ANNUAL SURVEY OF CANADIAN LAW

CONSTITUTIONAL LAW

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I. INTRODUCTION

Ours has been described as a turbulent and disturbed-reactive environment, one of increased complexity and of a heightened level of relevant uncertainty.[1] Yet in a survey of the constitutional jurisprudence which has evolved over the past three years,[2] some areas have provided few, if any surprises. The extension of the right of individual citizens to challenge the constitutionality of legislation, for example, is understandable even though it may have no more utility than I had first suspected.[3] Likely no one was surprised either by the continuation of the flow of decisions in relation to section 253 of the Criminal Code[4] or by the increase in cases relating to custody and maintenance after the decisions in *Jackson*[5] and *Zacks*.[6] However, after the election of the Trudeau government in 1974 on a platform that specifically denied any chance of wage and price controls, one would not have anticipated a case involving the issues raised in the *AIB Reference*.[7] Still, once the issues in the case were presented to the Supreme Court, the result was predictable.

It is unfortunate that the Supreme Court has not been as predictable in more of its decisions. Decisions such as those rendered in the *AIB* case[8] (the general power), the *Dionne* case[9] (communications), and the *CIGOL* case[10] (taxation) may be seen as clear indications of a centralist trend in the Supreme Court. On the other hand, those rendered in the

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[1] Emery & Trist, *The Causal Texture of Organizational Environments*, 18 HUMAN RELATIONS 21 (1965). *See also* Paquet, *The Regulatory Process and Economic Performance*, in THE REGULATORY PROCESS IN CANADA (G. Doern ed.) (to be published).

[2] This Survey analyzes the decisions reported for the period July 1, 1974 through June 30, 1977. However, as might be expected, I have included comments on some significant decisions rendered after June, 1977. For a discussion of cases prior to July 1, 1974, *see* MacKenzie, *Annual Survey of Canadian Law: Constitutional Law*, 7 OTTAWA L. REV. 138 (1975).

[3] After a long battle to get status to challenge the constitutionality of the Theatres and Amusements Act of Nova Scotia, R.S.N.S. 1967, c. 304, Gerry McNeil lost the final round when the Supreme Court of Canada declared the Act to be *intra vires*. *See* Nova Scotia Bd. of Censors v. McNeil, 25 N.S.R. (2d) 128 (S.C.C. 1978) (5:4 decision), *rev'g in part* 14 N.S.R. (2d) 225 (C.A. 1976) (4:0 decision).

[4] R.S.C. 1970, c. C-34.

[5] Jackson v. Jackson, [1973] S.C.R. 205, [1972] 6 W.W.R. 419, 8 R.F.L. 172, 29 D.L.R. (3d) 641 (9:0 decision), *rev'g* 22 D.L.R. (3d) 583 (B.C.C.A. 1972), *aff'g* 21 D.L.R. (3d) 112 (B.C.S.C. 1971).

[6] Zacks v. Zacks, [1973] S.C.R. 891, [1973] 5 W.W.R. 289, 10 R.F.L. 53, 35 D.L.R. (3d) 420 (9:0 decision), *rev'g on other grounds* 29 D.L.R. (3d) 99 (B.C.C.A. 1972).

[7] Reference *Re* Anti-Inflation Act, [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452 (7:2 decision).

[8] *Id.*

[9] Public Serv. Bd. v. Dionne, 83 D.L.R. (3d) 178 (S.C.C. 1977) (6:3 decision), *rev'g* Dionne v. La Régie des services publics, (Que. C.A. Jan. 12, 1977) (3:0 decision).

[10] Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, [1977] 6 W.W.R. 607 (S.C.C.) (7:2 decision), *rev'g* 65 D.L.R. (3d) 79 (Sask. C.A. 1975) (5:0 decision), *aff'g* [1975] 2 W.W.R. 481 (Sask. Q.B. 1974).

Canadian Indemnity case[11] (status of companies), and the *Vapour* case [12] (trade and commerce) could be construed as indicating a provincialist Court. There are of course obvious limits to predictability. However, as a result of the decisions of the Supreme Court we are either in, or are about to enter into, the worst of all possible worlds: a world of inconsistent inconsistency. If this continues, it may well be that the role of the Supreme Court in constitutional matters will have to be examined more closely.

Anticipation of constitutional litigation over the linguistic policies of the Bourassa government has been dwarfed by the real constitutional shock which has occurred during the review period: the election of the Levesque government in Quebec. No doubt legislation such as Bill 101 will in time result in as much litigation as anything that the Bourassa government might have enacted. To date, the problems raised by the election of Premier Levesque are largely political and basically beyond the scope of this review. Nevertheless one or two comments seem appropriate.

First, constitutional review and the national unity question have become, in the words of some skeptics, the only growth sector of the Canadian economy. As beneficial as this may be for those of us who are engaged in the constitutional industry, continued inconsistencies by the Supreme Court may result in the productivity of this industry being no greater than that of other service sectors of the economy.

Secondly, the use of the referendum as proposed in Mr. Burns' White Paper[13] is constitutionally valid and perhaps is a necessary stage in the evolution of a so-called participatory democracy. As I have said elsewhere in a slightly different context:

> Today, the gap between the policy intentions of politicians and the implementing expertise of the legislative draftsmen may well be even wider. If we cannot be confident that our elected representatives fully understand that the language of legislation produced by civil servants will in fact accomplish what is intended, then we can just as well dispense altogether with the elected representatives. If such a gap exists we can be no worse off with a system of direct participatory democracy by referendum on every single legislative act that may govern our existance [*sic*].[14]

It must be emphasized that any form of majority rule, even by democratic means, can degenerate into mob rule unless there are some real

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[11] Canadian Indemnity Co. v. Attorney-General of British Columbia, [1977] 2 S.C.R. 504, 11 N.R. 466, 73 D.L.R. (3d) 111 (1976) (8:0 decision), *aff'g* 63 D.L.R. (3d) 468 (B.C.C.A. 1975) (2:1 decision), *aff'g* 56 D.L.R. (3d) 7 (B.C.S.C. 1974).

[12] MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134, 7 N.R. 477, 66 D.L.R. (3d) 1 (1976) (7:0 decision), *rev'g* 33 D.L.R. (3d) 434 (F.C. App. D. 1972) (3:0 decision), *aff'g* 6 C.P.R. (2d) 204 (F.C. Trial D. 1972).

[13] Burns, *Consulting the People of Quebec* (Gov't of Quebec, 1977) and Projet de loi 92, 31ème Leg. Que., 2ème sess., 1977.

[14] MacKenzie, *Planning the B.N.A. Act*, 6 OTTAWA L. REV. 332, at 373 (1974).

constitutional constraints upon the will of the majority to protect minorities and the constitution itself. In this regard, the fact that Canada has no domestic amending formula for the division of legislative powers may have been, and may yet turn out to be, a very great blessing rather than the barrier to Valhalla that so many persons on both sides of the national unity debate seem to think it is.

Thirdly, the on-again-off-again attitude of Canadian courts toward the exact status of the Canadian Bill of Rights[15] not only contributes to the general malaise of inconsistency, but directs debating and analytical energies away from the issue of what desirable checks on potential mob rule are to be found in the Canadian constitution.

Finally, the need to avoid mob rule is being countered by the trend of judicial acceptance of "necessity" as the basis for allocation of legislative power to both levels of government under sections 91 and 92. This will lead to functional concurrency in areas other than criminal law.[16] Increased functional concurrency will reduce the number of checks on arbitrary actions of politicians and citizens and is as subversive to the Canadian constitution as is any talk of separatism.

II. The Division of Legislative Power

A. *The General Power*

The major decision in this area, the *AIB Reference*,[17] has created as many problems as it has solved. Stated briefly, the result of the decision is that although the control of wages and prices (like the control of contractual matters generally) is a matter coming within section 92(13), Property and Civil Rights, in a period of sufficient crisis Parliament may exercise jurisdiction, temporarily, over these matters. (Of course, it may also do so under emergency conditions such as war or apprehended insurrection.) Of the five judges who took this view, three (Ritchie, Pigeon and Martland JJ.) found that the evidence produced by the federal government justified a finding of such a crisis. The Laskin group (which concurred in the result with the Ritchie group), was prepared to find a new aspect to wages and prices which was outside section 92 and therefore within the purview of the general power: the concept of inflation.

In the result, the Anti-Inflation Act[18] was declared to be *intra vires* Parliament by a majority of seven to two. As a subsidiary but determinant point, the Court also found that the Act did not apply to the

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[15] R.S.C. 1970, App. III.

[16] *See* Leigh, *The Criminal Law Power: A Move Towards Functional Concurrency?*, 5 Alta.L. Rev. 237 (1967).

[17] *Supra* note 6.

[18] S.C. 1974-75-76, c. 75.

public employees of the Province of Ontario because the provincial Order in Council setting up the agreement with the federal government did not have any legislative base.[19]

The decision has already received considerable attention[20] and no doubt before long every path of its labyrinth will be explored. Consequently I shall only outline two major problems resulting from the case.

The decision has substituted "crisis" for "emergency" as the basis for the temporary transfer of provincial matters to Parliament's jursidiction without giving any clear indication of the limits of the concept of crisis. Clearly an economic crisis is sufficient but even that is somewhat murky. The concept of crisis is too open-ended, especially since, in the opinion of the minority (the Laskin judgment), it would give Parliament permanent jurisdiction.

The second major problem that stems from both the Laskin and Ritchie judgments is rooted in the amount of evidence that will be necessary to justify the judicial finding of a crisis. One is tempted to applaud a move to widen the ambit of evidence that will be admissible in constitutional decisions. However, if the move is not accompanied by a formulation of the amount of evidence necessary to preclude the Supreme Court from taking no more than a cursory glance at the reality of any alleged crisis we have gained very little.

I am not stressing here the admissibility of evidence. In fact it would be far more rational to admit all evidence and base decisions on the weight to be attached to that evidence. It is on this point of weight that the decisions of Laskin and Ritchie are deficient. For example, it makes little sense to admit statements of a minister of the Crown as to how a particular piece of legislation is being administered but to reject his or her statements about the intent of the legislation.[21]

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[19] For a similar result on this point alone *see* Manitoba Government Employees' Ass'n v. Manitoba, 17 N.R. 506 (S.C.C. 1977) (5:4 decision), *rev'g* on appeal *per saltum*, *Re* Manitoba Gov't Employees' Ass'n, 74 D.L.R. (3d) 672 (Man. Q.B. 1976).

[20] *See*, *e.g.*, Abel, *The Anti-Inflation Judgment: Right Answer to the Wrong Question?*, 26 U. TORONTO L.J. 409 (1976); Buglass, Lyon and MacKenzie, *Three Comments on the A.I.B. Reference*, 9 OTTAWA L. REV. 169 (1977); Tennenhouse, *The Emergency Doctrine and the Anti-Inflation Case: Prying Pandora's Box*, 8 MAN. L.J. 445 (1977); Hogg, *Proof of Facts in Constitutional Cases*, 26 U. TORONTO L.J. 386 (1976); Chevrette and Marx, Comment, 54 CAN. B. REV.732 (1976).

[21] *See*, *e.g.*, Canex Placer Ltd. v. Attorney-General of British Columbia, [1976] 1 W.W.R. 644, 63 D.L.R. (3d) 282 (B.C.S.C. 1975). Naturally I prefer the approach of Disbery J. in Central Canada Potash Co. v. Attorney-General for Saskatchewan, [1975] 5 W.W.R. 193, 57 D.L.R. (3d) 7 (Sask. Q.B.). In allowing the subsequent appeal, the Court of Appeal rejected much of the evidence admitted by Mr. Justice Disbery and came to a different conclusion: [1977] 1 W.W.R. 487 (Sask. C.A.). On the admission of extrinsic evidence, Chief Justice Culliton stated for the court, at 504:

> In my respectful view, the issues on the constitutional problems which are to be faced in this case are so readily determinable from the impugned regulations, licences and directives that most of the extrinsic evidence which was admitted was inadmissible and unneces-

This dichotomy is usually justified on the foolish notion that a legislative body can have no legislative intent other than what is expressed in the statutes and regulations that it enacts. Consequently, when a court is attempting to find the meaning, and hence the intent of the legislature, it cannot accept the statements of single members of the legislature (made *ex gratia* or otherwise), as indications of that meaning and intent. This mythology which supposedly prevents the courts from legislating merely masks the reality of their doing so. The court is always selecting one meaning from a range of choices that, admittedly, may vary considerably in their rationality. Yet, there is no logic in excluding the opinions of members of the legislative body as to what the purpose or intent of the legislation is. Furthermore, even if this fictional approach to the collective legislative intent of parliamentary bodies was justifiable at some point in the past, it is hardly justifiable today, when the only true intent is that of the Cabinet (nay, in many cases, that of a particular minister), rather than that of Parliament as a whole. It would seem, therefore, that the statements of ministers ought not to be excluded but rather included as a matter of course, albeit in balance with other evidence. With the gradual tendency towards making legislative purpose, rather than legislative effect the test of constitutionality, this will be of increasing significance.

In any event, the whole anti-inflation experiment would have been better left untried both economically and jurisprudentially. It has been a sorry affair illustrating, if anything, that good government is no government.

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The National Library Act [22] has been held to be legislation in relation to matters coming within Peace, Order and Good Government. Even section 11 of the Act, which expropriates for the National Library one copy of every book published in Canada, without compensation, is *intra vires*, notwithstanding the fact that it interferes with the property and civil rights of the publisher.[23]

> sary. With respect, I think the learned judge undertook a difficult, if not an impossible, task in trying to reconcile the apparently conflicting decisions and to draw from them a rule of general application [as to admissibility].

Where, therefore, do we stand on the question of admissibility? One certainly will not find the answer in the *AIB Reference*; perhaps the Supreme Court will provide an answer on the appeal of this case.

[22] R.S.C. 1970, c. N-11.

[23] R. v. Appleby, 15 N.B.R. (2d) 650 (C.A. 1976) (3:0 decision), *aff'g* 12 N.B.R. (2d) 67 (Q.B. 1975). For the court, Chief Justice Hughes stated, at 657:

> It is apparent from the provisions of the Act that the National Library is an institution of the Government of Canada constituted by Parliament to provide library services to the Government and people of Canada and is administered by the National Librarian under the direct supervision of the Secretary of State. As the objects and purposes of

B. *Trade and Commerce*

In *Chamney v. The Queen*,[24] the appellant argued that Parliament's power to declare works and undertakings to be for the general advantage of Canada under section 92(10) did not extend to warehousing in an intraprovincial grain trade. Relying on its decision in *Jorgenson v. Attorney General of Canada*,[25] the Supreme Court of Canada rejected the submission and found that the rapeseed elevators in question were indeed subject to section 174 of the Canada Grain Act[26] and section 45 of the Canadian Wheat Board Act.[27] Consequently, the appellant was convicted for failing to record transactions as required by section 16(2) of the Canadian Wheat Board Act. The Court felt that section 16(2) was merely a means of exercising control over a work now within the exclusive jurisdiction of Parliament although it was a local work in origin.

In *Montana Mustard Seed Co. v. Continental Grain Co.*,[28] the Saskatchewan Court of Appeal held that the essential aspect of the Canada Grain Act was to maintain an adequate grain-grading system and that, therefore, an efficient licensing scheme for grain operations was necessarily incidental to the effective administration of the Act. The Act was held to be *intra vires* Parliament under the doctrine of ancillary powers. In its judgment, the court employed the following test which had been proposed and applied by Mr. Justice Laskin (as he then was) in *Papp v. Papp*:[29] if one can find a "rational, functional connection" between what is admittedly *intra vires* a federal law (considered by itself) and what is challenged (and would be *ultra vires* if considered by itself), then the latter is also *intra vires*.

The application of the doctrine of ancillary powers has always had to meet the test of functional necessity. It has led to a degree of

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> the Act do not fall within any of the classes of subjects assigned exclusively to the Legislatures of the Provinces by the *British North America Act*, 1867, I must conclude that Parliament had legislative jurisdiction under s. 91 of that Act to establish such an institution under the general residual powers conferred upon 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 Legislature of the Provinces".

[24] [1975] 2 S.C.R. 151, [1974] 1 W.W.R. 493, 40 D.L.R. (3d) 146, *aff'g* 25 D.L.R. (3d) 1 (Sask. C.A. 1972) (3:0 decision), *aff'g* [1971] 2 W.W.R. 641 (Sask. Dist. C.).

[25] [1971] S.C.R. 725, [1971] 3 W.W.R. 149 (9:0 decision), *aff'g* 12 D.L.R. (3d) 652 (Man. C.A. 1970) (5:0 decision).

[26] R.S.C. 1970, c. G-16.

[27] R.S.C. 1970, c. C-12.

[28] [1974] 4 W.W.R. 695, 49 D.L.R. (3d) 72 (Sask. C.A.) (3:0 decision), *rev'g* 41 D.L.R. (3d) 582 (Sask. Q.B. 1973). An appeal to the Supreme Court of Canada was dismissed without consideration of the constitutional question: [1975] S.C.R. v, [1976] 2 W.W.R. 768 (9:0 decision).

[29] [1970] 1 O.R. 331, 8 D.L.R. (3d) 389 (C.A. 1969). This was also relied upon in *Zacks: see Matrimonial Matters, infra*.

legislative concurrency between the provinces and Parliament which, it is submitted, is not permitted, strictly speaking, by the wording of sections 91 and 92 of the B.N.A. Act. This type of exclusivity leakage has been most blatant in the area of criminal law, especially with respect to highway traffic legislation.[30]

Although largely similar and duplicating legislation may lead to the possibility of double prosecution, this may not be objectionable in the area of criminal law where essentially dangerous activities are being regulated. It is, however, objectionable in situations such as that dealt with by Mr. Justice Henry in *Multiple Access Ltd. v. McCutcheon.*[31] Here, sections 100.4 and 100.5 of the Canadian Corporations Act[32] (identical to sections 113 and 114 of the Securities Act of Ontario[33]), which establish a civil cause of action for the misuse of confidential information by insiders of corporations were being considered.

Although in the circumstances of the case the federal legislation could not be utilized by the plaintiff, this fact was hardly a reason for allowing the provincial legislation to be effective, particularly in the case of a federally-incorporated company. Both sides conceded that the two sets of provisions were valid and the learned judge added some *obiter* reasoning to that effect. This left only the issue of paramountcy and Mr. Justice Henry held that only conflict with federal legislation in the narrowest sense could render a valid provincial statute inoperative.

The logical consequence of this reasoning is that in a case where both federal and provincial statutes are applicable, a plaintiff could conceivably recover two amounts of damages for the same wrong. Indeed, the learned judge discussed such a possibility but felt that, in "applying common sense and justice",[34] double recovery would not in fact be permitted. Nevertheless, it was for this very reason that Mr. Justice Henry's decision was reversed on appeal;[35] the court held that the two provisions could not operate concurrently and applied the doctrine of paramountcy.

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If *Multiple Access* illustrates the dangers which may result from the misuse of the ancillary doctrine then *Reference Re Agricultural Products Marketing Act*[36] illustrates the potential dangers of misuse of the

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[30] *See, e.g.*, Leigh, *supra* note 15, and more recently Bell v. Attorney-General for Prince Edward Island, [1975] 1 S.C.R. 25, 14 C.C.C. (2d) 336, 24 C.R.N.S. 232, 42 D.L.R. (3d) 82 (1973) (7:0 decision), and Ross v. Registrar of Motor Vehicles, [1975] 1 S.C.R. 5, 14 C.C.C. (2d) 322, 23 C.R.N.S. 319, 42 D.L.R. (3d) 68 (1973) (5:2 decision).

[31] 11 O.R. (2d) 249, 65 D.L.R. (3d) 577 (H.C. 1975).

[32] R.S.C. 1970, c. C-32, *as amended by* R.S.C. 1970, c. 10 (1st Supp.), s. 7.

[33] R.S.O. 1970, c. 426.

[34] *Supra* note 30, at 264, 65 D.L.R. (3d) at 592.

[35] 78 D.L.R. (3d) 701 (Ont. Div'l Ct. 1977) (2:1 decision).

[36] (S.C.C. Jan. 19, 1978) (9:0 decision), *rev'g in part* 78 D.L.R. (3d) 477 (Ont. C.A. 1977) (4:1 decision).

doctrine of exhaustiveness. By that doctrine there is not a subject matter that cannot be regulated either by the federal or by the provincial level of government. (There are one or two recognized exceptions to this such as section 121 but even that section can be overridden by Parliament under section 91(2).) However, the doctrine does not mean that one or other level of government must be able to enact any given *law* as this would provide little, if any check upon the legislative powers of Parliament.[37]

In the *Agricultural Products Marketing Act Reference*, the Ontario Court of Appeal and the Supreme Court faced the following issue: given that a province cannot impose indirect taxation even for provincial purposes, can Parliament do so even if the effect, if not the purpose, is the regulation of intraprovincial trade and commerce? The majority of the Ontario Court of Appeal answered affirmatively.

The preamble to the Act, along with section 2, which was called into question provide that:

> Whereas it is desirable to improve the methods and practices of marketing agricultural products of Canada; and whereas the legislatures of several of the provinces have enacted legislation respecting the marketing of agricultural products locally within the province; and *whereas it is desirable to cooperate with the provinces and to enact a measure respecting the marketing of agricultural products in interprovincial and export trade*; and whereas it is desirable to facilitate such marketing by authorizing the imposition of levies or charges for the equalization or adjustment among producers of the moneys realized from the marketing of the products: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:....
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> 2(1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product in interprovincial and export trade and for such purposes to exercise all of any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.
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> (2) The Governor in Council may by order grant to any board or agency mentioned in subsection (1) authority
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> (a) in relation to the powers granted to such board or agency under the laws of any province with respect to the marketing of any agricultural product locally within the province, and
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> (b) in relation to the powers that may be granted to such board or agency under this Act with respect to the marketing of any agricultural product in interprovincial and export trade,
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> to fix, impose and collect levies or charges from persons engaged in the production or marketing of the whole or any part of any agricultural product and for such purpose to classify such persons into groups and fix the levies or charges payable by the members of the different groups in different amounts, to use such levies or charges for the purposes of such board or agency, including the creation of reserves, and the payment of expenses and

[37] See my discussion of this point: *The Anti-Inflation Act and Peace, Order and Good Government*, 9 OTTAWA L. REV. 169 (1977).

> losses resulting from the sale or disposal of any such agricultural product, and the equalization or adjustment among producers of any agricultural product of moneys realized from the sale thereof during such period or periods of time as the board or agency may determine. [38]

Four of the judges of the Ontario Court of Appeal, Justices MacKinnon, Evans, Zuber and Dubin, held that sections 2(2)(a) and 2(2)(b) were separate provisions whereas Mme Justice Wilson (who concurred in the result with the majority of Justices MacKinnon, Evans and Zuber in holding that both provisions were valid) treated the two provisions as being a composite delegation of power.

Mr. Justice MacKinnon, for himself and Justices Evans and Zuber, held that section 2(2)(b) could be justified as being in relation to indirect taxation and as being in relation to interprovincial and international trade and commerce. Obviously the second of these grounds could not apply to section 2(2)(a) which, by its terms, dealt only with local or intraprovincial trade and commerce. However, by applying the doctrine of exhaustiveness the majority held that since the provinces could not impose indirect taxes for provincial purposes, Parliament could. Therefore, section 2(2)(a) was held to be *intra vires* Parliament even though it dealt solely with local trade.

