THE CONSTITUTIONALITY OF THE COMPENSATION AND RESTITUTION PROVISIONS OF THE CRIMINAL CODE — THE PICTURE AFTER *REGINA v. ZELENSKY*

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I. INTRODUCTION

A. *The Social Background and Statement of Issues*

Compensation and restitution[1] are *formal* remedies available to a judge sentencing someone for breach of particular sections of the Criminal Code. The major sections of the Code which provide for compensation and restitution are sections 388, 653, 655 and 663.[2] In recent years some judges, unhappy with the ineffectiveness and perhaps the irrationality of the traditional criminal punishments of jail and fines, have shown a willingness to experiment with compensation and restitution as legitimate components of the sentencing process. It is likely that this trend will continue. For example, the Law Reform Commission of Canada recently recommended that restitution be accorded a central place in criminal sentencing policy.[3] The reasoning of the Commission is persuasive and should inspire a number of judges to test the Commission's thinking in the laboratories of their criminal courts.

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[1] The ordinary meaning of the terms "restitution" and "compensation" differs from the meaning assigned in the CRIMINAL CODE. Usually, restitution refers to the payment of money or goods *by the offender* to the victim; compensation refers to payment *by the state* to the victim. *See, e.g.*, LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, WORKING PAPER 5, at 8 (1974). In the CRIMINAL CODE, restitution usually means the return of goods to the victim *by the offender*; compensation means the payment of money *by the offender* to the victim to compensate the victim for loss suffered on account of the actions of the offender. The Code meaning will be used in this article.

[2] CRIMINAL CODE, R.S.C. 1970, c. C-34, *as amended*.

[3] *Supra* note 1, at 1.5-8.

Compensation and restitution are gaining increased visibility and acceptance on a second front as well. They are being used by the police, particularly in the juvenile area, as *informal* punishments for minor offences, to be imposed on offenders in lieu of a charge, and ultimately conviction and traditional punishment.[4] In other words, compensation and restitution are central components of the theory and practice of diversion, a concept which appears to be gaining substantial acceptance in the criminal justice system.

Of course, compensation and restitution represent a departure, conceptually, from traditional sentencing theory. The focus of the criminal law has always been on the protection of public, not private, interests. Hence criminal sentencing policy has flowed from a balancing of the interests of the state and the offender; the needs of the third member of the criminal activity triangle, the victim, were lost in the shuffle. But modern sentencing theory recognizes the value of a three-dimensional approach to sentencing.[5] Compensation and restitution are simply the most visible and most effective methods of according, to the victim of a crime, a meaningful place in the sentencing process.

Because of the importance, originality and complexity of the compensation and restitution sections of the Criminal Code, the recent decision of the Supreme Court of Canada in *Regina v. Zelensky*[6] is of particular importance. It is a watershed in the discussion of innovative penalties in the Criminal Code, and, on its particular facts, is an authoritative statement of the constitutionality of some, and probably all, of the compensation and restitution sections of the Code.

Using the decision in *Regina v. Zelensky* as a foundation, the remainder of this article will be devoted to a consideration of three topics.[7] First, there will be a survey of some of the important provincial superior court decisions concerning the constitutionality of the various compensation and restitution sections of the Criminal Code. Secondly, those same sections will be considered, from a constitutional perspective, in light of the Supreme Court's decision in *Zelensky*. Thirdly, the decision in *Zelensky* will be discussed, briefly, against the backdrop of other recent Supreme Court decisions in the constitutional/criminal area. An attempt

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[4] For a description of this development in a British Columbia context, *see* Alsop, *Making Punishment Fit Crime*, in The Province, October 31, 1978, at 9.

[5] "Justice. . .in focussing on the wrong done and the need to restore the rights of the victims, provides an opportunity to individualize the sentence and to emphasize the need for reconciliation between the offender; society and the victim." LAW REFORM COMMISSION OF CANADA, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3, at 3-4 (1974).

[6] [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179.

[7] *Zelensky* raises an important non-constitutional issue, *viz.*, the merits of judicial use of compensation and restitution. In the final pages of his judgment, Laskin C.J. set down some guidelines for the application of these penalties in future cases. *Id.* at 962-64, 41 C.C.C. (2d) at 112-14, 86 D.L.R. (3d) at 194-96. Because the focus of this paper is on constitutional issues, these guidelines will not be considered.

will be made to discern whether *Zelensky* is representative of, or inconsistent with, the direction of other decisions in this important area of the law.

Before turning to these issues it is necessary to describe briefly the factual background of *Regina v. Zelensky*.

B. *Regina v. Zelensky — The Factual Background*

Regina v. Zelensky was an appeal on the sentence after a guilty plea on a charge of theft, with the sentence including orders for compensation and restitution pursuant to sections 653 and 655 of the Criminal Code and a term of imprisonment. The accused pleaded guilty to a charge of theft of money in the amount of $18,000 "more or less" and of merchandise worth $7,000 "more or less" following a plea bargain which had resulted in the dropping of some other charges. The accused, an employee of the T. Eaton Company, had taken advantage of her position by fraudulently making money orders payable to herself and some relatives. The Eaton Company had commenced civil proceedings at the same time as the criminal action and these continued throughout the trial. In spite of the guilty plea, the accused disputed the amount involved when the company applied for compensation and restitution of the money and goods. Counsel for the opposing parties were unable to agree on the amount (much to the dismay of the trial judge) but the application was granted and compensation and restitution were ordered in the sums of $18,000 and $7,000 (goods) respectively. The accused appealed the sentence, including these orders, arguing *inter alia* that section 653(1) was unconstitutional as it infringed the provincial power over property and civil rights (section 92(13) of the B.N.A. Act). The Manitoba Court of Appeal unanimously upheld the sentence of imprisonment. But, by a three-two decision, the court ruled that section 653(1) was unconstitutional and struck out the orders for compensation and restitution.[8]

The Crown appealed this decision. The Attorneys-General of Alberta and Quebec intervened to support the decision, the Attorney-General of Canada (and the Eaton Company) intervened to support the constitutionality of section 653(1). Judgment was pronounced on May 1, 1978. The Court had little difficulty restoring the order for restitution — the constitutionality of section 655 had not been challenged before either the Manitoba Court of Appeal or the Supreme Court of Canada. In any case, all nine justices of the Supreme Court of Canada considered section 655 to be constitutional. With respect to section 653(1), the Supreme Court reversed the decision of the Manitoba Court of Appeal. Six justices, in an

