to-day operations of the legislature (*Blaikie*, at p. 320). However, an executive branch with the power to legislate on its own, without the legislature at all, wields a much greater and far more dangerous power. As we have seen above, the legislative process takes place in public before the scrutiny of non-government members and the press. When the government does not control a majority of seats in the legislature, the legislative process can require extensive compromise. In contrast, when Cabinet amends the *GGPPA*, it does so shrouded in cabinet secrecy, free from public scrutiny. There can be no doubt as to "the pre-eminent importance of the House of Commons as 'the grand inquest of the nation'" (*Vaid*, at para. 20).

[293] The Fathers of Confederation and the Framers of the *Constitution Act, 1982*, both recognized the importance of the parliamentary process by requiring that Parliament sit at least once every twelve months (s. 20 of the *British North America Act, 1867* (as enacted) and s. 5 of the *Charter*). There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

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IV. Conclusion

[294] When the clear text of ss. 17 and 91 of the *Constitution Act, 1867*, is read in light of the foundational constitutional principles of parliamentary sovereignty, rule of law and separation of powers, I have no doubt that clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional. In addition, the *GGPPA* cannot fall within a matter of national concern defined by minimum standards when such standards are those of the executive, and not those of the Parliament.

[295] Therefore, while I agree with the Chief Justice's formulation of the national concern branch analysis, I do not agree with his application of the law to the facts of this case. As this *Act* is presently drafted, it does not set minimum standards and delegates a legislative power to the executive. Accordingly, while I join the Chief Justice in finding that Parliament has the power to enact constitutionally valid legislation in this realm, I must partially dissent.

The following are the reasons delivered by

BROWN J. —

I. Introduction

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[296] With the aim of mitigating climate change, the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*Act*"), implements measures — specifically, carbon pricing (in the case of Part 1 of the *Act*) and the regulation of heavy industry (in the case of Part 2) — to discourage activities that emit greenhouse gases ("GHGs") into the atmosphere.

[297] The issue before us is whether the *Act* is *intra vires* Parliamentary authority. Importantly, the issue is *not* whether Parliament can act to combat climate change. It clearly can — indeed, it can do much of what it seeks to do in the *Act* by, for example, exercising its taxation power under s. 91 of the *Constitution Act, 1867*. Nor is the issue whether Parliament can act to confront this or other existential threats to the country. Again, it clearly can, by relying upon its broad residual power to legislate in response to emergencies for the peace, order, and good government of Canada ("POGG").

[298] In other words, the constitutionality of the scheme that Parliament has enacted in this case does not govern *whether* Parliament can seek to control GHG emissions so as to meet reduction targets. It can. The question before us goes simply to *how* Parliament has chosen to do so — and, in particular, whether it has chosen a means of doing so that is supported by its legislative authority as conferred by the Constitution of Canada. This question properly directs our attention to the structure and operation of the *Act* — features which receive little to no consideration in the majority's reasons — and to the jurisdictional basis upon which the Attorney General of Canada seeks to

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uphold it. Again, it is worth stressing — since all parties before us say that much is at stake in the fight against climate change — that Parliament's capacity to contribute meaningfully to that fight *does not* hang on the Court's answer to the reference question.

[299] The Attorney General of Canada urges us to find that the *Act* represents a constitutionally valid exercise by Parliament *not* of the powers it clearly has to address climate change, but of its residual authority to legislate with respect to matters of "national concern" under POGG. The significance of this cannot be overstated. This power — unlike Parliament's authority to legislate in the face of national emergencies — *permanently* vests *exclusive* jurisdiction in Parliament over the matter said to be of national concern. Were this simply the straightforward matter, as the Attorney General of Canada says, of requiring polluters to "pay", the consequences for the division of powers would be minor. But neither the Attorney General nor the majority fairly or completely describes what the *Act* does. In particular, they downplay significantly what the *Act* actually authorizes the Governor in Council — that is, the federal Cabinet — to do, and ignore the detailed regulatory intrusion into matters of provincial jurisdiction authorized by Part 2 of the *Act*. The result is a permanent and significant expansion of federal power at the expense of provincial legislative authority — unsanctioned by our Constitution, and indeed, as I will explain, expressly precluded by it.

[300] The majority accedes to all these things, granting the Attorney General of Canada everything he seeks. But it does not stop there. The majority goes even further,

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in substance abandoning and re-writing this Court's jurisprudence on the national concern branch of POGG as stated in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. Specifically, it dilutes the test stated in *Crown Zellerbach*, which required that a national concern exhibit qualities of "singleness, distinctiveness and indivisibility" (p. 432) from a matter falling within provincial legislative authority, by injecting into that test a body of unrelated trade and commerce jurisprudence. The result is a new three-step test. Under this new test, the requirement of "singleness, distinctiveness and indivisibility" is informed by two "principles" that "animat[e]" the inquiry (Chief Justice's reasons, at para. 146). The first of these "animating" principles is two-pronged, and one of those prongs is informed by three "factors" (paras. 147, 151 and 157). The second "animating principle" is to be analyzed by reference to three other requirements (paras. 152-56). To add to the confusion, the inevitable resulting expansion of federal authority under the national concern branch is fortified by the injection of judicial discretion into the scale of impact analysis, by which the scale of impact on provincial jurisdiction is balanced in light of other "interests", which implicitly include the judiciary's view of the *importance* of the matter (paras. 161 and 206). (It is apparently to be assumed that all important matters fall within federal jurisdiction.)

[301] But the true danger in the majority's reasons for judgment does not lie in the blending of trade and commerce jurisprudence with POGG jurisprudence, or in the confusing and confused test that it states. It is in the majority's abandonment of any meaningful constraint on the national concern branch of the POGG power.

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[302] I concur with Rowe J.'s reasons and therefore adopt his review of the jurisprudence on the residual POGG power, conferred upon Parliament by the preamble to s. 91 of the *Constitution Act, 1867*. My reasons proceed as follows. First, I will canvass the scheme of the *Act* itself, with a view to explaining its structure and operation so as to characterize its pith and substance, and to classify it among the heads of legislative authority prescribed in the Constitution. In so doing, I will explain why Parliament's reliance on the national concern doctrine to defend the *Act* encounters an insurmountable constitutional problem. The *Act*'s very structure belies any argument that its dominant subject matter relates to a distinctly federal matter, since it applies only where provincial legislatures have not enacted carbon pricing measures, either at all or as stringent as those preferred by the federal Cabinet. In other words, the *Act*'s structure and operation is *premised* on provincial legislatures *having authority* to enact the same scheme. This is fatal to the constitutionality of the *Act* under the POGG national concern branch, since s. 91 states provincial legislative authority is "assigned exclusively" — that is, to the exclusion of Parliament's authority to act. This is a fundamental limiting feature of the federal POGG power for which the majority's reasons do not account.

[303] I will then consider how the Attorneys General of Canada and of British Columbia, seeking to overcome that objection, argue that the imposition of *minimum national standards* is the distinctly federal or national aspect of the matter. But this simply begs the question — minimum national standards *of what*? If the subject of those "minimum national standards" is a matter falling within provincial legislative

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authority — which, again, the *Act* by its very structure contemplates — the injection of "minimum national standards" adds nothing. For example, until this Court's judgment from which I now dissent, it would have been no more constitutional for Parliament to adopt "minimum national standards" governing hospital administration, the location or construction of hydroelectric generating facilities, the inflationary effects of intra-provincial trade and commerce (such as wage and price controls), or the exploration and development of non-renewable natural resources. Now, such things are entirely possible (at least, where a judge views them as being "important").

[304] It follows that the *Act* is not a valid exercise of Parliament's residual legislative authority. Nor — though the argument was hardly pursued by the Attorney General of Canada — can the *Act* be upheld as a valid exercise of any other federal head of power, at least not without the benefit of fuller argument than the passing reference contained in the Attorney General's factum. I would therefore conclude that the *Act* is wholly *ultra vires* Parliament.

[305] Having disposed of the reference question by applying this Court's jurisprudence, I will then turn to consider the majority's dilution of the *Crown Zellerbach* test.

II. The *Act*

[306] The *Act*'s preamble describes climate change as a national problem, which cannot be contained within geographic boundaries and requires immediate action. It

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therefore states its intention to create "incentives for . . . behavioural change" by implementing a "federal greenhouse gas emissions pricing scheme".

[307] Two distinct regulatory mechanisms are authorized by the *Act*. Part 1 creates a regulatory charge on GHG-emitting fuels, which will increase annually until 2022. This charge is levied against certain producers, distributors and importers, with the expectation that they will pass this charge on to end consumers. In this way, it is expected to change public behaviour, thereby reducing demand for and consumption of GHG-emitting fuels. Subject to a number of exceptions, the charge applies to fuels that are produced, delivered or used in a "listed province", brought into a listed province from another place in Canada, or imported into Canada at a location in a listed province (ss. 17 to 39). The fuel charge currently applies to 22 fuels that emit GHGs when burned, including gasoline, diesel fuel, natural gas and "combustible waste". The fuels are listed in Sch. 2 of the *Act* and are subject to modification by the federal Cabinet.

[308] The second mechanism, created under Part 2, is described as an output-based pricing system ("OBPS"). The structure of the OBPS casts significant doubt on the correctness of the majority's characterization of the entire *Act*'s pith and substance as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (para. 57). Rather, the OBPS is animated by concerns over industrial competitiveness in *specific* emissions-intensive Canadian industries that compete in international markets, and with the consequent economic and

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environmental impacts of "carbon leakage" — the movement of industry to jurisdictions with a lower carbon price. Part 2, therefore, is designed not only "to create incentives for . . . behavioural change", but also to maintain the international competitiveness of *some* emissions-intensive and trade-exposed industries (being those selected by the federal Cabinet) by *exempting* them from the fuel charge established by Part 1, and subjecting them instead to different levels of carbon pricing based on Cabinet's responsiveness to the competitiveness and carbon leakage concerns of that particular industry.

[309] Part 2 achieves its goal by authorizing the federal Cabinet to limit the total emissions that can be produced without charge by an industrial facility. It applies to facilities located in a listed province that either meet the criteria set out in the regulations or are designated by the Minister of the Environment. Facilities subject to the OBPS that operate within their emissions limit receive surplus credits called compliance units which can be sold or banked to offset future emissions. Facilities that exceed their limit must pay an excess emissions charge, remit compliance units, or both.

[310] The emissions limit of a particular facility is calculated by multiplying its volume of production by a factor — in the language of the *Act*, a sector-specific "output-based standard" — set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 ("*Regulations*"). This standard is typically based on a percentage of the national, production-weighted average emissions intensity of the specific industrial

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activity in question (a large exception is electricity generation, where the standards are based on whether solid, liquid or gaseous fuels are used). The percentage used to calculate the standard is adjusted based on an assessment of competitiveness and carbon leakage concerns for that particular industrial activity. This assessment is crucial because the cost per tonne of carbon emitted in relation to any given industrial activity is dictated solely by the percentage used to set the output-based standard.

[311] In the result, Part 2 grants the federal Cabinet the power to set carbon costs on an activity-by-activity basis. Schedule 1 of the *Regulations* sets out the standards for an array of different products, from bitumen to potash to pulp, that give rise to different carbon prices for emissions related to that product.

[312] A key feature of the *Act* is that its application is dependent upon whether and how provinces have exercised their legislative authority to reduce GHG emissions. Meaning, the *Act* is designed to operate as a backstop, applying in only those provinces that have not (1) adopted carbon pricing as the means for reducing GHG emissions, (2) to a stringency that meets the federal Cabinet's preferred measure. To allow for this contingent operation, the *Act* grants the federal Cabinet discretion to determine whether it will apply in a given province. (As I will discuss below, this is a significant consideration militating against the *Act*'s constitutionality.) In Part 1, ss. 166(2) and (3) provide that, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate", Cabinet may designate the listed provinces in which the fuel charge regime will apply,

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taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor. In Part 2, ss. 189(1) and (2) authorize Cabinet to designate the backstop jurisdictions in which Part 2 will apply, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate" taking into account, again, "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor.

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III. Analysis for Constitutionality

[313] A reviewing court must apply two steps to determine whether an enactment falls within the legislative authority of the enacting body. First, the enactment must be characterized to determine its pith and substance or dominant subject matter. Secondly, the identified subject matter must be classified, with reference to the classes of subjects described in ss. 91 and 92 of the *Constitution Act, 1867* (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 30). Each step must be treated distinctly. Characterizing an enactment with reference to the heads of power creates "a danger that the whole exercise will become blurred and overly oriented towards results" (*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16; see also A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490). At the same time, however, we cannot lose sight of how these two distinct steps interact. As Professor P. W. Hogg explains in *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 15-6:

> . . . neither of these two steps has any significance by itself. The challenged statute is characterized . . . as in relation to a "matter" (step 1) only to determine whether it is authorized by some head of power in the Constitution. The "classes of subjects" are interpreted (step 2) only to determine which one will accommodate the matter of a particular statute.

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[314] The analytical process differs somewhat, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*.

A. *Characterization*

[315] The pith and substance of a law has been described as "an abstract of the statute's content", or the law's "dominant purpose", "leading feature", "true nature and character", or "dominant or most important characteristic" (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286, citing P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 313; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 482). It is well established that the dominant subject matter of an enactment is determined by considering its purpose and effects (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29).

[316] Determining the appropriate breadth by which to characterize the impugned law is essential. The legislation's dominant subject matter must be

characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. Characterizations that are too broad, vague, or general "are unhelpful in that they can be superficially assigned to various heads of powers" (*Desgagnés*, at para. 35; see also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190).

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(1) Broad Proposed Characterizations

[317] The Attorneys General of Ontario and Alberta describe the *Act*'s pith and substance as relating to the regulation of GHG emissions. I agree with the Attorneys General of Canada and British Columbia that this is too broad because it does not facilitate classification under a federal or provincial head of power. GHG emissions are produced by virtually *all* facets of human activity and can therefore be regulated in innumerable different ways that will correspond to different heads of power. In that sense, identifying "regulating GHG emissions" as the pith and substance of a law suffers from the same deficiency as "regulating the environment" which, as this Court has said, is "not an independent matter of legislation" but rather "a sweeping subject or theme virtually all-pervasive in its legislative implications", that "touch[es] several of the heads of power assigned to the respective levels of government" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63-64; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 154, quoting W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 610). Identifying the pith and substance

requires greater specificity in describing *how* the legislation proposes to regulate GHG emissions. Again, the purpose of characterization must be borne in mind: it is to facilitate classification so as to determine whether the Constitution grants the enacting body — in this case, Parliament — legislative authority over the subject matter.

[318] In support of a broad characterization, Ontario says that legislative purpose must not be confused with the means chosen to achieve it, a proposition various parties attribute to this Court's decision in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25 (A.F., Attorney General of Ontario, at para. 35; I.F., Attorney General of New Brunswick (38663 and 38781), at para. 20; I.F., Attorney General of Manitoba (38663 and 38781), at para. 25). But *Ward* simply reinforces the view that greater specificity than "regulating GHG emissions" is required. While the provision at issue in *Ward* imposed a prohibition on the "sale, trade or barter" of whitecoat and blueback seals, to refer to the legislation as prohibiting trade in baby seals was insufficiently precise. The same prohibition might relate to property and trade (authorized by s. 92(13)), or to conserving the economic viability of the seal fishery (authorized by s. 91(12)). It was clear from the broader context, however, that the enactment's purpose was to conserve the seal fishery, and the enactment was therefore authorized by the federal government's fisheries power (paras. 23 and 49). This Court's statement in *Ward* was, accordingly, directed to cases where describing legislation *only* in terms of its means would not accurately capture its dominant subject matter. Nothing in *Ward* requires altogether excluding legislative means from the pith and substance analysis.

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[319] Moreover, it will not always be possible to clearly distinguish between means and purpose. The end goal at one level of abstraction may be viewed as the means to some broader goal at another level of abstraction. Here, for example, carbon pricing is the chosen means to generate behavioral change, which is the chosen means to reduce GHG emissions, which is the chosen means to combat climate change. Feasibility and efficacy aside, alternatives exist at each level of abstraction: the government might opt to remove GHGs from the atmosphere to combat climate change; it might prohibit certain products or activities to reduce GHG emissions; and it might reward "green" behaviours to generate behavioral change. It cannot therefore be said, as a general proposition, that the dominant subject matter of an enactment must not refer to the means chosen to implement the legislative purpose. That said, and as I will explain below, to incorporate the legislative means within the pith and substance of a statute will have particular consequences when deciding its constitutionality under the national concern branch of POGG.

[320] Whether one views the stated subject matter as the means or the objective depends, then, on the chosen level of abstraction. And the determinative consideration in identifying an appropriate level of abstraction should be *facilitating the subject matter's classification* among the classes of subjects described in ss. 91 and 92 so far as necessary to resolve the case. If an enactment's subject matter could be classified under different heads of power listed under both ss. 91 and 92, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof (*Reference re*

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Assisted Human Reproduction Act, at para. 190). A sufficiently precise description may well refer to why *and* how the law operates (*Chatterjee*, at para. 16).

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(2) Narrow Proposed Characterizations

[321] I turn now to the characterizations advanced by the Attorneys General of Canada and British Columbia in support of their arguments that the *Act* is *intra vires* Parliamentary authority to regulate matters of national concern under POGG.

[322] I observe at the outset that, when Parliament seeks to permanently and exclusively regulate a matter of national concern, one would expect the Attorney General of Canada to have a single, clear, and consistent position about just *what* he thinks Parliament was doing. More particularly, he should be able to readily — and, again, consistently — identify the narrow and distinct matter that the legislation in question addresses. That has not occurred here. Instead, the Attorney General has offered up a vast array of shifting arguments in various courts at various stages in the proceedings. This alone should provoke deep suspicion about the correctness of those arguments.

[323] To assuage these suspicions, the Attorney General of Canada acknowledges that his approach has "evolved", having been "informed" along the way "by the characterizations of [the] courts below" (R.F., at para. 61). So where has this "evolution" brought him? Before this Court, it has at last brought him to the revelation

that the *Act*'s dominant subject matter is "establishing minimum national standards integral to reducing nationwide GHG emissions" (para. 56 (emphasis deleted)).

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[324] This is similar to the characterization that the Attorney General of British Columbia successfully urged the Court of Appeal for Saskatchewan to adopt: ". . . 'minimum national standards of stringency for pricing GHG emissions'" (2019 SKCA 40, 440 D.L.R. (4th) 398, at paras. 11 and 431). Before us, British Columbia urged a variation, specifically: ". . . establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction" (A.F., at para. 2 (emphasis deleted)).

[325] None of these characterizations can be sustained.

[326] The principal difficulty with these submissions is the invocation of "minimum national standards". It adds nothing to the pith and substance of a matter, which is directed *not* to the fact of *a standard*, but to *the subject matter* to which the standard is to be applied. In other words, identifying "minimum national standards" as part of the dominant subject matter begs the very question which the characterization analysis seeks to answer: minimum national standards *of what*?

[327] "Minimum national standards" is a *nothing*. It is an *artifice* — or, as the Attorney General of Alberta puts it, a rhetorical "sleight of hand" (R.F., at para. 44). *Only* federally enacted standards can be both "national" (in the sense that only federal legislation can apply nationwide, while provincial legislative authority cannot extend

beyond its borders) *and* a "minimum" (since, if a provincial standard is different from a corresponding federal standard, the operation of paramountcy ensures that the federal standard will prevail). In the result, using "minimum" and "national" to describe the *Act*'s pith and substance is empty and misleading.

[328] None of this is answered by the majority. Indeed, nowhere does the majority justify the inclusion of "minimum national standards" in its characterization of the pith and substance of the *Act*. Instead, the majority simply and peremptorily expresses its "view" that "the federal government's intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions", and that "minimum national standards" adds something "essential" to the pith and substance of the *Act* (paras. 65 and 81). The majority also says that the impugned federal legislation in *Hydro-Québec* (which also included a backstop) was not described by this Court as imposing minimum national standards (at para. 33, per Lamer C.J. and Iacobucci J., dissenting, and at paras. 130 and 146, per La Forest J.), because the backstop nature of that legislation was but a "mere feature" — whereas, in this case, the backstop nature of the *Act* is its "main thrust", "dominant characteristic", and "defining feature" (Chief Justice's reasons, at para. 82). Respectfully, the distinction between a legislative structure that operates as a "mere" feature as opposed to a "dominant" or "defining" one is elusive. Indeed, my colleagues appear also to find it so, since they do not explain it. Little in Part 1 or 2 of the *Act* is cited in support for the proposition that, *here*, the backstop model is a "defining", as opposed to a "mere",

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feature. We are simply to accept that this is so because the majority declares it to be so, citing *not* the actual statute and what it does, but instead the *Final Report* of the Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, 2016 (online), two federal reports, and excerpts from debates in the House of Commons (paras. 65-67). While these sources form part of the relevant backdrop, they are not a proxy for serious judicial scrutiny of the *Act* and, in particular, of Part 2 — the slightest attention to which reveals, as I have already described, that it does indeed have the potential to "take over the field of regulating GHG emissions" in the listed industries.

[329] The majority responds to this point by stating that *some* federal legislation — such as the legislation at issue in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), which allowed provinces to opt-in — does not necessarily apply nationally or create a minimum standard. Here, by contrast, the *Act* "applies in all the provinces at all times" (yet it is not a "blunt unified national system") (Chief Justice's reasons, at para. 81). This, says the majority, somehow legitimizes the inclusion of "minimum national standards" in its description of the *Act*'s pith and substance (para. 81). With respect, this misses the critical point. It is not that *all* federal legislation imposes minimum national standards, but rather that, by operation of paramountcy and the territorial limits of provincial jurisdiction, only Parliament *is capable* of imposing minimum national standards. The inclusion of "minimum national standards" in the pith and substance of a federal statute effectively decides the jurisdictional dispute. While, as I have explained, it can be appropriate to include reference to the legislative means in the pith and substance, it is entirely

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inappropriate to short-circuit the analysis by describing the means as something that only federal legislative authority can undertake.

[330] In short, and remarkably, the majority barely acknowledges that this idea of describing the pith and substance of a statute in terms of "minimum national standards" might be the least bit controversial, saying nothing to justify it, either generally or specifically. Indeed, in the face of objections thereto from the parties, and majority and dissenting judgments at the courts of appeal, one can only surmise that the majority does not wish to truly engage the point. This may well be because the device of "minimum national standards" allows the majority to effectively bypass several steps of their diluted reformulation of the test for the national concern branch from *Crown Zellerbach* — a subject to which I return below.

[331] A final point about "minimum national standards". Even if "minimum national standards" represented anything meaningful for our purposes, the fact remains that Part 2 of the *Act* imposes *no* explicit standards, whether "minimum" or "national". Rather, it allows the federal Cabinet to selectively impose an array of carbon prices on an array of different trade-exposed industries, with the stated goal of maintaining their international competitiveness and minimizing carbon leakage.

[332] The Attorney General of Canada's reference to "integral" standards also has no relevance to identifying the *Act*'s pith and substance. Determining whether the standards implemented through the *Act* are "integral" to reducing Canada's GHG emissions would require this Court to consider whether the standards set out in the *Act*

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are effective. Yet, as this Court has repeatedly maintained, "the efficacy of the law is not a valid consideration in the pith and substance analysis" (*Ward*, at para. 22). Indeed, "the wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial review" (*Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 425). Whether and to what extent any given standard is integral to reducing Canada's GHG emissions is a matter of policy that has no bearing on the constitutional question facing this Court.

[333] Without "minimum national standards" and "integral" to round out the characterization proposed by the Attorney General of Canada, we are left with "reducing nationwide GHG emissions" which — as a statement of *the goal* of the law without any reference to *the means* proposed to achieve it — obviously lacks the specificity necessary to enable classification. This Court's description of the *Act*'s subject matter should provide "an abstract of [its] content, instancing the subjects or situations to which it applies and the ways it proposes to govern them" (Abel, at p. 490). In order to determine whether the federal government can enact any particular GHG emission "standard of stringency", we must describe, concisely but precisely, how that standard operates.

[334] Turning to the Attorney General of British Columbia's proposed characterization, without "minimum national standards", we are left with "allocat[ing] part of Canada's targets for GHG emissions reduction". However, as the Attorney General of Alberta points out, it is difficult to accept that the *Act* allocates part of

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Canada's overall targets when it "neither sets nor allocates any targets" at all (R.F., at para. 45). The *Act* imposes a fuel charge and gives the federal Cabinet policy levers to set carbon prices by industry. This is an odd way to allocate emissions reduction targets.

[335] For these reasons, Canada and British Columbia's proposed characterizations of the *Act*'s pith and substance must be rejected. It is therefore necessary to analyze anew the purpose and effects of the law so as to characterize them appropriately.

(3) Purpose and Effects

[336] There is no real dispute about the *Act*'s purpose. Its broad aim is to reduce Canada's GHG emissions to mitigate climate change. More narrowly, the *Act*'s purpose is to change behaviour. Its preamble states that behavioral change "is necessary for effective action against climate change" and, further, that "the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change". The *Act* refers to Canada having made international commitments to reducing its GHG emissions.

[337] The difficulty with many of the submissions before us, however, including those of the Attorney General of Canada, is that they attempt to characterize the pith and substance of the *Act* as if Parts 1 and 2 were each doing the same thing in the same way. The majority's pith and substance analysis is based on the same premise (para. 71). This is both *inexplicable* and *superficial*. *Inexplicable*, because the two parts

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of the *Act* are not remotely similar to each other; Parliament could have set out each Part in its own statute. Indeed, doing so might have prompted the majority to consider the distinct operational features of each Part. And *superficial*, because it pays little attention to the regulations; where regulations have been passed, they can — and, here, *should* — be scrutinized to ascertain the true intent of the legislature (*Reference re Assisted Human Reproduction Act*, at para. 84). While Part 1 of the *Act* increases the cost of producing, delivering, using, or importing fuels that produce GHG emissions (which is expected to be passed on to consumers through an increase in the ultimate retail cost of those fuels), Part 2 does something quite different: it increases the cost of certain industrial activities by charging large facilities for producing GHG emissions over prescribed limits based on their particular industry and production processes. Part 2 also alleviates the impact of carbon pricing on *some* industries, but *not all*: the OBPS covers only the emissions-intensive trade-exposed industries that carry out an activity that the federal Cabinet chooses to list in the regulations. Picking winners and losers in this way is the stuff of industrial policy, not carbon price stringency.

[338] It becomes even more difficult to reconcile Part 2 with the notion of carbon price stringency when considering the effects of the *Regulations* themselves. My colleague Rowe J. has comprehensively reviewed the provisions in the *Act* that empower the federal Cabinet to make regulations, and I endorse his analysis, to which I add this. The current regulations impose varying carbon costs on the industries subject to the OBPS. The present *Regulations* establish, by my count, 78 separate output-based standards across 38 industrial activities. As these output-based standards depend on a

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chosen level of stringency (to be decided based on competitiveness and carbon leakage concerns), the output-based standards — and thus the average cost per tonne of GHG emissions — varies for each of these activities. For example, the 2019 Regulatory Impact Analysis Statement indicates that a stringency of 95 percent of the average emissions intensity is prescribed for iron, steel and cement production, which (with an excess emissions charge of $40 per tonne of carbon emissions in 2021) sets an average carbon cost of $2 per tonne; a stringency of 90 percent is prescribed for refineries and petrochemical production, setting an average carbon cost of $4 per tonne; and a stringency of 80 percent is prescribed for mining, potash and bitumen production and upgrading, setting an average carbon cost of $8 per tonne (*Canada Gazette*, Part II, vol. 153, No. 14, July 10, 2019, at pp. 5387-88 and 5391).

[339] I stress Part 2 here because, in analysing the scale and sweep of discretion granted to the federal Cabinet under Part 2 of the *Act*, the majority vastly understates what Part 2 actually does. For example, after referring to the federal Cabinet's power under Part 2 to regulate and issue orders that take it deep into matters of industrial policy, the majority says that, like in Part 1, "no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country" (para. 76). But this ignores the detailed regulation-making powers in Part 2, including the federal Cabinet's discretion to set — on an industry-by-industry basis — output-based pricing standards under the *Regulations*, and to select which industries are exempt from having to pay the Part 1

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fuel charge so as to preserve their international competitiveness. Rather than establish minimum national standards, therefore, it seems more correct to say that the *Act* empowers the federal Cabinet to establish variable and inconsistent standards for an array of different industrial activities.

[340] It follows from the foregoing that the pith and substance of Parts 1 and 2 of the *Act* ought to be characterized separately. And it also follows from the foregoing that the pith and substance of Part 1 of the *Act* is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 of the *Act* is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

B. *Classification*

[341] I now turn to determining the class of subjects — that is, the heads of power under our Constitution — to which each of the enactment's two dominant subject matters belongs. While the Attorney General of Canada and my colleagues in the majority have rushed directly to consider whether the *Act*'s dominant subject matter fits within the national concern branch of POGG, doing so is unsound as a matter of constitutional methodology: generally, courts should look *first* to the enumerated powers, resorting to the residual POGG authority only if necessary (*Hydro-Québec*, at para. 110, per La Forest J.; see also Hogg, at pp. 17-4 to 17-7; and D. Gibson, "Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 17).

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(1) Provincial Jurisdiction

[342] It must be remembered that the *Act*'s entire scheme is *premised* on the provinces *having* jurisdiction to do precisely what Parliament has presumed to do in the *Act* — that is, to impose carbon pricing through a comparable scheme.

[343] Provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as, of course, the law of property and of contracts (Hogg, at pp. 21-2 to 21-3 and 21-8 to 21-10; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 110; Lederman, at pp. 603-4). Indeed, as I have explained, the *Act* operates as a backstop, operating only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet.

[344] The majority acknowledges the importance of s. 92(13), emphasizing its importance for Quebec. Ironically, as I shall explain below, that importance is reinforced by *Quebec*'s conspicuous absence from s. 94's provision for the uniformity of laws governing property and civil rights — an important feature of the terms on which Quebec entered Confederation, and which the majority ignores. Further, the majority's meager appreciation of s. 92(13)'s significance is made evident *both* by the

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majority's description of it as a tool merely for preserving "regional and cultural diversity" (para. 210), *and* by the hard reality that, under this legislation, the authority of Quebec and the other provinces under s. 92(13) is now subordinate to federal authority. To announce that the new national concern test invented by the majority is both "rigorous" and a "meaningful constraint" on federal power does not make it so (para. 210). With respect, and as I shall also explain, the majority's new test, far from constraining federal authority, instead enables it to encroach on provincial authority, notably that under s. 92(13).

[345] The provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorise Parts 1 and 2 of the *Act* in the alternative (Hogg, at pp. 21-4 to 21-5).

[346] Part 2 of the *Act*, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 of the *Act* — with its emphasis on heavy industrial emitters, trade exposure, and international competitiveness — is s. 92A. This head of power gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation, and management of non-renewable natural resources in the province. Though not intended to derogate from the existing powers of Parliament, the resource amendment fortifies the pre-existing provincial powers in this area and gives the provinces indirect taxation powers, and greater control over, their natural resources (W. D. Moull, "Section 92A of the Constitution Act, 1867" (1983),

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61 *Can. Bar Rev.* 715, at p. 716; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at pp. 375-77; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 84).

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[347] The foregoing identification of several areas of provincial legislative authority over the dominant subject matter of a federal statute should — and, as a matter of this Court's constitutional methodology, *always has* — led this Court to the conclusion that the statute is *ultra vires* Parliament (barring application of the double aspect or ancillary powers doctrines). As McLachlin C.J. wrote for the majority in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 19,

> [t]he first step in determining the validity of the amendments brought by by-law No. 260 is to identify their dominant characteristic. This is known as the "matter" of the legislation. Once the matter of the legislation has been determined, the next step is to assign this matter to one or more heads of legislative power. If the matter comes within one of the heads of power allocated to the provinces under the *Constitution Act, 1867*, then the impugned law is valid. If it does not, then the court must consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers. [Emphasis added; citations omitted.]

[348] And so, in this case the identification of several applicable provincial heads of power should truly be the end of the matter. This is because all such heads of power, including those I have just identified as applicable here, are, by the terms of s. 92 (and s. 92A(1)), matters over which provincial legislatures "may exclusively make Laws". And, by the terms of s. 91, the POGG power applies only "in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". While the constitutional text of "not coming within the

Classes of Subjects . . . assigned exclusively to . . . the Provinces" is recounted in passing by my colleagues in the majority, they give it no consideration (Chief Justice's reasons, at para. 89). Instead, they offer up bromides about the need to "maintain the autonomy of the provinces and respect the diversity of Confederation" (paras. 4, 48-50 and 89-90) — which assurances are belied by majority judgment's eliding of clear constitutional text that was intended to maintain that very provincial autonomy and diversity. The objection, therefore, remains unanswered: the *exclusivity* of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of our Constitution who were concerned about federal overreach via the POGG power — a concern, until now, shared by this Court.

[349] The language of "peace, order, and good government" (often in the form of "peace, welfare, and good government", or "welfare, peace, and good government") was frequently included in Imperial constituting documents long before the *Constitution Act, 1867* (appearing, for example, in the *Royal Proclamation 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1); the Commission appointing James Murray, Captain General and Governor in Chief of the Province of Quebec, November 21, 1763 (reproduced in *Sessional Papers*, vol. XLI, 3rd Sess., 10th Parl., 1907, No. 18, at p. 128); the *Quebec Act, 1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2); *An Act for the better regulating the Government of the Province of the Massachuset's Bay in New England* (G.B.), 1774, 14 Geo. 3, c. 45; the *Constitutional Act, 1791* (G.B.), 31 Geo. 3, c. 31 (reproduced in

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R.S.C. 1985, App. II, No. 3); *An Act to make temporary Provision for the Government of Lower Canada* (U.K.), 1838, 1 & 2 Vict., c. 9; the *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35 (reproduced in R.S.C. 1985, App. II, No. 4); *An Act to provide for the Government of British Columbia* (U.K.), 1858, 21 & 22 Vict., c. 99; and the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63). (See, generally, S. Reid and M. Scott, *Interpretative note on the terms "Peace, order and good government" and "Peace, welfare and good government"*, April 7, 2020 (online).)

[350] What is different, however, about s. 91 of the *Constitution Act, 1867* is the caveat that laws made under the POGG power may "not com[e] within the Classes of Subjects . . . assigned exclusively to . . . the Provinces". While the above-listed constitutional documents all contain *a* caveat, it was to the effect that the law-making power being conferred should not be exercised in a manner inconsistent with the laws of the Imperial Parliament. For example, the *Royal Proclamation* cautioned that laws enacted for the "Peace, Welfare, and good Government" should be "as near as may be agreeable to the Laws of England". But our Constitution imposed a new kind of caveat, by its terms clearly designed to preserve the integrity of provincial legislative authority. And it makes clear that the federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but *exclusively so*. Hence the constitutional impossibility of the *Act*'s backstop model: if the provinces *have* jurisdiction to do what the *Act* does — and, that is, again, the very premise of the

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Act's scheme — then the *Act* cannot be constitutional under the national concern branch of POGG.

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[351] Again, my colleagues in the majority do not grapple with this fundamental objection, despite accepting that the provinces have the jurisdiction under ss. 92(13) and (16) and 92A to do precisely what the *Act* does (para. 197). Instead, they accept the submissions of the Attorneys General of Canada and of British Columbia that *something else* is going on here, that *some aspect* of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction which can be regulated by Parliament under the POGG residual authority over matters of national concern. While these submissions are premised on what I have explained is an inadequate description of the pith and substance of the *Act*, I now turn to show that this view is unsustainable on this Court's jurisprudence.

(2) The National Concern Branch of POGG

(a) *Defining the Matter of National Concern*

[352] The Attorneys General of Canada and British Columbia urge us to find that their proposed characterizations of the pith and substance of the *Act* are one and the same as the matters of national concern falling under the POGG power. This point reveals a lack of clarity in the jurisprudence, stemming from the particular way in which the division of powers analysis proceeds under POGG relative to the enumerated heads of power under s. 91. As I have explained, where an enumerated head of power is relied

upon, the pith and substance of the impugned law is identified at the characterization step (for instance, "enhancing public safety by controlling access to firearms through prohibitions and penalties" in *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 4), and that pith and substance is then classified under a head of power or class of subjects (in that case, the criminal law power in s. 91(27)).

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[353] The analysis proceeds somewhat differently, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and after deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction. The question arises, however, whether the pith and substance of the impugned legislation should or can be *coextensive* with the matter of national concern, or whether the matter of national concern should or can be *broader* than the pith and substance of the legislation. The POGG jurisprudence offers little guidance on this point. The cases have described the matters of national concern both broadly (as in *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics) and *Ontario Hydro* (atomic energy)) and narrowly (as in *Munro v. National Capital Commission*, [1966] S.C.R. 663 (the development, conservation and improvement of the National Capital Region in accordance with a coherent plan)), depending on the particular question to be resolved. What the cases have not done — with the possible exception of *Crown Zellerbach* — is include, within the description

of the matter of national concern, the *legislative means* of the particular statute under review. (In *Crown Zellerbach*, the matter of national concern is described at p. 436 as both "[m]arine pollution" *and* "the control of marine pollution by the dumping of substances", although later cases have described the matter of national concern identified in *Crown Zellerbach* as only "marine pollution", without the additional reference to legislative means: see *Hydro-Québec*, at para. 115, and *Friends of the Oldman River Society*, at p. 64.)

[354] As a general proposition, if a proposed matter of national concern is described more narrowly — for instance, by including legislative means — it will be easier for that matter to qualify under the test for applying the national concern doctrine stated in *Crown Zellerbach*. This is because, again generally, it is easier to demonstrate that a narrowly defined matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. And, of course, the narrower the matter, the less the impact on provincial jurisdiction. The majority accepts the proposition that identifying the matter of national concern is simply a matter of identifying the pith and substance of the statute under review, which can, as here, include legislative means. Indeed, the majority says it *must* be so; one must always be the same as the other (paras. 115-16). But accepting this view effectively confines Parliament to that particular legislative means in responding to the matter of national concern. This would be unprecedented and undesirable. The arguments of the Attorneys General of Canada and of British Columbia illustrate this point.

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[355] The Attorney General of Canada urges us to find that the matter of national concern to be recognized under POGG is precisely the same as its proposed pith and substance of the law, namely, "establishing minimum national standards integral to reducing nationwide GHG emissions". The Attorney General of British Columbia similarly urges us to accept the matter of national concern in the same terms as his proposed pith and substance of the law: ". . . establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction". To be clear, then, each of these submissions couple a description of *the legislative means* (minimum national standards) with *the purpose* of the law.

[356] Considering first the Attorney General of Canada's proposed matter of national concern, I have already explained that it is not a court's place to consider whether regulatory measures are "effective" or "integral". Doing so is no more appropriate at the classification step than it is at the characterization step — and, in any event, the efficacy of legislation is irrelevant to distinguishing an area of distinctly federal jurisdiction from that of provincial jurisdiction. What is of greater significance here is the invocation, common to the proposals of the Attorney General of Canada and the Attorney General of British Columbia, of "minimum national standards". As I have also explained, when used to characterize the pith and substance of the *Act*, this phrase is empty and misleading, and it can be rejected for that reason alone. But reliance upon "minimum national standards" is even less tenable as a proposed matter of national concern. Indeed, its acceptance as such would work pernicious effects on federalism.

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[357] By way of explanation, the Attorney General of Canada urges us in his factum to find that a matter formerly under provincial jurisdiction is "transformed" (*how*, he does not say) into a matter of national concern when "minimum national standards" are invoked. This is simply not possible. Were it so, Parliament could unilaterally create an area of distinctly federal jurisdiction from matters that fall within exclusive provincial jurisdiction simply by doing the very thing that exclusive provincial jurisdiction was intended to preclude: legislating a national standard in respect of that matter. So understood, *every* subject matter listed under s. 92 of the *Constitution Act, 1867* could be viewed as having a national component. The possibilities are endless: "minimum national standards" governing hospital and health care administration; "minimum national standards" governing the availability of bilingual municipal services; "minimum national standards" governing the location or construction of hydroelectric generating stations; "minimal national standards" of second-language education in public schools; or "minimum national standards" governing the content of public school courses in 18th century Canadian history.

[358] For this to serve as a basis for recognizing that *some aspect* of an area of provincial jurisdiction is truly and distinctly "national" in scope, and therefore actually lies *outside* provincial jurisdiction, "is to create something out of nothing and to subject every area of provincial jurisdiction to the potential setting of national standards that denude provincial power" (D. Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019), 82 *Sask. L. Rev.* 187, at p. 199). It represents a model of *supervisory* federalism. This is all but acknowledged by my majoritarian colleagues who, in minimizing the

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Act's effects on provincial authority, *repeatedly* stress that provinces are "free" to "implement their own GHG pricing mechanisms", to "prescribe any rules for provincial pricing mechanisms", to "design and legislate any GHG pricing system", or to "design any GHG pricing system they choose" — but *then* adding, *every time*, the caveat "**as long as**" (or "**provided**") they are "**sufficiently** stringent" to meet "the federally-designated standards", or "targets" (paras. 27, 61, 65, 72, 79, 81, 178, 179, 183, 186, 200 and 206 (emphasis added)). In other words, the provinces can exercise their jurisdiction however they like, *as long as* they do so in a manner that the federal Cabinet also likes. And yet, "[e]nsuring provincial compliance with Parliament's wishes" is hardly an appropriate basis for recognizing a new matter of national concern (J. Hunter, "Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern" (2021), 100 *S.C.L.R.* (2d) 59, at p. 79).

[359] Much the same can be said about British Columbia's submission that "allocat[ing] part of Canada's targets for GHG emissions reduction" is an appropriate matter of national concern. As I have already explained, this is not an accurate description of the pith and substance of the *Act*. More to the point, however, the notion of allocating national *targets* encounters the same objection as Canada's minimum national *standards*: it is an artifice which, once grafted onto matters that are plainly of provincial jurisdiction (as the backstop scheme of the *Act* itself contemplates) adds nothing. And like minimum national standards, it can be applied to open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides

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to legislate uniform treatment in the form of mandatory, national "targets". In this sense, there is no difference between Parliament legislating national standards and legislating national targets.

[360] British Columbia responds to this concern by raising the provincial inability test, coupled with a submission that, in most areas of provincial jurisdiction, there is no need for Parliament to interfere by enacting national targets. This is because, the argument goes, provincial legislation on such matters — for instance, education — has primarily *intra*-provincial impacts, such that the costs and benefits of the legislature's policy choice are felt principally within the province. Education is therefore said to be unlike GHG emissions, since minimum national standards in education "would not indivisibly address a provincial inability" (A.F., Attorney General of British Columbia, at para. 49).

[361] But this submission misconceives the proper focus of the provincial inability test, a subject to which I will return below. For now, it suffices to observe that the existence of extra-provincial impacts does not mean that uniform legislative treatment is truly *essential* — as is made clear by considering, with reference to *Anti-Inflation*, the extra-provincial inflationary impacts of intra-provincial economic activities. It hardly seems likely that a similarly imaginative argument in that case about imposing "minimum national standards" or "allocating national targets" related to the containment and reduction of inflation would have moved Beetz J. from his conclusion that inflation was inappropriate as a matter of national concern.

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[362] More fundamentally, I reject the idea that adding "minimum national standards" or the "allocation of nationwide targets" to a proposed matter creates or identifies a distinctly federal aspect of that matter. On this point, various parties invoked the concept of "systemic risk", borrowed from the securities references — as indeed does the majority (at paras. 176 and 182) — to support a finding that the proposed matter met the requirements of the provincial inability test. In the *2011 Securities Reference*, this Court accepted that federal securities legislation engaged trade as a whole (as is required under the trade and commerce power), but nevertheless found that the law went too far by delving into "detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial" (para. 114 (emphasis in original)). A more focussed law that was "limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada's financial system" was later upheld in the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 ("*2018 Securities Reference*") because "the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular" (para. 111 (emphasis in original)).

[363] The submission that the proposed matter is suitable as a matter of national concern because it addresses the systemic risks of climate change has superficial appeal. But this ignores fundamental differences between the respective analyses under the POGG national concern doctrine and under the s. 91(2) trade and commerce power. The federal power to regulate trade and commerce has no requirement for singleness,

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distinctiveness and indivisibility. On the contrary, subjects like competition law or systemic risk to capital markets can be diffuse and permeate the economy as a whole, and yet still validly fall under the federal trade and commerce power (see, for instance, para. 87 of the *2011 Securities Reference*, which discusses the diffuse nature of the competition law that was at issue in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641). "Systemic risk" is, therefore, an ill-fitting concept to borrow from the s. 91(2) analysis.

[364] Finally, I note that, in advancing an expansive national concern doctrine so as to augment federal power, both the Attorney General of Canada and the majority rush past s. 94 of the *Constitution Act, 1867*, which provides that "the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights". As that section makes clear, the Constitution already contemplates that Parliament might wish to enact uniform laws related to property and civil rights in the provinces, as it does by the *Act*. But s. 94 also imposes certain constraints: it does not apply to Quebec and, in the provinces where it does apply, it requires the consent of the provincial legislatures.

[365] In other words, in bypassing s. 94 so as to embrace their centralized vision of Canadian federalism, both the Attorney General of Canada and the majority would (1) strip Quebec of its protection from federally imposed uniformity of laws relative to property and civil rights, and (2) write out of the Constitution the requirement for provincial consent elsewhere. This deprives the provinces, and Quebec in particular, of

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part of the bargain negotiated among the partners, without which "the agreement of the delegates from Canada East . . . could [not] have been obtained" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 36-37). As the Privy Council recognized more generally in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 361, s. 94 "would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole".

[366] It is no simple matter to tinker with the Constitution. This is why that task is left by the amending formula to legislatures, who can deliberate upon the complexities in depth, and not to courts which lack the necessary institutional competencies to navigate those complexities — as here, where, by engorging federal power as it does under the residual POGG power, the majority not only risks doing violence to s. 92 (and, for that matter, to s. 92A), but also trips over s. 94.

[367] This goes to a more fundamental point. As I will discuss below, both the Attorney General of Canada and the majority speak of a "balance" — the Attorney General of striking a "balance of federalism", and the majority of a "federal-provincial balance" (R.F., at para. 69 (emphasis deleted); Chief Justice's reasons, at paras. 102, 117 and 134). But what my colleagues in the majority do not appreciate is that they are *undoing* a balance. And that is because, as difficult as it may be for them to accept, the "balance" that *they* presume to strike, and that *they* would have *the judiciary* strike in

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future cases, has *already been struck* by Part VI of the *Constitution Act, 1867* ("Distribution of Legislative Powers"). The role of the courts is *not* to *strike* a balance, but *to maintain and preserve* the balance that is already recorded by our Constitution in its division of powers. As this Court wrote in *Reference re Firearms Act*, "it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power" (para. 48 (emphasis added)). Section 94, like ss. 91 and 92, is part of a larger package that itself, and as a whole, reflects a "balance" that was agreed to by both the federal and provincial levels of government or their colonial predecessors.

[368] Of course, re-balancing may occasionally be desirable or necessary — hence, for example, the negotiations that led to s. 92A, and hence certain particulars of the amending formula. But when that need arises, *if* it arises, it is not in the gift of either the Attorney General of Canada or of the Court to meet it. Indeed, their attempting to do so simply upsets the balance — by, as here, effectively stripping Quebec of an immunity held for over 150 years under the Constitution of Canada, which immunity protected, among other things, Quebec's rights to the use of civil law in private matters, guaranteed nearly 250 years ago by the *Quebec Act*.

[369] For all these reasons, the matters of national concern proposed by the Attorneys General of Canada and British Columbia are constitutionally untenable. While it is unnecessary to resolve here the question of whether a newly recognized matter of national concern under POGG can ever be so narrowly defined to encompass

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only the pith and substance of the impugned law (and including the legislative means), I offer the following observations. As noted by Huscroft J.A., in dissent, describing the new matter of national concern so narrowly in effect constitutionalizes the law under review, and the particular means it adopts (2019 ONCA 544, 146 O.R. (3d) 65, at para. 224). It also risks the analysis devolving into results-oriented thinking, which must be avoided in the division of powers analysis (*Chatterjee*, at para. 16). Further, *Crown Zellerbach* suggests that the broader approach is appropriate. Recall that once a matter is recognized to be of national concern under POGG, Parliament is granted an "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (para. 433). This language suggests that, in relation to a matter of national concern, Parliament is granted a scope of jurisdiction — and the ability to employ means — beyond that specifically contemplated by the law under review.

[370] All this said, I decline to conclude that, as a general proposition, it would never be appropriate to describe a matter of national concern so narrowly as to encompass only the law under review and the legislative means it employs. Still, in the case at bar, a broad characterization of the national concern is unavoidable. Defining a matter of national concern that encompasses *both* the reduction of GHG emissions by raising the cost of fuel (Part 1) and the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) requires broad strokes. The legislative means employed by Parts 1 and 2 are mutually distinct. Indeed, each is quite different from the other,

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sharing only a purpose: the reduction of GHG emissions. This, and my conclusion stated above that the definition of the matter of national concern should not tie Parliament to a particular legislative means, tend to support the identification of the matter said to be of national concern as the purpose of the *Act*: *the reduction of GHG emissions*. The only remaining question, then, is whether the reduction of GHG emissions satisfies the test stated in *Crown Zellerbach* for a valid national concern.

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(b) *Singleness, Distinctiveness and Indivisibility*

[371] "The reduction of GHG emissions" does not meet the requirements of *Crown Zellerbach*. This would be so, even if it were appropriate to consider each of the pith and substance of Parts 1 and 2 as proposed matters of national concern, since the reduction of GHG emissions by raising the cost of fuel (Part 1) and by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) each fail to meet the requirement of distinctiveness. Neither of these matters is distinct from matters falling under provincial jurisdiction under s. 92. I begin, therefore, by considering why the pith and substance of each of Parts 1 and 2, respectively, fail to meet the requirement of distinctiveness (even if they were appropriate matters of national concern). Then, I consider why the proper matter of national concern as I understand it ("the reduction of GHG emissions") fails to meet the requirements of singleness and indivisibility.

(i) <u>The Pith and Substance of Each Part Is Not Distinct</u>

[372] Here again, the backstop model of the *Act* is of significance. The principal difficulty in finding that the reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) has the requisite distinctiveness to be recognized as a matter of national concern is illustrated by the very quality of the scheme that Parliament has legislated. Through the *Act*, Parliament encourages provinces to enact substantially *the same* scheme to serve *the same* regulatory purpose of altering behaviour. Again, this demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority, specifically, ss. 92(10) (local works and undertakings), (13) (property and civil rights), (16) (matters of a local nature) and 92A (natural resources). The *Act*'s backstop scheme admits of no other conclusion (Newman, at p. 197). This is much like *Hydro-Québec*, where the legislation contained no opt-out for the provinces, but rather empowered the Governor in Council to exempt provinces that had equivalent regulations in force (para. 57, per Lamer C.J. and Iacobucci J., dissenting, but not on this point). The observations of Lamer C.J. and Iacobucci J. on this point are therefore apposite:

> The s. 34(6) equivalency provision also implicitly undermines the appellant's submission that the provinces are incapable of regulating toxic substances. If the provinces were unable to regulate, there would be even more reason for the federal government not to agree to withdraw from the field. Section 34(6) demonstrates that the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible. [para. 77]

[373] Proponents of the *Act* urge us to find that, even if the *Act* and provincially legislated GHG pricing schemes address the same matter, they each address different

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aspects of that matter. This argument rests on the applicability of the double aspect doctrine, whose application here the majority not only accepts but describes as *inevitable* whenever minimum national standards are employed (Chief Justice's reasons, at paras. 125-31). But the majority is simply wrong — the double aspect doctrine has no application here.

[374] The double aspect doctrine arose because "some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 30). It therefore contemplates that "both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various 'aspects' of the 'matter' in question" (para. 30). Whether the doctrine applies to the national concern doctrine of POGG is a question of some controversy, given this Court's statement in *Crown Zellerbach* that Parliament acquires "exclusive jurisdiction of a plenary nature to legislate in relation to" the matter of national concern (p. 433; see, for instance, *Lacombe*, at paras. 26-27). Assuming without deciding, however, that the double aspect doctrine may, in some instances, apply to matters of national concern recognized as such under POGG, it has no application here.

[375] As the provinces clearly have jurisdiction to establish standards of GHG price stringency in the province, this leaves as the only difference between the federal aspect and the provincial aspect "minimum national standards". Obviously, adopting

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"minimum national standards" as part of the matter of national concern allows the majority to invoke the double aspect doctrine, since it has defined the matter in terms of something (enacting "national standards") which, as a practical matter, only Parliament could possibly do. And just as obviously, when the matter is defined in terms of something only Parliament could possibly do, *whatever it is* that the provinces are doing *must* be *something different*. This reasoning, however, could easily be applied to create federal "aspects" of all sorts of matters falling within provincial jurisdiction. Indeed, the majority suggests *just that*, acknowledging that whenever the device of "minimum national standards" is used, a double aspect "will inevitably result" (para. 129).

[376] The device of minimum national standards, combined with the double aspect doctrine, artificially meets many aspects of the *Crown Zellerbach* test, as diluted by the majority. By definition, "minimum national standards", being *national*, would presumably, and in every case, qualify as "qualitatively different from matters of provincial concern" and as "predominantly extraprovincial . . . in character" (Chief Justice's reasons, at para. 148). And, of course provinces, being provinces, are *unable* to establish binding minimum national standards (para. 182). Further, because the *Act* leaves the provinces free to adopt their own schemes *as long as* (or *provided*) they meet federal approval, the impact on provincial jurisdiction is "qualified and limited" (paras. 198, 205 and 211). In short, the device of "minimum national standards", where applied, deprives the majority's framework of much of its "exacting" quality.

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[377] It is, however, this simple. While the double aspect doctrine "allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction*" (*2011 Securities Reference*, at para. 66 (underlining added)). Like the POGG power itself, the double aspect doctrine must be carefully constrained and applied with caution, because its casual and undisciplined application in the majority's reasons runs the near-certain risk that ss. 91 and 92 of the *Constitution Act, 1867* will be merged into a "concurrent field of powers governed solely by the rule of paramountcy of federal legislation" (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766). It was for this very reason, in *Bell Canada*, that Beetz J. cautioned that the doctrine "must not be [used] to create concurrent fields of jurisdiction . . . in which Parliament and the legislatures may legislate on the same aspect"; rather, it must be applied only "where the multiplicity of aspects is real and not merely nominal" (p. 766 (emphasis in original)).

[378] Nearly all of the parties and intervenor Attorneys General — aside from the Attorneys General of Canada, New Brunswick and British Columbia — expressed concerns about the application of the double aspect doctrine here. The Attorney General of Quebec offers a particularly compelling and constitutionally sound encapsulation of the problem with the majority's invocation of the double aspect doctrine in this case, and of the damage to the federation that will follow. The Attorney General of Quebec — no stranger to carbon pricing and legislative action to mitigate climate change — says that the proposed matter does not contemplate two aspects of the same matter; rather, it contemplates the same aspect of the same matter. And because the provinces

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may legislate in this area only where such legislation meets the criteria unilaterally set by the federal government, defining the matter so as to artificially conjure a double aspect effectively amounts to a *transfer of jurisdiction* from the provinces to the federal government. This was, of course, also the point of the majority of the Court of Appeal of Alberta: the *Act* purports to do exactly what *the provinces* can do, and for precisely the same reason (2020 ABCA 74, 3 Alta. L.R. (7th) 1, at para. 209). There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. And describing the imposition of "minimum national standards" as the distinctly federal aspect of the matter simply brings us back to the arguments that, as I have already explained, get the Attorney General of Canada nowhere. Since such matters fall squarely within provincial jurisdiction, they cannot be matters of "national concern", given that POGG is a residual power.

(ii) "The Reduction of GHG Emissions" Is Not Single or Indivisible

[379] It is, of course, true that *aspects* of "the reduction of GHG emissions" may be distinct from matters listed in s. 92. Like "inflation" or "the environment", its nature is inherently diffuse, and it therefore would not *entirely* fall within provincial jurisdiction. Aspects of "the reduction of GHG emissions" would likely come within, for instance, exclusive federal powers over trade and commerce, navigation and shipping, and interprovincial or international works and undertakings (ss. 91(2) and (10) and 92(10)).

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[380] But this is of no assistance to the majority here. While aspects of "the reduction of GHG emissions" may be distinct from matters falling under s. 92, as a matter of national concern it still fails to meet the *Crown Zellerbach* requirements of singleness and indivisibility. In *Crown Zellerbach*, it was "not simply the possibility or likelihood of the movement of pollutants across [the boundary between the territorial sea and the internal marine waters of a state]", but "the difficulty of ascertaining by visual observation" that boundary that meant uniform legislative treatment was required for marine pollution (p. 437). This proposition could not be clearer. The matter was indivisible in that case *not* because pollutants might cross an invisible boundary; rather, the matter was indivisible because of the difficulty of knowing the source and physical location (federal territorial seas vs. provincial inland waters) of the pollution at any given time, and therefore whose regulatory and penal provisions might apply.

[381] Here, however, the territorial jurisdiction from which GHG emissions are emitted is readily identifiable. The matter is divisible, because whenever fuel is purchased, or an industrial activity is undertaken, no question arises as to physical location and, therefore, no difficulty arises in identifying whose jurisdiction might apply. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of such emissions. This is not a concern which, absent exclusive federal jurisdiction, the provinces could not address. Rather, both Parliament and the provinces may within their respective spheres of legislative authority "operate in tandem" to reduce GHG emissions (*Hydro-Québec*,

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at para. 59). The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern.

[382] My majoritarian colleagues say that I have overstated the regulatory uncertainty aspect of Le Dain J.'s reasoning in *Crown Zellerbach*. They say that there are many routes to establishing indivisibility (at para. 193), and I agree, as does my colleague Rowe J. (see para. 548). My point is not that regulatory uncertainty is a precondition to finding a matter of national concern. Rather, it is that, where the matter in question otherwise lacks specificity and unity — as is the case here, where the matter under consideration is the reduction of GHG emissions, as opposed to, for instance, the matter in *Munro* — the fact that harms may cross borders is not enough to make out indivisibility. Something more is required, and in *Crown Zellerbach*, that was the regulatory and penal uncertainty stemming from an inability to know the jurisdiction in which the pollution had been dumped (p. 437), since the crane depositing the woodwaste in that case was mobile, fixed as it was on a scow. That uncertainty is absent here, and so relying on cross-border harms is simply not enough to make out indivisibility. The emission of GHGs, whether from a factory or an automobile, can be connected to the source province. GHG emissions are therefore *divisible*. This understood, "nationwide GHG emissions" are nothing more than the sum of provincial and territorial GHG emissions (Hunter, at pp. 75-76).

[383] Of course, uniform legislative treatment in the area of GHG emissions reduction might be *desirable*, as it might assist Canada in meeting its international

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commitments in relation to GHG emission targets. But the desirability of uniform treatment is hardly the marker of a matter of national concern. Here, the non-participation of one province does not prevent any other province from reducing its own GHG emissions. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is *precisely* what this Court held was insufficient to meet the requirement of indivisibility in *Crown Zellerbach*. To be clear, even if this *could* be said to meet the provincial inability test — that is, even if *Crown Zellerbach* could be read as understanding "provincial inability" as including a provincial failure to act — my conclusion on this point would not change. This is because, properly understood — and contrary to the framework developed by the majority — the provincial inability test is but one indicium of singleness and indivisibility.

[384] Further, I agree with the majority at the Court of Appeal of Alberta, at para. 324, that

> there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. . . . The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries. Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world's GHG emissions.

[385] Obviously, uniform legislative treatment might be desirable in that it could alleviate concerns about carbon leakage. But, and again as the Court of Appeal of Alberta observed, the evidence on this record of the harms of interprovincial carbon

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leakage is equivocal at best. Indeed, it tends to suggest that, in most sectors and for most provincial economic activity, such concerns are insignificant (E. Beale, et al., *Provincial Carbon Pricing and Competitiveness Pressures*, November 2015 (online), at p. II; Working Group on Carbon Pricing Mechanisms, *Final Report*, fn. 23; Sask. C.A. reasons, at para. 155, per Richards C.J.S.). This falls well short of establishing the majority's peremptory assertion that uniform treatment is *essential* to address carbon leakage concerns (paras. 183 and 186). And in the absence of actual evidence on this point, the majority's implicit proposition that Part 2 of the *Act* is *desirable* to address concerns about carbon leakage asks us to judge the *wisdom* of this particular policy choice, something that has no bearing on the analysis.

[386] In sum, the reduction of GHG emissions as a matter of national concern fails to meet the requirements of singleness and indivisibility. Like the containment and reduction of inflation, the reduction of GHG emissions

> is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.
>
> (*Anti-Inflation*, at p. 458)

(c) *Scale of Impact*

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[387] Even *were* the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers.

[388] The power to legislate to reduce GHG emissions effectively authorizes an array of regulations, "the boundaries of [which] are limited only by the imagination" (Sask. C.A. reasons, at para. 128). It extends to the regulation of any activity that requires carbon-based fuel, including manufacturing, mining, agriculture, and transportation. Indeed, Part 2 of the *Act*, much like the impugned law in the *2011 Securities Reference*, descends into the detailed regulation of industrial GHG emissions reduction by imposing different carbon prices on different industrial activities. As Huscroft J.A. recognized, in dissent, the power to create minimum standards for GHG emissions could potentially authorize minimum standards related to home heating and cooling, public transit, road design and use, fuel efficiency, manufacturing and farming prices (Ont. C.A. reasons, at para. 237).