Mme Justice Wilson did not concede that because the provinces could not impose indirect taxes for provincial purposes, this necessarily meant that Parliament could. In any case, she found that the legislation was not in relation to taxation, although it may have so appeared on first reading.[39] Rather, the whole of section 2 of the Agricultural Products

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[38] Agricultural Products Co-operative Marketing Act, R.S.C. 1970, c. A-6 (emphasis mine).

[39] He said:

> As is pointed out by my brother MacKinnon, it has been conclusively established by the Supreme Court of Canada in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, following the judgment of the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168, that levies imposed by the provinces for equalization purposes are *ultra vires* because they are indirect taxes and only Parliament can impose indirect taxes. In my respectful view, however, this does not necessarily mean that such levies, if imposed by Parliament, must be constitutionally valid. Where such levies are imposed in relation to local trade they must be scrutinized in order to determine which is the true "pith and substance" of the legislation, indirect taxation or the regulation of local trade. The exercise of any legislative power, provincial or federal, may be challenged as "colourable" and this is, of course, the primary basis on which Mr. Turkstra challenged the constitutional validity of s. 2(2)(a). He submitted to us that the Agricultural Products Marketing Act is by its own terms legislation in relation to the marketing of agricultural products in interprovincial and export trade and that the Court should not characterize s. 2(2)(a) as legislation in relation to indirect taxation in order to support it as valid federal legislation. The Agricultural Products Marketing Act is not, he submitted, nor was it intended to be, a taxing statute and Parliament should not be permitted under the guise of its taxing power to invade

Marketing Act was a comprehensive scheme of interprovincial and international trade and commerce and was therefore valid federal legislation.

As the only dissenting judge, Mr. Justice Dubin looked at the preamble of the Act and its purpose. He stated:

> Since s. 2(2)(a) of the Act is not, in my opinion dependent on any plan for the interprovincial or export marketing of the agricultural product, it cannot be supported by the trade and commerce powers of Parliament....
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> I do not view s. 2(2) of the Act as a taxing statute. The preamble of the Act itself disclaims any such purpose. The levy contemplated by the preamble is in support of "such marketing", *i.e.*, "a measure respecting the marketing of agricultural products in interprovincial and export trade". There is no need for Parliament to resort to its taxing powers for that purpose....
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> To uphold the validity of such legislation raises implications which, in my opinion, transcend the matters brought in issue by this Reference. Can Parliament in purporting to regulate export trade give a provincial agency authority to impose an export tax on goods which never reach the export market? If this type of legislation were to stand, a provincial agency in any Province could effectively limit the free flow of goods across provincial boundaries which would appear to be inconsistent with s.121 of the *British North America Act, 1867*.[40]

The probable impact of section 121 was not considered by the other judges.

The Supreme Court of Canada unanimously held section 2(2)(a) of the Agricultural Products Marketing Act invalid but otherwise agreed with the Ontario Court of Appeal on the validity of the other statutes and regulations. Chief Justice Laskin agreed with the dissenting reasons of Mr. Justice Dubin[41] and would not consider section 2(2)(a) to be more than legislation in relation to intraprovincial trade.

Again the Court faced the following issue: even if the legislation could be classified as being in relation to taxation, could Parliament impose indirect taxation for provincial purposes? Chief Justice Laskin, essentially for the full Court, seems to have said "no":

> A province cannot impose or authorize the imposition of indirect taxes, and if the levies authorized by s. 2(2) are species of taxation why cannot Parliament fill the gap in provincial regulatory power by supplying that authorization? Indeed, MacKinnon J.A. found reinforcement for his view in the so-called theory of exhaustiveness of legislative power, namely, that what is not given to the provincial Legislatures must rest with Parliament so that legislative authority in relation to any particular matter must be vested in the one or the other.

> the field of local trade as it has purported to do in paragraph (a). If the Court characterizes the legislation as legislation in relation to interprovincial and export trade which, Mr. Turkstra submitted, it is expressed in its title and also in its preamble to be, then s. 2(2)(a) must fall because, Mr. Turkstra says, it represents a clear incursion into the field of local trade purportedly in order to make possible a comprehensive scheme for the regulation of all trade in the product.

Supra note 36, at 512-13.

[40] *Supra* note 36, at 483-84.

[41] *Supra* note 36 (S.C.C. Jan. 19, 1978), at 31 (Laskin C.J.C.).

> Rand J. in a familiar statement of the principle expressed it in *Murphy* v. *C.P.R.*, [1958] S.C.R. 626 at p. 643 with necessary qualifications, as follows:
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> > "It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself..."
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> I need not dwell on all the limitations, but one recognized by the Courts is the prohibition of inter-delegation of legislative power as between Parliament and a provincial Legislature. There are others resulting from certain entrenched provisions of the Constitution as, for example, ss. 91(1), 99 and 133. The distribution of taxing authority suggests another limitation, this being a limitation on federal power to impose indirect taxes for provincial purposes. The question, as is well known, was raised and left open in *Caron* v. *The King*, [1924] A.C. 999, at p. 1004 by Lord Phillimore and I leave it open here. There is, nonetheless, some incongruity in Parliament legislating to impose or authorize taxation for provincial purposes but that may be an undue nod to excessive formality. What is more to the point, however, is the view expressed by the Privy Council in the *Employment and Social Insurance Act* reference, [1937] A.C. 355, at p. 356 that the use of the federal taxing power to finance a regulatory scheme which is itself beyond its authority cannot rectify the invalidity.[42]

Finally, while noting the egg-marketing scheme could potentially lead to the creation of disparities among provinces, Chief Justice Laskin held that the federal legislation was not in essence related in a punitive way to provincial boundaries and therefore was not in contravention of section 121.[43]

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[42] *Id.* at 32.

[43] *Id.* at 67-68. The Chief Justice analyzed the relationship of ss. 91 and 92 as follows:

> A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. In *Gold Seal Ltd. v. Dominion Express Co.* (1921), 62 S.C.R. 424, both Anglin and Mignault JJ. viewed s. 121 as prohibiting the levying of customs duties or like charges when goods are carried from one Province into another. Rand J. took a broader view of s. 121 in *Murphy v. C.P.R.*, [1958] S.C.R. 625, where he said this, at p. 642:
>
> > I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation, I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation, that in its essence and purpose is related to a provincial boundary.
>
> Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.

The judgment of the Supreme Court in this case is somewhat surprising when compared to the treatment of provincial taxing powers in *CIGOL*.[44] In *CIGOL* the majority, *inter alia*, held that a provincial commodity tax and petroleum tax on producers would be an interference with interprovincial and international trade and commerce notwithstanding the fact that the tax did not affect the price beyond the borders of a province.

Mr. Justice Martland, for the majority, said:

> In an effort to obtain for the provincial treasury the increases in the value of oil exported from Saskatchewan, which began in 1973, in the form of a tax upon the production of oil in Saskatchewan, the legislation gave power to the Minister to fix the price receivable by Saskatchewan oil producers on their export sales of a commodity that has almost no local market in Saskatchewan. Provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market. It involves the regulation of interprovincial trade and trenches upon s. 91(2) of the B.N.A. Act.[45]

He then compared this case to the facts of the *Carnation* case.[46] He stated:

> The legislation there indirectly affected Carnation's export trade in the sense that its costs of production were increased, but was designed to establish a method for determining the price of milk sold by Quebec milk producers, to a purchaser in Quebec, who processed it there. Here the legislation is directly aimed at the production of oil destined for export and has the effect of regulating the export price, since the producer is effectively compelled to obtain that price on the sale of his product.[47]

In a somewhat similar case, *Central Canada Potash Co. v. Attorney-General for Saskatchewan*,[48] the province enacted a statute and regulations which created a quota system for the potash produced in Saskatchewan. It should be noted that this potash was produced entirely for the export market. The appellant sought, *inter alia*, a declaration of invalidity of the regulations because its alloted quota was below its contracted commitments.

After examining the evidence and rejecting as inadmissible much of what was accepted by Mr. Justice Disbery at trial, Chief Justice Culliton, for the court, stated:

> I agree...that the purposes, as disclosed in the regulations are to control the production and sale of potash, to determine fair prices and to prorate production when advisable. The regulations, on their face, do not disclose any purpose or intent to interfere with the flow of interprovincial or international trade in potash. That being so, I am satisfied the regulations are valid; they

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[44] *Supra* note 10.

[45] *Id.* at 626.

[46] Carnation Co. v. Quebec Agricultural Mkting. Bd., [1968] S.C.R. 238, 67 D.L.R. (2d) 1 (7:0 decision), *aff'g* B.R. 122 (Que. C.A. 1966) (5:0 decision).

[47] *Supra* note 10, at 626.

[48] *Supra* note 21.

> disclose neither an attempt to invade the field of trade and commerce nor are they inconsistent with the provisions of the Mineral Resources Act under which they were passed.[49]

However, as the regulations would affect the interprovincial trade in and the price of potash, the learned Chief Justice felt obliged to consider the issues further.

First, he noted that the regulations dealt only with potash produced in Saskatchewan. Secondly, he cited case law to the effect that the provinces were not completely denied jurisdiction over products merely because they might enter interprovincial and international trade streams. Finally, he relied upon the Supreme Court's decision in *Carnation*,[50] which justified provincial fixing of compulsory prices even if this would have some ultimate economic effects outside of the province. The Chief Justice therefore found the regulations to be valid notwithstanding their effect on the international market in potash.

This case has been appealed to the Supreme Court. In reaching its decision, the Court will ultimately have to choose between reiterating *Carnation* and dismissing the appeal, and following its rationale in *CIGOL* and striking the regulations down. It is my feeling that the *CIGOL* rationale will be followed even though the case can be distinguished as a decision dealing with the relative taxing powers. However, in this age of uncertainty, it is difficult to establish a "morning line" on the Supreme Court of Canada's decisions.

Given the centralist tendency of some of these judgments, the Supreme Court's overruling of the Federal Court of Appeal in *Vapour*[51] appears to be somewhat inconsistent. The constitutional issue in *Vapour* concerned the validity of section 7(e) of the Trade Marks Act[52] of Canada:

> 7. No person shall...
> (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage.

Chief Justice Laskin characterized the legislation as "a formulation of the tort of conversion, perhaps writ large and in a business context".[53] It then became necessary to deal with the submission that the provision nevertheless was justified under the regulation of trade and commerce, the criminal law power and the treaty-making power.

First, the Chief Justice rejected geographical scope as the criterion for justification of federal laws.[54] He then held that because the Act did not provide for any federal administrative machinery, this provision

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[49] *Id.* at 509.
[50] *Supra* note 46.
[51] *Supra* note 12.
[52] R.S.C. 1970, c. T-10.
[53] *Supra* note 12, at 149, 7 N.R. at 491-92, 66 D.L.R. (3d) at 13.
[54] As he also did in Reference *Re* Anti-Inflation Act, *supra* note 7.

could not be classified as being regulatory in nature and hence could not be justified under section 91(2).[55] With respect to the criminal law power, he simply stated that Parliament could not "piggy-back" a civil remedy, available only at the instigation of private citizens, onto the general provisions of section 115 of the Criminal Code.[56] Finally, in considering the treaty-making power, he followed traditional jurisprudence in holding that the power could not be used to give Parliament legislative power that it did not otherwise have. Section 7(e) of the Trade Marks Act was therefore *ultra vires* Parliament.

Given *Vapour*, the result in cases such as *Stubbe v. P.F. Collier &*

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[55] He said, *supra* note 12, at 158, 7 N.R. at 500, 66 D.L.R. (3d) at 20:

> This depends not only on what the liability is, but as well on how the federal enactment deals with its enforcement. What is evident here is that the predatory practices are not under administrative regulation of a competent federally-appointed agency, nor are they even expressly brought under criminal sanction in the statute in which they are prohibited. It is, in my opinion, difficult to conceive them in the wide terms urged upon the Court by the respondent and by the Attorney-General of Canada when they are left to merely private enforcement as a private matter of business injury which may arise, as to all its elements including damage, in a small locality in a Province or within a Province. I do not see any general cast in s. 7(e) other than the fact that it is federal legislation and unlimited (as such legislation usually is) in its geographic scope. Indeed, the very basis upon which s. 7(e) is analyzed by the respondent, namely, that it postulates two or more competitors in business, drains it, in my opinion, of the generality that would have been present if the legislation had established the same prescriptions to be monitored by a public authority irrespective of any immediate private grievance as to existing or apprehended injury.

And later, at 164-65, 7 N.R. at 506, 66 D.L.R. (3d) at 25:

> The plain fact is that s. 7(e) is not a regulation, nor is it concerned with trade as a whole nor with general trade and commerce. In a loose sense every legal prescription is regulatory, even the prescriptions of the *Criminal Code*, but I do not read s. 91(2) as in itself authorizing federal legislation that merely creates a statutory tort, enforceable by private action, and applicable, as here, to the entire range of business relationships in any activity, whether the activity be itself within or beyond federal legislative authority. If there have been cases which appeared to go too far in diminution of the federal trade and commerce power, an affirmative conclusion here would, in my opinion, go even farther in the opposite direction.
>
> What is evident here is that the Parliament of Canada has simply extended or intensified existing common and civil law delictual liability by statute which at the same time has prescribed the usual civil remedies open to an aggrieved person. The Parliament of Canada can no more acquire legislative jurisdiction by supplementing existing tort liability, cognizable in provincial Courts as reflective of provincial competence, than the provincial Legislatures can acquire legislative jursidiction by supplementing the federal criminal law: *see Johnson v. A.G. Alta.*, [1954] 2 D.L.R. 625, 108 C.C.C. 1, [1954] S.C.R. 127.

[56] The section reads:

> 115. Everyone who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

Son[57] seems axiomatic. In the *Stubbe* case, the defendant, a company in the business of selling encyclopedias door to door, was found to have contravened sections 2(1), (2) and (3) of the British Columbia Trade Practices Act,[58] its selling practices having been declared deceptive. In its defence, it submitted that the Act was *ultra vires* as being in relation to interprovincial trade and commerce. Alternatively it was argued that if the Act was *intra vires*, it could not apply to the defendant company because the company was engaged in interprovincial trade and commerce. Furthermore, although its transactions were consummated in British Columbia, they were all clearly interprovincial.

While the legislation would affect the manner in which the defendant carried on its business, the learned judge held that, in pith and substance, the legislation was not in relation to trade and commerce under section 91(2). He used the following negative test to arrive at this conclusion:

> The impugned legislation is *prima facie* within the jurisdiction of the provincial Legislature. The point which I still have to consider is whether the legislation nevertheless *directly* trenches upon the exclusive federal power to regulate trade and commerce. It will be useful at this point to consider what the impugned Act does not do. The Act imposes no impediment whatsoever to the flow of goods of any kind across the provincial boundary. There is no discrimination against imported goods in that a consumer transaction involving imported goods is treated differently from one involving goods produced in the Province. . . .The issue now emerges; it is, in my view, simply this. Has the Legislature, by enacting the impugned legislation which will affect Collier in the way I have indicated, together with all other importers of goods for sale in British Columbia, trenched upon the federal power to regulate trade and commerce?...
>
> [I]f an interprovincial trading transaction is affected by provincial legislation, that affectation, *per se*, does not mean that the Legislature has trenched upon the federal trade and commerce power. Many interprovincial trading transactions are affected by provincial legislation which is clearly not in relation to trade and commerce and is *intra vires* the Province.[59]

As a result, business ethics as such are primarily a matter of provincial concern, although presumably the capacity of Parliament to create new crimes respecting business ethics is in no way limited by these decisions. Moreover, Parliament may have some jurisdiction in relation to interprovincial business ethics if it also provides for the establishment of proper administrative machinery.

C. *Transportation and Communication*

In a similar vein to the decision in *Jasper Lodge*,[60] the Supreme

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[57] [1977] 3 W.W.R. 493, 74 D.L.R. (3d) 605 (B.C.S.C.).

[58] S.B.C. 1974, c. 96.

[59] *Supra* note 57, at 539-40, 74 D.L.R. (3d) at 643-44.

[60] Canada Lab. Rel. Bd. v. C.N.R., [1975] 1 S.C.R. 786, [1974] 4 W.W.R. 661, 45 D.L.R. (3d) 1 (9:0 decision), *aff'g* [1973] 2 W.W.R. 700 (Alta. C.A.) (2:1 decision), *aff'g* [1972] 2 W.W.R. 674 (Alta. S.C.).

Court in *C.N.R. v. Nor-Min. Supplies Ltd.*[61] held that a rock quarry did not fall within the category of "other transportation works" in section 18(1) of the Canadian National Railways Act[62] and was therefore not immune from provincial mechanics lien legislation. This was so despite the fact that all of the stone from the quarry was used for the Canadian National Railway. In future, Parliament will have to be rather more specific in its enumerations of those works and undertakings over which it wishes to acquire exclusive jurisdiction.

Not unexpectedly, the Supreme Court upheld the decision of the Newfoundland Supreme Court in *C.N.R. v. Board of Commissioners of Public Utilities*.[63] Here it found that the bus line operated by C.N.R. in Newfoundland, a replacement for the old Newfoundland railway which had also been operated by C.N.R., was so intimately connected with the interprovincial railway operations of C.N.R. that it was a federal work or undertaking and within the exclusive jurisdiction of Parliament.

In *Saskatchewan Power Corp. v. Trans-Canada Pipelines Ltd.*,[64] the Federal Court extended the rationale of *The Queen in Right of Ontario v. Board of Transport Commissioners*[65] to the case of pipelines. In the earlier decision, the fares of an intraprovincial rail passenger service were held to be within the regulatory powers of a federal agency (the C.T.C.) because the service was operating on the hardware (track) of the C.N.R., a federally-regulated railway. By analogy, contracts for the sale of natural gas which was to be transmitted through an interprovincial pipeline were held to be subject to federal control even though the contracts related to the intraprovincial sale and transmission of gas. The decision seems to be consistent with the results in *CIGOL*[66] although it fails, as do the cases relating to cablevision,[67] to differentiate properly between the technical and economic aspects of transportation and communication. In general, it is felt that the decisions in both the *Board of Transport* and the *Saskatchewan Power* cases are very centralist in outlook and are bad law because they fail to distinguish between the technical and economic aspects of these two modes of transportation.

A strong provincialist tendency is evident in *Williams v. C.N.R.*,[68] a decision of the Nova Scotia Court of Appeal. Here an infant plaintiff

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[61] [1977] 1 S.C.R. 322, 7 N.R. 603 (1976) (9:0 decision).

[62] R.S.C. 1970, c. C-10.

[63] [1976] 2 S.C.R. 112, 7 Nfld. & P.E.I.R. 515, 5 N.R. 421, 59 D.L.R. (3d) 71, *aff'g* 4 Nfld. & P.E.I.R. 501 (Nfld. S.C. 1973).

[64] [1977] 2 F.C. 324 (App. D.) (3:0 decision); the case is currently on appeal to the Supreme Court of Canada.

[65] [1968] S.C.R. 118, 65 D.L.R. (2d) 425 (1967) (7:0 decision).

[66] *Supra* note 10.

[67] *See infra* note 84 *et seq.*

[68] 18 N.S.R. (2d) 229 (C.A. 1976) (3:0 decision), *rev'g* 18 N.S.R. (2d) 256 (S.C. 1976).

suffered the loss of both legs when he was run over by one of the defendant's trains. Section 342(1) of the Railway Act[69] provided that:

> 342(1) All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall, and notwithstanding anything in any Special Act may, be commenced within two years next after the time when such supposed damage is sustained, or if there is continuation of damage, within two years next after the doing or committing of such damage ceases, and not afterwards.

Section 3 of the Nova Scotia Statute of Limitations,[70] however, provided that:

> 3. If any person who is entitled to any action...is, at the time any such cause of action accrues, within the age of twenty-one years...then such person shall be at liberty to bring the same action, so as [*sic*] such person commences the same within such time after his or her coming to or being of full age...as other persons having no such impediment should, according to the Act, have done.

In an action for damages for personal injuries, the statute provided for a six year limitation period.

The issue facing the court, then, was whether section 3 of the Statute of Limitations applied so as to permit postponement of the action, despite the provisions of the Railway Act. Chief Justice MacKeigan would have found the relevant sections of the Railway Act to be *ultra vires*:

> Without benefit of authority, I would have considered s. 342(1) *ultra vires* as an unwarranted intrusion into the administration of justice, as an improper restriction of a common law right of action and as a trespass on "property and civil rights" reserved to the province, a trespass not justified by Parliament's right to legislate as to railways. I must agree with Chief Justice Cowan, however, that high authority binding on us has held the section *intra vires*.[71]

Having found it to be *intra vires*, however, he then stated that:

> It should not be construed as creating more than the minimum interference with provincial procedural rules governing an action against a railway than the language compels. All it does is reduce from six years to two years the limitation period for an action against a railway. It should not be gratuitously construed as also relieving the railway of the force of the quite separate protection given an infant by the provincial *Statute of Limitations*.
>
> Section 342(1), which we assume to be valid federal legislation, changes the limitation period for a provincial action to one of two years. Section 3 of the *Statute*, a valid provincial act, extends that period for an infant. We thus have here no conflict between a federal statute and a provincial statute and thus no paramount need for the federal to override the provincial.[72]

With respect, this is even worse treatment of the doctrine of federal paramountcy than that of the *Bell* and *Ross* decisions.[73] It effectively

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[69] R.S.C. 1970, c. R-2.
[70] R.S.N.S. 1967, c. 168.
[71] *Supra* note 68, at 237.
[72] *Id.* at 252.
[73] *Supra* note 30.

says that the Nova Scotia legislation dealing with infants, which provides for a limitation period of six years, is paramount over federal legislation dealing with railways, which provides for a limitation period of two years. However desirable the result might be, this is not the way to achieve it.

In *Air Canada v. The Queen in Right of Province of Manitoba*,[74] it was held that the air space over a province was not part of the province. This decision may affect the status of decisions such as *Northern Helicopters Ltd.*[75] In the *Air Canada* case, however, Mr. Justice Morse did hold that even though a company was engaged in aeronautics, a federally-regulated activity, it would not be immune from provincial taxing statutes.

Recent decisions have also held that neither the construction of a building at an airport[76] nor the construction of a runway[77] is so vitally connected with the technical aspects of aeronautics as to bring these activities within the control of Parliament. It is submitted, however, that the technical features of runways should not be distinguished from the technical features of the servicing of aircraft and the latter rightly have been held to be in relation to aeronautics.[78] It should also be recalled that provinces (*via* their municipalities) cannot even have zoning restrictions applicable to the siting of airports.