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[8] Regina v. Zelensky, [1977] 1 W.W.R. 155, 33 C.C.C. (2d) 147, 73 D.L.R. (3d) 596 (Man. C.A. 1976). The two majority judgments were written by Matas J.A. (Hall J.A. concurring) and O'Sullivan J.A. The dissenting judgment was by Monnin J.A. (Guy J.A. concurring).

opinion written by Chief Justice Laskin, declared the section *intra vires*; Justices Beetz and Pratte joined in a dissent penned by Mr. Justice Pigeon.[9]

II. CONSTITUTIONAL ISSUES

A. *Compensation and Restitution — the Criminal Code Framework*

Although section 388(2) of the Criminal Code deals with compensation, its application is limited to situations in which property damage does not exceed fifty dollars. The significant Code provisions concerning compensation and restitution are sections 653,[10] 654, 655 and 663(2)(e).

Even though these provisions may provide for compensation in only "an imperfect and partial manner"[11] and although judicial application of the provisions may be anarchic,[12] it is still possible to discern a theme or underlying philosophy in these sections. As the Chief Justice put it, correctly, in *Zelensky*:

> It appears to me that ss. 653, 654 and 655, historically and currently, reflect a scheme of criminal law administration under which property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability and may be ordered by the criminal court to be returned to the victimized owner if it is under the control of the court and its ownership is not in dispute or that reparation be made by the offender, either in whole or in part out of money found in his possession when arrested if it is indisputably his and otherwise under an order for compensation, where the property has been destroyed or damaged.[13]

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[9] I doubt that there is any significance in the fact that the three dissenting justices were the Quebec justices on the Court. Even if there is merit in the suggestion that there may be substantial differences between civilian and common law-trained justices concerning the fundamental nature of Canadian constitutional law, the judgment by Mr. Justice Pigeon, which is narrow and technical in emphasis, does not reflect this potential difference.

[10] 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, to be taken out of moneys found in the possession of the accused at the time of his arrest.

[11] Turcotte v. Gagnon, [1974] Que. R.P. 309, at 318 (C.S.) (*per* Hugessen A.C.J.).

[12] "Restitution in Canadian criminal law is in a near state of lawlessness in the sense that there are very few established principles governing its application." Chasse, *Restitution in Canadian Criminal Law*, 36 C.R.N.S. 201 (1977).

[13] *Supra* note 6, at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.

One qualification should be made concerning the view that these sections are a schematic whole. Although such a view is acceptable from a substantive criminal law perspective, that does not mean that the sections, when viewed from a constitutional law perspective, do not pose constitutional problems of varying degrees of difficulty. It is not possible, and the courts have not tried, to consider the constitutionality of sections 653, 654, 655, and 663(2)(e) on a package basis. There are significant differences in the purpose and the wording of these sections, differences which require careful and separate judicial treatment. For example, the courts have had more difficulty with section 653 than with the other sections. This can be explained by two important and unique components of section 653. First, there is the fact that a judge can order compensation only on the application of the injured citizen; secondly, the compensation order can be enforced in a provincial superior court in a manner identical to the enforcement of a civil judgment. These and other differences underline the need for careful consideration of each section of the Code whose subject matter is compensation or restitution.

B. *Provincial Superior Court Consideration of Compensation and Restitution*

The constitutionality of the compensation and restitution sections of the Criminal Code has been considered by a number of provincial superior court justices in recent years. Decisions, some of them of very high quality, in this area have been rendered in Quebec, Ontario and Manitoba.[14]

In *Turcotte v. Gagnon*[15] Associate Chief Justice Hugessen, of the Quebec Superior Court, was faced with a petition asking that a compensation order pronounced by a lower court, be entered as a judgment in the superior court, and enforced pursuant to section 653(2) of the Criminal Code. Hugessen A.C.J. had no difficulty upholding the constitutionality of those sections of the Code which permit a judge to order compensation or restitution as part of a criminal sentence. In his opinion, there was an important public interest to be served in focusing on the needs of the victim in the sentencing process.[16] Accordingly, since for Hugessen A.C.J., "a criminal prosecution is one in which the interests and protection of the body politic as a whole are concerned",[17] it followed that the Code sections establishing compensation and restitution were constitutional. He concluded that "an order for restitution to the victim of a crime

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[14] *See* Regina v. Zelensky, *supra* note 8; Rex v. Cohen, 32 Man. R. 409, 38 C.C.C. 334, [1923] 1 D.L.R. 687 (C.A. 1922); Turcotte v. Gagnon, *supra* note 11; *Re* Torek, 2 O.R. (2d) 228, 15 C.C.C. (2d) 296, 44 D.L.R. (3d) 416 (H.C. 1974); Regina v. Groves, 17 O.R. (2d) 65, 37 C.C.C. (2d) 429, 79 D.L.R. (3d) 561 (S.C. Chambers 1977)

[15] *Supra* note 11.

[16] *Id.* at 317-18, quoting with approval from LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 31.

[17] Turcotte v. Gagnon, *supra* note 11, at 315.

is not only incidental to criminal law and procedure; it may be an inherent part of the sentencing process''.[18]

Hugessen A.C.J. then proceeded to the issue raised by the actual fact situation in *Turcotte v. Gagnon*, namely, the constitutionality of the enforcement mechanisms in section 653(2). The argument against the validity of this section was that the enforcement proceedings which would take place pursuant to section 653(2) would, in effect, be civil actions between private litigants, a subject matter outside the scope of Parliament's criminal law power. Hugessen did not accept this argument. In reasoning that was quoted with approval by Chief Justice Laskin in *Zelensky*,[19] Hugessen A.C.J. stated:

> [I] take it that the superior court in which the order of the criminal court it [*sic*] filed is not called upon to exercise a judicial function in any normal sense of that word, but rather a purely administrative one, which has as its sole purpose to allow the civil execution process to be used to enforce what is already a binding order given by the criminal court.
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> ... Proceedings such as the present ones taken in a civil court in order to effect the execution of such an order do not cause it thereby to lose its criminal law character. In effect, all that Parliament has done is to impose upon the provincial superior courts, which are equipped for such purpose, the duty of providing for the execution of an order already given by a court of competent jurisdiction.[20]

The constitutionality of sections 653(1) and 663(2)(*e*) was tested and upheld in two recent Ontario cases.[21] The judgments by Justices Haines and O'Driscoll were comparable in both their general direction and high quality to that of Hugessen A.C.J. in Quebec.