[389] Unlike previously recognized matters of national concern, including aeronautics, the development and conservation of the national capital region, atomic energy and marine pollution, the power to legislate to reduce GHG emissions has the potential to undo Canada's division of powers. It is in this respect comparable to the broad topics of environmental regulation and inflation, which this Court has expressly refused to recognize as independent legislative subjects. GHG emissions simply cannot be treated as a single regulatory matter, "because no system in which one government

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was so powerful would be federal" (D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85).

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[390] In an attempt to minimize the scale of impact on provincial jurisdiction, the Attorney General of British Columbia reminds us that the *Act* does not forbid any *activity*, but only increases the *cost* of certain activities. The *Act*, he argues, is not about regulation, but pricing; it does not allow the federal Cabinet to determine *who* may emit GHGs or set *conditions* on how they do it, but rather allows anyone to emit GHGs if they pay for it (A.F., at paras. 19-21). It follows, on this reasoning, that any impact on provincial jurisdiction is minimal, particularly compared to what it might have been had Parliament resorted to its criminal law power, for instance, to prohibit GHG emissions.

[391] The majority adopts this line of argument, describing "establishing minimum national standards of GHG price stringency to reduce GHG emissions" as an exclusively "pricing-based formulation" of the *Act*'s pith and substance (para. 57). As it explains, "the focus of the [*Act*] is on national GHG pricing" (para. 60; see also para. 70). In so concluding, the majority stresses that "the [*Act*] does not require those to whom it applies to perform or refrain from performing specified GHG emitting activities", or "tell industries how they are to operate in order to reduce their GHG emissions" (para. 71). Rather, it says, the *Act* simply "require[s] persons to pay for engaging in specified activities that result in the emission of GHGs" (para. 71) — in other words, "just paying money".

[392] This view ignores two problems. First, "just paying money" is an odd way of describing the impact of a law. The *goal* of the financial charges — "just paying money" — is *to influence behaviour*, in this case both consumer and industrial. And that is precisely the point. As Canada's Ecofiscal Commission observed during oral submissions, Part 2 of the *Act* "uses pricing to achieve its environmental goals" (transcript, day 2, at p. 77). Further, poised as they are to affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed industries, the charges imposed by the *Act* stand to have a profound effect on provincial jurisdiction and the division of powers.

[393] The point is that "just paying money" hardly captures the intended impact of the *Act*, let alone its potential impact. And yet, this is central to the efforts of the *Act*'s proponents, including the majority, to downplay what the law actually does. Indeed, the majority takes matters even further, by stressing how minimally, in its view, the *Act* actually impacts provincial autonomy. Provinces, observes the majority, may still choose any type of carbon pricing regime they wish. "[F]lexibility and support for provincially designed GHG pricing schemes" remain the order of the day, and provinces are "free to design and legislate any GHG pricing system" they wish, "**as long as**", of course, their schemes are "sufficiently stringent" and meet the federally-designated standards (Chief Justice's reasons, at paras. 79 and 200 (emphasis added)). This leads to an impact on provincial jurisdiction that is, in their view, "strictly limited" (para. 200). This, like the flawed idea that the *Act* is just about paying money

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— as opposed to the discouragement or prohibition of an activity — informs much of the majority's classification analysis. It is simply unsustainable.

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[394] The second problem with the "just paying money" line of defence is that the contrasting degree of potential impact on provincial jurisdiction of a hypothetical law validly promulgated under Parliament's criminal law power, or its taxation power for that matter, has absolutely no bearing on whether another matter should be recognized as a matter of national concern. Contrary to the submissions of the Attorneys General of Canada and British Columbia at the hearing of these appeals, the Constitution does not require provinces to happily accept a severe intrusion on their jurisdiction under POGG simply because Parliament *could* have passed a *criminal* law. Likewise, an intrusion into provincial jurisdiction is no less severe simply because it leaves the provinces with authority to enact *more* stringent regulatory requirements. This argument misses the point of the division of powers analysis, which — *pace* the majority — allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867* does not permit federal overreach *as long as* it preserves provincial autonomy to the greatest extent possible. It sets out spheres of exclusive jurisdiction. It *divides* powers — *exclusive* powers — between Parliament and the provincial legislatures. And within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act — or not act — as they see fit, not *as long as* they do so in a manner that finds approval at the federal Cabinet table (see H. Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014), 23 *Const. Forum* 20, at pp. 21-22). The very idea

of recognizing federal jurisdiction to legislate "minimum national standards" of matters falling within provincial jurisdiction is corrosive of Canadian federalism.

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(3) Other Sources of Federal Legislative Authority

[395] While the Attorney General of Canada focused his submissions on the national concern doctrine, at the conclusion of his factum he pleads, in the alternative, that "Part 1 of the *Act* is validly enacted under Parliament's taxation power" and, further, that "the entire *Act* is validly enacted under the emergency branch of Parliament's POGG power, Parliament's criminal law power, or other existing heads of power, as argued by various Interveners" (R.F., at paras. 167-68 (emphasis added)). Yet, no actual *argument* is advanced by the Attorney General on *any* of those potential sources of Parliament's authority, or for that matter on anything other than the national concern branch of POGG. Indeed, that appears to have been the basis upon which Parliament understood itself as proceeding since, when asked during debate about the *Act*'s constitutionality, the reply of the Minister of Environment and Climate Change was to identify that climate change was a "national concern" (*Debates of the Senate*, vol. 150, No. 275, 1st Sess., 42nd Parl., April 2, 2019, at p. 7714 (Hon. Catherine McKenna)). But now, in a storm, any port will apparently do.

[396] Despite the Attorney General's evident lesser degree of commitment here, I now turn to address the various sources of federal authority "argued by various Interveners".

(a) *Gap Branch of POGG*

[397] Several interveners urged us to consider the gap branch of the POGG power as a possible source of federal jurisdiction for the *Act*. For instance, the intervener Athabasca Chipewyan First Nation submitted that the three branches of POGG must be read "fluidly" and that the "scientific newness" of climate change — being a matter unknown at the time of Confederation — should militate in favour of the validity of the *Act*. A version of this idea finds support in academic scholarship. Professor Newman, for instance, suggests that POGG's national concern branch and gap branch are one and the same (pp. 195-96 and fn. 47).

[398] I agree with Rowe J. that the case law does not support a distinction between the "gap" and "national concern" branches of POGG. Regardless of whether the "gap" branch is understood as housing "new" matters that did not exist at the time of Confederation or as requiring a lacuna in the text of the Constitution, all such matters must still pass the national concern test. As such, the scientific newness of climate change has no bearing on my analysis. As I have already explained, resort to this branch of POGG is not possible here, given that the pith and substance of each of Parts 1 and 2 of the *Act* are properly classified under provincial heads of power.

(b) *Emergency Branch of POGG*

[399] The emergency branch of POGG was also proposed as a possible basis for federal authority by several interveners including the David Suzuki Foundation, the

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Canadian Labour Congress, the Intergenerational Climate Coalition, the Athabasca Chipewyan First Nation, and the National Association of Women and the Law and Friends of the Earth. It is curious that the majority does not consider this, since its reasons speak in such terms, describing climate change as "an existential challenge[,] a threat of the highest order to the country, and indeed to the world" (para. 167; see also paras. 187, 190, 195 and 206). Further, the emergency branch's requirement of temporariness means that the majority's unconstitutional transfer of jurisdiction from the provinces to Parliament would do less damage to Canadian federalism, and for less time, lasting only until this crisis passes.

[400] It is a problem for the *Act* — although presumably a problem that Parliament could have corrected had it wished to proceed in reliance upon the emergency power — that it does not expressly provide for temporary operation. As I have already recounted, however, the *Act* by its terms is intended to change behaviour. The preamble to the *Act* anticipates what will follow: ". . . increased energy efficiency, . . . the use of cleaner energy, . . . the adoption of cleaner technologies and practices and . . . innovation . . . ." In other words, while the *Act* does not come with a "best before" date, it does contemplate *an end*. And while at the outset of an emergency it will often be difficult or impossible to identify with any precision when it might end, the emergency branch *has* been applied in circumstances where it is reasonably apparent that the emergency will, *at some point,* end. Indeed, the point of action is presumably to do what is necessary to ensure that the emergency *will* end. For that reason, "Invocation of exceptional measures is typically justified on the basis that the

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ordinary system is not up to handling the threat and that, once the crisis passes, the usual state of affairs can and will return" (S. Burningham, *"The New Normal": COVID-19 and the Temporary Nature of Emergencies*, June 4, 2020 (online) (emphasis added)).

[401] This is not to suggest that Parliament would have lacked "a rational basis" to act here, as required by the caselaw on the emergency branch. Rather, my point is that the Attorney General has not done the necessary (or any) work to show that Parliament justifiably relied upon its emergency power as a source of its authority. This stands in contrast to *Anti-Inflation*, where Parliament manifested such reliance (by specifying an expiration date), and where the Attorney General of Canada made full argument on the point (pp. 383-84 and 417-18).

[402] I should add that the intervener the David Suzuki Foundation urges us to find that the *Act*'s temporary character is to be found in its preambular references to Canada's commitments under the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, and that those commitments come with the clear deadline of 2030. Hence, the intervener submits, the *Act* implies a 10-year timeline to achieve required reductions, and it urges us to read in that deadline, by designating an end date to the jurisdiction of Parliament to authorize the *Act* (I.F. (38663 and 38781), at para. 36). While this is an intriguing proposition, considering time-delimited jurisdiction in the emergency doctrine analysis would require a departure from this Court's jurisprudence. It would also ask this Court to attempt to

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forecast when a given emergency may end, an issue usually left to Parliament (and rightly so, given the relative institutional competencies). The current record before this Court is inadequate to support designating 2030 as a suitable end date, or any other year for that matter, for Parliament to lose legislative competency in this area.

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[403] Furthermore, the role of this Court — the Attorney General of Canada's concluding sentences of his factum notwithstanding — is not to root around the Constitution or constitutional doctrine to scrounge up some basis, *any* basis, to rescue federal legislation. (This is particularly so where, as here, the exceptional residual authority of POGG is contemplated and the dominant subject matter of the impugned statute is consigned by our Constitution to the provinces.) The proper question to ask is, therefore, not whether the *Act* is potentially salvageable under the emergency branch of POGG, but rather whether Parliament, in passing the *Act*, did so relying on its legislative authority under the emergency branch of POGG. Both the response of the Minister of Environment and Climate Change to a question about the source of Parliament's authority, and the submissions of the Attorney General of Canada, make clear that it did not.

(c) *Criminal Law*

[404] The criminal law power can be addressed briefly. While the precise scope of this power remains uncertain in this Court's jurisprudence, it is tolerably clear that its exercise requires a legislated prohibition that is accompanied by a penalty and backed by a criminal law purpose (*Reference re Genetic Non-Discrimination Act*, 2020

SCC 17, at para. 67). As I have explained, however, the pith and substance of the *Act* relates to a scheme of monetary disincentives intended to *discourage*, rather than *prohibit*, certain activity. The offences and penalties in the *Act* are incidental to its true regulatory nature and, accordingly, the criminal law power is not applicable.

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(d) *Taxation*

[405] The Attorneys General of Saskatchewan and Ontario argue that Part 1 of the *Act* imposes a tax, and ask this Court to conclude that the *Act* violates the principle of no taxation without representation, which principle is guaranteed by s. 53 of the *Constitution Act, 1867* (see *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 71).

[406] Section 91(3) of the *Constitution Act, 1867* authorizes the federal government to raise money by any mode or system of taxation, which provides broad jurisdiction to impose both direct and indirect taxation. But as broad as the taxing authority is, it is "subject to the ordinary principles of classification and colourability that apply to all legislative powers" (Hogg, at p. 31-2 (footnotes omitted)). Not every monetary levy is a tax. While monetary measures that relate in pith and substance to the raising of revenue for federal purposes are classified as taxation (*Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1070; see also *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 30), other monetary measures are regulatory charges that must be supported by some other head of power (*Westbank*, at para. 23; *Exported Natural Gas Tax*, at p. 1068).

[407] This Court has stated the relevant criteria for distinguishing between a tax and a regulatory charge. One consideration applied in the most recent cases has been that regulatory charges are typically connected to a broader regulatory scheme (see, e.g., *Westbank*, at paras. 44-45; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at paras. 30-47). And so here, the Attorneys General of Saskatchewan and Ontario argue that the fuel charge under Part 1 of the *Act* is not connected to a broader regulatory scheme. While that is so, it is not dispositive, since regulatory charges *need not always* be connected to a broader scheme. In particular, there are cases where the charge itself *is* the scheme (*Westbank*, at para. 32).

[408] What *is* dispositive, in my view, is whether the charge is implemented primarily for a regulatory purpose, as opposed to a revenue-raising purpose. If so, the charge should be considered regulatory (*Westbank*, at para. 32; *Exported Natural Gas*, at p. 1070). In *Exported Natural Gas*, this Court concluded that one such regulatory purpose is to generally discourage certain behaviour (p. 1075). While the Attorney General of Ontario argues that we should not be so quick to label charges as regulatory, the conclusion I reach supports Canada's division of powers. It "would afford the Dominion an easy passage into the Provincial domain" were every monetary measure to be regarded as a tax (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355 (P.C.), at p. 367).

[409] As I have explained, the charges imposed by the *Act*, in pith and substance, relate to the regulatory purpose of changing behaviour, for the broader purpose of

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reducing GHG emissions. The *Act*'s provisions reveal that it does not relate to the raising of revenue for federal purposes. It is therefore unnecessary to consider s. 53 of the *Constitution Act, 1867*.

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(4) Broad Delegation to the Cabinet

[410] As a final comment to my analysis of the constitutionality of the *Act*, I observe that the provinces arguing against the *Act*'s constitutionality placed significant emphasis on the scope of delegated authority found within it. This emphasis is understandable, as the sweep of delegation granted by the *Act* to the Cabinet is breathtakingly broad. Indeed, the *Act* goes so far as to delegate authority to amend portions of the *Act* itself through a Henry VIII clause (s. 168(3) and (4); see also Sask. C.A., at paras. 361-66, per Ottenbreit and Caldwell JJ.A., dissenting). The majority notes this, but then speaks reassuringly of how the federal Cabinet's discretion is constrained by the purposes of the *Act* and specific guidelines in the statute, and how any listing decision by federal Cabinet can be judicially reviewed (paras. 72-76).

[411] But this is an incomplete response. The majority does not mention that failure to comply with the purposes of an enabling statute such as the *Act* would signify *not only* that the impugned regulations are *ultra vires* the enabling statute, but that it may also be repugnant to the division of powers. Nor does the majority explain just how a court is to review regulations for compliance with the division of powers.

[412] Further, the examples given by the majority of how a regulation may fail to conform to the purposes of the *Act* are not enlightening. For example, the majority posits that federal Cabinet "could not list a fuel . . . that does not emit GHGs when burned" (para. 75). That may be so, but what the majority might *also* have wished to consider is the obvious possibility that the federal Cabinet will discriminate against provinces or industries in a way that has nothing to do with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Indeed, this is a particular risk with Part 2 which, as I have explained, does not exist to establish such standards.

[413] In the absence of useful guidance from the majority on this point, I endorse that provided by Rowe J., both as to the imperative that the division of powers — no less than the purposes of the *Act* — confines the exercise by the federal Cabinet of Parliament's delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

[414] Further, my brevity on this issue should not be taken as agreement with the majority's response to my colleague Côté J.'s reasons on this point. Indeed, the majority largely misses the point, treating the matter of the Henry VIII clause as simply one of *administrative* law (since regulatory decisions can be judicially reviewed), ignoring the potentially significant *separation of powers* concerns that Côté J. identifies. I see those concerns as raising serious questions which, given my conclusion

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on the Attorney General of Canada's reliance on the national concern doctrine, are unnecessary for me to decide here.

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IV. Canada's Proposed "Modernization" of *Crown Zellerbach*

[415] While counsel before us did not advance this submission, the Attorney General of Canada urges us in his factum to "modernize" the national concern doctrine under POGG in an effort to make it easier for matters — including the one proposed here — to be recognized under the doctrine. I respond to it here because aspects of the proposal were adopted by my colleagues in the majority.

[416] Instead of speaking about a new matter or a provincial matter that has a national aspect, the Attorney General of Canada speaks of matters having been "transform[ed]" in a way that is "constitutionally significant" (R.F., at para. 69). How a matter is "transformed" — and, who or what does the "transforming" — is not explained. Nor is it explained what "constitutional significance" requires.

[417] This is, I observe with as much regret as astonishment, an unserious submission from the chief law officer of the federal Crown. The Attorney General of Canada has a responsibility to the whole country to support and act within, not ignore or undermine, Canada's federal structure: "Because the [Attorney General] is the chief law officer of a democratic government, she must be a guardian of the rule of law. As such, the [Attorney General] is held to a standard of accountability that is unique, that extends beyond the standard that applies to an ordinary litigant" (F. Hawkins, "Duties,

Conflicts, and Politics in the Litigation Offices of the Attorney General" (2018), 12 *J.P.P.L.* 193, at p. 193). As noted by Professor K. Roach, "[t]he Constitution . . . imposes and entrenches special restraints and obligations on the government as part of the supreme law of the land" ("Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006), 31 *Queen's L.J.* 598, at p. 610).

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[418] Federalism is an essential feature of our Constitution. The Attorney General of Canada must defend it, not undermine it by casually and recklessly urging upon this Court some vaguely conceived notion of "transformation", so meaningless as to effectively deprive the provinces of the opportunity to respond substantively to it, but yet so clearly intended to effect the expansion of federal jurisdiction.

[419] Beyond the cant of "transformation", the most we have by way of a concrete proposal from the Attorney General on this point is that a national concern must be "distinctly national", as measured by the provincial inability test borrowed from the general branch of the federal trade and commerce power, and that it must be reconcilable with the division of powers (or, as the Attorney General now calls it, "the balance of federalism"; R.F., at para. 69 (emphasis deleted)).

[420] It is on the first of those considerations — that a national concern must be "distinctly national" — that I wish to focus, since it is embraced by the majority in its dilution of the *Crown Zellerbach* test (para. 177). This abandons this Court's jurisprudence, since — under *Crown Zellerbach* — provincial inability is but one

indicator of singleness, distinctiveness and indivisibility, while under Canada's proposed framework it becomes the singular test for distinctiveness (R.F., at para. 70).

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[421] The respective tests for provincial inability, as set down for the national concern branch of POGG in *Crown Zellerbach* and for the trade and commerce power in *General Motors*, are different from each other. In *Crown Zellerbach*, Le Dain J. described the provincial inability test as an inquiry into "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter", a threshold that would be met "whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament" (p. 432, citing Gibson (1976), at p. 34). In *General Motors*, however, Dickson C.J. described the provincial inability test in the fourth and fifth factors of the analysis under the general branch of the federal trade and commerce power as follows: ". . . the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting" and ". . . the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country" (p. 662).

[422] It is important to note that, despite being released one year after *Crown Zellerbach*, the Court in *General Motors* made *no* reference to *Crown Zellerbach*, or to its test for provincial inability under the national concern doctrine of POGG. Presumably, it did not occur to the Court to do so, since each test has its own aim, distinct from the

other. The *General Motors* test for provincial inability focusses on the prospect of a *legislative scheme* not working unless it is national in scope. By contrast, the *Crown Zellerbach* test for provincial inability is firmly focussed on the *nature of the problem* as being one which cannot be overcome without national action. This is fatal to the Attorney General of Canada's submission. As I have already explained, while this Court held in the *2018 Securities Reference* that legislation aimed at "systemic risk in capital markets" can meet the test for provincial inability under the *General Motors* factors (paras. 111, 113 and 115), it *does not follow* that "systemic risk in capital markets" is a matter sufficiently singular, distinctive and indivisible to make it an appropriately recognized matter of national concern under POGG. Legislation that passes the *General Motors* test can be aimed at a problem that is diffuse — such as the elimination of anti-competitive behaviour — yet still engage trade as a whole.

[423] Provincial inability, as an indicium of singleness, distinctiveness and indivisibility, was intended in *Crown Zellerbach* to confine POGG as a *residual* power by filtering matters that could fit under any enumerated head of power, *including trade and commerce*. The point is that, *by its residual nature*, the national concern branch of POGG must *not include* matters that satisfy the trade and commerce test. Hence, while the control of systemic risk was recognized as a valid federal objective under the trade and commerce power in the *2018 Securities Reference*, it would *not* qualify as a national concern under POGG, failing under "distinctiveness" (since it falls under the trade and commerce power) and "indivisibility" (because of its pervasive and diffuse character).

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[424] The Attorney General of Canada's argument on this point is also revealing. The proposed "modernized" framework includes the *General Motors* provincial inability test, squarely aimed at provincial legislative inability, as the sole criterion to determine whether a matter is "distinctly national". And this is because such a framework would support Canada's submission that the provinces acting in concert would be legislatively unable to pass mandatory minimum national standards related to GHG emissions. But such an approach ignores the important statement in *Crown Zellerbach* that the provincial inability test is but "one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine" (p. 434).

[425] As the above analysis suggests, Canada's proposed framework would make it easier for a matter to be recognized as a national concern under POGG whenever minimum national standards are said to be required. The departure from this Court's jurisprudence that Canada proposes — and that the majority pronounces — would therefore enable the federal government to more easily invade provincial jurisdiction, and has the potential to upset the fundamental distribution of legislative power under the Constitution.

[426] As Abella and Karakatsanis JJ. forcefully expressed in their concurring judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the doctrine of "*[s]tare decisis* places significant limits on this Court's ability to overturn its precedents" (para. 255). While the Court was divided in *Vavilov* about

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whether those strictures were satisfied, the point is that horizontal *stare decisis* promotes certainty and predictability in the development of the law, contributes to the integrity of the judicial process and safeguards this Court's institutional legitimacy (paras. 260-61). If this applies to our statements of the law governing the standard by which judges review the decisions of administrative tribunals, it surely applies to our precedents on adjudicating the division of powers under the Constitution.

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[427] In my view, the high threshold for departing from the long-established principles set down in *Crown Zellerbach* is not met here. And putting even that determinative consideration aside, at the very least, and for the sake of doctrinal clarity, I say with respect that the majority should acknowledge that it is completely re-writing the framework for the national concern branch of POGG. Instead, it insists upon linking its novel framework to *Crown Zellerbach*, as if its reasons represent *not* the confusing and confused eliding of the constraints of *Crown Zellerbach* that I will now demonstrate them to be, but as something of an inevitable and even obvious exegesis. I turn, then, to the majority's framework.

V. The Majority's Dilution of *Crown Zellerbach*

[428] The majority accepts aspects of the Attorney General of Canada's proposal to "modernize" the national concern doctrine, but takes it further still. And so — although this appears nowhere in this Court's judgment in *Crown Zellerbach* — the majority divines from that judgment, at paras. 142-66, the following "three-step process" (para. 132):

1) **Threshold question**: is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?

2) **Singleness, distinctiveness and indivisibility**: as this is not a "readily applicable legal test", the two "principles" that follow must be satisfied (para. 146).

    a. First, the matter must be "***specific and identifiable***" and "***qualitatively different*** from matters of provincial concern" (para. 146 (emphasis added)).

        Three factors or considerations may inform whether something is "qualitatively different":

        i. Whether "the matter is predominantly extraprovincial and international in its nature or its effects" (para. 151);

        ii. Whether international agreements related to the matter exist; and

        iii. Whether "the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces" (para. 151).

    b. Secondly, federal jurisdiction should be recognized "only where the evidence establishes ***provincial inability*** to deal with the matter" (para. 152).

        Three factors must be present:

        i. The "legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting" (para. 152);

        ii. The "failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country" (para. 152); and

        iii. A "province's failure to deal with the matter must have grave extraprovincial consequences" (para. 153).

3) **Scale of impact**: this requires the court to balance the intrusion on provincial autonomy against the impact on other interests that will be affected if federal jurisdiction is not granted.

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[429] As will be apparent from the above, the majority has accepted Canada's proposal that principles from the trade and commerce jurisprudence ought to be adopted into the national concern analysis. But the majority adds additional elements that were previously considered irrelevant to the national concern analysis. I will discuss each of them in turn.

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A. *"Threshold Question": Whether the Matter Is of Sufficient Concern to Canada as a Whole*

[430] The majority's new framework requires a reviewing court to ask whether "the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine", which, we are told "invites a common-sense inquiry into the national importance of the proposed matter" (para. 142). While framed as "a threshold question", I observe that the importance of the matter implicitly permeates the entire analysis, reappearing in the majority's discussion of "scale of impact", where that step of the test is understood as an exercise in balancing "competing interests" (paras. 142 and 160).

[431] My colleague Rowe J. addresses why importance should not be a relevant consideration under "singleness, distinctiveness and indivisibility". It therefore suffices for me to stress two points here.

[432] First, the majority reasons appear to suffer from the misconception that, if a matter is *important*, it follows that it is a matter for Parliament and the federal

government. This is remarkably dismissive of provincial jurisdiction. I agree with Professor Gibson, who says:

> If importance of the subject matter is the measure of "national dimensions" there can be little hope for federalism in Canada's future. Since there are very few functions of government which are not of great importance, to grant federal jurisdiction over all such functions would be to make the supposedly autonomous provincial legislatures mere "tenants at sufferance" of the federal Parliament.
>
> ((1976), at p. 31)

[433] Secondly, in considering the importance of the matter urged by the Attorney General of Canada, the majority emphasizes that carbon pricing is "a necessary tool", an "essential elemen[t]", and a "critical measure" (paras. 169-70). But these considerations have no bearing on the division of powers. I acknowledge that the majority might be taken as responding to this point by positioning this as only a "threshold" question. Even so understood, however, the majority's analysis allows the efficacy or wisdom of a policy choice to colour the analysis that follows. It is, in effect, a backdoor to injecting into the division of powers framework the judiciary's views of such matters. In a literal and dangerous sense, this risks *politicizing* the judiciary, pulling it (as here) into expressing views *not* on the *constitutionality* of one side or another on deeply contentious policy questions within the federation, but on their *merits*.

B. *Singleness, Distinctiveness and Indivisibility*

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[434] The majority explains that the phrase "singleness, distinctiveness and indivisibility" does not articulate a "readily applicable legal test" (para. 146). It should, the majority says, therefore be understood in light of two "animating" principles: ". . . first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter" (para. 157).

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(1) The First Principle: "A Specific and Identifiable Matter That Is Qualitatively Different From Matters of Provincial Concern"

[435] Under the principle that singleness, distinctiveness and indivisibility will require "a specific and identifiable matter that is qualitatively different from matters of provincial concern", the majority identifies three factors "that properly inform th[e] analysis" of whether something is "qualitatively different" (paras. 146-47).

[436] The first factor is "whether [the matter] is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects" (para. 148). It is far from clear what my colleagues in the majority understand by a matter's "inherent nature". They appear to equate it with a matter's "character and implications" (para. 173). But the meaning of a matter's "implications" is not explained (aside from a reference to "serious effects that can cross provincial boundaries", at para. 148). And identifying a matter's "predominantly extraprovincial and international

. . . character" by considering its "inherent nature" appears to veer into presupposing the answer to the very question that the framework is intended to address: whether the matter is a national concern. None of this is helpful.

[437] The second factor is whether international agreements related to the matter exist (para. 149). This, as Rowe J. makes plain, undermines *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Further, it serves as no constraint whatsoever on the recognition of a national concern. That is, while *the absence* of international agreements will not militate against recognition of a national concern, *the presence* of such agreements — depending on their content — may *support* recognition of a national concern.

[438] The third factor is "whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces" (para. 151). Here, the majority says that this factor is satisfied, because the *Act* works "on a distinctly national basis" — echoing the language urged upon us by the Attorney General of Canada — in establishing minimum national standards to meet Canada's obligations under the *Paris Agreement*, which constitutes a federal role in pricing that is qualitatively different from matters of provincial concern (para. 177).

[439] In other words, the majority says that "minimum national standards" can qualify as a national concern under POGG because, *inter alia*, they work in a *national* way. But this simply illustrates how the concept of minimum national standards has been employed to create a federal aspect of the matter out of thin air. *How else*, after

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all, *would* national standards work, if not *nationally*? This consideration adds nothing to the analysis, and therefore achieves nothing except to facilitate the recognition of Parliament's legislative authority over a matter simply by casting Parliament as doing something that Parliament almost always does: legislating in a *national* way, by creating minimum *national* standards.

[440] None of this supports the majority's reference to having developed an "exacting" test with "meaningful barrier[s]" (para. 208). Rather, and as I have already observed, it is a departure from *Crown Zellerbach* that operates not to *constrain* the recognition of POGG matters, but effectively to *facilitate* it via the artifice of "minimum national standards".

[441] In its dilution of the national concern test, the majority has lost sight of what that test is supposed to achieve: the identification of matters that are *distinctive* (being different from those falling under any other enumerated power, and thus beyond the constitutional powers of the provinces to address), and *indivisible* (being a matter for which responsibility cannot be divided between Parliament and the provinces). While the majority's "principle" of "qualitativ[e] differen[ce] from matters of provincial concern" (para. 146) echoes *Crown Zellerbach*'s requirement of *distinctiveness*, its three "factors" in effect adulterate that requirement to the point that there is no principle left. Almost any provincial head of power is open to federal intrusion simply by recasting the federal matter as one of "minimum national standards".

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[442] This leaves, of course, *Crown Zellerbach*'s requirement of *indivisibility* — which is nowhere accounted for in the majority's dilution. While the majority does caution that "the matter must not be an aggregate of provincial matters" and insists that the "requirement of indivisibility is given effect through [the two] principles" set out in their framework (at paras. 150 and 158), this does not capture the concerns of Beetz J. in *Anti-Inflation*. In that case, Beetz J. explained that matters like inflation are aggregates of subjects coming under federal *and* provincial jurisdiction, and that they lack a degree of unity that makes them indivisible. The point is that many matters, like inflation, are qualitatively *distinct* from provincial heads of power, but they still do not qualify as a national concern under POGG because they are not *indivisible*, since they can be divided between both orders of government. Yet, and as Rowe J. explains, the majority now allows for such matters to be subsumed under federal jurisdiction as a national concern, thereby discarding Beetz J.'s careful, compelling and (until now) important judgment in *Anti-Inflation*.

(2) The Second Principle: "Federal Jurisdiction Should Be Found to Exist Only Where the Evidence Establishes Provincial Inability to Deal With the Matter"

[443] The majority says that "federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter" (para. 152). The "starting point" for this analysis, says the majority, is the understanding of provincial inability stated in the fourth and fifth indicia from the *General Motors* test (para. 152). To this, they add that "a province's failure to deal with the matter must

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have grave extraprovincial consequences" (para. 153). These three factors must be satisfied to meet the criterion of provincial inability, which is now a necessary but insufficient condition for the recognition of a matter of national concern (para. 156).

[444] I have already described the problem with using principles from the trade and commerce jurisprudence in the national concern analysis in responding to the submissions on this point from the Attorney General of Canada, which is that reliance on the test governing the federal trade and commerce power is inappropriate; the tests for provincial inability are different, and the point of the provincial inability analysis was — before now — to filter out matters that could fit under any enumerated head of power, so that POGG would be truly residual. But there are other problems with this "principle", as stated by the majority.

[445] First, by forcing trade and commerce jurisprudence into the national concern test, the majority requires constitutional incapacity to establish provincial inability (para. 182). The majority analogizes to the *2018 Securities Reference*, in which provincial legislation addressing systemic risk was considered unsustainable because of the ability of the provinces to withdraw at any time. But it will always be the case that provinces are unable to fetter themselves against future legislative action. This requirement is therefore meaningless.

[446] Secondly, in discussing the final requirement, the need for "grave extraprovincial consequences", the majority furnishes examples which are indeed grave, including serious harm to human life, contagious disease, and arms trafficking

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(paras. 153-55). But the majority fails to link those grave consequences to provincial inability, properly understood. And this is because the majority does not appear to appreciate that the extra-provincial effects must be such that all or part of the matter is beyond the scope of provinces' legislative authority under s. 92 to address, whether independently or in tandem.

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[447] Finally, the majority also stresses the requirement of "grave extraprovincial consequences" as demonstrating the "exacting" nature of its test (paras. 155, 208-9 and 211). But this standard is peremptory, almost uselessly subjective and susceptible to change (as the majority's description of the extra-provincial harm in *Munro* as "meaningful" makes clear (para. 154)). And far from *constraining* federal intrusion, this standard effectively *invites* it into other areas of provincial jurisdiction whose exercise could also cause "grave extraprovincial consequences", such as public health and pandemic response (*pace* the majority's reference to "one province's failure to deal with health care", at para. 209), the management of provincial public lands, the construction of hydroelectric dams, the development and management of non-renewable and forestry resources, the inflationary effects of intra-provincial trade and commerce (including the regulation of wages and prices) and the management of prisons. Simply put, the *gravity* of the extra-provincial consequences should not and (until now) has not dictated the outcome of the provincial inability test.

[448] For my part, rather than dilute *Crown Zellerbach* so as to assure the *Act*'s constitutionality, I consider myself bound by its understanding of provincial inability.

The reason why is illustrated by this Court's decision in *Anti-Inflation*. While controlling inflation could undoubtedly meet aspects of the provincial inability test — in the sense that part of the matter is beyond the scope of provincial legislative authority to address — this Court held that controlling inflation does not qualify as a matter of national concern, because it is *divisible* ("an aggregate of several subjects", at p. 458). In other words, it is possible for a matter to be characterized by provincial inability, while still failing to satisfy the requirement of singleness, distinctiveness and indivisibility. This surely means that, where extra-provincial effects are such that all or part of a matter is beyond provincial legislative power to address, this is an *indicator* — but no more — that the matter *may* be distinct from provincial jurisdiction and have extra-provincial aspects that are indivisible from its local and private aspects. In other words, the insight of *Crown Zellerbach* obtains: consistent with the residual nature of POGG, federal usurpation of what was formerly within provincial jurisdiction is possible only where a matter has become distinct from what the provinces can do, and yet cannot be separated from what the provinces can do. In such a case, resort to POGG, and in particular its national concern branch, is necessary to preserve the exhaustiveness of the division of powers.

C. *Scale of Impact*

[449] The final step in the majority's diluted reformulation of the test for national concern requires the reviewing court to determine "whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that

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will be affected if Parliament is unable to constitutionally address the matter at a national level" (para. 196). The "impact on provincial jurisdiction" is considered, then weighed against other "interests", which requires the court to "balance competing interests" (para. 160). This is yet another departure from *Crown Zellerbach*, in which this Court said that a matter of national concern must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (p. 432). Curiously, while the majority cites to this passage, it then abandons it, seeking to reconcile the impact on provincial jurisdiction *not* with *the division of powers*, but with *the importance* that the reviewing judge ascribes to other "interests" (para. 206).

[450] The judicial role in federalism disputes is properly confined to identifying the boundaries set by the Constitution that separate federal from provincial jurisdiction. In the context of considering the "scale of impact", this entails looking to the scope of provincial powers affected and the impact on the relative autonomy of Parliament *and* provinces. It also requires carefully considering the contours of the matter said to be of national concern, as it is only where the matter has "ascertainable and reasonable limits" that it can be said to have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power" (*Crown Zellerbach*, at pp. 432 and 438). Determining the contours of jurisdiction and the effects of legislation is what courts do. The role of the judiciary, properly understood, does *not* extend to evaluating the importance of other interests that could be affected if the provinces are not supervised in the exercise of their jurisdiction. That is the stuff of policy-making,

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not adjudication. This distinction, which appears to elude the majority, was once thought uncontroversial at this Court (see *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136).

[451] But the real problem with my colleagues' scale of impact analysis is their significant understatement of the intrusion into provincial jurisdiction effected by the *Act*. It will be recalled that the majority finds that the impact on provincial jurisdiction is limited, in part because the "impact on the provinces' freedom to legislate is minimal" and "strictly limited", since provinces "are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency" (paras. 199-200 (emphasis added)). As I have noted, this ignores the detailed industrial regulations authorized by Part 2 of the *Act*. But it also ignores that the federal benchmark is *not static*, and can be set to an increasingly stringent level so as to correspondingly narrow provincial jurisdiction in the field. It is only by ignoring such things that the majority is able to claim that the federal power that it recognizes here is "significantly less intrusive than [that recognized] in *Crown Zellerbach*" (para. 201).

[452] More fundamentally, and even if federalism *were* a thing whose terms were not constitutionally enshrined but could instead be judicially balanced, the majority's overall approach is not one of balance. Rather, the majority puts its thumb heavily on the federal side of the scale — by legitimating as a national concern the device of "minimum national standards" on matters of importance that otherwise fall within

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provincial jurisdiction, and by insisting that doing so still preserves provincial autonomy (*as long as* it is exercised in accordance with federal priorities). Parliament now knows how to ensure that the balance will always tip its way, whenever provinces choose to exercise their legislative authority in a way that impedes the federal agenda.

[453] Even the Attorney General of Canada was not so bold as to ask for a weighted scale, much less a redefined framework that accounts for other interests that should have no bearing on the division of powers. And yet, the majority has given him just that.

VI. Conclusion

[454] The *Act*'s subject matter falls squarely within provincial jurisdiction. It cannot be supported by any source of federal legislative authority, and it is therefore *ultra vires* Parliament. This Court, a self-proclaimed "guardian of the constitution" should condemn, not endorse, the Attorney General of Canada's leveraging of the importance of climate change — and the relative popularity of Parliament's chosen policy response — to fundamentally alter the division of powers analysis under ss. 91 and 92 of the *Constitution Act, 1867* and, ultimately, the division of powers itself (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155).

[455] The majority's reasons for judgment are momentous, and their implications should be fully and soberly comprehended. This Court once maintained that the Constitution, underpinned as it is by the principle of federalism, "demands respect for

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the constitutional division of powers" (*2011 Securities Reference*, at para. 61; see also *Reference re Secession of Quebec*, at paras. 56 and 58). But in its unfortunate judgment, the majority discards that constitutionally faithful principle for a new, distinctly hierarchical and supervisory model of Canadian federalism, with two defining characteristics: (1) the subjection of provincial legislative authority to Parliament's overriding authority to establish "national standards" of how such authority may be exercised; and (2) the replacement of the constitutionally mandated *division* of powers with a judicially struck *balance* of power, which balance must account for other "interests".

[456] No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects our Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into *all* areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways. I dissent.

The following are the reasons delivered by

ROWE J. —

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[457] The national concern doctrine is a residual power of last resort. I have come to this view through a close reading of *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and the cases that preceded it. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the "Peace, Order, and good Government" ("POGG") power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*Act*").

[458] My focus is mainly doctrinal. To attain the objectives sought by the federal structure, and for courts to be accountable to the public in how they exercise their power as umpires in federalism disputes, doctrinal coherence, clarity and predictability regarding the division of powers are essential (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 23; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 3).

[459] First, I discuss the principle of federalism and the division of powers: the starting point for a complete understanding of the national concern doctrine. Second, I discuss the residual and circumscribed nature of the POGG power, rooted in s. 91 of the *Constitution Act, 1867*. While some commentators refer to the existence of three branches of POGG — gap, national concern, and emergency — in my view, the case law does not support a distinction between "gap" and "national concern", nor is such a distinction useful. Rather, what commentators refer to as "gap" and "national concern" is better understood as one manifestation of the cumulatively exhaustive nature of the division of powers, and the residual nature of POGG. Third, I apply this understanding

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to the national concern test set out in *Crown Zellerbach*, and interpret the concepts of "singleness, distinctiveness and indivisibility", "provincial inability" and "scale of impact on provincial jurisdiction" accordingly (p. 432). The national concern doctrine applies only to matters that are distinct from those falling under provincial jurisdiction and that cannot be distributed between the existing powers of both orders of government. In addition, their recognition under POGG cannot upset the federal balance. Fourth, I compare this approach to the approach urged on us by the Attorney General of Canada. Finally, I address an entirely distinct matter: the methodology for reviewing regulations for compliance with the division of powers and how it may apply to regulations made under the *Act*. In the result, for these reasons and those of Justice Brown, which I adopt, the legislation is *ultra vires* in whole.

I. Federalism and the Division of Powers

[460] This case requires a careful consideration of one of the fundamental underlying principles animating the Canadian Constitution: federalism (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The "primary textual expression" of the principle of federalism can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* (*Secession Reference*, at para. 47; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 ("*Reference re GNDA*"), at para. 20).

[461] An essential characteristic of the distribution of powers is its exhaustiveness, which precludes legislative voids (*Reference re Same-Sex Marriage*,

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2004 SCC 79, [2004] 3 S.C.R. 698, at para. 34; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 44). Exhaustiveness reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign.

[462] The principle of federalism pursues some well-known objectives: "to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good" (*Canadian Western Bank*, at para. 22). The distribution of powers, in turn, was not random; rather, it was designed to achieve these objectives. It accommodates diversity between provinces — by allocating considerable powers to provincial legislatures to allow them pursue their own interests — and their desire for unity — by granting powers to Parliament when they share a common interest (*Secession Reference*, at paras. 58-59; *Reference re GNDA*, at para. 21). The federal structure protects the separate identities of the provinces from being subsumed under a unitary state.

[463] The federal structure was an essential condition for Confederation. Many provinces would not have supported the project of Confederation without the adoption of a federal form (*Secession Reference*, at para. 37; see also *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.) ("*Labour Conventions*"), at pp. 351-53). In other words, "[w]ithout federalism, Canada could not have formed or endured" (*Newfoundland and Labrador (Attorney General) v.*

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Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4, at para. 240, per Brown and Rowe JJ., dissenting). Consequently, courts interpreting the division of powers must be careful not "to dim or to whittle down" the provisions of the *Constitution Act, 1867*, and its underlying values, or "impose a new and different contract upon the federating bodies" through an exercise of interpretation (*In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.) ("*Aeronautics Reference*"), at p. 70).

[464] The Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination between equal partners, not subordination (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*Securities Reference*"), at para. 71; see also *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 442-43). The guarantee of provincial autonomy to facilitate the pursuit of collective goals has particular salience for a province like Quebec, "where the majority of the population is French-speaking, and which possesses a distinct culture" (*Secession Reference*, at para. 59; see also *Labour Conventions*, at pp. 351-52).

[465] Autonomy, rather than subordination, entails that provinces have the right to "legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific" (*Labour Conventions*, at p. 352). As Professor Pigeon (as he then was) explained:

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> The true concept of autonomy is thus like the true concept of freedom. It implies limitations, but it also implies free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies. [Emphasis added.]
>
> ("The Meaning of Provincial Autonomy" (1951), 29 *Can. Bar Rev.* 1126, at pp. 1132-33)

[466] Thus, federalism recognizes that "there may be different and equally legitimate majorities in different provinces and territories and at the federal level" (*Secession Reference*, at para. 66).

[467] Embracing differences between the provinces also has instrumental value. Allocating powers to the provinces may produce policies tailored to local realities, since provinces are "closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3; see also D. Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019), 82 *Sask. L. Rev.* 187, at pp. 192-93). In addition, provinces can serve as "social laborator[ies]" when they enact innovative legislative policies that can be "tested" at the local level (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)),

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vol. 1, at s. 5.2, referring to *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at p. 311, per Brandeis J.).

[468] The judiciary is charged with delimiting the sovereignties of both orders of government, guided by the "lodestar" of the principle of federalism (*Secession Reference*, at para. 56; *Securities Reference*, at para. 55). More specifically, in *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, this Court explained that "[t]he tension between the centre and the regions is regulated by the concept of jurisdictional balance" (para. 78 (emphasis added)).

[469] Division of powers disputes must be resolved in a way that reconciles unity and diversity. This cannot be achieved by merely determining which order of government "is thought to be best placed to legislate regarding the matter in question" (*Securities Reference*, at para. 90). Functional effectiveness is often erroneously equated with centralization and uniformity and eclipses the value of regional diversity (see, e.g., J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411). As Professor Beetz (as he then was) explained:

> [TRANSLATION] As a result, Quebec jurists can only be suspicious of the argument that, for example, legislative authority must be commensurate with the problem to be resolved. They find, first of all, that this is not a legal argument, but a political and functional reason to amend the constitution if necessary. Next, they find, from a political standpoint, that it is a permanent argument, one that is favorable to a concentration of powers in the federal government, since the problems to be resolved will obviously not stop increasing in intensity, in complexity and in their ramifications. [Emphasis added; footnote omitted.]

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("Les Attitudes changeantes du Québec à l'endroit de la Constitution de 1867", in P.-A. Crépeau and C. B. Macpherson, eds., *The Future of Canadian Federalism* (1965), 113, at p. 120)

[470] Rather than the functional approach, Professor Beetz argued for [TRANSLATION] "further development and clarification of concepts, [and for] analytical jurisprudence" (p. 120). This is consistent with the view that at every step of the analysis, courts must assess "constitutional compliance, not policy desirability" (*Comeau*, at para. 83).

[471] In recent years, this Court has adopted a flexible, cooperative conception of the division of powers. This approach accommodates overlap between valid exercises of federal and provincial authority and encourages intergovernmental cooperation (*Reference re GNDA*, at para. 22; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18).

[472] Cooperative federalism, however, cannot override the division of powers or "make *ultra vires* legislation *intra vires*" (*Reference re Pan-Canadian Securities Regulation*, at para. 18; see also *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 39). Moreover, while it encourages cooperation between orders of government, it does not impose it (J.-F. Gaudreault-DesBiens and J. Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian*

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Constitution (2017), 391, at p. 391; *Securities Reference*, at paras. 132-33). Finally, precise and stable definitions of the powers of the two orders of government are an essential precondition to cooperative federalism. Without them, the "respective bargaining positions of the two levels of government will be too uncertain for federal-provincial agreements to be reached" (W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 616).

[473] Respect for the principle of federalism is essential in deciding these appeals. This Court is called to determine, primarily, if the *Act* can be upheld as an exercise of Parliament's authority to enact laws under the national concern doctrine. This involves consideration of the purposes sought by the choice of a federal structure, the logic of the distribution of powers, and a careful examination of the jurisdictional balance between both orders of government.

II. POGG Is Residual and Circumscribed

[474] The Attorney General of Canada seeks to uphold the *Act* as a valid exercise of Parliament's jurisdiction under the national concern doctrine of its "Peace, Order, and good Government" power. The exhaustive nature of the division of powers, discussed above, means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial.

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[475] The federal residual clause, which I refer to as the "Peace, Order, and good Government" or "POGG" power, comes from the opening words of s. 91 of the *Constitution Act, 1867*:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . .

[476] The provincial residual clause is s. 92(16) 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 hereinafter enumerated; that is to say,
>
> . . .
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

[477] Collectively, the federal and provincial residual clauses ensure that the division of powers is exhaustive. The role of POGG is thus limited to instances where the matter does not fall under any enumerated heads and cannot be distributed among existing heads of powers. Notably, by the operation of s. 92(16), POGG does not apply to matters of a "merely local or private Nature". This residual and circumscribed

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understanding of the POGG power informs my understanding of the national concern test. I justify this understanding of POGG first, through a close reading of the text of ss. 91 and 92, and second, through a close reading of the case law.

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[478] In the analysis that follows, there are two points which could be seen as unorthodox. The first relates to residual authority in the division of powers. It is commonly accepted that POGG is a grant of residual authority to Parliament. What is less widely accepted is that s. 92(16) is a residual grant of authority to provincial legislatures. My view is that both provisions confer residual authority, as I will explain below. The second point is that, properly read, the jurisprudence supports a view of POGG as having two branches, "national concern" and "emergency". The (third) "gap" branch constitutes part of "national concern", which is Parliament's general residual power. I would underline that my analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG ("national concern", "gap" and "emergency"). Thus, my conclusions are in no way dependent on these two points. Nor do these two points affect my critique of the augmentation and extension of "national concern" urged on this Court by the Attorney General of Canada.

A. *A Close Reading of Sections 91 and 92*

[479] While the statement of the heads of power set out in 1867 could not contemplate the changes in technology and society that would follow, that statement was exhaustive. The heads of power must be given meaning in a changing world; a

living tree capable of growth and development but grounded in natural and fixed limits (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at pp. 135-37; see also *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 45). This is accomplished through a flexible, progressive interpretation of the division of powers, but one that begins with and is constrained by the "natural limits of the text" (*Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 S.C.R. 805, at para. 20, quoting *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 94; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, at paras. 8-13).

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(1) POGG Is Residual to Section 92

[480] The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92. Section 91 confers the power to legislate for peace, order and good government "in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". As Professor Lysyk points out, it does *not* confer a power to legislate "in relation to peace, order and good government" ("Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), 57 *Can. Bar Rev.* 531, at p. 541 (emphasis in original deleted)). Rather, the power is to legislate "in relation to matters" that do not fall under any provincial, enumerated head of power (p. 541 (emphasis added; emphasis in original deleted)):

> In other words, Parliament is not authorized to legislate in relation to a matter caught by the provincial categories simply because it might in some sense be thought to qualify as contributing toward the "peace, order and good government of Canada". [p. 542]

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[481] Further, as Professor Gibson explains, every conferral of provincial legislative jurisdiction is qualified by words such as "in the Province", including s. 92(16). The result is that the POGG power is limited to only those matters that are *not* of a provincial nature; in other words, it confers Parliament jurisdiction over matters with a "national dimension" ("Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 18).

[482] Thus, focusing on "peace, order, and good government" is "unproductive", because it provides little assistance in drawing the line between provincial and federal areas of competence. In addition, it "tends to draw attention away from the central question pointed to by the introductory clause, namely, whether the matter to which an enactment relates is one 'not coming within' the classes of subjects assigned exclusively to provincial legislatures" (Lysyk, at p. 534; see also J. Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005), 38 *U.B.C. L. Rev.* 353, at pp. 358-59).

[483] A general power to legislate "in relation to peace, order and good government" would also be incompatible with the intention to create a robust sphere of provincial jurisdiction to protect the autonomy of the provinces. Section 92(13), in particular, grants the provinces jurisdiction over "Property and Civil Rights in the

Province", which was understood as "descriptive of the full range of civil law, as opposed to criminal law" (Lysyk, at p. 544). In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), Sir Montague Smith similarly observed that the words of s. 92(13) were "sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract" (p. 110). He held that there is no reason for holding that these words are not used in their "largest sense" in s. 92(13) (p. 111).

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[484] As a result, the general POGG power does not confer authority to Parliament to enact laws of a local or private nature, or related to "property and civil rights" under the guise of "peace, order, and good government". As Lord Watson observed in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 (P.C.) ("*Local Prohibition*"), at pp. 360-61:

> . . . the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures. [Emphasis added.]

(2) POGG Should Be Understood as Residual to the Enumerated Heads of Section 91

[485] While case law has consistently held that POGG is residual to the *provincial* enumerated heads, this Court's approach to whether it is residual to the *federal* enumerated heads is not so clear.

[486] Some early cases treat the POGG power as residual to both the provincial and federal enumerated heads of power. For example, in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.), Viscount Haldane said that courts should first ask whether the subject matter falls within s. 92. If it does, the court asks whether it also falls under s. 91. Only if the subject "falls within neither of the sets of enumerated heads" would POGG be considered (p. 406 (emphasis added)).

[487] However, some commentators have claimed that POGG is not residual to the enumerated federal heads of power because the enumerated federal heads are only illustrative of "peace, order, and good government" (see, e.g., B. Laskin, '"Peace, Order and Good Government' Re-Examined" (1947), 25 *Can. Bar Rev.* 1054, at p. 1057).

[488] Moreover, in some cases this Court has held that a matter may fall within the POGG power *or* another enumerated federal head of power (see, e.g., *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, which concluded that nuclear power fell *either* under the declaratory undertaking power (s. 92(10)(*c*)) *or* national concern; *In re Regulation and Control of Radio Communication in Canada*,

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[1932] A.C. 304 (P.C.) ("*Radio Reference*"), which concluded that the matter could fall under the POGG power or the interprovincial undertakings power (s. 92(10)(*a*)); and *Aeronautics Reference*, which appeared to conclude that the matter fell under both s. 132 and the POGG power). While there is nothing wrong with making alternative findings, these cases could be read as indicating that it is possible for a matter to fall *both* within the POGG power *and* within a federal enumerated head of power at the same time.

[489] In my view, this approach is wrong. I agree with Professor Hogg that the POGG power is residual to the enumerated provincial *and* federal heads of power, and that "matters which come within enumerated federal or provincial heads of power should be located in those enumerated heads, and the office of the p.o.g.g. power is to accommodate the matters which do not come within any of the enumerated federal or provincial heads" (s. 17.1). Contrary to Professor Laskin's view (as he then was), I do not understand a number of the enumerated heads of power assigned to Parliament, such as its power over copyrights (s. 91(23)), to be merely examples of a broad power to legislate for peace, order, and good government. Rather, many had to be specifically enumerated to avoid falling under the large scope of provincial jurisdiction over "property and civil rights" (s. 92(13)) (Leclair (2005), at pp. 355-57; Hogg, at s. 17.1; Lysyk, at p. 539).

[490] There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction. As Professor Hogg explains, the normal

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process of constitutional interpretation, like the interpretation of any statute or contract, is to rely first on a more specific provision before resorting to a more general one (s. 17.1). Resort to the general over the specific improperly treats the specific as redundant. Moreover, as Professor Abel argues, the more specific will usually be more defined and less contentious, and courts should not waste time arguing about the outer limits of the more general and diffuse when it is not necessary. In doing so, they would avoid the difficult question of whether a matter is of a "merely local or private" nature or if it has reached a national dimension so as to fall under POGG ("The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at pp. 510-12).

[491] When we are classifying the subject matter of an enactment, we are therefore *first* trying to classify it among the exclusive heads of power assigned to the federal and provincial legislatures. If the matter cannot fit within any enumerated head, *only then* may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

(3) The Parallel Structure of the Provincial and Federal Residual Clauses Supports a Narrow Understanding of POGG

[492] The federal residual clause has typically been seen as the sole residual power, such that all matters "not coming within" those assigned to the federal and provincial legislatures come within federal power (Hogg, at s. 17.1). However, there is a strong case for viewing the opening words of s. 91 and s. 92(16) as setting out a

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"parallel structure of complementary federal and provincial residua" (Leclair (2005), at p. 355 (emphasis added)).

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[493] There is much to be said for the theory that the two sections "complement and modify each other", with the federal residuum dealing with matters "of a general character" and the provincial residuum encompassing matters "of a merely local or private nature" (Lysyk, at pp. 534 and 536-38). Indeed, the two sections have been said to strike a "careful balance . . . with matters potentially regulated at the federal level already within the enumerated provincial powers or ultimately covered within this last clause on matters of local concern" (Newman, at p. 192). Professors Hogg and Wright similarly say:

> . . . there is a plausible argument that the *Constitution Act, 1867* includes not one, but two complementary residuary powers. This argument, in turn, strengthens the view that the *Act*, as drafted, was intended to form the foundation for a federal system that is less centralized than many English-Canadian commentators have supposed. [Footnote omitted.]
>
> ("Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005), 38 *U.B.C. L. Rev.* 329, at p. 338)

[494] As the Attorney General of Quebec argues in this case, the scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. Accordingly, when determining if a matter falls under POGG, it is relevant to consider if it is of a "merely local and private nature" such that it would

fall under s. 92(16) (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 599-600).

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[495] There is also support for this understanding of the relationship between the POGG power and s. 92(16) in the case law. In *Local Prohibition*, at p. 365, Lord Watson explains:

> In s. 92, No. 16 appears to [their Lordships] to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated. [Emphasis added.]
>
> (See also *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 700.)

[496] In *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, this Court also addressed the residual nature of s. 92(16), and explained that "[h]ead 16 contains what may be called the residuary power of the Province . . . and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved" (p. 212). More recently in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, McLachlin C.J. stated that s. 92(16) along with s. 92(13) are "often seen as sources of residual jurisdiction", and LeBel and Deschamps JJ. stated that s. 92(16) "can also be regarded as a partial residual jurisdiction" (paras. 134 and 264; see also *R. v. Hauser*, [1979] 1 S.C.R. 984; and *Schneider v. The Queen*, [1982] 2 S.C.R. 112).

[497] The parallel structure of the residual clauses contributes to the balance of powers within the Confederation and ensures that, as society changes, more and more matters are not enveloped exclusively within federal competence (Lysyk, at p. 534; Newman, at p. 192). Accordingly, the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power.

[498] For clarity, this understanding of the relationship between s. 92(16) and POGG differs from the understanding of the Court of Appeal of Alberta majority. In my view, POGG is residual to all enumerated provincial heads of power, including s. 92(16). Matters that formerly fell under *any* enumerated provincial head of power can come to extend beyond provincial competence and, where the *Crown Zellerbach* test is met, come within POGG.

B. *A Close Reading of the Case Law*

[499] A review of POGG case law reveals that courts have long struggled to define its contours in a way that preserves the division of powers. The result has been doctrinal confusion and categories that lack clarity. Many commentators speak of three separate POGG branches: emergency, national concern and gap. Professor Hogg explains that matters falling under the "gap" branch are not just "new" in the sense that they do not come within any enumerated head of power, but rather "depend upon a lacuna or gap in the text of the Constitution", where "the Constitution recognizes certain topics as being classes of subjects for distribution-of-power purposes, but fails

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to deal completely with each topic" (s. 17.2). Though the terminology between commentators differs, the schema is similar (see, e.g., G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at c. 6; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 264; Brun, Tremblay and Brouillet, at p. 584).

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[500] In my view, the POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power. What some commentators have named "gap" and "national concern" are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the *Crown Zellerbach* test. A close reading of *Crown Zellerbach* reveals that the test set out in that case applies to both "national concern" and "gap" cases, and this affinity between "gap" and "national concern" informs my understanding of that test.

(1) The Early Development of the POGG Power

[501] From the beginning, courts have treated the POGG power as *residual*, only relevant where a matter does not come within the enumerated classes of subjects. The early cases reveal no distinction between "gap" and "national concern", but rather a distinction between a general residual power and the emergency power. In either instance, the courts emphasize that POGG is a category of last resort, and the

importance of keeping the doctrine circumscribed and narrow, so as to properly preserve the sphere of provincial jurisdiction.

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[502] The earliest cases of *Parsons* and *Russell* treated s. 91 and POGG essentially as one: if a matter did not come within a s. 92 head of power, it fell somewhere within s. 91 (*Parsons*, at p. 109; *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), at pp. 836-37). In *Russell*, Sir Montague Smith upheld the *Canada Temperance Act*, noting that temperance was a subject "of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it" (p. 841 (emphasis added)).

[503] In *Local Prohibition*, Lord Watson upheld a provincial local-option temperance scheme quite similar to the federal one in *Russell*, under s. 92(13) or (16). While noting that there may be matters not coming within the enumerated heads of s. 91 or 92 that fell under federal power, Lord Watson cautioned that such non-enumerated matters "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance" and should not trench upon provincial subjects at the risk of destroying provincial autonomy (p. 360). He then made the frequently cited statement:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and

> has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. [Emphasis added; p. 361.]

[504] Following *Local Prohibition*, the Privy Council, per Viscount Haldane, ignored this passage and the national concern idea for many years. Instead, POGG was seen as encompassing only emergencies (Hogg, at s. 17.4(a); *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 (P.C.), at pp. 703-6; *Snider*, at pp. 405-6 and 412). These cases represent the first scaling back of national concern. At the same time, they illustrate that the courts have long been concerned with ensuring provincial legislatures did not lose their powers.

[505] In 1931, national concern seemed to resurface in the *Aeronautics Reference*, which reiterated that matters can attain "such dimensions as to affect the body politic of the Dominion" (p. 72). Ultimately, the Privy Council held that aeronautics fell within federal jurisdiction, essentially under s. 132 of the *British North America Act, 1867* (the treaty power). In the *Radio Reference*, Viscount Dunedin held that Parliament had jurisdiction to regulate radio communication based on both the interprovincial undertaking power and POGG. He noted that the *British North America Act, 1867*, was silent on the ability of Canada (as opposed to the "British Empire" in s. 132) to enter treaties and thus did not authorize treaty-implementing legislation. POGG therefore filled what appeared to be a gap.

[506] Next, a series of "new deal" cases in 1937 reverted to the idea that POGG applied only to emergencies (see Hogg, at s. 17.4(a)). Among these was the *Labour*

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Conventions case, in which Lord Atkin held that neither the *Aeronautics Reference* nor the *Radio Reference* stood for the proposition that legislation to perform a treaty was an exclusively federal power. For division of powers purposes, there was "no such thing as treaty legislation as such" (p. 351); rather, provinces could legislate over aspects of treaties falling under s. 92 and Parliament over aspects falling under s. 91.

[507] National concern re-emerged in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.). Viscount Simon held that *Russell* was not based on the emergency branch and that POGG was *not* confined to emergencies and could encompass matters of "concern of the Dominion as a whole" (p. 205).

[508] As the foregoing discussion demonstrates, early POGG cases suffered from a series of twists and turns, with various "national concern" statements infusing them at various points. As I read the above cases, the common theme is this: courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. With this backdrop, I turn to *Crown Zellerbach* and its survey of the modern case law on POGG.