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Although some doubts have been expressed in the past concerning the power of Parliament to regulate the commercial aspects of intraprovincial air carriers,[79] the Federal Court's decision in *Re Pacific Western Air Lines Ltd.*[80] should serve to remove at least some of them. This decision upheld federal statutes and regulations which enabled the

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[74] [1977] 3 W.W.R. 129, 77 D.L.R. (3d) 68 (Man. Q.B.). Mr. Justice Morse stated at 148, 77 D.L.R. (3d) at 83:

> It is, therefore, my opinion that neither when the Province of Manitoba was created in 1870 did it acquire nor, subsequently, has it acquired any rights in respect of the airspace above its territory except the limited rights pertaining to the ownership or possession of land to which I have referred. Accordingly, it is my view that the airspace above the Province of Manitoba is not "within" the province and that the province has no legal right to assess or levy a tax under the Act in respect of aircraft, aircraft engines and parts consumed, and services, meals and liquor consumed or supplied to aircraft while in the airspace over the Province of Manitoba.

[75] Northern Helicopters Ltd. v. Vancouver Soaring Ass'n, [1972] 6 W.W.R. 342, 31 D.L.R. (3d) 321 (B.C.S.C.).

[76] *Re* Plumbing and Pipefitting, Local 496, 67 D.L.R. (3d) 381 (Alta. S.C. 1976).

[77] Comm'n du salaire minimum v. Construction Montcalm Inc., [1975] C.A. 675 (Que.) (2:1 decision). This decision is on appeal to the Supreme Court and will likely be overruled.

[78] *Re* Field Aviation Co., [1974] 6 W.W.R. 596, 49 D.L.R. (3d) 234 (Alta C.A.) (3:0 decision), *aff'g* 45 D.L.R. (3d) 751 (Alta. S.C. 1974). *See also Re* Staron Flight Ltd., 73 D.L.R. (3d) 78 (B.C.S.C. 1976).

[79] McNairn, *Aeronautics and the Constitution*, 49 CAN. B. REV. 411 (1971).

[80] 13 N.R. 28, 66 D.L.R. (3d) 507 (F.C. App. D. 1976) (3:0 decision).

Canadian Transport Commission to disallow any change of ownership of an air carrier if the change would unduly restrain competition or be against the public interest. The court held that these provisions played an integral role in the regulation of air carriers. Furthermore, even though a provincially-incorporated company was involved, the court rejected any suggestion that the federal laws were interfering with provincial jurisdiction under section 92(11), Incorporation of Companies with Provincial Objects. If the transfer of ownership of an air carrier is vital to aeronautics it is difficult to envisage any economic aspect of air carriers that will not be.[81]

This case was appealed to the Supreme Court of Canada[82] but was allowed on different grounds. In holding that the legislation was inapplicable to the Crown in right of a province because it did not expressly state that it was so applicable, Chief Justice Laskin, for the Court, stated:

> Any apprehension by the Government or Parliament of Canada that any Provincial Government would attempt to engage in air carrier business without compliance with federal regulatory provisions could easily be allayed by appropriate legislation.[83]

This, then, seems to give Parliament a carte blanche in the field of aeronautics.

* * *

The decisions of the Supreme Court in *Dionne*[84] and *Capital Cities Communications*[85] have assured Parliament of a broad legislative jurisdiction in the regulation of cablevision as well. The *Capital Cities* decision was first in point of time. It arose because three cablevision companies wanted to substitute Canadian advertising in place of the American commercials being shown on programmes which were being received from the United States and rerouted to their Canadian subscribers. On an appeal to the Supreme Court, the appellants asked:

> Whether the Broadcasting Act, R.S.C. 1970, Chapter B-11, and regulations made thereunder, are *ultra vires* the Parliament of Canada insofar as they purport to regulate, or to authorize the Canadian Radio-Television Commission to licence and to regulate the content of programs carried by CATV systems situated wholly within Provincial boundaries.[86]

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[81] Surely fare schedules, even of tertiary air services are as much a part of rationalizing a national transportation policy as is a change of ownership.

[82] The Queen in Right of Alberta v. C.T.C., 75 D.L.R. (3d) 257 (S.C.C. 1977) (9:0 decision).

[83] *Id.* at 262. *But see* the subsequent amendment to the Aeronautics Act, S.C. 1976-77, c. 26, ss. 1,3.

[84] *Supra* note 9.

[85] Capital Cities Communications Inc. v. C.R.T.C., 18 N.R. 181, 81 D.L.R. (3d) 609 (S.C.C. 1977) (6:3 decision), *aff'g Re* Capital Cities Communications Inc., 7 N.R. 18, 52 D.L.R. (3d) 415 (F.C. App. D. 1975) (3:0 decision).

[86] *Id.* at 189, 81 D.L.R. (3d) at 615.

Chief Justice Laskin delivered the judgment for the majority and refused to draw any distinction between the reception of Hertzian waves from the air and their future transmission through co-axial cables.[87] For the minority of three, Mr. Justice Pigeon accepted the arguments that were rejected by Chief Justice Laskin. In his view there was a difference between the technical and economic aspects of broadcasting. He felt that although Parliament had jurisdiction over the technical features of the reception of Hertzian waves, the provinces had economic jursidiction over those parts of the system that were clearly intraprovincial. Indeed he saw no problem in dividing the system into two stages: (1) the initial reception of the waves, and (2) their subsequent redistribution by cable.

One analogy referred to by Mr. Justice Pigeon is particularly worthy of comment. In the course of his judgment, he looked to the constitutional provisions concerning shipping and navigation. He found that although Parliament has exclusive technical jurisdiction over navigation, it does not have exclusive control over the economics of intraprovincial shipping. Unfortunately, the majority refused to accept this relevant comparison.

In *Dionne* the issues were essentially the same. Here, however, the problem arose as a result of legislation enacted by the province of Quebec concerning cablevision. The members of the Supreme Court essentially restated their respective positions. The Chief Justice expounded on his judgment in *Capital Cities* saying that any analogy with telephone lines was not acceptable because, in the case of cable systems, there was the added feature of the initial reception by Hertzian waves.

As these decisions will undoubtedly be the subject of future writing, I wish to make just two brief comments. First, the judgment of the minority provides a better analysis of the physical realities of the broadcasting system. Secondly, it makes a better attempt at rationalizing the economic and technical aspects of this medium with those of other modes of transportation and communication than does the majority decision.

It should also be noted that the entire field is not lost to the provinces. The Chief Justice stated quite clearly that these decisions did not deal with cablevision broadcasting that did not rely on the reception of Hertzian waves. There can, therefore, be a totally enclosed intraprovincial system (a large closed-circuit T.V. system) over which the provinces should be given jurisdiction if and when the issue arises. This is of great economic and social importance in light of the future emergence of pay-T.V. systems that will not need to depend on the initial reception of Hertzian waves.

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[87] *Id.* at 197-201, 81 D.L.R. (3d) at 121-24.

Moreover, the provinces can take comfort from the fact that in regulating advertising within a province, they are not precluded from prohibiting certain types of television advertising, such as the use of cartoon characters in children's advertisements.[88] The *Kellogg's* decision leaves the issue of control of media content a little more open than did *Dionne* and *Capital Cities*.

D. *Taxation*

In *Central Mortgage and Housing Corp. v. Co-op College Residences Inc.*[89] the Ontario Court of Appeal held Part Vla of the National Housing Act[90] to be valid federal legislation in relation to section 91(1A), The Public Debt and Property. The legislation provided for federal loans for student housing under specified conditions. In rejecting claims that the legislation was in relation to either housing (conceded to be at least in part a provincial area) or education, Mr. Justice Howland (as he then was) stated:

> The loaning of public money to aid university or student housing is simply one way of imposing conditions on the disbursing of federal public funds. It is a proper exercise of the power of the Parliament of Canada under s. 91(1A)....In so far as CMHC sought at a later date to utilize provincial laws within the competence of a provincial Legislature, such as those regulating mortgages and their enforcement, to enforce the mortgage security it had taken, then it would be subject to the provisions of this legislation: *Reid* v. *Canadian Farm Loan Board*, [1937] 4 D.L.R. 248, [1937] 3 W.W.R. 1, 45 Man. R. 357. It is not a case of the Parliament of Canada under colour of its powers under s. 91(1A) invading the fields in respect of which the Legislatures of the Provinces have jurisdiction, nor is it in pith and substance legislation in relation to housing or education.[91]

The learned judge quoted extensively, with approval, from *Reference Re Employment and Social Insurance Act*[92] and its affirming decision, *Attorney-General for Canada v. Attorney-General for Ontario*.[93] Those decisions suggested that it may not be constitutional for Parliament to tax the exclusive areas of the provinces by setting up a special fund. In the *Agricultural Products Marketing Act Reference*,[94] however, the Supreme Court of Canada doubted that Parliament could impose indirect taxation for provincial purposes. These two cases would seem to suggest that so long as Parliament utilizes funds that have been taken from the Consolidated Revenue Fund, these funds may be

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[88] Attorney-General of Quebec v. Kellogg's Co. of Canada, 83 D.L.R. (3d) 314 (S.C.C. 1978) (6:3 decision), *rev'g* [1975] C.A. 518 (Que.) (2:1 decision).

[89] 13 O.R. (2d) 394, 71 D.L.R. (3d) 183 (C.A. 1975) (3:0 decision), *aff'g* 44 D.L.R. (3d) 662 (Ont. H.C. 1974).

[90] R.S.C. 1970, c. N-10.

[91] *Supra* note 89, at 411, 71 D.L.R. (3d) at 201.

[92] [1936] S.C.R. 427, [1936] 3 D.L.R. 644 (4:2 decision).

[93] [1937] A.C. 355, [1937] 1 W.W.R. 312, [1937] 1 D.L.R. 684 (P.C.).

[94] *Supra* note 36.

used to control a provincial area of jurisdiction. Parliament may not, however, impose a special tax for the purpose of controlling an exclusive provincial area.[95]

In considering these cases, it is submitted that the distinction which some courts have made between legislation in relation to a matter and legislation that effectively controls such a matter is in fact a distinction without a difference and should no longer be drawn. For as long as the exercise of the federal spending power is characterized as being an exercise of Parliament's jurisdiction under section 91(1A), The Public Debt and Property, it will not become apparent that notwithstanding this fact, the legislation (or the expenditure of funds by Parliament) in question may actually control a subject area exclusively assigned to the provinces. Surely the control of a particular subject area, by whatever means, is legislation regulating that activity and therefore must be legislation in relation to that matter. If the matter being controlled is within the exclusive legislative jurisdiction of the provinces, the expenditure should be *ultra vires* Parliament. In the *Central Mortgage* case the purpose of expending the federal funds in question was to control, and hence to regulate, a portion of housing and education. The legislation should have been declared *ultra vires*. No doubt the federal-provincial discussions prompted by the present political situation in Quebec will bring this problem to the fore.

* * *

In *Simpsons-Sears Ltd. v. Provincial Secretary of New Brunswick*,[96] the importance of the merchantable-commodity concept in the characterization of taxes as direct or indirect was restated. In this case, the appellant sent free catalogues to its New Brunswick customers. The relevant sections of the Social Services and Education Tax Act of New Brunswick[97] provided that:

> 1(b) "consumption" includes use and also includes the incorporation into any structure, building, or fixture of goods including those manufactured by the consumer or further processed or otherwise improved by him;
> (c) "consumer" means a person who
> (i) utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense; or
> (ii) utilizes or intends to utilize within the Province goods on behalf of or as the agent for a principal, who desired or desires to so utilize such goods for consumption by the principal or by any other person at the expense of the principal ....
> 4. Every consumer of goods consumed in the Province shall pay to the Minister for the raising of a revenue for Provincial purposes, a tax in respect of

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[95] *See also* Chief Justice Laskin's comment on the Doctrine of Exhaustiveness, *supra* note 43.

[96] 82 D.L.R. (3d) 321 (S.C.C. 1978), *rev'g* 71 D.L.R. (3d) 717 (N.B.C.A. 1976) (3:0 decision), *rev'g* 14 N.B.R. (2d) 289 (Q.B. 1975).

[97] R.S.N.B. 1973, c. S-10.

> the consumption of such goods, computed at the rate of eight per centum of the fair value of such goods.
> 5(1) If the goods to be consumed are purchased at a retail sale within the Province, the consumer shall pay such tax computed on the fair value of the goods at the time of such purchase.
> (2) If the goods are not purchased at a retail sale within the Province, the consumer shall pay such tax on the fair value thereof, determined in the manner following, namely:
> (a) if the goods are primarily intended for consumption by use only, such tax shall be computed on the fair value of the goods at the time they are brought into the Province;
> (b) if the goods are primarily intended for consumption otherwise than by use only, such tax shall be computed on the fair value of the goods at the time of consumption.

The Court of Appeal held that Simpsons-Sears Ltd. was a consumer within the definition of the Act and was therefore *prima facie* liable to pay the tax. Chief Justice Hughes stated:

> In my opinion catalogues of the kind distributed by the Company in the present case are not a merchantable commodity....
> Naturally a merchandiser of goods seeks to recover such taxes and any other direct taxes, such as real property and business taxes which he pays on his business premises, from the purchasers of his merchandise, but that does not make such taxes indirect taxes. Professor La Forest in his publication entitled *Allocation of Taxing Power under the Canadian Constitution* (1967), commented on the effect of passing on the burden of a tax at p. 65 as follows:
> What is required is the passing on of the tax itself in a recognizable form, not its recovery by more or less circuitous operation of economic forces. For that reason, subtle tracing of the ultimate economic incidence of a tax is irrelevant, and evidence of such economic tendencies will be rejected.
> In my opinion this statement accurately sums up the effect of the leading cases on the subject. In my view of the facts of the present case the tax imposed by the Act is a direct one and within the legislative jurisdiction of the Province to impose.[98]

He found that in these circumstances the legislation provided for a direct tax and was therefore *intra vires*. He also maintained that the only type of indirect tax was a commodity tax.[99]

Although the appeal to the Supreme Court of Canada was allowed,[100] there was no substantial disagreement with either the general tendency theory or with the conclusion that the only type of indirect tax was a commodity tax. Mr. Justice Ritchie, for Justices Judson, Spence and Dickson, held that Simpsons-Sears was not a consumer. Chief Justice Laskin agreed and saw no need to discuss the issue of direct taxation. While Mr. Justice Ritchie felt that the tax was indirect because it was not payable by the final purchaser or consumer, his definitive conclusion was:

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[98] *Supra* note 96, at 724, 725.

[99] This idea, along with some other aspects of traditional views, is canvassed in J.E. Magnet, *The Federal Distribution of Taxing Powers in Canada* (unpublished to date).

[100] *Supra* note 96.

> In the present case, however, the uncontradicted evidence in my view establishes that Simpsons-Sears Limited has developed and perfected a system to ensure that the expense involved in producing and delivering its catalogue is reflected in the retail price charged for the goods which it displays and is therefore borne by the ultimate consumer.[101]

The minority disagreed with the conclusion that the effects of the tax could be so accurately traced as to render it a tax on commodities and hence an indirect tax. It would seem, therefore, that there was no difference in opinion as to the law, but merely as to its application to the facts.

In *MacKeen v. Minister of Finance of Nova Scotia*[102] it was held that a province could tax interprovincial share transactions so long as it only taxed the increase in the value of the shares in the hands of those who were resident in the province. The validity of this clever scheme was commented on by Mr. Justice Hart:

> The Nova Scotia *Succession Duty Act* under section 8 makes resident successors to property of deceased persons situate outside the Province liable for payment of succession duties. Subsection 2(5) deems the shareholders of non-resident corporations becoming beneficially entitled to property of deceased persons as a result of their death to be successors to the extent of the increase in value of their shareholdings. In my opinion this is clearly direct taxation upon residents of the Province and establishes a method for the calculation of the benefit being received by the successor. It is not taxation on property outside the Province but rather on persons within the Province to the extent to which they have been benefited by transfers to non-resident corporations.
>
> I find therefore that subsection 2(5) of the Nova Scotia *Succession Duty Act* is valid legislation within the legislative competence of the Province of Nova Scotia to the extent that the shareholders benefited are residents of this province. The Province would not, of course, have the power to tax non-resident shareholders of these corporations but only those who are resident successors under subsection 8(2) of the Act.[103]

It is also permissible for a province to impose an income tax upon particular activities within a province even if the tax is paid by a non-resident. In *Alworth v. Minister of Finance*,[104] the Supreme Court of Canada accepted the submission that the Logging Tax Act of British Columbia[105] was imposed on economic activities within the province and was therefore valid. The Court rejected the contention that the tax was a personal tax on the logger, who may or may not be living in the province. It has always been a requirement that provincial taxation be "within the Province". This decision affirms that economic activity is as valid a base as a person's residence or property in satisfying the requirement.

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[101] *Id.* at 328.
[102] [1977] C.T.C. 230 (N.S.S.C.).
[103] *Id.* at 251.
[104] 76 D.L.R. (3d) 99 (S.C.C. 1977) (8:0 decision).
[105] R.S.B.C. 1960, c. 225.

In light of the *Alworth* decision, the Province of Saskatchewan might have been able to avoid the result reached by the Supreme Court of Canada in *CIGOL*.[106] The legislation in question was designed to freeze the price per barrel of oil which would be paid to producers at the 1973 level. It then compelled the producers to continue to produce oil and to sell it at the international or world price. The difference in the price per barrel between the frozen or so-called "well-head price" and the international price was to be retained by the province as either a royalty or a tax.

By a majority of seven to two, the legislation was held to be in relation to both indirect taxation (because it was an export tax), and extraprovincial trade. Both the majority (the Martland judgment) and the minority (the Dickson judgment) concluded that the tax was not an income tax largely because the tax was not imposed on net profits. For the majority, Mr. Justice Martland stated:

> It is contended that the imposition of these taxes will not result in an increase in the price paid by oil purchasers, who would have been required to pay the same market price even if the taxes had not been imposed, and so there could be no passing on of the tax by the Saskatchewan producer to his purchaser. On this premise it is argued that the tax is not indirect. This, however, overlooks the all important fact that the scheme of the legislation under consideration involves the fixing of the maximum return of the Saskatchewan producers at the basic well-head price per barrel, while at the same time compelling him to sell at a higher price. There are two components in the sale price, first the basic well-head price and second the tax imposed. Both are intended by the legislation to be incorporated into the price payable by the purchaser. The purchaser pays the amount of the tax as a part of the purchase price.
>
> For these reasons it is my opinion that the taxation scheme comprising the mineral income tax and the royalty surcharge does not constitute direct taxation within the province and is therefore outside the scope of the provincial power under subs. 92(2) of the B.N.A. Act.[107]

For himself and Mr. Justice de Grandpré, Mr. Justice Dickson stated:

> It is hard to see that the mineral income tax fits snugly into the commodity tax category. There are several rough edges. First, the tax falls upon a holder of certain rights in respect of part of the amount received. Secondly, unlike a true commodity tax — *i.e.*, a fixed imposition or a percentage of the commodity — s. 6 of the Act contemplates an imposition varying with production costs. If production costs rise, the share of the Province by taxation falls. Thirdly, the tax is not an "add-to-the-price" impost but, rather, a "take-from-the-owner" levy.
>
> Finally, the tax does not fall on the product but only on certain entitled holders. Owners of rights having an aggregate area of less than 1,280 acres in producing tracts are exempted. For these reasons, the tax resists classification

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[106] *Supra* note 10. In fact, as a result of *CIGOL*, Saskatchewan is moving to retroactively tax the *income* from the oil producers. *See* Oil Well Income Tax Act, S.S. 1977-78, c. 26.

[107] *Id.* at 624.

> as a commodity tax insofar as constitutional jurisprudence knows that term. It must be subject, therefore, to further constitutional scrutiny....
>
> It should be clear from the foregoing that neat constitutional categories are of marginal assistance in the present case. The tax resists such classification; it is a hybrid. It must be assessed in the light of constitutional analysis, keeping in mind the indicia to which I have above referred.
>
> Can it be said, then, that the tax is one which is demanded from the very person who it is intended or desired should pay it, or can it be said, rather, that it is demanded from the oil producer in the expectation and intention that he shall indemnify himself at the expense of another? The question is not easily answered....
>
> I cannot stress too strongly the point that purchasers would be paying the same price whether the tax existed or not. This fact, to my mind, conclusively prevents the levy from being in the nature of an indirect tax or an export tax. It is not passed on to purchasers to augment the price they would otherwise pay. Instead, they pay exactly the price they would pay in the absence of the tax and the producers are taxed on the profits they would otherwise receive.[108]

Because the consumer would have to pay the international price in any event (whether the difference between the well-head price and the international price went to the province or to the producer), Mr. Justice Dickson could not hold the tax to be indirect and hence it was *intra vires* the province. On the issue of trade and commerce, Mr. Justice Dickson relied upon the rationale of *Carnation*,[109] holding that economic effects due to pricing did not mean that the legislation could be characterized as an invasion of the federal trade and commerce power.

With all due respect, it is submitted that in reaching its decision the Supreme Court may have missed the issue that was at stake in this case. All taxes may be considered as examples of expropriation. Normally, expropriation means that property is taken from a citizen by the government for a legitimate government purpose, and compensation is given to the owner of the property based on some method of assessed value. The Province of Saskatchewan, it may be argued, was not imposing a tax in the *CIGOL* case but was in reality expropriating the property of the producers, namely their oil, and making a payment by way of compensation in the amount of the well-head price per barrel of oil.

Viewed in this way there was no need to deal with the legislation as being in relation to taxation at all. Rather, when viewed as a situation of nationalization, the question should have been: is the expropriation of the property of the oil producers made for a constitutionally legitimate provincial purpose? In this connection it must be remembered that the provinces do not have the carte blanche powers that Parliament possesses under section 92(10)(c). Furthermore, it has been held that a province may not nationalize either a federally-incorporated or a

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[108] *Id.* at 640-41, 646.

[109] *Supra* note 46.

federally-regulated company.[110] However, a province can steal and emasculate a business by establishing a provincial monopoly.[111] It is submitted that these are the real issues that should have been canvassed in this case.

In *Amax Potash*[112] the Supreme Court declared section 5(7) of the Proceedings Against The Crown Act[113] to be invalid insofar as it operated to prevent the recovery of taxes paid to the province under taxing legislation later found to be *ultra vires*. It has also been held that taxes must be returned where the taxing legislation is merely inoperative in the face of paramount and conflicting legislation of Parliament.[114] It should be noted, however, that there is nothing to prevent the Province of Saskatchewan from collecting oil taxes retroactively if it can find a constitutionally valid means of doing so.[115]

E. *Labour Relations*

In delivering the unanimous judgment of the Supreme Court, Mr. Justice Beetz upheld the decision of the Federal Court in the *Martin Service Station* case.[116] He held that Parliament could extend the concept of "insurable person" to include anyone who incurred the risk of involuntary unemployment.

The Beetz judgment conceded that independent contractors could voluntarily become unemployed. Yet, in many industries (including the taxi industry), when employees became involuntarily unemployed, it was likely that many of those who were engaged as independent contractors in the same industry would also become involuntarily unemployed. The legislation sought to protect the latter by making them eligible for unemployment insurance.

Beetz J. indicated that to enact legislation falling within section 91(2A) of the B.N.A. Act, some element of insurance must be present once a court has concluded that the legislation in question is truly in relation to unemployment insurance. However, the fact that the legislation affects the civil rights of those governed by contracts *for* service as well as of those governed by contracts *of* service will not render it invalid.