In *Re Torek*[22] the validity of section 653 was challenged. Mr. Justice Haines conceded that the right to bring and defend an ordinary civil action is a civil right, which is normally within provincial legislative jurisdiction.[23] In addition, he acknowledged that section 653 deprives an accused of many of the protections he would have in an ordinary civil action, such as the right to have prior notice of the claim and the right to discovery.[24] But these considerations did not persuade Mr. Justice Haines that the section was *ultra vires*. Without stating it explicitly, Haines J. applied the aspect doctrine[25] and found a valid criminal purpose underlying section

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[18] *Id.* at 317.

[19] *Supra* note 6, at 958-59, 41 C.C.C. (2d) at 109-10, 86 D.L.R. (3d) at 191-92.

[20] *Supra* note 11, at 312, 318.

[21] *Re* Torek, *supra* note 14; Regina v. Groves, *supra* note 14.

[22] *Supra* note 14.

[23] *Id.* at 230, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 419.

[24] *Id.* at 229-30, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 418.

[25] This is one of the oldest and most important principles of constitutional interpretation. It was first enunciated in Hodge v. The Queen, 9 App. Cas. 117, at 130, 53 L.J.P.C. 1, at 6 (1883), where the Privy Council stated that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

653. For him, "proceedings under s. 653 can be considered to be part of the sentencing process";[26] this was sufficient to establish their constitutionality under section 91(27) of the B.N.A. Act.

The only criticism that may be made of Haines J.'s judgment, which generally is both thorough and well-reasoned, is his spurious reliance on section 601 of the Criminal Code as a prop for the constitutionality of section 653. He said: "It is worth noting that in s. 601 . . .the word 'sentence' is defined to include an order made under s. 653."[27] In a constitutional sense this fact is not at all worth noting; it is irrelevant, as both the Chief Justice[28] and Mr. Justice Pigeon[29] hinted in their judgments in *Zelensky*. Inclusion in a definition does not determine validity, particularly when, as in this case, the definition section is found in a completely unrelated part of the Code.[30]

The second recent Ontario case concerning the compensation and restitution provisions of the Criminal Code is *Regina v. Groves*.[31] In that case Mr. Justice O'Driscoll decided that section 663(2)(*e*) of the Code, which permits a judge to make a restitution order part of a sentence of probation, was *intra vires* Parliament's criminal law power. The judgment, which was rendered after the decision of the Manitoba Court of Appeal in *Zelensky*, but before that of the Supreme Court, is remarkable for its anticipation, not only of the result in *Zelensky*, but also of the broad outlines of the reasoning advanced in the Chief Justice's opinion. Using as starting points the presumption of constitutionality[32] and the breadth of Parliament's criminal law power,[33] O'Driscoll J. easily concluded that sentencing is part of that power and section 663(2)(*e*) was part of sentencing. But he recognized, correctly, that this did not conclude the matter:

> To say that s. 663(2)(e) is part of sentencing does not remove the necessity of determining its constitutional validity. . . .
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> To answer this question one must examine how the concepts of "restitution" and "reparation" relate to the principles of sentencing. If the whole purpose of the provision in s. 663(2)(e) were to save the victim the necessity and expense of a civil suit, such would render the provision *ultra vires* because it would not be in "pith and substance" legislation in relation to criminal law.[34]

O'Driscoll J. then embarked on an examination of the purposes of section 663(2)(*e*) and their relationship to the accepted purposes of

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[26] *Supra* note 14, at 230, 15 C.C.C. (2d) at 298, 44 D.L.R (3d) at 419.

[27] *Id.*

[28] *Supra* note 6, at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90.

[29] *Id.* at 984, 41 C.C.C. (2d) at 128, 86 D.L.R. (3d) at 210, citing Regina v. Scherstabitoff, 40 W.W.R. 575, [1963] 2 C.C.C. 208, 39 C.R. 233 (B.C.C.A. 1962).

[30] *Id.* at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90. The definition is found in the part of the Code relating to appeals.

[31] *Supra* note 14.

[32] *Id.* at 74, 37 C.C.C. (2d) at 439, 79 D.L.R. (3d) at 570.

[33] *Id.* at 69, 37 C.C.C. (2d) at 433, 79 D.L.R. (3d) at 565.

[34] *Id.* at 70-71, 37 C.C.C. (2d) at 435, 79 D.L.R (3d) at 566-67

sentencing policy. He concluded that the three purposes of section 663(2)(*e*) were rehabilitation of the offender, deterrence and protection of the public. All of these are legitimate goals of criminal sentencing.[35] Hence the constitutional nexus between section 663(2)(*e*) of the Criminal Code and section 91(27) of the B.N.A. Act was established.

The picture, therefore, in Quebec and Ontario was one of judicial acceptance of the constitutionality of the various compensation and restitution sections of the Code. In Manitoba, prior to *Zelensky*, there was a similar picture. In an early case, *Rex v. Cohen*,[36] Chief Justice Perdue remarked (albeit clearly *obiter*) that section 91(27) of the B.N.A. Act supported the compensation and restitution sections of the Criminal Code.[37] More recently, in 1970, the Manitoba Court of Appeal upheld the predecessor of the present section 663(2)(*e*).[38]

So, as the Manitoba Court of Appeal began its deliberations in *Zelensky*,[39] it did so against a background of judicial acceptance of three different compensation and restitution sections, in three different jurisdictions, including Manitoba itself. Yet the Court of Appeal declared in *Zelensky* that section 653(1) of the Code was unconstitutional. The decision was three-two;[40] the judgments unremarkable in either organization or depth of analysis.