(2) The Modern Development of the POGG Power and the "National Concern" Test from *Crown Zellerbach*

[509] In *Crown Zellerbach*, Le Dain J. set out the modern "national concern" test. A close reading of *Crown Zellerbach* and the cases on which Le Dain J. relies reveals

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that his test applies both to what commentators refer to as "national concern" cases and "gap" cases: both are manifestations of the exhaustive nature of the division of powers and the residual nature of the POGG power. Both types of cases must have the requisite "singleness, distinctiveness and indivisibility" and must have a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (p. 432).

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[510] In *Crown Zellerbach*, Le Dain J. surveys a number of POGG cases. The first one of note for our purposes is *Canada Temperance Federation*, where Viscount Simon set out the following formulation of the test:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. [Emphasis added; footnotes omitted.]
>
> (*Canada Temperance Federation*, at p. 205, as cited in *Crown Zellerbach*, at pp. 423-24.)

Here, we have the *Aeronautics Reference* and the *Radio Reference* being cited as examples of "national concern" cases.

[511] Applying *Canada Temperance Federation*, this Court held that aeronautics fell under POGG apart from any question of a treaty power (as in *Aeronautics*

Reference) and that legislation establishing the National Capital Commission could be upheld under POGG (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663).

[512] Le Dain J. then reviews *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, a case which provided important statements on both the emergency branch and the national concern branch. In *Anti-Inflation*, Laskin C.J., writing for a majority on this point, upheld the federal *Anti-Inflation Act* under the emergency branch of POGG. Although he wrote in dissent on the emergency power, Beetz J.'s reasons on national concern attracted a majority (p. 437).

[513] Beetz J. noted that national concern leads to exclusive, permanent federal competence and expressed serious concerns about a fundamental shift in the division of powers arising from recognizing inflation as a matter of national concern, as various provincial matters could be transferred to Parliament. In his view, if inflation were recognized as a matter of national concern, "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly" (p. 445; see also p. 444).

[514] In *Anti-Inflation*, at p. 457, Beetz J. appears to have grouped what some commentators would call "gap" and "national concern" cases together, and understood them to be motivated by the same underlying logic:

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> In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern. [Emphasis added.]

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[515] This statement groups together the incorporation of federal companies and radio (referring to *Parsons* and *Radio Reference*, cases commentators typically characterize as "gap" cases) with "conservation and improvement of the National Capital Region" and aeronautics (referring to *Munro* and *Johannesson*, cases commentators typically characterize as "national concern" cases) (Régimbald and Newman, at paras. 6.5 and 6.21; Hogg, at ss. 17.2 and 17.3).

[516] Beetz J. understood each of these subject matters as not falling within any enumerated head *and* as being "of national concern" (p. 457). Beetz J. goes on to explain, at p. 458, that such matters must not be

> an aggregate but ha[ve] a degree of unity that [makes them] indivisible, an identity which [makes them] distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enable[s] Parliament to touch on provincial matters ha[s] also to be taken into consideration before they [are] recognized as federal matters . . . . [Emphasis added.]

[517] These constraints apply *both* to "national concern" cases *and* to the cases some commentators understand to be "gap" cases. They allow courts to ascertain whether the matter is of a truly national dimension (rather than local) and whether it

has sufficient unity to be recognized as a matter under POGG rather than subdivided among existing heads of jurisdiction. I note that Beetz J. expressed that he was "much indebted" (p. 452) to an article by Professor Le Dain (as he then was) for his doctrinal statement on POGG (see G. Le Dain, "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261).

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[518] Later in *Crown Zellerbach*, Le Dain J. refers to *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, where Estey J. illustrated the range of federal jurisdiction under POGG, characterizing the POGG doctrine as falling into three categories:

> . . . (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature", of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter 'goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole'", citing *Canada Temperance Federation*.
> [Emphasis added.]
>
> (*Crown Zellerbach*, at p. 428, citing *Labatt*, at pp. 944-45.)

[519] Here, Estey J. (at p. 944) has characterized aeronautics and radio as examples of matters which "did not exist at the time of Confederation" and "cannot be put into the class of matters of merely local or private nature" (category "b" above), unlike Viscount Simon in *Canada Temperance Federation*, who saw these cases as examples of national concern in the traditional sense (category "c" above). This is

indicative of a relationship or overlap between both categories, which Le Dain J. later reconciles.

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[520] Le Dain J. then cites Dickson J.'s dissenting reasons in *R. v. Wetmore*, [1983] 2 S.C.R. 284, who read *Anti-Inflation* and *Labatt* as establishing *two* branches: an emergency branch and a general residual branch, the second of which could be sub-divided into categories "b" and "c" from *Labatt*:

> In the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, Beetz J., whose judgment on this point commanded majority support, reviewed the extensive jurisprudence on the subject and concluded that the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern" (p. 457). In the *Labatt* case, *supra*, at pp. 944-45, Estey J. divided this second heading into (i) areas in which the federal competence arises because the subject matter did not exist at the time of Confederation and cannot be classified as of a merely local and private nature and (ii) areas where the subject matter "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". This last category is the one enunciated by Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193, at p. 205. The one preceding it formed the basis of the majority decision in *Hauser* that the *Narcotic Control Act*, R.S.C. 1970, c. N-1, came under the peace, order and good government power as dealing with "a genuinely new problem which did not exist at the time of Confederation". [Emphasis added.]
>
> (*Wetmore*, at pp. 294-95, cited in *Crown Zellerbach*, at p. 430.)

[521] Le Dain J. did not draw a distinction between "gap" and "national concern" cases. Rather, he appeared to understand the two non-emergency POGG categories set

out in *Labatt* as falling under a general, residual branch of the POGG power, to which the following national concern test applies:

> From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:
>
> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. [Emphasis added.]
>
> (*Crown Zellerbach*, at pp. 431-32)

[522] On my reading, Le Dain J. subsumed all non-emergency POGG cases into one test, which is "separate and distinct from the national emergency doctrine" but applies to both "new matters which did not exist at Confederation" *and* "to matters which, although originally matters of a local or private nature in a province, have since,

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in the absence of national emergency, become matters of national concern". The requirements of singleness, distinctiveness and indivisibility and an assessment of the scale of impact on provincial jurisdiction apply for a matter to qualify as a matter of national concern "in either sense".

[523] Therefore, while some commentary speaks of "emergency", "gap" and "national concern" as three separate branches, in my view it is more accurate having regard to the case law to say there are two branches: emergency and a general residual power, to which the national concern test applies.

[524] This is consistent with Beetz J.'s approach in *Anti-Inflation* and the view Le Dain J. expressed when he wrote on POGG as a professor. Indeed, he seemed to view all non-emergency POGG cases as subsumed under the "general power", which was decidedly residual:

> . . . the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92.
>
> (Le Dain, at p. 293; see also Lederman, at p. 606.)

[525] Le Dain J.'s view as a professor and Beetz J.'s reasons in *Anti-Inflation* should inform the interpretation of the test set out in *Crown Zellerbach*, as subsuming "gap" and "national concern". This reading of *Crown Zellerbach* is also shared by some commentators. Dwight Newman says that POGG "applies only in the context of what

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would otherwise be a gap in the structure" and "the case law does not support the three-branch description of [POGG]" (pp. 200-201).

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[526] If "national concern" and "gap" are understood as separate, it is easy to mistakenly understand "gap" as the sole residual power, and to fail to appreciate the residual nature of "national concern". Rather, what some commentators call "gap" and "national concern" have the same underlying logic. They are both manifestations of the exhaustive nature of the division of powers, and the residual nature of POGG. This close affinity between "gap" and "national concern" is crucial to a proper understanding of the *Crown Zellerbach* test: all matters of national concern must fill a kind of "gap" in the sense that they do not fit under the enumerated heads, and, conversely, all matters that do not fit under the enumerated heads must still pass the national concern test to be within federal jurisdiction. Historical newness is irrelevant in ascertaining the existence of a constitutional "gap". Le Dain J. is clear in *Crown Zellerbach* that the test he sets out applies to historically new matters *and* matters that have come to extend beyond provincial competence and "become" matters of national concern. When I say that the matter must fill a kind of "gap", I simply mean that the matter does not fall under any enumerated head of power, and cannot be divided between multiple enumerated powers.

[527] As I explain below, "singleness, distinctiveness and indivisibility", "provincial inability", and "scale of impact" should be understood so as to give effect to the residual nature of the POGG power, and filter out any matter that could fall under

an enumerated head of power, including matters that are of a "merely local or private Nature" falling under s. 92(16), and matters that could be distributed among multiple heads.

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[528] I pause here to note that the emergency branch, too, can and should be understood as residual to the enumerated heads of power. Viscount Haldane, the architect of the emergency doctrine, "employed expressions which suggest a temporary transcending of the confines of the provincial heads of power" (Lysyk, at p. 549). Cases invoking the emergency branch indicate that in an emergency, a new aspect of government business arises that extends beyond provincial competency (*Fort Frances*, at p. 705; *Snider*, at p. 412; see also Lysyk, at pp. 548-51). For clarity, the fact that the emergency branch should also be understood as residual does not mean matters classified as emergencies need to pass the "national concern" test set out in *Crown Zellerbach*. Indeed, Le Dain J. specifically clarified that "[t]he national concern doctrine is separate and distinct from the national emergency doctrine" (p. 431).

(3) Going Forward

[529] The arc of the POGG jurisprudence has been an effort to navigate such that the division of powers is collectively exhaustive, in a way that respects provincial jurisdiction. The national concern doctrine, when properly applied, plays an essential role in achieving this. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government, do not fit comfortably within the division of

powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their "distinctiveness" from matters under provincial jurisdiction and their "indivisibility" between various heads of jurisdiction. But when the doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority.

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[530] The POGG case law reviewed above is at times amorphous and difficult to organize, but one common denominator runs throughout: courts must be careful in recognizing matters of national concern and heed the consistent warnings from the case law, because the national concern branch has great potential to upset the division of powers (*Local Prohibition*, at p. 361; *Canada Temperance Federation*, at pp. 205-6; see also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paras. 67, 110 and 115).

[531] Once a matter is qualified as "of national concern", Parliament has exclusive jurisdiction over the matter, including its intra-provincial aspects (*Crown Zellerbach*, at p. 433). Thus, as the Attorney General of Quebec argued, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences, including Quebec's ability to retain exclusive control over [TRANSLATION] "all powers deemed essential to the

survival and flourishing of its distinct cultural identity" (E. Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 299).

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[532] Courts should never *start* a division of powers analysis by looking to the federal residual power (Gibson (1976), at p. 18). This approach helps guard against an unwarranted and artificial expansion of federal jurisdiction. While the national concern doctrine allows courts to recognize Parliament's jurisdiction over matters that used to fall under provincial jurisdiction, there is no corresponding transfer of matters that are no longer of national interest to the provinces (Brun, Tremblay and Brouillet, at pp. 589-91). Rather, recognizing a matter of national concern has the effect of "adding by judicial process new matters or new classes of matters to the federal list of powers", which "would belong to Parliament permanently" (*Anti-Inflation*, at pp. 444 and 458). Therefore, to preserve the federal balance, courts should treat POGG as a power of last resort.

[533] Some more recent case law from this Court recognizes this. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, this Court declined to uphold federal legislation under the POGG power and stated that "the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867*" (p. 65 (emphasis added); see also *Hydro-Québec*, at paras. 109-10).

[534] My view of the national concern test gives effect to this truly residual understanding of POGG. The scope of the national concern doctrine must be limited to

matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of "national concern", as opposed to matters of a "merely local or private nature" that fall under s. 92(16).

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III. The National Concern Doctrine

A. *Singleness, Distinctiveness, Indivisibility*

[535] In *Crown Zellerbach*, Le Dain J. explained that "[f]or a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (p. 432). A close reading of Le Dain J.'s reasons in *Crown Zellerbach* and of Beetz J.'s influential reasons in *Anti-Inflation* reveal that "singleness, distinctiveness and indivisibility" should be understood purposively, as a way to identify matters that are beyond the powers of the provinces, and cannot be divided between both orders of government, which must fall under the general federal residual power in order to fill a constitutional gap.

[536] Beetz J.'s reasons in *Anti-Inflation* are an essential starting point to understand how matters can qualify as of "national concern". Beetz J. explained that matters of national concern have only been recognized "in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds

of form" (p. 458 (emphasis added)). The matter at issue in *Anti-Inflation*, the "containment and reduction of inflation", did not meet such requirements:

> It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. [p. 458]

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[537] In *Crown Zellerbach*, Le Dain J. noted that the majority of the Court in *Anti-Inflation* "held that the national concern doctrine applied, in the absence of national emergency, to single, indivisible matters which did not fall within any of the specified heads of provincial or federal legislative jurisdiction" and referred to Beetz J.'s reasons extensively (pp. 426-27). Thus, it appears that Le Dain J. understood *Anti-Inflation* as standing for the proposition that the national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e. it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible.

[538] The issue in *Crown Zellerbach* was whether "marine pollution" could qualify as a matter of national concern. More specifically, the question was whether "the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters" (p. 436 (emphasis added)). Le Dain J. proceeded in two steps, in line with *Anti-Inflation*. First, he determined that marine pollution was sufficiently distinct from the pollution of other provincial waters because of the distinction between salt and fresh water. Second, he

determined that the distinction was sufficient to conclude that marine pollution was a single and indivisible matter.

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[539] These cases demonstrate that the requirements of "singleness, distinctiveness and indivisibility" serve the purpose of identifying matters that are truly residual in two ways. That is, the matter must be "distinct" from provincial matters *and* must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both "new matters" and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

(1) Importance Is Irrelevant

[540] Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. In the *Insurance Reference* case, the Supreme Court and the Judicial Committee of the Privy Council made plain that the importance of a subject did not mean that it had attained a national dimension so as to transfer matters from provincial to federal authority (*In re "Insurance Act, 1910"* (1913), 48 S.C.R. 260, at p. 304, aff'd *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.), at p. 597, cited in Le Dain, at pp. 276-78; see also *Anti-Inflation*, at pp. 446-50). The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize "important"

matters that can be legislated upon by the provinces or by both orders of government. This would severely undermine the principle of federalism (Gibson (1976), at p. 31; see also Hogg, at s. 17.3(b)). For instance, provinces have jurisdiction to legislate in relation to education and the national concern doctrine cannot displace such authority simply because of the importance of the matter.

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(2) Distinctiveness

[541] First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92 (*Anti-Inflation*, at p. 457). This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters "in the Province" (see Gibson (1976), at p. 18). This inquiry includes consideration of the provincial residuum: if the matter is of a "merely local or private Nature", it would fall under s. 92(16).

[542] For example, federal legislation regulating the insurance business could not be sustained under POGG because it was not distinct from provincial matters. Provincial legislatures could have enacted legislation "substantially identical" under their authority to make laws in relation to civil rights and matters of local interest, under ss. 92(13) and 92(16) (*In re "Insurance Act, 1910"*, at pp. 302-3, per Duff J.). Similarly, "[t]he brewing and labelling of beer and light beer" did not transcend the provincial authorities' powers so as to give rise to a matter of national concern. On the contrary, Estey J. noted that there had been "legislative action duly taken in this field by the provinces" (*Labatt*, at p. 945).

[543] By contrast, marine pollution was found to be sufficiently distinct from pollution in other provincial waters, which fall under provincial jurisdiction (*Crown Zellerbach*, at pp. 436-38). Likewise, the subject of aeronautics was found to "transcen[d] provincial legislative boundaries" (*Johannesson*, at p. 309, per Kerwin J.).

[544] I would add that the matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Of course, since division of powers disputes typically pertain to the boundaries between provincial and federal jurisdiction, in practice, distinctiveness is mainly considered with respect to provincial powers.

(3) Singleness and Indivisibility

[545] Second, as the Attorney General of Quebec correctly argued, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction (Lederman, at pp. 604-5). In other words, the fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum. This will be the case when the matter has a degree of unity and specificity that makes it indivisible or where the intra-provincial and extra-provincial aspects of the matter are inextricably interrelated (*Anti-Inflation*, at p. 458; *Crown Zellerbach*, at p. 434).

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[546] For instance, diffuse matters such as "inflation", "labour relations" and "the environment" are distinct from matters falling under s. 92; they are not of a "merely local or private Nature" (s. 92(16)) and cannot be fully regulated by the province. However, they cannot be assigned to Parliament exclusively since they are divisible aggregates of several subjects cutting across provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; *Oldman River*, at pp. 63-64). They do not have a singleness such that they must be regulated exclusively by Parliament to avoid a jurisdictional gap.

[547] Such general categories should be viewed as "outside the system . . . [and] subdivided into appropriate parts so that necessary legislative action can be taken by some combination of both federal and provincial statutes" (Lederman, at p. 616; see also D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85, cited in *Oldman River*, at p. 63). This is not a flaw of federalism, since we ought to reject the view that "there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem" (*Crown Zellerbach*, at p. 434). Rather, these matters are properly dealt with through federal-provincial agreements, what Professor Lederman calls "[t]he essence of co-operative federalism" (p. 616). Accordingly, resort to the general federal residual power is not necessary to preserve the exhaustiveness of the division of powers.

[548] This Court has found that certain matters have the requisite singleness and indivisibility to fall under the general federal residual power rather than be distributed

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between federal and provincial heads of powers. For instance, the conservation of the National Capital Region was, by nature, a specific matter with a degree of unity that made it indivisible (*Anti-Inflation*, at pp. 457-58; *Munro*, at pp. 671-72). In *Crown Zellerbach*, the majority of this Court found that marine pollution was a single and indivisible matter in part because "the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions" (p. 437). The interrelatedness of the intra-provincial and extra-provincial aspects of the matter was such that marine pollution could not be shared between both orders of government if it were to be regulated. On this view, if it did not fall under the general federal residual power, neither Parliament nor provincial legislatures could have effectively legislated upon marine pollution, which would be inconsistent with the exhaustive division of powers.

[549] Singleness and indivisibility are thus means to determine whether the matter truly lies outside the enumerated heads or if it is merely a "new nam[e]" applied to "old legislative purposes" that can be distributed among existing heads of jurisdiction (Le Dain, at p. 293).

B. *Provincial Inability*

[550] In *Crown Zellerbach*, Le Dain J. held that in evaluating whether the matter has a singleness, distinctiveness and indivisibility, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with

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the control or regulation of the intra-provincial aspects of the matter" (p. 432). This factor is known as the "provincial inability" test.

[551] Once again, it is essential to look at the genesis of the provincial inability inquiry to understand what it sought to accomplish and its role in the national concern doctrine. The provincial inability inquiry has been designed to control the centralization of powers and to limit the extension of the national concern doctrine to matters that are "beyond the power of the provinces to deal with" and that must be legislated upon by Parliament, exclusively (Gibson (1976), at pp. 33-34 (emphasis deleted); see also Leclair (2005), at p. 361; *Crown Zellerbach*, at pp. 432-33).

[552] In *Labatt*, this Court held that matters would meet this "test" when interprovincial cooperation is realistically impossible because "the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces" (p. 945, citing P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 261). In such cases, the matter is effectively beyond the power of the provinces to deal with it.

[553] This background sheds light on the purpose of the concept of provincial inability: to help identify potential jurisdictional voids or gaps, which may indicate that a matter has a national dimension so as to fall under POGG to ensure the division of powers is exhaustive. The underlying purpose of the provincial inability inquiry is essential to understanding its iteration in *Crown Zellerbach*.

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(1) Extra-Provincial Effects Are Relevant to, But Not Determinative of, Provincial Inability

[554] First, "extra-provincial effects", on their own, are insufficient to satisfy the "provincial inability" test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem.

[555] I acknowledge that this is not the only way to read *Crown Zellerbach*. Read in isolation, Le Dain J.'s reasons could suggest that provincial inability is met whenever there are considerable effects on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter. In my view, this understanding cannot be correct. Understood this way, provinces would be "unable" to legislate with respect to many matters that were expressly entrusted to them. For example, if a province did not deal effectively with the administration of justice in the province (s. 92(14)), this may have grave consequences for residents of other provinces — the absence of any criminal prosecutions in an entire province would surely have spillover effects for neighbouring provinces. However, I would not say that this mere possibility makes all provinces "unable" to administer justice in the province.

[556] Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction (Brun, Tremblay and Brouillet, at pp. 592-93; Hogg, at s. 13.3(c)). If the pith and substance of

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provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at paras. 23, 24 and 38; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 28). Given the potential displacement of provincial authority, courts should have a "strong empirical base" for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem (K. Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992), 55 *Law & Contemp. Probs.* 121, at p. 136; Leclair (2005), at p. 370).

[557] Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. The sovereign and democratic will of provincial legislatures entitles them to agree or disagree that uniformity of laws is a desirable goal, and to change their mind in the future (*Reference re Pan-Canadian Securities Regulation*, at para. 69; Hogg, at s. 17.3(b)). Moreover, since the possibility of one or more provinces not cooperating is always hypothetically present, such lax criteria would be ineffective protection for provincial jurisdiction (E. Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011), 54 *S.C.L.R.* (2d) 601, at pp. 620-21). It is worth repeating that striking a balance between diversity and uniformity is precisely why the Canadian constitution has a

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federal structure. In certain fields, the *Constitution Act, 1867*, places diversity and the right to provincial difference above uniformity. This is not a defect of our Constitution, it is a strength.

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(2) Provincial Inability Is Relevant to, But Not Determinative of, "Singleness, Distinctiveness and Indivisibility"

[558] Second, the residual role of the national concern doctrine explains why Le Dain J. in *Crown Zellerbach* indicated that the "provincial inability" test is only a "factor" to evaluate whether a subject matter has the required singleness, distinctiveness and indivisibility.

[559] Many matters are "beyond the power of the provinces to deal with" but do not meet the requirements of singleness, distinctiveness and indivisibility, and are therefore not matters of national concern. Obviously, matters that fall squarely within federal jurisdiction are one example (i.e. currency and coinage, the postal service, etc.). This is also the case when matters are mere divisible aggregates that span provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; Brouillet (2011), at p. 619). For instance, there is no denying that the containment of inflation is "beyond the power of the provinces to deal with", since it involves measures that fall squarely under federal jurisdiction, such as central banking measures relating to the rate of interest (*Anti-Inflation*, at p. 452). This does not mean that the containment of inflation has the required singleness and indivisibility to qualify as a matter of national concern since it can be divided and distributed to both orders of government. Since there is no

constitutional gap, there is no need for the national concern doctrine to be applied such that the entire matter comes under federal jurisdiction.

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[560] Provincial inability is no more than Le Dain J. says it is in *Crown Zellerbach*: an indicium of "singleness, distinctiveness and indivisibility". Extra-provincial effects resulting in provincial inability may indicate that the matter is not of a local or private nature (i.e. "distinct" from provincial matters), or is not separable from the local and private aspects of the matter (i.e. "indivisible" or "single"). This will be the case where the extra- and intra-provincial aspects of a matter are interrelated and inseparable (*Crown Zellerbach*, at p. 434). This makes sense. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

C. *Scale of Impact*

[561] When determining if a matter can pass muster as a subject matter falling under POGG, the final step is to consider whether it has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (*Crown Zellerbach*, at p. 432). If the "singleness, distinctiveness

and indivisibility" inquiry has been carried out correctly such that reliance on POGG is necessary to avoid a jurisdictional vacuum, then the scale of impact will necessarily be reconcilable with the division of powers. This stage of the test should therefore be understood as a "check" or "litmus test", rather than as an independent requirement. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers (*Anti-Inflation*, at p. 444).

[562] This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does *not* ask whether the importance of the proposed new federal power *outweighs* the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Further, assessing importance requires courts to assess the desirability of certain policies, something which is not their role.

[563] Rather, the notion of scale of impact on the fundamental distribution of powers is a manifestation of the principle of federalism. As this Court held in *Comeau*, this principle "requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (para. 78). Professor Brouillet explains that the idea of preserving a "federal balance" ought to be a principled exercise, animated by the values underlying federalism:

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> The search for a federal balance aims at keeping an equilibrium between the values of unity and diversity, whose first legal expression is laid down in the distribution of powers between the levels of government. The value of unity will be essentially preserved if the autonomy of the central government is protected, as the value of diversity will be maintained if the federated units are free from interference from the central government in the exercise of their exclusive legislative powers. [Emphasis added.]
>
> ("The Federal Principle and the 2005 Balance of Powers in Canada" (2006), 34 *S.C.L.R.* (2d) 307, at pp. 311-12)

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[564] If ubiquitous, all-pervasive matters, such as "the containment and reduction of inflation", fell under POGG, they would authorize federal action that would have a radical effect on the federal balance as they would "render most provincial powers nugatory" (*Anti-Inflation*, at p. 458). Rather, the matter must be of a sufficiently narrow and specific nature to be consistent with the value of diversity and the autonomy of provincial governments to set their own priorities and come up with policies tailored to their unique needs (*Securities Reference*, at para. 73).

[565] Moreover, the fact that some matters were not assigned exclusively to either Parliament or the provincial legislatures, and instead are shared between both orders of government, must be given effect. This must not be disturbed through constitutional interpretation. In *Hydro-Québec*, at para. 59, Lamer C.J. and Iacobucci J., dissenting, but not on this point, made this clear in relation to the "environment" as a subject matter:

> *A decision by the framers of the Constitution not to give one level of government exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed*

> *to take over the field so as to completely dwarf the presence of the other*. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. As La Forest J. noted in his dissenting reasons in *Crown Zellerbach*, at p. 455, "environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable." [Underlining in original; italics added.]

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[566] Although the modern conception of federalism is flexible and accommodates overlapping jurisdiction, courts must be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or "matter" may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 84; *Canadian Western Bank*, at para. 30). For example, the prohibition of driving while intoxicated can be enacted by Parliament under its power over criminal law, while provinces can legislate regarding the suspension of driving licenses for highway safety reasons, likely under their power over "property and civil rights" (*O'Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238).

[567] The role of the double aspect doctrine is simply to explain how similar rules in otherwise valid provincial and federal laws can apply simultaneously, "when the contrast between the relative importance of the two features is not so sharp" (*Rogers Communications*, at para. 50, citing W. R. Lederman, "Classification of Laws and the

British North America Act", in *The Courts and the Canadian Constitution* (1964), 177, at p. 193; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 182). Thus, while this doctrine "allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction* over a matter" (*Securities Reference*, at para. 66 (emphasis in original)).

[568] As its name indicates, the doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. It is "neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction" and does not allow Parliament and provincial legislatures to legislate on the "*same* aspect" of the matter (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766, per Beetz J. (emphasis in original)). As Professors Brouillet and Ryder write, "an unbridled application of the doctrine would undermine the principle of exclusiveness that forms the foundation of the distribution of powers in Canada" ("Key Doctrines in Canadian Legal Federalism", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 415, at p. 423).

[569] Moreover, the double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. Under the paramountcy doctrine, "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency" (*Saskatchewan*

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(Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 15; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11). The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy. I note that Quebec scholars have warned about the particular effects of an unrestrained application of the double aspect doctrine on the province's exclusive jurisdiction. To quote Professor Patenaude:

> [TRANSLATION] It is because of section 92, subsection 13, that Quebecers are governed by a distinct private law system adapted to the specificity of their culture. Any weakening of the rule of [provincial] exclusiveness signifies a possibility for the federal Parliament, in which Francophones are in the minority, to legislate, pre-eminently, in fields the framers had entrusted exclusively to the Parliament of Quebecers. . . . Quebecers cannot accept that fields of jurisdiction over which they have exclusive control can, under the guise of the aspect doctrine, pass into the sphere in which federal jurisdiction has priority of application. [Emphasis added.]
>
> ("L'érosion graduelle de la règle de l'étanchéité: une nouvelle menace à l'autonomie du Québec" (1979), 20 *C. de D.* 229, at p. 234; see also G. Rémillard, "Souveraineté et fédéralisme" (1979), 20 *C. de D.* 237, at p. 242.)

[570] As Professor Hogg explained, "[i]f in a nation paramount central power completely overlapped regional power, then that nation would not be federal . . . . It is only where overlapping of power is incomplete, or the scope of central control is limited, that we have a federal system" (s. 5.1(a); see also *Bell Canada*, at p. 766). When Professor Hogg wrote that the "nation would not be federal", he did not mean that provinces would cease to exist. Rather, he meant that where provinces become

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subordinate units, the nation is no longer federal in its nature. In other words, supervisory federalism isn't federalism at all.

[571] In para. 139, the Chief Justice says that my description of national concern (referred to as "two-step") is not reflective of the jurisprudence, noting *Munro* and *Crown Zellerbach*. He concludes by saying: "In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern." In reply, first, I would say that aside from a few shining beacons of clarity and coherence, notably Beetz J. in *Anti-Inflation*, the jurisprudence on national concern has been unclear, even obscure. Second, I do not agree that my description of national concern is not consistent with the jurisprudence while that of the Chief Justice is so. Neither he nor I simply apply precedent. Rather, each of us in different ways makes sense of what was written before. The two-step approach I adopt reflects the methodology Le Dain J. set out and applied in *Crown Zellerbach*, as I have indicated throughout. Third, the difference is not how faithfully we each adhere to a tortuous case law, but rather how we each conceive of the purpose of the national concern doctrine. For me, it is to give effect to federal residual authority over matters not otherwise assigned under the enumerated heads of power and that cannot be divided between both orders of government. For the Chief Justice it is akin to a debenture, with POGG being a general federal authority that floats over that of the provinces, and crystalizes into exclusive federal jurisdiction when a matter of "inherent national concern" is recognized. These views are fundamentally different, but neither follows directly from the case law.

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[572] The Chief Justice also takes issue with my account of the national concern test. I agree that our understandings of POGG are fundamentally different. Mine is that POGG confers residual authority, by which I mean authority to legislate in relation to only those matters which would otherwise fall into a jurisdictional vacuum. As such, it can only be the basis of jurisdiction for matters that do not come within heads of power listed in ss. 91 and 92, and *cannot be divided between them*. Such residual authority is necessary to ensure that the division of powers is exhaustive. To put it in the simplest terms, the matters falling under the competence conferred on Parliament by s. 91 and that conferred on the legislatures of the provinces by s. 92, or any combination of the two, by definition, cannot come within a residual authority.

[573] Therein lies the conceptual difference that the Chief Justice highlights. In his framework, POGG is a primary source of authority conferred on Parliament in relation to "matters of inherent national concern" (para. 139). Moreover, it is a source of authority that can be used to deal with federal "aspects" of matters under enumerated powers within the exclusive jurisdiction of provincial legislatures. Thus, he states at para. 130: ". . . where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount."

[574] By means of "minimum national standards", a federal aspect is *generated,* and this federal aspect can be used as a basis to supervise provinces in the exercise of their authority. This is not residual authority. It is the antithesis of residual authority,

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as it would operate to encroach on jurisdiction conferred on the provinces. Most respectfully, I disagree.

D. *Conclusion*

[575] The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would "disappear not gradually but rapidly" (*Anti-Inflation*, at p. 445).

IV. The Attorney General of Canada's Expansive Approach Lacks Caution

[576] Repeated warnings about the misuse of the "national concern" power, notably by Beetz J. in *Anti-Inflation*, were all but ignored by the Attorney General of Canada in his submissions before this Court. The Attorney General of Canada did not seek to rely on the federal enumerated powers, notably taxation or trade and commerce, as the basis for the constitutionality of the *Act*. He did not set forth national concern as an alternative basis. Nor did he rely on the emergency branch, which confers Parliament temporary, rather than permanent, authority. (In a "throw-away" submission, the Attorney General of Canada made passing reference to these potential grounds and referred the Court to the submissions of certain interveners.) This was audacious as national concern has been recognized repeatedly as being a threat to the distribution of powers that is at the heart of the Confederation bargain. Further, the Attorney General

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of Canada's proposed national concern test would considerably extend the doctrine, despite this Court's call for caution when considering a doctrine that "inevitably raises profound issues respecting the federal structure of our Constitution" (*Hydro-Québec*, at para. 110). I would reject this doctrinal expansion of national concern. I do so for two reasons. First, it departs in a marked and unjustified way from the jurisprudence of this Court. And, second, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction.

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A. *Becoming a Matter of National Concern*

[577] The Attorney General of Canada argues in his factum (at para. 2) that the pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide [greenhouse gas] emissions" has attained national dimensions because of its importance and the existential threat that climate change poses. This reasoning misstates what it means to attain national dimensions. A matter has attained national dimensions when it has the requisite singleness, distinctiveness and indivisibility such that it cannot fit under any enumerated head or be divided among multiple enumerated heads, and a scale of impact on provincial jurisdiction that is reconcilable with the division of powers, as explained above. How important a matter is does not determine which order of government has jurisdiction. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern

analysis, which is "separate and distinct from the national emergency doctrine" (*Crown Zellerbach*, at p. 431; see also *Anti-Inflation*, at p. 425).

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[578] Similarly, the Attorney General of Canada also says that the presence of international agreements indicates that the matter is of national concern. This argument is not only inconsistent with the residual nature of POGG, it also undermines almost nine decades of jurisprudence beginning with the *Labour Conventions* case, which held that the federal government does not gain legislative competence by virtue of entering into international agreements. Rather, the federal government and the provinces must cooperate to implement international agreements that relate to matters within provincial jurisdiction. What is urged on us by the Attorney General of Canada is a means — indirect, but no less significant thereby — for the federal Cabinet to expand the competence of Parliament by the exercise of its authority in respect of foreign relations.

B. *Singleness, Distinctiveness and Indivisibility*

[579] The treatment of "singleness, distinctiveness and indivisibility" by the Attorney General of Canada conflates key elements of the test, skipping over — I would go so far as to say denying the existence of — what should be important limits on federal jurisdiction. Interpreting such limits out of existence will have profound implications for the future on issues having nothing to do with climate change.

[580] On distinctiveness, the Attorney General of Canada argues in his factum that "the subject matter and the *Act* target a distinct type of pollutant with indisputable

persistence, atmospheric diffusion, harmful effects and interprovincial aspects" (para. 88). While the distinctiveness of greenhouse gases ("GHGs") from other types of gases may be relevant to the distinctiveness inquiry, it is only relevant insofar as the regulation of GHGs is outside of or "distinct from" provincial competence, which the Attorney General of Canada fails to adequately explain. The distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Lamer C.J. and Iacobucci J. make a similar point in their dissenting reasons in *Hydro-Québec*, at paras. 57 and 77. In that case, "equivalency provisions" which allowed the Governor in Council to exempt a province from the scheme if the province had equivalent regulations in force led them to reject the argument that the provinces were unable to regulate toxic substances.

[581] The Attorney General of Canada glosses over the problems with its distinctiveness argument through a proposed "modernized" national concern test that draws on the trade and commerce power jurisprudence and focuses on its version of provincial inability. This new test urged on us by the Attorney General of Canada does away with many of the requirements of "singleness, distinctiveness and indivisibility", and simply asks is the matter "distinctly national" (para. 69). The Attorney General of Canada says this should be assessed using the provincial inability test. He says it is "more than an indicium of distinctiveness, it is the test for distinctiveness" (para. 70). In effect, the Attorney General of Canada's proposition collapses "singleness,

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distinctiveness and indivisibility" into "provincial inability" — despite Le Dain J.'s caution that "provincial inability" should be only *one* indicium in determining whether a matter meets the singleness, distinctiveness and indivisibility requirements (*Crown Zellerbach*, at p. 434).

[582] This approach fails to give effect to the residual nature of the POGG power. It ignores Beetz J.'s caution that an aggregate of provincial and federal matters is not sufficiently distinctive and too pervasive to justify the creation of (what amounts to) a new head of power under national concern (*Anti-Inflation*, at p. 458). This is exacerbated by the Attorney General of Canada's reliance on the trade and commerce power jurisprudence to understand the "provincial inability" test. There is no reason why the national concern test should be informed by tests for enumerated heads of power, because the national concern test is directed towards matters that would not pass those tests. If a matter comes with "trade and commerce" or another enumerated power, then it cannot also be a matter of "national concern" if POGG is a residual power.

[583] The result is that something like the "containment and reduction of inflation", which Beetz J., with majority support on this point, held did not pass muster in *Anti-Inflation*, may pass the Attorney General of Canada's proposed "modernized" test. This is so because, even though such a matter could be divided between provincial and federal enumerated heads of power rendering it "divisible", the provinces, on their own or in tandem, would be unable to fully deal with it, and the failure of one province to act would endanger the interests of other provinces. This example illustrates how the

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Attorney General of Canada's proposal increases — I would go so far as to say transforms — the scope of the "national concern" branch under POGG.

[584] The device of "minimum national standards" makes wider still the pathway for enhancement of federal jurisdiction. The Attorney General of Canada argues that the provincial inability test is met, in part, because "no single province or territory can constitutionally legislate minimum national standards" (para. 101). But "by means of minimum national standards" could be applied to *any* matter, the same way "by means of the federal government" could be applied to any matter. If it could be applied to any matter, then it adds nothing meaningful to the description of a matter and has no place. Including "minimum national standards" in the matter of national concern short-circuits the analysis and opens the door to federal "minimum standards" with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision.

[585] Further, the Attorney General of Canada fails to identify extra-provincial effects that would be relevant to provincial inability. The Attorney General of Canada points to carbon leakage (interprovincial competition resulting from businesses relocating from jurisdictions with more strict climate policies to jurisdictions with less strict climate policies), but this is not the kind of extra-provincial effects that make the

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provinces unable to deal with the matter, on their own or in tandem. An imaginative lawyer can almost always find some effects of provincial measures outside the province (Swinton, at p. 126). This is not enough to put all or part of a matter beyond the power of the provinces to deal with. If it were, the provinces would be "unable" to legislate in many areas of provincial jurisdiction.

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[586] The Attorney General of Canada departs from this Court's jurisprudence in treating "provincial inability" and extra-provincial effects as more than an indicator, and losing sight of what it is supposed to be indicating: singleness, distinctiveness and indivisibility, which give effect to the residual nature of POGG. Extra-provincial effects leading to provincial inability to deal with all or part of a matter can constitute *one step* towards singleness, distinctiveness and indivisibility. In treating provincial inability as determinative, the Attorney General of Canada reframes the national concern test so as to expand the scope of POGG beyond its proper residual nature.

[587] In effect, the Attorney General of Canada's "modernized" test does away with "singleness, distinctiveness and indivisibility" by understanding these concepts in terms of (his version of) "provincial inability". It then renders "provincial inability" meaningless by defining the matter in terms "minimum national standards", something no province can do. By this logical sleight of hand, "provincial inability" exists whenever Parliament provides for "minimum national standards".

C. *Scale of Impact*

[588] The Attorney General of Canada suggests that the scale of impact on provincial jurisdiction of the *Act* is reconcilable with the distribution of powers, in part because of the backstop mechanism. He argues in his factum that the *Act* respects provincial jurisdiction because it provides provinces with the "flexibility" to implement their own GHG pricing systems and "fills in gaps" where the provincial pricing systems do not meet the "minimum national standards" (para. 6). This is presented as "cooperative" federalism.

[589] These conclusions are based on a highly centralized understanding of federalism. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. Indeed, this is the whole point. It would not be a minimum national standard if it were possible to drop below that standard or ask to be measured by a different yardstick. Given the number of activities and industries that produce GHG emissions, the *Act*'s scale of impact on provincial jurisdiction would be "so pervasive that it knows no bounds" (*Anti-Inflation*, at p. 458).

[590] While provincial authority would remain nominally intact, in reality it would become subject to oversight by the federal Cabinet through the exercise of its ability to invoke "minimum national standards" that would override provincial measures. But provinces are not "simple agents for implementing national policies but rather . . . veritable laboratories for the development of solutions adapted to local realities" (A. Bélanger, "Canadian Federalism in the Context of Combatting Climate

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Change" (2011), 20 *Const. Forum* 21, at p. 27). The *Act* is not an exercise in cooperative federalism. Rather, it is the means to enforce supervisory federalism.

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[591] As the Attorney General of Quebec points out, even provincial schemes that, at a given time, meet the federal benchmark would never be secure from federal displacement; as a result, the continued application and consistent operation of provincial schemes would be less predictable. This is especially the case considering that minimum national standards could be elevated to a level that completely subsumes provincial schemes. The *Act* effectively undermines the predictability, stability and integrity of provincial regulatory schemes. Exercise of provincial authority would be permanently contingent on the federal Cabinet's discretion.

[592] The reasoning of the Attorney General of Canada turns provincial autonomy on its head. It also suggests that Parliament could enact "minimum national standards" for a panoply of areas within provincial jurisdiction, and thereby create a federal "aspect" of multiple provincial matters. This has implications far beyond this legislation; these implications permanently alter the Confederation bargain.

[593] The double aspect doctrine does not cure this problem. The double aspect doctrine allows the same fact situation to "be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power" (*Desgagnés Transport*, at para. 84). The problem here is that the federal matter has been defined in terms of the extent to which it can limit the provinces' discretion to legislate: the backstop mechanism. This is not two aspects of the same fact situation. It is one aspect,

and it gives the federal government the upper hand and the final say. But, that is what "minimum national standards" are intended to do.

[594] In conclusion, I would reject the Attorney General of Canada's proposed expansion of the national concern doctrine and, for the reasons of my colleague Brown J., conclude that Parliament did not have jurisdiction to enact the *Act* under its general residual power. However, given that the majority has concluded that Parliament has the power to enact the *Act*, I want to emphasize that this conclusion does not extend to the regulations made under the *Act*.

V. The Constitutionality of Regulations Made Under the *Act* Are a Matter for Another Day

[595] The *Act* confers exceptionally broad authority on the Governor in Council to create policy in the regulations, particularly under Part 2. Although the majority has decided to uphold the *Act*, the *regulations* are not before this Court, and may well be challenged in future cases. I take this opportunity to clarify the appropriate methodology for reviewing regulations facially enacted pursuant to a constitutional statute for compliance with the division of powers, and how this methodology may apply to regulations made under the *Act*. In short, the federal power when applied in the regulations must be limited to the matter of national concern in which the *Act* is grounded: establishing minimum national standards of price stringency to reduce GHG emissions. To establish "minimum national standards", any differences in treatment between industries or provinces in the regulations must be justified with respect to

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"price stringency to reduce GHG emissions" (Chief Justice's reasons, at para. 207). Regulations that have the effect of favouring or imposing unequal burdens on certain provinces and industries in a manner that cannot be so justified would be *ultra vires* the division of powers.

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A. *Regulations Purportedly Enacted Under a Constitutional Act Can Be Unconstitutional*

[596] It is possible for a statute to be *intra vires*, and yet for regulations facially enacted under that statute to be *ultra vires* on division of powers grounds. One way to see this is that such regulations are not properly *intra vires* the Act, insofar as they are not consistent with the purpose for which the Act was upheld (even if facially they are within the Act's wording). In *Reference re Assisted Human Reproduction Act*, McLachlin C.J. assessed whether an Act was valid under the federal criminal law power, and explained that "[a]ny regulations passed under the enabling statute will be valid only insofar as they further valid criminal law goals, and they will be subject to challenge to the extent that they do not" (para. 84). As long as the regulations made under an Act reflect and further the purposes for which the Act was held to be constitutional, such regulatory schemes remain "securely anchored" in the Act and *intra vires* (para. 85).

[597] Certain regulation-making powers are more likely to give rise to regulations that may overstep the bounds of the division of powers than others. For example, the power to make regulations that define the mere details of a valid scheme

are unlikely to affect the division of powers. Broader regulatory powers are cause for greater concern. In such cases, [TRANSLATION] "[t]he regulatory authority, which must then itself consider the limits of the power so granted, is more likely to make regulations that will be found to be unconstitutional, whereas the enabling Act, owing to the generality of the language used and to the presumption of validity of laws, will avoid such a finding" (P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at p. 290).

[598] In this case, the *Act* delegates substantial authority to the Governor in Council to make regulations. The *Act*, and especially Part 2, could be described as "framework" or "skeletal" legislation, in the sense that much of its content is given effect by means of the regulations. In the context of framework legislation, the risk of regulations using their powers in a manner that is beyond their constitutional competence is particularly high. While the validity of the regulations the Governor in Council has made, or will make in the future, is a matter for another day, I offer some guidance on the proper methodology for reviewing the constitutionality of such regulations.

[599] At para. 220 of his reasons, the Chief Justice writes: "My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. . . . [H]is speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable." This legislation is an instrument not only of environmental policy, but

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also industrial policy. By design, regulations under Part 2 will have impacts that vary by enterprise, sector and region. These regulations will affect the viability, for example, of natural resource industries that need to generate power at remote locations or heavy industries that require intense heat, like making cement or smelting ore. By contrast, they will have little effect on industries that are either not power-intensive (like finance) or where production is electrified (like manufacturing). While the primary purpose of the legislation is environmental protection, Part 2 is premised on tailoring the impact of emissions reduction by reference, inter alia, to economic considerations (G. Bishop, *Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing* (2019), C.D. Howe Institute Commentary 559). Issues as to whether regulations veer too deeply into industrial policy, thus calling into question the regulations' constitutionality, will inevitably arise.

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B. *Methodology for Evaluating the Constitutionality of Regulations*

[600] An administrative decision to enact regulations is, presumptively, reviewed solely for "reasonableness", unless there is a reason to rebut that presumption. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, this Court made clear that there is no separate "jurisdictional questions" category of correctness review that would rebut the presumption, even for delegated legislation (paras. 65-66). *Vavilov* also adopted the view that "[w]here [the legislature] has established a clear line, the [administrative decision maker] cannot go beyond it; and where [the legislature] has established an ambiguous line, the [decision maker] can go no further

than the ambiguity will fairly allow" (para. 68, quoting *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 307).

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[601] One way that the presumption of reasonableness can be rebutted, however, is when the constitutionality of a provision is in issue, including a challenge based on the division of powers (*Vavilov*, at para. 55). As *Vavilov* explained, at para. 56:

> A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

Where the reason for which regulations are said to be *ultra vires* their enabling statute is *because* they are *ultra vires* the division of powers, this raises a constitutional question. As the standard of review may depend on the nature of the challenge and the relief sought, I will say no more about it here.

[602] As for methodology, the review of *regulation* for compliance with the division of powers follows the same structure as the review of *legislation* for compliance with the division of powers. In both cases, one must characterize the measure and then classify it. This Court explained the process for analyzing the constitutionality of subordinate legislation, specifically a municipal by-law, in *Rogers Communications*, at para. 36:

> In analyzing the pith and substance of the notice of a reserve, the Court must consider both its purpose and its effects: *Goodwin*, at para. 21; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 63-64; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at paras. 20-22. The purpose of a municipal measure, like that of a law, is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted: *Lacombe*, at paras. 20-22; *COPA*, at para. 18; *Canadian Western Bank*, at para. 27. As for the effects of a municipal measure, they are determined by considering both the legal ramifications of the words used and the practical consequences of the application of the measure: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83.

[603] Analyzing the pith and substance of the municipal measure at issue above is done in the same way as it is for the pith and substance of a statute. Regulations are no different (D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at topic 13:3210; see also *Labatt*; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, 398 D.L.R. (4th) 91; *Oldman River*). The underlying logic is the same: Parliament cannot via statute exercise power it does not have, and so it cannot delegate power that it does not have. Scrutiny for compliance with the division of powers can be no less, simply because Parliament has chosen to give effect to its authority through a delegate who is empowered to make regulations. A division of powers analysis begins with pith and substance, and pith and substance begins with purpose and effect.

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[604] In considering purpose, courts can and should consider both intrinsic and extrinsic evidence (see, e.g., *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 20; see also *Rogers Communications*, at para. 36, per Wagner and Côté JJ., and at paras. 100-104, per Gascon J., concurring). However, certain empowering provisions are more likely than others to generate extrinsic evidence. Empowering provisions of cities, where bylaws are passed after public debate, almost always generate extrinsic evidence. *Rogers Communications* is an example. Similarly, empowering provisions that place a duty to give reasons on an administrative decision-maker can also be adequately reviewed for constitutionality. Regulations directed to an individual or specific site, as opposed to regulations of general application, may attract a duty of procedural fairness (Brown and Evans, at topic 7:2331).

[605] Where, however, there is no public debate and no duty to give reasons, there is no guarantee that extrinsic evidence will be created. Without such extrinsic evidence, a court's ability to effectively adjudicate the boundaries of federal and provincial powers may be made more difficult. This will generally arise with regulation-making powers.

[606] This problem is particularly pernicious where the Governor in Council is empowered to make regulations. As Cabinet deliberates in secret, submissions to it are protected from disclosure and it gives no reasons for its decisions. It is very nearly a total black box. Further, it has been said that it is not the function of a court to

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investigate the "motives" of Cabinet (Brown and Evans, at topic 15:3262; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106).

[607] It is clear that courts have the power to review the *vires* of subordinate legislation, even where it is promulgated by the Governor in Council, where the basis for the review is that the subordinate legislation is *ultra vires* on division of powers grounds. As noted, Parliament cannot delegate power that it does not have. This is fundamental. While there may be evidentiary hurdles to identify the purpose of the regulations, where a review of the validity of a regulation turns on whether or not it is *ultra vires* the division of powers, courts remain tasked with ascertaining the pith and substance. Courts may consider extrinsic evidence in assessing the *vires* of an Order in Council, and have found Orders in Council to be invalid on the basis of extrinsic evidence of purpose (see *Heppner v. Province of Alberta* (1977), 6 A.R. 154 (S.C. (App. Div.)), at paras. 27-43). Where available, documents such as a Regulatory Impact Analysis Statement may provide extrinsic evidence of the purpose of a regulation (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 156-57). Where there is no extrinsic evidence of purpose, courts must infer the purpose as best they can from the language of the regulation itself, and ascertain the pith and substance using that in conjunction with the effects of the regulation. The legal and practical effects of the regulations will thus likely be highly relevant to determine their pith and substance and their validity in light of federal jurisdiction over "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (Chief Justice's reasons, at para. 207).

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C. *Empowering Provisions Under the Act*

[608] I discuss a few key regulation-empowering provisions in the *Act*, and how such regulations may interact with the methodology set out above. The overall scheme of the *Act* has been explained by my colleague Brown J., and I need not repeat it here. As regulations made under the *Act* are not before us, I make only general observations.

(1) Part 1

[609] In Part 1 of the *Act*, ss. 166-168 provide the regulation granting powers. Section 166(1)(a), in combination with other sections, empowers the Governor in Council to make regulations prescribing who pays the fuel charge (and under what conditions), who is exempt from the fuel charge (and under what conditions), and the amount of the fuel charge in certain conditions (see ss. 26, 27, 40(3), 41(2), 46(3) and 48). Section 166(1)(e) gives the Governor in Council the power to make regulations "distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things". These provisions have clear potential for use that is within federal competence over establishing minimum national standards of price stringency to reduce GHG emissions. The Governor in Council could distinguish between provinces, industries, fuels, etc. if the distinction is justified in light of the goal of reducing greenhouse gas emissions, for example, by taking into account the risk of international carbon leakage and the relative effectiveness of the pricing standard on GHG emissions. Regulations that differentiate between industries on such bases may fall within the matter of national concern in which the *Act* is grounded.

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However, the potential for "playing favourites" for reasons that have nothing to do with establishing minimum national standards of price stringency to reduce GHG emissions is obvious. Moreover, even if regulations are enacted without such favouritism, they could have the effect of unduly disadvantaging certain provinces or industries in a way that is incompatible with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Such regulations would be unconstitutional, even though the provisions that facially empower them are valid.

[610] Sections 166(2) and 166(3) give the Governor in Council the power to amend the list of provinces and areas to which Part 1 of the *Act* applies taking into account the stringency of provincial pricing mechanisms for GHG emissions as the primary factor. Although the *Act* does not define "stringency", the Governor in Council's decision to list or not list a province is nonetheless constrained by the limits of "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Similar provisions exist in Part 2 as well.

[611] Section 166(4) gives the Governor in Council the power to change the fuel charge for an individual fuel, on a per-region basis. Section 168 allows the Governor in Council to make regulations in relation to the fuel charge system. Section 168(3) provides the power to modify "this Part" through regulations, and s. 168(4) allows regulations made under "this Part in respect of the fuel charge system" to prevail over "this Part" in case of conflict. This is the so-called "Henry VIII" clause. There is similar

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potential for abuse or unconstitutional effects in the exercise of these empowering provisions as there is in those described above.

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(2) Part 2

[612] Part 2 delegates even more of the details to the regulations, and contains even more potential for overstepping the bounds of the division of powers. Part 2 of the *Act* creates a per-facility emissions limit. This creates the potential for improper differential treatment of facilities through the regulations.

[613] Key to the operation of Part 2 is s. 192. This section gives the Governor in Council 17 explicit regulation-making powers, including the power to make regulations respecting covered facilities and when they cease to be covered facilities (s. 192(b)) and respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility (s. 192(i)). Section 192(g) is particularly important, as it allows the Governor in Council to make regulations "respecting greenhouse gas emissions limits". Section 192(g) gives the Governor in Council power to create a scheme that defines the emissions limits: these are not otherwise defined in the statute. The only stated restriction on the Governor in Council here is that the regulations must be "for the purposes of this Division". Although the Division does not have a stated purpose, it is titled "Pricing Mechanism for Greenhouse Gas Emissions".

[614] This power to set per-facility emissions limits is at the heart of Part 2 of the *Act*, and it could support a wide variety of regulations. Given, however, that the *Act* is

a "per-facility" scheme, the statute contemplates that the Governor in Council will create regulations that do not treat all covered facilities identically. This gives rise to the possibility of differences in treatment between industries that have nothing to do with the effectiveness of GHG emissions pricing in those industries. This would be inconsistent with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Regulations that impose different treatment of facilities and industries must be justified in light of federal jurisdiction over this matter, or they will exceed the powers Parliament could validly delegate to the Governor in Council.

[615] The regulations, no less than the legislation under which they are enacted, must constitute an exercise of authority that is within federal competence. If they are not, they will be *ultra vires* the division of powers and, thereby, void in law.

VI. Conclusion

[616] A patient and careful examination of the doctrine reveals that POGG should be, and was always intended to be, a residual and circumscribed power of last resort that preserves the exhaustiveness of the division of powers. It is only available where no enumerated head of power, or combination of enumerated heads of power, is available. The approach of the Attorney General of Canada reflects a troubling misinterpretation of and departure from *Crown Zellerbach* and the doctrine that preceded it. For these reasons, and those of Justice Brown which I adopt, the *Greenhouse Gas Pollution Pricing Act* is *ultra vires* in whole and the reference questions are answered in the affirmative. Accordingly, I would allow the appeals of

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the Attorney General of Saskatchewan and the Attorney General of Ontario and I would dismiss the appeal of the Attorney General of British Columbia.

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Appeals of the Attorney General of Saskatchewan and of the Attorney General of Ontario dismissed and appeal of the Attorney General of British Columbia allowed, CÔTÉ J. *dissenting in part and* BROWN *and* ROWE JJ. *dissenting.*

Solicitors for the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina; MLT Aikins, Regina.

Solicitor for the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the Attorney General of Canada: Attorney General of Canada, Winnipeg; Borden Ladner Gervais, Ottawa.

Solicitors for the Attorney General of Alberta: Gall Legge Grant Zwack, Vancouver; Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitors for the intervener Progress Alberta Communications Limited: Nanda & Company, Edmonton.

Solicitors for the interveners the Anishinabek Nation and the United Chiefs and Councils of Mnidoo Mnising: Westaway Law Group, Ottawa.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the interveners the Saskatchewan Power Corporation and SaskEnergy Incorporated: McKercher, Saskatoon.

Solicitors for the intervener the Oceans North Conservation Society: Arvay Finlay, Vancouver.

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Solicitor for the intervener the Assembly of First Nations: Assembly of First Nations, Ottawa.

Solicitors for the intervener the Canadian Taxpayers Federation: Crease Harman, Victoria.

Solicitor for the intervener Canada's Ecofiscal Commission: University of Ottawa, Ottawa.

Solicitor for the interveners the Canadian Environmental Law Association, Environmental Defence Canada Inc. and the Sisters of Providence of St. Vincent de Paul: Canadian Environmental Law Association, Toronto.

Solicitors for the intervener Amnesty International Canada: Stockwoods, Toronto.

Solicitor for the interveners the National Association of Women and the Law and Friends of the Earth: University of Ottawa, Ottawa.

Solicitors for the intervener the International Emissions Trading Association: DeMarco Allan, Toronto.

Solicitor for the intervener the David Suzuki Foundation: Ecojustice Environmental Law Clinic at the University of Ottawa, Ottawa.

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Solicitor for the intervener the Athabasca Chipewyan First Nation: Ecojustice Environmental Law Clinic at the University of Ottawa, Ottawa.

Solicitor for the intervener the Smart Prosperity Institute: Smart Prosperity Institute, Ottawa.

Solicitors for the intervener the Canadian Public Health Association: Gowling WLG (Canada), Toronto.

Solicitors for the interveners Climate Justice Saskatoon, the National Farmers Union, the Saskatchewan Coalition for Sustainable Development, the Saskatchewan Council for International Cooperation, the Saskatchewan Environmental Society, SaskEV, the Council of Canadians: Prairie and Northwest Territories Region, the Council of Canadians: Regina Chapter, the Council of Canadians: Saskatoon Chapter, the New Brunswick Anti-Shale Gas Alliance and the Youth of the Earth: Kowalchuk Law Office, Regina.

Solicitors for the interveners Centre québécois du droit de l'environnement and Équiterre: Michel Bélanger Avocats Inc., Montréal.

Solicitors for the interveners Generation Squeeze, the Public Health Association of British Columbia, the Saskatchewan Public Health Association, the Canadian Association of Physicians for the Environment, the Canadian Coalition for

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the Rights of the Child and the Youth Climate Lab: Ratcliff & Company, North Vancouver.

Solicitor for the intervener the Assembly of Manitoba Chiefs: Public Interest Law Centre, Winnipeg.

Solicitors for the interveners the City of Richmond, the City of Victoria, the City of Nelson, the District of Squamish, the City of Rossland and the City of Vancouver: Lidstone & Company, Vancouver.

Solicitors for the intervener the Thunderchild First Nation: McKercher, Saskatoon.

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TAB 10

IN THE MATTER OF a Reference by the Government of Quebec to the Court of Appeal of Quebec for hearing and consideration of the questions set out in Order in Council 642-2015 concerning the constitutionality of the implementation of pan-Canadian securities regulation

Attorney General of Canada *Appellant*

v.

Attorney General of Quebec *Respondent*

and

Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Barreau du Québec and Institute for Governance of Private and Public Organizations *Interveners*

-and-

Attorney General of Quebec *Appellant*

v.

Attorney General of Canada and Attorney General of British Columbia *Respondents*

and

Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Barreau du Québec and Institute

DANS L'AFFAIRE D'UN renvoi par le Gouvernement du Québec à la Cour d'appel du Québec au sujet des questions formulées dans le décret 642-2015 relativement à la constitutionnalité de l'instauration d'un régime de réglementation pancanadienne des valeurs mobilières

Procureur général du Canada *Appelant*

c.

Procureure générale du Québec *Intimée*

et

Procureure générale de l'Ontario, procureur général de la Nouvelle-Écosse, procureur général du Nouveau-Brunswick, procureur général du Manitoba, procureur général de l'Île-du-Prince-Édouard, procureur général de la Saskatchewan, procureur général de l'Alberta, Barreau du Québec et Institut sur la gouvernance d'organisations privées et publiques *Intervenants*

-et-

Procureure générale du Québec *Appelante*

c.

Procureur général du Canada et procureur général de la Colombie-Britannique *Intimés*

et

Procureure générale de l'Ontario, procureur général de la Nouvelle-Écosse, procureur général du Nouveau-Brunswick, procureur général du Manitoba, procureur général de l'Île-du-Prince-Édouard, procureur général de la Saskatchewan, procureur général de l'Alberta, Barreau du Québec et Institut sur

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for Governance of Private and Public Organizations *Interveners*

-and-

Attorney General of British Columbia *Appellant*

v.

Attorney General of Quebec *Respondent*

and

Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Barreau du Québec and Institute for Governance of Private and Public Organizations *Interveners*

la gouvernance d'organisations privées et publiques *Intervenants*

-et-

Procureur général de la Colombie-Britannique *Appelant*

c.

Procureure générale du Québec *Intimée*

et

Procureure générale de l'Ontario, procureur général de la Nouvelle-Écosse, procureur général du Nouveau-Brunswick, procureur général de l'Île-du-Prince-Édouard, procureur général de la Saskatchewan, procureur général de l'Alberta, Barreau du Québec et Institut sur la gouvernance d'organisations privées et publiques *Intervenants*

Indexed as: Reference re Pan-Canadian Securities Regulation

2018 SCC 48

File No.: 37613.

2018: March 22; 2018: November 9.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Répertorié : Renvoi relatif à la réglementation pancanadienne des valeurs mobilières

2018 CSC 48

N° du greffe : 37613.

2018 : 22 mars; 2018 : 9 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Trade and commerce — Securities — Proposal by federal government and some provincial and territorial governments to implement national cooperative capital markets regulatory system including model provincial and territorial statute, federal statute and national securities regulator overseen by federal and provincial ministers — Whether Constitution authorizes implementation of cooperative system — Whether draft federal statute exceeds authority

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences — Trafic et commerce — Valeurs mobilières — Proposition du gouvernement fédéral et de certains gouvernements provinciaux et territoriaux pour la mise en place d'un régime coopératif national de réglementation des marchés des capitaux comprenant une loi provinciale et territoriale type, une loi fédérale et un organisme national de réglementation des valeurs mobilières surveillé par un ministre fédéral et des ministres provinciaux — La Constitution

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of Parliament over general branch of trade and commerce power — Constitution Act, 1867, s. 91(2).

The federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon have proposed to implement a national cooperative system for the regulation of capital markets in Canada ("Cooperative System"). The framework of the Cooperative System is set out in an agreement between the federal government and the participating provincial and territorial governments ("Memorandum").

The main components of the Cooperative System include a model provincial and territorial statute ("Model Provincial Act") that deals primarily with the day-to-day aspects of the securities trade, a proposed federal statute ("Draft Federal Act") that is aimed at preventing and managing systemic risk and which establishes criminal offences relating to financial markets, and a national securities regulator ("Authority") charged with administering this coordinated regime. The Authority and its board of directors are to operate under the supervision of a Council of Ministers, which will comprise the ministers responsible for capital markets regulation in each participating province and the federal Minister of Finance.

Neither the Model Provincial Act nor the Draft Federal Act have the force of law unless and until they are properly enacted into legislation by the provincial legislatures and Parliament, respectively; the Memorandum provides that both remain "subject to legislative approval". The Memorandum also contemplates that the Council of Ministers will have a role to play in making amendments to these proposed legislative enactments. With respect to the Model Provincial Act, s. 5.5 of the Memorandum provides that any proposals to amend the Model Provincial Act are subject to a vote and must be approved by at least 50 percent of the members of the Council of Ministers, as well as by the members representing the "Major Capital Markets Jurisdictions" — which at present, are Ontario and British Columbia.

Another important aspect of the Cooperative System is the Authority's power to make regulations. Both the Model Provincial Act and the Draft Federal Act provide that any regulations proposed by the Authority must be approved by the Council of Ministers before coming into force. Section 5.2 of the Memorandum lays out the voting

autorise-t-elle la mise en place du régime coopératif? — L'ébauche de la loi fédérale excède-t-elle le volet général de la compétence du Parlement en matière de trafic et de commerce? — Loi constitutionnelle de 1867, art. 91(2).

Le gouvernement fédéral et les gouvernements de l'Ontario, de la Colombie-Britannique, de la Saskatchewan, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et du Yukon ont proposé de mettre en place un régime coopératif national de réglementation des marchés des capitaux au Canada (« régime coopératif »). Le cadre du régime coopératif est établi dans un accord entre le gouvernement fédéral et les gouvernements provinciaux et territoriaux participants (« Protocole »).

Les principales composantes du régime coopératif comprennent une loi provinciale et territoriale type (« loi provinciale type ») portant principalement sur les aspects courants du commerce des valeurs mobilières, une proposition de loi fédérale (« ébauche de la loi fédérale ») visant la prévention et la gestion des risques systémiques et créant des infractions criminelles relatives aux marchés financiers, ainsi qu'un organisme national de réglementation des valeurs mobilières (« Autorité ») chargé de l'application de ce régime coordonné. L'Autorité et son conseil d'administration doivent être supervisés par un conseil des ministres, composé des ministres responsables de la réglementation des marchés des capitaux de chacune des provinces participantes et du ministre fédéral des Finances.

La loi provinciale type et l'ébauche de la loi fédérale n'ont pas force de loi tant et aussi longtemps qu'elles n'ont pas été dûment adoptées par les législatures provinciales et le Parlement, respectivement; le Protocole précise que les deux lois demeurent assujetties à « l'approbation législative ». Le Protocole prévoit aussi que le Conseil des ministres aura un rôle à jouer dans la modification de ces propositions de textes de loi. Pour ce qui est de la loi provinciale type, l'art. 5.5 du Protocole énonce que les propositions visant à modifier cette loi doivent faire l'objet d'un vote et être approuvées par au moins 50 pour 100 des membres du Conseil des ministres et par les membres représentant « chaque partie ayant de grands marchés des capitaux », c'est-à-dire, à l'heure actuelle, l'Ontario et la Colombie-Britannique.

Un autre aspect important du régime coopératif est le pouvoir de l'Autorité de prendre des règlements. La loi provinciale type et l'ébauche de la loi fédérale prévoient toutes deux que les règlements proposés par l'Autorité doivent être approuvés par le Conseil des ministres avant d'entrer en vigueur. L'article 5.2 du Protocole précise les

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requirements that apply to the approval of proposed regulations.

The Government of Quebec referred the following two questions pertaining to the Cooperative System to the Quebec Court of Appeal:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

A majority of the Court of Appeal answered both questions in the negative. In response to the first question, the majority concluded that the Cooperative System was unconstitutional, because the process for amending the Model Provincial Act — and in particular, the requirement that any amendments thereto be approved by the Council of Ministers in accordance with s. 5.5 of the Memorandum — has the effect of fettering the sovereignty of the participating provinces' and territories respective legislatures. The majority also opined that the process for making federal regulations, as set out in the Draft Federal Act and the Memorandum, is inconsistent with the principle of federalism because it allows certain provinces to effectively veto the adoption of a federal regulation. As to the second question, the majority concluded that the Draft Federal Act is not *ultra vires* Parliament under the general trade and commerce power, except with respect to the provisions (ss. 76 to 79) that set out the role of the Council of Ministers in the making of federal regulations. Again expressing the view that these provisions, when read alongside the Memorandum, have the effect of conferring on certain provinces a veto over federal regulations, the Majority concluded that they would render the entire Draft Federal Act unconstitutional if not removed.

The Attorney General of Canada appealed the Quebec Court of Appeal's opinion on both questions; the Attorney General of British Columbia appealed on the first question; and the Attorney General of Quebec appealed on the second question.

exigences relatives au vote qui s'appliquent à l'approbation des propositions de règlements.

Le gouvernement du Québec a soumis les deux questions suivantes à la Cour d'appel du Québec relativement au régime coopératif :

1. La Constitution du Canada autorise-t-elle la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon le modèle prévu par la plus récente publication du « Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux »?

2. La plus récente version de l'ébauche de la loi fédérale intitulée « Loi sur la stabilité des marchés des capitaux » excède-t-elle la compétence du Parlement du Canada sur le commerce selon le paragraphe 91(2) de la *Loi constitutionnelle de 1867*?

Les juges majoritaires de la Cour d'appel ont répondu aux deux questions par la négative. En réponse à la première question, ils ont conclu que le régime coopératif était inconstitutionnel parce que le processus de modification de la loi provinciale type — et particulièrement l'exigence selon laquelle toute modification à cette loi doit être approuvée par le Conseil des ministres conformément à l'art. 5.5 du Protocole — entrave effectivement la souveraineté respective des législatures des provinces et des territoires participants. En outre, selon les juges majoritaires, le processus de prise des règlements fédéraux, énoncé dans l'ébauche de la loi fédérale et le Protocole, est incompatible avec le principe du fédéralisme, car il a pour effet de permettre à certaines provinces d'exercer un droit de veto à l'égard de la prise de règlements fédéraux. En ce qui a trait à la seconde question, les juges majoritaires ont conclu que l'ébauche de la loi fédérale n'excédait pas la compétence générale du Parlement en matière de trafic et de commerce, sauf pour ce qui est des dispositions (art. 76 à 79) énonçant le rôle du Conseil des ministres dans la prise de règlements fédéraux. Réitérant qu'à leur avis ces dispositions, lues en corrélation avec le Protocole, ont pour effet de conférer à certaines provinces un droit de veto à l'égard de la réglementation fédérale, les juges majoritaires ont conclu que les dispositions en question rendraient l'ébauche de la loi fédérale inconstitutionnelle dans son ensemble si elles n'en étaient pas retirées.

Le procureur général du Canada porte en appel l'avis de la Cour d'appel du Québec quant aux deux questions. Le procureur général de la Colombie-Britannique interjette appel relativement à la première question, tandis que l'appel de la procureure générale du Québec porte sur la seconde question.

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Held: The appeals brought by the Attorney General of Canada and the Attorney General of British Columbia should be allowed. The appeal brought by the Attorney General of Quebec should be dismissed. Question 1 should be answered in the affirmative. Question 2 should be answered in the negative.

Question #1: The Constitution authorizes the implementation of pan-Canadian securities regulation under the authority of a single regulator in accordance with the terms set out in the Memorandum.

First, the Cooperative System, as set out in the Memorandum, does not purport to — and in any event, cannot — improperly fetter the legislatures' sovereignty. Sections 4.2 and 5.5 of the Memorandum make clear that the Council of Ministers' role is limited to proposals for amendments to the Model Provincial Act. The Model Provincial Act is expressly subject to legislative approval, and thus lacks the force of law within a province unless and until it is enacted by that province's legislature. These provisions of the Memorandum do not contemplate that the Council of Ministers will have any formal involvement in the amendment of securities laws that have already been enacted by provincial legislatures. Nowhere does the Memorandum imply that the legislatures of the participating provinces are required to implement the amendments made to the Model Provincial Act that have been approved by the Council of Ministers, or that they are precluded from making any other amendments to their securities laws. The terms of the Memorandum do not even require that the provisions of the Model Provincial Act themselves be enacted into law by the legislatures of the participating provinces. Accordingly, the legislatures remain free to reject the proposed statutes, and any amendments made to them, if they so choose.

Even if the terms of the Memorandum actually purported to fetter the provincial legislatures' right to enact, amend and repeal their securities legislation, it would be ineffective in this regard in view of the principle of parliamentary sovereignty. Parliamentary sovereignty, a foundational principle of the Westminster model of government, means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments and neither can usurp or interfere with the legislature's law-making function. An important corollary to parliamentary sovereignty is the rule that the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation. An executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have that effect. In the case at hand, executive signatories

Arrêt : Les pourvois du procureur général du Canada et du procureur général de la Colombie-Britannique sont accueillis. Le pourvoi de la procureure générale du Québec est rejeté. La première question appelle une réponse positive; la seconde, une réponse négative.

Question nº 1 : La Constitution autorise la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon les modalités énoncées dans le Protocole.

Premièrement, le régime coopératif prévu par le Protocole n'est pas censé — et ne peut, de toute façon — entraver indûment la souveraineté des législatures. Il est clair, suivant les art. 4.2 et 5.5 du Protocole, que le rôle du Conseil des ministres se limite aux propositions de modifications à la loi provinciale type. Cette dernière est expressément assujettie à l'approbation législative, ce qui signifie qu'elle n'a pas force de loi dans une province tant et aussi longtemps qu'elle n'a pas été adoptée par la législature de cette province. Ces dispositions du Protocole ne prévoient pas que le Conseil des ministres jouera un rôle officiel dans la modification des lois relatives aux valeurs mobilières déjà adoptées par les législatures provinciales. Rien dans le Protocole ne suggère que les législatures des provinces participantes sont tenues de mettre en œuvre les modifications à la loi provinciale type approuvées par le Conseil des ministres, ou qu'il leur est interdit d'apporter d'autres modifications à leurs lois sur les valeurs mobilières. Les termes du Protocole n'obligent même pas les législatures des provinces participantes à légiférer pour adopter les dispositions de la loi provinciale type elles-mêmes. Par conséquent, les législatures demeurent libres de rejeter les lois proposées et toute modification apportée à celles-ci si elles choisissent de le faire.

Même si le Protocole devait réellement viser à entraver le droit des législatures provinciales d'adopter, de modifier et d'abroger leurs lois relatives aux valeurs mobilières, il serait tout simplement inopérant à cet égard en raison du principe de la souveraineté parlementaire. La souveraineté parlementaire est un principe fondateur du modèle de gouvernement de Westminster suivant lequel le pouvoir législatif du gouvernement l'emporte sur les pouvoirs exécutif et judiciaire, qui doivent tous deux agir conformément aux textes législatifs et ne peuvent usurper la fonction législative de la législature ou y nuire. Un important corollaire du principe de la souveraineté parlementaire réside dans la règle selon laquelle l'exécutif ne peut entraver l'exercice du pouvoir de la législature d'adopter, de modifier et d'abroger des lois. Un accord conclu par différents exécutifs et censé lier les législatures respectives des parties ne

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would thus not actually be capable of either requiring that the legislatures of their respective jurisdictions implement any amendments dictated by the Council of Ministers, or of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal effect of the impugned executive action, but not its underlying validity. Any executive agreement that purports to fetter the legislature is not inherently unconstitutional but will simply not have the desired effect.

Second, the Cooperative System does not entail an impermissible delegation of law-making authority. Parliamentary sovereignty also means that the legislature has the authority to enact laws on its own, as well as the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. One important restriction on delegation, however, is that Parliament or a provincial legislature is barred from transferring its primary legislative authority with respect to a particular matter, over which it has exclusive constitutional jurisdiction, to a legislature of the other level of government. In this case, neither the Memorandum nor the Model Provincial Act empowers the Council of Ministers to unilaterally amend the provinces' securities legislation and no part of the Cooperative System imposes any legal limit on the participating provinces' legislative authority to enact, amend or repeal their respective securities laws as they see fit. The Council of Minister's role in approving amendments to the Model Provincial Act — a model statute that has no force of law until a provincial enactment gives it such force — is therefore plainly distinguishable from the delegation of primary legislative authority. Because the Cooperative System does not allow the Council of Ministers to bypass the provincial legislatures at all, the proper implementation of the Cooperative System, in accordance with the terms of the Memorandum, will not result in any transfer or abdication of a participating province's primary legislative authority. The Council of Ministers is and remains subordinate to the sovereign will of the legislature.

Question #2: The proposed Draft Federal Act is *intra vires*; it falls within the general branch of Parliament's trade and commerce power pursuant to s. 91(2) of the *Constitution Act, 1867*.

peut donc avoir un tel effet. Dans la présente affaire, les signataires représentant les différents pouvoirs exécutifs ne seraient donc pas réellement capables d'obliger les législatures dans leur territoire respectif à mettre en œuvre les modifications dictées par le Conseil des ministres ou de les empêcher de modifier leurs propres lois sur les valeurs mobilières sans l'approbation du Conseil des ministres. Lorsqu'une action du pouvoir exécutif semble être en conflit avec les pouvoirs de légiférer de la législature, la souveraineté parlementaire peut être invoquée pour déterminer l'effet juridique de l'action exécutive contestée, mais non sa validité sous-jacente. Un accord de l'exécutif censé entraver l'action de la législature n'est pas intrinsèquement inconstitutionnel; il ne produira tout simplement pas l'effet souhaité.

Deuxièmement, le régime coopératif ne comporte pas de délégation inacceptable du pouvoir de légiférer. La souveraineté parlementaire signifie également que la législature a compétence pour adopter elle-même des lois et pour déléguer à d'autres personnes ou organismes certains pouvoirs administratifs ou réglementaires, notamment le pouvoir de prendre des règlements contraignants, mais subordonnés. Cependant, cette délégation a pour limite importante qu'il est interdit au Parlement ou à une législature provinciale de transférer à une législature de l'autre ordre de gouvernement sa compétence législative primaire sur une matière en particulier à l'égard de laquelle la Constitution lui confère la compétence exclusive. En l'espèce, ni le Protocole ni la loi provinciale type n'habilite le Conseil des ministres à modifier unilatéralement la législation des provinces en matière de valeurs mobilières, et le régime coopératif n'impose aucune limite juridique au pouvoir législatif des provinces participantes d'adopter, de modifier et d'abroger leurs lois respectives en matière de valeurs mobilières comme elles l'entendent. Ainsi, le rôle du Conseil des ministres dans l'approbation des modifications à la loi provinciale type — une loi type n'ayant pas force de loi tant qu'une législature provinciale ne la lui donne pas — se distingue clairement de la délégation de la compétence législative primaire. Étant donné qu'il ne permet aucunement au Conseil des ministres de court-circuiter les législatures provinciales, le régime coopératif, s'il est correctement mis en œuvre conformément aux modalités du Protocole, n'entraînera en aucun cas l'abdication de la compétence législative primaire des provinces participantes. Le Conseil des ministres est — et demeure — soumis à la souveraineté de la législature.

Question n° 2 : L'ébauche de la loi fédérale proposée est *intra vires*; elle relève du volet général de la compétence du Parlement en matière de trafic et de commerce conférée par le par. 91(2) de la *Loi constitutionnelle de 1867*.

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The two-stage analytical framework for the review of legislation on federalism grounds is well established. At the first stage (the "characterization stage"), the court considers the law's purpose and its effect with a view to identifying the true subject matter — the pith and substance — of the law in question. Once the court has completed this exercise, it then moves on to the second stage (the "classification stage") and determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity. Where it does, the legislation will be upheld on the basis that it is *intra vires*.

On the question of characterization, the pith and substance of the Draft Federal Act is to control systemic risk having the potential to create material adverse effects on the Canadian economy. The Draft Federal Act's preamble, its stated purposes (at s. 4) and the Authority's statutory mandate (at s. 6) together suggest that the federal government's role in regulating capital markets is limited to the detection, prevention and management of risk to the stability of the Canadian economy, as well as to the protection against financial crimes. The concept of systemic risk is specifically invoked throughout the Draft Federal Act as a means of limiting the scope of federal regulatory powers. Systemic risk can be understood as having three constituent elements: the risk must represent a threat to the stability of the country's financial system as a whole; it must be connected to the capital markets; and it must have the potential to have a material adverse effect on the Canadian economy. Moreover, the Draft Federal Act does not contain provisions that go to the day-to-day regulation of all aspects of securities trading. Properly understood, therefore, the intention is not that the Draft Federal Act will displace provincial and territorial securities legislation. It was instead designed to complement these statutes by addressing economic objectives that are considered to be national in character.

With respect to the classification of the Draft Federal Act, the ultimate question in this case is whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole, in a way that is distinct and different from provincial concerns. The application of the framework set out in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, leads to the conclusion that the Draft Federal Act does address a matter of genuine national importance and scope relating to trade as a whole, and it therefore falls within Parliament's general trade and commerce power

Le cadre d'analyse en deux étapes applicable au contrôle d'une loi pour des motifs fondés sur le fédéralisme est bien établi. À la première étape (l'étape de la « qualification »), la cour doit examiner l'objet de la loi ainsi que ses effets afin de déterminer l'objet véritable — le caractère véritable — de la loi en question. Une fois qu'elle a terminé cet exercice, la cour passe à la deuxième étape (l'étape de la « classification ») et évalue si l'objet de la loi contestée relève du chef de compétence invoqué pour soutenir la validité de la loi. Dans l'affirmative, la loi est confirmée puisqu'*intra vires*.

En ce qui concerne la qualification, le caractère véritable de l'ébauche de la loi fédérale est d'endiguer le risque systémique susceptible d'avoir des conséquences négatives importantes sur l'économie canadienne. Lus ensemble, le préambule de l'ébauche de la loi fédérale, les objets que celle-ci énonce (à l'art. 4) et le mandat statutaire de l'Autorité (à l'art. 6) donnent à penser que le rôle du gouvernement fédéral dans la réglementation des marchés des capitaux se limite au repérage, à la prévention et à la gestion du risque systémique pour la stabilité de l'économie canadienne, ainsi qu'à la protection contre les crimes financiers. La notion de risque systémique est explicitement énoncée tout au long de l'ébauche de la loi fédérale pour limiter la portée des pouvoirs fédéraux en matière de réglementation. Le risque systémique peut être interprété comme se composant de trois éléments : il doit constituer une menace à la stabilité du système financier du pays dans son ensemble; il doit être lié aux marchés des capitaux; et il doit être susceptible d'avoir des conséquences négatives importantes sur l'économie canadienne. De plus, l'ébauche de la loi fédérale ne contient aucune disposition portant sur la réglementation des aspects courants du commerce des valeurs mobilières. Interprétée correctement, l'ébauche de la loi fédérale ne vise donc pas à remplacer les lois provinciales et territoriales sur les valeurs mobilières. Elle a plutôt été conçue de manière à compléter ces lois en s'attaquant aux objectifs économiques considérés comme de nature nationale.

Pour ce qui est de la classification de l'ébauche de la loi fédérale, l'ultime question qui se pose en l'espèce est celle de savoir si la loi, considérée dans son entièreté, porte sur une matière d'importance et de portée véritablement nationales touchant le commerce dans son ensemble et distincte des enjeux provinciaux. L'application du cadre d'analyse établi dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, mène à la conclusion que l'ébauche de la loi fédérale porte sur une matière d'importance et de portée véritablement nationales touchant le commerce dans son ensemble et qu'elle relève

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under s. 91(2) of the *Constitution Act, 1867*. The preservation of the integrity and stability of the Canadian economy quite clearly has a national dimension, and one which lies beyond provincial competence. Moreover, the fact that the federal government's foray into securities regulation under the Draft Federal Act is limited to achieving these objectives supports the validity of this proposed statute.

Lastly, the manner in which the Draft Federal Act delegates the power to make regulations accords with Parliament's constitutional powers, meaning that ss. 76 to 79 of the Draft Federal Act have no impact on its constitutionality. There is nothing problematic about the way in which the Draft Federal Act delegates the power to make regulations to the Authority under the supervision of the Council of Ministers. The legislature has the broad authority to delegate administrative powers, including the power to make legally binding rules and regulations, to a subordinate body. In exercising its sovereign legislative powers, Parliament has the authority to confer on a statutory body — in this case, the Council of Ministers — the power to approve or reject proposed subordinate regulations, even if some members of that body are representatives of certain provinces. The delegation of administrative powers in a manner solicitous of (or even dependent upon) provincial input is in no way incompatible with the principle of federalism, provided that the delegating legislature has the constitutional authority to legislate in respect of the applicable subject matter in the first place.

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Applied: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; **referred to:** *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Canadian Taxpayers Federation v.*

par conséquent de la compétence générale en matière de trafic et de commerce conférée au Parlement par le par. 91(2) de la *Loi constitutionnelle de 1867*. La préservation de l'intégrité et de la stabilité de l'économie canadienne est très clairement une matière qui a une dimension nationale et qui excède la compétence provinciale. De plus, le fait que l'intrusion du gouvernement fédéral dans la réglementation des valeurs mobilières sous le régime de l'ébauche de la loi fédérale se limite à l'atteinte de ces objectifs appuie sa validité.

Enfin, la façon dont l'ébauche de la loi fédérale délègue le pouvoir de prendre des règlements respecte les pouvoirs constitutionnels du Parlement, si bien que les art. 76 à 79 de l'ébauche de la loi fédérale n'ont aucune incidence sur sa constitutionnalité. Il n'y a rien de problématique dans la façon dont l'ébauche de la loi fédérale délègue à l'Autorité le pouvoir de prendre des règlements sous la supervision du Conseil des ministres. La législature jouit du vaste pouvoir de déléguer des pouvoirs administratifs — notamment le pouvoir d'établir des règlements juridiquement contraignants — à un organisme subordonné. Lorsqu'il exerce ses pouvoirs législatifs souverains, le Parlement a le pouvoir de conférer à un organisme créé par la loi — en l'espèce, le Conseil des ministres — le pouvoir d'approuver ou de rejeter des projets de règlement subordonnés, même si certains membres de cet organisme sont des représentants de certaines provinces. La délégation de pouvoirs administratifs qui se soucie (voire dépend) de l'avis des provinces n'est aucunement incompatible avec le principe du fédéralisme, dans la mesure où la législature ayant procédé à la délégation a compétence constitutionnelle pour légiférer relativement à l'objet visé.

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Robert J. Frater, *Q.C.*, and *Alexander Pless*, for the Attorney General of Canada.

Francis Demers and *Jean-François Beaupré*, for the Attorney General of Quebec.

J. Gareth Morley and *Alandra Harlingten*, for the Attorney General of British Columbia.

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Robert J. Frater, *c.r.*, et *Alexander Pless*, pour le procureur général du Canada.

Francis Demers et *Jean-François Beaupré*, pour la procureure générale du Québec.

J. Gareth Morley et *Alandra Harlingten*, pour le procureur général de la Colombie-Britannique.

Robin K. Basu and *Emily Bala*, for the intervener the Attorney General of Ontario.

Isabel Lavoie Daigle, for the intervener the Attorney General of New Brunswick.

No one appeared for the intervener the Attorney General of Nova Scotia.

Michael A. Conner, for the intervener the Attorney General of Manitoba.

Jonathan M. Coady and *Justin L. Milne*, for the intervener the Attorney General of Prince Edward Island.

Alan F. Jacobson, for the intervener the Attorney General of Saskatchewan.

L. Christine Enns, *Q.C.*, for the intervener the Attorney General of Alberta.

Raymond Doray and *Guillaume Laberge*, for the intervener Barreau du Québec.

François LeBel and *Annie Gallant*, for the intervener the Institute for Governance of Private and Public Organizations.

Robin K. Basu et *Emily Bala*, pour l'intervenante la procureure générale de l'Ontario.

Isabel Lavoie Daigle, pour l'intervenant le procureur général du Nouveau-Brunswick.

Personne n'a comparu pour l'intervenant le procureur général de la Nouvelle-Écosse.

Michael A. Conner, pour l'intervenant le procureur général du Manitoba.

Jonathan M. Coady et *Justin L. Milne*, pour l'intervenant le procureur général de l'Île-du-Prince-Édouard.

Alan F. Jacobson, pour l'intervenant le procureur général de la Saskatchewan.

L. Christine Enns, *c.r.*, pour l'intervenant le procureur général de l'Alberta.

Raymond Doray et *Guillaume Laberge*, pour l'intervenant le Barreau du Québec.

François LeBel et *Annie Gallant*, pour l'intervenant l'Institut sur la gouvernance d'organisations privées et publiques.

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The following is the judgment delivered by

THE COURT —

I. Introduction

[1] A number of attempts to develop and implement a national system for the regulation of Canadian capital markets in a manner that is compatible with the country's federal structure have been made since the 1930s. At issue in these appeals is the constitutionality of a recent proposal by the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon to implement a national cooperative capital markets regulatory system ("Cooperative System").

[2] The structure of the Cooperative System builds on the guidance provided by this Court in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837. Its main components include a model provincial and territorial statute known as the *Capital Markets Act* ("Model Provincial Act") that deals primarily with the day-to-day aspects of the securities trade, a federal statute known as the *Capital Markets Stability Act* ("Draft Federal Act") that is aimed at preventing and managing systemic risk and which establishes criminal offences relating to financial markets, and a national securities regulator that is to be overseen by the federal Minister of Finance and the ministers responsible for capital markets regulation in the participating provinces[1] ("Authority").

[3] On July 15, 2015, the Government of Quebec referred two questions pertaining to the Cooperative System to the Quebec Court of Appeal:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication

[1] In these reasons, references to "provinces" participating in the Cooperative System include participating territories.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Plusieurs initiatives ont été entreprises pour élaborer et mettre en place un régime national de réglementation des marchés de capitaux canadiens d'une manière qui est compatible avec la structure fédérale du pays depuis les années 1930. Les présents pourvois portent sur la constitutionnalité d'une récente proposition par le gouvernement fédéral et les gouvernements de l'Ontario, de la Colombie-Britannique, de la Saskatchewan, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et du Yukon concernant la mise en place d'un régime coopératif national de réglementation des marchés de capitaux (« régime coopératif »).

[2] La structure du régime coopératif s'appuie sur les enseignements de la Cour suprême du Canada dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837. Ses principales composantes comprennent une loi provinciale et territoriale type intitulée *Loi sur les marchés des capitaux* (« loi provinciale type ») portant principalement sur les aspects courants du commerce des valeurs mobilières, une loi fédérale intitulée *Loi sur la stabilité des marchés des capitaux* (« ébauche de la loi fédérale ») visant la prévention et la gestion du risque systémique et créant des infractions criminelles relatives aux marchés financiers, ainsi qu'un organisme national de réglementation des valeurs mobilières qui serait surveillé par le ministre fédéral des Finances et les ministres responsables de la réglementation des marchés de capitaux des provinces participantes[1] (« Autorité »).

[3] Le 15 juillet 2015, le gouvernement du Québec soumettait à la Cour d'appel du Québec deux questions relativement au régime coopératif :

1. La Constitution du Canada autorise-t-elle la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon le modèle prévu par la plus récente publication du

[1] Dans les présents motifs, la mention des « provinces » participant au régime coopératif vaut également mention des territoires participants.

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of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

[4] A majority of the Quebec Court of Appeal (the "Majority") answered both questions in the negative. In response to the first question, the Majority concluded that the Cooperative System was unconstitutional for two reasons: (a) because the process for amending the Model Provincial Act effectively fetters the sovereignty of the respective participating provinces' legislatures and (b) because the process for making federal regulations is inconsistent with the principle of federalism. As to the second question, the Majority held that the Draft Federal Act is within Parliament's jurisdiction over the general branch of the trade and commerce power under s. 91(2) of the *Constitution Act, 1867*, but took issue with the provisions of the Draft Federal Act (ss. 76 to 79) that pertain to the making of federal regulations. In the Majority's opinion, the provisions in question, if not removed, render the entire Draft Federal Act unconstitutional.

[5] The dissenting judge would have declined to answer the first question. In his view, it is not for courts to rule on the constitutional validity of intergovernmental agreements that are of a political nature and lack the force of law. Had the first question been limited to the two draft statutes, however, he would have answered in the affirmative; he saw no issues pertaining either to the delegation of law-making authority or to the principle of parliamentary sovereignty. Turning to the second question, the dissenting judge agreed with the Majority that the Draft Federal Act fell within the general branch of Parliament's trade and commerce power, but found nothing problematic about the manner by which federal regulations were to be made under ss. 76 to 79 of the Draft Federal Act.

« Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux »?

2. La plus récente version de l'ébauche de la loi fédérale intitulée « Loi sur la stabilité des marchés des capitaux » excède-t-elle la compétence du Parlement du Canada sur le commerce selon le paragraphe 91(2) de la *Loi constitutionnelle de 1867*?

[4] Les juges majoritaires de la Cour d'appel du Québec (les « juges majoritaires ») ont répondu aux deux questions par la négative. En réponse à la première question, ils ont conclu que le régime coopératif était inconstitutionnel pour deux raisons : a) parce que le processus de modification de la loi provinciale type entrave effectivement la souveraineté respective des législatures des provinces participantes; et b) parce que le processus de prise des règlements fédéraux est incompatible avec le principe du fédéralisme. Quant à la seconde question, les juges majoritaires ont statué que l'ébauche de la loi fédérale relève du volet général de la compétence du Parlement en matière de trafic et de commerce prévue au par. 91(2) de la *Loi constitutionnelle de 1867*, mais ont critiqué les dispositions de l'ébauche de la loi fédérale (art. 76 à 79) qui portent sur la prise des règlements fédéraux. Selon les juges majoritaires, si elles ne sont pas retirées, ces dispositions rendent l'ensemble de l'ébauche de la loi fédérale inconstitutionnelle.

[5] Le juge dissident aurait refusé de répondre à la première question. À son avis, il n'appartient pas aux tribunaux de se prononcer sur la validité constitutionnelle d'accords intergouvernementaux qui sont de nature politique et qui n'ont pas force de loi. Cependant, si la première question s'était limitée aux deux projets de loi, il y aurait répondu par l'affirmative; il n'a relevé aucun problème relativement à la délégation du pouvoir de légiférer ou au principe de la souveraineté parlementaire. En ce qui concerne la seconde question, le juge dissident s'est dit en accord avec les juges majoritaires, selon lesquels l'ébauche de la loi fédérale relevait du volet général de la compétence du Parlement en matière de trafic et de commerce. Il a conclu cependant qu'il n'y a rien de problématique dans la façon dont les règlements fédéraux doivent être pris sous le régime des art. 76 à 79 de l'ébauche de la loi fédérale.

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[6] The Attorney General of Canada appeals the Quebec Court of Appeal's opinion on both questions. The Attorney General of British Columbia appeals only the opinion on the first question, while the Attorney General of Quebec appeals only the opinion on the second question.

[7] For the reasons that follow, the Attorney General of Canada's appeal is allowed, the Attorney General of British Columbia's appeal is allowed, and the Attorney General of Quebec's appeal is dismissed. With respect to the first question posed by the reference, we find that the Cooperative System does not improperly fetter the legislatures' sovereignty, nor does it entail an impermissible delegation of law-making authority. We therefore answer that question in the affirmative. As to the second question, we answer it in the negative: our view is that the subject matter of the Draft Federal Act falls within the general branch of Parliament's trade and commerce power pursuant to s. 91(2) of the *Constitution Act, 1867*.

II. Background

[8] Canada is one of the only industrialized countries in the world that does not have a *national* securities regulator. This is largely attributable to the constitutional division of provincial and federal powers as set out in Part VI of the *Constitution Act, 1867*. As a result of their jurisdiction over property and civil rights (s. 92(13)) and matters of a merely local nature (s. 92(16)), the provincial legislatures — and not Parliament — have the authority to legislate in respect of the securities trade within their respective borders. The result is a nationwide patchwork of provincial regulatory schemes and the absence of a truly national approach to regulating capital markets.

[9] In spite of this constitutional impediment, however, various attempts to centralize or standardize the regulation of securities in Canada have been made for over 80 years (see: D. Johnston, K.

[6] Le procureur général du Canada porte en appel l'avis de la Cour d'appel du Québec quant aux deux questions. Le procureur général de la Colombie-Britannique interjette appel de l'avis concernant la première question seulement, tandis que l'appel de la procureure générale du Québec se limite à l'avis relatif à la seconde question.

[7] Pour les motifs qui suivent, le pourvoi du procureur général du Canada est accueilli, tout comme celui du procureur général de la Colombie-Britannique, et le pourvoi de la procureure générale du Québec est rejeté. En ce qui concerne la première question posée par le renvoi, nous concluons que le régime coopératif n'entrave pas indûment la souveraineté des législatures, pas plus qu'il ne comporte une délégation inacceptable du pouvoir de légiférer. Nous y répondons par l'affirmative. Quant à la seconde question, nous sommes d'avis d'y répondre par la négative : nous estimons que l'objet de l'ébauche de la loi fédérale relève du volet général de la compétence du Parlement en matière de trafic et de commerce conférée par le par. 91(2) de la *Loi constitutionnelle de 1867*.

II. Contexte

[8] Le Canada est l'un des seuls pays industrialisés au monde à ne pas avoir d'organisme *national* de réglementation des valeurs mobilières. Cette situation est en grande partie attribuable au partage constitutionnel des compétences fédérales et provinciales établi à la partie VI de la *Loi constitutionnelle de 1867*. Puisqu'elles ont compétence sur la propriété et les droits civils (par. 92(13)) et sur les matières d'une nature purement locale (par. 92(16)), les législatures provinciales — et non le Parlement — ont le pouvoir de légiférer en matière de commerce des valeurs mobilières à l'intérieur de leurs frontières respectives. Il en résulte un ensemble disparate de régimes provinciaux de réglementation à l'échelle du pays et l'absence d'une véritable approche nationale pour la réglementation des marchés de capitaux.

[9] Toutefois, malgré cet obstacle constitutionnel, diverses tentatives en vue de centraliser et d'uniformiser la réglementation des valeurs mobilières ont été faites au Canada depuis plus de 80 ans : voir

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Doyle Rockwell and C. Ford, *Canadian Securities Regulation* (5th ed. 2014), at pp. 634-62). Although proposals aimed at establishing a national securities regulator have not succeeded, certain interprovincial initiatives aimed at coordinating regulatory functions have. These include the adoption by some provincial securities commissions of various national and multilateral instruments (which are standardized rules and regulations respecting specific aspects of the securities trade), as well as the implementation of the "passport regime", which allows market participants to have access to the capital markets of other participating jurisdictions while dealing with a single principal regulator and complying with harmonized legislative provisions (Johnston et al., at pp. 91-94). Detailed discussions about the impetus behind and response to the various proposals and initiatives that have been put forward over the past several decades can be found elsewhere (see: *Reference re Securities Act*, at paras. 11-28; A. D. Harris, *White Paper — A Symposium on Canadian Securities Regulation: Harmonization or Neutralization?* (2002); Johnston et al., at pp. 634-62).

D. Johnston, K. Doyle Rockwell et C. Ford, *Canadian Securities Regulation* (5e éd. 2014), p. 634-662. Même si les propositions visant à établir un organisme national de réglementation ont échoué, certaines initiatives interprovinciales ayant pour objectif de coordonner les fonctions de réglementation ont réussi. Ces initiatives comprennent l'adoption par certaines commissions provinciales des valeurs mobilières de divers documents nationaux et multilatéraux (qui constituent des règlements uniformisés concernant certains aspects du commerce des valeurs mobilières) ainsi que la mise en place du « régime de passeport », qui permet aux acteurs du marché d'accéder aux marchés de capitaux des autres provinces participantes, et ce, sous l'autorité d'un organisme de réglementation unique et en se conformant à des dispositions législatives harmonisées : Johnston et autres, p. 91-94. Des analyses détaillées de la raison d'être des différentes propositions et initiatives présentées au cours des dernières décennies, et des réponses qu'elles ont suscitées, peuvent être consultées ailleurs : voir *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 11-28; A. D. Harris, *White Paper — A Symposium on Canadian Securities Regulation : Harmonization or Neutralization?* (2002); Johnston et autres, p. 634-662.

A. *Reference re Securities Act (2011)*

[10] In 2009, the federal government responded to recommendations from a body known as the Expert Panel on Securities Regulation by preparing draft federal legislation, the *Proposed Canadian Securities Act*, Order in Council P.C. 2010-667, which would establish a national scheme for the regulation of capital markets under the oversight of a national securities regulator. The stated purposes of the *Proposed Canadian Securities Act* were "to provide protection to investors" (s. 9(*a*)), "foster fair, efficient and competitive capital markets" (s. 9(*b*)) and "contribute . . . to the integrity and stability of [Canada's] financial system" (s. 9(*c*)).

A. *Le Renvoi relatif à la Loi sur les valeurs mobilières (2011)*

[10] En 2009, le gouvernement fédéral donnait suite aux recommandations d'une entité connue sous le nom de Groupe d'experts sur la réglementation des valeurs mobilières en préparant une ébauche de loi fédérale — la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières*, décret C.P. 2010-667 — qui visait la création d'un régime national de réglementation des marchés de capitaux sous la surveillance d'un organisme national de réglementation des valeurs mobilières. La *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* avait pour objets de « protéger les investisseurs » (al. 9*a*)), de « favoriser des marchés des capitaux justes, efficaces et compétitifs » (al. 9*b*)) et de « contribuer [. . .] à l'intégrité et à la stabilité du système financier [du Canada] » (al. 9*c*)).

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[11] The *Proposed Canadian Securities Act* was designed to regulate all aspects of capital markets, and it therefore dealt in large part with the day-to-day aspects of the trade in securities (like registration requirements, prospectus filings and disclosure obligations). Although much of this scheme overlapped with provincial securities laws, it also contained provisions for the regulation of systemic risk in capital markets — risk that represents a threat to the stability of the country's economy. It is important to note, as well, that this proposed national regulatory scheme was not intended to *immediately* displace provincial securities legislation once the federal legislation was enacted by Parliament. Rather, the scheme was designed to function on an "opt-in" basis, each province retaining the right to choose whether to participate in the scheme or instead to keep its existing regulatory framework in place.

[11] La *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* a été conçue de manière à réglementer tous les aspects des marchés de capitaux et portait donc, dans une large mesure, sur les aspects courants du commerce des valeurs mobilières (comme les exigences concernant l'inscription, le dépôt des prospectus et les exigences relatives à la communication de renseignements). Même si une grande partie du régime chevauchait les lois provinciales sur les valeurs mobilières, il contenait également des dispositions sur la réglementation du risque systémique lié aux marchés de capitaux — risque qui constitue une menace pour la stabilité de l'économie canadienne. Il importe également de souligner que le régime national de réglementation proposé n'était pas censé remplacer *immédiatement* la législation provinciale sur les valeurs mobilières une fois la loi fédérale adoptée par le Parlement. Le régime devait plutôt fonctionner sur la base d'une « participation volontaire », chaque province pouvant toujours choisir d'y participer ou de conserver son cadre de réglementation existant.

[12] The constitutionality of the *Proposed Canadian Securities Act* was at issue before this Court in *Reference re Securities Act*. Specifically, the federal government sought from this Court an advisory opinion as to whether the enactment of the *Proposed Canadian Securities Act*, which this Court described as "a comprehensive foray by Parliament into the realm of securities regulation" (para. 2), would constitute a valid exercise of Parliament's power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.

[12] La constitutionnalité de la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* était en cause devant notre Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières*. Plus précisément, le gouvernement fédéral sollicitait l'avis consultatif de la Cour sur la question de savoir si l'adoption de la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* — que la Cour a décrite comme « une intrusion massive par le Parlement dans le domaine de la réglementation des valeurs mobilières » (par. 2) — constituerait un exercice valide de la compétence du Parlement en matière de trafic et de commerce conférée par le par. 91(2) de la *Loi constitutionnelle de 1867*.

[13] This Court unanimously held that it would not, and rejected the federal government's argument that the securities market had "evolved from a provincial matter to a national matter affecting the country as a whole" (para. 4). Having determined that the main thrust of the *Proposed Canadian Securities Act* was to regulate *on an exclusive basis* all aspects of the trade in securities in Canada, this Court went on to conclude that the constitutionality of the draft statute

[13] La Cour a statué, à l'unanimité, que ce n'était pas le cas, et a rejeté l'argument du gouvernement fédéral selon lequel le marché des valeurs mobilières avait « évolué, passant d'une matière provinciale à une matière nationale touchant l'ensemble du pays » : par. 4. Après avoir établi que l'objet principal de la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* consistait à réglementer, *à titre exclusif*, tous les aspects du

could not be supported by Parliament's general trade and commerce power.

[14] This Court analyzed the s. 91(2) issue in accordance with the five indicia set out in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, and based its conclusion on the final three indicia: (a) the detailed regulation of capital markets is not a matter that engages trade *as a whole*, but instead relates to the securities trade *in particular*; (b) the provinces have the constitutional capacity to legislate in respect of most matters covered by the *Proposed Canadian Securities Act* and can delegate regulatory powers to a single national securities regulator if they so choose; and (c) the successful operation of this regulatory scheme would not be jeopardized should any one province decline to participate, especially given that this proposed scheme would function on an "opt-in" basis. In the end, this Court held that "the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity . . . simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns" (*Reference re Securities Act*, at para. 125).

[15] Although this Court found that legislation purporting to regulate *all aspects* of the trade in securities was outside Parliament's sphere of legislative authority, it acknowledged that certain aspects of securities regulation may nevertheless fall within the federal sphere of jurisdiction, including the prevention and management of systemic risk in Canadian capital markets. Indeed, it is clear from this Court's reasons that the preservation of capital markets and the maintenance of Canada's economic stability are matters that are beyond provincial concern, and therefore fall within Parliament's jurisdiction over trade and commerce.

commerce des valeurs mobilières au Canada, la Cour a conclu que la constitutionnalité du projet de loi ne pouvait trouver appui dans la compétence générale du Parlement en matière de trafic et de commerce.

[14] La Cour a analysé la question du par. 91(2) conformément aux cinq critères établis dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, et a conclu sur la base des trois derniers critères : a) la réglementation détaillée des marchés de capitaux n'est pas une question qui met en jeu le commerce *dans son ensemble*, mais concerne plutôt le commerce des valeurs mobilières *en particulier*; b) les provinces disposent du pouvoir constitutionnel de légiférer sur la plupart des matières visées par la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* et peuvent déléguer leurs pouvoirs de réglementation à un seul organisme national de réglementation des valeurs mobilières si elles le souhaitent; et c) l'application du régime de réglementation ne serait pas compromise si une province refusait d'y participer, d'autant plus que le régime proposé fonctionnerait sur la base d'une « participation volontaire ». Ultimement, la Cour a conclu que « la réglementation courante de tous les aspects du commerce des valeurs mobilières et de la conduite des participants à ce secteur d'activités [. . .] ne peut tout simplement pas constituer un enjeu d'importance et de portée véritablement nationales qui le rend différent, sur le plan qualitatif, des enjeux provinciaux » : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 125.

[15] Bien que la Cour ait conclu qu'une loi dont l'objectif était de réglementer *tous les aspects* du commerce des valeurs mobilières ne relevait pas de la compétence législative du Parlement, elle a reconnu que certains aspects de la réglementation des valeurs mobilières pouvaient néanmoins relever de la compétence fédérale, notamment la prévention et la gestion du risque systémique lié aux marchés de capitaux canadiens. En effet, il ressort clairement des motifs de la Cour que la préservation des marchés de capitaux et le maintien de la stabilité économique du Canada sont des questions qui vont au-delà des enjeux provinciaux et, par conséquent, relèveraient de la compétence du Parlement en matière de trafic et de commerce.

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B. *Securities Regulation and Cooperative Federalism*

[16] While it is true that this Court found the *Proposed Canadian Securities Act* to be unconstitutional, it nevertheless recognized that a scheme based on a cooperative approach to the regulation of securities in Canada — one under which the provinces would address issues falling within their powers over property and civil rights and matters of a local nature while also leaving room for Parliament to address genuinely national concerns — might be constitutional (*Reference re Securities Act*, at paras. 130-33; see also para. 9). Given that the Attorneys General of Canada and British Columbia, as well as several of the interveners, submit that the Cooperative System follows this cooperative approach, a word about cooperative federalism is in order here.

[17] Cooperative federalism is an interpretative aid that is used when "interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, para. 78). Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 38). This principle is based on the presumption that "Parliament intends its laws to co-exist with provincial laws" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27).

[18] Cooperative federalism is often applied "to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action" (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at paras. 17-19). Broadly speaking, it "accommodates overlapping jurisdiction and encourages intergovernmental cooperation", and therefore discourages courts from interfering with

B. *La réglementation des valeurs mobilières et le fédéralisme coopératif*

[16] S'il est vrai que la Cour a jugé inconstitutionnelle la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières*, elle a tout de même reconnu qu'un régime fondé sur une approche coopérative en matière de réglementation des valeurs mobilières au Canada — régime suivant lequel les provinces se chargeraient des questions relevant de leur compétence sur la propriété et les droits civils et les matières d'une nature locale tout en permettant au Parlement de s'occuper des enjeux d'une nature véritablement nationale — pourrait être constitutionnel : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 130-133; voir aussi par. 9. Étant donné que les procureurs généraux du Canada et de la Colombie-Britannique, ainsi que plusieurs des intervenants, soutiennent que le régime coopératif s'inscrit dans cette approche coopérative, il convient ici de dire quelques mots sur le fédéralisme coopératif.

[17] Le fédéralisme coopératif est un outil d'interprétation utilisé pour interpréter « des textes constitutionnels [de manière à tenir] compte des répercussions des différentes interprétations sur l'équilibre entre les intérêts du fédéral et ceux des provinces » : *R. c. Comeau*, 2018 CSC 15, [2018] 1 R.C.S. 342, par. 78. Dans la mesure du possible, les tribunaux doivent favoriser une interprétation cohérente des lois fédérales et provinciales de manière à permettre qu'elles s'appliquent concurremment : *Rogers Communications Inc. c. Châteauguay (Ville)*, 2016 CSC 23, [2016] 1 R.C.S. 467, par. 38. Ce principe relève de la présomption selon laquelle « le Parlement a voulu que ses lois coexistent avec les lois provinciales » : *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 27.

[18] On a souvent recours au fédéralisme coopératif « pour faciliter l'intégration des régimes législatifs fédéra[l] et provinciaux et éviter l'imposition de contraintes inutiles aux interventions législatives provinciales » : *Québec (Procureur général) c. Canada (Procureur général)*, 2015 CSC 14, [2015] 1 R.C.S. 693, par. 17-19. De façon générale, il « permet le chevauchement des compétences et [. . .] encourage la coopération intergouvernementale » et décourage

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cooperative regulatory schemes so long as they are not incompatible with the boundaries dictated by the *Constitution Act, 1867* (*Reference re Securities Act*, at para. 57, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 63; *Reference re Securities Act*, at paras. 61-62). We stress that cooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Chateauguay (City)*, at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, at para. 19; *Reference re Securities Act*, at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).

par conséquent l'ingérence des tribunaux dans les régimes de réglementation coopératifs tant que ceux-ci ne sont pas incompatibles avec les limites dictées par la *Loi constitutionnelle de 1867* ni ne les modifient : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 57, citant *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2, p. 18; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134, par. 63; *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 61-62. Nous tenons à souligner que le fédéralisme coopératif ne peut servir « ni [à] l'emporter sur le partage [des compétences] lui-même ni [à] le modifier » (*Rogers Communications Inc. c. Châteauguay (Ville)*, par. 39), pas plus qu'il ne peut imposer « des limites à l'exercice par ailleurs valide d'une compétence législative » (*Québec (Procureur général) c. Canada (Procureur général)*, par. 19; *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 61-62). Il ne peut donc servir à rendre *intra vires* une loi *ultra vires*. En favorisant la coopération entre le Parlement et les législatures à l'intérieur des limites constitutionnelles existantes, le fédéralisme coopératif appuie le partage des compétences législatives au lieu de le supplanter : voir *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 22.

[19] This modern view of federalism sees Part VI of the *Constitution Act, 1867* as a set of boundaries within which provinces and the federal government are free to give full effect to "Canadian federalism's constitutional creativity and cooperative flexibility" (*Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, at para. 15). In short, cooperative federalism allows "different levels of government [to] work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own" (*Comeau*, at para. 87).

[19] Selon cette vision moderne du fédéralisme, la partie VI de la *Loi constitutionnelle de 1867* constitue un ensemble de limites à l'intérieur desquelles les provinces et le gouvernement fédéral sont libres de donner pleinement effet à « la créativité constitutionnelle et [à] la souplesse coopérative du fédéralisme canadien » : *Fédération des producteurs de volailles du Québec c. Pelland*, 2005 CSC 20, [2005] 1 R.C.S. 292, par. 15. En somme, le fédéralisme coopératif permet à « différents ordres de gouvernement [de travailler] de concert au départ pour tirer parti en tandem des pouvoirs constitutionnels qui leur sont propres afin d'établir un régime réglementaire qui pourrait outrepasser la compétence d'une assemblée législative à elle seule » : *Comeau*, par. 87.

[20] Among the issues in the present case is whether the Cooperative System is consistent with this cooperative approach to the constitutional division of federal and provincial powers.

[20] Parmi les questions en litige en l'espèce, il y a celle de savoir si le régime coopératif est compatible avec cette approche coopérative en matière de partage constitutionnel des compétences fédérales et provinciales.

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C. *The Cooperative System*

[21] The framework of the Cooperative System is set out in an agreement between the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon (together the "Participating Jurisdictions") which is known as the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory Scheme" ("Memorandum"). This system has four primary components, which are as follows:

(1) *Uniform Provincial and Territorial Legislation*: The Cooperative System's first component involves the standardization of provincial and territorial legislation respecting the day-to-day aspects of the securities trade. To this end, the Memorandum provides that each participating province is to enact a statute that mirrors the Model Provincial Act. The Model Provincial Act purports to address all matters respecting capital markets that fall within provincial or territorial jurisdiction (Memorandum, s. 3(a)(i)), including the registration of dealers and certain other market participants, prospectus requirements, disclosure and proxies, takeover and issuer bids, derivatives trading, and civil liability. Importantly, the Model Provincial Act does not have legal force within any participating province unless the province's legislature enacts it into law.

(2) *Complementary Federal Legislation*: The uniform provincial and territorial securities legislation is to be complemented by a federal statute, that is, the Draft Federal Act. The Draft Federal Act is more limited in scope, as it addresses only criminal matters, matters relating to systemic risk in Canada's capital markets, and national data collection (Memorandum, s. 3(a)(ii)). The federal government undertakes to seek the enactment by Parliament of legislation that mirrors this draft statute (s. 8.3).

(3) *A National Regulator*: The Memorandum contemplates a delegation by the federal government

C. *Le régime coopératif*

[21] Le cadre du régime coopératif est établi dans un accord entre le gouvernement fédéral et les gouvernements de l'Ontario, de la Colombie-Britannique, de la Saskatchewan, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et du Yukon (collectivement, les « juridictions participantes »), connu sous le nom de « Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux » (« Protocole d'accord »). Le régime est constitué des quatre principales composantes suivantes :

(1) *Législation provinciale et territoriale uniforme* : La première composante du régime coopératif concerne l'uniformisation des lois provinciales et territoriales régissant les aspects courants du commerce des valeurs mobilières. À cette fin, le Protocole d'accord prévoit que chaque province participante doit adopter une loi qui reflète en tous points la loi provinciale type. La loi provinciale type concerne toutes les questions de compétence provinciale ou territoriale ayant trait aux marchés de capitaux (Protocole d'accord, sous-al. 3a)(i)), notamment l'inscription des courtiers et de certains autres acteurs du marché, les exigences relatives aux prospectus, la communication et les procurations, les offres publiques d'achat et de rachat, le commerce des instruments dérivés et la responsabilité civile. Fait important, la loi provinciale type n'a pas force de loi dans la province participante tant et aussi longtemps que la législature de celle-ci ne l'a pas adoptée.

(2) *Législation fédérale complémentaire* : La loi provinciale et territoriale uniforme en matière de valeurs mobilières doit être accompagnée d'une loi fédérale, c.-à-d. l'ébauche de la loi fédérale. L'ébauche de la loi fédérale a une portée plus limitée, puisqu'elle porte seulement sur les questions de droit criminel et les questions relatives au risque systémique dans les marchés de capitaux canadiens et à la collecte de données à l'échelle nationale : Protocole d'accord, sous-al. 3a)(ii). Le gouvernement fédéral s'engage à demander au Parlement de promulguer une loi qui reflète en tous point cette ébauche : art. 8.3.

(3) *Organisme national de réglementation* : Le Protocole d'accord prévoit la délégation par le

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(pursuant to s. 73 of the Draft Federal Act) and the participating provinces (pursuant to s. 202 of the Model Provincial Act) of certain regulatory powers to a single operationally independent capital markets regulatory authority (the Authority). The intention is that the Authority will become the sole entity responsible for administering both the federal and provincial cooperative system legislation, and will fulfill all relevant regulatory, enforcement and adjudicative functions relating to the trade in securities under these statutes as enacted (Memorandum, s. 3(a)(iii)). As of now, a draft of the Authority's enabling legislation has not yet been published.

(4) *The Council of Ministers*: Finally, the Authority and its Board of Directors are to operate under the supervision of a Council of Ministers, which will comprise the ministers responsible for capital markets regulation in each participating province and the federal Minister of Finance (Memorandum, s. 3(a)(iv)).

[22] Each of these components is integral to the Cooperative System's ultimate objective: to establish a unified and cooperative system for the regulation of capital markets in Canada *in a manner that accords with the constitutional division of powers*. This objective is expressed in s. 2.2 of the Memorandum, which reads as follows:

In entering into this [Memorandum] and participating in the Cooperative System, each of the Participating Jurisdictions is addressing matters within its constitutional jurisdiction and is neither surrendering nor impairing any of its jurisdiction, with respect to which it remains sovereign.

[23] The parties to the agreement are the executive branches of the governments of the Participating Jurisdictions. By signing the Memorandum, each undertakes to establish the Cooperative System on the basis set out in the Memorandum (s. 10.1(a)).

[24] The Memorandum makes clear that the two proposed statutes — the Draft Federal Act and the

gouvernement fédéral (en vertu de l'art. 73 de l'ébauche de la loi fédérale) et par les provinces participantes (en vertu de l'art. 202 de la loi provinciale type) de certains pouvoirs de réglementation à un organisme unique de réglementation des marchés de capitaux indépendant sur le plan opérationnel (l'Autorité). L'intention est que l'Autorité devienne la seule entité chargée d'appliquer la législation, tant fédérale que provinciale, relative au régime coopératif, et qu'elle s'acquitte de toutes les fonctions de réglementation et d'application de la loi et des fonctions juridictionnelles pertinentes ayant trait au commerce des valeurs mobilières sous le régime de ces lois, telles qu'elles ont été adoptées : Protocole d'accord, sous-al. 3a)(iii). À l'heure actuelle, aucune ébauche de la loi habilitante de l'Autorité n'a encore été publiée.

(4) *Conseil des ministres* : Enfin, l'Autorité et son conseil d'administration doivent être supervisés par un conseil des ministres, composé des ministres responsables de la réglementation des marchés de capitaux de chacune des provinces participantes et du ministre fédéral des Finances : Protocole d'accord, sous-al. 3a)(iv).

[22] Chacune de ces composantes est indispensable à la réalisation de l'objectif ultime du régime coopératif : l'instauration d'un régime coopératif et unifié de réglementation des marchés de capitaux au Canada *conformément au partage constitutionnel des compétences*. Cet objectif est exprimé à l'art. 2.2 du Protocole d'accord, dont voici le texte :

En participant au présent [Protocole d'accord] et au régime coopératif, chaque partie traite de questions qui relèvent de ses compétences constitutionnelles et ne cède et ne compromet aucune de ses compétences, à l'égard desquelles elle demeure souveraine.

[23] Les parties à l'accord sont les différents exécutifs issus des gouvernements des juridictions participantes. En signant le Protocole d'accord, chacune des parties s'engage à instaurer le régime coopératif selon les principes énoncés dans le Protocole d'accord : al. 10.1a).

[24] Le Protocole d'accord indique clairement que les deux lois proposées — l'ébauche de la loi fédérale

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Model Provincial Act — remain subject to legislative approval (s. 3(a)(i) and (ii)). What this means is that neither has any legal effect unless and until the applicable legislatures enact them into law. It is for this reason that the executive signatories of the Participating Jurisdictions have agreed, in s. 10.1(b) of the Memorandum, "to use their best efforts to cause their respective legislatures to enact or approve" legislation that is substantially the same as the proposed statutes (see also ss. 8.1 and 8.3).

[25] The Council of Ministers plays an important role in the overall operation of the Cooperative System. Its duties, which are listed in s. 4.2 of the Memorandum, include proposing amendments to the Draft Federal Act and the Model Provincial Act. Section 5.6 of the Memorandum provides that proposed amendments to the Draft Federal Act require consultation between the federal Minister of Finance and the other members of the Council of Ministers. Proposals to amend the Model Provincial Act, by contrast, are subject to a vote and must be approved by (a) at least 50 percent of all members of the Council of Ministers, and (b) the members of the Council of Ministers from each "Major Capital Markets Jurisdiction" — which, at present, are Ontario and British Columbia (s. 5.5). It must be observed, however, that those voting requirements apply only to proposals to amend the Model Provincial Act, which provides content to the commitments of the executive signatories, *but which remains subject to legislative approval*. We also note that s. 5.7 of the Memorandum — which requires enhanced majority approval from the Council of Ministers for certain listed fundamental changes — does not apply to proposals to amend the Model Provincial Act. Put simply, s. 5.5 does not purport to apply to the amendment of legislation after it has been enacted into law in a participating province. As we will explain below, the power to enact, amend and repeal legislation lies exclusively in the hands of the legislatures, and cannot be subject to the approval of the Council of Ministers.

et la loi provinciale type — demeurent assujetties à l'approbation législative (sous-al. 3a)(i) et (ii)), ce qui signifie que ces lois n'ont aucun effet juridique tant et aussi longtemps qu'elles n'ont pas été adoptées par les législatures concernées. C'est pour cette raison que les signataires représentant le pouvoir exécutif des juridictions participantes ont convenu, à l'al. 10.1b) du Protocole d'accord, de « tout mettre en œuvre pour amener leur assemblée législative respective à promulguer ou approuver » des lois qui ressemblent essentiellement aux lois proposées : voir aussi art. 8.1 et 8.3.

[25] Le Conseil des ministres joue un rôle important dans le fonctionnement global du régime coopératif. Ses devoirs, énumérés à l'art. 4.2 du Protocole d'accord, comprennent le fait de proposer des modifications à l'ébauche de la loi fédérale et à la loi provinciale type. L'article 5.6 du Protocole d'accord prévoit que les propositions de modification de l'ébauche de la loi fédérale nécessitent des consultations entre le ministre fédéral des Finances et les autres membres du Conseil des ministres. En revanche, les propositions visant à modifier la loi provinciale type sont assujetties à un vote et doivent être approuvées par a) au moins 50 pour 100 des membres du Conseil des ministres et b) les membres du Conseil des ministres de chaque « partie ayant de grands marchés des capitaux » — qui sont, à l'heure actuelle, l'Ontario et la Colombie-Britannique : art. 5.5. Cependant, il convient de souligner que ces exigences en matière de vote s'appliquent uniquement aux propositions de modification de la loi provinciale type, laquelle détermine la teneur des engagements des signataires représentant les différents pouvoirs exécutifs, *mais qui demeure assujettie à l'approbation législative*. Nous ajoutons également que l'art. 5.7 du Protocole d'accord, suivant lequel certaines modifications fondamentales qui y sont énumérées nécessitent l'accord d'une majorité élargie du Conseil des ministres, ne s'applique pas aux propositions de modification de la loi provinciale type. Autrement dit, l'art. 5.5 n'est pas censé s'appliquer à la modification de la loi une fois que celle-ci a été adoptée dans une province participante. Comme nous l'expliquerons plus loin, le pouvoir d'adopter, de modifier et d'abroger des lois relève exclusivement des législatures et ne saurait être assujetti à l'approbation du Conseil des ministres.