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[110] British Columbia Power Corp. v. Attorney-General of British Columbia, 44 W.W.R. 65, 47 D.L.R. (2d) 633 (B.C.S.C. 1963).

[111] *See* discussion following note 277, *infra*.

[112] Amax Potash Ltd. v. Gov't of Saskatchewan, 11 N.R. 222, 71 D.L.R. (3d) 1 (S.C.C. 1976) (9:0 decision), *rev'g* 65 D.L.R. (3d) 159 (Sask. C.A. 1975) (3:0 decision).

[113] R.S.S. 1965, c. 87.

[114] *Re* The Coloured Gasoline Tax Act, [1976] 6 W.W.R. 315 (B.C.S.C.), with supplementary reasons, [1977] 4 W.W.R. 436 (B.C.S.C.).

[115] *Id*. *See also* note 106, *supra*.

[116] *Re* Martin Serv. Station Ltd., 9 N.R. 257, 67 D.L.R. (3d) 294 (S.C.C. 1976) (8:0 decision), *aff'g* [1974] 1 F.C. 398, 1 N.R. 464, 44 D.L.R. (3d) 99 (App. D.) (3:0 decision).

The Beetz judgment, like the Federal Court decision before it, seems to suggest that "the federal government can extract unemployment insurance premiums from any person generating income by whatever means".[117] The element of risk which was held to be so definitive in this case, is surely present in any type of activity carried on for profit.

In contrast to its explicit jursidiction in relation to unemployment insurance, Parliament's jurisdiction over traditional areas of labour relations continues to be limited. Recent decisions have upheld the view that Parliament only has jurisdiction over the labour relations of those engaged in works, undertakings and activities over which Parliament has exclusive control, [118] unless, of course, we are in the midst of a declared economic crisis.

Thus, in *Re United Fishermen & Allied Worker's Union*,[119] section 107(1) of the Canada Labour Code[120] was declared to be invalid. This section sought to extend the definition of "employees" to include fishermen who were not employed in the traditional sense but who participated in a scheme of profit-sharing and who were referred to as "dependent contractors".

Chief Justice Jackett, for the Federal Court, held that this section sought to regulate the sale of fish. The only justification for bringing these dependent contractors within federal control, therefore, would be if the legislation was found to be in relation to section 91(12), Seacoast and Inland Fisheries. With regret, Chief Justice Jackett was unable to find that contractual activities between the fishermen and packing companies fell within the meaning of this section. The appeal to the Supreme Court was allowed, but the constitutional point was avoided.[121]

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[117] MacKenzie, *supra* note 2, at 142.

[118] See this confirmed in: Western Stevedoring Co. v. Pulp Paper & Woodworkers of Canada, 61 D.L.R. (3d) 701 (B.C.C.A. 1975) (3:0 decision); Jebsens (U.K.) Ltd. v. Lambert, 64 D.L.R. (3d) 574 (B.C.C.A. 1975) (3:0 decision), (in which the Labour Code of British Columbia was held to be inapplicable to shipping and interprovincial trucking); and *Re* Staron Flight and *Re* Field Aviation, *supra* note 78. The effect of the erosion of Parliament's jurisdiction under s. 96 in respect of labour relations' tribunals will require time to assess.

[119] [1976] 1 F.C. 375, 64 D.L.R. (3d) 522 (App. D. 1975) (3:0 decision), *aff'g* 50 D.L.R. (3d) 602 (F.C. Trial D. 1974).

[120] R.S.C. 1970, c. L-1.

[121] British Columbia Provincial Council v. British Columbia Packers Ltd., [1978] 1 W.W.R. 621, 82 D.L.R. (3d) 182 (S.C.C. 1977) (9:0 decision). Chief Justice Laskin stated, at 630, 82 D.L.R. (3d) at 190:

> I see no escape from the conclusion that Part V of the *Canada Labour Code* does not bring fishing crew members and fish processors into an employee-employer relationship so as to authorize the Canada Labour Board to entertain applications for certification. . .
>
> In the result, the appeal is dismissed on a ground other than that taken either by the Federal Court of Appeal or by Addy J. and without reference to any issue of constitutionality.

Similarly, in *Canada Labour Relations Board v. C.N.R.*,[122] employees of the Jasper Park Lodge which was operated by the C.N.R. were not found to be employees engaged on a federal work or undertaking. The hotel, it must be noted, was open to the general public.

Of some interest is the decision of the British Columbia Court of Appeal in *C.P.R. v. Building Material, Construction & Fuel Truck Drivers Union, Local 213*.[123] Here the enforcement of an agreement between a provincially-regulated company and a provincially-regulated union clearly interfered with the capacity of an interprovincial trucking company to carry on its business. The interprovincial trucking company was held to be a federal work, undertaking or business under the Canada Labour Code.

The court refused to declare three clauses of the agreement to be invalid due to their interference with the status and essential capacities of the federal undertaking. The court admitted that while the provincial legislature could not legislate directly to affect the status and capacities of federally-regulated endeavours, this principle did not apply to a collective agreement made between private parties.[124]

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[122] *Supra* note 60. That this decision reached the Supreme Court is surprising in view of C.P.R. v. Attorney-General of British Columbia, [1950] A.C. 122, [1950] 1 W.W.R. 220, [1950] 1 D.L.R. 721 (P.C. 1949), which reached a similar conclusion with respect to the employees of the Empress Hotel operated by the C.P.R. Admittedly, the Canadian National Railways Act (S.C. 1955, c. 29, now R.S.C. 1970, c. C-10) declared the "railway and other transportation works" to be for the general advantage of Canada, but the *C.P.R.* decision had made the separation of hotel functions from interprovincial railway functions quite clear.

[123] [1975] 5 W.W.R. 329, 60 D.L.R. (3d) 249 (B.C.C.A.) (2:1 decision), *aff'g in part* [1971] 5 W.W.R. 1 (B.C.S.C.), and [1972] 2 W.W.R. 535 (B.C.S.C. 1971).

[124] Mr. Justice Bull said, at 367-68, 60 D.L.R. (3d) at 267:

> The frustration claimed is, of course, the continual refusal of the respondent Teamsters to unload the trucks of the corporate appellant delivering materials at construction sites. The appellants state that the subcontractors' clause, the non-affiliation clause and the unfair goods and persons clause were intended to effect and were aimed at that frustration and, in any event, had that effect. It was argued, applying what has been approved by high authority in constitutional cases involving or interpreting the respective powers of the provincial Legislatures and Parliament, that the collective agreements and the clauses in particular should, because of their creation within the power ambit of provincial authority, be construed as being inapplicable or inoperative to the appellants to prevent such frustration and sterilization happening. The argument was an interesting one, but, in my view, is without substance. The provisions of ss. 91 and 92 of the *British North America Act, 1867*, are decisive of legislative authority. Where Parliament, acting within its ambit, creates and gives status and powers to a corporation such as the corporate appellant, a provincial Legislature does not have the power other than by laws of general application to enact valid or effective legislation to frustrate and sterilize that corporation's corporate status and powers. But here there is no legislative conflict. Unions have entered into negotiated collective agreements with contractors and certain contractual rights are purportedly given to the unions by the impugned clauses. Their creation, implementation and use was between contracting parties and

It therefore appears that provincial instrumentalities may be able to emasculate a federal undertaking whereas provincial legislatures may not. When this decision is considered together with the *Canadian Indemnity*[125] decision, it seems that with respect to federal instrumentalities, provinces can do indirectly what they cannot do directly.

* * *

The courts have continued to follow the rational approach of using the legitimate existence of interprovincial business within a company's operations as the criterion for determining federal and provincial jurisdiction under section 92(10)(a). In a recent British Columbia Court of Appeal decision, for example, it was held that the fact that a substantial portion of a company's business was carried on beyond the limits of a province was sufficient to characterize the company as a federal undertaking.[126] Moreover, in the *Cannet Freight* case,[127] a freight forwarding company was held not to be a federal undertaking even though it used the facilities of, and contracted with, an interprovincial railway: the company's "entire sphere of operation in its business" was found to be local.[128]

The reasoning in *Pacific Produce* and *Cannet Freight* is to be preferred to that of the *Board of Transport*[129] and *Saskatchewan Power*[130] cases.

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> the Legislature has not attempted or purported to legislate beyond its powers.

In his dissent, Mr. Justice Seaton stated, at 343, 60 D.L.R. (3d) at 391:

> Whether the appellant be the Canadian Pacific Railway Company or C.P. Transport Limited it is a federally incorporated body. The appellant union is certified under the laws of Canada. The argument is that the impugned clauses are intended to and have the effect of frustrating the corporate status of these federally constituted bodies, that it would be *ultra vires* the Province to enact clauses having that effect, and that citizens may not by their agreement do that which the Province cannot do by legislation. This leads to a request for a declaration that the offending clauses do not apply to the appellants. The short answer to this argument is that the *British North America Act, 1867* divides legislative authority between the provincial Legislatures and the federal Parliament. There is no legislative action that is challenged here, it is the action of companies, unions and individuals. Federally incorporated companies and federally certified unions, like the rest of us, are subject to the vicissitudes of life. They do not go about with special powers or immunities. I agree with the trial Judge that this argument is untenable.

The result of the case was that by interpretation of the agreement it did not apply to the federal trucking business in its "first drop" of materials, a result consistent with the decisions in *Western Stevedoring* and *Jebsens*, *supra* note 118.

[125] *Supra* note 11.

[126] *Re* Pacific Produce Delivery & Warehouses Ltd., [1974] 3 W.W.R. 389, 44 D.L.R. (3d) 130 (B.C.C.A.) (2:1 decision).

[127] *Re* Cannet Freight Cartage Ltd., [1976] 1 F.C. 174, 60 D.L.R. (3d) 473 (App. D. 1975) (3:0 decision).

[128] *Id.* at 181, 60 D.L.R. (3d) at 478.

[129] *Supra* note 65.

[130] *Supra* note 64.

There have been two significant decisions relating to provincial minimum wage legislation. In the first, *MacMillan* v. *Frizzell Plumbing and Heating Ltd.*,[131] Mr. Justice Morrison relied upon *Re Dairy Maid Chocolates Ltd.*[132] to find that a province could create a trust for the accrued vacation pay of employees which would be given priority over all other claims, provided that the trust was created prior to the property passing to a trustee in bankruptcy. This would not, it was held, constitute an interference with federal jurisdiction over bankruptcy and insolvency.

In the second, *Regina v. Baert Construction Ltd.*,[133] a provincial minimum wage law which imposed a higher wage level than did its federal counterpart was held to be supplementary to federal legislation. The Manitoba Court of Appeal held that Parliament had contemplated that the provincial law would be applicable. However, Hall J.A. did not consider it necessary to pass upon the validity of the federal and provincial legislation.

It should be noted that in this case the provincial company that signed a contract with the federal government, thereby bringing into application the Fair Wages and Hours of Labour Act[134] and Regulations, was not one engaged exclusively by the federal government.[135] The decision, therefore, leaves open the question of the application of

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[131] 56 D.L.R. (3d) 415 (N.S.S.C. 1975).

[132] [1973] 1 O.R. 603, 31 D.L.R. (3d) 699 (H.C. 1972). Remarking on this case Mr. Justice Morrison said, 56 D.L.R. (3d) at 425:

> However, it seems to me that Houlden, J., in the *Dairy Maid Chocolates* case, in saying that there was no power in the provincial Legislature to give priority over other claims or to *create* a trust on property in the hands of the trustee, was referring to a situation where the trust would be created after the goods had passed into the hands of the trustee or where there is a trustee in bankruptcy. However, having read the entire decision I have come to the conclusion that this would not apply to the situation where the goods come into the hands of a receiver already impressed with a trust. Giving s. 34 of the *Labour Standards Code* its open and clear meaning it seems to me that where vacation pay is accruing due to an employee then such vacation pay is a charge upon the assets of the employer or his estate in his hands or the hands of a trustee and has priority over all other claims.

[133] [1975] 3 W.W.R. 347, 51 D.L.R. (3d) 265 (Man. C.A. 1974) (3:0 decision), *aff'g* [1974] 4 W.W.R. 135 (Man. Prov. Ct.).

[134] R.S.C. 1970, c. L-3.

[135] As Mr. Justice Matas analysed it, *supra* note 133, at 350-51, 51 D.L.R. (3d) at 270-71 (citations omitted):

> Counsel for Baert cited *City of Ottawa* v. *Shore & Horwitz Construction Co. Ltd., Loughead* v. *Shackleton*, and *R.* v. *Pacific Coyle Navigation Co. Ltd.* in support of his argument that competency was exclusive to federal Parliament; he contended that even if there were no federal legislation, a Province could not enact a valid statute governing employees under a federal contract for work to be performed on federal land. Counsel did not go so far as to suggest that the four employees would be subject to federal laws relating to certification and labour relations generally; in the isolated instance of

provincial minimum wage legislation in a situation where both the employees and the contractor concerned are exclusively engaged on federal projects or on federal property.[136]

The *Vipond*[137] and *Montcalm*[138] decisions are also relevant in considering this issue. In *Vipond*, a labour problem arose among employees engaged in the construction of a building at an airport. Mr. Justice Cavanaugh stated:

> The applicant's argument then is that this employment is subject to the *Canada Labour Code* because it comes under the legislative authority of Parliament as being a matter connected with aeronautics under s. 3(a) of the *Aeronautics Act*. The fact of construction of a building called an air terminal does not in my view show that the construction is connected with aeronautics. This I think is particularly so when you consider that aeronautics has to do with the flight of aircraft from take-off to landing and possibly including the loading and unloading thereof.[139]

It would seem, then, that only if the building or construction itself is vitally connected with a federally-regulated area will provincial legislation be held not to apply. Undoubtedly, this point will be reconsidered when the Supreme Court renders its decision in the *Montcalm* case.

In general, there seems to be little reason why provincial legislation should not apply in these cases. It is possible that in some cases, the legislation may be perceived as an indirect, if not direct, interference

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this particular project, federal law would apply; on the conclusion of the project, provincial law would again apply to employees of Baert.

In my view, this argument is based on an artifical division of legislative competency. From a practical point of view it would be a strange result if federal legislation, providing for a minimum standard, could be interpreted so as to require that standard to apply to a part of a contractor's work force, for part of the time, where there was intermittent employment under a federal contract on federal land. The result would be chaos and would be contrary to the intent of labour legislation, both federal and provincial. In my opinion, the cases cited, *supra*, by counsel for Baert are not relevant to the point in issue here where federal legislation contemplates the possibility of supplementary provincial legislation.

It is apparent, from a reading of the *Wages Act* and Regulations that Parliament intended to set a floor for wages payable on any federal contract, but left open the possibility of payment of higher wages depending on the area in which federal work was to be carried on. In the case at bar, the Province has stipulated rates which the Legislature has considered fair for Manitoba by enacting legislation on the subject. Payment by a contractor of those rates would not contravene federal legislation. On the contrary, the provincial statutes supplement federal legislation and would be in accordance with the intention of the *Wages Act*: see W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" 9 McGill L.J. 185 (1963). In my opinion, it cannot be said in the case at bar, that there is any interference with federal legislation or contracts.

[136] *But see* Comm'n du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, 59 D.L.R. (2d) 145 (7:0 decision), *aff'g* [1966] Que. Q.B. 301 (C.A.).

[137] *Supra* note 76.

[138] *Supra* note 77.

[139] *Supra* note 76, at 383.

with the federal expenditure of funds. It may therefore be classified as a breach of section 125,[140] which provides that the property of one level of government will be immune from the taxation of the other.

F. *Matrimonial Matters*

The Divorce Act[141] has been the source of further constitutional problems even after the *Jackson*[142] and *Zacks*[143] decisions.

In *R. v. R.*,[144] the Nova Scotia Court of Appeal was faced with, *inter alia*, the following two issues:

> (a) Has the Supreme Court, as the successor to the Court of Divorce and Matrimonial Causes, jurisdiction under Nova Scotia pre-Confederation statutes, notwithstanding the *Divorce Act*, R.S.C. 1970, chap. D-8, to declare a marriage null and void because of the impotence of the husband?
> (b) If so, has it jurisdiction at the same time to grant maintenance to the wife?[145]

On historical grounds the court found that at least until 1948, there was a dual nature to the decree of dissolution of marriage in Nova Scotia. The order decreed that the marriage "is hereby dissolved and declared from henceforth null and void by reason of impotence of the said respondent". Holding that the old jurisdiction was unimpaired and speaking for the court, Chief Justice MacKeigan remarked:

> On the jurisdictional aspects there remains a question not raised by the parties or the learned trial judge—did the *Divorce Act* of 1968, in giving a right to divorce for, *inter alia*, non-consummation after one year of marriage (s. 4(1)(d)) and at the same time repealing "all other laws respecting divorce" (s. 26(2)), effectively deprive the Nova Scotia Court of power to deal with the present case?
>
> I think not. Undoubtedly a decree of divorce dissolving a marriage for impotence under the old Nova Scotia laws cannot now be issued, even for impotence not falling within the restrictive terms of s. 4(1)(d). And a dual decree, as in *Langmaid*, *supra*, and *Bezanson*, *supra*, could not now be issued. I see no reason, however, that the old jurisdiction to declare a marriage null and void for impotence is in any way impaired, especially in cases, like the present, which do not fall within s. 4(1)(d) of the *Divorce Act*. Section 26(2), after repealing "all other laws respecting divorce that were in force in. . .any province", goes on to provide that "nothing in this Act shall be construed as repealing any such law to the extent that it constitutes authority for any other matrimonial cause". These saving words in my view preserve the powers of the Nova Scotia Court, now the Supreme Court, to grant a declaration of nullity in this case and to award maintenance.[146]
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[140] S.125 reads: "No land or property belonging to Canada or any Province shall be liable to taxation."

[141] R.S.C. 1970, c. D-8.

[142] *Supra* note 5.

[143] *Supra* note 6.

[144] 18 N.S.R. (2d) 662 (C.A. 1976) (3:0 decision).

[145] *Id.* at 665-66.

[146] *Id.* at 672.

In *Re Sanders*,[147] the Nova Scotia Supreme Court held that provincial legislation creating a duty of support following cohabitation did not create a new form of marriage so as to interfere with Parliament's jurisdiction under section 91(26).

In contrast, in *Re North*[148] a marriage between two males could not be registered under the Vital Statistics Act of Manitoba,[149] notwithstanding that all the formal requirements of marriage had been met, because it was not a marriage at common law. County Court judge Philp stated:

> The Parliament of Canada has not legislated that the union between two males is not a marriage, and the Legislature of Manitoba has not legislated that such a marriage cannot be solemnized or registered. It is argued that s. 2 of the *Marriage Act* suggests that such a union is within the contemplation of the Act. That section is as follows:
>
> > 2. If duly authorized as herein provided, a person eighteen years of age or more. . .may solemnize the ceremony of marriage between *any two persons* not under a legal disqualification to contract the marriage.
>
> (The italics are mine.)
>
> I cannot conclude that the Legislature, in using the words "any two persons" intended to recognize the capacity of two persons of the same sex to marry. Even if I could conclude that such was the intention of the Legislature, I would have no hesitation in finding that such a provision is clearly *ultra vires* as being part of the substantive law of marriage and divorce, a matter exclusively within the legislative competence of the Parliament of Canada under s. 91(26) of the *British North America Act*, 1867. I would view such a provision as affecting the essential capacity of a person to marry, and not as a condition as to the solemnization which is within the legislative competence of the provincial Legislatures under s. 92(12).[150]

Judge Philp's logic concerning the meaning of the word "person" is interesting.

* * *

Establishing the grounds upon which a decree of judicial separation can be granted is clearly *intra vires* Parliament's jurisdiction under section 91(26).[151] However, following *Regina v. MacDonald*,[152] provincial legislatures can make it an offence to interfere unlawfully with lawful custody under a divorce decree.

* * *

Clearly after *Zacks*, maintenance orders made pursuant to the Divorce Act will override those made under provincial legislation. However, if there is an existing provincial order and no order is made at the time of the decree *nisi*, the provincial order will remain in force.[153] In *Traill v. Traill*,[154] Mr. Justice Toy went so far as to hold

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[147] 15 N.S.R. (2d) 624, 53 D.L.R. (3d) 153 (S.C. 1974).

[148] 20 R.F.L. 112, 52 D.L.R. (3d) 280 (Man. Cty. Ct. 1974).

[149] R.S.M. 1970, c. V-60.

[150] *Supra* note 148, at 113-14, 52 D.L.R. (3d) at 281-82.

[151] Salloum v. Salloum, [1976] 5 W.W.R. 603 (B.C.S.C.).

[152] [1976] 5 W.W.R. 391 (B.C.S.C.).

[153] Hughes v. Hughes, [1977] 1 W.W.R. 579, 72 D.L.R. (3d) 577 (B.C.C.A. 1976) (3:0 decision).

[154] 21 R.F.L. 183, 55 D.L.R. (3d) 760 (B.C.S.C. 1975).

that even a consent judgment made under provincial legislation would be no bar to the jurisdiction of the court to grant an order for maintenance at the time of the decree *nisi* under the Divorce Act.

By virtue of section 11 of the Divorce Act, a court undoubtedly has the power to order lump sum payments by way of maintenance. However, in *K. v. K.*,[155] the Manitoba Court of Appeal suggested that, if section 11 is interpreted to mean that a court had the power to order the transfer of particular property from one spouse to the other, it would be *ultra vires* Parliament. Such a power would not be necessarily incidental to Parliament's jurisdiction over marriage and divorce.

It appears that the extent of Parliament's jurisdiction under section 91(26) has not yet been settled by the Supreme Court, at least with regard to the issue of financial assistance. In *Vadeboncoeur v. Landry*[156] Beetz J. stated, for the Court:

> In the case at bar, the petition is not based on needs arising after the dissolution of the marriage bond, nor was the wife's petition considered and denied for lack of merit when the decree *nisi* was granted, nor, finally, was the matter of her needs and support not raised during the proceedings; it was in fact raised and determined in favour of respondent, on an interim basis, before the decree *nisi*. The petition for alimony is based on needs that existed at the time of the dissolution of the marriage. According to the trial Judge's undisputed findings the lack of an appropriate order made in favour of respondent when the decree *nisi* was granted is only the result (translation) "of an omission on the part of his or respondent's counsel or of a misunderstanding between them". Respondent's right to alimony in the circumstances would normally have been dealt with when the decree *nisi* was granted, and it was only by an oversight that this did not happen and the issue remained unsettled. Respondent submitted her petition two months after the decree absolute was granted—in my opinion, a reasonable lapse of time—after she learned of a fortuitous omission in the proceedings taken to dissolve her marriage. The purpose of her petition was to remedy this omission. In my view, the Superior Court had jurisdiction to grant the petition and this jurisdiction, connected as it is with the granting of the decree of divorce, originates in s. 11 of the *Divorce Act*.
>
> As in *Zacks v. Zacks*, the Attorney-General of Canada asks that the Court deal with the appeal on a much broader basis, namely, that the Constitution empowers the Parliament of Canada to prescribe that the obligation to provide assistance indefinitely survives the dissolution of the marriage bond and that this is what was done in the *Divorce Act*. The circumstances of this case do not enable us to express an opinion upon such general propositions, anymore than it was possible in *Zacks v. Zacks*.[157]

In fact, as a result of the decisions in *Zacks* and *Vadeboncoeur* (and the cases reviewed in the latter decision), the Supreme Court has impliedly done what Beetz J. said it has not done. At the time of the

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[155] [1975] 3 W.W.R. 708, 20 R.F.L. 22, 53 D.L.R. (3d) 290 (Man. C.A.) (3:0 decision).