The dissenting judgment of Monnin J.A. (Guy J.A. concurring) was relatively simple. He cited *Regina v. Littler*,[41] *Turcotte v. Gagnon*[42] (quoting *Rex v. Cohen*[43]) and *Re Torek*[44] as cases supporting the validity of the section. He also supported the reasoning of *Torek*. He concluded:

> In pith and substance s. 653 is part and parcel of the sentencing process set out in the Criminal Code of Canada. If it were not, the hands of our courts would be sadly tied and the victims of crimes would of necessity have to seek recovery of property and moneys illegally taken away from them through civil courts on the basis that one cannot mix that which is criminal with that which is civil, and on the further basis that provincially appointed judges are not fit persons to deal with matters of civil law. Can one think of a more ridiculous proposition and one bound to bring the entire legal process — already badly challenged — in disrepute? Distinctions for the sake of distinctions have no place in courts of law.[45]

Although one may sympathize with the general sentiments expressed by Mr. Justice Monnin in the last two sentences of this passage, it is doubtful that the first two sentences are particularly persuasive in

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[35] *Id.* at 74. 37 C.C.C. (2d) at 429, 79 D.L.R. (3d) at 570.
[36] *Supra* note 14.
[37] *Id.* at 411, 38 C.C.C. at 335, [1923] 1 D.L.R. at 688-89.
[38] Regina v. Butkans (unreported, Man. C.A., June 18, 1970).
[39] *Supra* note 8.
[40] *See id.* for identification of majority and dissenting justices.
[41] 27 C.C.C. (2d) 216, 65 D.L.R. (3d) 443 (Que. C.A. 1974).
[42] *Supra* note 11.
[43] *Supra* note 14.
[44] *Id.*
[45] *Supra* note 8, at 160, 33 C.C.C. (2d) 152-53, 73 D.L.R. (3d) at 602.

establishing the constitutionality of section 653(1). If we are to be convinced that section 653(1) is part of the sentencing process of the Code, then it would have to be on the basis that compensation meshes with some of the traditional and accepted goals of sentencing. Basically, those goals are rehabilitation, deterrence and punishment or retribution — all of which are primarily *offender*-focused. But Monnin J.A. did not tie section 653 to any of these goals; rather, his reason for upholding section 653(1) was *victim*-focused — it relieved the victim from having to go to the civil courts to recover property or money taken from him. Even though in policy terms this is undoubtedly desirable, it hardly relates to sentencing and, therefore, does not support the conclusion Monnin J. reached in the first sentence.

The majority judgments were written by O'Sullivan J.A. and Matas J.A. (Hall J.A. concurring). Matas J.A. commenced by quoting Lord Atkin's statement in *Attorney-General of British Columbia v. Attorney-General of Canada* that the only limitation on the federal criminal power was that Parliament could not enact legislation in the guise of criminal law which encroached on provincial jurisdiction.[46] Next, he pointed out three differences between section 653(1) and section 655(1). First, section 653(1) uses the verb "may", whereas section 655 uses "shall"; secondly, section 653 requires an application by the victim; and thirdly, section 655 refers to property before the court which was capable of restoration to the victim, whereas there is no such limitation in section 653.[47] These distinctions led Matas J.A. to the consideration of section 653 in isolation.

Matas J.A. considered the key issue to be whether the procedure for compensation was necessarily incidental to the criminal law power.[48] While acknowledging that Parliament must have wide powers over sentencing with the changing times, he still felt an examination was in order to determine whether the legislation was a valid criminal function or merely an expedient conjunction of civil and criminal remedies.[49] He then proceeded to consider the appropriateness of compensation, mentioning the lack of discovery and the possibility of the accused being deprived of the right to make full answer and defence.[50] It seems that his views on these functions were very important to his decision. He agreed that compensating victims was a worthy goal and that a valid object of sentencing was preventing the criminal from profiting from his crime. But he felt that the former did not necessarily flow from the latter. Instead, he mentioned using fines to prevent profits and using other means of compensating victims.[51] All of this led Matas J.A. to the conclusion that

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[46] *Id.* at 172, 33 C.C.C. at 162, 73 D.L.R. (3d) at 611, citing with approval Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 368, at 375-76, 67 C.C.C. 193, at 195, [1937] 1 D.L.R. 688, at 690 (P.C.)

[47] *Id.* at 173, 33 C.C.C. (2d) at 163, 73 D.L.R. (3d) at 612-13.

[48] *Id.* at 175, 33 C.C.C. (2d) at 164-65, 73 D.L.R. (3d) at 614

[49] *Id.* at 175-76, 33 C.C.C. (2d) at 165, 73 D.L.R. (3d) at 614.

[50] *Id.* at 178-79, 33 C.C.C. (2d) at 167-68, 73 D.L.R. (3d) at 616-17

[51] *Id.* at 180, 33 C.C.C. (2d) at 168, 73 D.L.R. (3d) at 617-18

section 653(1) was not supported by section 91(27) or by the necessarily incidental doctrine; rather it was an encroachment on the provincial property and civil rights power.

Matas J.A.'s judgment suffers throughout from a fundamental error, namely confusion between the *constitutionality* of compensation and the *merits* of compensation. This confusion is clearly manifested when he states the following:

> 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". . . .[52]

In terms of constitutional analysis he needed to go no further. He had established a valid nexus between compensation (the impugned section) and an accepted purpose of sentencing (punishment). Since sentencing has always been accepted as a component of Parliament's criminal law power, this should have concluded the matter in favour of the constitutionality of section 653(1). Yet, Mr. Justice Matas continued: "But the two objectives do not need to be tied together. . . . There are other constitutionally valid ways of accomplishing this purpose."[53] Here Matas J.A. crossed the line dividing jurisdictional considerations from considerations of the wisdom of legislation. The existence of other methods, or the merits of those methods, are irrelevant from a constitutional perspective. Rather, the sole question is whether there is a rational connection between the method chosen by Parliament to accomplish a purpose, and one of its heads of legislative power. Having specifically found that there was such a connection in this case, Matas J.A. unfortunately failed to recognize that this concluded his judicial function.

The short concurring judgment of O'Sullivan J.A. seemed to be based on the assumption that section 653 conferred "a right" on the victim of a crime to claim compensation from the offender.[54] What O'Sullivan J.A. failed to recognize was that even if the victim established his claim, he would not be automatically entitled to compensation. In a civil court, the establishment of entitlement and award of damages are closely connected; if you prove you lost $100 because of the actions of the defendant, then you will be awarded $100. Such is not necessarily the case under the compensation and restitution sections of the Code. There, because these orders are components of the sentencing process, the judge imposing sentence focuses on the offender, not the victim. Accordingly, the amount the victim lost may be only one factor in the judge's mind as he imposes sentence. The victim has no "right" to recovery as he would have in an ordinary civil case if he established his claim. Rather, under section 653, his recovery is dependent entirely on the discretion of the judge, who may or may not attach significance to his loss.