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[26] The Memorandum contemplates the possibility that other provinces and territories will join the Cooperative System at a later date: s. 11(a) requires that Participating Jurisdictions "use their best efforts and work together to secure the agreement of the government of each non-Participating Jurisdiction of Canada to participate in the Cooperative System on the basis of the terms of [the Memorandum]". Accession by a non-Participating Jurisdiction remains subject to the approval of the Council of Ministers (ss. 5.7(b) and 11(b)). The Memorandum also sets out a mechanism by which Participating Jurisdictions can withdraw from the Cooperative System. Section 13 reads as follows:

A Participating Jurisdiction may withdraw from the Cooperative System by providing at least six months' written notice to the other Participating Jurisdictions. A Minister of a Participating Jurisdiction that has provided written notice to any other Participating Jurisdiction of its intention to withdraw from the Cooperative System will no longer be entitled to vote as a member of the Council of Ministers.

The [Authority] shall use all reasonable efforts to facilitate an expeditious withdrawal and the transfer and/or assignment of employees, assets and contracts relating to capital markets regulation in a withdrawing Participating Jurisdiction as of the effective withdrawal date.

[27] Another important aspect of the Cooperative System is the Authority's power to make regulations pursuant to both the Draft Federal Act and the Model Provincial Act. Both statutes provide that any regulations proposed by the Authority must be approved by the Council of Ministers before they come into force (Model Provincial Act, s. 206; Draft Federal Act, s. 76). Section 5.2 of the Memorandum, which sets out the mechanism by which the Council of Ministers approves or rejects regulations submitted by the Authority's Board of Directors, reads as follows:

5.2 Voting on a Regulation made by the Board of Directors

(a) A regulation made by the Board of Directors subsequent to the Initial Regulations will be put before the Council of Ministers before it comes

[26] Le Protocole d'accord évoque la possibilité que d'autres provinces et territoires se joignent au régime coopératif à une date ultérieure; l'al. 11a) exige que les juridictions participantes « collabore[nt] et déploie[nt] leurs meilleurs efforts dans le but d'obtenir l'adhésion au régime coopératif de tous les gouvernements des provinces et territoires non participants du Canada sur la base des modalités du [Protocole d'accord] ». L'adhésion d'une juridiction non participante demeure assujettie à l'approbation du Conseil des ministres : al. 5.7b) et 11b). Le Protocole d'accord établit également le mécanisme permettant aux juridictions participantes de se retirer du régime coopératif. L'article 13 se lit comme suit :

Une partie peut se retirer du régime coopératif en donnant par écrit un préavis d'au moins six mois aux autres parties. Le ministre d'une partie qui a donné à toute autre partie un préavis écrit de son intention de se retirer du régime coopératif n'aura plus le droit de vote en tant que membre du Conseil des ministres.

L'[Autorité] déploiera tous les efforts raisonnables pour faciliter promptement le retrait et le transfert ou l'affectation des employés, des actifs et des contrats se rapportant à la réglementation des marchés des capitaux dans la partie à la date d'entrée en vigueur du retrait.

[27] Un autre aspect important du régime coopératif est le pouvoir de l'Autorité de prendre des règlements tant en vertu de l'ébauche de la loi fédérale qu'en vertu de la loi provinciale type. Les deux lois prévoient que tous les règlements proposés par l'Autorité doivent être approuvés par le Conseil des ministres avant leur entrée en vigueur : loi provinciale type, art. 206; ébauche de la loi fédérale, art. 76. L'article 5.2 du Protocole d'accord, qui établit le mécanisme par lequel le Conseil des ministres approuve ou rejette les règlements présentés par le conseil d'administration de l'Autorité, est ainsi libellé :

5.2 Vote à propos d'un règlement pris par le conseil d'administration

a) Un règlement pris par le conseil d'administration une fois les règlements initiaux pris sera soumis au Conseil des ministres avant d'entrer en vigueur.

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into force. Unless the Council of Ministers has asked that the Board of Directors reconsider the regulation or the Council of Ministers has decided to reject the regulation within a specified period, the regulation will be considered to have been approved by the Council of Ministers.

(b) The Council of Ministers must request that the Board of Directors reconsider a regulation before the Council of Ministers makes a decision to reject the regulation.

(c) A request by the Council of Ministers to the Board of Directors to reconsider a regulation must be approved by:

(i) at least 50 [percent] of all members of the Council of Ministers; and

(ii) any one of the members of the Council of Ministers from the Major Capital Markets Jurisdictions and from Canada taken together.

(d) A decision to reject a regulation that has been reconsidered by the Board of Directors at the request of the Council of Ministers and once again put before the Council of Ministers before it comes into force must be approved by:

(i) at least 50 [percent] of all members of the Council of Ministers; and

(ii) a majority of the members of the Council of Ministers from the Major Capital Markets Jurisdictions and from Canada taken together.

[28] The Council of Ministers is thus required to request that the Board of Directors reconsider a proposed regulation before it can reject the regulation outright. Moreover, any decision to request the reconsideration of a proposed regulation must be approved by at least half of the members of the Council of Ministers *and* by any one member from the Major Capital Markets Jurisdictions and the federal government. A decision to reject a regulation that has been reconsidered by the Board of Directors must be approved by at least half of the former and by a majority of the latter. A proposed regulation that the

À moins que le Conseil des ministres ne demande au conseil d'administration de réexaminer le règlement ou que le Conseil des ministres ne décide de le refuser dans un délai précisé, le règlement sera réputé avoir été approuvé par le Conseil des ministres.

b) Le Conseil des ministres doit demander au conseil d'administration de réexaminer un règlement avant de rejeter ce dernier.

c) Une telle demande de réexamen doit être approuvée par :

(i) au moins 50 % des membres du Conseil des ministres;

(ii) l'un ou l'autre des ministres représentant les parties ayant de grands marchés des capitaux ou représentant le Canada.

d) La décision de rejeter un règlement que le conseil d'administration a réexaminé à la demande du Conseil des ministres et présenté à nouveau devant ce dernier avant son entrée en vigueur doit être approuvée par :

(i) au moins 50 % des membres du Conseil des ministres;

(ii) la majorité des membres du Conseil des ministres représentant les parties ayant de grands marchés des capitaux ou représentant le Canada.

[28] Par conséquent, le Conseil des ministres doit demander au conseil d'administration de réexaminer le projet de règlement avant de rejeter carrément ce dernier. De plus, la décision de demander le réexamen d'un projet de règlement doit être approuvée, d'une part, par au moins la moitié des membres du Conseil des ministres *et*, d'autre part, par un membre représentant les parties ayant de grands marchés de capitaux ou représentant le gouvernement fédéral. Quant à la décision de rejeter un règlement que le conseil d'administration a réexaminé, elle doit être approuvée par au moins la moitié des membres du

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Council of Ministers has not rejected or requested that it be reconsidered will be deemed to have been approved (Memorandum, s. 5.2(a)).

III. Opinion of the Quebec Court of Appeal — 2017 QCCA 756

[29] As mentioned above, the following two questions were referred to the Quebec Court of Appeal:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

The reference was heard by a panel of five judges.

[30] With respect to the first question, the Majority — composed of Duval Hesler C.J.Q. and Bouchard, Savard and Mainville JJ.A. — found the Cooperative System to be unconstitutional, for two main reasons.

[31] First, the Majority held that the mechanism for amending the Model Provincial Act, as set out in the Memorandum, effectively subjects the legislative jurisdiction of the participating provinces to the approval of an external entity: the Council of Ministers. In the Majority's view, the terms of the Memorandum had to be understood as *prohibiting* all participating provinces from amending their securities legislation without the consent of the Council of Ministers, while also *requiring* the legislative implementation of all amendments dictated by the Council of Ministers. This, it held, conflicts with

Conseil des ministres et par la majorité des membres du Conseil des ministres représentant les parties ayant de grands marchés de capitaux ou représentant le Canada. Le projet de règlement qui ne fait pas l'objet d'un rejet ou d'une demande de réexamen par le Conseil des ministres est réputé avoir été approuvé : Protocole d'accord, al. 5.2a).

III. Avis de la Cour d'appel du Québec — 2017 QCCA 756

[29] Comme nous l'avons mentionné précédemment, les deux questions suivantes ont été soumises à la Cour d'appel du Québec :

1. La Constitution du Canada autorise-t-elle la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon le modèle prévu par la plus récente publication du « Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux »?

2. La plus récente version de l'ébauche de la loi fédérale intitulée « Loi sur la stabilité des marchés des capitaux » excède-t-elle la compétence du Parlement du Canada sur le commerce selon le paragraphe 91(2) de la *Loi constitutionnelle de 1867*?

Le renvoi a été entendu par une formation de cinq juges.

[30] En ce qui concerne la première question, les juges majoritaires — à savoir la juge en chef Duval Hesler et les juges Bouchard, Savard et Mainville — ont conclu que le régime coopératif était inconstitutionnel pour deux raisons principales.

[31] Premièrement, les juges majoritaires ont conclu que le mécanisme de modification de la loi provinciale type, comme l'établit le Protocole d'accord, assujettit en réalité la compétence législative des provinces participantes à l'approbation d'une entité extérieure : le Conseil des ministres. Selon eux, les modalités du Protocole d'accord devaient être interprétées comme *empêchant* toutes les provinces participantes de modifier leurs lois portant sur les valeurs mobilières sans le consentement du Conseil des ministres, tout en *imposant* la mise en œuvre législative de toutes les modifications dictées par le

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the principle of parliamentary sovereignty, which protects a legislature's freedom to enact, amend and repeal legislation as it sees fit.

[32] Second, the Majority held that the involvement of the Council of Ministers in the making of regulations pursuant to the Draft Federal Act undermines the validity of that Act "by permitting certain provinces to exercise what amounts to a veto over federal initiatives that seek to guard against systemic risks related to capital markets which would have material adverse effects on the Canadian economy as a whole" (para. 56). On this point, the Majority expressed the opinion that a provincial veto is incompatible with the general branch of the trade and commerce power and accordingly calls the constitutional validity of the Draft Federal Act into question, as it "negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale" (para. 90; see also para. 95). The Majority added that the involvement of the Council of Ministers in the making of regulations under the Draft Federal Act amounts to an abdication of federal jurisdiction.

[33] Schrager J.A. (the "Dissenting Judge") took the position that the analysis of the scheme's constitutional validity should be limited to the two draft statutes — the Model Provincial Act and the Draft Federal Act — and should not encompass the terms of the Memorandum, given that the Memorandum is an intergovernmental agreement that lacks the force of law. He would have answered this first question posed by the reference, amended accordingly, in the affirmative. In his view, both of the statutes are constitutional, as they entail neither the delegation of legislative authority nor the abdication of parliamentary sovereignty. Although he found that s. 5.5 of the Memorandum does have the effect of limiting a provincial legislature's authority to amend its legislation, he observed that such a limitation is not incorporated into either the Draft Federal Act or the Model Provincial Act.

Conseil des ministres. Cela, ont-ils affirmé, va à l'encontre du principe de la souveraineté parlementaire, qui protège la liberté de la législature d'adopter, de modifier et d'abroger des lois comme elle l'entend.

[32] Deuxièmement, les juges majoritaires ont conclu que la participation du Conseil des ministres à la prise des règlements sous le régime de l'ébauche de la loi fédérale sape la validité constitutionnelle de cette loi « en permettant à certaines provinces d'exercer un droit de veto effectif sur les initiatives fédérales visant à prémunir les risques systémiques liés aux marchés des capitaux qui sont susceptibles d'avoir des conséquences négatives importantes sur l'économie canadienne dans son ensemble » : par. 56. À ce sujet, les juges majoritaires se sont dits d'avis qu'un veto provincial est incompatible avec le volet général de la compétence en matière de trafic et de commerce et, par conséquent, met en cause la validité constitutionnelle de l'ébauche de la loi fédérale, car un tel veto « ni[e] la nécessité même d'une intervention législative fédérale pancanadienne afin de contrer les risques systémiques à l'échelle nationale » : par. 90; voir aussi par. 95. Les juges majoritaires ont ajouté que la participation du Conseil des ministres à la prise de règlements sous le régime de l'ébauche de la loi fédérale équivaut à une abdication de la compétence fédérale.

[33] Le juge Schrager (le « juge dissident ») était pour sa part d'avis que l'analyse de la validité constitutionnelle du régime devait se limiter aux deux ébauches de loi — la loi provinciale type et l'ébauche de la loi fédérale — et ne devait pas porter sur les modalités du Protocole d'accord, étant donné que ce dernier constitue un accord intergouvernemental n'ayant pas force de loi. Il aurait répondu à la première question posée par le renvoi — modifiée en conséquence — par l'affirmative. À son avis, les deux lois étaient constitutionnelles, car elles ne comportaient ni délégation de la compétence législative ni abdication de la souveraineté parlementaire. Bien qu'il ait conclu que l'art. 5.5 du Protocole d'accord a pour effet de restreindre le pouvoir de la législature provinciale de modifier sa loi, il a fait remarquer que cette restriction n'est incorporée ni dans la l'ébauche de la loi fédérale ni dans la loi provinciale type.

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[34] To the extent that he was bound to consider the first question with reference to the terms of the Memorandum, the Dissenting Judge would have declined to do so because, in his view, it is not for the courts to pronounce on the constitutional validity of intergovernmental agreements. He also found it problematic that the Court of Appeal did not have before it a draft of the Authority's enabling legislation.

[35] In response to the second question, the Majority concluded that the Draft Federal Act is not *ultra vires* Parliament under s. 91(2) of the *Constitution Act, 1867*, except with respect to ss. 76 to 79, which set out the role of the Council of Ministers in the making of regulations. Given the stated purposes of the Draft Federal Act, the definition of "systemic risk" provided therein, and the limitations imposed on the scope of the Authority's delegated regulatory powers, the Majority found that the pith and substance of the Draft Federal Act is to promote the stability of the Canadian economy by managing systemic risk in capital markets — risk which could have material adverse effects on the economy as a whole. Following this Court's guidance in *Reference re Securities Act*, the Majority had little trouble concluding that this is a subject matter that falls within Parliament's jurisdiction over trade and commerce.

[36] However, the Majority took issue with ss. 76 to 79 of the Draft Federal Act, which require that all regulations made by the Authority pursuant to the Draft Federal Act be approved by the Council of Ministers. In the Majority's view, these provisions have the effect of conferring on certain provinces a veto over federal regulations, and therefore "negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale" (para. 90). The Majority concluded on this basis that ss. 76 to 79 would render the Draft Federal Act unconstitutional as a whole if they are not removed from it.

[34] Dans la mesure où il était tenu d'examiner la première question par rapport aux modalités du Protocole d'accord, le juge dissident aurait refusé de le faire parce que, à son avis, il n'appartient pas aux tribunaux de se prononcer sur la validité constitutionnelle des accords intergouvernementaux. Il a également jugé problématique que la Cour d'appel ne dispose pas d'une ébauche de la loi constitutive de l'Autorité.

[35] En réponse à la seconde question, les juges majoritaires ont conclu que l'ébauche de la loi fédérale n'excédait pas la compétence conférée au Parlement par le par. 91(2) de la *Loi constitutionnelle de 1867*, sauf pour ce qui est des art. 76 à 79, qui énoncent le rôle du Conseil des ministres dans la prise de règlements. Compte tenu des objets énoncés dans l'ébauche de la loi fédérale, de la définition de « risque systémique » qui y figure et des limites imposées aux pouvoirs de réglementation délégués de l'Autorité, les juges majoritaires ont conclu que le caractère véritable de l'ébauche de la loi fédérale est de promouvoir la stabilité de l'économie canadienne par la gestion du risque systémique lié aux marchés de capitaux, lequel risque est susceptible d'avoir des conséquences négatives importantes sur l'économie dans son ensemble. S'inspirant des enseignements de la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, les juges majoritaires n'ont eu aucun mal à conclure que cet objet relève de la compétence du Parlement en matière de trafic et de commerce.

[36] Cependant, les juges majoritaires ont critiqué les art. 76 à 79 de l'ébauche de la loi fédérale, qui exigent que tous les règlements pris par l'Autorité sous le régime de l'ébauche de la loi fédérale soient approuvés par le Conseil des ministres. À leur avis, ces dispositions ont pour effet de conférer à certaines provinces un droit de veto à l'égard de la réglementation fédérale, et donc de « nier la nécessité même d'une intervention législative fédérale pancanadienne afin de contrer les risques systémiques à l'échelle nationale » : par. 90. Pour cette raison, les juges majoritaires ont conclu que les art. 76 à 79 rendraient l'ébauche de la loi fédérale inconstitutionnelle dans son ensemble s'ils n'en étaient pas retirés.

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[37] The Dissenting Judge would have found the Draft Federal Act *in its entirety* to represent a valid exercise of Parliament's general trade and commerce power. Although he agreed that the subject matter of the draft legislation falls within Parliament's jurisdiction under s. 91(2) of the *Constitution Act, 1867*, he did not find that ss. 76 to 79 render the Draft Federal Act unconstitutional. He noted that Parliament has the power to delegate regulatory authority as it sees fit and to structure the body to which it delegates authority in any manner that is deemed appropriate to the task. In the Dissenting Judge's view, therefore, the fact that such a body may be populated by ministers of provincial governments does not invalidate the delegation of any such regulatory authority or undermine the inherently federal nature of the statute.

IV. Positions of the Parties

[38] With respect to the first question posed by the reference, the Attorneys General of Canada and British Columbia, supported by those of Ontario, Prince Edward Island, Saskatchewan and New Brunswick, submit that the proposed Cooperative System is constitutional. They argue that the Majority erred in interpreting the Memorandum, taking the position that it neither *purports to* nor *has the effect of* binding the legislatures of the participating provinces, and does not require them to abdicate their legislative authority either. In particular, the Attorneys General of Canada and British Columbia dispute the Majority's understanding of the principle of parliamentary sovereignty: in their submission, the executive is simply *incapable* of binding the legislature by way of cooperative agreements. Their opinion is that the Majority's conception of parliamentary sovereignty would, if accepted, limit the ability of provinces and the federal government to cooperate in the pursuit of common objectives, and would ultimately frustrate the application of cooperative federalism.

[39] The Attorneys General of Canada and British Columbia (as well as the interveners that support their position) agree with the Court of Appeal that the Draft Federal Act is *intra vires* Parliament,

[37] Le juge dissident a conclu que l'ébauche de la loi fédérale *en entier* constituait un exercice valide de la compétence générale du Parlement en matière de trafic et de commerce. Même s'il était d'accord que l'objet de la loi proposée relève de la compétence du Parlement conférée par le par. 91(2) de la *Loi constitutionnelle de 1867*, il n'a pas été d'avis que les art. 76 à 79 rendraient l'ébauche de la loi fédérale inconstitutionnelle. Il a souligné que le Parlement a le pouvoir de déléguer son pouvoir de réglementation comme il l'entend, et d'organiser comme bon lui semble la structure de l'organisme auquel il délègue ce pouvoir. Selon le juge dissident, le fait que cet organisme puisse être composé de ministres des gouvernements provinciaux n'invalide pas la délégation de tels pouvoirs de réglementation, pas plus qu'il ne mine la nature intrinsèquement fédérale de la loi.

IV. Position des parties

[38] En ce qui concerne la première question posée par le renvoi, les procureurs généraux du Canada et de la Colombie-Britannique — appuyés par ceux de l'Ontario, de l'Île-du-Prince-Édouard, de la Saskatchewan et du Nouveau-Brunswick — soutiennent que le régime coopératif proposé est constitutionnel. Ils affirment que les juges majoritaires ont commis une erreur dans leur interprétation du Protocole d'accord, estimant que celui-ci n'a ni *pour objet* ni *pour effet* de lier les législatures des provinces participantes, et qu'il ne les oblige pas à abdiquer leur compétence législative. En particulier, les procureurs généraux du Canada et de la Colombie-Britannique contestent la façon dont les juges majoritaires comprennent le principe de la souveraineté parlementaire; selon leurs observations, l'exécutif est tout simplement *incapable* de lier la législature au moyen d'accords de coopération. Ils soutiennent que souscrire à la façon dont les juges majoritaires conçoivent la souveraineté parlementaire limiterait la capacité des provinces et du gouvernement fédéral de collaborer à la poursuite d'objectifs communs et finirait par entraver l'application du fédéralisme coopératif.

[39] Les procureurs généraux du Canada et de la Colombie-Britannique (de même que les intervenants qui appuient leur position) conviennent avec la Cour d'appel que l'ébauche de la loi fédérale relève

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but disagree with the Majority's conclusion that the Council of Ministers' involvement in reviewing federal regulations renders the Draft Federal Act unconstitutional. They submit that the existence of a "provincial veto" is factually inaccurate, and add that the manner in which a statute delegates regulatory powers cannot affect that statute's constitutionality, since the legislature remains free to delegate such regulatory powers as it sees fit.

[40] The Attorneys General of Quebec and Alberta, together with the Barreau du Québec and the Institute for Governance of Private and Public Organizations — agree with the Majority that the Cooperative System is unconstitutional. They submit that the proposed scheme requires participating provinces to surrender their legislative jurisdiction by undertaking to enact the Model Provincial Act and to refrain from unilaterally amending that legislation, the result being a violation of the principle of parliamentary sovereignty. They also argue that this transfer of legislative authority to the Council of Ministers effectively creates a legislative body that is not contemplated by the Constitution. This, they contend, represents a colourable attempt to amend the Constitution and is incompatible with the rule respecting legislative delegation.

[41] Turning to the second question, the Attorneys General of Canada, Ontario and New Brunswick submit that the Draft Federal Act falls within Parliament's general trade and commerce power. In their view, the proposed Act relates, in pith and substance, to the promotion and protection of the stability of the country's financial system by managing systemic risk in capital markets. This, they argue, falls squarely within the general branch of the trade and commerce power, in accordance with this Court's decision in *Reference re Securities Act*.

[42] The Attorney General of Quebec, together with the Attorney General of Alberta, the Barreau du

de la compétence du Parlement, mais rejettent la conclusion des juges majoritaires selon laquelle la participation du Conseil des ministres à l'examen des règlements fédéraux rend l'ébauche de la loi fédérale inconstitutionnelle. Ils soutiennent que l'existence d'un « veto provincial » est inexacte sur le plan factuel et ajoutent que la façon dont une loi délègue les pouvoirs de réglementation ne saurait compromettre la constitutionnalité de cette loi, car la législature demeure libre de déléguer de tels pouvoirs de réglementation comme elle l'entend.

[40] En revanche, les procureurs généraux du Québec et de l'Alberta — auxquels se joignent le Barreau du Québec et l'Institut sur la gouvernance d'organisations privées et publiques — conviennent avec les juges majoritaires que le régime coopératif est inconstitutionnel. Ils soutiennent que le régime proposé oblige les provinces participantes à renoncer à leur compétence législative en s'engageant à adopter la loi provinciale type et à s'abstenir de modifier unilatéralement cette loi une fois promulguée, de sorte qu'il en résulte une violation du principe de la souveraineté parlementaire. Ils soutiennent également que le transfert de cette compétence législative au Conseil des ministres crée de fait un corps législatif qui n'est pas prévu dans la Constitution, ce qui, prétendent-ils, constitue une tentative déguisée de modifier la Constitution et va à l'encontre de la règle en matière de délégation de pouvoirs législatifs.

[41] Quant à la seconde question, les procureurs généraux du Canada, de l'Ontario et du Nouveau-Brunswick soutiennent que l'ébauche de la loi fédérale relève de la compétence générale du Parlement en matière de trafic et de commerce. À leur avis, le caractère véritable de cette ébauche se rapporte à la promotion et à la protection de la stabilité du système financier du pays par la gestion du risque systémique lié aux marchés de capitaux, ce qui, soutiennent-ils, relève clairement du volet général de la compétence en matière de trafic et de commerce, conformément à l'avis consultatif de la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières*.

[42] La procureure générale du Québec, ainsi que le procureur général de l'Alberta, le Barreau du

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Québec and the Institute for Governance of Private and Public Organizations, submits that the Draft Federal Act is beyond Parliament's general trade and commerce power. As the management of systemic risk is a purpose that animates the regulation of securities generally, it is not helpful in drawing a line between provincial and federal jurisdiction. Moreover, and even assuming the Draft Federal Act's pith and substance can be characterized as the management of systemic risk, the Attorney General of Quebec takes the view that the constitutionality of this proposed legislation still cannot be supported under the general trade and commerce power on the basis of the *General Motors* indicia: the Draft Federal Act is concerned solely with the securities industry, there is no evidence that the provinces are incapable of enacting and enforcing similar measures, and given the realities of the trade in securities, one province's failure to regulate will not jeopardize the regulation of securities in other jurisdictions.

Québec et l'Institut sur la gouvernance d'organisations privées et publiques, affirment que l'ébauche de la loi fédérale excède la compétence générale du Parlement en matière de trafic et de commerce. Étant donné que la gestion du risque systémique est un objet qui sous-tend la réglementation des valeurs mobilières en général, cet objet n'est guère utile pour tracer une ligne de démarcation exacte entre les compétences provinciales et fédérales. De plus, même en supposant que le caractère véritable de l'ébauche de la loi fédérale puisse être considéré comme étant la gestion du risque systémique, la procureure générale du Québec est d'avis que la constitutionnalité de la loi proposée ne peut toujours pas trouver appui dans la compétence générale en matière de trafic et de commerce suivant les critères établis dans l'arrêt *General Motors* : l'ébauche de la loi fédérale porte uniquement sur le secteur des valeurs mobilières, rien n'indique que les provinces ne sont pas en mesure d'adopter et d'appliquer des mesures similaires et, compte tenu des réalités du commerce des valeurs mobilières, l'omission par une province de réglementer ne compromettra pas la réglementation des valeurs mobilières dans d'autres provinces.

[43] The Attorney General of Manitoba agrees with the Attorney General of Quebec that the Draft Federal Act is *ultra vires*, but takes a slightly different approach. Manitoba accepts that Parliament has the authority to legislate for the purpose of managing systemic risk, as this Court held in *Reference re Securities Act*. Given that the provinces also have the authority to legislate for this purpose, and in light of the inherently amorphous nature of the concept of "systemic risk", Manitoba instead argues that federal authority over systemic risk must be confined to urgent circumstances that demonstrably require uniform national action. Manitoba submits that the Draft Federal Act fails to meet this standard and would simply duplicate provincial regulation of the same risks for the same purposes without employing a qualitatively different approach.

[43] Le procureur général du Manitoba est d'accord avec la procureure générale du Québec pour dire que l'ébauche de la loi fédérale est *ultra vires*, mais adopte une approche légèrement différente. Il reconnaît que le Parlement a le pouvoir de légiférer pour gérer le risque systémique, comme l'a conclu la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières*. Comme les provinces peuvent elles aussi légiférer à cette même fin, et compte tenu du caractère intrinsèquement imprécis de la notion de « risque systémique », le Manitoba fait plutôt valoir que la compétence fédérale en matière de risque systémique doit se limiter aux circonstances urgentes nécessitant manifestement une action nationale uniforme. Le Manitoba soutient que l'ébauche de la loi fédérale ne satisfait pas à cette norme et qu'elle ferait simplement double emploi avec la réglementation provinciale visant les mêmes risques aux mêmes fins, sans emprunter une approche qualitativement différente.

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V. Analysis

A. *Question #1: Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?*

[44] This first question requires this Court to consider whether the Cooperative System, as set out in the Memorandum, is constitutional. As noted above, the Majority answered this question in the negative, for two reasons. First, it held that the involvement of the Council of Ministers in the proposal of amendments to the Model Provincial Act (as set out in ss. 4.2 and 5.5 of the Memorandum) fetters the law-making powers of the provincial legislatures, and therefore contravenes the principle of parliamentary sovereignty (paras. 57-81). Second, it found the requirement that proposed regulations under the Draft Federal Act be approved by the Council of Ministers (Draft Federal Act, ss. 76 to 79), coupled with the mechanism by which the Council of Ministers approves or rejects such proposed regulations (Memorandum, s. 5.2), has the effect of giving certain provinces a "veto" over federal intervention in capital markets (para. 87). This, in the Majority's view, is incompatible with the constitutional foundation for federal jurisdiction under the general trade and commerce power (para. 95).

[45] The arguments advanced by the Attorney General of Quebec in this Court are consistent with the Majority's conclusions. Quebec contends that the effect of s. 5.5 of the Memorandum is to bind the legislatures of the respective participating provinces by (a) prohibiting them from amending their securities legislation without the consent of the Council of Ministers, and by (b) requiring that they enact all amendments to the Model Provincial Act that are approved by the Council of Ministers. In Quebec's

V. Analyse

A. *Question nº 1 : La Constitution du Canada autorise-t-elle la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon le modèle prévu par la plus récente publication du « Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux »?*

[44] Cette première question amène la Cour à se demander si le régime coopératif, tel qu'il est établi dans le Protocole d'accord, est constitutionnel. Comme nous l'avons mentionné précédemment, les juges majoritaires ont répondu à cette question par la négative, pour deux raisons. Premièrement, ils ont conclu que la participation du Conseil des ministres aux propositions visant à modifier la loi provinciale type (comme le prévoient les art. 4.2 et 5.5 du Protocole d'accord) entrave l'exercice des pouvoirs de légiférer des législatures provinciales, et contrevient par conséquent au principe de la souveraineté parlementaire : par. 57-81. Deuxièmement, ils ont conclu que l'exigence voulant que les projets de règlement pris sous le régime de l'ébauche de la loi fédérale soient approuvés par le Conseil des ministres (ébauche de la loi fédérale, art. 76 à 79), conjuguée au mécanisme par lequel le Conseil des ministres approuve ou rejette ces projets de règlement (Protocole d'accord, art. 5.2), a pour effet de conférer à certaines provinces un « droit de veto » sur l'intervention fédérale dans les marchés de capitaux (par. 87), ce qui, affirment-ils, est incompatible avec l'assise constitutionnelle de la compétence fédérale générale en matière de trafic et de commerce (par. 95).

[45] Les arguments soumis par la procureure générale du Québec devant notre Cour s'accordent avec les conclusions des juges majoritaires. Le Québec prétend que l'art. 5.5 du Protocole d'accord a pour effet de lier les législatures des provinces participantes : a) en les empêchant de modifier leurs lois portant sur les valeurs mobilières sans le consentement du Conseil des ministres; et b) en les obligeant à adopter toutes les modifications à la loi provinciale type approuvées par le Conseil des ministres. Selon

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submission, this amounts to an impermissible fettering of the legislatures' sovereign authority.

[46] The Attorney General of Quebec also submits that this aspect of the Cooperative System is contrary to the prohibition against legislative delegation, as it effectively requires each of the participating provinces to "surrender their jurisdiction over securities in order to hand it over to a composite body which none of them controls" (R.F., at para. 77). As a final point, Quebec adds that the effect of the Memorandum is to create a legislative body that is not contemplated in the Constitution.

[47] For the reasons that follow, we respectfully disagree with the Majority's conclusion and are unable to accept the position advanced by Quebec.

(1) Parliamentary Sovereignty and the Fettering of Provincial Legislative Authority

[48] The proposition that the Council of Ministers' involvement in amending the Model Provincial Act is inconsistent with the principle of parliamentary sovereignty rests on two erroneous premises: first, that the Memorandum *purports* to bind the legislatures of the participating provinces and second, that it is *actually capable* of doing so. As we will explain, the terms of the Memorandum do not and cannot fetter the legislatures' primary law-making authority.

(a) *Terms of the Memorandum*

[49] Section 4.2 of the Memorandum provides that the Council of Ministers will be responsible for, among other things, proposing amendments to the Model Provincial Act, the Draft Federal Act, and the Authority's charter documentation. The voting rules applicable to approval by the Council of Ministers of a proposal to amend the Model Provincial Act are set out in s. 5.5, which reads as follows:

le Québec, cela constitue une entrave inadmissible à l'exercice du pouvoir souverain des législatures.

[46] La procureure générale du Québec soutient également que cet aspect du régime coopératif est contraire à l'interdiction visant la délégation de pouvoirs législatifs, car il oblige en fait les provinces participantes à « abandonne[r] leur compétence en matière de valeurs mobilières, afin de la confier à un organisme composite qu'aucune d'entre d'elles ne contrôle » : m.i., par. 77. En dernier lieu, le Québec ajoute que le Protocole d'accord a pour effet de créer un corps législatif qui n'est pas prévu dans la Constitution.

[47] Avec égards, pour les motifs qui suivent, nous ne pouvons nous rallier à la conclusion des juges majoritaires et ne pouvons souscrire à la position soutenue par le Québec.

(1) La souveraineté parlementaire et l'entrave à l'exercice de la compétence législative des provinces

[48] La thèse voulant que la participation du Conseil des ministres à la modification de la loi provinciale type contrevienne au principe de la souveraineté parlementaire repose sur deux prémisses erronées : premièrement, que le Protocole d'accord *vise à* lier les législatures des provinces participantes, et deuxièmement, qu'il est *réellement capable* de le faire. Comme nous l'expliquons plus loin, les modalités du Protocole d'accord n'entravent pas, ni ne peuvent entraver, le pouvoir primaire de légiférer des législatures.

a) *Les modalités du Protocole d'accord*

[49] L'article 4.2 du Protocole d'accord prévoit que le Conseil des ministres sera notamment responsable de proposer des modifications à la loi provinciale type, à l'ébauche de la loi fédérale et aux documents relatifs à la charte de l'Autorité. Les règles concernant le vote relatif à l'approbation par le Conseil des ministres d'une proposition de modification à la loi provinciale type sont énoncées à l'art. 5.5, qui est rédigé comme suit :

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5.5 Voting on a Proposal to Amend Provincial and Territorial Legislation

A proposal to amend the Capital Markets Act must be approved by:

(a) at least 50 [percent] of all members of the Council of Ministers; and

(b) the members of the Council of Ministers from each Major Capital Markets Jurisdiction.

[50] It is clear from these sections that the Council of Ministers' role is limited to proposals for amendments to the Model Provincial Act — a model statute which, by definition, remains "subject to legislative approval" (s. 3(a)(i)). Sections 4.2 and 5.5 refer exclusively to the proposed legislation on which this Cooperative System is based, and do not contemplate that the Council of Ministers will have any formal involvement in the amendment of legislation that has already been enacted by provincial legislatures. This is key: nowhere does the Memorandum imply that the legislatures of the participating provinces are *required* to implement the amendments made to the Model Provincial Act that have been approved by the Council of Ministers, or that they are *precluded* from making any other amendments to their securities laws. Indeed, the terms of the Memorandum do not even require that the provisions of the Model Provincial Act themselves be enacted into law by the legislatures of the participating provinces: the fact that the executive signatories are bound to "use their best efforts to cause their respective legislatures to enact or approve the Cooperative System Legislation" (s. 10.1; see also s. 8.1) shows that these legislatures remain free to reject the proposed statutes (as amended) if they so choose.

[51] We also note that neither of ss. 4.2 and 5.5 was incorporated into the Model Provincial Act. In our view, this further undermines the submission that the Council of Ministers has a formal role to play in the legislative process. And the fact that the Model Provincial Act's definition of "Council of Ministers" refers to the Memorandum cannot be understood

5.5 Vote à propos d'une proposition visant à modifier la législation provinciale et territoriale

Une proposition visant à modifier la loi sur les marchés des capitaux doit être approuvée par :

a) au moins 50 % des membres du Conseil des ministres;

b) les membres du Conseil des ministres de chaque partie ayant de grands marchés des capitaux.

[50] Il est clair de ces articles que le rôle du Conseil des ministres se limite aux propositions de modifications à la loi provinciale type — une loi type qui, par définition, demeure assujettie à « l'approbation législative » : sous-al. 3a)(i). Les articles 4.2 et 5.5 visent uniquement la législation proposée sur laquelle repose le régime coopératif et ne prévoient pas que le Conseil des ministres jouera un rôle officiel dans la modification des lois déjà adoptées par les législatures provinciales. Il s'agit là de l'élément clé : rien dans le Protocole d'accord ne suggère que les législatures des provinces participantes sont *tenues* de mettre en œuvre les modifications à la loi provinciale type approuvées par le Conseil des ministres, ou qu'il leur est *interdit* d'apporter d'autres modifications à leurs lois en matière de valeurs mobilières. En effet, les termes du Protocole d'accord n'obligent même pas les législatures des provinces participantes à légiférer pour adopter les dispositions de la loi provinciale type elles-mêmes; le fait que les signataires représentant les différents pouvoirs exécutifs soient tenus de « tout mettre en œuvre pour amener leur assemblée législative respective à promulguer ou approuver la législation sur le régime coopératif » (art. 10.1; voir aussi art. 8.1) démontre que les législatures demeurent libres de rejeter les lois proposées (dans leur version modifiée) si elles choisissent de le faire.

[51] Nous tenons également à souligner que ni l'art. 4.2 ni l'art. 5.5 n'a été incorporé dans la loi provinciale type. À notre avis, cet élément mine encore plus l'argument selon lequel le Conseil des ministres a un rôle officiel à jouer dans le processus législatif. Et le fait que la définition de « Conseil des ministres » contenue dans la loi provinciale type

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as incorporating the voting rules of s. 5.5 into the statutory scheme (see: C.A. reasons, at para. 75). Incorporation by reference requires clear language (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at paras. 11-12; citing with approval *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720 (Sup. Ct.), at p. 1741, citing N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), 29 *Alta. L. Rev.* 792, at p. 832). Similarly, a legislature intending to bind itself to rules respecting the manner and form by which the statute is to be amended *must* do so in clear terms (see: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 561-64; *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (S.C.J.), at para. 49).

[52] We therefore reject the proposition that the Cooperative System, as set out in the Memorandum, purports to fetter the law-making powers of the participating provinces' legislatures.

(b) *Parliamentary Sovereignty*

[53] At a broader level, the Majority's reasoning reflects a misunderstanding of the principle of parliamentary sovereignty. In short, the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation. An executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have any such effect.

[54] Parliamentary sovereignty is a foundational principle of the Westminster model of government, and it is based on a recognition that the legislature's power to make laws exists without any legal limits or constraints (P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 85). In its traditional form, parliamentary sovereignty means that the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and

renvoie au Protocole d'accord ne saurait être interprété comme incorporant les règles relatives au vote prévues à l'art. 5.5 dans le régime législatif : voir les motifs de la C.A., par. 75. L'incorporation par renvoi nécessite un libellé clair : *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309, par. 11-12, citant en l'approuvant *UL Canada Inc. c. Québec (Procureur général)*, [1999] R.J.Q. 1720 (C.S.), p. 1741, citant N. Bankes, « Co-operative Federalism : Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia » (1991), 29 *Alta. L. Rev.* 792, p. 832. De la même façon, la législature qui a l'intention de s'engager à respecter des règles quant à la manière et à la forme selon lesquelles la loi est censée être modifiée *doit* le faire en termes clairs : voir *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, p. 561-564; *Canadian Taxpayers Federation c. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (C.S.J.), par. 49.

[52] Par conséquent, nous rejetons la thèse voulant que le régime coopératif, tel qu'il est établi dans le Protocole d'accord, vise à entraver l'exercice des pouvoirs de légiférer des législatures des provinces participantes.

b) *La souveraineté parlementaire*

[53] De façon générale, le raisonnement des juges majoritaires témoigne d'une incompréhension du principe de la souveraineté parlementaire. En somme, le pouvoir exécutif est incapable de restreindre le pouvoir de la législature d'adopter, de modifier et d'abroger des lois. Un accord conclu par différents exécutifs et censé lier les législatures respectives des parties ne peut donc avoir un tel effet.

[54] La souveraineté parlementaire est un principe fondateur du modèle de gouvernement de Westminster qui repose sur la reconnaissance du fait que le pouvoir de la législature de faire des lois ne connaît aucune limite ou contrainte juridique : P. J. Monahan, B. Shaw et P. Ryan, *Constitutional Law* (5e éd. 2017), p. 85. Dans sa forme traditionnelle, la souveraineté parlementaire signifie que la législature jouit du pouvoir *exclusif* d'adopter, de

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that there is no matter in respect of which it may not make laws. As explained by A. V. Dicey:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

(A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 39-40)

[55] The sovereignty of the legislature is central to the United Kingdom's uncodified constitutional structure (*Jackson v. Her Majesty's Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 9 (per Lord Bingham)). Because there are no constituent instruments that either restrict the U.K. Parliament's jurisdiction over certain subject matters or enshrine certain civil rights and liberties, "[a]ny law, upon any subject matter, is within Parliament's competence" (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 12-1). Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature's law-making function.

[56] While the principle of parliamentary sovereignty is an equally important feature of Canadian law, various aspects of our written Constitution have qualified the basic Diceyan rule that Parliament has the power "to make or unmake any law whatever". One such qualification lies in the federal structure of the Canadian state, which restricts the subject matters over which each legislature has jurisdiction. The distribution of legislative power between Parliament and the provincial legislatures is set out in Part VI of the *Constitution Act, 1867*. Since neither level of government has the power to legislate in respect of matters that fall within the exclusive competence of the other, the sovereignty of Parliament and of the provincial legislatures has been limited

modifier et d'abroger des lois comme elle l'entend et aucun sujet n'échappe à son pouvoir de légiférer. Comme l'a expliqué A. V. Dicey :

> [TRADUCTION] Le principe de la souveraineté parlementaire veut tout simplement dire que le Parlement, ainsi défini, a, en vertu de la constitution anglaise, le droit de faire ou d'abroger quelque loi que ce soit; de plus, le droit anglais ne reconnaît à aucun individu ou organisme le droit de déroger aux lois du Parlement ou de les annuler.

(A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10e éd. 1959), p. 39-40)

[55] La souveraineté de la législature est un élément essentiel de la structure constitutionnelle non codifiée du Royaume-Uni : *Jackson c. Her Majesty's Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, par. 9 (lord Bingham). Comme il n'existe pas d'acte constitutif restreignant la compétence du Parlement du Royaume-Uni à l'égard de certains sujets ou enchâssant certains droits et libertés civils, [TRADUCTION] « [n]'importe quelle loi, sur n'importe quel sujet, relève de la compétence du Parlement » : P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 12-1. La souveraineté parlementaire signifie donc que le pouvoir législatif du gouvernement l'emporte sur les pouvoirs exécutif et judiciaire, qui doivent tous deux agir conformément aux textes législatifs et ne peuvent usurper la fonction législative de la législature ou y nuire.

[56] Si le principe de la souveraineté parlementaire est tout aussi important en droit canadien, plusieurs aspects de notre Constitution écrite ont toutefois restreint la règle de Dicey selon laquelle le Parlement a le pouvoir [TRADUCTION] « de faire ou d'abroger quelque loi que ce soit ». L'une de ces restrictions tient à la structure fédérale de l'État canadien, qui limite les sujets sur lesquels chaque législature a compétence. La répartition du pouvoir législatif entre le Parlement et les législatures provinciales est établie à la partie VI de la *Loi constitutionnelle de 1867*. Étant donné qu'aucun des ordres de gouvernement n'a le pouvoir de légiférer sur les matières qui relèvent de la compétence exclusive de l'autre, la souveraineté du Parlement et des législatures provinciales est limitée

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in Canada since Confederation. This was explained by the Judicial Committee of the Privy Council in *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), as follows:

> When the British North America Act [now known as the *Constitution Act, 1867*] enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters enumerated in sect. 92, it conferred . . . authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances . . . . [Emphasis added; p. 132.]

Given this constitutional division of powers, therefore, neither Parliament nor the provincial legislatures have the authority to enact laws that touch on all subject matters. Rather, the effect of parliamentary sovereignty in the context of Canadian federalism is that Parliament and the provincial legislatures are supreme with respect only to matters that fall within their respective spheres of jurisdiction.

[57] Further limits were placed upon parliamentary sovereignty in Canada following the enactment of the *Constitution Act, 1982*, a constitutional document which (among other things) protects the various civil rights and freedoms enshrined in the *Canadian Charter of Rights and Freedoms* (ss. 1 to 34), recognizes and affirms existing Aboriginal and treaty rights (s. 35), and provides that any laws which are inconsistent with the provisions of the Constitution are, "to the extent of the inconsistency, of no force or effect" (s. 52(1)). Not only does this constitutional instrument impose substantive limits on the content of statutory enactments, but it also codifies the authority of superior courts to review legislation for constitutional compliance (an authority that had previously been only assumed to exist). Professor Monahan et al. had the following to say about the effect of the *Constitution Act, 1982*

au Canada depuis la Confédération. C'est ce qu'a expliqué le Comité judiciaire du Conseil privé dans *Hodge c. The Queen* (1883), 9 App. Cas. 117 (C.P.) :

> [TRADUCTION] En décrétant que l'Ontario avait droit à une législature et qu'il appartenait en exclusivité à son assemblée législative d'adopter des lois pour la province et pour des fins provinciales relativement aux catégories de sujets énumérés à l'art. 92, l'Acte de l'Amérique du Nord britannique [maintenant connu sous le nom de *Loi constitutionnelle de 1867*] lui conféra [. . .] une autorité aussi complète et aussi vaste, dans les limites prescrites par l'art. 92, que le Parlement impérial, dans la plénitude de ses attributions, possédait et pouvait conférer. Dans les limites des sujets précités et à l'intérieur de ce cadre, la législature locale est souveraine et possède le même pouvoir que le Parlement impérial ou le Parlement du Dominion aurait, dans des circonstances analogues . . . [Nous soulignons; p. 132.]

Compte tenu de ce partage constitutionnel des compétences, ni le Parlement ni les législatures provinciales n'ont, par conséquent, le pouvoir d'adopter des lois qui touchent tous les sujets. Dans le contexte du fédéralisme canadien, la souveraineté parlementaire fait plutôt en sorte que le Parlement et les législatures provinciales sont souverains uniquement quant aux matières qui relèvent de leur compétence respective.

[57] D'autres limites furent apportées à la souveraineté parlementaire au Canada par l'adoption de la *Loi constitutionnelle de 1982*, un document constitutionnel qui (entre autres choses) protège les divers droits et libertés civils enchâssés dans la *Charte canadienne des droits et libertés* (art. 1 à 34), reconnaît et confirme les droits existants, ancestraux ou issus de traités (art. 35), et rend « inopérantes les dispositions incompatibles de toute autre règle de droit » (par. 52(1)). Non seulement ce document constitutionnel assujettit-il le contenu des textes législatifs à des limites de fond, mais il codifie aussi le pouvoir des cours supérieures de contrôler les mesures législatives afin d'en vérifier la conformité constitutionnelle (pouvoir dont l'existence avait été jusque-là simplement présumée). Le professeur Monahan et ses coauteurs ont tenu les propos suivants au sujet de l'effet de la *Loi constitutionnelle de 1982* sur les

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on the principles of parliamentary supremacy and of the rule of law:

> All laws, regardless of the subject matter, are subject to review on the basis that they offend fundamental rights of individuals or groups under the *Charter*, or Indigenous rights under [s. 35]. . . . In this sense, the principle of constitutionalism and the rule of law — which requires that all actions of the state must be authorized by law and consistent with constitutional requirements — has now significantly narrowed the principle of parliamentary supremacy in Canada. [p. 86]

[58] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court observed that, "with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of parliamentary supremacy to one of constitutional supremacy" (para. 72). This is of course true, insofar as the Constitution places limits on the law-making powers of Parliament and the provincial legislatures. However, the principle of parliamentary sovereignty remains foundational to the structure of the Canadian state: aside from these constitutional limits, the legislative branch of government remains supreme over both the judiciary and the executive.

[59] An important corollary to parliamentary sovereignty is the rule that the executive cannot unilaterally fetter the legislature's law-making power. This rule was illustrated in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, in which this Court was called upon to decide, among other things, whether an intergovernmental agreement between the governments of Canada and Ontario that purported to render certain portions of the federal *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, applicable to that province's public sector could in fact achieve this end. Writing for a Court that was unanimous on this point, Laskin C.J. answered this question in the negative, reasoning as follows:

> If the agreement alone has the effect contended for, it imposes the Guidelines and accompanying sanctions on the provincial public sector, thereby altering the existing

principes de la suprématie parlementaire et de la primauté du droit :

> [TRADUCTION] Toutes les lois, peu importe l'objet, sont susceptibles de contrôle au motif qu'elles portent atteinte aux droits fondamentaux individuels ou collectifs que garantit la *Charte* ou aux droits ancestraux prévus à [l'art. 35]. [. . .] En ce sens, le principe du constitutionnalisme et la primauté du droit — qui exigent que tous les actes de l'État soient autorisés par la loi et conformes aux exigences constitutionnelles — ont maintenant restreint de façon importante le principe de la suprématie parlementaire au Canada. [p. 86]

[58] Dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, la Cour a fait observer que, « dans une large mesure, l'adoption de la *Charte* avait fait passer le système canadien de gouvernement de la suprématie parlementaire à la suprématie constitutionnelle » : par. 72. Cela est évidemment vrai, dans la mesure où la Constitution apporte des limites aux pouvoirs de légiférer du Parlement et des législatures provinciales, mais le principe de la souveraineté parlementaire reste un élément fondamental de la structure de l'État canadien; outre ces limites constitutionnelles, le pouvoir législatif du gouvernement l'emporte toujours sur le pouvoir exécutif et le pouvoir judiciaire.

[59] Un important corollaire du principe de la souveraineté parlementaire réside dans la règle selon laquelle l'exécutif ne peut entraver unilatéralement l'exercice du pouvoir de légiférer de la législature. Cette règle est illustrée par le *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373, où la Cour a été appelée à décider, entre autres choses, si un accord entre les gouvernements du Canada et de l'Ontario, qui était censé étendre l'application de certaines parties de la loi fédérale intitulée *Loi anti-inflation*, S.C. 1974-75-76, c. 75, au secteur public de cette province, pouvait effectivement parvenir à cette fin. S'exprimant au nom de la Cour, unanime sur ce point, le juge en chef Laskin a répondu par la négative à cette question, expliquant ainsi son raisonnement :

> Si l'accord seul a l'effet prétendu, il impose les Indicateurs et leurs sanctions au secteur public provincial et, par le fait même, modifie la loi existante de l'Ontario et

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law of Ontario and precluding changes in that law that are inconsistent with the Guidelines: see s. 4(1) of the *Anti-Inflation Act*. I am unable to appreciate how the provincial Executive, *suo motu*, can accomplish such a change. I agree, of course, that the Executive or a Minister authorized by it may be the proper signatory to an agreement to which the Government of Ontario is a party. That, however, is merely a formality of execution; and even if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting parties but yet be without domestic force, that would not make the agreement part of the law of Ontario binding upon persons purportedly affected by it. [Emphasis added; pp. 432-33.]

[60] The rule that the executive cannot bind the legislature is perhaps more clearly exemplified by the decision of Supreme Court of South Australia in *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 — a decision that was cited by the Majority of the Quebec Court of Appeal in its reasons. At issue in *West Lakes* was a provision in an agreement between the State of South Australia and a land developer, which could be interpreted as giving the developer a veto over any amendment to the statute that enacted the agreement into law. When a bill to amend that statute was later introduced into the Parliament of South Australia, the developer sought a declaration that the covenants contained in the agreement were binding upon the State and an injunction restraining the State from taking any step or being party to any step to further the bill. The Supreme Court of South Australia unanimously held that the developer was not entitled to such relief, relying in part on the principle of parliamentary sovereignty. Of particular note for the purpose of these appeals, King C.J. stated that ministers of the State, as members of parliament, were "free to propose, to consider, to discuss, and to vote for any bill unconstrained by a contract entered into on behalf of the State" (pp. 390-91).

[61] Returning to the case at hand, the Majority of the Quebec Court of Appeal took issue with ss. 4.2 and 5.5 of the Memorandum, concluding that the combined effect of these sections is to fetter the

empêche d'y apporter des modifications incompatibles avec les Indicateurs : voir art. 4.(l) de la *Loi anti-inflation.* Je ne vois pas comment le pouvoir exécutif provincial pourrait, de son chef, effectuer de tels changements. Naturellement, je suis d'accord que l'exécutif, ou un ministre autorisé par lui, peut régulièrement signer un accord auquel le gouvernement de l'Ontario est partie. Toutefois, cela ne vise que la formalité de la signature; même si l'accord lie le gouvernement de l'Ontario comme tel, par analogie avec les traités qui peuvent lier les parties contractantes mais sans avoir d'effet en droit interne, il ne devient pas une loi de l'Ontario à l'égard des personnes qu'il prétend obliger à s'y conformer. [Nous soulignons; p. 432-433.]

[60] La règle voulant que l'exécutif ne puisse lier la législature est peut-être encore plus évidente dans la décision rendue par la Cour suprême de l'Australie-Méridionale dans l'affaire *West Lakes Ltd. c. South Australia* (1980), 25 S.A.S.R. 389 — une décision citée par les juges majoritaires de la Cour d'appel du Québec dans leurs motifs. L'affaire *West Lakes* portait sur une clause d'une entente entre l'État de l'Australie-Méridionale et un promoteur immobilier qui pouvait être interprétée comme conférant au promoteur un droit de veto sur toute modification à la loi de mise en œuvre de l'entente. Plus tard, lorsqu'un projet visant à modifier cette loi a été déposé au Parlement de l'Australie-Méridionale, le promoteur a demandé un jugement déclarant que les engagements pris dans l'entente liaient l'État, et une injonction empêchant l'État de prendre des mesures ou de participer à la prise de mesures visant à faire progresser le projet de loi. Se fondant en partie sur le principe de la souveraineté parlementaire, la Cour suprême de l'Australie-Méridionale a conclu, à l'unanimité, que le promoteur n'avait pas droit à une telle réparation. Il convient tout particulièrement de souligner, aux fins des présents pourvois, que le juge en chef King a affirmé que les ministres d'État, en tant que députés, étaient [TRADUCTION] « libres de proposer, d'étudier, de discuter et de voter n'importe quel projet de loi sans aucune contrainte émanant d'un contrat conclu pour le compte de l'État » (p. 390-391).

[61] Revenant à l'affaire qui nous occupe, les juges majoritaires de la Cour d'appel ont critiqué les art. 4.2 et 5.5 du Protocole d'accord, statuant que ces articles ont pour effet combiné d'entraver l'action

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sovereignty of the legislatures of the participating provinces (at para. 62). Not only does this represent a misunderstanding of the terms of the Memorandum themselves, but it also rests on the flawed premise that the executive signatories are *actually capable* of binding the legislatures of their respective jurisdictions to implement any amendments dictated by the Council of Ministers, and of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. In light of the principle of parliamentary sovereignty, this cannot in fact be the case.

[62] When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal *effect* of the impugned executive action, but not its underlying *validity*. For example, the executive of one province may act within the confines of its constitutional authority when entering into an intergovernmental agreement with that of another province. If a term in such an agreement purports to bind the province's legislature, the result is not that the agreement itself is constitutionally invalid; the principle of parliamentary sovereignty simply means that the legislature's hands cannot be tied, and therefore that the impugned term is ineffective. In other words, because the legislature's law-making powers are supreme over the executive, the latter cannot bind the former. The result is that any executive agreement that purports to fetter the legislature is not inherently unconstitutional, but will quite simply not have the desired effect.

[63] This understanding of the principle of parliamentary sovereignty is firmly established in this Court's jurisprudence. The advisory opinion in *Reference Re Canada Assistance Plan (B.C.)* is particularly illustrative in this regard. At the centre of that case was an agreement entered into in 1967 between the governments of Canada and British Columbia, pursuant to the *Canada Assistance Plan*, S.C. 1966-67, c. 45 ("*Plan*"). Section 4 of the *Plan* authorized the federal government to enter into agreements with individual provinces to share the

des législatures des provinces participantes : par. 62. Non seulement cette conclusion constitue-t-elle une mauvaise compréhension des modalités mêmes du Protocole d'accord, mais elle repose aussi sur la prémisse erronée que les signataires représentant les différents pouvoirs exécutifs sont *réellement capables* d'obliger les législatures dans leur territoire respectif à mettre en œuvre les modifications dictées par le Conseil des ministres et de les empêcher de modifier leurs propres lois sur les valeurs mobilières sans l'approbation du Conseil des ministres. Compte tenu du principe de la souveraineté parlementaire, cela ne peut en fait être le cas.

[62] Lorsqu'une action du pouvoir exécutif semble être en conflit avec les pouvoirs de légiférer de la législature, la souveraineté parlementaire peut être invoquée pour déterminer l'*effet* juridique de l'action exécutive contestée, mais non sa *validité* sous-jacente. Par exemple, l'exécutif d'une province peut respecter les limites de sa compétence constitutionnelle en concluant un accord intergouvernemental avec celui d'une autre province. Si un tel accord contient une modalité censée lier la législature provinciale, il ne s'ensuit pas que l'accord est lui-même constitutionnellement invalide; le principe de la souveraineté parlementaire signifie tout simplement que les mains de la législature ne peuvent être liées et que, par conséquent, la modalité contestée ne produit aucun effet. En d'autres termes, comme les pouvoirs de légiférer de la législature l'emportent sur les pouvoirs de l'exécutif, celle-ci ne peut être liée par ce dernier. Il en résulte qu'un accord de l'exécutif censé entraver l'action de la législature n'est pas intrinsèquement inconstitutionnel; il ne produira tout simplement pas l'effet souhaité.

[63] Cette interprétation du principe de la souveraineté parlementaire est bien établie dans la jurisprudence de la Cour. L'avis consultatif dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)* en est un bon exemple. Un accord intervenu en 1967 entre les gouvernements du Canada et de la Colombie-Britannique dans le cadre du *Régime d'assistance publique du Canada*, S.C. 1966-1967, c. 45 (« *Régime* ») était au cœur de cette affaire. L'article 4 du *Régime* habilitait le gouvernement fédéral à conclure avec chaque province des accords

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cost of expenditures on social assistance and welfare, and s. 5 authorized payments to each contracting province of roughly 50 percent of that province's eligible expenditures. The *Plan* also provided that any such agreement would continue in force so long as the relevant provincial law remained in operation (s. 8(1)), and could be amended or terminated only by mutual consent or by giving one year's notice (s. 8(2)). In response to a budget deficit, however, the federal government introduced legislation into Parliament that would limit the growth of payments to financially stronger provinces — including British Columbia — to less than 50 percent. This Court rejected the Government of British Columbia's challenge to the bill (which was eventually passed into law). Sopinka J., writing for a unanimous Court, held on the basis of the principle of parliamentary sovereignty that Parliament was free to amend the *Plan* as it did, and that the terms of the agreement could not restrict its power to effect such change. On this, he specifically acknowledged that the federal executive "could not bind Parliament from exercising its powers to legislate amendments to the *Plan*" (p. 548), and that parliamentary sovereignty "prevents a legislative body from binding itself as to the substance of its future legislation" (p. 563).

prévoyant le partage des frais engagés au titre de l'assistance publique et de la protection sociale, et l'art. 5 permettait de payer à chacune des provinces contractantes environ 50 pour 100 de leurs dépenses admissibles. Le *Régime* prévoyait également qu'un tel accord resterait en vigueur tant que la législation provinciale était appliquée (par. 8(1)) et qu'il ne pouvait être modifié ou résilié que par consentement mutuel ou à la suite d'un préavis d'un an (par. 8(2)). Toutefois, pour remédier à un déficit budgétaire, le gouvernement fédéral a déposé devant le Parlement un projet de loi limitant l'augmentation des paiements effectués aux provinces les plus fortes financièrement, dont la Colombie-Britannique, à moins de 50 pour 100. La Cour a rejeté la contestation du gouvernement de la Colombie-Britannique à l'égard de ce projet de loi, qui a finalement été adopté. S'exprimant au nom d'une Cour unanime, le juge Sopinka s'est fondé sur le principe de la souveraineté parlementaire pour statuer qu'il était loisible au Parlement de modifier le *Régime* comme il l'avait fait, et que les conditions de l'accord ne pouvaient restreindre son pouvoir d'effectuer pareille modification. À ce sujet, il a expressément reconnu que l'exécutif fédéral « ne pouvait prendre un engagement qui empêcherait le Parlement d'exercer ses pouvoirs de légiférer pour modifier le *Régime* » (p. 548), et que la souveraineté parlementaire « vient empêcher un corps législatif de se lier les mains en ce qui concerne la teneur de sa législation future » : p. 563.

[64] A similar issue arose in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, in which this Court considered a claim for damages brought by Mr. Wells, a member of the Public Utilities Board, after amendments made to the *Public Utilities Act*, R.S.N. 1970, c. 322, by the Newfoundland House of Assembly had led to his position being abolished. As per the terms of his appointment, he was entitled to serve as a commissioner of the Board during good behaviour until the age of 70. This Court found that these terms were part of an enforceable contract of employment with the Crown and could thus form the basis of a claim for breach of contract. Relying on the opinion in *Reference re Canada Assistance Plan*, however, it unanimously affirmed that this employment contract did not in any way fetter the House of Assembly's authority to restructure or eliminate the

[64] Une question similaire s'est posée dans l'arrêt *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199, où la Cour s'est penchée sur une action en dommages-intérêts intentée par M. Wells, un membre de la Public Utilities Board, après que des modifications à la *Public Utilities Act*, R.S.N. 1970, c. 322, apportées par l'Assemblée législative de Terre-Neuve, aient mené à l'abolition de son poste. Selon les conditions de sa nomination, il avait le droit d'exercer ses fonctions de commissaire à titre inamovible jusqu'à l'âge de 70 ans. La Cour a conclu que ces conditions faisaient partie d'un contrat de travail exécutoire avec la Couronne, et qu'elles pouvaient donc fonder une action pour rupture de contrat. Se fondant sur le *Renvoi relatif au Régime d'assistance publique du Canada*, elle a toutefois confirmé à l'unanimité que ce contrat de travail ne limitait aucunement le

Public Utilities Board pursuant to its constitutionally protected law-making powers. Although this Court found that Mr. Wells was still entitled to pursue a claim for breach of contract against the Government of Newfoundland, it relied on the principle of parliamentary sovereignty in affirming the primacy of the legislature's will over acts of the executive.