[156] 10 N.R. 469, 23 R.F.L. 360, 68 D.L.R. (3d) 165 (S.C.C. 1976) (9:0 decision), *aff'g* [1973] C.A. 351 (Que.).

[157] *Id.* at 477-78, 23 R.F.L. at 366-67, 68 D.L.R. (3d) at 171.

decree *nisi*, a court either will or will not make an order as to maintenance. If it does not, there is no bar to a later grant if the omission has resulted by mistake. It is also true that even a grant of *nil* maintenance can be reviewed at a later date. Where, then, is there a limitation on Parliament's jurisdiction, apart from the limitation suggested in *K. v. K.*?

The *Gillespie* decision,[158] which was referred to in a previous survey,[159] held that a custody order made pursuant to the Divorce Act superseded an order made under provincial legislation. The case also implied that a custody order under the Divorce Act would, in all circumstances, supersede an order under provincial legislation or jurisdiction even when the welfare of the child was before the court under its inherent jurisdiction of *parens patriae*.[160]

This conflict between Parliament's jurisdiction under section 91(26) (and its exercise by virtue of the Divorce Act), the effect of a custody order under the Divorce Act and the inherent provincial jurisdiction over the welfare of children has been considered in a number of decisions.[161] The conflict has not, however, come before the Supreme Court of Canada. The cases to date seem to support the following propositions:

(a) Section 11 makes it possible only for the original court making the order of custody and maintenance to vary that order;
(b) Orders under section 11 take precedence over existing orders of custody made under provincial statutes insofar as the orders under the Divorce Act relate to the issue of custody and the welfare of the child at the time of divorce;

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[158] Gillespie v. Gillespie, 6 N.B.R. (2d) 227, 36 D.L.R. (3d) 421 (C.A. 1973) (3:0 decision).

[159] MacKenzie, *supra* note 2, at 144.

[160] As Hughes C.J.N.B. stated, *supra* note 158, at 238-39, 36 D.L.R. (3d) at 430:

> In my view, when Parliament enacted the corollary provisions respecting custody of children of a marriage contained in ss. 10(b), 11(1)(c), 11(2) and 15, it carved out of the general jurisdiction in custody matters theretofore administered solely by Courts deriving their powers through provincial legislation, a segment of that jurisdiction limited to the children of a marriage sought to be dissolved and empowered the Courts exercising divorce jurisdiction to make orders applicable to any children of such marriage. Since, in the circumstances of the present case, provincial legislation and federal legislation cover the same subject-matter, the federal legislation must prevail and supersede that enacted by the Province. It follows, I think, that any custody order made by a divorce court under ss. 10 or 11 of the *Divorce Act*, supersedes any previous order made under provincial legislation with respect to the same child.

[161] *See, e.g.*, Rodness v. Rodness, [1976] 3 W.W.R. 414, 23 R.F.L. 266 (B.C.C.A. 1975) (3:0 decision); Ramsay v. Ramsay, 13 O.R. (2d) 85, 23 R.F.L. 147 (C.A. 1976) (5:0 decision), *aff'g* 18 R.F.L. 225 (Ont. H.C. 1974); *Re* Hall, [1976] 4 W.W.R. 634, 24 R.F.L. 6, 70 D.L.R. (3d) 493 (B.C.C.A.) (3:0 decision), *rev'g* 53 D.L.R. (3d) 710 (B.C.S.C. 1975); *Re* Hutchings, 9 Nfld. & P.E.I.R. 438, 24 R.F.L. 328 (Nfld. C.A. 1976) (3:0 decision), *rev'g* 6 Nfld. & P.E.I.R. 461 (Nfld. S.C. 1974); Hilborn v. Hilborn, 4 Alta. L.R. (2d) 52 (S.C. 1977).

(c) The effect of section 11 is not to oust the inherent jurisdiction of *parens patriae* of provincial courts. Provincial courts, therefore, can make subsequent orders as to custody in situations where the courts have always had the power to intervene, that is, where the welfare of the child is at stake (due to neglect, for example). Surely Parliament did not intend to oust this provincial jurisdiction even at the cost of some of its own jurisdiction over divorce.

(d) There is no firm opinion as to Parliament's constitutional power to oust this jurisdiction of the provincial courts should it seek to do so by amendment of the Divorce Act. It is submitted that such an attempt would be viewed as an interference with property and civil rights in the province and therefore as going beyond what is necessarily incidental to the exercise of jurisdiction over marriage and divorce. In reaching this conclusion, however, the decision in *Re M.*[162] should not be overlooked. In that case it was held valid for Parliament to place children in specific homes and to order municipalities to contribute to the support of these juveniles. In light of this decision, what is the difference between the considerations attendant to the prevention of juvenile delinquency (presumably justified under the Juvenile Delinquents Act of Canada[163]) and those attendant to the exercise of the authority of *parens patriae*? There must be a line over which Parliament cannot step. However, unlike the situation in respect of maintenance, in the case of custody this line does not seem to be readily apparent.

G. *Indians and Indian Lands*

David Elliott has accurately described the *Canard* case[164] as the return of the triad of the Canadian Bill of Rights,[165] the Indian Act[166] and the concept of equality before the law.[167]

Mrs. Canard was the widow of an Indian. Her right under provincial law to be the administratrix of her husband's estate was usurped by the appointment of an administrator under section 43 of the Indian

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[162] 14 O.R. (2d) 20, 14 R.F.L. 1, 72 D.L.R. (3d) 472 (Fam. Ct. 1976).

[163] R.S.C. 1970, c. J-3. *See* Attorney-General of British Columbia v. Smith, [1967] S.C.R. 702, [1969] 1 C.C.C. 244, 61 W.W.R. 236, 65 D.L.R. (2d) 82 (7:0 decision), *aff'g* 53 D.L.R. (2d) 713 (B.C.C.A. 1966).

[164] Attorney-General of Canada v. Canard, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1, 4 N.R. 91, 52 D.L.R. (3d) 548 (5:2 decision), *rev'g* 30 D.L.R. (3d) 9 (Man. C.A. 1972) (3:0 decision), *aff'g* [1972] 4 W.W.R. 618 (Man. Q.B.).

[165] R.S.C. 1970, App. III.

[166] R.S.C. 1970, c. I-6.

[167] Elliott, *Canard: A Triad Returns*, 25 U. TORONTO L.J. 317 (1975). *See also* Brun, *De Drybones à Lavell à Canard*, 53 CAN. B. REV. 795 (1975); Sanders, *Indian Women: A Brief History of Their Roles and Rights*, 21 McGILL L.J. 656 (1975); Kriger, Comment, 8 OTTAWA L. REV. 662 (1976); McDonald, *Equality Before the Law and the Indian Act: In Defence of the Supreme Court*, 3 DALHOUSIE L.J. 726 (1977).

Act. The issues to be decided by the Supreme Court were:
(1) Could Parliament oust provincial jurisdiction over the administration of estates in the case of Indians?; and
(2) If Parliament could do so, would this contravene the provisions of equality before the law under the Bill of Rights?

The majority decided that, under section 91(24) of the B.N.A. Act, Parliament could provide for the administration of the estates of Indians in a manner inconsistent with existing provincial legislation. Such an enactment would not be a law in relation to property and civil rights. Moreover, it was held that there was no denial of equality before the law under the Bill of Rights because, in fact, Mrs. Canard was not precluded from being appointed under section 43. If there was to be any breach of the Bill of Rights it must be in the administration of the Indian Act, which would effectively preclude her appointment as executrix of her husband's estate.[168]

Relying largely upon the judgment of Mr. Justice Beetz, Elliott concludes: "The judgments in *Canard* appear to support the proposition that a denial of equality before the law must involve some element of disadvantage, as opposed to benefit".[169]

The decision almost defies analysis and should be confined to its facts.

Ironically, but not surprisingly, it has been held that this "it's for your own good" rationale used by the courts to justify discrimination and denial of equality before the law[170] cannot be used as a sword to ensure that Indians are guaranteed trial by their cultural peers, namely Indians. In *Regina v. La Forte*,[171] Guy J.A. stated: "To me the argument that the Canadian Bill of Rights was passed to prevent discrimination is completely inconsistent with the argument that Indians cannot be tried by non-Indians."[172]

The Supreme Court's judgment in *Natural Parents v. Superintendent of Child Welfare*[173] is equally unsatisfying. Here the issue was whether a status Indian child could be adopted by non-Indian parents

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[168] Both the majority and the minority saw this to be the case, but only Chief Justice Laskin and Mr. Justice Spence were prepared to reach a positive conclusion in favour of Mrs. Canard.

[169] Elliott, *supra* note 167, at 323.

[170] The best (*sic*) example of this is R. v. Burnshine, [1975] 1 S.C.R. 693, 25 C.R.N.S. 270, [1974] 4 W.W.R. 49, 44 D.L.R. (3d) 584 (6:3 decision), *aff'g* 39 D.L.R. (3d) 161 (B.C.C.A. 1974). *See also* MacKenzie, *supra* note 2, at 149-50, and Conklin and Ferguson, *The Burnshine Affair: Whatever Happened to Drybones and Equality Before the Law*, 22 CHITTY's L.J. 303 (1974).

[171] 25 C.C.C. (2d) 75, 62 D.L.R. (3d) 86 (Man. C.A. 1975) (3:0 decision).

[172] *Id.* at 77, 62 D.L.R. (3d) at 88. *See also* R. v. Diabo, 30 C.R.N.S. 75, 27 C.C.C. (2d) 411 (Que. C.A. 1974) (3:0 decision).

[173] [1976] 2 S.C.R. 751, [1976] 1 W.W.R. 699, 60 D.L.R. (3d) 148 (1975), *aff'g*, *sub nom. Re* Adoption Act, 44 D.L.R. (3d) 718 (B.C.C.A. 1974) (5:0 decision), *rev'g* [1974] 1 W.W.R. 19 (B.C.S.C. 1973).

under the Adoption Act of British Columbia,[174] without the consent of the natural parents. The Indian Act was silent with regard to this particular issue.

The Supreme Court unanimously upheld the judgment of the Court of Appeal of British Columbia allowing the adoption, although the judgments reflect varying reasons. Four members of the Court, Laskin C.J.C., and Justices Dickson, Judson and Spence, felt that even in the absence of federal legislation on the matter, the provinces could not legislate with respect to the adoption of Indians. As he put it:

> *Ex facie*, and apart from the amendment of 1973 introducing s. 10(4a), the *Adoption Act* did not purport to extend to areas of exclusive federal competence, *e.g.*, Indians. It could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness", to strike at a relationship integral to a matter outside of provincial competence. This is entirely apart from the question whether, if referentially incorporated the *Adoption Act* could have any force in the face of various provisions of the *Indian Act*, securing certain benefits for Indians.[175]

However, the Laskin group held that the Adoption Act was incorporated as part of federal law under section 88 of the Indian Act and that there

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[174] R.S.B.C. 1960, c. 4 *as amended by* S.B.C. 1973 (2d sess.), c. 95, s. 1. Subs. 10(1)-(4a) of the Adoption Act, as amended, read:

> 10(1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.
>
> (2) For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.
>
> (3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2).
>
> (4) Subsections (2) and (3) do not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them.
>
> (4a) The status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the Indian Act (Canada) or under any other Act or law are not affected by this section.

and s. 88 of the Indian Act, R.S.C. 1970, c. I-6, reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

[175] *Supra* note 173, at 760-61, [1976] 1 W.W.R. at 704-05, 60 D.L.R. (3d) at 154.

was, therefore, no denial of rights under the Canadian Bill of Rights. An adoption under the Adoption Act, however, could not operate so as to deprive an adopted child of the right to Indian status where this was applicable. Section 10(4a) of the British Columbia Adoption Act, which was passed after the case had begun, only served to reinforce this view.

The remaining five judges permitted the provincial adoption legislation to apply to Indians in view of the silence of the federal government on the matter. Justices Martland, Ritchie, de Grandpré and Pigeon held that the effect of section 88 of the Indian Act was not to incorporate the Adoption Act as part of the law of Canada but to permit its application *ex proprio vigore*. Mr. Justice Beetz did not pass on the effect of section 88. Of this group of five, Justices Martland and Ritchie denied that the adoption could deprive an adopted Indian of his or her status. Mr. Justice Beetz, with Justices Pigeon and de Grandpré concurring, refused to say that section 91(24) of the B.N.A. Act gave Parliament jurisdiction over all aspects of Indians. Essentially following the "it's better for you" rationale expressed in *Canard*, Mr. Justice Beetz held that even if an adoption were to deprive a child of his or her status, the Indian Act could not be interpreted so as to deny that child the rights that other members of society had. In other words, in the opinion of the Beetz group, the opportunity of being adopted was more advantageous to the child than his or her right to Indian status. This analysis fails to achieve the best of all worlds for the child namely, adoption with retention of status, which was the position reached by the majority.[176]

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As was discussed above, the judgments in *Natural Parents* differed sharply with regard to what constituted "laws of general application" under section 88 of the Indian Act. The Supreme Court finally gave some indication of the tests to be applied in its unanimous verdict in *Kruger v. The Queen*.[177] The *Kruger* case concerned a non-treaty Indian who had been charged under the British Columbia Wildlife Act[178] with killing big game during the closed season. Speaking for the Court, Dickson J. postulated:

> There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law

[176] To the same effect *see Re* Nelson, [1975] 5 W.W.R. 45, 21 R.F.L. 222, 56 D.L.R. (3d) 567 (Man. C.A.) (3:0 decision), *aff'g* 46 D.L.R. (3d) 633 (Man. Q.B. 1974).

[177] 15 N.R. 495, 75 D.L.R. (3d) 434 (S.C.C. 1977) (9:0 decision), *aff'g* 60 D.L.R. (3d) 144 (B.C.C.A. 1975) (5:0 decision), *rev'g* 51 D.L.R. (3d) 435 (B.C. Cty. Ct. 1974).

[178] S.B.C. 1966, c. 55.

> may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company: see *Great West Saddlery Co. Ltd.* v. *The King*, [1921] 2 A.C. 91. Such an act is no "law of general application": see also *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.[179]

As the B.C. Wildlife Act did not strike at the accused's essential status or capacities as an Indian, it was held to be applicable under section 88 of the Indian Act. The Court also stated that it did not matter in this case whether the Wildlife Act was incorporated or applied *ex proprio vigore* for, in either case, the accused could not find anything within the language of section 88 to save him.

In *Frank v. The Queen*,[180] the Wildlife Act of Alberta[181] was also held to be applicable to Indians. In this case, however, the accused was a treaty Indian and therefore was protected by section 12 of the Alberta Natural Resources Act of 1930.[182] In a unanimous decision, he was acquitted by the application of section 88 of the Indian Act.

In considering the effect of section 88, it should also be noted that the saving provisions of a treaty allowing traditional hunting rights within the umbrella of section 88 of the Indian Act, do not operate so as to preclude the effects of provincial laws that establish safety standards for hunting.[183] In *Myran v. The Queen*, safety laws were viewed as being laws of general application. The Court therefore held that although Indians may have special rights to hunt, those rights could only be exercised in accordance with established provincial standards.

Although the issues surrounding the effects of section 88 have not yet been fully analyzed, this area of the law does seem to be permeated with a distinct aroma of surrealism.

H. *Banking, Bankruptcy and Insolvency*

Perhaps no federal area of jurisdiction is secure when it comes to the licensing of the operation of motor vehicles. Section 172 of the Saskatchewan Vehicles Act[184] provides that where, following an accident, a driver's license has been suspended, it may not be renewed until any judgment against the licensee for damages has been discharged,

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[179] *Supra* note 177, at 500, 75 D.L.R. (3d) at 438.

[180] [1977] 4 W.W.R. 294, 75 D.L.R. (3d) 481 (S.C.C.) (9:0 decision), *aff'g* 61 D.L.R. (3d) 327 (Alta. C.A. 1975). *See also* R. v. Wesley, 62 D.L.R. (3d) 305 (Ont. Dist. C. 1975) and R. v. Dennis, 56 D.L.R. (3d) 379 (B.C. Prov. Ct. 1974), which have been overruled by *Kruger*.

[181] R.S.A. 1970, c. 391.

[182] S.A. 1930, c. 21.

[183] Myran v. The Queen, [1976] 2 S.C.R. 137, [1976] 1 W.W.R. 196 (1975) (9:0 decision), *aff'g* 35 D.L.R. (3d) 473 (Man. C.A. 1973).

[184] R.S.S. 1965, c. 377.

otherwise than by a discharge in bankruptcy. In addition, the licensee must provide satisfactory proof of financial responsibility before the license will be restored.

This section was challenged in *Re Ritcher*[185] as being legislation in relation to Bankruptcy and Insolvency under section 91(21) of the B.N.A. Act. Predictably,[186] the Saskatchewan Court of Appeal held that the legislation was in relation to property and civil rights and that it did not affect judgments and operations under the Bankruptcy Act of Canada.[187] The province was merely using an aspect of bankruptcy for a legitimate provincial purpose: the control of highway traffic.

Mr. Justice Bouck reached a similar result in *Malczewski v. Sansai Securities Ltd.*[188] This case concerned the validity of regulations made pursuant to the Securities Act of British Columbia.[189] These regulations required brokers to post securities as a condition precedent to the obtaining of a license to conduct business. The securities deposited by the plaintiffs, along with those deposited by other dealers, were placed in a trust fund which was used to pay clients not receiving payments directly from brokers. By the terms of the trust a broker could not call for the return of the deposit on demand and could not assign the securities in any manner as long as the party was in the business. It was a condition of payment to claimants that the dealer be either bankrupt or insolvent.

In analyzing these regulations, Judge Bouck stated:

> [I]t seems to me that merely because bankruptcy or insolvency is used as a test in the Regulations, this in itself does not make the Regulations *ultra vires*—particularly where no receiving order or assignment has been made. Indeed, the definition of bankruptcy and insolvency in the Regulations allows the trustee to declare a participant (*i.e.*, Sansai) bankrupt or insolvent within the definition set out in the *Bankruptcy Act* even though no order or assignment in bankruptcy has taken place. It follows that the Regulations are not *ultra vires* the provincial Legislature for this reason.
>
> The plaintiffs then submitted that should I find the preceding Regulations *intra vires*, none the less, the Regulations in question taken as a whole contravene the provisions of the *Bankruptcy Act*. The submission advanced under this heading as I understand it, is that the provincial Legislature has devised a scheme of distribution of the assets of Sansai to certain creditors of Sansai (*i.e.*, its clients) and that this scheme is in conflict with the *Bankruptcy Act* which specifically states how creditors are to be paid and does not give any preference to such a class of creditors as clients of bankrupt broker-dealers.
>
> I believe the answer to this submission is somewhat the same as was given above. So long as Sansai is not in bankruptcy the provisions of the Regulations under the provincial *Securities Act* continue to apply.[190]

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[185] 70 D.L.R. (3d) 730 (Sask. C.A. 1976) (3:0 decision), *aff'g* 55 D.L.R. (3d) 765 (Sask. Q.B. 1975).

[186] *See* note 30, *supra*.

[187] R.S.C. 1970, c. B-3.

[188] [1975] 1 W.W.R. 462, 49 D.L.R. (3d) 629 (B.C.S.C. 1974).

[189] S.B.C. 1967, c. 45.

[190] *Supra* note 188, at 468, 49 D.L.R. (3d) at 635-36.

The learned judge concluded that the assets would not be assignable to the trustee in bankruptcy under the Bankruptcy Act of Canada and that therefore no conflict existed. He distinguished the decision of the Ontario Court of Appeal in *Wentworth*[191] on the basis that, whereas in *Wentworth* a federal winding up order was in force, no such order was in force in the case before him.

With respect, in reaching this conclusion the learned judge ignored the fact that the legislation in the *Wentworth* case was declared to be in relation to bankruptcy and insolvency. This should have been distinguished from a finding that the provincial legislation was valid but inapplicable in the face of the federal Bankruptcy Act. The judge's approach was, however, consistent with that used in *Frizzell*[192] in relation to wages for workers.

Section 73 of the Bankruptcy Act has given rise to some constitutional litigations.[193] In the first of these cases, *Gingras v. General Motors Products of Canada Ltd.*,[194] articles 1032 to 1040 of the Civil Code of Quebec[195] were held to constitute a distinct cause of action from that set out in section 73 of the Bankruptcy Act. The court did not have to specifically decide whether these sections were constitutional because the limitation period of article 1040 did not apply to an action in bankruptcy. However, the following language of Mr. Justice Pigeon, speaking for himself and Justices Martland and Dickson, strongly suggests that these articles are in fact *intra vires*:

> If it could be shown that, in the case of bankruptcy, these provisions on preferential payments replace those in the *Civil Code* regarding the Paulian

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[191] Attorney-General for Ontario v. Policy-holders of Wentworth Ins. Co., [1969] S.C.R. 779, 6 D.L.R. (3d) 545 (5:4 decision), *aff'g* 69 D.L.R. (2d) 448 (Ont. C.A. 1968), *rev'g* 67 D.L.R. (2d) 509 (Ont. H.C. 1968).

[192] *Supra* note 131.

[193] The section reads:

> 73(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.

[194] [1976] 1 S.C.R. 426, 13 N.R. 361, 57 D.L.R. (3d) 705 (1974) (4:1 decision).

[195] QUEBEC CIVIL CODE, arts. 1032-40 (1974).

> action, it might be logical, though not in keeping with the text, to apply the prescription period for the Paulian action thereto. However, that is not so. The special remedy provided, in the case of bankruptcy, for having preferential payments declared void, has always been legislatively distinct from the Paulian action since the first insolvency statute was adopted in 1864. There is thus no reason not to give a literal interpretation to Art. 1040 C.C.[196]

In *Robinson v. Countrywide Factors Ltd.*,[197] this issue was dealt with directly. Here, sections 3 and 4 of the Fraudulent Preferences Act of Saskatchewan[198] were held to be valid and operative notwithstanding section 50(6) of the Bankruptcy Act.[199] The rather complex factual situation was concisely stated by Chief Justice Laskin:

> The appellant is trustee in bankruptcy of Kozan Furniture (Yorkton) Ltd. pursuant to a receiving order of November 19, 1968. On November 19, 1966, Kozan entered into a transaction with a pressing creditor, the respondent, whereby it sold certain stock-in-trade to a third person (payment being made to the respondent which reduced Kozan's indebtedness accordingly) and also agreed to give the respondent a debenture on its stock-in-trade for its remaining indebtedness. The debenture was executed on or about March 20, 1967, and duly registered. After the receiving order against Kozan was made, proceedings were taken by the appellant trustee in bankruptcy to set aside the transaction of November 19, 1966, as constituting a fraudulent preference under the provincial *Fraudulent Preferences Act* and to recover the money paid to the respondent and to annul the debenture.

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[196] *Supra* note 194, at 436, 13 N.R. at 373, 57 D.L.R. (3d) at 712.