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[52] *Id.*

[53] *Id.*

[54] *Id.* at 183-84, 33 C.C.C. (2d) at 170-71, 73 D.L.R. (3d) at 620-21.

In summary then, none of the judgments in *Zelensky* at the Court of Appeal level was particularly strong. An impartial observer, however, keeping in mind both the substantial provincial superior court support for the constitutionality of a variety of compensation and restitution sections in the Code, and the traditional support of the Supreme Court of Canada for federal legislation generally,[55] could not with any confidence have predicted that the decision of the Manitoba Court of Appeal would have been upheld.[56]

C. *Regina v. Zelensky — Supreme Court of Canada*

The Supreme Court of Canada, in a six-three decision, reversed the decision of the Manitoba Court of Appeal.[57] The dissenting judgment by Mr. Justice Pigeon was a strong judgment, although perhaps top-heavy in its description of the facts.[58] It was well-organized and dealt clearly and separately with the two potential bases — the criminal law power and the necessarily incidental doctrine — for the validity of section 653.

As for the criminal law power, Pigeon J.'s conclusion that it did not support section 653 flowed from two dominant features of his judgment — first, his characterization of section 653; secondly, the importance he attached to the unique civil consequences of section 653(1). His characterization was brief: "As to the nature of the enactment, it obviously deals with a matter that is *prima facie* within provincial jurisdiction 'satisfaction or compensation for loss of or damage to property' ".[59] His analysis of the features of section 653(1) was more complete:

> Unlike practically every other procedural provision of the *Criminal Code*, the remedy contemplated in s. 653 has the characteristics of a civil remedy. It is available only "upon the application of a person aggrieved". It is not sanctioned by a penalty but is "enforceable . . . as . . . a judgment rendered . . . in civil proceedings". In short the substance of s. 653 is that it enables a person who has suffered loss of or damage to property by the commission of an indictable offence, to obtain from the court of criminal jurisdiction a civil judgment against the offender.[60]

This characterization and analysis led Pigeon J. to the conclusion that section 653(1) was outside the ambit of section 91(27) of the B.N.A. Act.

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[55] Since 1949, only two minor sections of two federal statutes have been declared unconstitutional by the Court: s. 7(e) of the Trade Marks Act, R.S.C. 1970, c. T-10 and s. 2(2) of the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7. *See* MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 (1976); Reference *re* Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

[56] The author made the rash prediction to his Constitutional Law class that the Court of Appeal decision would be reversed 9-0.

[57] *Supra* note 6.

[58] The judgment is twenty pages in length. Thirteen pages are devoted to a description of the facts and some analysis of non-constitutional points.

[59] *Supra* note 6, at 979, 41 C.C.C. (2d) at 124-35, 86 D.L.R. (3d) at 206-07.

[60] *Id.* at 980, 41 C.C.C. (2d) at 125, 86 D.L.R. (3d) at 207

There is much to admire in Pigeon J.'s discussion. Section 653(1) does have distinct provisions which, at first blush, appear to be primarily civil in nature. He presents clearly the arguments to support such a finding. But, the judgment loses much of its force by failing to deal with the arguments on the other side. For example, it is not "obvious" that the subject matter of section 653(1) is compensation for loss of or damage to property. Certainly that is one possible characterization. However, section 653 is found in the sentencing chapter of the Criminal Code and the actual words of section 653(1) clearly refer to compensation in a sentencing context. Consequently, Pigeon J. should have, at a minimum, acknowledged the possible sentencing *cum* criminal law characterization of section 653(1), and attempted to rebut the characterization.

Likewise, it is true that one possible analysis of "the substance" of section 653(1), is that it enables a victim to obtain a civil judgment from a criminal court. But surely, before coming to that conclusion, some discussion of other potential "substances" would be appropriate. Could not the essence of section 653(1) be criminal sentencing? Is compensation not consistent with the traditional goals of sentencing — deterrence, punishment, rehabilitation? For example, in *Zelensky* itself, could not an order for compensation and restitution, in the amount of $25,000, be considered a very significant punishment and deterrent *to the offender*, irrespective of any attention the court might pay to the victim? In other words, it is not obvious, as Pigeon J. seemed to think, that there is not even an arguable nexus between compensation and criminal sentencing. His conclusions would have been much stronger if he had acknowledged the potential strength of the arguments in support of constitutionality, and had tried to rebut them.

A similar criticism can be levelled against that part of Pigeon J.'s judgment dealing with the possible application of the necessarily incidental doctrine to section 653(1). He took two pages to set out, carefully, the nature of that doctrine and to establish its applicability to section 91(27) of the B.N.A. Act.[61] Having done that, though, he leaped directly to his conclusion:

> I cannot find anything which would made it possible for me to consider subss. (1) and (2) of s. 653 of the *Criminal Code* as necessarily incidental to the full exercise by Parliament of its authority over criminal law and criminal procedure. A compensation order is nothing but a civil judgment.[62]

With respect, this conclusion is not at all self-evident. The same considerations suggested above, in the discussion of the criminal law power, apply here. Is there not, arguably, a rational connection between a compensation order and a valid sentencing objective such as punishment or deterrence? Or, is there not a potentially rational connection between those compensation and restitution sections of the Code which were admittedly good (Pigeon J. himself strongly hinted that all of these sections except

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[61] *Id.* at 982-84, 41 C.C.C. (2d) at 127-28, 86 D.L.R. (3d) at 209-10.

[62] *Id.* at 984, 41 C.C.C. (2d) at 128, 86 D.L.R. (3d) at 210.

section 653(1) and (2) were valid), and those which were alleged to be *ultra vires*? These issues should have, at least, been canvassed before Mr. Justice Pigeon reached his conclusion that he "cannot find anything" to tie section 653(1) and (2) to a subject matter necessarily incidental to the full exercise of Parliament's criminal law power. Without this analysis, his conclusion is unsupported and unpersuasive.