[65] Interestingly, in both *Reference Re Canada Assistance Plan* and *Wells*, this Court supported its decision by quoting the following passage from the Supreme Court of South Australia in *West Lakes*:

> Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations. [p. 390]

[66] Parallels can be drawn between the effect of executive agreements and that of international treaties. As the Privy Council explained in the *Labour Conventions Case* (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.)), at p. 348, the valid exercise of the federal government's treaty-making power is distinct from the legislative enactment of such agreements into domestic law. Though the federal government may have the authority to enter into international agreements upon subjects falling within the legislative competence of the provinces, the individual provinces will only be bound by the terms of such an agreement once their respective legislatures enact them into law (*Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 611-12, citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at p. 294).

[67] In short, the foregoing makes clear that the principle of parliamentary sovereignty is precisely what preserves the provincial legislatures' right to enact, amend and repeal their securities legislation

pouvoir de l'Assemblée législative de restructurer ou d'éliminer la Public Utilities Board dans le cadre de l'exercice des pouvoirs de légiférer que lui garantit la Constitution. Bien que la Cour ait conclu que M. Wells avait toujours le droit d'intenter une action pour rupture de contrat contre le gouvernement de Terre-Neuve, elle s'est appuyée sur le principe de la souveraineté parlementaire pour confirmer la primauté de la volonté de la législature sur les actes de l'exécutif.

[65] Fait intéressant, tant dans le *Renvoi relatif au Régime d'assistance publique du Canada* que dans l'arrêt *Wells*, la Cour justifie sa décision en citant le passage suivant de la décision de la Cour suprême de l'Australie-Méridionale dans l'affaire *West Lakes* :

> [TRADUCTION] Les ministres d'État ne sauraient toutefois, au moyen d'obligations contractées pour le compte de l'État, imposer des restrictions à leur propre liberté, à celle de leurs successeurs ou à celle d'autres députés, de proposer, d'étudier et, s'ils le jugent opportun, de voter des lois, fussent-elles incompatibles avec les obligations contractuelles. [p. 390]

[66] On peut établir un parallèle entre l'effet des accords exécutifs et ceux des traités internationaux. Comme l'a indiqué le Conseil privé dans l'*Affaire des relations du travail* (*Attorney-General for Canada c. Attorney-General for Ontario*, [1937] A.C. 326 (C.P.)), p. 348, l'exercice valide du pouvoir du gouvernement fédéral de conclure des traités se distingue de l'adoption de ces traités en droit interne. Bien que le gouvernement fédéral ait le pouvoir de conclure des accords internationaux sur des sujets relevant de la compétence législative des provinces, les différentes provinces ne seront liées par les modalités d'un tel accord que lorsque leur législature respective aura légiféré pour les adopter : *Thomson c. Thomson*, [1994] 3 R.C.S. 551, p. 611-612, citant P. W. Hogg, *Constitutional Law of Canada* (3e éd. 1992), p. 294.

[67] En somme, il ressort clairement de ce qui précède que le principe de la souveraineté parlementaire est précisément ce qui protège le droit des législatures provinciales d'adopter, de modifier

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independently of the Council of Ministers' approval. Therefore, even if the Memorandum actually purported to fetter this legislative power, it would be merely *ineffective* in this regard (since it cannot bind the legislature), and not *constitutionally invalid*.

et d'abroger leurs lois relatives aux valeurs mobilières *indépendamment* de l'approbation du Conseil des ministres. Par conséquent, même si le Protocole d'accord devait réellement viser à entraver l'exercice de ce pouvoir de légiférer, il serait tout simplement *inopérant* à cet égard — puisqu'il ne peut lier la législature — et non *constitutionnellement invalide*.

(c) *Political and Legal Effects*

c) *Les effets politiques et juridiques*

[68] We would pause at this juncture to distinguish the Memorandum's *political* effects from its *legal* effects. While the Memorandum does not and cannot legally bind the participating provinces' respective legislatures, its political objective is nevertheless to achieve uniformity in provincial securities laws across Canada (Memorandum, s. 1). Achieving such uniformity will effectively require that the legislatures of the participating provinces enact a statute that mirrors the Model Provincial Act, as amended from time to time. The Memorandum therefore envisages an important role for the Council of Ministers; provinces that wish to participate in this coordinated approach to the regulation of capital markets will likely find it necessary to implement any amendments to the Model Provincial Act that may be proposed and approved by the Council of Ministers. Practically speaking, therefore, the Council of Ministers may well play an important political role in the area of securities regulation if the Cooperative System operates as planned.

[68] Nous ouvrons ici une parenthèse pour distinguer les effets *politiques* du Protocole d'accord de ses effets *juridiques*. S'il est vrai que le Protocole d'accord ne lie pas ni ne saurait lier juridiquement les législatures respectives des provinces participantes, son objectif politique n'en est pas moins d'assurer l'uniformité des lois provinciales sur les valeurs mobilières dans l'ensemble du Canada (Protocole d'accord, art. 1). Pour atteindre une telle uniformité, les législatures des provinces participantes devront, en fait, adopter une loi qui reflète en tous points la loi provinciale type, avec ses modifications successives. Le Protocole d'accord prévoit donc un rôle important pour le Conseil des ministres; les provinces qui souhaitent participer à cette approche coordonnée en matière de réglementation des marchés de capitaux estimeront vraisemblablement nécessaire de mettre en œuvre toutes les modifications à la loi provinciale type qui pourront être proposées et approuvées par le Conseil des ministres. Sur le plan pratique, le Conseil des ministres pourrait donc jouer un rôle politique important dans le domaine de la réglementation des valeurs mobilières si le régime coopératif fonctionne comme prévu.

[69] The Majority below went one step further. It rejected the proposition that the Memorandum is merely a political undertaking that is not legally enforceable, and instead found it necessary to *assume* that the mechanisms set out in the Memorandum — including the involvement of the Council of Ministers in proposing and approving legislative amendments — will have their intended effect (para. 70). With this, we do not agree: the principle of parliamentary sovereignty is precisely the reason why we cannot rely on such an assumption. Any *de facto* control that the executive may be

[69] Les juges majoritaires en appel sont allés plus loin. Ils ont rejeté la thèse voulant que le Protocole d'accord ne soit qu'un engagement politique n'ayant aucune force exécutoire et ont plutôt conclu qu'il fallait *présumer* que les mécanismes prévus dans le Protocole d'accord — notamment la participation du Conseil des ministres à la proposition et à l'approbation des modifications législatives — auront l'effet recherché : par. 70. Nous ne pouvons souscrire à cette conclusion; le principe de la souveraineté parlementaire est précisément ce qui nous empêche d'être en accord avec une telle présomption. Le fait que l'on

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said to have over the legislature is irrelevant to our analysis:

> It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not, with all respect to the contrary position taken by Jerome A.C.J., constitutionally cognizable by the judiciary.

(*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 103)

Although the executive signatories may *at present* view uniformity in securities laws as a desirable goal, the sovereign and democratic will of their respective legislatures entitles the latter to disagree, or to change their mind at some point in the future.

[70] We also recognize that the operation of the Cooperative System will require a significant commitment from its participants. For example, the participating provinces will be required to effectively dissolve their existing securities commissions, and to merge the administration of those commissions into the Authority's organizational structure (as contemplated in ss. 9.2 and 9.3 of the Memorandum). Once this has been done, it would undoubtedly be impractical for those provinces to extricate themselves from the Cooperative System at a later date. Although these practical considerations are of no consequence to this Court's analysis, they are likely to weigh heavily in the exercise of each jurisdiction's sovereign will — especially given that, at present, no draft of the Authority's enabling legislation has yet been published.

[71] To conclude on this point, we are of the view that neither the principle of parliamentary sovereignty nor the terms of the Memorandum themselves allow us to conclude, as did the Majority of the Court

puisse dire que l'exécutif exerce un contrôle *de fait* sur la législature n'est pas pertinent dans le cadre de notre analyse :

> Il ne sert à rien d'insister sur la centralisation des pouvoirs qui caractérise le système de gouvernement hérité de Westminster. Avec égards pour l'opinion contraire du juge en chef adjoint Jerome, la possibilité que, grâce à sa majorité à la Chambre des communes, l'exécutif dicte en pratique à cette dernière la position qu'elle doit prendre quant à l'étendue des attributions du Parlement en matière de vérification, ne relève pas sur le plan constitutionnel de la compétence du judiciaire.

(*Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, p. 103)

Même si les signataires représentant les différents pouvoirs exécutifs peuvent *aujourd'hui* être d'avis que l'uniformité des lois sur les valeurs mobilières est un objectif souhaitable, la volonté souveraine et démocratique de leur législature respective permet à ces législatures de ne pas être d'accord ou de changer d'idée dans un avenir plus ou moins proche.

[70] Nous reconnaissons également que la mise en œuvre du régime coopératif nécessitera un engagement important de la part de ses participants. Par exemple, les provinces participantes devront effectivement dissoudre leur commission des valeurs mobilières existante et en fusionner l'administration avec la structure organisationnelle de l'Autorité (comme le prévoient les art. 9.2 et 9.3 du Protocole d'accord). Une fois cela fait, il sera sans doute très difficile, en pratique, pour ces provinces de s'extirper du régime coopératif à une date ultérieure. Même si ces considérations d'ordre pratique n'ont aucune incidence sur l'analyse de la Cour, elles risquent de peser lourd dans l'exercice de la volonté souveraine de chaque province — surtout compte tenu du fait que, à l'heure actuelle, aucune ébauche de la loi habilitante de l'Autorité n'a été présentée.

[71] Pour conclure sur ce point, nous sommes d'avis que ni le principe de la souveraineté parlementaire ni les modalités du Protocole d'accord comme telles ne nous permettent de conclure, comme l'ont

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of Appeal, that this cooperative agreement either is *capable* of binding, or *purports* to bind, the legislatures of the various participating provinces. As is clear from the foregoing, legislatures in Canada are constrained only by the Constitution — and are otherwise free to enact laws that they consider desirable and politically appropriate.

(2) Delegation of Law-Making Powers

[72] A second (and related) basis upon which the Attorney General of Quebec claims that the Cooperative System is unconstitutional pertains to the limits on a legislature's authority to delegate law-making powers to some separate person or body. Quebec submits that the Memorandum effectively requires that each participating province transfer the power to unilaterally amend its securities legislation to the Council of Ministers. This is because, on Quebec's interpretation of the Memorandum, the legislature of each participating province (a) will be *obliged* to enact the provisions of the Model Provincial Act into law and to implement any amendments to those provisions that are approved by the Council of Ministers, and (b) will be otherwise *prohibited* from amending that legislation. Quebec claims that this amounts to a direct transfer of legislative authority from the legislatures of the participating provinces to the Council of Ministers, the result being that those provinces will effectively surrender their ability to legislate in respect of the regulation of capital markets.

[73] Before we address this issue, it is necessary to briefly explain the concept of delegation. Parliamentary sovereignty means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. Accordingly, the power to make such rules and regulations is sometimes referred to as a "subordinate law-making power". This kind of delegation occurs quite frequently in the administrative state, where statutory schemes often merely "set out the legislature's basic objects", such that "most of the

fait les juges majoritaires de la Cour d'appel, que cet accord de coopération est *capable* de lier les législatures des différentes provinces participantes ou qu'il *vise* à le faire. Comme il ressort clairement de ce qui précède, les législatures canadiennes ont pour seule contrainte la Constitution; elles sont par ailleurs libres d'adopter les lois qu'elles estiment souhaitables et appropriées sur le plan politique.

(2) La délégation des pouvoirs de légiférer

[72] Le deuxième motif (connexe au premier) sur lequel s'appuie la procureure générale du Québec pour affirmer que le régime coopératif est inconstitutionnel concerne les limites imposées au pouvoir des législatures de déléguer des pouvoirs de légiférer à une personne ou un organisme. Le Québec soutient que le Protocole d'accord oblige en fait chacune des provinces participantes à transférer le pouvoir de modifier unilatéralement sa propre législation en matière de valeurs mobilières au Conseil des ministres. Il en est ainsi suivant l'interprétation du Protocole d'accord par le Québec, car a) les législatures des provinces participantes seront *tenues* d'adopter par voie législative les dispositions de la loi provinciale type et de mettre en œuvre toutes les modifications à ces dispositions qui seront approuvées par le Conseil des ministres et b) il leur sera par ailleurs *interdit* de modifier leur loi. Selon le Québec, cela équivaut à un transfert direct de la compétence législative des législatures des provinces participantes au Conseil des ministres, si bien que ces provinces renonceront en pratique à leur capacité de légiférer en matière de réglementation des marchés de capitaux.

[73] Avant d'aborder cette question, il est nécessaire d'expliquer brièvement la notion de délégation. La souveraineté parlementaire signifie que la législature a compétence pour adopter elle-même des lois *et* pour déléguer à d'autres personnes ou organismes certains pouvoirs administratifs ou réglementaires, notamment le pouvoir de prendre des règlements contraignants, mais subordonnés. C'est pourquoi le pouvoir de prendre de tels règlements est parfois qualifié de « pouvoir législatif subordonné ». Ce type de délégation se produit assez fréquemment dans l'État administratif, où les régimes législatifs se contentent souvent d'énoncer « les grands objectifs [. . .] arrêtés par le

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heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council" (B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online), see also Hogg (5th ed.), at pp. 14-1 and 14-2).

[74] It should be noted that a delegated power is rooted in and limited by the governing statute, which of course takes precedence over every exercise of that power. More importantly, the sovereign legislature always ultimately retains the complete authority to revoke any such delegated power (*Hodge*, at p. 132; R. Tuck, "Delegation — A Way Over the Constitutional Hurdle" (1945), 23 *Can. Bar Rev.* 79, at p. 89).

[75] While it is true that a legislature has broad authority to delegate *subordinate* law-making powers to a person or administrative body, Canadian courts have nevertheless espoused the principle that a legislature of one level of government may not delegate to a legislature of the other level its *primary* authority to legislate — that is, its authority to enact, amend and repeal statutes — in respect of matters that fall within its exclusive jurisdiction under Part VI of the *Constitution Act, 1867*. This was made clear in *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, which concerned a bill that provided for the delegation of Nova Scotia's jurisdiction over employment in certain industries to Parliament, and the delegation of federal jurisdiction over indirect taxation to the legislature of Nova Scotia. At issue was whether Parliament and a provincial legislature could, by statutory enactment, delegate or transfer their exclusive jurisdiction to legislate in respect of particular subject matters to one another. This Court held that they could not, reasoning that the bill had the effect of redistributing jurisdiction over these heads of power in a way that would be fundamentally incompatible with the division of federal and provincial powers as set out in ss. 91 and 92 of the *Constitution Act, 1867*. It was on this basis that the proposed bill was deemed unconstitutional.

législateur », de sorte que « le gros de la gouvernance se fai[t] désormais par voie réglementaire, conformément à des décrets de l'exécutif » : B. McLachlin, C.P., *Tribunaux administratifs et tribunaux judiciaires : une relation en évolution*, 27 mai 2013 (en ligne); voir aussi Hogg (5e éd.), p. 14-1 et 14-2.

[74] Il convient de souligner que le pouvoir délégué trouve sa source dans la loi habilitante et est limité par celle-ci, laquelle loi habilitante a évidemment préséance sur tout exercice de ce pouvoir. Fait plus important, la législature souveraine conserve toujours ultimement le pouvoir absolu de révoquer tout pouvoir ainsi délégué : *Hodge*, p. 132; R. Tuck, « Delegation — A Way Over the Constitutional Hurdle » (1945), 23 *R. du B. can.* 79, p. 89.

[75] S'il est vrai que la législature dispose de vastes pouvoirs l'autorisant à déléguer des pouvoirs de prendre des mesures législatives *subordonnées* à une personne ou à un organisme administratif, les tribunaux canadiens ont néanmoins adopté le principe selon lequel la législature d'un ordre de gouvernement ne peut déléguer à la législature d'un autre ordre son pouvoir de légiférer *primaire* — c'est-à-dire son pouvoir d'adopter, de modifier et d'abroger des lois — relativement aux matières relevant de sa compétence exclusive selon la partie VI de la *Loi constitutionnelle de 1867*. C'est ce qui a été clairement établi dans *Attorney General of Nova Scotia c. Attorney General of Canada*, [1951] R.C.S. 31, qui portait sur un projet de loi prévoyant la délégation au Parlement de la compétence de la Nouvelle-Écosse en matière d'emploi dans certains secteurs, et la délégation à la législature de la Nouvelle-Écosse de la compétence fédérale en matière de taxation indirecte. Il s'agissait de savoir si le Parlement et la législature provinciale pouvaient, par l'adoption d'un texte législatif, se déléguer ou se transférer mutuellement leur pouvoir exclusif de légiférer relativement à un objet en particulier. La Cour a conclu qu'il ne leur était pas possible le faire, estimant que le projet de loi avait pour effet de redistribuer la compétence à l'égard de ces chefs de compétence d'une manière qui serait fondamentalement incompatible avec le partage constitutionnel des compétences fédérales et provinciales établi aux art. 91 et 92 de la *Loi constitutionnelle de 1867*. C'est sur ce fondement que le projet de loi a été jugé inconstitutionnel.

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[76] To put it simply: while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government.

[77] Before this Court, the Attorney General of Quebec contends that the Memorandum is designed to implement the very type of scheme that this Court prohibited in *Nova Scotia*:

> Even though the delegation will not be made to a traditional legislature, it will be made to a body that, for all intents and purposes, will exercise legislative powers. The decisive criterion is that each participating province will surrender its jurisdiction over securities. [R.F., at para. 78]

In Quebec's submission, therefore, *Nova Scotia* should be understood as prohibiting both the direct transfer of power from one legislature to another *and* "any scheme resulting in substantially similar effects, namely, the centralization, transfer, abdication or delegation of provincial legislative powers" (R.F. at para. 72). Underlying this submission is the principle that a provincial legislature lacks the power to transfer its *primary* legislative authority to any other person or body — in this case, the Council of Ministers — so as to bypass the legislative process altogether.

[78] We respectfully reject this argument on the basis that it rests on a misunderstanding of how the Cooperative System was designed to operate. Neither the Memorandum nor the Model Provincial Act empowers the Council of Ministers to unilaterally amend the provinces' securities legislation. Further, no part of the Cooperative System imposes any *legal* limit on the participating provinces' legislative

[76] Pour dire les choses simplement, bien que le Parlement ou une législature provinciale puisse déléguer à une autre personne ou un autre organisme le pouvoir de réglementation permettant d'adopter des mesures législatives *subordonnées* (comme des règles et des règlements contraignants) sur des matières qui relèvent de sa compétence, il lui est interdit de transférer à une législature de l'autre ordre de gouvernement sa compétence législative *primaire* — c'est-à-dire le pouvoir d'adopter, de modifier et d'abroger des lois — sur une matière en particulier à l'égard de laquelle la Constitution lui confère la compétence exclusive.

[77] Devant notre Cour, la procureure générale du Québec prétend que le Protocole d'accord est conçu de façon à mettre en place le type même de régime interdit par la Cour dans l'arrêt *Nova Scotia* :

> Même si le destinataire de la délégation n'est pas une législature traditionnelle, il s'agit d'un organe qui exercera, à toutes fins utiles, un pouvoir législatif. Le critère déterminant est que chaque province participante abandonne sa compétence en matière de valeurs mobilières. [m.i., par. 78]

Selon le Québec, l'arrêt *Nova Scotia* devrait donc être interprété comme interdisant à la fois le transfert direct de pouvoirs d'une législature à une autre *et* « tout mécanisme qui entraîne des effets substantiellement semblables, c'est-à-dire la centralisation, le transfert, l'abdication ou la délégation d'une compétence législative provinciale » : m.i., par. 72. Cet argument repose sur le principe suivant lequel la législature provinciale ne peut transférer sa compétence législative *primaire* à une autre personne ou un autre organisme — en l'espèce, le Conseil des ministres — de manière à court-circuiter le processus législatif.

[78] En toute déférence, nous rejetons cet argument, au motif qu'il représente une mauvaise compréhension de la façon dont le régime coopératif a été conçu pour fonctionner. Ni le Protocole d'accord ni la loi provinciale type n'habilite le Conseil des ministres à modifier unilatéralement la législation des provinces en matière de valeurs mobilières. De plus, le régime coopératif n'impose aucune limite

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authority to enact, amend and repeal their respective securities laws as they see fit.

[79] What this means is that the Council of Ministers' role in approving amendments to the Model Provincial Act is plainly distinguishable from the delegation of *primary* legislative authority that was prohibited in *Nova Scotia*. Whereas in *Nova Scotia* the impugned bill would have permitted Parliament to legislate *directly* in respect of certain provincial matters and the legislature of Nova Scotia to legislate *directly* in respect of certain federal matters, the Cooperative System does not allow the Council of Ministers to bypass the provincial legislatures at all; its role is instead to make amendments to a model statute that has no force of law *until a provincial legislature gives it such force*. For this reason, the proper implementation of the Cooperative System in accordance with the terms of the Memorandum will not result in any abdication of a participating province's primary legislative authority.

[80] We similarly reject the proposition that the terms of the Memorandum (s. 5.5 in particular) have the effect of creating "an unprecedented legislative body" — i.e. the Council of Ministers — "whose establishment is incompatible with the current architecture of the Constitution" (R.F., at para. 95). Again, because the provisions of the Model Provincial Act (as amended from time to time by the Council of Ministers) will only have the force of law if and when they are properly enacted by the legislature of a participating province, the Council of Ministers is and remains subordinate to the sovereign will of the legislature.

(3) Conclusion With Respect to the First Reference Question

[81] In light of the arguments presented before us, we thus see no constitutional impediment to the implementation of the Cooperative System in accordance with the terms set out in the Memorandum. Our answer to the first question posed by the reference is therefore: "Yes".

juridique au pouvoir législatif des provinces participantes d'adopter, de modifier et d'abroger leurs lois respectives en matière de valeurs mobilières comme elles l'entendent.

[79] Ainsi, le rôle du Conseil des ministres dans l'approbation des modifications à la loi provinciale type se distingue clairement de la délégation de la compétence législative *primaire* interdite dans l'arrêt *Nova Scotia*. Alors que dans cet arrêt, le projet de loi contesté aurait permis au Parlement de légiférer *directement* sur des matières provinciales et à la législature de la Nouvelle-Écosse de légiférer *directement* sur des matières fédérales, le régime coopératif ne permet aucunement au Conseil des ministres de court-circuiter les législatures provinciales; son rôle consiste plutôt à modifier une loi type qui n'a pas force de loi *tant qu'une législature provinciale ne la lui donne pas*. Pour ce motif, s'il est mis en œuvre correctement, conformément aux modalités du Protocole d'accord, le régime coopératif n'entraînera en aucun cas l'abdication de la compétence législative primaire des provinces participantes.

[80] Nous rejetons également la thèse voulant que les modalités du Protocole d'accord (l'art. 5.5 en particulier) aient pour effet de créer « un organe législatif inédit » — le Conseil des ministres — « dont la mise en place est incompatible avec l'architecture actuelle de la Constitution » : m.i., par. 95. Encore une fois, comme les dispositions de la loi provinciale type (avec leurs modifications successives par le Conseil des ministres) n'auront force de loi qu'après avoir été dûment adoptées par la législature d'une province participante, le Conseil des ministres est — et demeure — soumis à la souveraineté de la législature.

(3) Conclusion quant à la première question du renvoi

[81] Compte tenu des arguments qui nous ont été présentés, nous ne voyons aucun obstacle constitutionnel à la mise en place du régime coopératif selon les modalités énoncées dans le Protocole d'accord. Notre réponse à la première question posée par le renvoi est donc : « oui ».

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B. *Question #2: Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the Constitution Act, 1867?*

[82] The second question posed by this reference raises the same issue as the one considered in *Reference re Securities Act*: whether proposed federal securities legislation falls within Parliament's jurisdiction over trade and commerce, pursuant to s. 91(2) of the *Constitution Act, 1867*. Before proceeding, however, we wish to reaffirm that policy considerations and practical effects are irrelevant to the question before this Court (see: *Reference re Securities Act*, at para. 90; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 18). Our concern is with *legislative competence*, not with *policy*.

[83] In the Court of Appeal, the Majority concluded that Parliament has the constitutional authority to enact the Draft Federal Act, with the exception of the provisions relating to the role and powers of the Council of Ministers in the making of federal regulations. It found that the pith and substance of the Draft Federal Act is "to promote the stability of the Canadian economy by managing systemic risks related to capital markets having the potential to have material adverse effects on the Canadian economy" (para. 128). Characterizing the legislation in this manner, the Majority relied on this Court's advisory opinion in *Reference re Securities Act* to conclude that the Draft Federal Act is *intra vires* Parliament pursuant to the general branch of the trade and commerce power (paras. 129-35). But the Majority then held that ss. 76 to 79 of the Draft Federal Act, which require that the Council of Ministers approve all federal regulations, were irreconcilable with the purposes of the proposed federal legislation (paras. 137-38). Its conclusion was therefore that these provisions, unless removed from the legislation, would render the Draft Federal Act unconstitutional as a whole.

B. *Question nº 2 : La plus récente version de l'ébauche de la loi fédérale intitulée « Loi sur la stabilité des marchés des capitaux » excède-t-elle la compétence du Parlement du Canada sur le commerce selon le paragraphe 91(2) de la Loi constitutionnelle de 1867?*

[82] La seconde question posée par ce renvoi soulève la même question que celle examinée dans le *Renvoi relatif à la Loi sur les valeurs mobilières* : celle de savoir si une loi fédérale proposée sur les valeurs mobilières relève de la compétence conférée au Parlement en matière de trafic et de commerce par le par. 91(2) de la *Loi constitutionnelle de 1867*. Avant d'aller plus loin, nous tenons toutefois à réaffirmer que les considérations de politique générale et les effets pratiques n'ont rien à voir avec la question dont nous sommes saisis : voir *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 90; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, 2000 CSC 31, [2000] 1 R.C.S. 783, par. 18. Nous nous intéressons à la *compétence législative* et non aux *enjeux de politique générale*.

[83] En Cour d'appel, les juges majoritaires ont conclu que le Parlement a le pouvoir constitutionnel d'adopter l'ébauche de la loi fédérale, à l'exception des dispositions portant sur le rôle et les pouvoirs du Conseil des ministres à l'égard de la prise des règlements fédéraux. Ils ont conclu que le caractère véritable de l'ébauche de la loi fédérale est « [de promouvoir] la stabilité de l'économie canadienne par la gestion des risques systémiques liés aux marchés des capitaux qui sont susceptibles d'avoir des conséquences négatives importantes sur l'économie canadienne » : par. 128. Ayant ainsi qualifié la loi, les juges majoritaires se sont fondés sur l'avis consultatif de la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières* pour conclure que l'ébauche de la loi fédérale relève du volet général de la compétence du Parlement en matière de trafic et de commerce : par. 129-135. Cela dit, les juges majoritaires ont ensuite statué que les art. 76 à 79 de l'ébauche de la loi fédérale, qui exigent que le Conseil des ministres approuve tous les règlements fédéraux, étaient irréconciliables avec les objets de la législation fédérale proposée : par. 137-138. Ils ont donc conclu que ces dispositions, si elles n'étaient pas retirées de la loi, rendraient l'ébauche de la loi fédérale inconstitutionnelle dans son ensemble.

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[84] The Dissenting Judge, while in substantial agreement with the Majority, would not have concluded that ss. 76 to 79 invalidate the Draft Federal Act. In his view, Parliament has the power to delegate the authority to make rules and regulations "in the manner it chooses, to whom it chooses" (para. 206). He therefore did not consider the involvement of the Council of Ministers in the making of federal regulations to be problematic.

[85] We agree with the Dissenting Judge, and therefore answer the second question posed by the reference in the negative. Applying the principles developed by this Court in *Reference re Securities Act*, we conclude that the Draft Federal Act falls within Parliament's general trade and commerce power. Moreover, the manner in which the Draft Federal Act delegates the power to make regulations accords with Parliament's constitutional powers, which means that ss. 76 to 79 of the Draft Federal Act have no impact on its constitutionality.

(1) Constitutional Validity of the Draft Federal Act

[86] The two-stage analytical framework for the review of legislation on federalism grounds is well established in the jurisprudence: *Quebec (Attorney General) v. Canada (Attorney General)*, at para. 28; *Reference re Securities Act*, at paras. 63-65; *Reference re Firearms Act (Can.)*, at para. 15. At the first stage (the "characterization stage"), the court considers the law's purpose and its effect with a view to identifying the true subject matter — the *pith and substance* — of the law in question. Once the court has completed this exercise, it then moves on to the second stage (the "classification stage") and determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity. Where it does, the legislation will be upheld on the basis that it is *intra vires*, and therefore valid.

(a) *Characterization of the Draft Federal Act*

[87] On the question of characterization, we agree with the Majority of the Court of Appeal that the

[84] Même s'il était d'accord pour l'essentiel avec les juges majoritaires, le juge dissident n'a pas conclu que les art. 76 à 79 invalident l'ébauche de la loi fédérale. À son avis, le Parlement a le pouvoir de déléguer son pouvoir d'adopter des règlements « de la façon qui lui plaît et à qui bon lui semble » : par. 206. La participation du Conseil des ministres à la prise des règlements fédéraux ne posait donc selon lui aucun problème.

[85] Nous partageons l'avis du juge dissident et, par conséquent, répondons par la négative à la seconde question posée par le renvoi. En appliquant les principes élaborés par la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, nous concluons que l'ébauche de la loi fédérale relève de la compétence générale du Parlement en matière de trafic et de commerce. De plus, la façon dont l'ébauche de la loi fédérale délègue le pouvoir de prendre des règlements respecte les pouvoirs constitutionnels du Parlement, si bien que les art. 76 à 79 de l'ébauche de la loi fédérale n'ont aucune incidence sur sa constitutionnalité.

(1) La validité constitutionnelle de l'ébauche de la loi fédérale

[86] Le cadre d'analyse en deux étapes applicable au contrôle d'une loi pour des motifs fondés sur le fédéralisme est bien établi dans la jurisprudence : *Québec (Procureur général) c. Canada (Procureur général)*, par. 28; *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 63-65; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, par. 15. À la première étape (l'étape de la « qualification »), la cour doit examiner l'objet de la loi ainsi que ses effets afin de déterminer l'objet véritable — le *caractère véritable* — de la loi en question. Une fois qu'elle a terminé cet exercice, la cour passe à la deuxième étape (l'étape de la « classification ») et évalue si l'objet de la loi contestée relève du chef de compétence invoqué pour soutenir la validité de la loi. Dans l'affirmative, la loi est confirmée puisqu'*intra vires* et, par conséquent, valide.

a) *La qualification de l'ébauche de la loi fédérale*

[87] En ce qui concerne la qualification, nous convenons avec les juges majoritaires de la Cour

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pith and substance of the Draft Federal Act is "to control systemic risks having the potential to create material adverse effects on the Canadian economy" (para. 124). Indeed, we find that the Draft Federal Act's purpose, its structure and the limits it imposes upon the exercise of the Authority's delegated power all support the conclusion that it has this narrow objective. Importantly, this singular focus distinguishes the Draft Federal Act from the *Proposed Canadian Securities Act* at issue in *Reference re Securities Act*, which went beyond the regulation of nationally significant systemic risk to regulate day-to-day aspects of the trade in securities as well (paras. 97 and 100).

d'appel que le caractère véritable de l'ébauche de la loi fédérale est « d'endiguer les risques systémiques susceptibles d'avoir des conséquences négatives importantes sur l'économie canadienne dans son ensemble » : par. 124. En effet, nous estimons que l'objet de l'ébauche de la loi fédérale ainsi que sa structure et les limites qu'elle impose à l'exercice du pouvoir délégué de l'Autorité étayent tous la conclusion selon laquelle la loi fédérale poursuit cet objectif restreint. Fait important, cet objectif singulier distingue l'ébauche de la loi fédérale de l'ébauche de la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* en cause dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, qui ne se limitait pas à la réglementation du risque systémique d'une importance nationale mais visait aussi à réglementer les aspects courants du commerce des valeurs mobilières : par. 97 et 100.

[88] The Draft Federal Act's preamble refers to "the stability of Canada's financial system" and to the "detection, prevention and management of systemic risk". It adds that "events and circumstances in domestic and international capital markets can have a profound effect on the stability of Canada's financial system and on the Canadian economy as a whole". The dual purposes of the Draft Federal Act are clearly expressed in s. 4:

[88] Le préambule de l'ébauche de la loi fédérale mentionne la « stabilité du système financier canadien » et le « repérage, la prévention et la gestion [. . .] des risques systémiques ». Il précise que « les réalités des marchés des capitaux intérieurs et internationaux et les événements qui s'y déroulent peuvent avoir de graves conséquences sur la stabilité du système financier canadien ainsi que sur l'ensemble de l'économie canadienne ». Le double objet de l'ébauche de la loi fédérale est clairement exprimé à l'art. 4 :

4. The purposes of this Act are, as part of the Canadian capital markets regulatory framework,

(a) to promote and protect the stability of Canada's financial system through the management of systemic risk related to capital markets; and

(b) to protect capital markets, investors and others from financial crimes.

4. La présente loi a pour objet, dans le cadre du régime canadien de réglementation des marchés des capitaux :

a) de promouvoir et de protéger la stabilité du système financier canadien par la gestion des risques systémiques liés à ces marchés;

b) de protéger notamment ces marchés et les investisseurs contre les crimes financiers.

This provision, when read together with the Authority's statutory mandate (s. 6), suggests that the federal government's role in regulating capital markets is limited to the detection, prevention and management of risk to the stability of the Canadian economy, as well as to the protection against financial crimes. These stated purposes are not nearly as broad as those of the proposed legislation that was at issue

Lue en corrélation avec le mandat statutaire de l'Autorité (art. 6), cette disposition donne à penser que le rôle du gouvernement fédéral dans la réglementation des marchés de capitaux se limite au repérage, à la prévention et à la gestion du risque systémique pour la stabilité de l'économie canadienne, ainsi qu'à la protection contre les crimes financiers. Tels qu'énoncés, ces objets sont loin d'être aussi vastes que ceux

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in *Reference re Securities Act*, namely "to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system" (para. 95).

[89] Effect is given to the purposes listed in s. 4 by the substance of the Draft Federal Act, the terms of which carefully limit federal authority to the management of threats to the stability of the Canadian economy. The regulatory powers authorized by the Draft Federal Act are engaged solely when such threats *may foreseeably affect national economic interests*.

[90] The cornerstone of the Draft Federal Act is the prevention and control of "systemic risk related to capital markets", which is defined in s. 3 as follows:

> **3.** In this Act, systemic risk related to capital markets means a threat to the stability of Canada's financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have a material adverse effect on the Canadian economy.

For the purposes of this definition, systemic risk can be understood as having three constituent elements: (a) it must represent a threat to the stability of the country's financial system *as a whole*; (b) it must be *connected to the capital markets*; and (c) it must have the potential to have a *material adverse effect* on the Canadian economy. It is noteworthy that this definition does not encompass every economic risk that may relate to capital markets, but is limited to those that pose a sufficiently significant threat to the Canadian economy.

[91] The concept of "systemic risk" is invoked throughout the Draft Federal Act as a means of limiting the scope of federal regulatory powers. This is made clear in Part 2, which empowers the Authority to make an order designating a benchmark as "systemically important" (s. 18) and to prescribe

de la proposition de loi en cause dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, à savoir : « protéger les investisseurs, établir des mécanismes visant à garantir des marchés des capitaux équitables, efficaces et compétitifs et contribuer à l'intégrité et à la stabilité du système financier canadien » : par. 95.

[89] La teneur de l'ébauche de la loi fédérale, dont les modalités limitent soigneusement le pouvoir fédéral à la gestion des menaces à la stabilité de l'économie canadienne, donne effet aux objets énoncés à l'art. 4. Les pouvoirs de réglementation autorisés par l'ébauche de la loi fédérale n'entrent en jeu que lorsque de telles menaces *peuvent de manière prévisible nuire aux intérêts économiques nationaux*.

[90] La pierre angulaire de l'ébauche de la loi fédérale est la prévention et le contrôle du « risque systémique lié aux marchés des capitaux », terme défini à l'art. 3 de la façon suivante :

> **3.** Dans la présente loi, risque systémique lié aux marchés des capitaux s'entend d'une menace à la stabilité du système financier canadien qui, d'une part, émane des marchés des capitaux, est propagée au sein ou par l'entremise de ceux-ci ou les entrave et, d'autre part, est susceptible d'avoir des conséquences négatives importantes sur l'économie canadienne.

Pour l'application de cette définition, le risque systémique peut être interprété comme se composant des trois éléments suivants : a) il doit constituer une menace à la stabilité du système financier du pays *dans son ensemble*; b) il doit être *lié aux marchés de capitaux*; et c) il doit être susceptible d'avoir des *conséquences négatives importantes* sur l'économie canadienne. Il convient de souligner que cette définition ne vise pas chaque risque économique pouvant être lié aux marchés de capitaux, mais seulement ceux qui constituent une menace suffisamment importante à l'économie canadienne.

[91] La notion de « risque systémique » revient tout au long de l'ébauche de la loi fédérale pour limiter la portée des pouvoirs fédéraux en matière de réglementation. Cela ressort clairement de la partie 2, qui habilite l'Autorité à rendre une ordonnance désignant un indice de référence comme étant « d'importance

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by regulation a product to be "systemically important" (s. 20) or a practice to be "systemically risky" (s. 22). Where such an order or regulation is made, the Authority is also given the power to "prescribe requirements, prohibitions and restrictions" respecting these benchmarks (s. 19), products (s. 21) or practices (s. 23).

[92] The Draft Federal Act constrains the exercise of each of these powers in several ways. First, the Authority does not have the power to make any such designation or prescription unless the benchmark, product or practice "could pose a systemic risk related to capital markets" (ss. 18 and 20). Second, any regulations prescribing requirements, prohibitions or restrictions respecting a designated benchmark, product or practice may be made only "in order to address a systemic risk related to capital markets" (ss. 19 and 21). Third, the Authority's power under s. 24 to make an urgent order can likewise be exercised only for the purpose of addressing "a serious and immediate systemic risk to the capital markets". Finally, in designating a benchmark or prescribing a product or practice, the Authority must consider a number of factors, including whether there are any relevant existing provincial regulations (ss. 18(2), 20(2) and 22(2)). These requirements indicate that the effect of the Draft Federal Act is to address any risk that "slips through the cracks" and poses a threat to the Canadian economy (C.A. reasons, at para. 197 (per Schrager J.A., dissenting)).

[93] The same is true of Part 1 of the Draft Federal Act, which deals with the collection and disclosure of information. Section 9 confers on the Authority the power to make regulations pertaining to the keeping and provision of records and information, but only for the purposes of "monitoring activity in capital markets or detecting, identifying or mitigating systemic risk related to capital markets", or "conducting policy analysis related to the Authority's mandate and the purpose of [the Draft Federal Act]". Similar restrictions are placed on the Chief Regulator's

systémique » (art. 18) et à désigner par règlement un produit comme étant « d'importance systémique » (art. 20) ou une pratique comme « comportant des risques systémiques » (art. 22). Lorsqu'une telle ordonnance est rendue ou un tel règlement est pris, l'Autorité est également habilitée à « prévoir des exigences, interdictions et restrictions » concernant ces indices de référence (art. 19), produits (art. 21) ou pratiques (art. 23).

[92] L'ébauche de la loi fédérale restreint l'exercice de chacun de ces pouvoirs de plusieurs façons. Premièrement, l'Autorité ne peut procéder à une désignation ou prévoir des éléments par règlement que si l'indice de référence, le produit ou la pratique peuvent « poser un risque systémique lié aux marchés des capitaux » : art. 18 et 20. Deuxièmement, les règlements prévoyant des exigences, des interdictions ou des restrictions concernant un indice de référence, un produit ou une pratique ne peuvent être pris que « [p]our parer à un risque systémique lié aux marchés des capitaux » : art. 19 et 21. Troisièmement, les pouvoirs permettant à l'Autorité, en vertu de l'art. 24, de rendre une ordonnance d'urgence ne peuvent également être exercés que « pour parer à un grave et imminent risque systémique lié aux marchés des capitaux ». Enfin, lorsqu'elle désigne un indice de référence, un produit ou une pratique, l'Autorité doit tenir compte d'un certain nombre de facteurs, notamment la question de savoir s'il existe des règlements provinciaux pertinents : par. 18(2), 20(2) et 22(2). Ces exigences indiquent que l'ébauche de la loi fédérale a pour effet de parer à tout risque qui passe entre les « mailles du filet » et qui constitue une menace à l'économie canadienne : motifs de la C.A., par. 197 (le juge Schrager, dissident).

[93] Il en va de même de la partie 1 de l'ébauche de la loi fédérale, qui porte sur la collecte et la communication de renseignements. L'article 9 habilite l'Autorité à prendre des règlements concernant la tenue de dossiers et la conservation et la fourniture de dossiers et de renseignements, mais seulement en vue « de surveiller les activités menées sur les marchés des capitaux ou de repérer, de cerner ou d'atténuer les risques systémiques liés à ces marchés » ou « d'analyser les orientations concernant l'objet de [l'ébauche de la loi fédérale] et la mission

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authority to require that records and information be provided to him or her (s. 10(1)) and on the Authority's right to disclose information obtained under the Draft Federal Act to various specified bodies (s. 15(1)).

[94] Part 3 of the Draft Federal Act deals with the administration and enforcement of the Act. It provides, among other things, for (a) the Authority's power to conduct inquiries into matters relating to compliance with the Draft Federal Act (ss. 28 to 32), and (b) the power of a tribunal (which is to be established under legislation known as the *Capital Markets Regulatory Authority Act*) to make certain orders where it is deemed "necessary to address a systemic risk related to capital markets" (s. 39). Parts 4 and 5 concern offences, and the validity of their provisions is not at issue in this Court. Part 6 contains various general provisions relating to the operation of the Draft Federal Act, including the procedure for making regulations. Parts 7 and 8 contain transitional provisions and consequential amendments, respectively.

[95] Thus, unlike the proposed legislation that was at issue in *Reference re Securities Act*, the Draft Federal Act does not purport "to regulate, on an exclusive basis, all aspects of securities trading in Canada" (*Reference re Securities Act*, at para. 106). It does not contain provisions that go to the day-to-day regulation of all aspects of securities trading, like requirements for the registration of dealers, prospectus filing and disclosure obligations. The extent to which the statutory powers under the Draft Federal Act permit the regulation of these matters remains circumscribed by the requirement of systemic risk, which is a significant threshold that must be met before those powers can be exercised (A.F. (Canada), at para. 94). The management of risk which falls below this threshold — that is, risk that does not pose a threat to the Canadian economy *as a whole* — lies outside the scope of the Draft Federal Act.

de l'Autorité ». Des restrictions similaires sont imposées au pouvoir du régulateur en chef d'exiger qu'on lui fournisse des dossiers et des renseignements (par. 10(1)) et au droit de l'Autorité de communiquer des renseignements obtenus sous le régime de l'ébauche de la loi fédérale à certains organismes qui y sont précisés (par. 15(1)).

[94] La partie 3 de l'ébauche de la loi fédérale porte sur l'administration et le contrôle d'application de la loi. Entre autres choses, a) elle habilite l'Autorité à mener des enquêtes sur toute question concernant le respect de l'ébauche de la loi fédérale (art. 28 à 32), et b) elle habilite un tribunal — devant être établi conformément à une loi intitulée *Loi sur l'Autorité de réglementation des marchés des capitaux* — à rendre certaines ordonnances s'il l'estime « nécessaire pour parer à un risque systémique lié aux marchés des capitaux » (art. 39). Les parties 4 et 5 portent sur les infractions, et la validité des dispositions qu'elles contiennent n'est pas en cause devant nous. La partie 6 énonce les diverses dispositions générales relatives à l'application de l'ébauche de la loi fédérale, y compris la façon dont les règlements doivent être pris. Les parties 7 et 8 contiennent respectivement des dispositions transitoires et des modifications corrélatives.

[95] Ainsi, contrairement à la législation proposée qui était en cause dans le *Renvoi relatif à la Loi sur les valeurs mobilières*, l'ébauche de la loi fédérale ne vise pas à « réglementer, à titre exclusif, tous les aspects du commerce des valeurs mobilières au Canada » : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 106. Elle ne contient aucune disposition portant sur la réglementation des aspects courants du commerce des valeurs mobilières, comme les exigences relatives à l'inscription des courtiers, au dépôt des prospectus et à la communication de renseignements. La mesure selon laquelle les pouvoirs prévus par l'ébauche de la loi fédérale permettent la réglementation de ces matières demeure circonscrite par la présence obligatoire d'un risque systémique. Cette exigence constitue un seuil élevé à atteindre avant que ces pouvoirs puissent être exercés : m.a. (Canada), par. 94. La gestion du risque qui ne franchit pas ce seuil — c'est-à-dire celui qui ne constitue pas une menace à l'économie canadienne *dans son ensemble* — échappe à la portée de l'ébauche de la loi fédérale.

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[96] Properly understood, therefore, the intention is not that the Draft Federal Act will *displace* provincial and territorial securities legislation. It was instead designed to *complement* these statutes by addressing economic objectives that are considered to be national in character.

[97] When the Draft Federal Act is viewed as a whole, its pith and substance clearly does not relate, as Quebec suggests, to regulation of the trade in securities generally (R.F., paras. 111-16). Rather, its subject matter accords with its stated purposes: "to promote and protect the stability of Canada's financial system through the management of systemic risk related to capital markets" (s. 4(a)), and "to protect capital markets, investors and others from financial crimes" (s. 4(b)).

(b) *Classification of the Draft Federal Act*

[98] We now turn to the question of whether the Draft Federal Act, so characterized, falls within federal jurisdiction. We observe, at the outset, that there is no dispute regarding Parliament's authority to enact the provisions related to criminality in capital markets (i.e. Parts 4 and 5). At issue is the validity of the balance of the Draft Federal Act — that is, those portions that are regulatory in nature.

[99] The Attorney General of Canada, supported by a number of interveners, submits that Parliament has the constitutional jurisdiction to enact the Draft Federal Act pursuant to the general trade and commerce power, one of two branches of Parliament's jurisdiction under s. 91(2) of the *Constitution Act, 1867* (*Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 113; *General Motors*, at pp. 656-57). The other branch under s. 91(2) is the power over international and interprovincial trade and commerce.

[96] Interprétée correctement, l'ébauche de la loi fédérale ne vise donc pas à *remplacer* les lois provinciales et territoriales sur les valeurs mobilières. Elle a plutôt été conçue de manière à *compléter* ces lois en s'attaquant aux objectifs économiques considérés comme de nature nationale.

[97] Si l'on considère l'ébauche de la loi fédérale dans son ensemble, il est clair que son caractère véritable n'est pas, comme l'affirme le Québec, la réglementation du commerce des valeurs mobilières en général : m.i., par. 111-116. L'objet de l'ébauche de la loi fédérale concorde plutôt avec ses objectifs énoncés, soit « de promouvoir et de protéger la stabilité du système financier canadien par la gestion des risques systémiques liés [aux marchés de capitaux] » (al. 4a)) et « de protéger notamment ces marchés et les investisseurs contre les crimes financiers » (al. 4b)).

b) *La classification de l'ébauche de la loi fédérale*

[98] Nous passons maintenant à la question de savoir si l'ébauche de la loi fédérale, ainsi qualifiée, relève de la compétence fédérale. D'entrée de jeu, nous tenons à souligner que nul ne conteste le pouvoir du Parlement d'adopter les dispositions portant sur la criminalité liée aux marchés de capitaux (c.-à-d. les parties 4 et 5). Ce qui est en cause, c'est la validité des autres dispositions de l'ébauche de la loi fédérale — c'est-à-dire celles qui sont de nature réglementaire.

[99] Le procureur général du Canada, appuyé par un certain nombre d'intervenants, soutient que le Parlement a compétence constitutionnelle pour adopter l'ébauche de la loi fédérale en vertu de la compétence générale en matière de trafic et de commerce, l'un des deux volets de la compétence que possède le Parlement au titre du par. 91(2) de la *Loi constitutionnelle de 1867* : *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96 (C.P.), p. 113; *General Motors*, p. 656-657. L'autre volet du par. 91(2) est la compétence en matière de trafic et de commerce internationaux et interprovinciaux.

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[100] The scope of Parliament's jurisdiction over trade and commerce has been greatly influenced by "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors*, at p. 659). The concern here is that an overly broad interpretation of the general branch under s. 91(2) could entirely supplant the provinces' jurisdiction over property and civil rights (s. 92(13)) and over matters of a purely local nature (s. 92(16)), while an unduly narrow interpretation could leave this branch "vapid and meaningless" (*General Motors*, at p. 660).

[101] Bearing these concerns in mind, this Court has developed an approach that seeks to limit the general branch to matters of a genuinely national scope — matters that are "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination" (*Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at p. 267). The regulation of such matters, which are irreducible to individual transactions, specific industries or local markets, will necessarily transcend local concerns and must therefore, by their very nature, "be regulated federally, or not at all" (*Reference re Securities Act*, at para. 87; see also M. Lavoie, "Understanding Trade as a Whole in the *Securities Reference*" (2013), 46 *U.B.C. L. Rev.* 157, at p. 160).

[102] This delicate balance between federal and provincial jurisdiction has been safeguarded by the application of several indicia that this Court has recognized as useful in identifying matters that properly fall within the general branch under s. 91(2) (see: *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Canadian National Transportation, Ltd.*; *General Motors*, at p. 662; *Kirkbi AG v. Rivtik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302, at paras. 16-18). These indicia assist the courts in answering the "ultimate question" with respect to classification within the general trade and commerce

[100] La portée de la compétence du Parlement en matière de trafic et de commerce a été grandement influencée par « [le] besoin de concilier la compétence générale en matière [de trafic] et de commerce que possède le gouvernement fédéral avec la compétence provinciale en matière de propriété et de droits civils » : *General Motors*, p. 659. L'inquiétude est qu'une interprétation trop large du volet général de la compétence conférée par le par. 91(2) puisse supplanter complètement la compétence des provinces sur la propriété et les droits civils (par. 92(13)) et sur les matières d'une nature purement locale (par. 92(16)), et qu'une interprétation trop étroite puisse quant à elle rendre cette compétence « insipide et dépourvue de sens » (*General Motors*, p. 660).

[101] Compte tenu de ces préoccupations, la Cour a élaboré une méthode visant à limiter le volet général aux matières qui sont de portée véritablement nationale, c'est-à-dire à celles qui sont « [d]u point de vue qualitatif [. . .] différente[s] de ce que les provinces, agissant séparément ou conjointement, pourraient pratiquement ou constitutionnellement adopter » : *Procureur général du Canada c. Transports Nationaux du Canada, Ltée*, [1983] 2 R.C.S. 206, p. 267. La réglementation de ces matières, qui ne se limitent pas à des opérations individuelles, à des secteurs particuliers ou à des marchés locaux, transcende nécessairement l'enjeu local, et « c'est [donc] au fédéral — et à nul autre — qu'il appartient de [. . .] réglementer » ces matières, compte tenu de leur nature : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 87; voir aussi M. Lavoie, « Understanding Trade as a Whole in the *Securities Reference* » (2013), 46 *U.B.C. L. Rev.* 157, p. 160.

[102] Cet équilibre délicat entre les compétences fédérale et provinciales a pu être maintenu par l'application de plusieurs critères que la Cour a jugé utiles pour déterminer les objets qui relèvent à juste titre du volet général du par. 91(2) : voir *MacDonald c. Vapor Canada Ltd.*, [1977] 2 R.C.S. 134; *Transports Nationaux du Canada, Ltée*; *General Motors*, p. 662; *Kirkbi AG c. Gestion Rivtik Holdings Inc.*, 2005 CSC 65, [2005] 3 R.C.S. 302, par. 16-18). Ces critères aident les tribunaux à répondre à l'« ultime question » qui se pose lorsqu'il s'agit de classer une loi comme relevant de la compétence générale en

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power: "whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns" (*Reference re Securities Act*, at para. 124; see also para. 83). Where a close examination of the statute yields an affirmative answer, the absence of federal power to legislate in respect of the subject matter would create a constitutional gap, which this Court has described as "constitutional anathema in a federation" (*Reference re Securities Act*, at para. 83).

matière de trafic et de commerce : « la [l]oi, considérée dans son entièreté, intéresse-t-elle une matière d'importance et de portée véritablement nationales touchant le commerce dans son ensemble et distincte des enjeux provinciaux » : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 124; voir aussi par. 83. Lorsqu'un examen attentif de la loi mène à une réponse affirmative, l'absence de pouvoir fédéral de légiférer relativement à la matière créerait une lacune constitutionnelle qui, selon la Cour, « répugne sur le plan constitutionnel à l'esprit fédératif » : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 83.

[103] The five *General Motors* indicia are as follows:

(1) Is the law part of a general regulatory scheme?

(2) Is the scheme under the oversight of a regulatory agency?

(3) Is the law concerned with trade as a whole rather than with a particular industry?

(4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?

(5) Would a failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

[103] Les cinq critères de l'arrêt *General Motors* sont les suivants :

(1) La loi s'inscrit-elle dans un régime général de réglementation?

(2) Le régime fait-il l'objet de surveillance constante par un organisme de réglementation?

(3) La loi porte-t-elle sur le commerce dans son ensemble plutôt que sur un secteur en particulier?

(4) Le régime est-il d'une nature telle que la Constitution n'habiliterait pas les provinces, seules ou de concert, à l'adopter?

(5) L'omission d'inclure une seule ou plusieurs provinces ou localités dans le régime en compromettrait-elle l'application dans d'autres parties du pays?

Although these inquiries are neither exhaustive nor determinative of a law's validity under the general trade and commerce power, affirmative answers to these questions will strongly suggest that the subject matter of a federal enactment is "genuinely a national economic concern" (*Canadian National Transportation*, at p. 268; see also *General Motors*, at p. 662-63).

Bien que ces questions ne soient ni exhaustives ni déterminantes quant à la validité de la loi au regard de la compétence générale en matière de trafic et de commerce, des réponses affirmatives donnent fortement à penser que l'objet du texte législatif fédéral est « vraiment une question économique d'intérêt national » : *Transports Nationaux du Canada*, p. 268; voir aussi *General Motors*, p. 662-663.

[104] In *General Motors*, affirmative answers with respect to these indicia supported the validity of a federal statute that regulated anti-competitive behaviour. Dickson C.J., writing for the Court, described the impugned *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now the *Competition Act*, R.S.C. 1985, c. C-34) as "a complex scheme of competition

[104] Dans l'arrêt *General Motors*, des réponses affirmatives données à l'égard de ces critères soutenaient la validité d'une loi fédérale qui réglementait les pratiques monopolistiques. Le juge en chef Dickson, s'exprimant au nom de la Cour, a qualifié la loi contestée intitulée *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, c. C-23 (maintenant

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regulation aimed at improving the economic welfare of the nation as a whole" which was "designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all" (p. 682). The subject matter of the legislation therefore fell within Parliament's power over trade and commerce *even though* the provinces are also competent to "deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like" (p. 682).

[105] This Court unanimously reached the opposite conclusion in analyzing the constitutional validity of the *Proposed Canadian Securities Act* in 2011, finding that its enactment would be *ultra vires* Parliament pursuant to the general trade and commerce power:

> . . . the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity that the [challenged statute] would sweep into the federal sphere simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns.

(*Reference re Securities Act*, at para. 125)

[106] Importantly, however, this Court found that *some* aspects of securities regulation are actually national in character (*Reference re Securities Act* at paras. 6, 7 and 131). In particular, it recognized that the "preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability" is one aspect of securities regulation that may fall within the general trade and commerce power (*Reference re Securities Act*, at para. 114; see also paras. 97 and 123). This Court therefore accepted that Parliament is competent to enact legislation that pursues these "genuine national goals", which include the management of systemic risk and nationwide data collection (paras. 121 and 123). This

la *Loi sur la concurrence*, L.R.C. 1985, c. C-34) de « système complexe de réglementation de la concurrence qui vise à accroître le bien-être économique du pays dans son ensemble », qui était « conç[u] pour surveiller un aspect de l'économie qui doit être réglementé à l'échelle nationale si l'on veut que cet aspect soit réglementé efficacement » : p. 682. L'objet de la loi relevait donc de la compétence du Parlement en matière de trafic et de commerce *même si* les provinces peuvent également « traiter de concurrence dans l'exercice de leurs pouvoirs législatifs dans des domaines comme la protection du consommateur, les relations de travail, la commercialisation et ainsi de suite » : p. 682.

[105] La Cour, à l'unanimité, est parvenue à la conclusion contraire lorsqu'elle a analysé la validité constitutionnelle de la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières* en 2011, estimant que son adoption excéderait la compétence générale du Parlement en matière de trafic et de commerce :

> . . . la réglementation courante de tous les aspects du commerce des valeurs mobilières et de la conduite des participants à ce secteur d'activités, que la [loi contestée] aurait pour effet de rattacher à la compétence fédérale, ne peut tout simplement pas constituer un enjeu d'importance et de portée véritablement nationales qui le rend différent, sur le plan qualitatif, des enjeux provinciaux.

(*Renvoi relatif à la Loi sur les valeurs mobilières*, par. 125)

[106] Fait important, cependant, la Cour a conclu que *certains* aspects de la réglementation des valeurs mobilières sont en réalité de nature nationale : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 6, 7 et 131. En particulier, elle a reconnu que le « maintien des marchés des capitaux pour nourrir l'économie canadienne et assurer la stabilité financière du pays » est un aspect de la réglementation des valeurs mobilières qui pourrait relever de la compétence générale en matière de trafic et de commerce : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 114; voir aussi par. 97 et 123. La Cour a donc reconnu que le Parlement a compétence pour adopter une loi qui vise à atteindre de tels « objectifs véritablement

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was central to this Court's analysis of the *General Motors* indicia — particularly respecting the fourth inquiry, which pertains to the provinces' capacity to implement the proposed regulatory scheme.

[107] More specifically, this Court endorsed the concept of "systemic risk" as a useful way to differentiate matters that are genuinely national in scope from matters of merely local concern. It accepted the definition of systemic risk as "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system" (*Reference Re Securities Act*, para. 103, citing M. J. Trebilcock, *National Securities Regulator Report* (2010)). This Court also relied on expert evidence in concluding that "systemic risk is an emerging reality, ill-suited to local legislation" (para. 104).

[108] *Reference re Securities Act* settled a number of issues pertaining to the relationship between securities regulation and the general branch of the trade and commerce power under s. 91(2). The guidance it offers will be helpful to us as we analyze the constitutional validity of the Draft Federal Act in accordance with the *General Motors* criteria.

[109] Neither of the first two indicia is at issue here: it is common ground that the Draft Federal Act creates a general regulatory scheme that operates under the oversight of a regulatory agency (R.F., at para. 124).

[110] Regarding the third indicium, the Attorney General of Canada submits that the Draft Federal Act is concerned with trade *as a whole* rather than with the regulation of the securities industry in particular.

nationaux », comme la gestion du risque systémique et la collecte de données à l'échelle du pays : par. 121 et 123. Il s'agissait d'un élément essentiel de l'analyse de la Cour quant aux critères établis dans l'arrêt *General Motors* — particulièrement en ce qui concerne la quatrième question, qui porte sur la capacité des provinces de mettre en place le régime de réglementation proposé.

[107] Plus précisément, la Cour a souscrit à l'idée que le « risque systémique » peut servir à différencier les matières de portée véritablement nationale de celles qui sont seulement de nature locale. Elle a accepté la définition suivante des risques systémiques : [TRADUCTION] « . . . risques qui entraînent un "effet domino" où le risque de défaillance d'un participant du marché nuit à la faculté des autres de s'acquitter de leurs obligations juridiques et provoque une série de chocs économiques néfastes qui se répercutent dans l'ensemble d'un système financier » : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 103, citant M. J. Trebilcock, *National Securities Regulator Report* (2010). La Cour s'est également appuyée sur la preuve d'expert pour conclure que « les risques systémiques constituent une réalité émergente qui se prête mal à une législation locale » : par. 104.

[108] Le *Renvoi relatif à la Loi sur les valeurs mobilières* a réglé un certain nombre de questions portant sur la relation entre la réglementation des valeurs mobilières et le volet général de la compétence en matière de trafic et de commerce que confère le par. 91(2). Les enseignements énoncés dans ce renvoi nous aideront à analyser la validité constitutionnelle de l'ébauche de la loi fédérale au regard des critères établis dans l'arrêt *General Motors*.

[109] Les premier et deuxième critères ne sont pas en cause en l'espèce; nul ne conteste que l'ébauche de la loi fédérale crée un régime général de réglementation qui fonctionne sous la surveillance d'un organisme de réglementation : m.i., par. 124.

[110] Quant au troisième critère, le procureur général du Canada soutient que l'ébauche de la loi fédérale porte sur le commerce *dans son ensemble* plutôt que sur la réglementation du secteur des valeurs

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The Attorney General of Quebec counters that securities trading takes place within a specific industry or segment of the economy, and that the law applicable to it is therefore distinguishable from competition law or trade-marks law.