[197] 14 N.R. 91, [1977] 2 W.W.R. 111, 72 D.L.R. (3d) 500 (S.C.C.) (5:4 decision), *rev'g* 19 C.B.R. (N.S.) 24 (Sask. C.A. 1974), *rev'g* 16 C.B.R. (N.S.) 120 (Sask. Q.B. 1971).

[198] R.S.S. 1965, c. 397.

[199] Ss. 3 and 4 of the Fraudulent Preferences Act read:

> 3. Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
>
> 4. Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency to or for a creditor, with intent to give that creditor preference over his other creditors or over any one or more of them, is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

S. 50(6) of the Bankruptcy Act reads:

> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

> MacPherson, J., found that Kozan was insolvent at the time of the transaction of November 19, 1966, that there was a concurrent intention of Kozan and the respondent to give and receive a preference, and that, consequently, both the payment made to the respondent and the debenture constituted fraudulent preferences under the provincial statute and were hence impeachable. On appeal, this judgment was set aside on the view of the majority of the Saskatchewan Court of Appeal that the appellant had failed to prove that Kozan was insolvent on November 19, 1966. The trial Judge was not called upon to deal with any constitutional issue, and the majority of the Court of Appeal did not have to do so in view of its finding on insolvency. Hall, J.A., who dissented supported the trial Judge's finding of insolvency.[200]

The majority of the Court held that the Fraudulent Preferences Act was *intra vires* the province and that the relevant sections were not in conflict with the Bankruptcy Act.[201]

Chief Justice Laskin, for the minority, held that the two sections were *ultra vires* as being in relation to insolvency.[202] The Chief Justice relied upon the definition of insolvency:

> The view taken by the Privy Council and by this Court as to the meaning of "insolvency", as well after as before the abolition of Privy Council appeals, has been a uniform one. Lord Thankerton, speaking for the Privy Council in the *Farmers' Creditors Arrangement Act* reference, at p. 700 D.L.R., p. 402 A.C., expressed it as follows:

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[200] *Supra* note 197, at 96-97, [1977] 2 W.W.R. at 112-13, 72 D.L.R. (3d) at 502.

[201] Spence J. stated, *id.* at 131-32, [1977] 2 W.W.R. at 145, 72 D.L.R. (3d) at 528:

> I have dealt with what, in my view, are the main cases upon the subject in Canada. Upon considering them all, as well as the decision of the Judicial Committee in *A.-G. Ont. v. A.-G. Can.*, [1894] A.C. 189, I have come to the conclusion that the better view is to confine the effect of what is now s. 73 of the *Bankruptcy Act* to providing for the invalidity of transactions within its exact scope. To that extent, the Parliament of Canada, by valid legislation upon "bankruptcy" and "insolvency", has covered the field but has refrained from completely covering the whole field of transactions avoided by provincial legislation. I am of the opinion that the enactment in 1949 of the provisions now found in s. 50(6) of the *Bankruptcy Act* is a plain indication that Parliament recognized that provisions in provincial statutes dealing with preferential transactions were still valid provincial enactments in reference to "property" and "civil rights" and were valuable aids to trustees in bankruptcy in attacking the validity of such transactions and should be available to the said trustees in bankruptcy.
>
> I am assisted in coming to this conclusion by the view which I believe was behind the Lord Chancellor's reasons in *A.-G. Ont. v. A.-G. Can.* that the words "bankruptcy" and "insolvency" in s. 91, para. 21, of the *British North America Act, 1867* were aimed at legislative schemes which had the purpose of governing the distribution of a debtor's property amongst his creditors. There may well be, and there are, provisions in such legislative schemes, *i.e.*, the *Bankruptcy Act*, dealing with "property" and "civil rights". Such provisions are properly ancillary to the bankruptcy and insolvency legislation, and to the extent to which they go overcome existing valid provincial legislation and bar future provincial legislation *contra* thereto but do not purport to extend beyond that point to invalidate other valid provincial legislation upon "property" and "civil rights".

[202] This result is not surprising in view of his judgment in the Court of Appeal of Ontario in *Wentworth, supra* note 191.

> "In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration."[203]

The Chief Justice stated that, as was the case with the criminal law power, the concept of insolvency was fluid and it was for Parliament to define it. Furthermore, it was his view that section 73 of the Bankruptcy Act ought not to be considered in isolation:

> This preclusive principle of non-interference is as applicable in connection with the federal power in relation to bankruptcy and insolvency as it is in the field of criminal law. In that connection, I point to the words of the late Justice Rand in *Johnson v. A.-G. Alta.*, [1954] 2 D.L.R. 625 at p. 636, [1954] S.C.R. 127 at p. 138, 108 C.C.C. 1, and adapt them here to say that "any local legislation of a supplementary nature that would tend to weaken or confuse [the] enforcement [of the *Bankruptcy Act*] would be an interference with the exclusive power of Parliament."[204]

He found that the Bankruptcy Act so occupied the field as to preclude any interference; the provincial legislation was therefore *ultra vires*.

In reaching this decision, Laskin C.J.C. used the so-called occupied field theory as a test for the *validity* of provincial legislation. Normally, this theory is used only to establish the *inoperativeness* of valid provincial legislation in the face of valid co-existing federal legislation. It is another potential brick in the wall of inconsistency being built by the Court's approach to constitutional matters.[205]

A similar approach was used by Mr. Justice Craig in *Canadian Imperial Bank of Commerce v. Materi*.[206] By sections 22A(1), (2) and 22D of the Bills of Sale Act of British Columbia,[207] a grantee under a bill of sale could either repossess or bring suit but not both. In the case of the former, the obligations "under the bill of sale and in any instrument granting collateral security" would be extinguished. It was argued that these sections potentially extinguished rights under a promissory note, particularly the rights of a holder in due course, and therefore were within the purview of "banking" or "negotiable instruments".

After a somewhat confusing review of the relevant authorities, Mr. Justice Craig concluded:

> However, looking at the legislation generally, I think that it is legislation which falls *prima facie* within s. 92.

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[203] *Supra* note 197, at 99, [1977] 2 W.W.R. at 115, 72 D.L.R. (3d) at 504.

[204] *Id.* at 106-07, [1977] 2 W.W.R. at 122, 72 D.L.R. (3d) at 510.

[205] The same approach was used by Mr. Justice Ritchie in declaring reg. 32 under the Theatres and Amusements Act of Nova Scotia to be invalid, *supra* note 3.

[206] [1975] 2 W.W.R. 299, 50 D.L.R. (3d) 400 (B.C.S.C. 1974).

[207] S.B.C. 1961, c. 6.

> What is the effect of the legislation? The effect is that if a mortgagee seizes the goods he cannot sue on the covenant contained in the bill of sale to recover any deficiency, nor can he rely on any collateral security to achieve the same result. The plain meaning of the words may be construed as invalidating (or extinguishing) the promissory note either in the hands of the mortgagee, or in the hands of the holder, or a holder in due course. . . .
>
> In my opinion, the same observation is applicable to this case. I think that a Legislature is acting within its authority by passing legislation of this kind in so far as it relates to the parties to the original contract. In my opinion this is preeminently a matter of property and civil rights. However, as Tritschler, J.A., pointed out in the *Casselman* case, I have serious doubts as to whether the legislation is *intra vires* the Legislature in so far as it relates to a holder in due course. However, I am not faced with that particular problem. In the circumstances, I hold that the legislation is *intra vires* as regards to the parties to this transaction. Accordingly, I dismiss the action with costs.[208]

With respect, it is felt that this approach is incorrect. The legislation is either invalid because it embraces a holder in due course or it is inoperative because of that fact; it cannot be sometimes valid and sometimes invalid. This kind of reasoning, like that of the Chief Justice in *Robinson*[209] on the doctrine of occupied field, serves only to confuse the relative powers of the federal and provincial levels of government.

I. *Sections 96 to 101*

Traditionally, in deciding on the constitutionality of a court or other similar body, the broad conformity test has been applied. If the jurisdiction of a provincially-established court (or any other similar body) conforms broadly to that of a superior court prior to Confederation, this body will be found to be unconstitutional.

Conversely, if prior to Confederation the functions of a provincially-appointed body had been exercised by judges of inferior courts of the colonies, the provincial power to appoint and to endow a body with these same powers remains.[210] In *Lucy v. Interbuild Development Ltd.*,[211] for example, it was held that when a provincially-appointed Master granted a summary judgment and awarded damages,

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[208] *Supra* note 206, at 312-13, 314, 50 D.L.R. (3d) at 413, 414.

[209] *Supra* note 197.

[210] As Mr. Justice Dubé remarked in Regency Car Parks Ltd. v. Ville de Laval, [1975] C.A. 511, at 517 (Que.):

> La législature provinciale avait donc pouvoir en vertu de l'*Acte de l'Amérique du Nord Britannique*, de conférer à la cour provinciale présidée par un juge nommé par le gouvernement de la province la compétence d'instruire un litige relativement à la perception des taxes municipales, étant donné que cette compétence appartenait déjà à des tribunaux présidés par des juges nommés par le gouvernement de la province avant la Confédération.

This decision was followed in Parker v. Betnesky, [1976] C.P. 279 (Que. C.A.).

[211] [1975] 1 W.W.R. 244, 48 D.L.R. (3d) 150 (Alta. S.C. 1974). *See also* Le Procureur General de la Province de Québec v. Farrah (Que. C.A. Dec. 20, 1976) (3:0 decision), *aff'd* (S.C.C. May 1, 1978).

he was exercising a power conforming to the type of jurisdiction exercised by judges of a superior court and therefore was acting without jurisdiction. His judgment was held to be a nullity.

In *Drewery v. Century City Developments Ltd. (No. 2)*,[212] however, Cromarty J. stated that substantive provincial law otherwise validly enacted, did not conflict with section 96. Indeed, if this were not the case, the provinces would be deprived of all legislative competence.

* * *

In the *Jost* case[213] it was held that a provincial labour relations board did not have the power to make declaratory judgments; this was clearly a function exercised by section 96 courts. In contrast to this Manitoba Court of Appeal decision, the British Columbia Court of Appeal in *C.P.R. v. Teamsters Union*,[214] appears to have assumed that a province could oust, *exclusively*, the jurisdiction of the courts and give injunctive and declaratory powers to its own labour relations board.

In any event, the decision in *Jost* has been weakened considerably by the Supreme Court of Canada's decision in *Tomko v. Nova Scotia Labour Relations Board*.[215] The issue here concerned the constitutionality of the Trade Union Act of Nova Scotia[216] which empowered the Labour Relations Board to issue cease and desist orders. Under the Judicature Act of Nova Scotia,[217] the Supreme Court had similar powers to grant injunctive relief. In fact, these powers were not as broad as those given to the Labour Relations Board.

Chief Justice Laskin, speaking on behalf of the majority of eight, held that the provincial legislation was valid. He began by stating that the fact that a provincially-appointed body was empowered to exercise a judicial function was not definitive as to whether the body, or its powers, were within section 96: the exercise of these powers must be put in context. He then contrasted the powers of the Board with those of the Supreme Court of Nova Scotia, demonstrating that the Board had a more general and necessary function in the field of labour relations:

> What is significant about the provision for a cease and desist order obtainable from the Board or, in the construction industry, from the special panel for that industry, is that it makes allowance for efforts at settlement before or after the making of an interim cease and desist order. The fluidity and the volatility of labour relations issues must be counted as weighing heavily with the Legislature in providing this alternative means of seeking an accommodation between

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[212] 52 D.L.R. (3d) 515 (Ont. H.C. 1974), *appeal dismissed* 52 D.L.R. (3d) 523 (Ont. C.A. 1975) (3:0 decision).

[213] *Re* Jost, [1976] 2 W.W.R. 289, 65 D.L.R. (3d) 495 (Man. C.A. 1975) (3:0 decision).

[214] *Supra* note 123. *See also* the *Western Stevedoring* and *Jebsens* decisions, *supra* note 118.

[215] [1977] 1 S.C.R. 112, 69 D.L.R. (3d) 250 (1976) (8:1 decision), *aff'g* 9 N.S.R. (2d) 277 (C.A. 1974) (4:0 decision).

[216] S.N.S. 1972, c. 19.

[217] S.N.S. 1972, c. 2.

> employers and trade unions under the the superintendence of the Board or its special division and with the assistance of the Department of Labour, an accommodation that puts to one side the alternative routes of prosecution and Court injunction. The policy considerations are evident, and in pursuit therof the mechanism of a cease and desist order to restore the lawful *status quo ante* seems to me to be a rational way of dealing administratively with a rupture of peaceful labour relations.[218]

He also relied on the fact that the Board had no power of contempt to enforce its cease and desist orders; that still remained the function of the Supreme Court of Nova Scotia.[219]

There can be no doubt that in reaching this decision the majority was influenced by the argument that the power to issue cease and desist orders was necessary for the proper administration of labour relations in the province. As Laskin C.J.C. said:

> In my opinion, the same principle applies here in respect of the added power thought necessary to enable the administrative agency to deal with illegal strikes or lock-outs by exercising a remedial authority to induce or compel a settlement of the dispute which led to the unlawful activity or peremptorily to bring that activity to an end by an interim cease and desist order. I hold, therefore, as did the Appeal Division of the Nova Scotia Supreme Court, that s. 96 of the *British North America Act*, is not offended by the vesting of such a power in the Labour Relations Board under s. 49 of the *Trade Union Act* and in the Construction Industry Panel, by derivation, under s. 91(4) of the Act.[220]

This slight shift toward functional necessity as the test for constitutionality highlights the problem spotted by Mr. Justice de Grandpré. In his dissent, Mr. Justice de Grandpré held that while a board might be constitutionally appointed in general, this could not act as a constitutional justification for clothing it with all powers. In his opinion, cease and desist orders were too similar to the injunctive powers held by the Supreme Court in 1867. If one were to hold section 96 rigid while allowing section 92 to be fluid, section 96 would effectively be emasculated. He stated:

> The institution known as the Labour Relations Board of Nova Scotia is not a s. 96 Court as such. Furthermore, neither appellant nor the Attorney-General of Canada claims that it is. However, under s. 49 of the *Trade Union Act*, this institution was given a function to perform which, by its nature, belongs to the Courts described in s. 96. I can see no substantial difference between an injunction and a cease and desist order.
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> Even if we were to go one step further (which, in my opinion, is unnecessary), and ask whether the function vested in the Board by s. 49 of the

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[218] *Supra* note 215, at 122, 69 D.L.R. (3d) at 257.

[219] Yet, it seems that the Supreme Court would have little choice but to enforce the orders of the Board.

[220] *Supra* note 215, at 124, 69 D.L.R. (3d) at 259. Admittedly, the same court in Jones v. Bd. of Trustees, [1976] 6 W.W.R. 336, 70 D.L.R. (3d) 2 (S.C.C.), referred to its decision in *Tonko* in holding that the Courts of Revision, under s. 45(1)(e) of the Municipal Taxation Act of Alberta, R.S.A. 1970, c. 251, could validly exercise functions of inquiry in matters of assessment. Yet, it is submitted that the approach in *Jones* was more traditional because it was based upon history and the idea of broad conformity.

> *Trade Union Act* is, in a general way, a jurisdiction of a kind exercised in 1867 by the inferior courts or the superior courts, I would not hesitate to choose the second alternative. One need only point out that
> (a) the power to issue orders is not incidental to the administrative function conferred on the Board, since the latter operated until 1968 without this power and the ordinary Courts still have a parallel jurisdiction today;
> (b) it is inconceivable to view this as an aspect of the discretionary power of the State;
> (c) apart from this parallel jurisdiction which I have just mentioned, the ordinary Courts have no power of review, except perhaps through prerogative writs.
>
> In this analysis I have not lost sight of socio-economic arguments advanced by respondents. It should be remembered that this socio-economic aspect existed to varying degrees in each of the cases considered by the Courts, but this did not prevent them from holding that certain legislative provisions were *ultra vires*. This aspect is only one of several factors. It goes without saying that it would not provide a valid basis for setting aside the arrangement stated by s. 96 of the Constitution.
>
> Any other interpretation would be tantamount to abolishing the jurisdiction of the s. 96 courts sooner or later. Whatever the operational advantages of gradually drawing all judicial power under the roof of the Courts whose members are appointed by the Provinces (and this is a question on which I express no opinion), this is not the criterion which must guide our deliberations. We must interpret the Constitution, not rewrite it.[221]

It is felt that even if there will in fact be no emasculation of section 96, this test of functional necessity writ large will lead to concurrency of powers under the B.N.A. Act.

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In contrast to this somewhat open-ended approach towards section 96, the courts have always had a more rigid attitude when considering section 101 of the B.N.A. Act, which empowers Parliament to establish courts for the better administration of the laws of Canada.

In the *Vapour* case,[222] for example, it was held that Parliament did not have the power necessary to give its courts jurisdiction to entertain civil causes of action that were not connected to an area of exclusive legislative competence.

In addition, in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*[223] and in *McNamara Construction (Western) Ltd. v. The Queen*,[224] the Supreme Court made it clear that section 101 was not co-extensive with section 91. The phrase "laws of Canada" implies that before jurisdiction can be given to a federal court under section 101, there must

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[221] *Id.* at 144-45, 69 D.L.R. (3d) at 275.

[222] *Supra* note 12.

[223] [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111 (1976) (9:0 decision), *rev'g* 65 D.L.R. (3d) 525 (F.C. App. D. 1975), *aff'g* 60 D.L.R. (3d) 366 (F.C. Trial D. 1975). Mr. Justice Dubé considered the same issue as McNamara J. in Dome Petroleum Ltd. v. Hunt Int'l Petroleum Co., [1978] 1 F.C. 11 (Trial D. 1977), as did Smith J. in The Queen v. Saskatchewan Wheat Pool, 81 D.L.R. (3d) 459 (F.C. Trial D. 1977).

[224] [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273 (9:0 decision), *rev'g* 66 D.L.R. (3d) 258 (F.C. Trial D. 1975) (3:0 decision).

be a *law* in existence properly enacted under section 91. Hence the Court held that the Federal Court of Canada had no jurisdiction to hear a cause of action instituted by Her Majesty in Right of Canada as plaintiff unless there was an existing statutory right to recover.[225]

In general, then, this seems to be one of the more predictable areas of constitutional law.

J. *Criminal Law*

In one of the most highly publicized cases in recent history, the Supreme Court has held that, as a matter of health, abortion may be prohibited as an exercise of the criminal law power.[226] By implication, all of the judges in the *Morgentaler* decision held that section 251 of the Criminal Code was valid. In addition, Chief Justice Laskin, with whom Justices Spence and Judson agreed, went on to define the ambit of the criminal law power to be the prohibition of "socially undesirable conduct". In so doing, however, he did allude to the *Margarine Reference* case,[227] recognizing that there might be evidence to invalidate the claims of the federal government:

> What counsel sought to draw from *Roe v. Wade* and *Doe v. Bolton* was that the present s. 251 of the *Criminal Code* could no longer be supported as legislation for the protection of a pregnant woman's health, and hence that rationale could no longer justify the presence of s. 251 in the *Criminal Code*. This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power. I am unable to accept this assessment of the basis of s. 251. Perhaps the matter would have a different face if there was here the kind of material that moved the Courts in the *Margarine* reference (*Reference re Validity of s. 5(a) of Dairy Industry Act, supra*), to hold that the challenged s. 5(a) could no longer be supported as for the protection of health. Moreover, in that case there was no other supporting purpose open (apart from Parliament's power to control exports and imports of margarine). What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial.[228]

In considering this judgment, it is submitted that it will be just as difficult for a future court to second-guess Parliament as to what

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[225] The situation is different, however, when the Crown is the defendant and has established a general right of action against itself in derogation of its former immunity.

[226] Morgentaler v. The Queen, 4 N.R. 277, 53 D.L.R. (3d) 161 (S.C.C. 1975) (9:0 decision on the constitutional issue), *aff'g, sub nom.* R. v. Morgentaler (No. 5), 47 D.L.R. (3d) 211 (Que. C.A. 1974).

[227] [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.), *aff'g* [1949] 1 S.C.R. 1, [1949] 1 D.L.R. 433.

[228] *Supra* note 226, at 318-19, 53 D.L.R. (3d) at 169.

constitutes socially undesirable conduct as it will be to second-guess Parliament as to what constitutes a crisis.[229]

* * *

The decision of the Supreme Court in *Regina v. Zelensky*[230] has now been rendered. The issue in this case concerns the validity of section 653 of the Criminal Code[231] which provides that a court may order compensation to be paid by the accused to his victim. By a close decision the Manitoba Court of Appeal held the section to be *ultra vires* Parliament. In the words of Matas J.:

> No doubt compensating victims of crime is a worthy goal. And I agree with the statement by Haines, J., in *Torek*, that it is a valid object in sentencing "to prevent a convicted criminal from profiting from his crime by serving a jail term and then keeping the gains of his illegal venture". But the two objectives do not need to be tied together. Prevention of profit by a criminal can be dealt with by fines scaled to the magnitude of the offence. There are means of compensating victims of crime now available. There are other constitutionally valid ways of accomplishing this purpose. The point is, that a compensation order which is invalid, as an unwarranted invasion of provincial jurisdiction, does not become valid because of the objective in preventing a criminal from profiting from his crime.
>
> In my view, the section is not legislation in truth and substance in relation to criminal law and procedure, is not necessarily incidental to effective legislation by Parliament, and cannot be supported under s. 91(27). It falls within the category delineated by Lord Atkin in *A.G.B.C. v. A.G. Can., supra*, as legislation which, in the guise of enacting criminal legislation, in truth and substance encroaches on a class of subjects enunciated in s. 92, *i.e.*, civil rights. In my opinion, the section is an unauthorized invasion of provincial jurisdiction and is *ultra vires* Parliament.[232]

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[229] *See* discussion of the *AIB Reference*, *supra* note 17 *et seq.*

[230] (S.C.C. May 1, 1978) (6:3 decision), *rev'g* 33 C.C.C. (2d) 147, 73 D.L.R. (3d) 596 (Man. C.A. 1976) (3:2 decision).

[231] S. 653 reads:

> 653(1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.
>
> (2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.
>
> (3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest.

[232] *Supra* note 230, at 168, 73 D.L.R. (3d) at 617-18. In reaching this decision the majority ignored decisions to the contrary in Ontario and Quebec, as well as the opinions of the Law Reform Commission of Canada. (*See* the dissenting views of Mr. Justice Monnin, at 149-55, 73 D.L.R. (3d) at 599-605.)

In following this approach, the Court of Appeal was being consistent with its views in respect of a court's power to order the transfer of particular property under section 11 of the Divorce Act.[233]

In partially reversing the Court of Appeal, the Supreme Court, through the Chief Justice, held that the criminal law power must be adjusted to meet "new appreciations" from "new social conditions". Therefore, despite the fact that proceedings under section 653 might constitute an election in lieu of civil remedy, compensation granted under section 653 would be valid federal legislation as ancillary to the criminal law power.