In summary, Pigeon J.'s judgment was a significant improvement over the majority judgments in the Manitoba Court of Appeal. He avoided, rigourously, the major pitfall of those judgments, namely, confusion between considerations of jurisdiction (legitimate for judicial attention) and of merits (not legitimate). The main strength of his judgment was his analysis of the effects and potential effects of the distinct civil characteristics of section 653(1) and (2). This was valuable because those distinct characteristics cast doubts on the nexus between that section and valid criminal law purposes. Unfortunately, Pigeon J. looked only at the civil side of the coin. If he had supplemented this analysis with an identification and rebuttal of the arguments denying the importance of these civil characteristics (for example, if he had responded to some of the reasoning by Hugessen A.C.J., Haines and O'Driscoll J.J. in *Turcotte*, *Torek* and *Groves* or, even better, to the views of Laskin C.J. in this case), his conclusion of *ultra vires* would have been more persuasive — although still, in my view, incorrect.

The first point which can be made about the Chief Justice's majority judgment in *Zelensky* is that it differed markedly, in terms of style, from Pigeon J.'s judgment. Whereas the emphasis in Pigeon J.'s judgment was on a close, almost technical, analysis of section 653, Laskin C.J.'s judgment was more broadly conceived. He made an historical analysis of the compensation and restitution sections of the Code,[63] was prepared to consider those sections as a comprehensive scheme[64] and appeared to attach significance to the thinking of the Law Reform Commission in this area.[65] This is, of course, typical of the Chief Justice's approach in most constitutional cases. His policy-oriented (at times philosophical) approach to constitutional issues is in sharp contrast to the Austinian analytical framework which characterizes the judgments of such justices as Martland, Ritchie and Pigeon JJ.

In substantive terms, the chief merit of Laskin C.J.'s judgment was the thorough framework he established before considering section 653. This framework consisted of four components and contributed substantially to the persuasiveness of his ultimate conclusion that section 653 was constitutional. The first component of the background framework was an historical analysis of the Code sections dealing with compensation and restitution. Secondly, there was a review of the case law defining the scope of Parliament's criminal law power. This examination established

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[63] *Id.* at 948, 41 C.C.C. (2d) at 102, 86 D.L.R. (3d) at 184.
[64] *Id.* at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.
[65] *Id.* at 952-53, 41 C.C.C. (2d) at 105, 86 D.L.R. (3d) at 187

that this power is broad,[66] capable of growth[67] and includes criminal sentencing. Thirdly, Chief Justice Laskin reviewed all of the compensation and restitution provisions of the sentencing chapter of the Code. He concluded that they constituted a scheme of criminal law administration under which property taken, destroyed or damaged during an offence is accounted for after culpability is determined and returned to the victim.[68] Finally, he reviewed a number of leading cases in which the constitutionality of other non-traditional penalties or sanctions was upheld.[69] This four-pronged analysis established a background conducive to a favourable examination of section 653, an examination to which the Chief Justice then turned.

Although he had concluded that section 653 was part of a broad Criminal Code scheme of compensation and restitution and that these were valid parts of the sentencing process, he recognized that there were distinct features of section 653 which called for separate treatment. The two problematic features of section 653 — which for Pigeon J. were determinative of invalidity — are that the trigger for a compensation order is an application by the victim, not the court acting on its own motion and, secondly, that the compensation order can be registered and enforced in a civil court as if it were a civil order.

The Chief Justice, relying heavily on Associate Chief Justice Hugessen's judgment in *Turcotte v. Gagnon*, effectively answered the second problem. He concluded that section 653 was not invalid because it relied on provincial superior courts for automatic enforcement. Citing Hugessen A.C.J., he stated:

> [T]he fact that Parliament has made the compensation order enforceable as a judgment in a civil action is more a call on the administrative side of the Superior Court than on the judicial side but it is, in any event, a means open to Parliament to provide for the execution of an order validly made. . . .
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> . . . *This . . . is machinery which cannot control the issue of validity.*[70]

This is surely correct. Assuming the compensation order is a valid criminal order, it does not lose its criminal nature because, subsequently,

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[66] *Id.* at 950-51, 41 C.C.C. (2d) at 104, 86 D.L.R. (3d) at 186.

[67] *Id.* There is some eloquence in the Chief Justice's articulation of this view: We cannot, therefore approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the modes of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*.

[68] *Id.* at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.

[69] *Id.* at 953-58, 41 C.C.C. (2d) at 105-10, 86 D.L.R. (3d) at 187-92.

[70] *Id.* at 958, 959, 41 C.C.C. (2d) at 109, 110, 86 D.L.R. (3d) at 191, 192 (emphasis added).

another arm of the judicial process needs to be invoked for enforcement purposes. Once the court has declared the purposes of a legislative enactment to be constitutional, the choice of means to implement those purposes is solely a function of that legislature.

The Chief Justice's response to the first problem of section 653 was brief. He compared sections 653(1) and 663(2)(*e*) of the Code and concluded: "I find little to choose, *except on the side of formality*, in the requirement of s. 653 that the compensation order must be based on an application by the person aggrieved rather than be made by the Court *suo motu*. . .".[71] The underlined passage captures, succinctly, the essence of the insignificance of the factual distinction between the two sections. Both sections deal with compensation or restitution in a sentencing context, and authorize a judge, *at his discretion*, to include these punishments in a sentence. Presumably, in so doing, the judge will adopt the traditional offender-focus and assess compensation or restitution in the context of the accepted purposes of sentencing — punishment, deterrence and rehabilitation. The fact that under section 653(1) this whole process is initiated by the victim does not deny the essential criminal law features of the section — namely, *offender-orientation* and *judicial discretion* in making the order.

Having rebutted the arguments in favour of the essential nature of section 653, and having established a general background conducive to a finding of validity (these are two points of excellence in the judgment), the Chief Justice concluded that "s. 653 is valid as part of the sentencing process".[72]

However, in spite of the two strengths of the judgment, the conclusion of constitutionality would have been more persuasive if the judgment had been clearer or more thorough in two respects. The first, and minor, criticism is that the Chief Justice never clearly separated the criminal law and the necessarily incidental basis for validity. Although one suspects that the Chief Justice prefers not to rely on the necessary incident doctrine if it is at all possible to uphold a statutory provision under a specific head of power,[73] and although most of the judgment is clearly concerned with a discussion of section 91(27) of the B.N.A. Act, the combination of Laskin C.J.'s failure to specifically mention the doctrine, while at the same time talking in terms of rational connections between admittedly valid and challenged parts of legislation (the accepted formulation of the doctrine) and his citation of *Papp v. Papp*,[74] leave the reader wondering whether Chief Justice Laskin might invoke the doctrine to uphold the legislation.