[111] Although this Court held in *Reference re Securities Act* that the impugned legislation in that case was concerned not with trade as a whole but rather with the regulation of the securities market in particular, the Draft Federal Act is qualitatively different. Unlike the *Proposed Canadian Securities Act*, it does not "descen[d] into the detailed regulation of *all* aspects of trading in securities" (at para. 114 (emphasis in original)); rather, federal intervention in capital markets is instead limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada's financial system. In other words, the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular. Securities transactions are one of the principal means by which money moves from suppliers to consumers throughout the country (*Reference Re Securities Act*, at para. 113). For this reason, the Draft Federal Act is not concerned only with regulating capital markets specifically, but instead addresses economic matters of national scope which transcend the concerns of any one province. It is therefore akin to the *Combines Investigation Act* that was at issue in *General Motors*, in that both are aimed at stamping out risks and practices that are unhealthy to the Canadian economy. That Parliament's trade and commerce power is exercised in a way that affects particular industries is not inherently objectionable, so long as the focus of that exercise is on matters that affect trade as a whole.

mobilières en particulier. La procureure générale du Québec rétorque que le commerce des valeurs mobilières s'inscrit dans un secteur ou un segment de l'économie en particulier et que le droit qui lui est applicable se distingue ainsi du droit de la concurrence ou du droit des marques de commerce.

[111] S'il est vrai que la Cour a conclu dans le *Renvoi relatif à la Loi sur les valeurs mobilières* que la loi contestée dans cette affaire ne portait pas sur le commerce dans son ensemble, mais bien sur la réglementation du marché des valeurs mobilières en particulier, l'ébauche de la loi fédérale est différente sur le plan qualitatif. Contrairement à la *Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières*, elle ne « se préoccup[e] [pas] de la réglementation détaillée de *tous* les aspects du commerce des valeurs mobilières » (par. 114 (en italique dans l'original)); l'intervention fédérale dans les marchés de capitaux se limite plutôt à s'occuper des problèmes et du risque d'une nature *systémique* pouvant constituer une menace réelle à la stabilité du système financier canadien. Autrement dit, réglementer le risque systémique dans les marchés de capitaux vise à favoriser la stabilité de l'économie dans son ensemble et non celle de certains secteurs d'activités en particulier. Les transactions de valeurs mobilières constituent l'un des principaux moyens par lesquels fournisseurs et consommateurs échangent de l'argent partout au pays : *Renvoi relatif à la Loi sur les valeurs mobilières*, par. 113. Par conséquent, la portée de l'ébauche de la loi fédérale ne se limite pas à la réglementation des marchés de capitaux en particulier, mais vise plutôt des enjeux économiques de portée nationale qui transcendent les préoccupations de toute province. L'ébauche de la loi fédérale s'apparente donc à la *Loi relative aux enquêtes sur les coalitions* qui était en cause dans l'affaire *General Motors*, en ce que les deux lois visent à enrayer des risques et des pratiques qui nuisent à la santé de l'économie canadienne. Que la compétence du Parlement en matière de trafic et de commerce soit exercée d'une manière qui a des répercussions sur des secteurs en particulier n'est pas en soi répréhensible, dans la mesure où cet exercice porte essentiellement sur des matières touchant le commerce dans son ensemble.

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[112] Like the Majority of the Court of Appeal, we can do no better than to reiterate what this Court stated back in 2011:

> We accept that preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular "industry" and engages "trade as a whole" within the general trade and commerce power as contemplated by the *General Motors* test. Legislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole.

(*Reference re Securities Act*, para. 114)

[113] Turning now to the fourth indicium, we are of the view that the provinces, acting alone or in concert, would be incapable of enacting a scheme like the one set out in the Draft Federal Act. Relying on the principle of parliamentary sovereignty, this Court in *Reference re Securities Act* observed that "[t]he provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection" (para. 121), given that each of the provinces "retain[s] the ability to resile from an interprovincial scheme" (para. 119). In other words, the fact that any one province can opt against participating in (or can subsequently resile from) such a cooperative scheme could seriously impair that scheme's capacity to protect the Canadian economy from systemic risk. The Draft Federal Act, with its carefully tailored scope, constitutes a response to this provincial incapacity, with Parliament stepping in to fill this constitutional gap.

[114] We accept that the provinces can and do regulate systemic risk in their capital markets. However, our federalism jurisprudence supports the principle that a subject matter can have both federal

[112] À l'instar des juges majoritaires de la Cour d'appel, nous ne pouvons faire autrement que de réitérer les propos qu'a tenus la Cour en 2011 :

> Nous reconnaissons que le maintien des marchés des capitaux pour nourrir l'économie canadienne et assurer la stabilité financière du pays est une question qui va au-delà d'un « secteur » en particulier et met en jeu « le commerce dans son ensemble » visé par le pouvoir général en matière de trafic et de commerce au sens où il faut l'entendre selon le test formulé dans *General Motors*. Une loi qui vise à fixer des normes minimales applicables dans l'ensemble du pays et qui vise à assurer la stabilité et l'intégrité des marchés financiers du Canada pourrait fort bien avoir trait au commerce dans son ensemble.

(*Renvoi relatif à la Loi sur les valeurs mobilières*, par. 114)

[113] En ce qui concerne maintenant le quatrième critère, nous estimons que les provinces, seules ou de concert, seraient incapables d'adopter un régime du type établi dans l'ébauche de la loi fédérale. Se fondant sur le principe de la souveraineté parlementaire, la Cour a fait observer dans le *Renvoi relatif à la Loi sur les valeurs mobilières* que « [l]es provinces, agissant de concert, sont dépourvues de la capacité constitutionnelle de maintenir un régime national viable visant à atteindre des objectifs véritablement nationaux telles l'atténuation des risques systémiques ou la collecte de données à l'échelle nationale » (par. 121), étant donné que chaque province « pourr[a] toujours soustraire [son] adhésion à un régime interprovincial » (par. 119). En d'autres termes, le fait qu'une province puisse choisir de ne pas adhérer au régime coopératif ou de se retirer d'un tel régime pourrait sérieusement nuire à la capacité du régime de protéger l'économie canadienne contre le risque systémique. L'ébauche de la loi fédérale, dont la portée a été soigneusement circonscrite, remédie à cette incapacité des provinces, en faisant en sorte que le Parlement intervienne pour combler cette lacune constitutionnelle.

[114] Nous reconnaissons que les provinces peuvent réglementer, et réglementent, le risque systémique lié à leurs marchés de capitaux respectifs. Toutefois, notre jurisprudence portant sur le

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and provincial aspects (*Hodge*, at p. 130; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 181; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 65; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 23). In such a case, the double aspect doctrine permits the provinces to legislate in pursuit of a valid provincial objective and Parliament to do the same in pursuit of a separate federal objective. While provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so from a *local* perspective and therefore in a manner that cannot effectively address *national* concerns which transcend their own respective concerns. As this Court made clear in *Multiple Access Ltd.*, at p. 175, "[t]he validity of the federal legislation must be determined without heed to the . . . [provincial] legislation" (see also: *General Motors*, at pp. 680-82).

[115] Our conclusion with respect to the fifth indicium largely flows from our conclusion as to the fourth. Given our discussion on that subject, we are of the view that the effective management of systemic risk requires market-wide regulation, such that any one jurisdiction's failure to participate would jeopardize the scheme's successful operation. Put simply, the management of systemic risk across Canadian capital markets must be regulated federally, if at all. Once again, this Court's reasons in *Reference re Securities Act* effectively compel an affirmative answer to the final inquiry:

> The fifth and final *General Motors* inquiry is whether the absence of a province from the scheme would prevent its effective operation. On lesser regulatory matters the answer might well be no. However, when it comes to genuine national goals, related to fair, efficient and competitive markets and the integrity and stability of Canada's financial system, including national data collection and prevention of and response to systemic risks — the answer must be yes — much for the reasons discussed under the fourth question. On these matters a federal regime would

fédéralisme appuie le principe selon lequel un objet peut avoir à la fois un aspect fédéral et un aspect provincial : *Hodge*, p. 130; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 181; *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*, [1987] 2 R.C.S. 59, p. 65; *Law Society of British Columbia c. Mangat*, 2001 CSC 67, [2001] 3 R.C.S. 113, par. 23. Dans un tel cas, la règle du double aspect permet aux provinces de légiférer pour réaliser un objectif provincial valide et au Parlement de faire de même pour réaliser un objectif fédéral distinct. Les provinces ont la capacité de légiférer relativement au risque systémique lié à leurs marchés de capitaux, mais elles le font d'un point de vue *local* et, par conséquent, d'une manière qui ne peut aborder des enjeux *nationaux* qui transcendent les préoccupations qui leur sont propres. Comme l'a clairement indiqué la Cour dans *Multiple Access Ltd.*, p. 175, « [i]l faut déterminer la validité de la loi fédérale sans tenir compte de la loi [provinciale] » : voir aussi *General Motors*, p. 680-682.

[115] Notre conclusion quant au cinquième critère découle en grande partie de celle concernant le quatrième. Compte tenu de notre analyse à cet égard, nous estimons que la gestion efficace du risque systémique nécessite une réglementation du marché dans son ensemble, si bien que le fait pour une province de ne pas y participer compromettrait l'application du régime. En termes simples, c'est au fédéral qu'il appartient de réglementer, le cas échéant, la gestion du risque systémique dans les marchés de capitaux canadiens. Encore une fois, les motifs de la Cour dans le *Renvoi relatif à la Loi sur les valeurs mobilières* commandent effectivement une réponse affirmative à la dernière question :

> Abordons maintenant la cinquième et dernière étape de l'analyse tirée de *General Motors* : la non-adhésion d'une province au régime en entraverait-elle le fonctionnement? En ce qui a trait à des questions réglementaires de moindre importance, la question pourrait certainement appeler une réponse négative. Or, lorsqu'il s'agit d'objectifs véritablement nationaux, visant à favoriser des marchés équitables, efficaces et compétitifs et à assurer l'intégrité et la stabilité du système financier canadien, notamment par la collecte de données, la prévention des

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be qualitatively different from a voluntary interprovincial scheme. [para. 123]

[116] In our view, the *General Motors* framework leads to the conclusion that the Draft Federal Act addresses a matter of genuine national importance and scope that relates to trade as a whole. The preservation of the integrity and stability of the Canadian economy is quite clearly a matter with a national dimension, and one which lies beyond provincial competence. Moreover, the fact that the federal government's foray into securities regulation under the Draft Federal Act is limited to achieving these objectives supports the validity of this proposed statute. Given our conclusions with respect to each of the *General Motors* indicia, we therefore classify the legislation at issue in this case as falling within Parliament's power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.

(2) Regulations Under the Draft Federal Act: Sections 76 to 79

[117] Before concluding, we will briefly address the argument that the Council of Ministers' role in the making of regulations under the Draft Federal Act undermines the validity of this draft statute. The Majority of the Court of Appeal accepted that this was a proper basis on which to find that the Draft Federal Act is *ultra vires*.

[118] The involvement of the Council of Ministers in the making of regulations is set out in ss. 76 to 79 of the Draft Federal Act. Broadly speaking, those provisions require that the Authority submit proposed regulations to the Council of Ministers for approval, and confer onto the Council of Ministers the power either to approve any proposed regulation, to reject it, or to return it to the Authority for reconsideration. Approval from the Council of Ministers, whether express or implied, is necessary before a regulation can be made (see: s. 79 of the Draft Federal Act).

risques systémiques et l'intervention en cas de besoin, il faut répondre par l'affirmative — pour des raisons essentiellement identiques à celles avancées dans l'analyse du quatrième critère. Dans ces derniers cas, un régime fédéral différerait, au plan qualitatif, d'un régime interprovincial à participation volontaire. [par. 123]

[116] Nous estimons que le cadre d'analyse établi dans l'arrêt *General Motors* mène à la conclusion que l'ébauche de la loi fédérale porte sur une matière d'importance et de portée véritablement nationales touchant le commerce dans son ensemble. La préservation de l'intégrité et de la stabilité de l'économie canadienne est très clairement une matière qui a une dimension nationale et qui excède la compétence provinciale. De plus, le fait que l'intrusion du gouvernement fédéral dans la réglementation des valeurs mobilières sous le régime de l'ébauche de la loi fédérale se limite à l'atteinte de ces objectifs appuie sa validité. Compte tenu de nos conclusions quant à chacun des critères de l'arrêt *General Motors*, nous classons la loi en cause comme relevant de la compétence générale en matière de trafic et de commerce conférée au Parlement par le par. 91(2) de la *Loi constitutionnelle de 1867*.

(2) Les règlements pris sous le régime de l'ébauche de la loi fédérale : les art. 76 à 79

[117] Avant de conclure, nous traiterons brièvement de l'argument voulant que le rôle du Conseil des ministres dans la prise de règlements sous le régime de l'ébauche de la loi fédérale en sape la validité. Les juges majoritaires de la Cour d'appel ont reconnu qu'il s'agissait d'un motif valable pour déclarer l'ébauche de la loi fédérale *ultra vires*.

[118] La participation du Conseil des ministres à la prise de règlements est énoncée aux art. 76 à 79 de l'ébauche de la loi fédérale. De façon générale, ces dispositions obligent l'Autorité à remettre tout projet de règlement au Conseil des ministres pour approbation et confèrent au Conseil des ministres le pouvoir d'approuver le projet de règlement, de le rejeter ou de le renvoyer à l'Autorité pour réexamen. L'approbation du Conseil des ministres, qu'elle soit expresse ou implicite, est nécessaire à la prise du règlement : voir art. 79 de l'ébauche de la loi fédérale.

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[119] The mechanism applicable to the approval or rejection of regulations by the Council of Ministers is set out in s. 5.2 of the Memorandum (reproduced above, at para. 27). The Majority below found that this section, when combined with ss. 76 to 79 of the Draft Federal Act, confers on "a majority of ministers responsible for regulating capital markets in the participating provinces, or a majority of ministers representing major capital markets jurisdictions (currently Ontario and British Columbia)", a "veto right" over proposed federal regulations (para. 87). In the Majority's opinion, the possibility of a provincial veto "undermine[s] the constitutional foundation of the [Draft] Federal Act" (para. 137), since it belies the idea that the legislation's subject matter truly "relates to matters that transcend interests of a purely local and provincial nature" (para. 96; see also para. 95).

[120] The Dissenting Judge did not subscribe to the Majority's reasoning on this point. He observed that Parliament may delegate regulatory authority over subject matters that fall within its jurisdiction, and can structure the internal processes of subordinate regulatory bodies in such manner as it deems most appropriate. In his view, how regulatory authority is delegated under the Draft Federal Act cannot undermine the Act's validity.

[121] We agree with the Dissenting Judge. There is nothing problematic about the way in which the Draft Federal Act delegates the power to make regulations to the Authority under the supervision of the Council of Ministers.

[122] At the outset, we note that the Majority found that the mechanism for making regulations under the Draft Federal Act effectively confers on the participating provinces a "veto right". It is clear from s. 5.2 of the Memorandum that any request by the Council of Ministers to have the Authority reconsider a proposed regulation must be approved by a majority of the members of the Council of Ministers, and by one member representing the Major Capital Markets Jurisdictions and the federal government. Moreover,

[119] Le mécanisme applicable à l'approbation ou au rejet des règlements par le Conseil des ministres est établi à l'art. 5.2 du Protocole d'accord (reproduit précédemment, au par. 27). Les juges majoritaires de la Cour d'appel ont conclu que cet article, conjugué aux art. 76 à 79 de l'ébauche de la loi fédérale, confère à « une majorité de ministres responsables de la réglementation des marchés des capitaux des provinces participantes ou une majorité de ministres représentant les provinces participantes ayant de grands marchés des capitaux (en l'occurrence la Colombie-Britannique et l'Ontario) » un « droit de veto » sur les projets de règlement fédéraux (par. 87). Selon les juges majoritaires, la possibilité d'un droit de veto provincial « sape l'assise constitutionnelle de [l'ébauche de la loi fédérale] » (par. 137), car elle contredit l'idée que l'objet de la loi concerne réellement « des matières qui transcendent les intérêts de nature locale et provinciale » (par. 96; voir aussi par. 95).

[120] Le juge dissident n'a pas souscrit au raisonnement des juges majoritaires sur ce point. Il a fait remarquer que le Parlement peut déléguer son pouvoir de réglementation à l'égard d'objets qui relèvent de sa compétence et organiser les processus internes des organismes de réglementation subordonnés comme il l'entend. Selon lui, la façon dont le pouvoir de réglementation est délégué en vertu de l'ébauche de la loi fédérale ne peut saper la validité de la loi.

[121] Nous sommes d'accord avec le juge dissident. Il n'y a rien de problématique dans la façon dont l'ébauche de la loi fédérale délègue à l'Autorité le pouvoir de prendre des règlements sous la supervision du Conseil des ministres.

[122] Tout d'abord, nous soulignons que les juges majoritaires ont conclu que le mécanisme de prise de règlements prévu à l'ébauche de la loi fédérale confère effectivement un « droit de veto » aux provinces participantes. Le libellé de l'art. 5.2 indique clairement que toute demande du Conseil des ministres visant à faire réexaminer un projet de règlement par l'Autorité doit être approuvée par la majorité des membres du Conseil des ministres et par un représentant des parties ayant de grands marchés

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a decision to reject a proposed regulation after it has been reconsidered by the Authority must be approved by a majority of the members of the Council of Ministers and a majority of those members representing the Major Capital Markets Jurisdictions and the federal government. And it should be borne in mind that, in the absence of the requisite support for either a request to reconsider or a rejection, the regulation will be considered to have been approved by the Council of Ministers (s. 5.2(a)). As a result, any attempts *to block* proposed federal regulations require the support of a majority of the Council of Ministers *as well as* some level of support from the Major Capital Markets Jurisdictions and the federal Minister of Finance. No one province can therefore be said to have a "veto" power in this respect; at most, it is possible for a group of provinces *acting together* to reject a proposed federal regulation. As we will explain, however, this is not problematic.

[123] As noted above under the analysis of the first reference question, a corollary to the principle of parliamentary sovereignty is that the legislature has the broad authority to delegate *administrative* powers — including the power to make legally binding rules and regulations — to a subordinate body, like the Governor General in Council, the Lieutenant Governor in Council, an administrative agency or a Crown corporation. The Draft Federal Act is an excellent example of this: it sets out a broad framework for the regulation of systemic risk in capital markets, but delegates extensive administrative powers, including the power to make regulations, to the Authority. We repeat that this form of delegation of administrative powers is entirely consistent with the principle of parliamentary sovereignty, since the delegated authority can always be revoked by the sovereign legislature and its scope remains limited by and subject to the terms of the governing statute (*R. v. Furtney*, [1991] 3 S.C.R. 89). To borrow the words of the Judicial Committee of the Privy Council in *Hodge*:

It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself.

de capitaux ou un représentant du gouvernement fédéral. De plus, la décision de rejeter un projet de règlement après son réexamen par l'Autorité doit être approuvée par la majorité des membres du Conseil des ministres et par la majorité des membres représentant les parties ayant de grands marchés de capitaux ou représentant le gouvernement fédéral. Par ailleurs, il faut rappeler qu'à défaut de l'appui requis à l'égard d'une demande de réexamen ou d'un rejet, le règlement est considéré comme ayant été approuvé par le Conseil des ministres : al. 5.2a). Ainsi, toute tentative visant à *bloquer* la prise de projets de règlement fédéraux doit obtenir l'appui de la majorité des membres du Conseil des ministres *en plus* d'un certain appui des parties ayant de grands marchés de capitaux et du ministre fédéral des Finances. On ne peut donc pas affirmer qu'une province a un pouvoir de « veto » à cet égard; il est tout au plus possible que des provinces *agissent de concert* en vue de rejeter un projet de règlement fédéral. Comme nous l'expliquerons, toutefois, cela n'est pas problématique.

[123] Comme nous l'avons souligné précédemment dans notre analyse de la première question du renvoi, le principe de la souveraineté parlementaire a pour corollaire que la législature jouit du vaste pouvoir de déléguer des pouvoirs *administratifs* — notamment le pouvoir d'établir des règlements juridiquement contraignants — à un organisme subordonné, comme le gouverneur général en conseil, le lieutenant-gouverneur en conseil, un organisme administratif ou une société d'État. L'ébauche de la loi fédérale en est un excellent exemple; elle énonce un cadre général pour la réglementation du risque systémique lié aux marchés de capitaux, mais délègue de vastes pouvoirs administratifs, dont le pouvoir de prendre des règlements, à l'Autorité. Nous le répétons, cette forme de délégation de pouvoirs administratifs est tout à fait conforme au principe de la souveraineté parlementaire, car le pouvoir délégué peut toujours être révoqué par la législature souveraine et sa portée demeure limitée par les termes de la loi habilitante et assujettie à ceux-ci : *R. c. Furtney*, [1991] 3 R.C.S. 89. Pour reprendre les propos du Comité judiciaire du Conseil privé dans *Hodge* :

[TRADUCTION] On a soutenu à la barre que la législature qui confie la prise de règlements importants à un

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That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the Courts of Law, to decide. [Emphasis added; p. 132.]

[124] This Court has confirmed that the legislature retains a significant degree of latitude in deciding how it will delegate administrative law-making powers pertaining to matters within its jurisdiction. While Parliament cannot transfer primary legislative authority to a provincial legislature (and vice versa), this Court has not taken issue with federal legislation that delegated administrative powers to a creature of a provincial legislature (*P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392) or that incorporated by reference provincial legislation as amended from time to time (*Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569).

[125] It is therefore important to note the distinction between the *constitutionality of legislation* and *the legislature's authority to delegate administrative powers* to a subordinate person or body. Even though a statute's subject matter may fall within the jurisdiction of the enacting legislature, that statute may still contravene the rule against legislative delegation if it purports to transfer primary legislative authority to the other level of government. Conversely, a statute that delegates administrative powers, including a subordinate law-making power, to a statutory body may be struck down as unconstitutional if its subject matter is *ultra vires* the enacting legislature. In respect of matters over which a legislature has competence, however, the statutory delegation of administrative powers cannot undermine the underlying validity of that statute itself. In the words of Laskin C.J. in *Reference re Agricultural Products Marketing Association*, [1978] 2 S.C.R. 1198, at p. 1225, "delegation . . . cannot impeach the assertion of power".

mandataire ou à un délégataire s'efface. Ce n'est pas le cas. Ses pouvoirs restent intacts, et elle peut, quand bon lui semble, mettre fin au mandat qu'elle a établi et en créer un autre, ou prendre elle-même les choses en main. La mesure dans laquelle elle fera appel à des mandats subordonnés et la durée pendant laquelle elle les maintiendra sont des questions qu'il appartient à chaque législature, et non aux cours de justice, de trancher. [Nous soulignons; p. 132.]

[124] La Cour a confirmé que la législature conserve une grande latitude pour déterminer la façon dont elle délègue des pouvoirs administratifs autorisant la prise de mesures législatives se rapportant aux matières qui relèvent de sa compétence. S'il est vrai que le Parlement ne peut transférer sa compétence législative primaire à une législature provinciale (et vice-versa), la Cour n'a rien perçu de problématique dans une loi fédérale qui déléguait des pouvoirs administratifs à une entité créée par une législature provinciale (*P.E.I. Potato Marketing Board c. H. B. Willis Inc.*, [1952] 2 R.C.S. 392) ou qui incorporait par renvoi une loi provinciale et ses modifications postérieures (*Coughlin c. Ontario Highway Transport Board*, [1968] R.C.S. 569).

[125] Il importe par conséquent de souligner la distinction entre la *constitutionnalité d'une loi* et le *pouvoir d'une législature de déléguer des pouvoirs administratifs* à une personne ou un organisme subordonnés. Bien que l'objet d'une loi puisse relever de la compétence de la législature qui l'a adoptée, cette loi peut néanmoins contrevenir à la règle interdisant la délégation de pouvoirs législatifs si elle vise à transférer une compétence législative primaire à l'autre palier de gouvernement. Inversement, une loi qui délègue de simples pouvoirs administratifs, notamment le pouvoir de prendre des règlements, à un organisme créé par la loi peut être déclarée inconstitutionnelle si son objet excède la compétence de la législature qui l'a adoptée. S'agissant d'objets sur lesquels la législature a compétence, par contre, la délégation de pouvoirs administratifs prévue par une loi ne peut saper la validité sous-jacente de la loi elle-même. Pour reprendre les propos du juge en chef Laskin dans le *Renvoi relatif à la Loi sur l'organisation du marché des produits agricoles*, [1978] 2 R.C.S. 1198, p. 1225, la « délégation [. . .] ne remet pas en cause la répartition des pouvoirs ».

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[126] With this in mind, we turn to a second issue on the subject of the delegation of powers under the Draft Federal Act: Is the manner in which the Draft Federal Act delegates law-making powers to the Authority, under the oversight of the Council of Ministers, problematic from the perspective of federalism or the constitutional division of powers? In our view, the answer is quite clearly "no". In exercising its sovereign legislative powers, Parliament has the authority to confer on a statutory body — in this case, the Council of Ministers — the power to approve or reject proposed subordinate regulations, even if some members of that body are representatives of certain provinces. The delegation of administrative powers in a manner solicitous of (or even dependent upon) provincial input is in no way incompatible with the principle of federalism, provided that the delegating legislature has the constitutional authority to legislate in respect of the applicable subject matter.

[127] And as we explained above, the Draft Federal Act is *intra vires* Parliament pursuant to the general trade and commerce power, notwithstanding the fact that provincial representatives will be involved in the making of regulations. To put it simply, the *General Motors* framework is not concerned with whether a particular subject matter relating to trade can only be dealt with through direct, unfettered federal action; rather, its purpose is to identify aspects of the economy that the provinces, acting either individually or collectively, lack the capacity to regulate effectively. For this reason, the fact that some regulations might never be adopted because of provincial opposition does not change the reality that the regulations that are adopted *must*, by their very nature, be respected by all the provinces if the objectives underlying the Draft Federal Act are to be achieved. The Dissenting Judge's comments in this regard are particularly apt:

> . . . Parliament is free to delegate [in the manner set out in *Attorney General of Nova Scotia v. Attorney General for Canada*, [1951] S.C.R. 31, and *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392] and in such regard to constitute the body (the Authority) to whom it

[126] Ayant ces principes à l'esprit, nous passons maintenant à une deuxième question portant sur la délégation de pouvoirs sous le régime de l'ébauche de la loi fédérale : la façon dont l'ébauche de la loi fédérale délègue des pouvoirs de légiférer à l'Autorité, sous la surveillance du Conseil des ministres, est-elle problématique sous l'angle du fédéralisme ou du partage constitutionnel des pouvoirs? À notre avis, la réponse est clairement « non ». Lorsqu'il exerce ses pouvoirs législatifs souverains, le Parlement a le pouvoir de conférer à un organisme créé par la loi — en l'espèce, le Conseil des ministres — le pouvoir d'approuver ou de rejeter des projets de règlement subordonnés, même si certains membres de cet organisme sont des représentants de certaines provinces. La délégation de pouvoirs administratifs qui se soucie (voire dépend) de l'avis des provinces n'est aucunement incompatible avec le principe du fédéralisme, dans la mesure où la législature ayant procédé à la délégation a compétence constitutionnelle pour légiférer relativement à l'objet visé.

[127] Et comme nous l'avons expliqué ci-dessus, l'ébauche de la loi fédérale relève de la compétence générale du Parlement en matière de trafic et de commerce, et ce, même si des représentants des provinces participeront à l'élaboration des règlements. En termes simples, le cadre d'analyse de l'arrêt *General Motors* ne vise pas à savoir si l'objet en question se rapportant au commerce ne peut être réglé que par une intervention fédérale qui soit directe et libre d'entrave; il cherche plutôt à relever les aspects de l'économie que les provinces, seules ou de concert, ne peuvent réglementer efficacement. Pour ce motif, la possibilité que certains règlements puissent ne jamais être pris en raison d'une opposition des provinces ne change rien au fait que les règlements qui le sont *doivent*, de par leur nature même, être respectés par toutes les provinces pour que les objectifs qui sous-tendent l'ébauche de la loi fédérale soient atteints. Les remarques du juge dissident à cet égard sont particulièrement justes :

> . . . le Parlement est libre de déléguer ses fonctions réglementaires [conformément aux arrêts *Attorney General of Nova Scotia c. Attorney General. of Canada*, [1951] R.C.S. 31, et *P.E.I. Potato Marketing Board c. H. B. Willis Inc.*, [1952] 2 R.C.S. 392], et, à cet égard, de constituer

delegates regulatory functions. Parliament may determine the internal workings of such body and the process of approval of the regulations it proposes. The fact that the body approving the regulations (i.e. the Council [of Ministers]) is populated with ministers of provincial governments does not invalidate the delegation. Parliament can choose to structure the internal mechanics and approval process of the regulatory body in such manner deemed appropriate to the task. [Emphasis added.]

(C.A. reasons, at para. 205 (per Schrager J.A., dissenting))

[128] It therefore follows that we answer the second reference question in the negative.

VI. Conclusion

[129] For the foregoing reasons, we are of the view that the Cooperative System does not run afoul of the principle of parliamentary sovereignty or the rule respecting the legislature's authority to delegate law-making powers. Moreover, we hold that the enactment of the Draft Federal Act falls within Parliament's power over trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

[130] Again, however, we note that our advisory opinion is limited to the constitutionality of the Cooperative System. It is up to the provinces to determine whether participation is in their best interests. This advisory opinion does not take into consideration many of the political and practical complexities relating to this Cooperative System, and in particular those that may arise if a Participating Jurisdiction decides to withdraw at some later date. Moreover, with respect to the content of the Authority's enabling statute (which has not yet been published), we note that it will have to be carefully drafted so as to respect the limits on overlapping, yet distinct federal and provincial authority.

[131] *When* and *whether* to relinquish a degree of autonomy over the regulation of securities for the

l'organisme (l'Autorité) auquel il délègue ses fonctions. Le Parlement peut déterminer le fonctionnement interne d'un tel organisme, dont le processus d'approbation des règlements proposés par ce dernier. Le fait que l'organisme proposant ces règlements (le Conseil [des ministres]) soit composé de ministres des gouvernements provinciaux n'invalide pas la délégation. Le Parlement peut choisir comme bon lui semble d'organiser la structure interne de l'organisme de réglementation ainsi que les particularités du processus d'approbation des règlements de cet organisme. [Nous soulignons.]

(motifs de la C.A., par. 205 (le juge Schrager, dissident))

[128] Il s'ensuit par conséquent que nous répondons à la seconde question soumise par renvoi par la négative.

VI. Conclusion

[129] Pour les motifs qui précèdent, nous sommes d'avis que le régime coopératif ne va pas à l'encontre du principe de la souveraineté parlementaire ou de la règle concernant le pouvoir de la législature de déléguer des pouvoirs de légiférer. De plus, nous sommes d'avis que l'adoption de l'ébauche de la loi fédérale relève de la compétence du Parlement en matière de trafic et de commerce prévue au par. 91(2) de la *Loi constitutionnelle de 1867*.

[130] Encore une fois, cependant, nous tenons à souligner que notre avis consultatif ne porte que sur la constitutionnalité du régime coopératif. Il appartient aux provinces de décider s'il est dans leur intérêt d'y participer. Le présent avis consultatif ne prend pas en considération bon nombre des difficultés politiques et pratiques liées à ce régime coopératif, et particulièrement celles qui peuvent se présenter si une juridiction participante décide de se retirer à une date ultérieure. En outre, en ce qui concerne le contenu de la loi habilitante de l'Autorité (qui n'a pas encore été publiée), nous rappelons qu'elle devra être soigneusement rédigée de manière à respecter les limites imposées au pouvoir fédéral et au pouvoir provincial qui, bien qu'ils soient distincts, se chevauchent.

[131] La question de savoir *si* et *quand* il convient de renoncer à un certain degré d'autonomie en

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purpose of achieving national uniformity is *entirely* a matter of political choice. This too is a valid exercise of parliamentary sovereignty. The various jurisdictions have an unquestioned and equally sovereign right to join or to reject the Cooperative System.

[132] We answer the questions referred by the Government of Quebec as follows:

Question #1: Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

Answer: Yes.

Question #2: Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

Answer: No.

Accordingly, the Attorney General of Canada's appeal is allowed, the Attorney General of British Columbia's appeal is allowed, and the Attorney General of Quebec's appeal is dismissed.

Appeals of the Attorney General of Canada and of the Attorney General of British Columbia allowed. Appeal of the Attorney General of Quebec dismissed.

Solicitor for the Attorney General of Canada: Attorney General of Canada, Montréal.

Solicitors for the Attorney General of Quebec: Bernard, Roy (Justice Québec), Montréal.

Solicitor for the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

matière de réglementation des valeurs mobilières afin d'assurer l'uniformité nationale relève *entièrement* du choix politique. Il s'agit là aussi d'un exercice valide de la souveraineté parlementaire. Chacune des juridictions participantes a le droit incontestable et tout aussi souverain d'adhérer au régime coopératif ou de le rejeter.

[132] Nous répondons aux questions soumises par le gouvernement du Québec de la façon suivante :

Question nº 1 : La Constitution du Canada autorise-t-elle la mise en place d'une réglementation pancanadienne des valeurs mobilières sous la gouverne d'un organisme unique selon le modèle prévu par la plus récente publication du « Protocole d'accord concernant le régime coopératif de réglementation des marchés des capitaux »?

Réponse : Oui.

Question nº 2 : La plus récente version de l'ébauche de la loi fédérale intitulée « Loi sur la stabilité des marchés des capitaux » excède-t-elle la compétence du Parlement du Canada sur le commerce selon le paragraphe 91(2) de la *Loi constitutionnelle de 1867*?

Réponse : Non.

Par conséquent, le pourvoi du procureur général du Canada est accueilli, le pourvoi du procureur général de la Colombie-Britannique est accueilli et le pourvoi de la procureure générale du Québec est rejeté.

Pourvois du procureur général du Canada et du procureur général de la Colombie-Britannique accueillis. Pourvoi de la procureure générale du Québec rejeté.

Procureur du procureur général du Canada : Procureur général du Canada, Montréal.

Procureurs de la procureure générale du Québec : Bernard, Roy (Justice Québec), Montréal.

Procureur du procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

2018 SCC 48 (CanLII)

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant la procureure générale de l'Ontario : Procureure générale de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Solicitors for the intervener the Attorney General of Prince Edward Island: Stewart McKelvey, Charlottetown.

Procureurs de l'intervenant le procureur général de l'Île-du-Prince-Édouard : Stewart McKelvey, Charlottetown.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General for Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Solicitors for the intervener Barreau du Québec: Lavery, de Billy, Montréal.

Procureurs de l'intervenant le Barreau du Québec : Lavery, de Billy, Montréal.

Solicitors for the intervener the Institute for Governance of Private and Public Organizations: Langlois avocats, Québec.

Procureurs de l'intervenant l'Institut sur la gouvernance d'organisations privées et publiques : Langlois avocats, Québec.

2018 SCC 48 (CanLII)

TAB 11

1998 CanLII 837 (SCC)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

1998 CanLII 837 (SCC)

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

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Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

1998 CanLII 837 (SCC)

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

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order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

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to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

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Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

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7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

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the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

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tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

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tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

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the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

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subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

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tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

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clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

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74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

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That has not been done in this case, and, therefore, in our opinion, the plaintiff has no present cause of action in respect of the extra sum, and the appeal must be allowed.

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HOWLETT v. MAYOR, &c., OF MAIDSTONE.

Appeal allowed.

Solicitors: *Sharpe, Parker, & Co., for H. Monckton, Town Clerk of Maidstone; Kingsford, Dorman, & Co., for Hoare, Howlett, & Tatham, Maidstone.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.

April 29.

UNWIN *v.* HANSON.

Highway—Surveyor—Cutting Trees near Highway—5 & 6 Wm. 4, *c.* 50, *s.* 65—"*Lopping*," *Construction of.*

By 5 & 6 Wm. 4, c. 50, s. 65, justices of the peace have power to order and direct that trees growing near a highway, which prejudice the highway by excluding the sun and wind therefrom, be "pruned or lopped"; and, if the owner of the trees makes default in complying with the order, the surveyor of highways for the district is authorized to "prune and lop" such trees:—

Held, that the term "lop," as used in this section, meant to cut off the branches laterally, and, therefore, that the section did not give any power or authority to the justices or the surveyor in respect of cutting off the tops of any trees.

APPEAL from the judgment of Pollock, B., at the trial of an action for trespass to land, in which the plaintiff claimed damages for the cutting and mutilation of certain trees by the defendant. The plaintiff was the owner and in possession of land adjoining a highway called Tentlow Lane, in the parish of Norwood, and the defendant was the surveyor of highways for the same parish.

On February 25, 1889, two justices of the peace of the county made an order, upon the application of the defendant, under 5 & 6 Wm. 4, c. 50, s. 65 (1) directing that certain trees growing

(1) 5 & 6 Wm. 4, c. 50, s. 65: "If the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament, or for shelter to any hop ground, house, building, or court yard of the owner thereof), growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to

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in and near the hedges in the plaintiff's lands adjoining Tentlow Lane (not being trees planted for ornament or for shelter to any hop ground, house, building, or court yard of the plaintiff) should be "pruned or lopped so that the said carriageway or cartway shall not be prejudiced by the shade thereof, and so that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof."

The plaintiff having failed to comply with this order as required by the statute, the defendant entered upon the land in question, and (inter alia) cut the tops off two fir trees, being two of the trees specified in the order. The plaintiff thereupon brought this action.

Pollock, B., at the trial gave judgment for the defendant, and the plaintiff appealed with respect to the cutting of the two fir trees.

Channell, Q.C. (*W. B. Trevelyan*, with him), for the appellant. The statute 5 & 6 Wm. 4, c. 50, s. 65 gives the justices no

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summon the owner of the land on which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways, to shew cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway shall not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning or lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent, and in default thereof shall forfeit, on conviction, a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall and he is hereby authorized and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this Act."

power to order that the tops of trees near highways shall be cut off. The word "lop" in s. 65 is used in connection with "prune," and does not include such a power. It is a well-known term in agriculture and forestry, and it was used by the legislature in order to carry out the object of the section, which was to prevent the branches of trees extending laterally over the highway so as to deprive it of sun and wind. If it had been intended to give a power to cut off the tops of trees, the word "topping," which word has also a well-known meaning, would have also been used. The expression "lop and top" occurs in many Acts of Parliament, as for example 6 Geo. 3, c. 48, s. 1, and in 6 Geo. 3, c. 36, s. 1, which statutes dealt with wilful injuries to trees; and it is an expression commonly to be found in precedents of conveyances of real property. The General Turnpike Act, 3 Geo. 4, c. 126, s. 116, provides that owners or occupiers of land adjoining turnpike roads shall "prune or lop the branches of trees" growing in or near the fences of the road, shewing that "lop" is used in the sense contended for here, and there is no reason for supposing that the legislature intended to give a power to take off the tops of trees growing near a highway, whilst the only power with respect to turnpike roads was to lop the branches. The 5 & 6 Wm. 4, c. 50, restricts the rights of the owners of property, and the words used in s. 65 must be strictly construed according to their proper technical meaning. All the witnesses at the trial understood the meaning of "lopping" to be cutting off the branches laterally.

Kemp, Q.C. (*C. C. M. Plumptre*, with him), for the respondent. The learned Judge at the trial was satisfied that the trees in question were within the mischief aimed at by the statute, i.e., that they prejudiced the highway by excluding the sun and wind from it. It is submitted that "lop" in s. 65 is used in the popular sense of cutting off the extreme end of anything, and that includes taking off the top of a tree. In Webster's Dictionary, and in the Imperial Dictionary, to "lop" is defined as "to cut off the end of anything," and Dryden, in 'The Spanish Friar,' uses the word in the sense of cutting off the top. The technical meaning of "lop" as used in forestry ought not to be applied here. The science of forestry deals with the

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protection of the trees; here the question is with respect to the protection of the highway. The words of s. 65 are that the surveyor shall be authorized "to prune and lop such trees," and the addition of the word "lop" to "prune" shews that something more than pruning was intended. In 3 Geo. 4, c. 126, s. 116, the words are "shall prune or lop the branches," and it is significant that the words "the branches" are omitted in 5 & 6 Wm. 4, c. 50, s. 65. If the construction contended for on behalf of the appellant be correct, the object of the Act would not be attained, because there would be no power to interfere with trees which inclined over the highway and had bushy tops. In such cases the highway would be as much prejudiced as by branches extending laterally.

LORD ESHER, M.R. In this case the action is brought by an owner of land which adjoins a highway in the country, and it is brought against the surveyor of highways of the district to recover damages in respect of something done by the surveyor, which it is said he was not authorized to do, to certain trees which were upon the plaintiff's land and near the highway. The question before us now is with regard to two fir trees. The plaintiff complains that the surveyor has "topped" them—i.e., cut them off at a certain height from the ground. The plaintiff asserts that the surveyor had no right by statute so to cut them off; and, if so, he certainly had no right at common law. The surveyor's answer is that the trees were injuring the highway; that by statute he had a right to lop them, and that what he did was lopping them within the meaning of the statute. The statute, which is the Highway Act of 1835, 5 & 6 Wm. 4, c. 50, provides by s. 65 that if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges or by any trees growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, a justice of the peace may, upon the application of the surveyor, summon the owner of the land to appear before the justices at a special sessions for the highways to shew cause why the said hedges are

not cut, pruned, or plashed, "or such trees not pruned or lopped in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun or wind may not be excluded from such carriageway or cartway to the damage thereof;" and the justices may at their discretion order and direct that the trees be "pruned or lopped" in the manner aforesaid; and if the owner makes default for ten days in complying with the order, the surveyor shall, and he is hereby authorized and required, "to prune and lop such trees for the benefit and improvement of the highway." On the one hand, it is said that the word "lop" does include cutting off the top of a tree; on the other, that it does not. If it does, the surveyor was justified in what he did; if it does not, he was not. Now when we have to consider the construction of words such as this occurring in Acts of Parliament we must treat the question thus: If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. For instance, the "waist" or the "skin" are well-known terms as applied to a ship, and nobody would think of their meaning the waist or the skin of a person when they are used in an Act of Parliament dealing with ships. Now dealing with the cutting of trees in the country, is there not a language which all people in the country conversant with trees know and understand? It is not a question of mere forestry, but of what persons generally living in the country know and understand by the use of a particular term with respect to the cutting of trees there. Therefore, dealing with the cutting of trees in the country, this Act of Parliament uses language which everybody conversant with the cutting of trees in the country knows and understands. I think it would be mere pedantry in the present case not to take notice of the well-known meaning which

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persons in the country conversant with the cutting of trees would attach to the word used in this Act of Parliament. There was evidence given at the trial of its well-known meaning, though I think that evidence was unnecessary. Two words, "lopping" and "topping," which mean different things, are used in the country with respect to the cutting of trees. The Act gives directions with respect to cutting trees near a highway to the person who has to cut them, and to the magistrates who may order them to be cut, and uses only one of those words, namely, "lop." That word is well known in the country to mean cutting off the branches of a tree; "topping" is the cutting off its top. I think that the proper way to construe the Act, under those circumstances, is to say that it was only intended to give power to cut off the branches. That view is strengthened by looking at the Turnpike Act, 3 Geo. 4, c. 126, s. 116, which provides that the owners or occupiers of lands adjoining a turnpike road shall "prune, or lop the branches of trees, growing near thereto." There the matter is made quite clear by the addition of those words "the branches" to the word "lop." In the Highway Act the word used is "lop" only; but if we were to hold that it includes "topping," then the extraordinary result would follow that by the side of a turnpike road the branches of the trees only could be cut, whilst by the side of a highway the tops of the trees could also be cut off. I am of opinion, therefore, that the surveyor in this case had no power to cut off the tops of the trees in question, and that the judge at the trial was bound to hold him liable for so doing.

FRY, L.J. I am of the same opinion. I think it is impossible to hold that "lopping" in its ordinary sense includes taking off the top of a tree. No doubt the word "lop" where used in connection with the head of anything may mean taking off that head; but according to the ordinary use of language, lopping a tree means taking off its branches, and does not mean taking off the top of it. If it was necessary to shew that "lopping" has a technical meaning, there was abundant evidence given on the point at the trial. All the witnesses called knew that "lopping" did not include "topping"; and indeed every one

who lives in the country and has to do with trees, or who has had to draw deeds in relation to real property in the country, knows the well-marked difference between lopping and topping. Under those circumstances, if the Act of Parliament had meant to include a power to take off the tops of trees it would have used the words "lop and top" instead of the word "lop" only. Then, is there anything in the section, having regard to the mischief which it is intended to prevent, which requires the wider interpretation of the word "lopping"? It was argued that mischief to the highway might equally result from allowing the top of a tree to remain as from allowing its lateral branches to remain. It is quite true that equal mischief might so result, but I do not think that it would in the great majority of cases. In that view the legislature may well have thought fit to confine the power to cutting off the branches, having regard to the greater injury to the owner's property which would result from cutting off the top.

LOPES, L.J. The Act of Parliament we have to construe relates to country matters, and it is to be administered by surveyors of highways and magistrates in the country. It is said that we ought to give an interpretation to the word "lopping" in the Act, which will include taking off the tops of trees. I am of opinion that we cannot do so having regard to the objects of the Act. In my opinion we must give the word the ordinary interpretation which it would bear in country life. In country life two entirely distinct terms, "lopping" and "topping," are used with respect to the cutting of trees, "lopping" meaning the cutting off the branches of a tree laterally, and "topping" meaning the cutting off its top. It was argued that, the object of the statute being to prevent prejudice to the highway by the trees on either side interrupting the free access of wind and sun, we should interfere with that object by holding that there was no power to top the trees. But if the matter is carefully considered, the removal of the lateral branches would, in the vast majority of instances, give a sufficient access of sun and wind to keep the road in proper order. If the legislature intended to include a power to take off the tops of trees, one is at a loss

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to conceive why they did not use the words "lopping and topping," which words in conjunction so readily occur to one's mind in connection with the cutting of trees. I think that the word "lopping" must have its ordinary meaning as used in country life. The appeal must be allowed.

Appeal allowed. (1)

Solicitor for appellant: *Godfrey H. Pownall.*
Solicitor for respondent: *A. Lawrence Houlder.*

W. A.

Feb. 23, 24, 26.

IN RE BELLENCONTRE.

Criminal Law—Extradition—Embezzlement or Misappropriation as a Notary—Fraud by a Bailee—Fraud as an Agent—Sufficiency of Warrants of Arrest and Committal—Attorney or Agent intrusted with Money for safe Custody—Extradition Treaty with France, Article 3, *Clause* 18—*French Penal Code, Article* 408—24 & 25 *Vict. c.* 96, *ss.* 75, 76—33 & 34 *Vict. c.* 52.

In order to justify the extradition of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country, amounting to an offence against the law of such country, and which if committed in England, would amount to an offence against English law.

A warrant was issued in France for the arrest of a French subject, accused of having embezzled or misappropriated money delivered to him in his capacity of notary. He escaped from France, and was arrested in English territory, and his extradition was demanded by the French authorities. A magistrate committed him for extradition on a warrant describing him as accused of the crime of fraud by a bailee and fraud as an agent. The French warrant specified nineteen separate charges. On an application for a habeas corpus, the Court came to the conclusion that as to fifteen of the charges, the evidence disclosed no crime punishable by English law. With regard to the other four charges, there was evidence that in each case money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer should have found a suitable investment, and that he had misappropriated such money:—

Held, that the offences charged were sufficiently described, both in the French and in the English warrant, and that the warrants were consistent with each other; that the fact that, as to some of the charges in the French warrant, the evidence did not disclose any crime against English law, was no answer to the claim for extradition; that as to the four charges last above-mentioned, there was evidence of offences within the meaning of article 408 of the French

(1) The Court of Appeal desired to consult Pollock, B., before stating what judgment should be entered for the plaintiff.

TAB 13

CHAPTER 5

TECHNICAL MEANING AND MEANINGS FIXED BY LAW

In statutory interpretation the expression "ordinary meaning" is used in two overlapping but distinguishable senses. In the presumption in favour of ordinary meaning, examined in Chapter 4, "ordinary meaning" refers to the meaning that spontaneously comes to the mind of an interpreter when he or she reads a legislative text. In this chapter, "ordinary meaning" refers to the popular, non-technical meaning of a word or expression contained in a legislative text.

Generally speaking, it is presumed that words should be given their ordinary, non-technical meaning subject to two exceptions. First, when words are defined in an Act or regulation, or when the meaning of legislation is otherwise declared by the legislature, this meaning prevails over the ordinary meaning to the extent of any inconsistency. Second, some words or expressions have technical as well as ordinary meanings, and on occasion it is the technical rather than the ordinary meaning that the law maker intends to use. Some technical meanings are legal, derived from common law, the *Civil Code*, or commercial usage.

A. PRESUMPTIONS APPLICABLE TO TECHNICAL MEANING

A technical meaning is a meaning understood by a group of speakers who are engaged in a specialized activity. Technical meanings are helpful because they permit insiders to refer to aspects of their activity in a

precise and functional way. To other insiders, technical meanings are clear and present little interpretative challenge; they facilitate accurate, efficient communication. To outsiders, however, such meanings are obscure and unnatural.

Because technical meanings are not familiar to the average language user, they do not meet the test for judicial notice.[1] They must be proven through the testimony of expert witnesses. In *R v Perka*,[2] for example, to prove the meaning of "*Cannibis sativa* L" in the *Narcotic Control Act*, both the Crown and the defence relied on the testimony of professional botanists. Experts may also be relied on to establish whether a term has a technical meaning within a given specialization.[3]

It is important to distinguish technical terms from technical meanings. Technical terms are words or expressions that have a technical meaning only. In such cases, the possibility of ambiguity between technical and ordinary meaning cannot arise, and there is no need for a presumption. A court determines the meaning of technical terms by receiving relevant expert evidence and making a finding of fact.[4]

A more difficult problem arises when legislation contains words that have both a technical and an ordinary meaning. In such cases, a court must decide which meaning should prevail. In addition to the usual techniques for resolving ambiguity, such as purposive and consequential analysis, the courts draw on two rules. The first is a presumption in favour of the ordinary, non-technical meaning of words. The other is a presumption in favour of the meaning that would be understood by the audience to which the legislation is addressed, given the matter dealt with. When legislation is addressed to the public at large, these presumptions complement one another, but where legislation is addressed to a specialized audience, they may be at odds.

The presumption in favour of ordinary, non-technical meaning was applied by the Supreme Court of Canada in *Pfizer Co v Deputy Minister of National Revenue (Customs & Excise)*.[5] The issue in the case was whether the drug imported by the appellant was a "derivative" of tetracycline within the meaning of the *Customs Tariff Act*. The ordinary meaning of

1 For an explanation of judicial notice, see *R v Find*, 2001 SCC 32, and Chapters 4 and 12.

2 [1984] 2 SCR 232.

3 See, for example, *Canadian Pacific Ltd v Canada*, [1994] FCJ No 933 (CA).

4 The ordinary or technical meaning of a word or expression is considered to be a matter of fact; whether that is the meaning intended by the legislature is a matter of law.

5 [1977] 1 SCR 456 [*Pfizer*]. See also *Canada (National Revenue) v Meyers Norris Penny Limited*, 2014 ABCA 176 at para 20; *Harmony Consulting Ltd v GA Foss Transport Ltd*, 2012 FCA 226 at para 72.

"derivative," established through judicial notice, was "drugs originating in or obtained from other drugs." The technical meaning of "derivative" was "drugs of the same group." This meaning was established through the expert testimony of academic and professional chemists. Even though the matter dealt with in the legislation was technical and even though "derivative" was linked to "tetracycline," clearly a technical term, the court opted for the ordinary meaning. Justice Pigeon wrote, "The rule that statutes are to be construed according to the meaning of the words in common language is quite firmly established and it is applicable to statutes dealing with technical or scientific matters, such as the *Patent Act*."[6]

The other presumption relied on by courts in resolving ambiguity favours the meaning that would naturally occur to the audience whose activities are governed by the legislation. This principle is explained in a leading passage from the judgment of Lord Esher in *Unwin v Hanson*:

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.[7]

Along similar lines, Baron Pollock wrote in *Granfell v Commissioners of Inland Revenue* that words are to be construed in their popular sense "meaning, of course, by the words 'popular sense' that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."[8] Relying on this "audience understanding" principle, the courts have adopted technical meanings for such common words as "sex" (in British Columbia's *Horse Racing Act*),[9] "earthenware" (in a tariff item under the *Customs Tariff Act*),[10] and "concentrators" (in Ontario's *Assessment Act*).[11]

It is not always clear whether legislation is addressed to a specialized audience or to the public at large. The federal *Income Tax Act*, for example, is addressed to everyone, but particular provisions target specialized

6 *Pfizer*, above note 5 at 460.
7 [1891] 2 QB 115 at 119 (CA).
8 (1876), 1 Ex D 242 at 248.
9 See *Re Witts and Attorney-General for British Columbia* (1982), 138 DLR (3d) 555 (BCSC).
10 See *Olympia Floor and Wall Tile Co v Deputy Minister of National Revenue for Customs and Excise* (1983), 49 NR 66 (FCA).
11 See *Township of Waters v International Nickel Co of Canada*, [1959] SCR 585.

audiences. In these circumstances, which presumption (if any) should apply? A further problem arises when a provision is addressed to several specialized audiences who would, or might, assign different technical meanings to a word or expression it contains. May each specialty rely on its own understanding of the provision? Or in the absence of a uniform technical meaning, must the ordinary meaning prevail? The courts are still grappling with these questions, and no definitive answers can be given.[12]

However, it appears that the courts currently put less emphasis on the presumptions dealing with technical meaning than in the past. In dealing with all interpretation issues, the starting point is the modern principle, which emphasizes the total context of the words to be interpreted.[13] Also, with bilingual legislation, regard must always be given to both language versions, one of which may be capable of bearing only one meaning, whether technical or ordinary.[14]

B. LEGAL TERMINOLOGY

Legal meaning is a subcategory of technical meaning. It is the meaning that legal insiders assign to the special vocabulary of the law, the terms and expressions used to identify legal interests, responsibilities, remedies, procedures, and the like. Legal meanings may originate in the common law, in civil codes, in statute law, or in the practice of lawyers, judges, and accountants.

Legal terms of art are words or expressions that have a legal meaning only. As Finch JA noted in *McRae v Canada (Attorney-General)*, for example, "subrogation" refers to a doctrine developed in law and equity and is a word used almost exclusively in a legal context.[15] However, as

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12 The issue has arisen most often in the context of fiscal legislation applicable to commodity extraction. See, for example, *TransCanada Pipelines Ltd v Manitoba*, 2013 MBCA 88; *Pacific Northern Gas Ltd v the Queen* (1990), 90 DTC 6252 (FCTD), aff'd (1991), 91 DTC 5287 (FCA); *Nova, an Alberta Corp v Canada*, [1987] FCJ No 218 (TD), aff'd [1988] FCJ No 636 (CA); *Northern and Central Gas Corp v Canada Ltd*, [1985] FCJ No 111 (TD), aff'd [1987] FCJ 1006 (CA).

13 See *Barrie Public Utilities v Canadian Cable Television Assn*, 2003 SCC 28.

14 See, for example, *Azdo v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 645 (CA), where the English word "guardian" could have referred to a legal or a social relationship, but the French word "*tuteur*" could refer to a legal relationship only. See also the discussion of bilingual legislation in Chapter 6.

15 [1997] BCJ No 2497 at paras 19 and 25 (CA). See also *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 104; *Barton v Nova Scotia (Attorney General)*, 2015 NSCA 34 at para 13.

often as not, legal terminology is ambiguous, that is, capable of bearing both a technical legal meaning and an ordinary, non-technical meaning. In *Citibank Canada v Canada*,[16] for example, the court had to decide whether the arrangement under which the bank received certain shares amounted to a "form of guarantee" of the shares' value. The bank relied on the technical meaning of guarantee — a promise to cover another's debt — while the Minister relied on the ordinary meaning — a promise to cover any loss, regardless of how it arose. To resolve this ambiguity, Malone JA relied primarily on the purpose of the provision, but he also invoked the presumption in favour of audience meaning: "where legislation applies to a narrow commercial context, Parliament must make clear its intention to apply a meaning other than that ascribed by settled commercial law."[17]

As the *Citibank* case illustrates, the presumption in favour of ordinary meaning applies to terms that have both an ordinary and a technical legal meaning. However, a number of factors complicate the interpretation of such terms and favour the adoption of legal over ordinary meaning, even in statutes aimed at the general public. First, in dealing with legal terminology, it is not always easy to distinguish technical from ordinary meaning. Words like "property" or "spouse" or "agent" have meanings in ordinary language that are closely related to, although not necessarily identical to, their technical legal meanings. This can be a source of confusion. Courts sometimes resort to law dictionaries, such as *Black's Law Dictionary,* to determine the ordinary meaning of words and occasionally to general dictionaries, such as the *Shorter Oxford English Dictionary*, in search of legal meanings.

A second factor is the expertise of legal interpreters. Because lawyers and judges are themselves legal experts, they do not require the assistance of expert witnesses to establish the legal meaning of terms. Technical legal meanings are established through judicial notice. And because lawyers and judges are legal insiders, they naturally tend to draw on their technical vocabulary when reading legislation. Although the presumption in favour of ordinary meaning may point one way, familiarity with legal meanings leans the other way.

Finally, because the purpose of legislation is to set out the law applicable to a matter, reliance on legal meanings often seems appropriate. Suppose, for example, that legislation dealing with taxation refers to "property given on trust." In ordinary conversation, this expression

16 2002 FCA 128 [*Citibank*].

17 *Ibid* at para 29. See also *Will-Kare Paving & Contracting Ltd v Canada*, [2001] 1 SCR 915 at 933–34 [*Will-Kare Paving*], and compare *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at paras 24–25 [*Celgene*].

might well be understood as describing a transfer of possession without benefit of a receipt or other security. But in the context of legislation, it is more plausible to treat it as a reference to the legal institution of trust.

For these reasons, the presumption in favour of ordinary meaning may be ignored or readily rebutted in the case of words with legal meanings. In *Hawboldt Hydraulics (Canada) Inc (Bankrupt) v MNR*,[18] for example, the issue was whether the manufacture of replacement parts for use in a repair business could be considered "manufacturing . . . goods for sale" within the meaning of the *Income Tax Act Regulations*. Chief Justice Isaac wrote:

> We are invited by the modern rule of statutory interpretation to give those words their ordinary meaning. But we are dealing with a commercial statute and in commerce the words have a meaning that is well understood. In the common law, "for sale" does not mean "for use in a repair process." And I doubt that any informed commercial person would seriously say that the manufacture of parts to be used to repair a customer's defective equipment was a manufacture of those parts for sale.[19]

Although the ordinary understanding of "sale" was broad enough to apply to facts such as these, Isaac CJ preferred a narrower technical meaning. He took judicial notice of the legal meaning of "sale" and found, again on the basis of judicial notice, that this meaning would be understood by the community of informed commercial persons who made up the audience for these provisions of the *Income Tax Act*.[20]

C. MEANINGS FIXED BY LAW

Meanings fixed by law are assigned to words used in legislation by the law maker, by legal drafting convention, or by precedent. When the meaning of a word is fixed by the legislature, usually in the form of statutory definitions, it prevails over other possible meanings. When the meaning is fixed by a court in interpreting the legislation, this interpretation is a precedent that may bind future courts. Meanings fixed by drafting convention are not legally binding, although repeated usage can give such conventions a strong presumptive force.

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18 (1994), 174 NR 6 (FCA).

19 *Ibid* at 17.

20 See also *Will-Kare Paving*, above note 17, but note the strong dissent of Binnie J. See also *Celgene*, above note 17 at paras 23–25, where the court favoured the non-commercial meaning of "sale" in the context of s 80(1)(b) of the *Patent Act*.

1) Statutory Definitions

Many statutes and regulations begin with a section or subsection, sometimes quite a long one, setting out definitions of words or expressions that are used in the Act. Definitions may also be found at the beginning of divisions, parts, or individual sections.[21] Because the legislature is sovereign, it may assign meanings to words that bear little or no relation to their ordinary meaning. It can deem "red" to mean blue or "land" to include sky and ocean. But legislatures generally have little interest in major departures from conventional usage, and most definitions incorporate, clarify, or only slightly modify the ordinary meaning, or in some cases the technical meaning, of the defined words.

The federal *Interpretation Act*[22] sets out a number of rules applicable to statutory definitions:

> **15** (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> (*a*) as being applicable only if a contrary intention does not appear; and
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> **16.** Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Similar rules apply to provincial and territorial legislation as well.

a) Exhaustive versus Non-exhaustive Definitions

It is important to distinguish between statutory definitions that are exhaustive and those that are non-exhaustive.

Exhaustive definitions are usually introduced by the word "means" followed by a definition that comprises the sole meaning the word may bear throughout the statute and throughout any regulations made under it, for example:

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21 Section 8 of the Uniform Law Conference Drafting Conventions says, "Definitions should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case, they should be placed at the beginning of the passage in question." In older Acts and in some jurisdictions, definitions are set out at the end of Acts, parts, or sections.

22 RSC 1985, c I-21.

> In this section,
>
> "fishing gear" means any tackle, netting, or other device designed or adapted to catch fish or marine mammals.

Unless a drafting error has occurred, the meaning assigned to "fishing gear" by this definition may not be varied or supplemented by ordinary usage or by other convention.