In contrast, Mr. Justice Pigeon, for the minority, thought that if proceedings under section 653 constitute an election in lieu of civil remedies, this would define sections 653(1) and (2) as legislation outside the ambit of the criminal law power. The minority view is consistent with a long line of jurisprudence which precludes wholesale incursion of Parliament into the arena of civil remedies.[234]

In *Re Miller*,[235] Mr. Justice Anderson had to consider the constitutionality of sections 178.12(a) and 178(b) of the Criminal Code,[236] and specifically whether:

> s. 178.12 of the *Criminal Code* of Canada is *ultra vires* the Parliament of Canada in that it is legislation which in pith and substance abrogates the exclusive legislative authority of the provincial Legislature over the administration of justice in the Province conferred by s.92(14) of the *British North America Act*, 1867 (U.K.), c. 3, in that there are no offences for which the Attorney-General of the Province may designate an agent to make an application for an authorization pursuant to that section.[237]

After considering, *inter alia*, the *Pelletier*[238] and *Miller*[239] decisions,

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[233] *See* K. v. K., *supra* note 155.

[234] Undoubtedly, the *Zelensky* decision will be material to the question of the constitutionality of s. 31.1 of the Combines Investigation Act.

[235] 23 C.C.C. (2d) 257, [1976] 1 W.W.R. 97, 59 D.L.R. (3d) 679 (B.C.S.C. 1975).

[236] R.S.C. 1970, c. C-34, *as amended by* S.C. 1973-74, c. 50, s. 2. The text of these sections reads:

> 178.12 An application for an authorization shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section by
>
> (a) the Solicitor General of Canada personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
>
> (b) the Attorney General of a province personally, in respect of any other offences in that province.

[237] *Supra* note 235, at 261, [1976] 1 W.W.R. at 99, 59 D.L.R. (3d) at 683.

[238] R. v. Pelletier, 4 O.R. (2d) 677 (C.A. 1974) (3:0 decision); application for leave to appeal to the Supreme Court of Canada denied (Oct. 11, 1974).

[239] R. v. Miller, 27 C.C.C. (2d) 438 (Que. C.A. 1975) (effectively 1:0 on the constitutional issue); application for leave to appeal to the Supreme Court of Canada denied (May 5, 1975).

Mr. Justice Anderson concluded that *Miller* was the correct decision. He therefore did not have to deal with the constitutional issue in the case.[240]

In the course of his judgment, Mr. Justice Anderson did make what I consider to be an important statement on the division of administration of justice in Canada:

> I pause here to point out that by the very language used in s. 178.12(a) and (b), Parliament has taken the view that only the Attorney-General of a Province can prosecute *Criminal Code* offences. If this were not so and the Government of Canada could institute proceedings in respect of *Criminal Code* offences, s. 178.12(b) would bestow illusory rights on the Attorneys-General of the Provinces. If the Government of Canada could institute proceedings in respect of all offences the words "other offences" in s. 178.12(b) would be meaningless. Thus in the case at bar if the Government of Canada could institute proceedings for conspiracy to murder, the Attorney-General would have had no power to appoint R.C. Hunter as his specially designated agent. Such an absurdity need not and should not be contemplated.
>
> In dealing with the constitutional issues in the case at bar, I am also mindful of the principle that in dealing with constitutional questions, the Court should endeavour to give a meaning to the legislation under attack which will preserve its validity: see *Re Army and Navy Veterans of Canada* (1921), 36 C.C.C. 83 at p. 85, 61 D.L.R. 416, [1921] 3 W.W.R. 29 at p. 32. The meaning which I attribute to the definition of "Attorney-General" in s. 2 of the *Criminal Code* preserves the validity of the legislation and at the same time avoids a finding that Parliament has, in enacting s. 178.12(b), created an absurdity.
>
> As to the second submission it is my view that Parliament has the power to prevent applications for authorizations being made by "provincial" agents in respect of purely "federal" offences, such as are defined in ss. 4 and 5 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. These "federal" offences are, or may be, offences which are national in scope or in which the Government of Canada has a special interest. It might be necessary, for example that the investigation of these offences be directed on a national rather than a local basis. As a result, I am unable to find that the requirement that only "federal" agents may apply for authorizations in respect of purely "federal" offences unduly fetters the right of the Provinces to investigate and ferret out crime.
>
> I should not be taken, however, as holding that Parliament could, while permitting the Solicitor-General or his agent to apply for "wire tapping" authorizations for all offences, prohibit the Attorneys-General or their agents from applying for "wire tapping" authorizations in respect of *Criminal Code* offences. Such a prohibition would go a long way toward placing the investigation and enforcement of our criminal laws in the hands of the Government of Canada. Except where it could be said that the national interest is involved, I do not think that the Attorneys-General of the Provinces can be prohibited, directly or indirectly, from investigating and prosecuting all offences under the *Criminal Code*. Parliament could enact a law which would make all interceptions of private communications a crime but it could not, except where the national interest is involved, discriminate in favour of the Government of Canada in so far as the investigation of crimes (as defined in the *Criminal Code*) is concerned.[241]

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[240] As Stuart has indicated in *Annual Survey of Canadian Law, Part 3: Criminal Law and Procedure*, 9 OTTAWA L. REV. 566, at 639 (1977), the conflict between *Pelletier* and *Miller* should have led to at least *Miller* being appealed to the Supreme Court.

[241] *Supra* note 235, at 280-82, [1976] 1 W.W.R. at 121-22, 59 D.L.R. (3d) at 702-04.

This attitude, expecially in relation to the matter of national security, is pertinent to the investigations of the R.C.M.P. now being conducted by provincial tribunals and commissions of inquiry.[242]

In *Regina v. Betesh*,[243] an Ontario County Court effectively allowed what Justice Anderson would have denied. In this case, an agreement not to prosecute between the Crown in Right of Canada and the Canadian Union of Postal Workers was held binding on the Crown in Right of Ontario because of section 5(a) of the Department of Justice Act of Canada.[244] Graham J. found that Parliament's inherent right to grant immunity under the Criminal Code was to be found either in section 91(27) or in the Peace, Order and Good Government clause of the B.N.A. Act. He held that *Re Bradley*[245] was not applicable as that case upheld only the right of the provincial legislature to authorize its Attorney-General to usurp private prosecutions under the Crown Attorneys Act.[246] The Crown was indivisible for criminal purposes and so the only issue was one of paramountcy. The paramount agreement of the federal Attorney-General was therefore binding on the provinces.

The Supreme Court of Canada will have to clearly delineate between the relative powers of prosecution and investigation as they exist at both the federal and provincial levels of government.[247]

* * *

Once again, provincial jurisdiction in relation to Sunday observance legislation has been upheld.[248] In *Regina v. Top Banana Ltd.*, the Ontario High Court has held that municipal by-laws dealing with the closing of stores on holidays including Sundays have secular purposes, are devoid of religious considerations, and are therefore valid under sections 92(13) and 92(16).

Prohibition of noise has also been held to be a legitimate provincial endeavour when such legislation is designed to increase the amenities of life. However, it is not to be confused with (and is not inconsistent with) Parliament's interest in noise as it relates to breaches of the peace and therefore the criminal law.[249]

Similarly, municipal by-laws relating to the abandonment of children (under the age of ten years for example) have been held not to be in relation to criminal law. Although similar provisions are contained in

[242] Mr. Justice Anderson's judgment was followed in R. v. Miller (No. 4), 28 C.C.C. (2d) 128 (B.C. Cty. Ct. 1975) by County Court Judge MacDonald, who felt he was bound by the earlier decision. The constitutionality of s. 178.12 has also been considered in R. v. Blomme, 31 C.C.C. (2d) 261 (Alta. S.C. 1976).

[243] 35 C.R.N.S. 238, 30 C.C.C. (2d) 233 (Ont. Cty. Ct. 1975).

[244] R.S.C. 1970, c. J-2.

[245] 9 O.R. (2d) 161, 24 C.C.C. (2d) 482 (C.A. 1975) (3:0 decision).

[246] R.S.O. 1970, c. 101.

[247] *Re* Hauser, 37 C.C.C. (2d) 129 (Alta. C.A. 1977), currently on appeal to the Supreme Court of Canada.

[248] 4 O.R. (2d) 513, 50 D.L.R. (3d) 209 (H.C. 1974).

[249] *Re* Nakashima, 51 D.L.R. (3d) 578 (B.C.S.C. 1974).

the Criminal Code, the purposes are said to be different.[250]

In *Attorney-General for Canada v. Dupond*,[251] the Supreme Court held that municipal by-laws banning demonstrations, regulating the use of the public domain, and preventing riots and other violations of public order are neither in relation to criminal law nor are an unconstitutional interference with freedom of speech, press and association. Speaking on behalf of the majority, Mr. Justice Beetz held that a provision banning demonstrations in Montreal for a period of thirty days was a valid regulation of the public domain and was justifiable under sections 92(8), 92(13), 92(14), 92(15) and 92(16) of the B.N.A. Act. The by-law was found to differ from Criminal Code provisions in that it only sought to prevent what might be a crime under the Criminal Code.

In deciding whether this legislation interfered with the fundamental freedoms of speech, press and association, Mr. Justice Beetz stated, *inter alia*:

> 3. Freedom of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. This is particularly so with respect to freedom of speech and freedom of the press as considered in *The Alberta Press Act Case (supra)*. Demonstrations are not a form of speech but of collective action. They are of the nature of the display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.
> 4. The right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done. . .
>
> Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian Constitution under the preamble of the *British North America Act, 1867*.
> 5. The holding of assemblies, parades or gatherings on the public domain is a matter which, depending on the aspect, comes under federal or provincial competence and falls to be governed by federal and provincial legislation such as the Criminal Code, laws relating to picketing, civil laws, municipal regulations and the like including section 5 of the impugned By-law and the Ordinance passed pursuant to it.[252]

It is strongly felt that this decision is disastrous for a country that professes to be "free".

* * *

In a predictable decision, the Manitoba Court of Appeal held that the Hazardous Products Act[253] is valid federal legislation in respect of criminal law.[254]

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[250] Fisette v. Ville de Beloeil, [1976] C.A. 628 (Que.) (3:0 decision). *See also* Ville de Montréal v. Dupond, [1974] C.A. 402 (Que.) (5:0 decision).

[251] (S.C.C. Jan. 19, 1978) (6:3 decision), *aff'g* [1974] C.A. 402 (Que.) (5:0 decision).

[252] *Id.* at 19-21 (Beetz J.).

[253] R.S.C. 1970, c. H-3.

[254] R. v. Cosman's Furniture (1972) Ltd., 32 C.C.C. (2d) 345, [1977] 1 W.W.R. 81 (Man. C.A. 1976) (3:0 decision).

In *Re Regina and Rose*,[255] the British Columbia Court of Appeal held that an attempt to provide a substituted procedure for *mandamus* by the province had no application to criminal proceedings, implying that if applicable it would be *ultra vires*.

In *Regina v. W.*,[256] The Corrections Act of Manitoba[257] was found to be constitutional but section 15[258] was found to be *ultra vires* to the extent that it was inconsistent with the provisions of the Juvenile Delinquents Act of Canada.[259] It is submitted that perhaps what the court had intended here was to declare the section inoperative to the extent of the conflict, rather than *ultra vires*.

Despite a wealth of history to the contrary, the Supreme Court of Canada has held that proceedings under the Coroners Act of Quebec[260] are not to be considered a criminal matter.[261]

It has also been held that a province may, under a Coroners Act, compel a witness to answer incriminating questions in the face of contempt so long as a criminal charge has not actually been laid.[262] If a criminal charge has been laid, however, a coroners' statute will have no application. Conversely, although a province can compel incriminating testimony, it cannot provide a witness with immunity from subsequent criminal prosecution. This would clearly be an invasion of section 91(27) and therefore *ultra vires*.[263] The proper procedure is for the witness to plead the protection of the Canada Evidence Act.[264]

By parity of reasoning, a police commission of inquiry into organized crime has been held to be akin to a coroner's inquest and is

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[255] 19 C.C.C. (2d) 108 (B.C.C.A. 1974) (3:0 decision).

[256] 70 D.L.R. (3d) 641 (Man. C.A. 1976) (4:0 decision on the constitutional issue).

[257] R.S.M. 1970, c. C-230.

[258] The section reads:

> 15. A family court judge having jurisdiction in the matter may, either before the hearing of a charge against a child, or after the hearing but before adjudication and sentence, order that an inquiry respecting, and examination of, the child be carried out by one or more of the following persons, namely,
> (a) a psychiatrist;
> (b) a physician;
> (c) a probation officer;
> (d) a psychologist;
> (e) a social worker;
> (f) any other suitably qualified person;
> for the purposes of assessing the emotional and physical condition and environmental circumstances of the child.

[259] R.S.C. 1970, c. J-3.

[260] S.Q. 1966-67, c. 19.

[261] Faber v. The Queen, 32 C.R.N.S. 3, 65 D.L.R. (3d) 423 (S.C.C. 1975) (5:4 decision), *aff'g, sub nom.* R. v. Coroner's Court, 11 D.L.R. (3d) 579 (Que. C.A. 1969).

[262] *Re* Morris-Jones, 67 D.L.R. (3d) 466 (Alta. C.A. 1975) (3:0 decision).

[263] R. v. Gauthier, 34 C.C.C. (2d) 266 (Que. C.A. 1975) (3:0 decision).

[264] R.S.C. 1970, c. E-10. *See generally* Granger, *Crime Inquiries and Coroners' Inquests: Individual Protection in Inquisitorial Proceedings*, 9 OTTAWA L. REV. 441 (1977).

therefore not in relation to section 91(27).[265] The establishment of such a commission has been seen as merely a furtherance of a province's powers to investigate crime. This power to investigate is provided for in section 92(14), a section which can hardly be limited to the establishment of traditional courts. As in the case of the coroner's inquest, no charges may be laid by the commission, its sole function being to investigate.

Considering this decision and the remarks of Mr. Justice Anderson in *Re Miller*,[266] does it not follow that provincial investigations of the R.C.M.P. should be considered to be constitutional even though they touch on matters of national security? Or, does national security fall within section 91(7), the defence power? Perhaps it even comes under the umbrella of the *AIB* rationale? Undoubtedly, we shall not be left in suspense for long.

K. *Miscellaneous*

In *Tomell Investments Ltd. v. East Marstock Lands Ltd.*[267] the Supreme Court of Canada was asked to deal with the concept of interest under section 8 of the Interest Act of Canada.[268] Earlier decisions had indicated that there were some limits on the federal power in this area. However this did not seem to disturb Chief Justice Laskin (with whom Justice Martland concurred):

> The central question raised by the constitutional attack on s. 8 of the *Interest Act*, R.S.C. 1970, c. I-18, is ascertainment of its pith and substance or, for convenience of expression, its focus. I agree with my brother Pigeon that it

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[265] Di Iorio v. Warden, Jail of Montreal, 8 N.R. 361, 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491 (S.C.C. 1976) (7:2 decision). Here is how Pigeon J. analyzed the issues, at 377, 33 C.C.C. (2d) at 316-17, 73 D.L.R. (3d) at 518:

> In my view, the decision in *Faber* is conclusive against appellants' contention that the matter is "criminal" because the inquiry was concerned with criminal activities. It is obvious that, in s. 91(27) of the *British North America Act, 1867*, the scope of "Criminal Law" and "Procedure in Criminal Matters" is narrowed by the allocation to the Provinces of jurisdiction over the "Administration of Justice" in all matters civil and criminal, which has consistently been held to include the detection of criminal activities. The judgment in *Batary v. A.-G. Sask. et al.*, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125, [1965] S.C.R. 465, shows that once a charge is laid under the *Criminal Code* an accused may be said to be subject to criminal proceedings, but *Faber* and the other cases cited show that a person who is merely exposed to a charge is not in the same situation. The conclusion reached in *Faber* cannot be viewed as proceeding on the basis that the detection of crime was not the principal object of the coroner's inquest. The fact is that this was the sole object of the inquest at the particular time when the proceedings were initiated.

[266] *Supra* note 235. *And see Re* Inquiry Re Dep't of Manpower and Immigration in Montreal, 22 C.C.C. (2d) 176 (Comm'n of Inquiry, Que., 1974).

[267] 16 N.R. 139, 77 D.L.R. (3d) 145 (S.C.C. 1977) (8:0 decision), *aff'g* (Ont. C.A. Dec. 8, 1975, no reasons), *aff'g* 8 O.R. (2d) 398, 58 D.L.R. (3d) 172 (Ont. H.C. 1975).

[268] R.S.C. 1970, c. I-18.

> focuses on the maximum charge that can be exacted from a debtor on arrears of principal or interest under a land mortgage by limiting it to the rate of interest payable of principal not in arrears. A charge, whether called or found to be a fine or penalty or rate of interest, which exceeds this limit is precluded. In my opinion, s. 8 is valid legislation in relation to interest.[269]

Speaking for the remaining members of the Court, Mr. Justice Pigeon was more restrained in his approach and applied the doctrine of ancillary powers to hold the federal legislation valid. He stated:

> In my opinion, s. 8 of the *Interest Act* is valid federal legislation in respect of interest because, although it does not deal exclusively with interest in the strict sense of a charge accruing day by day, it is, in so far as it deals with other charges, a valid exercise of ancillary power designed to make effective the intention that the effective rate of interest over arrears of principal or interest should never be greater than the rate payable on principal money not in arrears.[270]

This decision, then, changes the balance of power in relation to the financing of credit and may stimulate controversy in the area.

* * *

In *Morgan v. Attorney-General for P.E.I.*,[271] the Supreme Court held that regulation of land-holding was a valid provincial object. Furthermore, it was found that such legislation was not invalid even though it made residency the governing condition. In order for the Court to have found the legislation to be in relation to aliens and citizenship,

> [t]he question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence—is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.
>
> The issue here is not unlike that which has governed the determination of the validity of provincial legislation embracing federally-incorporated companies. The case law, dependent so largely on the judicial appraisal of the thrust of the particular legislation, has established, in my view, that federally-incorporated companies are not constitutionally entitled, by virtue of their federal incorporation, to any advantage, as against provincial regulatory legislation, over provincial corporations or over extra-provincial or foreign corporations, so long as their capacity to establish themselves as viable corporate entities (beyond the mere fact of their incorporation), as by raising capital through issue of shares and debentures, is not precluded by the provincial legislation. Beyond this, they are subject to competent provincial regulations in respect of businesses or activities which fall within provincial legislative power.[272]

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[269] *Supra* note 267, at 141, 77 D.L.R. (3d) at 146-47.

[270] *Id.* at 151-52, 77 D.L.R. (3d) at 154.

[271] [1976] 2 S.C.R. 349, 7 Nfld. & P.E.I.R. 537, 55 D.L.R. (3d) 527 (1975) (9:0 decision), *aff'g* 42 D.L.R. (3d) 603 (P.E.I.S.C. 1973).

[272] *Id.* at 364-65, 7 Nfld. & P.E.I.R. at 551, 55 D.L.R. (3d) at 539.

In *Newfoundland Colonization & Mining Co. v. Province of Newfoundland*,[273] Chief Justice Mifflin had no doubt that the Unimproved Lands (Redistribution) Act of Newfoundland[274] was valid legislation in relation to property and civil rights. The province could therefore expropriate and redistribute land. In this case, however, the price offered by the province was one dollar per acre: a "steal". In response to objections based upon this fact, Chief Justice Mifflin said:

> Counsel for the plaintiff also argued that the *Lands Act* is confiscatory because not more than one dollar an acre may be paid for lands expropriated under it whereas under *The Expropriation Act* compensation is settled by arbitration. Confiscatory or not, arbitrary or not, unjust or not, or even "bizarre", once it is established that the subject matter of the legislation is within section 92, as it surely is in this case, and consequently the legislature has the right to enact the legislation in question, the Courts, contrary to counsel's suggestion, cannot grant relief from it. The Courts have no rights to say that legislation is *ultra vires* merely because it is unpalatable to anyone in any sense.
>
> The following succinct statement of the law is given in Laskin, *Canadian Constitutional Law*, Fourth Edition, at page 537:
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> > Provincial power to take land in the province (other than federal Crown lands) is clear under s. 92(13) of the B.N.A. Act, and whether or not compensation is made is a matter of policy rather than constitutional obligation: see *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1908), 18 O.L.R. 275 (aff'd on appeal, and aff'd further (1910), 43 O.L.R. 474 (P.C.)), where Riddell J. said in reference to a provincial legislature: "The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.[275]

In sharp contrast, Mr. Justice Dickson in his judgment in the *Amax Potash* case stated:

> A State, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal State. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution, are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power. Both Saskatchewan and Alberta inform the Court that justice and equity are irrelevant in this case. If injustice results, it is the electorate which must administer a rebuke, and not the Courts. The two Provinces apparently find nothing inconsistent or repellent in the contention that a subject can be barred from recovery of sums paid to the Crown under protest, in response to the compulsion of the legislation later found to be *ultra vires*.
>
> Section 5(7) of The *Proceedings Against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under the *British North America Act, 1867*. It also brings into question the right

[273] 11 Nfld. & P.E.I.R. 442 (Nfld. S.C. 1976).
[274] R.S.N. 1970, c. 384.
[275] *Supra* note 273, at 448.

> of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.[276]

Indeed, the courts have always been moralistic when they have been able to strike at legislation that they have found to be *ultra vires*. But what have they said when they have not been able to do so?

The issue of essential capacities was also discussed in the *Canadian Indemnity* case.[277] A series of British Columbia statutes established a compulsory scheme of vehicle insurance in the province as well as a monopoly on this type of insurance, which was to be held by a provincially-established and provincially-owned corporation. A number of insurance companies attacked the legislation claiming that it was legislation in relation to trade and commerce and that it interfered with the capacities of federally-established and federally-regulated corporations.

Following the long line of decisions that denied that the insurance business was a trade at all, the Court rejected the first contention. It would have been satisfying if the Court had recognized the fact that if not a trade, the insurance business was at least vaguely connected to the connotations of the word "commerce". Instead, Mr. Justice Martland stated the findings cryptically:

> The impact of the legislation upon the appellants' automobile insurance business in British Columbia could not be more drastic. However, that effect of the legislation upon companies whose operations are interprovincial in scope does not mean that the legislation is in relation to interprovincial trade and commerce. The aim of the legislation relates to a matter of provincial concern within the Province and to property and civil rights within the Province.[278]

As was discussed above, the *B.C. Power* case[279] established that a province could not nationalize (expropriate) a federally-regulated (or incorporated) company in its entirety.[280] However, following the *Canadian Indemnity* case, provinces can effectively put a company out of business by establishing a provincial monopoly in the business. In

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[276] *Supra* note 122, at 238-39, 71 D.L.R. (3d) at 10.

[277] Canadian Indemnity Co. v. Attorney-General of British Columbia, [1976] 5 W.W.R. 748, 73 D.L.R. (3d) 111 (S.C.C.) (8:0 decision), *aff'g* 63 D.L.R. (3d) 468 (B.C.C.A. 1975), *aff'g* 56 D.L.R. (3d) 7 (B.C.S.C. 1974).

[278] *Id.* at 754-55, 73 D.L.R. (3d) at 117.

[279] *Supra* note 110.

[280] A more cynical view of the case is that its sole purpose was to establish a more equitable takeover price than the one originally offered by the government of British Columbia. When the government did finally pay that price, the litigation came to an end.

short, under the Canadian Constitution, the government can rob you and maim you as long as they do not go the length of killing you!