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[71] *Id.* at 954, 41 C.C.C. (2d) at 107, 86 D.L.R. (3d) at 189 (emphasis added)

[72] *Id.* at 960, 41 C.C.C. (2d) at 111, 86 D.L.R (3d) at 193 (emphasis added)

[73] *See, e.g.*, Tomell Investments Ltd. v. East Marstock Lands Ltd., [1978] 1 S.C.R. 974, 77 D.L.R. (3d) 145 (1977), wherein Chief Justice Laskin upheld the validity of s. 8(1) of the federal Interest Act, R.S.C. 1970, c. I-18, under s. 91(19) of the B.N.A. Act. Seven members of the Court, instead, invoked the ancilliary doctrine to uphold the section.

[74] [1970] 1 O.R. 331, 8 D.L.R. (3d) 389 (C.A.). This is the leading case on the doctrine.

Fortunately, the doubt is dispelled. His ultimate conclusion that "s. 653 is valid as part of the sentencing process",[75] makes it clear that section 653 is being upheld under the criminal law power per se, because it is now well-established that sentencing comes within that power.[76]

The second, and more fundamental, criticism of Chief Justice Laskin's judgment is that the reasoning leading to the conclusion that section 653 is valid as part of the sentencing process is not as persuasive as that in other parts of the judgment. For example, his historical analysis, consideration of judicial authority concerning other types of sentencing, discussion of the overall scheme of the compensation and restitution sections of the Code, analysis of the scope of the criminal law power in the abstract, and rebuttal of arguments in support of the essential civil nature of section 653, are all solid. But the other ingredient necessary in a complete judgment is missing. There is no particularly persuasive analysis of the relationship between section 653 and valid criminal purposes. Section 653 and the other compensation and restitution sections of the Code do not fit comfortably within the traditional forms of criminal punishments or penalties. What is it, then, that gives them a criminal law quality? Where is the nexus?

The Law Reform Commission has considered this issue in detail and has offered the following rationale:

> Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victim. Society gains from restitution in other ways as well. To the extent that restitution works toward self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not only by Parliament, the courts, police, and correctional officials but also by ordinary citizens and potential victims.[77]

This is a coherent and comprehensive basis upon which to establish the relationship between compensation and criminal purposes, from which a finding of the constitutionality of section 653 would automatically flow. Unfortunately, the Chief Justice simply quoted this passage without comment and then proceeded directly to an examination of the case law. Eight pages later he emerged with his conclusion that section 653 is valid as a part of the sentencing process. Conceptually, only the quoted passage above supports this conclusion; it would have been a much stronger judgment if the Chief Justice had built on this passage with some of his own logic and language.

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[75] *Supra* note 6, at 960, 41 C.C.C. (2d) at 111, 86 D.L.R. (3d) at 193.

[76] *Id.* at 950, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185, citing with approval City of Toronto v. The King, [1932] A.C. 98, 56 C.C.C. 273, [1932] 1 D.L.R. 161 (P.C. 1931).

[77] *Supra* note 1, at 7-8.

Finally, two minor conclusions of the Court should be mentioned. First, the Chief Justice suggested that, as a matter of statutory construction, "only the accused" has a right of appeal against a compensation order and that this "is consistent with the character of such an order as part of sentence".[78] This conclusion, in my view, is correct. It recognizes that the primary purpose of a compensation order is to punish or deter or rehabilitate the *offender*. The offender, not the victim, must be the focus of judicial attention. If the victim became a primary focus — as he could be if given a right of appeal — then the nexus between the compensation order and valid criminal purposes would be weakened.

The second incidental conclusion is raised and answered in the following passage from the Chief Justice's judgment:

> There looms in this case an obvious question of the effect of a discretionary order for compensation under s. 653 upon subsequent civil proceedings by the victim against the accused, if he has not been made whole by the order. Parliament has not purported to interfere with any right of civil recourse which thus remains open despite s. 653. What is involved is whether the obtaining of an order under s. 653 (not the mere application therefor) amounts to an election against civil proceedings or whether the order goes simply to quantum if civil proceedings are later taken. I am inclined to the view of an election as being consistent with the criminal law character of s. 653, but no argument was addressed to the Court . . . . [I] prefer to leave it open.[79]

With respect, the better view would seem to be that election is inconsistent with the criminal law character of section 653. If judicial attention under section 653 is focused on the offender, if the victim must invoke section 653 "to emphasize the sanctions against the offender",[80] if section 653 is not to be read "as requiring exact measurement",[81] and if the victim is not allowed to appeal the sentence, then it seems unfair that he be denied, in entirety, subsequent recourse to the civil courts. A judge who makes a compensation order under section 653 weighs many factors; but, most of those factors relate to the offender, not the victim. Hence, there is a good chance that a compensation order may not make the victim whole. It seems harsh, therefore, to deny the victim access to a civil remedy. The better view is to allow this later access in the reasonable expectation that the judge in the civil case will take into account the amount the victim was awarded in the criminal compensation order.

In conclusion, the majority judgment in *Zelensky* is, on the whole, well-organized, comprehensive and persuasive. The narrow substantive result of the decision is that section 653 of the Criminal Code is constitutional. But the implications of the decision are manifestly broader.

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[78] *Supra* note 6, at 965, 41 C.C.C. (2d) at 114, 86 D.L.R. (3d) at 196. Presumably the Chief Justice, in using the words "only the accused", was focusing only on the rights of appeal of the accused and the victim. The Crown, obviously, would retain its right to appeal the sentence.

[79] *Id.* at 964, 41 C.C.C. (2d) at 113-14, 86 D.L.R. (3d) at 195-96

[80] *Id.* at 961, 41 C.C.C. (2d) at 111, 86 D.L.R. (3d) at 193.

[81] *Id.* at 961, 41 C.C.C. (2d) at 112, 86 D.L.R. (3d) at 194.