Non-exhaustive definitions are usually introduced by the expression "includes," or "does not include," followed by a directive which adds to or subtracts from the ordinary (or technical) meaning of the defined term, for example:

> In this Part,
>
> "nets" includes crab pots and lobster traps but does not include gill nets.

This definition presupposes that the interpreter knows or will be able to determine the ordinary meaning of "nets" in this context. The point of the definition is not to fix the meaning of "nets" but to ensure that the provisions governing the use of nets apply equally to crab pots and lobster traps, which are functional equivalents, and do not apply to gill nets, which are meant to be governed by different rules.

Note that definitions in legislation sometimes use the word to be defined as part of the definition. This generally is done to limit the scope of the defined term and does not indicate a lack of skill on the part of the drafter; it simply reflects the fact that statutory definitions have a different function than dictionary definitions.

b) Uses of Statutory Definitions

Statutory definitions are used for a variety of purposes. One important use is to create a short form of reference for lengthy or awkward expressions, for example:

> In this Act,
>
> "investigation" means an investigation carried out by the Competition Commissioner pursuant to s. 19 of the *Competition Act*;
>
> "Minister" means the Minister of Employment and Immigration.

When readers come across the term "investigation" or "Minister" in the Act, they are expected to fill in the details identifying the relevant investigation or minister. This avoids having to repeat these details each time a reference is made.

Statutory definitions are also used to narrow the usual scope of a word or expression, for example:

In this Part,

"grain" does not include rice or wild rice;

"employee" means an employee who is not a member of a union;

"will" means a will made before 1 January 1957.

These definitions rely on the ordinary (or technical) meanings of the defined terms, which are then narrowed by excluding things that might normally fall within the meaning (the first example above) or by adding qualifying words or expressions that describe a subclass within the meaning (the next two examples).

Statutory definitions are also used to expand the usual scope of a word or expression, for example:

In this section,

"fish" includes shell fish, crustaceans, and marine mammals;

"sale" includes a promise to sell;

"will" means any writing signed by a person, whether witnessed or not, that contains a direction respecting the disposition of their property to take effect after their death.

In these examples, the statutory definition enlarges the ordinary (or technical) meaning of the defined terms by including things that might normally be thought to fall outside their denotation. The first two examples are non-exhaustive; the verb "includes" is used to extend the defined term to the things singled out for special mention—shell fish and some mammals, mere promises to sell—so that they are subject to the same rules as the things within the ordinary scope of the terms—standard types of fish, enforceable contracts of sale. In the third example, an exhaustive definition is used to expand the defined term to writings that are not ordinarily considered wills—an insurance contract naming the beneficiary of life insurance, for example.

Finally, statutory definitions are used to resolve possible doubt or ambiguity:

In this Act,

"mammal" includes whales and other marine mammals;

"fruit" does not include tomatoes;

"counsel" means a member of the Law Society of Upper Canada;

"vehicle" means any car, cart, truck, motorcycle, tractor, or other conveyance capable of travelling on roadways at a speed of 30 k.p.h. or more.

These definitions are meant to clarify rather than qualify the ordinary (or technical) meaning of the defined terms—to create precise meanings and sharp distinctions, to resolve doubt. They are often included by drafters in an effort to anticipate and resolve the interpretation issues that are likely to arise in the application of the legislation. Sometimes they are added to legislation by way of amendment in response to complaints or unsatisfactory judicial interpretations.

As these examples indicate, statutory definitions do not necessarily lighten the interpreter's load. Many simply add to the ordinary or technical meaning of the defined term, which must still be determined in the usual way. And since all consist of words, all require interpretation, like any other legislative text. In the definition of "vehicle" set out above, for example, although the interpreter is given help in determining the scope of the defined term, he or she must now tackle "conveyance," "roadway," and "capable."

2) Interpretation Acts

Each Canadian jurisdiction has an Act that applies to all the legislation enacted by that jurisdiction. Most are called "Interpretation Act," but Ontario's is called the *Legislation Act* because it applies to other legislative matters as well.

Although there are some significant variations in the Acts of the different jurisdictions, in many respects they are similar or identical. All include provisions about enactment, the coming into force of legislation, and its temporal and territorial application; all have a smattering of interpretation rules. In addition, some have rules for making appointments, conferring powers, tabling reports, taking oaths, computing time, and other miscellaneous matters. And finally, there are numerous definitions of particular words—words like "Act," "bank," "contravene," "standard time," "writing," and the auxiliary verbs "may" and "shall" or "must"—that might occur in legislation dealing with any subject.

In the federal Act, for example, "person" is defined to include corporations while "corporation" is defined to exclude partnerships, even partnerships that are considered separate legal entities under provincial law. This means that each time the word "person" is used in a federal enactment, it is presumed to refer to individuals and corporations but not to partnerships.

Interpretation Acts apply generally unless a "contrary intention" is either expressed or implied in the legislation being interpreted. For example, section 3 of the federal *Interpretation Act* says:

Application

3(1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

3) Legislative Interpretation (Declaratory Legislation)

As the sovereign law-making authority within a jurisdiction, the legislature can not only enact binding legislation but also give binding instructions on how to interpret it.[23] On occasion the legislature enacts declaratory provisions, which purport to establish the meaning of the law on a particular point. Declaratory provisions are usually enacted in response to judicial decisions that the legislature finds unacceptable and wishes to reverse.[24] The distinctive feature of a declaratory provision is that it does not make new law, but rather it declares what the law has been all along, notwithstanding the court's defective interpretation.

In 1899, for example, Quebec's legislature enacted the following provision:

> 4. All . . . grants of Crown lands made since the 1st June, 1884, are . . . subject to the reserve for fishing purposes of three chains in depth.

Some years later a dispute arose concerning the extent of the Crown's rights under the three-chain reserve. In 1919 the legislature enacted a provision that substituted the words "in full ownership by the Crown" for the words "for fishing purposes." In *Quebec (Attorney General) v Healy*,[25] the Supreme Court of Canada decided that this legislation was a declaration rather than an amendment; that is, it declared the true meaning of the 1899 provision rather than introducing new law. This meant that Crown grants since 1884 were subject to the full ownership reserve.

Although particular definition and application sections are common in legislation, binding directives concerning the proper interpretation of a previously enacted text are not. Statutory interpretation is a judicially managed operation, and courts are not always receptive to taking instruction from the legislature. For this reason, perhaps, courts generally are slow to label a provision declaratory of the law. This has most recently been demonstrated in *Reference re Sections 5 and 6 of the Supreme Court Act*.[26] The Supreme Court held that a provision declaring

23 See *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 at paras 26–28 [*Régie des rentes*].

24 See, for example, *Régie des rentes*, *ibid*.

25 [1987] 1 SCR 158.

26 2014 SCC 21.

the meaning of a provision setting qualification requirements for appointment to the Supreme Court substantively altered the provision and constituted an amendment to the Constitution.[27]

D. DRAFTING CONVENTIONS

Certain words or expressions are used by drafters repeatedly in legislation to signal particular meanings. For example, the use of the word "knowingly" in a regulatory offence indicates that *mens rea* is required for a conviction. The use of the word "deems" indicates that the legislature is declaring the law with respect to a matter even though the declaration may be contrary to common understanding. The use of the word "or" inclusively to mean "and/or" is another example, examined below. The effect of these conventions is to establish accepted legal meanings or usages for the relevant terms. Although these meanings are not binding, they are strongly presumed.

1) "May" and "Shall" or "Must"

Section 11 of the federal *Interpretation Act* provides that the meaning of "may" is permissive and "shall" is imperative.[28] Other Interpretation Acts have similar provisions. Section 29 of British Columbia's *Interpretation Act* includes the following definitions:

> "**may**" is to be construed as permissive and empowering;
>
> "**must**" is to be construed as imperative;
>
> "**shall**" is to be construed as imperative.

Despite these definitions, both "may" and "shall" are a recurring source of ambiguity, and "must" is not immune from ambiguity. "May" is ambiguous because it may or may not be coupled with a duty; "shall" and "must" are ambiguous because they may be either mandatory or directory.

a) "May" Confers Powers: Discretionary versus Obligatory

"May" is generally used in legislation to confer a power or legal authority on a person or a body. The expression "X may do y" means that X has a legal authority to do y and cannot be found guilty of an offence or liable

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27 *Ibid* at para 106.

28 In French, "*pouvoir*" is permissive, and the use of the present indicative tense of verbs is imperative.

in damages for doing y. The interpretation question that arises in connection with "may" is not whether it is permissive but whether the power it confers must be exercised. If the power is discretionary, the person or body on whom it is conferred must decide whether to exercise it and may choose not to. If it is obligatory, the recipient of the power must exercise it and has no choice but to do so. The difficulty lies in determining when a power is discretionary and when it is obligatory.

The leading authority on this problem is the judgment of Lord Cairns in *Julius v Lord Bishop of Oxford*.[29] In that case the court had to interpret the phrase "it shall be lawful," which was used by drafters of the day as "may" now is used, to confer legal authority. Lord Cairns wrote:

> The words "shall be lawful" [or "may"] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.[30]

In the absence of evidence to the contrary, powers conferred by "may" are taken to be discretionary. But when failure to exercise the power would tend to defeat the purpose of the legislation, undermine the legislative scheme, create a contextual anomaly, or otherwise produce unacceptable consequences, the courts may conclude that the power was meant to be exercised, that it is a power coupled with a duty. In particular, when exercising a power is made conditional on specific findings or the fulfilment of a set of conditions, the courts are apt to conclude that the power must be exercised once all the relevant findings are made or once all the conditions are met. This reasoning is exemplified in *Bates v Bates*,[31] involving section 17 of the *Divorce Act*:

> 17(1) A court of competent jurisdiction *may* make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order . . .
>
> . . .
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change in circumstances as provided for in the applicable [child support] guidelines

29 (1880), 5 App Cas 214 (HL).

30 *Ibid* at 222–23.

31 (2000), 49 OR (3d) 1 (CA).

> has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> . . .
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable [child support] guidelines.

The child support guidelines set out a formula to determine the amount each parent must contribute to the support of his or her child. Section 14 of the guidelines provides:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances:
>
> . . .
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act.

One of the issues that arose in interpreting subsection 17(1) of the Act was whether a court could refuse to vary a support order made before 1 May 1997 for which the coming into force of section 15.1 is deemed to constitute a change of circumstances. The following from the judgment of Laskin JA sets out the reasoning of the Ontario Court of Appeal:

> Provincial appellate courts have divided on this issue.
>
> . . .
>
> Those who argue in favour of giving the court an overriding discretion to refuse to apply the Guidelines focus on the word "may" in s. 17(1) of the Act: "[a] court . . . may make an order varying . . . a support order." . . . But the word "may" has to be read in its context.
>
> In the context of the new child support regime under s. 17 of the *Divorce Act* and the Guidelines it seems to me "may" in s. 17(1) is not permissive but authorizing or empowering, in the sense that if the condition of the section is met—if there has been a change in circumstances—the court must vary the child support order to comply with the Guidelines. Because the mere coming into force of the Guidelines is a change in circumstances, on application, a court must vary a previous child support order to comply with the Guidelines . . . .
>
> . . .
>
> This interpretation of the word "may" best reflects the purpose of the Guidelines. Their purpose is to promote uniformity, fairness, objectivity and efficiency in child support orders by curtailing, not expanding, judicial discretion.
>
> . . .

> Assuming the Guidelines reflect what Parliament considers "fair" support, adopting an interpretation of s. 17 of the *Divorce Act* that gives judges an open-ended discretion to refuse to apply the Guidelines does not promote fair support. Expanding the scope of judicial discretion to permit judges to refuse to apply the only objective standard of child support available, the Guidelines, will increase, not reduce, conflict and tension between spouses. Permitting judges to ignore the Guidelines will make the resolution of family disputes less efficient, not more efficient. And giving judges broad discretion to refuse to vary previous child support orders to comply with the Guidelines regime will not ensure that spouses and children in similar circumstances are treated consistently, because their treatment will differ depending on the wholly arbitrary factor of when separation or divorce took place.[32]

The courts have similarly divided over the proper interpretation of the dangerous offender provision in the *Criminal Code*,[33] which is in the following terms:

> **753** (1) The court *may* . . . find the offender to be a dangerous offender if it is satisfied
>
> (*a*) that the offence for which the offender has been convicted is a serious personal injury offence . . . and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons . . .
>
> (*b*) that the offence for which the offender has been convicted is a serious personal injury offence . . . and the offender, by his or her conduct in any sexual matter . . . has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses. [Emphasis added.]

In *R v Johnson*, Iacobucci and Arbour JJ commented on this provision:

> The language of s. 753(1) indicates that a sentencing judge retains a discretion whether to declare an offender dangerous who meets the criteria for that designation. As mentioned above, s. 753(1) provides that the court may find an offender to be a dangerous offender if it is satisfied that the statutory criteria set out in paras. (*a*) or (*b*) are

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32 *Ibid* at para 24. See also *R v Ahmad*, 2011 SCC 6 at para 39, where the court affirmed that enabling words are always compulsory where they are used to effectuate a legal right; *AE (Litigation guardian of) v DWJ*, 2011 BCCA 279 at para 36.

33 A list of the relevant cases is set out in *R v Johnson*, 2003 SCC 46 at para 25.

> met. On its face, the word "may" denotes a discretion, while the word "shall" is commonly used to denote an obligation: see for example *R. v. Potvin*, [1989] 1 S.C.R. 525, at p. 549. Indeed, s. 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, requires "shall" to be construed as imperative and "may" to be construed as permissive. If Parliament had intended that an offender must be designated dangerous if each of the statutory criteria have been satisfied, one would have expected Parliament to have used the word "shall" rather than "may."
>
> That said, cases do exist in which courts have found that the power conferred by "may" is coupled with a duty once all the conditions for the exercise of the power have been met.
>
> . . .
>
> In this case, there is no indication of a duty to find an offender dangerous once the statutory criteria have been met. As we will elaborate, neither the purpose of the dangerous offenders regime, nor the principles of sentencing, nor the principles of statutory interpretation suggest that a sentencing judge must designate an offender dangerous if the statutory criteria in s. 753(1)(*a*) or (*b*) have been met.[34]

In examining the relevant purpose and principles, the Court emphasized the need for judicial discretion in sentencing to ensure that the goals of punishment are appropriately balanced in each individual case. In these circumstances, there was no basis for coupling the power conferred by "may" with a duty.

In *Julius v Lord Bishop of Oxford*, Lord Cairns emphasizes that words of permission (such as "may") do not themselves impose obligation; the obligation (if any) arises from the context in which the words appear. Strictly speaking, then, it is incorrect, though commonplace, to say that "may" is sometimes imperative or that "may" sometimes means "shall." "May" is always permissive, in the sense that it always confers a power or authority. Exercise of the power or authority is presumed to be discretionary, but that presumption can be rebutted by something in the context or by considering the effects of non-exercise.

When a power is conferred to do something in a particular way, although the exercise of the power may be discretionary, the manner in which it is exercised is not. This is illustrated in *Reference re Canadian Agricultural Review Tribunal*.[35] It concerned section 14 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, providing that a person

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34 *Ibid* at paras 16–18. [Emphasis in original.] See also *Alberta (Minister of Justice and Attorney General) v Sykes*, 2011 ABCA 191 at paras 25 and 31.

35 2012 FCA 130.

> may make a request [to have a tribunal decision reviewed] by delivering it by hand or by sending it by registered mail, by courier or by electronic means, including electronic registered mail and fax, to a recipient and place authorized by the Minister.

The applicant argued that it should be allowed to make the request by ordinary mail on the basis that "may make a request" was permissive. Noël JA rejected this argument based on other provisions of the regulations and a consequential analysis:

> In my view, section 14 cannot be construed as authorizing regular mail as a means of communicating a request. Subsection 9(2) of the Act provides that a person may request a review by the Tribunal "in the prescribed time and manner". Section 14 of the Regulations simply does not prescribe regular mail as a manner of requesting a review by the Tribunal.
>
> The common thread that appears to run through section 14 is that the question whether a request has been filed within the time allowed for doing so can either be assessed independently by the Tribunal based on the time when a request is actually "delivered" or "received" by hand or by electronic transmission pursuant to paragraphs 14(2)(*a*) or (*c*), or by reference to independent third party evidence as to when a request has been "sent" when registered mail or courier service are resorted to as a mode of transmission. In such a case, paragraph 14(2)(*b*) provides that the request is considered to have been made on the earlier of the date on which the request is received or the date indicated on the receipt issued by the postal or courier service.
>
> In contrast, regular mail if read into section 14 would allow for no independent means of establishing whether and when the mailed request was sent in the event that it does not reach its proper destination.[36]

Finally, it should be noted that the scope of discretion is always limited as a matter of administrative law. As Rand J said in *Roncarelli v Duplessis*, "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'."[37] *R v Lavigne*[38] offers a good illustration of how courts analyse the scope of discretion conferred by "may." The issue was whether a court could take into account an offender's ability to pay when deciding to impose a fine instead of ordering

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36 *Ibid* at paras 22–24.

37 [1959] SCR 121 at 140.

38 2006 SCC 10 [*Lavigne*]. See also *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 54.

forfeiture under subsection 462.37(1) of the *Criminal Code*.[39] Subsection 462.37(3) provided that if a court is satisfied of certain conditions, "the court may, instead of ordering that property or part thereof or interest therein to be forfeited pursuant to subsection (1), order the offender to pay a fine in an amount equal to the value of that property, part or interest." Justice Deschamps concluded that the offender's ability to pay was irrelevant to the decision to order a fine instead of forfeiture:

> According to one interpretation, the word "may" indicates that the court has a broad discretion to adjust the amount of the fine by applying the general principles of sentencing, subject to the specific rules that have been expressly provided for . . . . According to a second interpretation, the word "may" conveys an obligation and is equivalent to "shall" once the court finds that the property cannot be forfeited . . . . Finally, according to a third interpretation, the court has a limited discretion when it imposes a fine, but the offender's ability to pay is not a factor that may be taken into consideration.[40]

After reviewing the various contextual features, she opted for the third interpretation:

> The effect of the word "may" cannot therefore be to grant a broad discretion. The exercise of the discretion is necessarily limited by the objective of the provision, the nature of the order and the circumstances in which the order is made.[41]

b) "Shall" or "Must" Imposes Duties: Mandatory versus Directory

The word "shall" also causes problems in interpretation. "Shall" is used in legislation to impose a duty on persons or to indicate the binding character of conditions or rules.[42] "Shall" is always imperative in the sense that it always imposes binding duties or requirements. The same can be said of "must."[43] The interpretation question that arises in connection with them is determining the consequences of breaching the binding duty or ignoring the binding requirement. Often the legislation

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39 RSC 1985, c C-46.

40 *Lavigne*, above note 38 at para 21.

41 *Ibid* at para 27.

42 Note that "shall" is never used to indicate future action. However, in older legislation, it has been used to define terms ("'X' shall mean . . ."), state rules of law ("this Act shall come into force on royal assent"), and declare legal effects ("it shall be lawful for women to vote"). The present indicative is now used instead.

43 In fact, "must" has been held to entail a "more mandatory obligation and admitting of less discretion" than "shall": see *Lovick v Brough*, [1998] BCJ No 539 at para 7 (SC).

itself stipulates what the consequences are, but when the legislation is silent, the courts or other interpreters must decide. If "shall" or "must" is judged to be mandatory, the result of the breach is total nullity. If it is judged to be directory, the result is an irregularity that can be cured.[44]

The leading authority on the distinction between mandatory and directory "shall" is a passage from the judgment of the Privy Council in *Montreal Street Railway Co v Normandin*:

> The question whether provisions in a statute are directory or imperative [mandatory] has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at . . . . When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.[45]

Generally, "shall" is taken to be mandatory unless this interpretation would lead to unacceptable consequences or is otherwise inappropriate. The *Montreal Street Railway* case describes one type of unacceptable consequence—causing gratuitous hardship to innocent parties or to the public at large. The courts look at other things as well, including context and purpose, to arrive at an appropriate result. As Iacobucci J wrote in *British Columbia (Attorney General) v Canada (Attorney General)*,

> the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.[46]

In *Blueberry River Indian Band v Canada*, Gonthier J wrote:

> This Court has . . . held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory.[47]

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44 Courts sometimes use the word "imperative" as a synonym for "mandatory"; but this is confusing and misleading given the use of "imperative" to mean "binding" in Interpretation Acts.

45 [1917] AC 170 at 174–75 (PC) [*Montreal Street Railway*].

46 [1994] 2 SCR 41 at 123–24.

47 [1995] 4 SCR 344 at para 42.

The courts also rely on a distinction between procedural requirements, which are likely to be considered directory, and substantive requirements, which are mandatory.[48]

Judicial reasoning in response to "shall" is well illustrated by *Canada v Harbour*,[49] in which the Federal Court of Appeal concluded that "shall" in section 55(4) of the *Unemployment Insurance Act* and in section 34(1) of the *Regulations* is directory rather than mandatory. The relevant parts of the Act provide:

> 54(1) No person is entitled to any benefit for a week of unemployment . . . until he makes a claim for benefit for that week in accordance with section 55.
>
> 55(4) A claim for benefit for a week of unemployment in a benefit period *shall* be made within such time as is prescribed [by regulation]. [Emphasis added.]

Section 34(1) of the *Regulations* provided:

> 34(1) . . . a claim for benefit for a week of unemployment . . . *shall* be made within three weeks of the week for which benefit is claimed. [Emphasis added.]

In this case the claimant filed his claim after the lapse of the three-week period. The issue was whether this late submission was an irregularity that could be cured or a nullity that could not.

The court first drew attention to the unfairness that might result from a mandatory reading of these requirements. In this case, for example, the claimant was late through no fault of his own but because the Unemployment Insurance Commission had failed to supply him with the necessary forms. The court also drew attention to the purpose of the requirements, distinguishing between substantive and procedural prerequisites to statutory rights. Because substantive prerequisites are conditions precedent to the right, they must be strictly complied with, or the right does not arise. However, this reasoning does not apply to procedural requirements the purpose of which is merely to facilitate efficient administration of the statutory scheme. Finally, the court relied on context. It pointed out that treating these provisions as mandatory would be inconsistent with other provisions of the Act which clearly contemplated the possibility of payment for late claims. In light of these considerations, the court found that "shall" in this context was

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48 See *Strata Plan LMS 1751 v Scott Management Ltd*, 2010 BCCA 192 at paras 78–82, leave to appeal to SCC refused, [2010] SCCA No 215.

49 (1986), 26 DLR (4th) 96 (FCA).

directory rather than mandatory and that the claimant's missed deadline could therefore be cured.

Not all procedural requirements are held to be directory. In *Doucet v British Columbia (Adult Forensic Psychiatric Services, Director)*,[50] for example, Lambert JA concluded that the "shall" in section 672.47(1) of the *Criminal Code* is mandatory and that a review board's untimely disposition under the section was therefore a nullity. The section read as follows:

> 672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board *shall*, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition. [Emphasis added.]

The accused in the case received a verdict of not criminally responsible on account of mental disorder, but the review board did not hold a hearing and make a disposition until seventy-three days after the verdict had been rendered. Lambert JA wrote:

> If s-s. 672.47(1) stood alone within the section, it might well be difficult to determine whether the provision was intended to be directory, involving no loss of jurisdiction if the time limit were not met, or mandatory, in the sense that failure to comply entails nullity and a loss of jurisdiction. But s-s. 672.47(1) does not stand alone. It is immediately followed by s-s. 672.47(2) which provides that the time limit of 45 days set by s-s. (1) may be extended by the Court to give a total period of up to 90 days under these conditions: "Where the court is satisfied that there are exceptional circumstances that warrant it." . . . It is contrary to one of the most fundamental principles of statutory interpretation to suppose that Parliament enacted a totally ineffective provision. If the "shall" in s-s. 672.47(1) were directory only, and involved no loss of jurisdiction if the time limit was not met, then s-s. 672.47(2) would be wholly ineffective and unnecessary. In my opinion, against the background of s-s. 672.47(2), the imperative "shall" must be construed as being mandatory in the sense that failure to comply entails nullity. If no extension is granted, then the Review Board's initial jurisdiction is lost after the lapse of 45 days from the date of the verdict.[51]

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50 2000 BCCA 195.

51 *Ibid* at para 13.

Lambert JA also pointed out that treating "shall" as directory would have reduced the protection available to an accused suffering from mental disorder, something Parliament would not have intended.

2) "And" and "Or"

a) Joint or Joint and Several "And"

Both "and" and "or" are inherently ambiguous. "And" is always conjunctive in the sense that it always signals the accumulation of the possibilities listed before and after the "and." However, "and" is ambiguous in that it may be joint or joint and several. In the case of a joint "and," every listed possibility must be included: both (a) and (b); all of (a), (b), and (c). In the case of a joint and several "and," all the possibilities may be, but need not be, included: (a) or (b) or both; (a) or (b) or (c) or any two or all three. In other words, the joint and several "and" is equivalent to "and/or."[52]

This ambiguity can always be avoided by drafting so as to indicate which sense of "and" is intended by including phrases such as "any of the following" or "all of the following." In the absence of such clarifying language, which meaning is appropriate depends on the context. When "and" is used before the final item in a list of powers, for example, it is joint and several:

> To carry out the purposes of this Act, the Governor in Council may make regulations respecting
>
> (a) the conditions on which licences may be issued;
> (b) the information and fees that firearm vendors may be required to furnish; and
> (c) the annual fees that firearm owners may be charged.

In this provision the Governor in Council is empowered to make regulations on any one or more of the listed subjects. However, notice what happens if "may" is replaced by "shall." If the Governor in Council is obliged to make regulations respecting (a) conditions, (b) information, *and* (c) fees, the joint and several "and" becomes joint.

b) Exclusive or Inclusive "Or"

"Or" is always disjunctive in the sense that it always indicates that the things listed before and after the "or" are alternatives. However, "or" is ambiguous in that it may be inclusive or exclusive. In the case of an exclusive "or," the alternatives are mutually exclusive: (a) or (b) but not both; (a) or (b) or (c) but only one of them to the exclusion of the others.

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52 In this book, "and/or" is equivalent to "and or or."

In the case of an inclusive "or," the alternatives may be cumulated: (a) or (b) or both; (a) or (b) or (c) or any two or all three.

Like the joint and several "and," the inclusive "or" expresses the idea of "and/or." In the provision conferring powers on the Governor in Council set out above, "and" could be replaced by "or" without changing the meaning. In this context, joint and several "and" is equivalent to inclusive "or."

In legislation, "or" is presumed to be inclusive, but the presumption is rebutted when it is clear from the context that the listed alternatives are meant to be mutually exclusive. For example, many *Criminal Code* provisions say that a person who acts in a certain way is guilty of an indictable offence *and* is liable to imprisonment for a stipulated number of years *or* is guilty of an offence punishable on summary conviction. In this context, the "and" is joint: the person is both guilty of an offence and also liable to punishment. As for "or," the presumption of inclusive "or" is rebutted. Since a given *Code* violation cannot be handled simultaneously through both indictable and summary conviction procedures, the "or" in this provision is exclusive: an indictable offence or a summary conviction offence but not both.

In referring to the inclusive "or," courts sometimes say that the "or" is conjunctive or, worse still, that "or" means "and." "Or" is always disjunctive, and, unless the drafter has made a mistake, "or" should never be understood to mean "and."

CHAPTER 11

PURPOSIVE ANALYSIS

A. INTRODUCTION

To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of the legislation. This includes the purpose of the provision to be interpreted as well as larger units—parts, divisions, and the Act as a whole. Once identified, the purpose is relied on to help establish the meaning of the text. It is used as a standard against which proposed interpretations are tested: an interpretation that promotes the purpose is preferred over one that does not, while interpretations that would tend to defeat the purpose are avoided.

Purposive analysis has become a staple of modern interpretation. It is used not only when the language of a text is found to be ambiguous but in every case and at every stage of interpretation. This reliance is justified by the interaction between language and purpose that is present in all communication. The listener or reader infers the purpose from what is being said and the circumstances in which it is said, and at the same time understands what is being said in light of the purpose.

A strong emphasis on purpose is also justified by a number of legal considerations. First, a purposive approach has been mandated by the legislature. There is a provision in every Canadian Interpretation Act directing interpreters to give to every enactment "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Second, much modern legislation is written in a form

that lends itself to purposive analysis. Provisions are often drafted in general terms and may confer a broad discretion on officials. For courts to discern the proper scope of such provisions, they must know their purpose. A third factor is the *Canadian Charter of Rights and Freedoms*, which came into force in 1982. In its earliest *Charter* decisions, the Supreme Court of Canada emphasized the need for purposive analysis both to give definite meaning to the broad language and complex ideas found in the *Charter* and to test whether legislation found to violate its provisions might be justified under section 1. In working with the *Charter*, Canadian courts have become accustomed to the techniques of purposive analysis.

B. WHAT IS MEANT BY LEGISLATIVE PURPOSE

"Legislative purpose" can refer to a number of things. First, it may refer to the primary aim or object of an enactment—that is, the effect the legislature hopes to produce through the operation of its rules or scheme. This objective could be a social or economic goal, such as job creation, reducing carbon emissions, or finding a cure for a disease. It could be the promotion of specific values or policies, such as multiculturalism or respect for privacy. Many statutes and individual provisions have two or more primary objects that may complement or conflict with one another. In analyzing multipurpose legislation, the courts often have to rank or strike a balance between competing goals.[1]

"Legislative purpose" may also refer to various secondary considerations. These are principles or policies that the legislature wishes to observe, or considerations it is obliged to take into account, in pursuing its primary goals. The legislature never pursues a goal single-mindedly, without qualification, and at all costs. There are always additional or competing factors to be taken into account.[2] These show up in legislation in a variety of ways:

- in words of restriction, qualification, or exception that limit the reach or effectiveness of the main goals
- in provisions that confer discretion on officials, permitting them to respond to a range of factors

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1 See, for example, *R v Steele*, 2014 SCC 61 at paras 25–29 and 35–36; *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 2–4; *R v Katigbak*, 2011 SCC 48 at para 38.

2 This point is made in *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 174.

- in the choice of program design and enforcement mechanism, which may be more, or less, comprehensive and efficacious

Finally, "legislative purpose" refers to the function performed by a provision or a series of provisions in a legislative scheme, or the contribution a provision makes to an existing body of law. It is assumed that every word of legislation, every feature of a legislative text, is there and takes the form it does because it contributes in some particular way to the scheme of the Act or the body of existing law. This contribution is its purpose, its *raison d'être*.

Even though we often speak of "the" purpose of legislation, as if there were only one, it is apparent that most legislation has multiple purposes that operate at different levels of generality. In sophisticated purposive analysis, the interpreter attempts to identify and work with the primary objects, the secondary considerations, and the specific functions of legislation at all levels, from the words to be interpreted and the provision in which they appear to larger units of legislation and the Act as a whole.

In *Febles v Canada (Citizenship and Immigration)*,[3] for example, the Supreme Court of Canada had to interpret article 1F(b) of the *Convention Relating to the Status of Refugees*, which was incorporated into Canadian law by section 98 of the *Immigration and Refugee Protection Act*. Article 1F(b) provided as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> . . .
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

The appellant initially sought refugee protection in the United States where he committed two serious non-political crimes for which he was convicted and served a sentence. To avoid deportation upon his release, he left the United States and sought refugee protection in Canada. He argued that article 1F(b) should be interpreted as applying only to fugitives from justice, and not to people like him who had served their sentences. As explained by McLachlin CJ,

> Despite its facial clarity, the meaning of the phrase "has committed a serious non-political crime" is the subject of debate by courts and academic writers. While there are many variations of these debates, the main issue in the present case is whether "has committed a serious

3 2014 SCC 68.

> . . . crime" is confined to matters relating to the crime committed, or should be read as also referring to matters or events after the commission of the crime, such as whether the claimant is a fugitive from justice or is unmeritorious or dangerous at the time of the application for refugee protection.[4]

After considering the ordinary meaning of the provision and its immediate context, McLachlin CJ turned to the overall purpose of the Convention:

> In *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the *Refugee Convention* "represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other" (para. 15).
>
> I agree with this statement of the *Refugee Convention*'s twin purposes. While exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention*'s broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory. Nor do a treaty's broad purposes alter the fact that the purpose of an exclusion clause is to exclude . . . .
>
> For these reasons, I conclude that consideration of the purposes of the *Refugee Convention* as a whole do not support Mr. Febles' argument that Article 1F (b) is confined to fugitives.[5]

Chief Justice McLachlin then considered the purpose of article 1F(b):

> Mr. Febles argues that the main rationale for Article 1F (b) is the exclusion of fugitives . . . .
>
> The Minister counters that the main rationale for Article 1F (b) is the exclusion of serious criminals because persons who have committed serious offences are by definition undeserving of refugee protection, supported by a secondary rationale of protection of the host society . . . .
>
> The UNHCR argues that Article 1F (b) has two purposes — exclusion of fugitives and exclusion of claimants undeserving of refugee protection at the time it is claimed.
>
> I cannot accept the arguments of Mr. Febles and the UNHCR on the purposes of Article 1F (b). I conclude that Article 1F (b) serves one main purpose — to exclude persons who have committed a serious crime. This exclusion is central to the balance the *Refugee Convention*

4 *Ibid* at para 14.
5 *Ibid* at paras 29–31.

> strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries . . . .
>
> Excluding people who have committed serious crimes may support a number of subsidiary rationales—it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. However, Article 1F (b) cannot be confined to any of these subsidiary purposes . . . .[6]

C. HOW LEGISLATIVE PURPOSE IS ESTABLISHED

Canadian courts establish purpose in the following ways: directly, through descriptions of purpose emanating from the legislature itself or some other authoritative source; and indirectly, through inference drawn from reading the legislative text and examining the external context or tracing the evolution of the provision to be interpreted.

1) Legislative Descriptions of Purpose

The most authoritative statements of purpose are found in purpose statements set out in the body of the statute or regulation and sometimes in preambles as well. Purpose statements normally list the primary goals that legislation is meant to achieve or the principles or policies that should be taken into account in interpreting it. Section 5 of the Yukon's *Environment Act* provides a good example:

> 5.(1) The objectives of this Act are
> (a) to ensure the maintenance of essential ecological processes and the preservation of biological diversity;
> (b) to ensure the wise management of the environment of the Yukon;
> (c) to promote sustainable development in the Yukon;
> . . .
> (g) to facilitate effective participation by Yukon residents in the making of decisions that will affect the environment.
>
> (2) The following principles apply to the realization of the objectives of this Act
> (a) economic development and the health of the natural environment are inter-dependent;

6 *Ibid* at paras 32–36.

> (b) environmental considerations must be integrated effectively into all public decision-making;
>
> . . .
>
> (e) all persons should be responsible for the consequences to the environment of their actions.
>
> (3) This Act shall be interpreted and applied to give effect to the objectives and principles of this section.[7]

Purpose statements are also included within provisions that confer powers or discretion on government entities or officials, to indicate the limits of the powers and to guide the exercise of discretion. For example, section 12 of the *Controlled Drugs and Substances Act* provides:

> **12.** For the purpose of exercising any of the powers described in section 11, a peace officer may
>
> (*a*) enlist such assistance as the officer deems necessary; and
>
> (*b*) use as much force as is necessary in the circumstances.[8]

Although this provision confers considerable discretion on peace officers, the scope of the discretion is limited by the statement of purpose. Any exercise of force that is not for the purpose of exercising a section 11 power would be illegal, tortious, or both.

Preambles usually recite the facts or considerations that led to the enactment of legislation, leaving it to the interpreter to infer the purpose. However, some preambles more closely resemble purpose statements in directly setting out the governing principles or goals to be achieved. A good example is found in the *Youth Criminal Justice Act*:

> WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;
>
> WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;
>
> . . .
>
> AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests

---

7 SY 1991, c 5, s 5. For an example from the federal statute book, see the *Sex Offender Information Registration Act*, SC 2004, c 10.

8 SC 1996, c 19.

> of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;
>
> NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:[9]

While legislative statements of purpose can be helpful, they generally do not take interpreters very far. This is because they focus on primary aims and objects or general principles that tend to be formulated in abstract, sometimes grandiose, language. Also, when more than one purpose is mentioned, they are almost never ranked. It is left to the courts to work out the relationship among the listed purposes and their connection to specific provisions and words.[10]

2) Other Authoritative Descriptions

Descriptions of purpose may also be found in extra-legislative sources such as law reform commission reports, legislative background papers, and the comments of ministers made at the second reading of bills or before the legislative committee studying a bill. Courts look as well to caselaw and to scholarly analyses of legislation for authoritative descriptions of purpose. Although rarely discussed, the authority accorded to legal textbooks, monographs, and law review articles is considerable. Finally, in the case of federal regulations, courts often rely on the regulatory impact analysis statement that is prepared for each regulation and published in the *Canada Gazette*. These statements include a section on background followed by a section on the regulatory objective sought. It is now well-established that these materials may be consulted by the courts for direct descriptions of purpose.

In *Bristol-Myers Squibb Co v Canada (Attorney General)*,[11] for example, the Supreme Court of Canada was concerned with the *Patented Medicines (Notice of Compliance) Regulations*, which regulated the relationship between the patent holders of innovative drugs and generic drug manufacturers. Before the enactment of Bill C-91 in 1993, generic drug manufacturers benefited from a compulsory licensing scheme which enabled them to market a generic version of patented drugs before expiry of the patent. Bill C-91 introduced a new scheme, implemented in

9 SC 2002, c 1, preamble.

10 See *M v H*, [1999] 2 SCR 3 at para 100.

11 2005 SCC 26 [*Bristol-Meyers*].

part through the *Regulations*. To determine the purpose of the *Regulations*, the court relied not only on precedent and the regulatory impact analysis statement but also on statements from Canada's submission to the World Trade Organization responding to a complaint that its patent legislation violated the international *Agreement on Trade-Related Aspects of Intellectual Property Rights*. Justice Binnie wrote:

> This Court has accepted the view that Parliament enacted Bill C-91 "with the intent of thwarting the possible appropriation by generic drug companies, such as Apotex, of the research and development initiatives of innovators, such as Merck" (*Apotex v. Canada (Attorney General)*, *per* Robertson J.A., at p. 752 (emphasis added), whose reasons were substantially adopted by this Court at 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100).
>
> The Regulatory Impact Analysis Statement . . . confirms that this was the intention of the regulator. It says that following the abolition of the compulsory licensing system, the government enacted the *NOC Regulations* in order to protect the right of patentees by preventing generic manufacturers from marketing their products until the expiry of all relevant patents . . . . The relevant portion of the Regulatory Impact Analysis Statement reads:
>
> > . . . As a general rule, judicial remedies are sufficient to address patent infringement. However, with the enactment of Bill C-91 the government has created an exception to patent infringement allowing generic competitors to undertake any activities necessary to work up a submission to obtain regulatory approval of a product. This removes a patent right that may have otherwise been available to patentees to prevent generic competitors from obtaining such regulatory approval of their products.
> >
> > These Regulations are needed to ensure this new exception to patent infringement is not abused by generic drug applicants seeking to sell their product in Canada during the term of their competitor's patent while nonetheless allowing generic competitors to undertake the regulatory approval work necessary to ensure they are in a position to market their products immediately after the expiry of any relevant patents . . . .
>
> . . . It seems clear that the *NOC Regulations* were introduced to help generic drug companies and at the same time curb potential patent abuse by them. This was confirmed by Canada's submissions to the World Trade Organization ("WTO") . . . . In effect, the WTO accepted

> Canada's argument that Bill C-91 achieved a fair compromise between important social interests in health (represented by cheaper generic drugs) balanced against the interests of patentees . . . .[12]

3) Purpose Inferred from Text

Most often the purpose of legislation is established simply by reading the words of the legislation. Sometimes the focus is on the provision to be interpreted, read in the context of the interpreter's common sense[13] as well as his or her individual knowledge, values, and beliefs. Interpreters rely on this contextual material, first, to surmise what effects are likely to result from the operation of the legislation and, second, to conclude which possible effects are desirable. The desirable effects are presumed to be the intended goals of the legislation.

A simple example of this sort of reasoning is found in the judgment of Cory J in *R v Heywood*.[14] The court there was concerned with a *Charter* challenge to section 179(1) of the *Criminal Code*, which made it an offence for persons previously convicted of designated sexual crimes to be "found loitering in or near a school ground, playground, public park or bathing area." Justice Cory wrote:

> The section is aimed at protecting children from becoming victims of sexual offences. This is apparent from the places to which the prohibition of loitering applies. School grounds, playgrounds, public parks and public bathing areas are typically places where children are likely to congregate. The purpose of the prohibition on loitering is to keep people who are likely to pose a risk to children away from places where they are likely to be found.[15]

In this passage Cory J is able to identify the purpose of the section simply from reading its terms because of the knowledge he brings to the text: the vulnerability of children to the crimes designated in the section, the importance of protecting children from harmful interference by strangers, and the opportunity for such interference in places like beaches and parks. Drawing on this knowledge, he surmises that the effect of the provision would be to reduce the exposure of children

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12 *Ibid* at paras 45–47. [Emphasis in original.] Reliance on disparate authoritative descriptions of purpose is also illustrated by the judgment of the Supreme Court of Canada in *Thibodeau v Air Canada*, 2014 SCC 67.

13 The importance of "common sense" in statutory interpretation is discussed in Chapter 2.

14 [1994] 3 SCR 761.

15 *Ibid* at 786.

to sexual predators. Since this is clearly a desirable goal, it may plausibly be imputed to the legislature. Since the information and values assumed by Cory J are non-controversial and are likely to be shared by nearly everyone, his analysis seems cogent and persuasive.

Another example is found in *R v Hasselwander*. Here the issue was the meaning of "capable of firing bullets in rapid succession" in subsection 84(1) of the *Criminal Code*. Justice Cory wrote:

> In my view, any uncertainty as to whether the word "capable" means either "immediately capable" or "readily capable", is resolved as soon as the word is interpreted in light of the purpose and goals of the prohibited weapons provisions of the *Code* . . . .
>
> Let us consider for a moment the nature of automatic weapons . . . . These guns are designed to kill and maim a large number of people rapidly and effectively . . . . They are not designed for hunting any animal but man. They are not designed to test the skill and accuracy of a marksman . . . . There is good reason to prohibit their use in light of the threat which they pose and the limited use to which they can be put. Their prohibition ensures a safer society . . . .
>
> Canadians, unlike Americans do not have a constitutional right to bear arms. Indeed, most Canadians prefer the peace of mind and sense of security derived from the knowledge that the possession of automatic weapons is prohibited.[16]

In other words, the purpose of the provisions is to curtail the use of automatic weapons so that a majority of the population can be secure and feel secure. Since automatic weapons are assumed to have no meritorious uses,[17] the balance between community protection and individual freedom weighs heavily on the side of protection.

4) Scheme Analysis

Although purpose can be inferred from reading the provision to be interpreted in isolation, it is usually helpful to consider the role of the provision in the context of the legislative scheme of which it is part. This entails analyzing its relationship to other provisions in the Act and related legislation.[18] There may be a common theme that runs through a series of provisions, suggesting a shared aim or concern. Or there may be a division of labour implicit in the provisions, with each performing a

16 [1993] 2 SCR 398 at 413–14.

17 Of course, not everyone would agree with this assumption. Justice Cory's judgment illustrates the frequently value-laden dimension of statutory interpretation.

18 Reliance on these aspects of context is discussed in Chapter 10.

distinct function. This type of reasoning and analysis is illustrated in the judgment of the Supreme Court of Canada in *R v Chartrand*.[19]

In this case the court had to decide what significance, if any, to attach to the word "unlawfully" that appeared in the English version of section 281 of the *Criminal Code*. That section made it an offence for a stranger to "unlawfully" take, entice away, detain, or harbour a child with intent to deprive the child's lawful guardian of possession. After reviewing the legislative evolution of the provision and noting that the word "*illégalement*" had been eliminated from the French version in a previous amendment, the court turned to purposive analysis. It identified the purpose of the provision by examining its place in the relevant legislative scheme. Justice L'Heureux-Dubé wrote, "In this examination of the purpose of s. 281, it is necessary to look at the whole scheme designed by Parliament to deal with such related offences as kidnapping, hostage taking and abduction . . . [which are set out in] ss. 279 to 286 of the *Code*."[20] Those sections, she went on to point out, offer a complete list of offences relating to the theme of abduction. Since legislative schemes are presumed to be coherent, where the legislature enacts a series of provisions dealing with similar or related matters, the interpreter may reasonably suppose that there are reasons why more than one provision was enacted, that each provision does distinct work, and that the parts comprise a sensible whole. In keeping with these presumptions, L'Heureux-Dubé J turned to consider the role and function of each provision in the series.

She began by noting that sections 279 and 279.1 dealt with kidnapping and hostage taking generally while sections 281 to 283 dealt with the abduction of children. She pointed out that in the first two sections, the consent of the abducted person was a defence whereas in sections 281 to 283 the consent of the abducted child was not a defence. She also noted that in sections 281 to 283 the taking had to be done with intent to deprive the lawful guardian of the child. She then asked herself "why?" What idea or purpose did the legislature have in mind that could account for these similarities and contrasts? She reached the following conclusion:

> [I]n ss. 279 and 279.1, the focus is on the person abducted while, in ss. 281 to 283, the focus is on the parents (guardians, etc.) since only their consent, and not that of the taken child, could constitute a defence. Therefore, it would appear that ss. 279 and 279.1 are offences against the person abducted, while ss. 281 to 283 are mainly offences against the rights of the parents (guardians, etc.) of the abducted child.
>
> . . .

19 [1994] 2 SCR 864.

20 *Ibid* at 879. See also *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 21.

> Seen in that context, the purpose of s. 281 is to secure the right and ability of parents (guardians, etc.) to exercise control over their children (those children for whom they act as guardians, etc.) for the protection of those children . . . . It is also a recognition by Parliament that children are best protected by the supervision of their parents (guardians, etc.).[21]

To the extent L'Heureux-Dubé J succeeds in connecting the legislature's purpose to specific details of the text and making sense of these details in terms of the legislative scheme, her account of the purpose is persuasive.

5) Purpose Inferred from Mischief to Be Cured

When carrying out a purposive analysis, courts sometimes refer to the mischief rule, also known as the rule in *Heydon's Case*.[22] *Heydon's Case* was decided in 1584 and has been cited ever since for the following passage:

> [F]or the sure and true interpretation of all statutes . . . four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy.[23]

On this approach, an enactment is to be understood as an attempt to solve a problem, suppress an evil, or deal with an inadequacy in existing law. The court discovers the purpose by locating the "mischief" it was meant to cure. More precisely, the court looks at the legal and external contexts[24] existing at the time the legislation was enacted, and it identifies the purpose by matching the "remedy"—the provision(s) adopted by the legislature—with the "mischief" to which they are a plausible response.

This approach was used by the Supreme Court of Canada in *Reference re Supreme Court Act, ss 5 and 6*[25] in interpreting the following provisions:

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21 Above note 19 at 879–80. See also *Wood v Schaeffer*, 2013 SCC 71 at para 47ff.

22 (1584), 76 ER 637.

23 *Ibid* at 638.

24 These contexts are explained in Chapter 3.

25 2014 SCC 21.

> 5. Any person may be appointed a judge [of the Supreme Court of Canada] who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
>
> 6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

It was clear that under section 5 a former member of the bar of a common law province could be appointed to the Supreme Court of Canada if he or she had been a member of that bar for at least ten years. The issue was whether section 6 not only established a minimum number of appointments from Quebec but also restricted eligibility to persons who were currently judges of the Court of Appeal or Superior Court of the province or currently members of the Quebec bar. In determining the purpose of section 6, the court looked to the historical concerns that led to the inclusion of section 6 in the first place. The majority wrote:

> At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law (Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992), at pp. 4-5; Russell, at pp. 8-9). Various Members of Parliament for Quebec expressed concerns about a "Supreme Tribunal of Appeal" that would be
>
> > composed of Judges, the great majority of whom would be unfamiliar with the civil laws of Quebec, which tribunal would be called upon to revise and would have the power to reverse the decisions of all their Quebec Courts . . . . (*Debates of the House of Commons*, 2nd Sess., 3rd Parl. ("*1875 Debates*"), March 16, 1875, at p. 739, Henri-Thomas Taschereau, M.P. for Montmagny, Quebec)
>
> The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebec's concerns. Most significantly, the amended bill that became the *Supreme Court Act* provided that two of the six judges "shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec": s 4 of the 1875 Act.
>
> . . .
>
> Quebec's confidence in the Court was dependent on the requirement of two (one third) Quebec judges. Jacques-Olivier Bureau, a Senator from Quebec, saw fit to "trust the rights of his compatriots . . .

> to this Supreme Court, as he considered their rights would be quite safe in a court of which two of the judges would have to be taken from the Bench of that Province" (*Debates of the Senate*, 2nd Sess., 3rd Parl., April 5, 1875, at p. 713). The comments of Joseph-Aldéric Ouimet, Liberal-Conservative Member for Laval, also underline that it was a matter of confidence in the Court:
>
> > In Quebec an advocate must have ten years' practice before he can be a Judge. The Judges from the other Provinces might have the finest intelligence and the best talent possible and yet not give such satisfaction to the people of Quebec as their own judiciary.
> > (*1875 Debates*, March 27, 1875, at p. 940)
>
> . . .
>
> Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.[26]

On this basis, the court found that a judge of the Federal Court who had been a member of the Quebec bar for nineteen years but was no longer a member was ineligible for appointment to the court.

6) Purpose Inferred from Legislative Evolution

The purpose of legislation can also be established by tracing its evolution from initial enactment through subsequent amendments and revisions to its current form. Generally, the court begins by inferring the original purpose of legislation, from its original terms or perhaps from the mischief it was originally designed to cure. It must then determine

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26 *Ibid* at paras 50–51, 54, and 56. For other examples of reliance on the mischief rule, see also *R v Quesnelle*, 2014 SCC 46 at para 14; *Richard v Time Inc*, 2012 SCC 8 at paras 38–41; *Re Canada 3000 Inc*, 2006 SCC 24 at para 36ff; *AstraZeneca Canada Inc v Canada (Minister of Health)*, 2006 SCC 49 at para 12ff.

whether this purpose has changed in the course of subsequent amendments.

In *Montréal v 2952-1366 Québec Inc*,[27] for example, a majority of the Supreme Court of Canada reviewed the evolution of the authority conferred on the City of Montreal to deal with nuisance caused by noise. Chief Justice McLachlin and Deschamps J noted that since 1851 the city had the authority to adopt bylaws for the peace and welfare of the city and for the "prevention and suppression of all nuisances." Since 1865 the city had been legislating for the purpose of controlling noise. Its first effort was a single article in a *By-law to Preserve Public Peace and Good Order*, which prohibited the wilful use of "any bell, horn, or bugle, or other sounding instrument." In 1937 the city adopted the first bylaw dealing exclusively with noise. It included a provision that prohibited "sounds produced by sound equipment and projected from a building into a public space." Chief Justice McLachlin and Deschamps J wrote:

> The purpose of the provision was apparently to prohibit sounds produced by equipment located inside a building at a volume such that a court could conclude that the person in control of the building intended the sounds to be heard by people in public spaces. The purpose of the prohibition was to preserve the peaceful nature of public spaces.[28]

By 1994, Montreal's noise bylaw had expanded to twenty-one sections. Section 9 prohibited "noise produced by sound equipment, whether it is inside a building or installed or used outside" if the noise "can be heard from the outside." On the basis of this review, McLachlin CJ and Deschamps J concluded:

> Although the wording [of this provision] has been modified over the years, all the provisions adopted since 1937 have had as their purpose the elimination of sounds emitted by sound equipment inside or outside a building at a volume such that they are audible and thus interfere with citizens' peaceful enjoyment of public spaces. The underlying objective of all these by-laws has been to preserve the peaceful nature of public spaces.[29]

In the Montreal case, the court concluded that the purpose of the provision in question had not changed since its initial enactment in 1937. However, changes in the wording of legislation often reflect significant changes in legislative policy or a distinct evolution in legis-

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27 [2005] 3 SCR 141 [*Montréal*].

28 *Ibid* at para 20.

29 *Ibid* at para 22. See also *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25 at paras 28–35; *R v Sinclair*, 2011 SCC 40 at para 78.

lative thought. In *Zeitel v Ellscheid*,[30] for example, the Supreme Court of Canada concluded that an important purpose of the *Municipal Tax Sales Act* (*MTSA*) was to facilitate the sale of property for non-payment of municipal tax, and for this purpose sales had to be final and secure, with minimum risk of challenge by previous owners. However, as the court noted, the *MTSA* contained a number of provisions designed to protect the interests of previous owners by permitting challenges to tax sales on a number of grounds. Clearly, in enacting the *MTSA*, the legislature sought to strike a balance between the competing interests of previous and current owners. This was the primary purpose of the part of the legislation to be interpreted. The interpretive challenge here was to determine how that balance should be, or was intended to be, struck—what weight should attach to each competing interest.

In rising to this challenge in the *Zeitel* case, the court relied on the historical evolution of the Act. Justice Major wrote:

> As purchasers must be assured of the integrity of title, the legislature has stated that, with few exceptions, once a tax deed is issued, it is final and binding. In recent years, the legislation has been amended to better ensure finality . . . . [Section] 13(1) was introduced to abolish the power of courts to declare tax sales invalid on the basis that an assessment was invalid . . . . Similarly, the *MTSA* does not contain a provision found in predecessor legislation which allowed a tax deed to be attacked within two years of issue.[31]

The common theme of the amendments was to minimize the opportunity of previous owners to recover land sold for arrears. This focus suggested an increasing legislative commitment to security of title. Although the interests of previous owners had not been totally abandoned, given the trend of the legislative evolution, it was fair to conclude that protecting the interests of current owners had become the more pressing concern.[32]

D. USES OF PURPOSIVE ANALYSIS

Purpose is relied on in many ways in statutory interpretation. Competent language users normally consider the apparent purpose of a

30 [1994] 2 SCR 142 [*Zeitel*].

31 *Ibid* at 152. A similar analysis is found in the dissenting judgment of Bastarache J in *Bristol-Myers*, above note 11.

32 For further discussion of the legislative evolution of provisions and its use in interpretation, see Chapter 16.

statement in constructing its ordinary meaning. Purpose is relied on to clarify doubts about the scope of generally worded provisions or to establish limits on the exercise of statutory powers: a power extends only to things that are rationally related to its purpose. It is also relied on to resolve ambiguity: the meaning that better promotes the purpose is the one that is preferred. As the Supreme Court of Canada noted in *Celgene Corp v Canada (Attorney General)*, "the words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute."[33]

The issue in the *Celgene* case was how to interpret the word "sold" in the provisions of the *Patent Act* conferring authority on the Patent Medicine Prices Review Board to review the price at which a patentee's medicine "is being or has been sold in any market in Canada." Celgene argued that "sold" is a legal term of art that should be given its commercial, private law meaning. On this interpretation, the sales in question occurred in New Jersey rather than Canada, and the board therefore had no authority to review them. The board rejected this argument on the following grounds, as summarized by Abella J:

> While commercial law principles for determining where a sale took place are helpful in enforcing contractual terms and determining the physical location at which risk to the goods and transportation costs pass from the vendor to the purchaser, the Board concluded that its authority under the *Patent Act* is unrelated to allocation of risk, cost of transportation, or choice of law in a contractual dispute. Because its mandate includes protecting Canadians from excessive prices that may be charged for patented medicines, it concluded that sales "in any market in Canada" include sales of medicine that are regulated by Canadian law, that will be delivered and used in Canada, and where the cost of the medicine will be borne by Canadians.[34]

The Supreme Court of Canada agreed. Justice Abella noted that "sold" might well have a commercial law meaning in other parts of the *Patent Act* but that in the context of these provisions the meaning adopted by the board was more appropriate:

> In my view, therefore, the legislative context and the consumer protection purpose of ss. 80(1)(*b*), 83(1) and 85 of the *Patent Act* support the Board's conclusion that, based on the language of those provisions, it has authority over Celgene's sales . . . .[35]

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33 2011 SCC 1 at para 21 [*Celgene*].
34 *Ibid* at para 10.
35 *Ibid* at para 32.

Purpose may be used not only to resolve doubt or ambiguity but also to "create" it, or more precisely to reveal the presence of an interpretive problem. When the ordinary meaning of a provision appears to be clear but conflicts with the legislature's apparent purpose, there is work to be done. An interpretation must be sought that accords with the purpose without imposing too great a strain on the text.[36]

Probably the most common use of purposive analysis is to clarify the scope of general language.[37] The scope of a word or expression is the range of things to which it applies. In the prohibition "No vehicles are allowed in the park," the range of reference of the word "vehicle" is doubtful. Presumably it applies to cars and buses. But does it also apply to toy wagons? to bicycles? to motorized wheelchairs? Does it apply to an ambulance responding to an in-park emergency? Should "vehicle" be defined broadly to include any means of transport or narrowly to include only some means of transport—those driven by an internal combustion engine or those that make a lot of noise? These are questions of scope.

Questions of scope are often answered by referring to the purpose of the provision. If the sole purpose of the "no vehicles in the park" prohibition were to minimize exhaust fumes, the broad definition should be rejected as overinclusive because it would make the prohibition applicable to vehicles like bicycles and wagons which, being fumeless, have no relation to the purpose. Conversely, if the park had no pathways and if the purposes were to protect the grass and ensure the safety of picnickers, the narrower definitions should be rejected as underinclusive. They would prevent the prohibition from applying to bicycles and wagons which, being capable of spoiling grass and interfering with picnics, are related to these purposes.

Use of purposive analysis to clarify the scope of legislation is illustrated by the Supreme Court of Canada in *John Doe v Ontario (Finance)*,[38] which dealt with an access to information request made under Ontario's *Freedom of Information and Protection of Privacy Act*. The appellant requested any records in the Ministry of Finance concerning the coming into force date of a provision that retroactively closed a loophole in the *Corporations Tax Act*. Although the ministry uncovered a number of policy option papers dealing with this subject, it refused to disclose them, relying on subsection 13(1) of the Act: "A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant . . . ."

An adjudicator from the Office of the Information and Privacy Commissioner ordered the disclosure of any information in these rec-

36 *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 47.

37 *Montréal*, above note 27 at para 23.

38 2014 SCC 36 [*John Doe*].

ords that did not reveal a preferred course of action either expressly, as in a "recommendation," or by inference, as in "advice." She relied on an Ontario Court of Appeal decision holding that although the ordinary meaning of "advice" could include information or intelligence that did not imply a particular course of action, to interpret "advice" so broadly would be inconsistent with the purpose of the Act. The Supreme Court of Canada held that limiting the term "advice" to an implied recommendation was unduly narrow given the important purpose of subsection 13(1): "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[39] The court instead interpreted "advice" in subsection 13(1) as including the presentation of various policy options, opinions concerning the advantages and disadvantages of each option, and considerations to be taken into account in making the decision. It concluded that this interpretation accords with the balance struck by the legislature between the goal of ensuring that the government receives effective non-partisan advice and the goal of providing the public with a meaningful right of access to information.[40]

In the *John Doe* case, purposive analysis led the court to choose the broader of two plausible interpretations. This outcome is in keeping with the conventional rhetoric of statutory interpretation, which associates purposive analysis with liberal applications. In practice, however, a purposive approach often leads to a narrower rather than a broader interpretation. Much modern legislation is written in general terms with minimal qualifications and exceptions. The resulting style is likely to be overinclusive, and to correct for this tendency, to bring the scope of the legislative language in line with the purpose, the court must read it down. It must, in effect, add words of limitation or qualification or exception to the provision. In this way the court ensures a rational connection between the purpose of the provision and the things to which it applies.

In *R v Khawaja*,[41] for example, the Supreme Court of Canada had to interpret section 83.18 of the *Criminal Code*, which provided as follows:

> **83.18** (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

39 *Ibid* at para 43.
40 *Ibid* at paras 46–47.
41 2012 SCC 69.

The appellant, Khawaja, argued that section 83.18 is overly broad and therefore contrary to section 7 of the *Canadian Charter of Rights and Freedoms* because participating in or contributing to virtually any activity of a terrorist group could be viewed as intended to enhance the group's ability to facilitate or carry out terrorist activities. A lawyer or doctor providing professional service to a member of a terrorist group could be convicted under the section. This argument did not succeed. Speaking for the court, McLachlin CJ wrote:

> The first step in assessing the validity of this argument is to interpret s. 83.18 to determine its true scope.
>
> . . .
>
> The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose. That purpose is "to provide means by which terrorism may be prosecuted and prevented" . . . *not* to punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.
>
> This purpose commands a high *mens rea* threshold. To be convicted, an individual must not only participate in or contribute to a terrorist activity "*knowingly*", his or her actions must also be undertaken "*for the purpose*" of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The use of the words "for the purpose of" in s. 83.18 may be interpreted as requiring a "higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity" . . . .
>
> To have the *subjective* purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must *specifically intend* his actions to have this general effect . . . .
>
> The effect of this heightened *mens rea* is to exempt those who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists—for example, such as occurs in normal interactions with friends and family members—will not, absent the specific intent to enhance the abilities of a terrorist group, permit a conviction under s. 83.18.[42]

By understanding "for the purpose" to mean having a specific subjective intent to enhance terrorist activities, the potential for overbreadth was significantly diminished.

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42 *Ibid* at paras 43–47. [Citations to authority omitted. Emphasis in original.]