* * *

By the closest of scores (a four to three decision) the Supreme Court allowed the appeal in *Interprovincial Co-operatives Ltd.*[281] Here, the government of Manitoba had brought action against the appellants, who had emptied mercury into rivers which ran into the province of Manitoba. The actual dumping had taken place in Saskatchewan and Ontario pursuant to licenses granted by these two provinces. The Manitoba legislation prohibited the result of the mercury dumping.

The majority held that this type of prohibition was within Parliament's jurisdiction under the general power. As a province cannot legislate with extra-territorial effect, it can neither inflict damages on another province (in this case Saskatchewan and Ontario) nor can it prevent the dumping of a substance in another province (in this case Manitoba). Only Parliament, therefore, can deal with this problem. Mr. Justice Ritchie, however, would only preclude the injunctive features of the Manitoba legislation.

Effectively, this decision has created a new category of interprovincial tort, a concept that received little tolerance from the minority.[282]

III FUNDAMENTAL RIGHTS

A. Status

The *Morgentaler*[283] and *Miller and Cockreill*[284] cases, among others, have made it clear that public interest groups will be given status in constitutional cases involving issues of general public concern. In addition, the *McNeil* case[285] has hopefully solidified the right of an individual to challenge the constitutionality of a law, a right which was established in the *Thorson* case.[286]

In *McNeil*, the Supreme Court stated that an individual could have standing where (a) in one of its central aspects (such as freedom of

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[281] Interprovincial Co-operatives Ltd. v. The Queen in Right of Manitoba, [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 4 N.R. 231, 53 D.L.R. (3d) 321 (4:3 decision), *rev'g* 38 D.L.R. (3d) 367 (Man. C.A. 1973) (4:1 decision), *rev'g* 30 D.L.R. (3d) 166 (Man. Q.B. 1972).

[282] *See* Hurlburt, Comment, 54 CAN. B. REV. 173 (1976).

[283] *Supra* note 226.

[284] R. v. Miller, 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324 (S.C.C. 1976) (9:0 decision), *aff'g* 63 D.L.R. (3d) 193 (B.C.C.A. 1975).

[285] Nova Scotia Bd. of Censors v. McNeil, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632 (1975) (9:0 decision), *aff'g* 53 D.L.R. (3d) 259 (N.S.C.A. 1974), *aff'g* 46 D.L.R. (3d) 259 (N.S.S.C. 1974). *See also* Mullan, *Standing After McNeil*, 8 OTTAWA L. REV. 32 (1976).

[286] Thorson v. Attorney-General of Canada (No. 2), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (1974) (6:3 decision), *rev'g* 25 D.L.R. (3d) 400 (Ont. C.A. 1972), *aff'g* 22 D.L.R. (3d) 274 (Ont. H.C. 1971).

speech) the legislation (in this case the Theatres and Amusements Act of Nova Scotia[287]) struck at the public at large, and (b) there is no other practical way of subjecting the legislation to judicial review.

With regard to the second stipulation, it is difficult to envisage any other practical means of subjecting legislation to judicial review (short, of course, of writing to one's member of the legislature). It would have been better if the Court had not made this test part of the matrix, for it is bound to produce problems in the future. Indeed, even the "public at large" test is not a happy one. Surely, if an individual wishes to challenge the validity of legislation he or she should have the right to do so without qualification. It is predicted that this two-fold test will most likely result in the use of more resources in its future clarification, rather than opening the mythical flood gate to individualistic attacks on the laws of the nation.

B. *General Considerations*

After gaining status, McNeil had to pursue the Theatres and Amusements Act of Nova Scotia on the merits.[288] The Nova Scotia Court of Appeal held the Act, which authorized the censorship of films by a provincial tribunal, to be *ultra vires*. However, only Mr. Justice MacDonald would have characterized the legislation as being in relation to a fundamental freedom. In his opinion such a massive intervention with a fundamental freedom was within the purview of Parliament alone, although he did concede that minor interventions by provinces would be permissible. The other three judges simply held that the legislation was in relation to criminal law and thus *ultra vires* the provinces. A majority of the Supreme Court of Canada held that morality, and hence censorship, was not equivalent to criminality. The Theatres and Amusements Act did not seek to do more than create an administrative board to regulate a business and to prevent exhibitions that did not comply with the standards of morality established by that board. Hence, at most, the legislation was for the prevention of crime, clearly permissible under established authority.

However, Mr. Justice Ritchie was prepared to find overlap with the Criminal Code with respect to one regulation, and because of this overlap was prepared to find the regulation *ultra vires*. With regard to possible interference with fundamental freedoms, the Ritchie judgment applied the presumption of constitutionality:

> As I indicated at the outset, I have taken note of the lengthy judgment of Mr. Justice MacDonald in the Appeal Division in which he finds that the impugned legislation is *ultra vires* as infringing on the fundamental freedoms to which he refers, which include freedom of associations; of assembly; of speech; of the

[287] R.S.N.S. 1967, c. 304.
[288] *Supra* note 3.

> press; of other media in the dissemination of news and opinion; of conscience and of religion. . . .
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> It is true that no limitations on the authority of the Board are spelled out in the Act and that it might be inferred that it *could* possibly effect some of the rights listed by MacDonald J.A., but having regard to the presumption of constitutional validity for which I have already referred, it appears to me that this does not afford justification for concluding that the purpose of the Act was directed to the infringement of one or more of those rights. With the greatest respect, this conclusion appears to me to involve speculation as to the intention of the Legislature and the placing of a construction on the statute which is nowhere made manifest by the language employed in enacting it.[289]

For the minority, Chief Justice Laskin followed the Nova Scotia Court of Appeal in holding the legislation to be in relation to criminal law and hence *ultra vires* in its entirety. He did not discuss the issue of fundamental freedoms.

No words are too harsh to criticize this decision. Unfortunately, increasing evidence of a general trend towards bigotry and racism has become apparent in recent years. That the Supreme Court of Canada would even contemplate upholding any legislation that conceivably could support this trend is unforgivable.

On the issue of free speech, the Ontario Court of Appeal has held that federal regulations prohibiting the broadcasting of telephone interviews without the consent of the interviewee are not an unconstitutional interference with freedom of speech but rather a constitutional protection of privacy.[290] The purpose of these regulations was to establish proper standards of broadcasting and not to impose a type of censorship.

* * *

In *Re Fardella*,[291] the Federal Court held that public funds may be used to promote the religious beliefs of a particular sect provided that this expenditure did not force others to partake of the publicly sponsored services. Otherwise, such a use of funds would constitute an interference with freedom of religion under the Canadian Bill of Rights; as has been established, that freedom is a matter of law and not of individual determination.

* * *

Anti-discriminatory provisions of provincial fair employment practices legislation have been held to be valid as long as they apply only to those persons who are within provincial jurisdiction.[292]

In *Regina v. Reale*[293] the Supreme Court held that an accused has

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[289] *Id.* at 164-65.

[290] R. v. CKOY Ltd., 30 C.C.C. (2d) 314, 70 D.L.R. (3d) 662 (Ont. C.A. 1976) (2:1 decision), *aff'g* 9 O.R. (2d) 549 (H.C. 1975) (currently on appeal to the Supreme Court of Canada). *See also* R. v. Simm, 31 C.C.C. (2d) 322 (Alta. S.C. 1976).

[291] 5 N.R. 277, 47 D.L.R. (3d) 689 (F.C. App. D. 1974) (3:0 decision).

[292] Harwood v. Lananière, [1976] C.A. 301 (Que. 1976) (2:1 decision).

[293] [1975] 2 S.C.R. 624, 5 N.R. 169, 58 D.L.R. (3d) 560 (1974) (9:0 decision), *aff'g* [1973] 3 O.R. 705 (C.A.).

the right to an interpreter at all stages, including during the charge to the jury.

Finally, in order for a piece of legislation to be found discriminatory, it is crucial that the discrimination be apparent on its face; potential discrimination is not sufficient. Thus, where federal legislation establishes administrative machinery which, in practice, has the power to make legal what would otherwise be illegal, that legislation will not constitute a denial of equality before the law nor infringe any other rights under the Canadian Bill of Rights.[294] There may be inequalities in the actual implementation, but unless these are apparent on the face of the legislation, the courts have no power to interfere under the Bill of Rights.

C. *Due Process*

The establishment of a government monopoly has been held not to constitute a denial of due process even though persons are effectively deprived of property.[295]

* * *

Since the National Parole Board has "exclusive jursidiction and absolute discretion" to grant, refuse and revoke parole, any proceedings leading to a warrant of re-committal do not require that prior notice be given the parolee under section 18(2) of the Parole Act.[296] It has been held that this does not constitute either a denial of due process or arbitrary detention.[297]

By similar reasoning, the making of recommendations to the institutional head of a prison by a classification board has been held to be a purely administrative function and therefore no notice need be given to the subject of the recommendations.[298]

Following the *Lowry* decision,[299] the New Brunswick Court of Appeal has guaranteed that an accused will have the right to be heard with respect to sentencing.[300] One wonders why the point would need to be argued.

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[294] *Morgentaler, supra* note 226.

[295] Manitoba Fisheries Ltd. v. Gov't of Canada, 17 N.R. 28 (F.C. App. D. 1977) (3:0 decision).

[296] R.S.C. 1970, c. P-2. *See also Ex parte* Thompson, 25 C.C.C. (2d) 228 (N.S.S.C. 1975).

[297] *Id.*

[298] Kosobook v. Solicitor-General of Canada, 30 C.C.C. (2d) 49, 69 D.L.R. (3d) 682 (F.C. Trial D. 1975). *See also* Mitchell v. The Queen, [1976] 1 W.W.R. 577, 61 D.L.R. (3d) 77 (S.C.C. 1975) (6:3 decision) and Howarth v. Nat'l Parole Bd., 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 349 (S.C.C. 1974) (5:4 decision), *aff'g* 41 D.L.R. (3d) 309 (F.C. App. D. 1973).

[299] Lowry v. The Queen, [1974] S.C.R. 195, 6 C.C.C. (2d) 531, 26 D.L.R. (3d) 224 (1972) (5:0 decision), *aff'g* 2 C.C.C. (2d) 39 (Man. C.A. 1970).

[300] R. v. Schofield, 13 N.B.R. (2d) 236 (C.A. 1976) (3:0 decision).

Finally, whatever arbitrary powers of committal for mental health reasons may exist under legislation, an accused who is not yet convicted has been held to be entitled to have his fitness for trial determined in accordance with the procedure outlined in the criminal law.[301]

D. *Equality Before the Law*

In a most disappointing decision, *Prata v. Minister of Manpower and Immigration*,[302] the Supreme Court ruled that as long as there exists a valid federal object, discrimination can exist without there being a denial of equality. In *Prata*, the discretion of the Immigration Appeal Board was removed by the filing of a ministerial certificate under section 21 of the Immigration Appeal Board Act.[303] The Court said that where there was a valid federal objective, equality before the law under the Bill of Rights did not require that federal legislation apply to all persons in the same manner. Consequently, some potential political refugees may find themselves subject to the exercise of the Board's discretion while others will not.

It also appears that while citizens can object to military service for reasons of conscience, applicants for citizenship cannot, without disqualifying themselves.[304] In *Re Jensen*, this obvious discrimination was overlooked by Mr. Justice Addy who could see no interference with equality. His attitude is sadly consistent with the *Prata* decision.

Section 143 of the Criminal Code[305] relates to the commision of rape by a "male person". Yet, in *Regina v. Krenn*,[306] Mr. Justice Anderson held that this created no discrimination on the basis of sex:

> In other words, Parliament was not discriminating against males when it made it a crime to compel a woman to have intercourse with a male person against her will. It was defining conduct applicable only to male persons. It is to be noted that female persons may be charged with rape pursuant to s. 21 of the *Criminal Code*. If a female person aids and abets a male person to commit rape she may be found guilty of rape.[307]

In a refreshing decision, *Regina v. MacKay*,[308] Judge Stevenson thought that this type of approach had been taken too far. Alberta legislation had defined juveniles as being girls under the age of eighteen

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[301] *Ex parte* Sayle, 18 C.C.C. (2d) 56 (B.C.S.C. 1974).

[302] [1976] 1 S.C.R. 376, 3 N.R. 484, 52 D.L.R. (3d) 383 (1975) (9:0 decision), *aff'g* 31 D.L.R. (3d) 465 (F.C. App. D. 1972). *See also Re* Jolly, 54 D.L.R. (3d) 277 (F.C. App. D. 1975) (3:0 decision); Maslej v. M.M.I., [1977] 1 F.C. 194, 13 N.R. 263 (App. D. 1976) (3:0 decision); Lugano v. M.M.I., [1976] 2 F.C. 438, 13 N.R. 322 (App. D. 1976) (3:0 decision).

[303] R.S.C. 1970, c. I-3.

[304] *Re* Jensen, [1976] 2 F.C. 665, 67 D.L.R. (3d) 514 (Citizenship App. Ct.).

[305] R.S.C. 1970, c. C-34.

[306] 27 C.C.C. (2d) 168 (B.C.S.C. 1975).

[307] *Id.* at 171.

[308] 30 C.C.C. (2d) 349 (Alta. Dist. C. 1975).

and boys under the age of sixteen. This was clearly a denial of equality on the basis of sex and Judge Stevenson declared the legislation inoperative. Even the Big Brother objectives of treatment and rehabilitation could not support this type of discrimination.[309]

E. *Cruel and Unusual Punishment*

The courts have here concerned themselves with three main issues: the death penalty, solitary confinement, and minimum sentencing without hope of parole.

In *Regina v. Miller*,[310] the death penalty was alleged to be cruel and unusual punishment for the following reasons:

(i) it was unacceptable to Canadians;
(ii) it was unnecessary because it lacked deterrent effect;
(iii) it was imposed arbitrarily;
(iv) it degraded human dignity.

All members of the Supreme Court agreed that "cruel" and "unusual" were used conjunctively in the Bill of Rights and that they could not be read separately.

In the view of the majority, section 1(a) contemplated that one might be deprived of life by due process, so that with regard to cruel and unusual punishment in section 2, there would be no need to abolish a right that never existed.

Chief Justice Laskin and Justices Spence and Dickson, however, took the view that the right established in section 2 of the Bill of Rights had a vitality separate from section 1. The Chief Justice then proceeded to examine each of the four grounds referred to above.

First, he found that there was a body of Canadian opinion that supported the death penalty. Secondly, he held that in the absence of statistics, Parliament could believe that the death penalty had deterrent effect and, in any event, Parliament could mete out retribution to satisfy the public's desire for revenge. Thirdly, as the sentence was mandatory it could not be classed as arbitrary. Finally, as to human dignity, the Chief Justice said only that the death penalty had been used for some time and could not be said to be unusual. *Ipso facto*, as cruel and unusual were conjunctive, the death penalty was not cruel. The superficiality of this reasoning requires no further comment.

In *McCann v. The Queen*,[311] Mr. Justice Heald was asked to declare that section 2.30(1) of the Penitentiary Service Regulations[312] was an

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[309] *But see* R. v. Davis, 3 A.R. 409 (C.A. 1977) (3:0 decision).
[310] *Supra* note 284.
[311] 68 D.L.R. (3d) 661 (F.C. Trial D. 1975).
[312] The regulation reads:
2.30(1) Where the institutional head is satisfied that
(a) for the maintenance of good order and discipline in the institution, or

infringement on the right of a prisoner to be free of cruel and unusual punishment. He found that while the Regulations were valid, in practice the treatment afforded prisoners, namely solitary confinement, was cruel and unusual. It was cruel and unusual in the circumstances because it served no positive penal purpose. It seems, then, that solitary confinement is not in itself cruel and unusual.

Finally, in *Regina v. Shand*,[313] the Ontario Court of Appeal held that the mandatory sentence of seven years for trafficking under section 5(2) of the Narcotic Control Act[314] was neither a denial of due process nor cruel and unusual punishment. Relying on the disproportionality test, the court said that the mandatory sentence of seven years was not cruel and unusual as it was not so disproportionate in respect to the offence as to shock the community.[315]

On reflection, these three cases present a sad commentary on the Canadian parliamentary and judicial systems. First, the death penalty was abolished in Canada because a majority of the members of Parliament considered it to be an affront to human dignity, and presumably cruel and unusual punishment. However, needing something to assuage the public desire for retribution, Parliament substituted mandatory sentences of up to twenty-five years without parole for certain types of murder.[316]

When one considers the mental attitude of someone who is sentenced to twenty-five years without hope of parole, two possibilities come to mind. First, no doubt as the inmate population in this group grows in future years, the suicide rate in the prisons will also climb due to the hopelessness of such a situation.[317] Effectively, Parliament has

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(b) in the best interests of an inmate

it is necessary or desirable that the inmate should be kept from associating with other inmates he may order the inmate to be dissociated accordingly, but the case of every inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.

(2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that

(a) can only be enjoyed in association with other inmates, or

(b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

[313] 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395 (Ont. C.A. 1976) (5:0 decision), *aff'g* 64 D.L.R. (3d) 626 (Ont. Cty. Ct.). Leave to appeal to the Supreme Court was refused [1976] 2 S.C.R. xi.

[314] R.S.C. 1970, c. N-1.

[315] The Ontario Court of Appeal followed *Shand* in R. v. Gignac, 30 C.C.C. (2d) 40 (Ont. C.A. 1976) (5:0 decision).

[316] Criminal Law Amendment Act (No. 2), S.C. 1974-75-76, c. 105.

[317] *See* Cooper, *Suicide in Prison: The Only Way Out For Some*, 24 CHITTY'S L.J. 58 (1976).

done indirectly what it did not have the courage to do directly. Secondly, if the penalty is merely another twenty-five years without hope of parole, what does a person have to lose in killing a prison guard to escape? As a result of this legislation, prison authorities will now have to keep "better control" of this group of prisoners. It is not unlikely that this will take the form of solitary confinement for most of the twenty-five years for what will now be a valid penal purpose. If death is not cruel and unusual punishment, is not solitary confinement for twenty-five years without hope of parole?

F. *Right to Counsel*

As might be expected, there have been further decisions in respect of section 235 of the Criminal Code, dealing with the denial of the right to counsel as a reasonable excuse for refusing a breathalyzer test.

In *Regina v. Irwin*[318] the Manitoba Court of Appeal admitted that the right of privacy is part of the right to instruct counsel but the right may be waived and if so, the refusal to take the test is not reasonable. The privacy of communication involved here is oral in nature. Visual surveillance by the police is permissible if it does not interfere with effective oral privacy.[319]

There is no rule that limits an accused to one telephone call as an element of the right to instruct counsel.[320] What is always required of the police is reasonable conduct. As Mr. Justice Freedman (as he then was) said: "[t]he 'one phone call' rule is a fiction propagated by Hollywood".[321]

Conversely, the right in respect of section 235 does not denote the right to instruct a particular counsel in all circumstances (for example, where that counsel is unreasonably far away[322]); furthermore, if counsel is to attend personally at the jail for consultation this should be made clear to the police, as it will affect the reasonableness of their actions.[323]

A number of decisions raised the question of whether the right to privacy is automatically an element of the right to counsel or whether it must be requested. The Supreme Court in *Jumaga v. The Queen*[324] has stated that the privacy must be requested, and if not requested and not provided then there is no denial of the right to instruct counsel. This is an unfortunate decision and will hopefully not remain law for long.

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[318] [1974] 5 W.W.R. 744, 50 D.L.R. (3d) 300 (Man. C.A.) (3:0 decision).

[319] R. v. Doherty, 18 C.C.C. (2d) 487 (N.S. Cty. Ct. 1974). *See also* R. v. Izard, 22 C.C.C. (2d) 441 (B.C. Cty. Ct. 1975) and R. v. Bowley, 10 Nfld. & P.E.I.R. 325 (P.E.I.S.C. 1976).

[320] R. v. Louttit, 21 C.C.C. (2d) 84 (Man. C.A. 1974) (3:0 decision).

[321] *Id.* at 86.

[322] R. v. Baker, 23 C.C.C. (2d) 361 (Sask. Dist. C. 1975).

[323] R. v. Anderson, 19 C.C.C. (2d) 301 (Sask. C.A. 1974) (3:0 decision).

[324] 29 C.C.C. (2d) 269, 34 C.R.N.S. 172, 68 D.L.R. (3d) 639 (S.C.C. 1976) (5:4 decision), *aff'g* 51 D.L.R. (3d) 272 (Man. C.A. 1974).

Ironically, the Federal Court has taken a different attitude with respect to the "right to obtain and be represented by counsel" provided by section 26 of the old Immigration Act.[325] It was held that the right must be freely explained and any untoward remarks by the Special Inquiries Officer will be grounds for quashing a deportation order.[326]

A witness faced with possible contempt proceedings for refusal to testify has a right to be represented by counsel.[327] However, following *Brownridge*,[328] the denial of the right to counsel will not affect the admissibility of a statement given by the witness. At most, the denial will be a factor in assessing the voluntariness of the statement.[329]

G. *Habeas Corpus*

Both sections 459.1[330] and 709[331] of the Criminal Code have been declared inoperative as constituting a denial of the right of *habeas corpus*.

IV. Conclusion

There is hardly an area of the Constitution that has not been reconsidered during the last three years, particularly by the Supreme Court of Canada. Unfortunately, however, civil liberties have been seriously curtailed in this country. This is a shame.

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[325] R.S.C. 1970, c. I-2.

[326] *See* Hinton v. M.M.I., [1975] F.C. 17, 10 N.R. 276 (App. D.) (3:0 decision); Molina v. M.M.I., 12 N.R. 317 (F.C. App. D. 1975) (3:0 decision); Swan v. M.M.I., 12 N.R. 319 (F.C. App. D. 1975) (3:0 decision).

[327] *Re* B., 30 C.C.C. (2d) 524 (N.W.T.S.C. 1976). *But see* R. v. Bechard, 24 C.C.C. (2d) 117 (Ont. Prov. Ct. 1975).

[328] Brownridge v. The Queen, [1972] S.C.R. 926, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1 (6:3 decision), *rev'g* [1972] 1 O.R. 105 (C.A. 1971).

[329] *See* R. v. Whynott, 27 C.C.C. (2d) 321 (N.S.C.A. 1975) (3:0 decision); R. v. Letendre, 25 C.C.C. (2d) 180, [1975] 6 W.W.R. 360 (Man. C.A.) (3:0 decision); and R. v. Settee, 22 C.C.C. (2d) 193, [1975] 3 W.W.R. 177 (Sask. C.A. 1974) (3:0 decision).

[330] The section reads:

> 459.1 No application may be made by way of *habeas corpus* for the purpose of obtaining the making of any order under this Part, Part XVIII or Part XXIV relating to interim release or for the purpose of reviewing or varying any decision made thereunder relating to interim release or detention.

See Ex parte Mitchell, 23 C.C.C. (2d) 473, [1975] 5 W.W.R. 178, 59 D.L.R. (3d) 425 (B.C.C.A.) (2:1 decision).

[331] The section reads:

> 709. Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or magistrate under whose warrant he is in custody, or any other judge, justice or magistrate to take any poceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

See Ex parte Amos, 24 C.C.C. (2d) 552 (B.C.S.C. 1975).