Because of the distinct civil features of section 653, its validity was more doubtful than the other compensation and restitution sections of the Code. Judicial validation of section 653, thus, carries with it an implicit validation of all the Code sections dealing with these subject matters. Accordingly, *Zelensky* stands for the proposition that the constitution will permit, under section 91(27), experimentation with new forms of sentencing such as compensation and restitution. This is good news for those law reformers, legislators and judges who think that the traditional punishments such as jail and fines are not effective in some cases. These people should now feel comfortable in searching for, and applying, new sanctions in the knowledge that these sanctions will be upheld, provided they mesh with the same valid objectives of sentencing.

D. *Zelensky as Representative of, or Inconsistent with, a Pattern of Decisions in the Constitutional/ Criminal Area*

There has been a large number of cases in recent years raising constitutional issues in a criminal law context.[82] For example, the Supreme Court of Canada has delivered seven significant decisions in cases in which provincial statutes were attacked as infringing Parliament's criminal law power. In *Attorney General for Canada v. Dupond*[83] a city by-law which granted a local committee authority to prohibit the holding of assemblies, parades and gatherings if the committee has reason to believe that the public peace or safety was endangered, was held not to be a criminal law, even though the provincial enactment consisted of a prohibition and made failure to observe the prohibition an offence. In *Faber v. The Queen,*[84] the Court held that a provincial coroner's inquest was not a proceeding in a criminal matter. In *Di Iorio v. Warden of the Common Jail of Montreal*[85] and in *Keable v. Attorney General for Canada,*[86] provincial inquiries into criminal activity were upheld as falling within the administration of criminal justice. In *Nova Scotia Board of Censors v. McNeil,*[87] the Court upheld a provincial movie censorship regime, and declared that the regulation of public morals was not necessarily legislation of a criminal nature. Finally, in two slightly earlier decisions, *Ross v. Registrar of Motor Vehicles*[88] and *Bell v. Attorney*

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[82] This is not the place to discuss in detail the recent decisions of the Supreme Court of Canada in the constitutional/criminal law field. For a more comprehensive discussion (although now somewhat dated) *see* J. MACPHERSON, DEVELOPMENTS IN CONSTITUTIONAL LAW 58-67 (1978); *see also* Arvay, *The Criminal Law Power in the Constitution: And Then Came McNeil and Dupond,* in this volume.

[83] [1978] 2 S.C.R. 770, 5 M.P.L.R. 4, 84 D.L.R. (3d) 420.

[84] [1976] 2 S.C.R. 9, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423 (1975).

[85] [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 73 D.L.R. (3d) 491 (1976).

[86] [1978] 2 S.C.R. 135, 41 C.C.C. (2d) 489, 87 D.L.R. (3d) 708.

[87] [1978] 2 S.C.R. 662, 25 N.S.R. 128, 84 D.L.R. (3d) 1.

[88] [1975] 1 S.C.R. 5, 14 C.C.C. (2d) 322, 42 D.L.R. (3d) 68 (1973).

General for Prince Edward Island,[89] the Court upheld sections of provincial legislation which provided for automatic suspension of a driver's licence after a conviction for "drunk driving" offences under the Criminal Code.

Was there, then, a trend before *Zelensky* away from the traditional broad definition of Parliament's criminal law power? At first instance, the decision and the language in *Zelensky* seem inconsistent with the decisions in the seven cases listed above, and, in particular, with some of the reasoning in cases such as *McNeil* and *Dupond* which appeared to restrict the scope of section 91(27) of the B.N.A. Act.

The question just posed, however, must be answered in the negative. The Court's decision in *Zelensky* is in fact reflective of a broader trend in the life of the present Court, namely, functional concurrency, or the trend to uphold almost all statutes enacted by both levels of government. Thus, in the criminal law area, section 91(27) has not proved useful as a shield against provincial legislation. But that fact does nothing to deny the strength of section 91(27) as an effective sword in the federal hand, one which the courts seldom stay.

This judicial tolerance of the legislation of both levels of government flows directly from open judicial attachment to both the aspect doctrine and the presumption of constitutionality. The aspect doctrine,[90] probably the seminal principle of Canadian constitutional law, directs courts to view legislation, if possible, from a perspective or "aspect" which will result in its validity. The presumption of constitutionality, although not cited by the courts as frequently as the aspect doctrine, has an ancient Canadian pedigree — it was enumerated by Mr. Justice Strong in *Severn* v. *The Queen*,[91] the first Canadian constitutional case. Recently, a number of the current justices, including Dickson J. in *CIGOL*[92] and Ritchie J. in *McNeil*,[93] have professed the importance of this principle.

The effects of the application of the aspect doctrine and the presumption of constitutionality have been particularly evident in the Supreme Court's treatment of federal legislation. Since the Supreme Court became our final court, only two very minor sections of two major federal economic statutes have been declared unconstitutional.[94] Provincial statutes have not fared quite as well,[95] but still the overall picture is one of substantial judicial tolerance.

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[89] [1975] 1 S.C.R. 25, 5 N. & P.E.I.R. 173, 42 D.L.R. (3d) 82 (1973).

[90] *Supra* note 25.

[91] 2 S.C.R. 70, at 103, 1 Cart. B.N.A. 414, at 446-47 (1878).

[92] Canadian Indus. Gas & Oil Ltd. v. Government of Saskatchewan, [1978] 2 S.C.R. 545, at 573-74, [1977] 6 W.W.R. 607, at 630, 80 D.L.R. (3d) 449, at 468 (1977).

[93] *Supra* note 87, at 687-88, 25 N.S.R. at 152, 84 D.L.R. (3d) at 20.

[94] *Supra* note 55.

[95] The decisions in *CIGOL*, *supra* note 92, and Central Canada Potash Co. v Government of Saskatchewan, [1979] 1 S.C.R. 42, 23 N.R. 481 (1978), indicate that provincial legislation (particularly economic legislation) will not automatically have an easy passage through the Supreme Court of Canada.

Accordingly, *Zelensky* and the other seven cases in the criminal area, are consistent with this major Supreme Court direction. The only reason that *Zelensky* stands out, at first glance, as potentially inconsistent with the other cases, is that it is the only one in which the criminal law power was raised in the context of a federal statute. It is unlikely that a Criminal Code provision would be struck down by the Court as being outside Parliament's criminal law power. The present Court is balanced, flexible and tolerant in its consideration of all statutes, but particularly federal statutes. Its decision in *Zelensky* is representative of these judicial characteristics.